

Consumer Protection Group Of The Year: Kelley Drye

By **Christopher Crosby**

Law360, New York (January 17, 2018, 6:26 PM EST) -- Kelley Drye & Warren LLP's staunch defense in regulatory and litigious cases solved dual-pronged problems for many clients last year — from the dismissal of the FTC's suit against the maker of a popular dietary supplement to a First Circuit victory for Kohl's over allegedly false and misleading "comparison prices," the firm's noteworthy victories have landed its consumer protection practice among Law360's Practice Groups of the Year.

Kelley Drye represented Quincy Bioscience, maker of the Prevagen-brand dietary supplement, in a head-on collision with the U.S. Federal Trade Commission over claims of false advertising. The heart of the case involved trial studies of subgroups taking the supplement, which contains a jellyfish protein, showing that it boosted memory — a finding the company then advertised.

The FTC indicated on eve of the most recent presidential election that it was recommending a complaint to the commission, a decision the team felt was a rush to judgment to file before a change of administration. While a group with mental impairment appeared to benefit from taking Prevagen, the FTC argued that splitting trial data into subgroups greatly raised the likelihood that the supplement would, by chance, appear to benefit some patients.

The team felt strong about its odds from the get-go.

"There are cases when you settle, and those where you dig in and fight," partner John Villafranco said. "The Quincy case is the latter."

With all eyes on the case, the attorneys felt optimistic when the FTC was forced to concede that the clinical test yielded statistically significant results for certain subgroups, Villafranco said. Instead, the agency could only raise the issue of whether the company properly relied on test subgroup analysis.

The firm's work proved vital at the dismissal stage, when it won on the pleadings, after the presiding judge in September ruled the agency had no evidence the claims weren't true and found that its objections were otherwise merely theoretical. Kelley Drye said this is the only instance it has ever heard of in which the FTC lost a case on a motion to dismiss.



"FTC litigators are excellent and tough adversaries," partner Jeffrey Jacobson said. "We think what happened here is they rushed to court with a bad theory. For that reason, they have to meet the same pleading standards as anyone. We were able to show that there was no way you could look at their allegations and say they stated a claim of false advertising."

Challenges in consumer protection law can arise from anywhere — from the FTC to state attorneys general and consumer class actions to industry self-regulation, Villafranco said, noting that Kelley Drye is "positioned to handle them all."

The consumer protection group, which at 50 attorneys spread across the country is one of the firm's largest practice areas, also scored a major win for Kohl's, fending off a consumer class action over allegedly misleading terms the retailer used to compare prices.

Consumers said that Kohl's had tricked them with fake markdowns, alleging that the retailer used words like "original" or "regular" despite the fact that those higher prices were false and goods were never sold for that amount, thus inflating the size of the discount.

With partner Lauri Mazzuchetti on the case, the firm argued at the district court stage and then on appeal at the First Circuit that consumers were never harmed, and that they therefore lacked standing for their supposed injury.

As Jacobson puts it: "This is an example of companies trying to do the right thing and statutes getting stretched. In some cases companies have to settle for tens of millions of dollars, but what are the actual damages? What are the actual out-of-pocket damages? The issue is if at the end of the process, you knew you were buying a T-shirt for \$5, what were your damages from seeing it discounted from another price? No damages, no claim."

Claims against Riddell Inc. showcased another Kelley Drye strength: confronting cases, whether they're brought by regulators or in consumer class actions.

Villafranco and special counsel Katie Bond fought off advertising and marketing investigations launched by the FTC and the New York Attorney General's Office, and then passed along the expert testimony to Michael Lynch and Joseph Boyle when consumers launched a class action over false advertising, raising the question of whether Riddell had falsely represented that its varsity and youth football helmets reduced the risk of concussions.

Kelley Drye attorneys pared the nationwide claims to just four states, after which plaintiffs in May dropped their case and settled, favorably for Riddell.

"I think Riddell is another great example of what sets our practice apart," Villafranco said. "The company received a civil investigation demand related to concussion reduction and we cooperated, providing all sorts of information supporting the [advertising] claims, and ultimately the FTC closed the investigation."

--Editing by Catherine Sum.