



ARMSTRONG TEASDALE LLP  
LITIGATION

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FIRM NEWS

## Armstrong Teasdale Named One of America's Best Corporate Law Firms

Armstrong Teasdale was identified as one of the top corporate law firms in the St. Louis, Missouri area according to the article "America's Best Corporate Lawyers" in the July/August 2006 issue of *Corporate Board Member* magazine. Armstrong Teasdale ranked #2 out of the five firms mentioned from St. Louis. The results of this annual legal survey were generated by asking corporate directors and officers serving on boards of publicly traded companies to identify the most respected local firms across 25 major U.S. markets.

## Noel Nominated to Chairman of the Board of ALAS

The Attorneys' Liability Assurance Society's (Bermuda) Ltd. (ALAS), Chairman of the Board of Directors, Ralph B. Levey, recently announced the nomination of Edwin L. Noel as the new Chairman of the Board. Mr. Noel assumed the position at the 2006 Annual General Meeting in Toronto, Canada, on June 23, 2006, and will serve a two-year term.

Mr. Levey stated: "We are pleased to have a person of Ted's stature in the profession and among the members to provide leadership to ALAS at this time. Ted has served on the ALAS Board with enthusiasm and distinction since 1995. He has been a member of several committees of the Board and is currently serving as Chairman of the Planning Committee and a member of the Executive, Underwriting and Budget Committees of the Board."

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## Antitrust, Distribution & Franchise

### *Understanding Civil RICO Actions*

In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (“RICO”) in response to a growing concern over organized crime’s infiltration into American business. RICO provides both criminal penalties and civil remedies for violations of its provisions. Early on, RICO were generally aimed at Mafia activity. In the 1980’s, however, civil lawyers

*“Racketeering activity” is defined as the commission of any of a number of state and federal offenses, including mail fraud, wire fraud, bank fraud, bribery, extortion, and embezzlement.*

noticed that RICO allows civil claims to be brought by any person injured in their business or property by reason of a RICO violation. Throughout the 1990’s, court decisions sought to limit the reach of civil RICO claims.

However, it remains true that individuals and legitimate businesses can be liable under RICO. This article provides a brief overview of what has become a very complicated area of the law.

RICO liability requires the defendant to have engaged in a pattern of racketeering activity. “Racketeering activity” is defined as the commission of any of a number of state and federal offenses, including mail fraud, wire fraud, bank fraud, bribery, extortion, and embezzlement. Among these, mail fraud and wire fraud, serve as perhaps the most common bases for civil RICO claims. The law does not require that the fraudulent statements themselves be transmitted by mail or wire, only that the fraudulent scheme be advanced, concealed, or furthered by such means. Given these principles, fraud claims against businesses can fit within RICO’s scope.

Racketeering activity alone does not violate the statute. A civil RICO plaintiff must demonstrate that the racketeering activity was committed in connection with the affairs of an “enterprise” engaged in or affecting interstate commerce in a manner that violates one of the four subsections of RICO. These subsections are:

- (a) Using or investing income that is derived from a pattern of racketeering activity or collection of unlawful debt in an enterprise;
- (b) Acquiring or maintaining an interest in or control of an enterprise through a pattern of racketeering activity or through collection of unlawful debt;
- (c) Conducting the affairs of an enterprise through a pattern of racketeering activity or collection of unlawful debt; and
- (d) Conspiring to commit one of these three acts.

To state a civil RICO cause of action, a plaintiff also must allege that he has been injured in his business or property by reason of a violation of one or more of the above. If successful, the plaintiff may be entitled to three times actual damages and reasonable attorneys’ fees.

Because RICO is complex, a number of hurdles face a potential civil plaintiff. One is the requirement that there be a distinction between a person and an enterprise. For example, this requirement is not met where the named defendant is a corporation (the enterprise) and the person alleged to have engaged in the pattern of racketeering activity is an officer or employee of the corporation. However, if the named defendants consist of officers or employees of the corporation who engaged in a pattern of racketeering activity through the corporate enterprise, those persons may be liable individually under RICO.

Going far beyond RICO’s original intent, and well beyond what one might view as traditional criminal activity, civil RICO lawsuits have arisen in countless instances against legitimate businesses. For example, the minority partners in the ownership group of the Montreal Expos recently used a RICO lawsuit against Major League Baseball and the team’s majority owner to contest the potential contraction of the team and ultimately secure its move to Washington, D.C. as part of a negotiated settlement. Although civil RICO suits are not an everyday occurrence, the complexity of the law and the potential for treble damages requires that practitioners have a basic understanding of the law.

## Health Care Litigation

### *Health Care Group Receives Summary Judgment Victory*



**Bob Foley and Anna Selby** recently obtained a summary judgment victory in a wrongful death action pending against a nursing home. The plaintiffs brought a wrongful death action

claiming that their 85-year-old mother suffered long term neglect and physical abuse at the hands of the nursing home staff. They claimed that the decedent was bruised repeatedly in various places as a result of being handled abusively, was prohibited from calling her family as the attendants would move the phone away from her bed so she could not reach it, and was prevented from eating as a result of no one bringing her food. The plaintiffs went on to allege that the abuse caused decedent to “lose her will to live” and thereby caused her death. They offered, as an expert witness, one of their sisters who had been the former director of nursing at the nursing home. The plaintiffs claimed that the abuse began shortly after the sister left the nursing home to take a new job. They claimed that the decedent sustained weight loss, dehydration and multiple bruises while at the nursing home. She was ultimately admitted to a nearby hospital where she was treated for her nutritional conditions. While admitted, she mentioned to the hospital staff that she “would do anything to get out of this bed.” During her admission, the decedent’s condition gradually improved until she was stable enough to be transferred to a nursing home. The decedent was discharged to a different nursing home where she

ultimately passed away after telling staff at the new facility that she wanted to die.

This case was filed in August of 2004 and was set for trial in June 2006. The plaintiffs’ expert witness testified at his deposition that the decedent’s dehydration, compromised nutritional status, and abuse contributed to her eventual death. The plaintiffs’ expert explained it was not unusual for elderly people to want to die when they get old. He admitted that determining the decedent’s cause of death, whether the decedent wanted to die on her own volition or as a result of the alleged abuse, involved some speculation. A motion for summary judgment was filed based on the plaintiffs’ expert’s testimony that the decedent’s cause of death was speculative and could not be known as the decedent never told anyone why she wanted to die. Bob and Anna also argued that after leaving the nursing home, the decedent stated that she wanted to get out of bed, a statement that seemed inconsistent with losing the will to live. Additionally, Bob and Anna pointed out that in Missouri there is no cause of action for causing someone to “lose the will to live.” After several rounds of replies and sur-replies and argument on the summary judgment motion, the Court entered summary judgment in favor of the nursing home, as there was insufficient testimony supporting the plaintiffs’ theory that the nursing home had caused the decedent’s death.

**Anna Selby**

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## Class Action

### *CAFA: When “Less” is Actually “More”*

The Class Action Fairness Act (“CAFA”), Pub. L. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.), continues to provide important litigation issues, most recently relating to imprecise language in the statute relating to the time to seek permission to appeal from a remand order. The Eleventh Circuit is the latest circuit to determine that CAFA should not be read literally when it states that an application to appeal a remand order “must be made to the court of appeals *not less than 7 days* after entry of the order.” 28 U.S.C. § 1453(c)(1) (emphasis added). To read § 1451(c)(1) literally “would produce an absurd result: there would be a front-end waiting period

(an application filed 6 days after entry of a remand order would be premature), but there would be no back-end limit (an application filed 600 days after entry of a remand order would not be untimely).” *Miedema v. Maytag Corp.*, — F.3d—, No. 06-12430, 2006 WL 1519630, \*2 (11th Cir., June 5, 2006).

The Tenth Circuit was the first circuit to address the issue when it held the “not less than 7 days” language to be at odds with the Senate Report accompanying CAFA, and “[r]ead literally, this provision seems to say that the appeal

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from an order granting or denying remand *cannot* be taken within seven days of the order. Once that period passes, however, the statute would permit an appeal to our court at any time thereafter. We believe this to be a typographical error. The Statute should read that an appeal is permissible if filed “not more than” seven days after entry of the remand order.” *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005).

Likewise the Ninth Circuit, while troubled that it was “faced with the task of striking a word passed on by both houses of Congress and approved by the President, and replacing it with a word of the exact opposite meaning,” held that “there is no apparent logical reason for the choice of the word “less” in the statute, use of the word “less” is, in fact, illogical and contrary to the stated purpose of the provision.” *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006). *See also, Patterson v. Dean Morris, L.L.P.*, 444 F.3d 365, 368 n.1 (5th Cir. 2006) (applying statutory 7-day limit to petition for permission to appeal without analysis).



Another issue of importance when calculating the time for filing an application for permission to appeal a remand order is whether the seven day deadline is calculated in calendar days or court days. The Circuits thus far have held the calculation is seven court days pursuant to Fed R. App. P. 26(a)(2). *Miedema*, 2006 WL 1519630 at \*2 (petition for permission to appeal filed six days after remand order, intervening weekend excluded under Fed. R. App. P. 26(a)(2)); *Amalgamated Transit Union Local 1309, AFL-CIO*, 435 F.3d at 1146 (statute does not specify calendar days, construed as court days excluding intermediate weekends and holidays, citing Fed. R. App. P. 26(a)(2)); *Patterson*, 444 F.3d at 368 n.1 (appeal was timely pursuant to 7-day limit according to counting procedure in Fed. R. App. P. 26(a)(2)).

Issues continue to arise regarding interpretation of the sweeping changes enacted by CAFA, and the practitioner should always be aware of these changes including the statutory elements for federal jurisdiction, appeals from remand orders, and the calculation of deadlines.

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## Intellectual Property Litigation

### *Anonymous E-Mailers – How to Find and Stop Them From Breaking the Law*

A member of a Board of Directors checks the stock price of the company on Yahoo® and notices that several people have posted negative messages about the company on the Yahoo® message board. The Director checks other stock message boards as well—on MSN®, AOL® and others. The same message from the same sender is found on each of them, namely that the company will be reporting losses exceeding \$10 million dollars next quarter and that it is about to be sued for patent infringement concerning one of the company’s main products. These statements are false. With the stock price already low, the board member attempts to identify the sender and put an end to these false statements. It turns out, the e-mail sender has concealed his or her true identity and only is known by an e-mail address, [beareofruth@saveamerica.com](mailto:beareofruth@saveamerica.com). The board member convinces the company to seek legal advice on how to stop the dissemination and posting of these false statements.

As most users of the Internet know, just about anyone can set up an e-mail account with an Internet Service Provider (ISP), without revealing his or her identity to the rest of the world. A person could use a false name or no name at all. Every recipient of e-mail from that person will not know who the real sender is. Only the ISP may know where the e-mail account originated and who the owner of that account is. Unfortunately, however, while a person who publishes a defamatory statement about a company, as noted above, may be liable under the laws of most states, Section 230 of the Communications Decency Act of 1996 excludes from defamation liability claims against ISPs. That leaves the unknown sender of the false statements as the only person who can be forced to stop dissemination of false statements, and potentially be liable for their publication.

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To start the process of enjoining the person who posted the defamatory statements, the company should file a lawsuit, naming "John Doe" as the defendant. The U.S. Supreme Court in *Bivens v. Siz Unknown Named Agents*, 401 U.S. 388, 390 n.2 (1971) has approved this procedure. Federal Rule 4(m) then provides that a complaint must be served within 120



days of filing. It is during this 120 day period when the company has the opportunity to identify the person who posted the statements.

After the suit has been filed, the company immediately should subpoena the entity that operates the message board on which the false statements were carried. The company should subpoena all information related to the identity of the person who posted the messages, including the "IP address" used by the offending person. An IP address is the Internet Protocol (IP) address given to every computer connected to the Internet. An IP address is needed to route information much like a street address or PO box is needed to receive regular mail. An example of an IP address is 66.46.181.116. Once the IP address has been obtained, IP registration databases can be searched to determine who

owns the IP address identified. One of the more popular searchable databases for this is [www.network-tools.com](http://www.network-tools.com). Searches may also be performed on many domain name registration Web sites. A reverse look-up search should be performed. This should identify the entity which owns the IP address. If a reverse search is done for the IP address, "66.105.124.1," for example, the database will show that the entity owning the address is "customer.algx.net."

Once the IP address owner has been identified, the company should subpoena documents and elicit testimony from that entity and request all information about the person who used the IP address at the date and time when the message board posting took place. Sometimes the first IP address owner discovered will not be able to identify the person who used the IP address; instead directing to another layer of IP address owner or owners which should have the requested information. If that occurs, the same type of subpoena sent to the first IP address owner should be issued to the additional IP address owners identified. It may require the service of several subpoenas before the originating address is identified. In most cases, the original owner ultimately will be identified. Thereafter, the company can name him or her as a defendant and proceed with litigation.

**Jeffrey Kass**

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## Appellate

### *Court Affirms Defendant's Verdict in Appellate Court*

The Missouri Court of Appeals affirmed a judgment received last year in favor of an Armstrong Teasdale health care client. The exceptional trial team consisting of **Tim Gearin**, **Dave Ott**, and **Kristen Byrd** previously obtained a defendants' verdict for the firm's client, a hospital located in Jefferson City and the plaintiff appealed. **Cindy Petracek** and **Jeff McPherson** also worked on the brief with help from **Deanna Wendler-Modde**. The appeal centered around the defendants' right to question a plaintiff's expert about the fact that he was censured in 2004 by ACOG (The American College of Obstetrics and Gynecology) for making factual misrepresentations in an opinion letter and in deposition testimony for a medical liability claim. The plaintiff contended that the censure was not only irrelevant, but also hearsay. The defendants' argued that the plaintiff

opened the door to the questions by submitting into evidence the expert's entire CV, which contained numerous references to his leadership in and accolades from ACOG, but merely cited that he "resigned" from that organization after decades of participation in it. The defendants' also argued that the censure was relevant to the expert's credibility. The circuit court permitted the questioning, based on the plaintiff's introduction of the expert's CV and the expert's references to his ACOG affiliation on the stand. The Court of Appeals rejected the plaintiff's argument that the trial court prejudicially erred in admitting the questioning, finding that the questions were relevant to the expert's credibility.

**Cindy Petracek**

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## OUTSTANDING TRIAL RESULTS

### CONTRACT AND COMMERCIAL LITIGATION

Congratulations to the team led by **Jeffrey Kass**, including **Lisa Wood** and **Scott Galt**, on three significant victories in litigation involving an Armstrong Teasdale client, a cable company, owned in large part by a venture capital firm based in New York. Our client, the third party plaintiff sold some of its Florida cable assets to another cable company, the third party defendant. After closing, the third party defendant refused to take assignment of two money-losing properties to which cable service was provided, claiming in part that the third party plaintiff waived the requirement to take the properties. The owner of the properties, under contract with the third party plaintiff, sued them for over \$2 million dollars, threatening their very existence. The third party plaintiff in turn sued the third party defendant, seeking to hold it liable for whatever damages the third party plaintiff was liable to the property owner.

On May 30, 2006, the U.S. District Court for the Middle District of Florida, Ocala Division, granted the third party plaintiff partial motion for summary judgment on the third party defendant's most important defense—its waiver defense. The Court also denied the third party defendant's motion for summary judgment on the third party plaintiff's claims against the third party defendant. The Court further granted the third party plaintiff's motion to dismiss the third party defendant's counterclaims against the third party plaintiff. This victory comes on the heels of another significant victory in this case just a month earlier when, after briefing and oral argument by Jeffrey Kass, the Court ruled that the third party plaintiff's lawyers could take the deposition of the third party defendant's trial lawyers who had been involved in the negotiations of the asset purchase agreement at issue. As a result, a year into the case, the third party defendant has had to hire new trial counsel as a result.

### TORT AND COMPLEX TRIAL

**Carlton Callenbach, Cynthia Petracek, Ann Buckley and Tom Weaver** recently obtained an outstanding defense verdict involving a premises liability/negligent security case. The plaintiff suffered serious brain damage after being shot in the head during a carjacking at the Blue Ridge Mall. Defendants included a mall management company and a mall security company. The plaintiff claimed the shooting was reasonably foreseeable based on previous criminal incidents at the mall. The plaintiff claimed that the security company failed to adhere to its internal policies, failed to properly patrol the mall parking lots, and failed to take reasonable measures to prevent the shooting. The security company contended that the mall was located in statistically a low crime area, employing reasonable security measures and the shooter would not have been deterred by additional security. Mall management stated that it acted reasonably by contracting with the security company to provide security at the mall. The plaintiff sought \$45 million in closing, and the jury returned a defense verdict.

## PROFESSIONAL DEVELOPMENT

**Winston Calvert** has been asked to write several entries pertaining to jurisprudence, religion, women's rights, and reproductive freedom for the *Encyclopedia of the U.S. Constitution* which will be published in 2007.

**Connie McFarland-Butler** was a guest speaker at the Washington University School of Law Honor's Graduation Ceremony on May 19. At the ceremony, she was made an honorary member of the Order of the Coif.

**Jim Martin** made a presentation on the topic of Sarbanes-Oxley at an "In House Investigators Seminar" hosted by the Department of Justice on May 31.

**Connie Johnson** participated as a moderator at the Bar Association of Metropolitan St. Louis' Legislative Update Plenary Session on June 3. She also spoke on the topic of "Women Lawyers in Public Office" at the 2006 Midwest Regional Conference for Women in the Law, "Gateway to the Future" (June 21-23), hosted by the Women Lawyers' Association of Greater St. Louis.

**Karrie Clinkenbeard, Patrick Kenny and Gerald King** co-wrote an article entitled, "Experts Beware: Ignoring the Scientific Method Results in the Exclusion of Opinions." The article was recently selected by the International Symposium on Fire Investigation Science and Technology (ISFI) peer review board for presentation by Patrick and Karrie at the 2006 symposium in Cincinnati, Ohio.



## PROFESSIONAL DEVELOPMENT

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**Glenn Davis** and **Mark Stoneman** were presenters at an in-house CLE program on June 22 entitled "Current Issues in Antitrust."

**Jeffrey Kass** will be writing a chapter and editing another for DRI's *Compendium* called "Defending Intellectual Property Claims," which will be distributed at the annual DRI IP Conference in November in Key Biscayne, Florida and made available for sale. He will be authoring a section entitled "Fair Use and Nominative Fair Use in Trademark Cases."

**Beverly Creaghan** was a panelist for the Saint Louis University Law School on June 26. She spoke about the realities of practicing law and the culture of the legal profession.

**Gentry Sayad** was quoted in the July 6 issue of the *St. Louis Post-Dispatch* in an article regarding Forest Park issues.

**Jim Martin's** commentary was recently included in a paper entitled, "Business Roundtable Institute for Corporate Ethics, Fostering a Culture of Trust: Implications of the Federal Sentencing Guidelines."

The section in which Jim is featured is "A Thought Leader Commentary™."

**Patrick Kenny**, the Editor-in-Chief of DRI's *Daubert Online* newsletter, published an article in the April issue entitled, "The Plaintiff's Game Plan." Shortly after it was published, *JurisPro* requested permission (which was granted) to run the same article *JurisPro's* own newsletter.

In the April issue of DRI's *Daubert Online* newsletter, **Karrie Clinkinbeard's** article, "Challenging Fire Experts in Product Liability Litigation Determination of a Specific Defect Required," was published as the feature article of the month.

**Darren Sharp**, a Circuit Editor for DRI's *Daubert Online* newsletter, reported on Daubert-related developments in his column on the Tenth Circuit in the April issue of the newsletter.

**Jacqueline Ulin Levey** has been appointed by the Washington University Board of Trustees to serve a three-year term on the Washington University National Council for the Undergraduate Experience.

**Jim Martin** was mentioned in the Big Brothers Big Sisters of Easter Missouri's e-newsletter regarding his contributions to fund an insert placed in the May 5-11 edition of the *St. Louis Business Journal* where he was listed as a sponsor.

**Byron Francis** was quoted in an article in the May 23 issue of the *St. Louis Post-Dispatch* in regards to area law firms hiring minorities.

**Anna Selby** is a presenter at the Mid-Summer Medical Malpractice Symposium sponsored by Greenbrook Financial Services and Signature Health Services, Inc. on July 27. The topic of her presentation is "Medical Malpractice After Tort Reform."

**Craig Moore** was recently elected President of the Board of Directors for the Downtown Children's Center. He will serve a two-year term.

This Litigation Practice Group Update is a summary for general information and discussion only. It should not be construed to be a complete analysis of the matters presented and may not be relied upon as legal advice.

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