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Q&A With Kelley Drye's John Villafranco

Law360, New York (August 9, 2011) -- John E. Villafranco is a partner in the advertising and marketing practice in the Washington, D.C., office of Kelley Drye & Warren LLP. His experience includes litigation and counseling with a focus on advertising law matters and consumer protection. He has particular experience representing clients in U.S. Federal Trade Commission regulatory matters, Lanham Act litigation, consumer class action defense, and in proceedings before the National Advertising Division. In addition, he counsels clients regarding promotion and marketing, product labeling, environmental marketing, and health and safety claims, among other issues.

Q: What is the most challenging case you have worked on and what made it challenging?

A: There have been so many, but if I had to pick one, it would be the investigation and eventual litigation into claims made for a product called “Slick 50.” In 1996, while a mid-level associate, I began working on a tangle of consumer protection issues related to the marketing of an aftermarket engine oil additive that established the automotive “engine treatment” category through a marketing campaign that all agreed was highly effective and many alleged was every bit as deceptive.

What began as an investigation under part two of the Federal Trade Commission’s Rules of Practice grew to include administrative litigation, consumer class actions, Lanham Act and Sherman Act litigation, state attorney general investigations, and industry self-regulation.

But it was more than just the fora that varied; the melee featured a diverse cast of characters and all of the fascinating issues that typify consumer protection practice, including express, implied and establishment claims; qualitative and quantitative consumer perception analysis; industry standard, modified industry standard, and nonstandard product testing; statistical analysis; and daunting science.

In other words, it had a bit of everything. It was a formative experience that helped me get hooked on false advertising law.

Q: What aspects of your practice area are in need of reform and why?

A: I would like to see some changes made to speed up the challenge process at the National Advertising Division (NAD) of the Council of Better Business Bureaus. The NAD is the self-regulatory organization that resolves competitor disputes relating to national advertising. When it finds that advertising is deceptive, the NAD issues a public report that includes a recommendation that the advertising be discontinued or changed.

The FTC strongly approves of the NAD process, and many companies and industries take the NAD very seriously and are strongly inclined to participate and to follow the NAD's recommendations. This has helped make the NAD a very successful alternative to litigation, which can be very expensive and substantially disrupt a company's business operations.

With this success has come a crowded docket, which has led to very long timelines prior to case resolution. For advertisers, it is not only important to get a case decision right — which the NAD is well positioned to achieve, given its expertise — it is also important to arrive at that decision in a timely manner. I would like to see stakeholders participate in an exercise that will consider reforms to the process that will result in quicker decisions.

Q: What is an important case or issue relevant to your practice area and why?

A: One of the big issues to watch is how the FTC is defining "competent and reliable scientific evidence" in support of advertising claims. The standard has clearly changed and has become more difficult to meet.

For at least the past decade, the vast majority of FTC orders on health-related advertising have provided similar injunctive relief on future advertising claims. Specifically, most past orders simply have restated applicable law and required that companies possess "competent and reliable scientific evidence." The FTC has defined competent and reliable scientific evidence broadly and flexibly as "tests, analyses, research or studies that have been conducted and evaluated in an objective manner." Recent FTC investigations, however, have resulted in settlement orders with far stricter terms for substantiation.

In July 2010, the FTC announced two consent orders containing the more specific substantiation provisions: one with Nestlé HealthCare Nutrition and the other with Iovate Health Sciences. The FTC complaints alleged that the companies made deceptive advertising claims about the health benefits of their products. The settlement agreements require that certain claims be substantiated by at least two "randomized, double-blind, placebo-controlled" clinical trials, conducted by "different researchers, independently of each other." Additionally, all claims to treat or prevent disease (other than claims to treat diarrhea in children) must be approved under the FDA's drug approval process or allowed by an FDA monograph.

POM Wonderful, the maker of pomegranate juices and supplements, has challenged the stricter provisions in federal court, seeking declaratory relief and alleging that the substantiation standards are invalid, exceed the FTC's jurisdiction, violate the First Amendment and are arbitrary and capricious. The case, however, is unlikely to change the move toward stricter standards.

The new standards, although technically applicable only to the named parties, change the playing field for all companies making health-related claims, with a sharper focus being placed on what types of studies and evidence will be acceptable.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Current Federal Trade Commissioner Tom Rosch. Commissioner Rosch joined the FTC from Latham & Watkins. He served as chairman of the American Bar Association's antitrust section in 1990 and was the FTC's Bureau of Consumer Protection director from 1973 to 1975. He is highly regarded for his antitrust and consumer protection law expertise and has been lead counsel in more than 100 federal and state court antitrust cases in his more than 40 years experience before the bar.

Whenever I have met with the commissioner, I have been impressed by his depth of knowledge regarding the facts and law relevant to the case at hand. I have also been impressed with his ability to cut to the main issues and his overall perspective. He is willing to credit a good argument and look critically at FTC staff recommendations. You will always receive a full and fair assessment of your case when you appear before Tom Rosch.

Q: What is a mistake you made early in your career and what did you learn from it?

A: I can recall a time as a senior associate when I did not do a complete job in document review and missed, at least initially, a document that was very helpful to our case. The case was FTC v. R.J Reynolds, also known as the Joe Camel case, which we litigated against the FTC in 1998. Complaint counsel relied on its unfairness authority under Section 5 of the FTC Act, alleging that the cartoon camel was a "substantial contributing factor" to smoking initiation among teens. I was a senior associate, and it was my first meaningful opportunity to devise case strategy, present oral argument and otherwise manage a case.

Early in discovery, I had sent a Freedom of Information Act request to the FTC's FOIA office, requesting all documents that refer or relate to the issue of why teens start smoking. Given what a document-intensive case it was and that FOIA requests often yield very little, it was not until a break in the trial that I pulled out the box out of FOIA documents and began looking through it.

To my surprise, I found a draft report from the FTC's Bureau of Economics that concluded that societal forces and not advertising caused smoking initiation. Probably the most significant document find in my career. I went into the office of the partner who was first-chairing the case, and delivered the bad news first — that I had come across a very important document that I should have found months earlier — and then the good news — that he was really, really going to like it.

After a few weeks of trial and immediately after we finished the successful cross examination of the FTC's causation experts (using the document to help establish that the cartoon camel did not cause substantial injury), the FTC surprised everyone by telling the judge that they were withdrawing the complaint.

They asserted that the issue was moot as a result of the multistate settlement agreement that had just been negotiated between the states and the tobacco companies. There was some truth to that, but we did not see it that way. They brought the complaint, litigated it, then withdrew it right when the case was breaking our way. No FTC order, no injunctive relief. We celebrated as if it was a clean win.

The lesson — there are no shortcuts during discovery — you need to look under every single rock because you never know what you might find.