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Q&A With Morgan Lewis' Steve Mahinka

Law360, New York (August 12, 2011) -- Stephen Paul Mahinka is a partner in the Washington, D.C., office of Morgan Lewis & Bockius LLP. He is co-coordinator of the firm's advertising, consumer protection and privacy practice, and chairman of the firm's life sciences and health care interdisciplinary group.

Mahinka has practiced in both the antitrust and health care areas throughout his career, and is the founder of the firm's U.S. Food and Drug Administration and health care practice. He is also a former leader of the firm's antitrust practice.

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

A: The most challenging matter I've worked on in the consumer protection area was a series of state attorney general actions alleging a violation of their state consumer protection statutes from the practice of a retail drug chain of charging different types of consumers different prices for the same prescription drugs.

Developing an effective defense was extremely challenging in view of the seeming reasonability of the states' position that the same prices should be charged to everyone for the same product. The states challenged our client's pricing as an unfair practice.

Agreeing with a novel approach that I developed based on the legality of price differentials for purchases of other types of products and services, such as airline tickets and new automobiles, and on applying the Federal Trade Commission's general principles for analyzing unfairness, first the Florida state courts and then others rejected the state challenges and affirmed the legality of the challenged conduct.

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

A: Several areas of consumer protection practice present significant difficulties in enforcement and settlement and are in need of reform:

1) In the settlement area, it is highly problematic and difficult for respondents to assess settlement proposals and likely exposure to penalties since a settlement with the FTC or one state does not provide a complete resolution of the matter, because all remaining states retain the ability to file separate complaints for the same alleged violative activity. Class action complaints raise similar issues of incomplete settlements.

2) Another concern is the scope of coverage of the new Consumer Financial Protection Bureau. Whether the CFPB will be the sole enforcement agency in the areas it has acquired from other agencies appears to be increasingly unclear. FTC officials have stated that the commission may retain dual enforcement jurisdiction with the CFPB over those areas formerly subject to the commission's enforcement.

This is surprising, as well as troubling, since a major rationale for creation of the CFPB was that it would centralize and clarify consumer financial protection guidance and enforcement. Whatever the differences are in approach that might be expected from the CFPB, it is certain that simply adding the new agency and thus creating a dual enforcement regime would be a retrograde step with respect to predictability and efficiency in enforcement.

3) The recent inflexible approach by the FTC to consumer redress and disgorgement also raises serious concerns. The FTC staff has consistently taken the position that it seeks to "impoverish" an individual respondent who is alleged to have defrauded consumers. Whatever the seeming theoretical sensibility of such a position, as a practical matter, of course, it makes settlement impossible.

Further, it encourages a view that the government is inflexibly vindictive in its enforcement approach, particularly where apparently reasonable legal or factual arguments are presented in defense of the alleged violations.

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

A: The most important long-term issue affecting consumer protection is the necessity of developing and better integrating information economics into federal and state investigations and enforcement and judicial review. Allegations of consumer protection violations are too often based on perceived "unfairness" or "deception," with little or no analytical support regarding the bases for challenged activities or their actual economic impact.

This is particularly apparent in many in many state challenges and, more obviously, in class action litigation. Unlike in the antitrust area, where industrial organization economics has informed and rationalized agency enforcement and judicial analysis since the mid-1970s, economic analysis has not been well integrated in the consumer protection area. The development of a commonly accepted framework of antitrust competition analysis based on industrial organization economics has had immense positive effects, making both enforcement and judicial review far more predictable.

As consumer protection issues and challenges continue to proliferate, particularly in the life sciences, health care and financial services industries, it will be crucial that more sophisticated information economics be developed and applied to consumer protection matters for enforcement actions and judicial decisions to make economic and policy sense.

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

A: Gary Hailey of Venable — Gary is a highly experienced lawyer in the consumer protection area, who is particularly adept with television infomercial issues and telemarketing. He is practical and astute in interpreting and assessing likely FTC enforcement trends.

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

A: One mistake that I, and I suspect many junior lawyers, made early in my career was so immersing myself in the facts of a matter that I did not notice or consider fundamental theoretical deficiencies in the legal basis of a challenge made against our client.

Working on a matter with my mentor at my firm, Miles W. Kirkpatrick, a former chairman of the FTC and one of the leading antitrust and consumer protection lawyers of his generation, I presented to him a detailed analysis of the voluminous facts of a district court decision we had been asked to take over on appeal to the Third Circuit, together with several legal arguments we could advance.

Miles simply asked why we were accepting the approach of the district court, as had the law firm that handled the trial, of the propriety of using a double inference to establish consumer harm from the challenged conduct, when the record showed actual evidence of no economic harm. We took this simple and direct approach, reversed a multimillion-dollar verdict against our client, and established new law in the Third Circuit, which was later adopted by other circuits.

The importance of simplifying complexity is a lesson I've never forgotten, and continue to try to pass down to associates working with me.