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Q&A With Troutman Sanders' David Anthony

Law360, New York (August 11, 2011) -- David N. Anthony is a partner in the Richmond, Va., office of Troutman Sanders LLP, where he serves as co-leader of the firm's financial services litigation practice group. He regularly represents national, regional and local banks, lenders, credit reporting agencies, furnishers, debt collectors, background screening companies, employers and other related consumer finance entities.

Anthony has handled class and individual claims in 400-plus cases under the Fair Credit Reporting Act, the Fair Debt Collections Practices Act, the Equal Credit Opportunity Act, state consumer protection acts as well as state common law. He also counsels clients on Consumer Financial Protection Bureau issues.

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

A: Partner Alan Wingfield and I represented a credit reporting agency in a Fair Credit Reporting Act class action case. The case presented a host of novel legal issues; however, the case became particularly challenging based upon rulings and settlement of a related class action, indemnification issues, the sale of our client in the midst of litigation and settlement discussions, and related individual liability lawsuits. The case presented as many moving parts and series of strategic decisions as I have had in one case.

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

A: The FCRA and the Fair Debt Collection Practices Act are two areas of my practice in need of reform. The Fair Credit Reporting Act was enacted in 1970 and, while amended as recently as 2003 with the Fair and Accurate Credit Transactions Act, still does not reflect the realities of the 21st century. While certain issues have been clarified, such as the risk-based pricing and adverse action notices, numerous other issues are in need of modernization.

Similarly, the FDCPA was enacted in 1977 to protect consumers from abusive, unfair and deceptive practices by third-party debt collectors. Much has changed since 1977 ranging from changes in technology, the explosion in consumer debt, privacy and data security laws, and the flow of information within the debt collection system.

As of July 21, 2011, the newly created Consumer Financial Protection Bureau assumes responsibility for the FCRA and the FDCPA. For many of my clients, the tremendous changes in the credit reporting industry, the debt collection business, regulatory oversight at the federal and state level and technology over the past 40 years have created numerous tension points, uncertainty and risk that is unnecessary or certainly justifies further reform. Questions about the CFPB's structure, funding and goals have contributed to these concerns.

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

A: Given my class action work, particularly in the consumer arena, the recent decisions from the United States Supreme Court in AT&T Mobility LLC v. Concepcion and Dukes v. Wal-Mart on class actions are particularly significant.

I expect litigation and legislative efforts relating to the enforceability of mandatory consumer arbitration contracts dealt with in Concepcion to continue for the foreseeable future. While the Dukes decision was limited to its facts, it is extremely relevant to class action litigation, including class sizes, the necessary evidence to demonstrate enough glue to link the claims in a single action, the greater potential for smaller classes and subclasses, class settlement and other technical Rule 23 certification issues. I fully anticipate new theories from plaintiff's counsel to develop in response to Dukes as well as the possibility of more multiplaintiff (as opposed to pure class) cases.

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

A: I have had the privilege of working with Ron Raether from Faruki Ireland & Cox in Dayton, Ohio. In our numerous cases together, Ron has impressed me with his breadth of knowledge in the consumer field as well as his practical trial experience. He is a fine lawyer and strategist who sees the big picture.

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

A: As a young associate, I defended a reverse discrimination case with a senior partner. As a former federal law clerk, I had been given the responsibility of drafting our proposed jury instructions and reviewing the plaintiff's proposed jury instructions. The case law in our circuit on reverse discrimination was thin, and the key decisions were from the D.C. and Ninth Circuit Court of Appeals.

When the trial judge asked whether we had any objection to one of plaintiff's key jury instructions, my senior partner said, "Yes." I leaned over and told him that he was wrong that there was no contrary precedent in the Fourth Circuit on the point. The trial judge asked my senior partner to explain his objection and, without missing a beat, my senior partner responded by saying, "Judge, the authority in support of plaintiff's proposed instruction is from the D.C. and Ninth Circuit Courts of Appeals. There has not been a D.C. or Ninth Circuit case cited favorably by the Fourth Circuit in 30 years."

The trial judge asked the plaintiff's attorney whether she had any authority for this proposed jury instruction from the Fourth Circuit. When she replied that she did not, the trial judge sustained our objection and struck the proposed jury instruction. My senior partner winked at me as he sat down.

I learned two valuable lessons that day. First, I needed to stop thinking like a law clerk and more like an advocate. Second, I had to think outside the box and be creative when facing a seemingly losing argument. I thank my former senior partner and mentor, Stanley G. Barr Jr. for teaching me these valuable lessons.

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