

Advertising and Marketing

Kelley Drye's Advertising and Marketing practice has a national reputation for excellence. No other firm can match our record in advertising litigation and National Advertising Division (NAD) proceedings, our substantive expertise in the area of advertising, promotions marketing and privacy law, and our experience at the Federal Trade Commission (FTC), the offices of State Attorneys General, the NAD, and the broadcast networks. Kelley Drye has successful, longstanding relationships with clients in a broad range of industries, from communications and technology, to manufacturing and marketing. Our advertising attorneys practice exclusively in this area of law, which provides you with comprehensive legal support as well as greater efficiency for the breadth of your advertising-related legal matters. Whether you seek to substantiate your advertising claims, execute preventative marketing strategies, or challenge your competitor's claims, Kelley Drye's lawyers know where to begin and how to finish on top.

Our Advertising and Marketing practice is highly respected in the field, and attorneys in this group have been honored by *Chambers USA* and *Legal 500*, among others. *The Best Lawyers in America 2010* ranks Kelley Drye #1 in the United States in Advertising Law with four attorneys listed.* In addition, *US Legal 500* recognizes the firm, which they note has "an impressively balanced advertising practice, with expertise ranging from transactional work to NAD hearings, class action defense and false advertising litigation."

* In a tie nationally; outright in Washington D.C.

We serve an extensive client base, which includes wireless carriers, telecommunication companies, media companies, Internet service providers, consultants, major retailers and direct marketers, as well as manufacturers of computers, dietary supplements, fast food, engine oils, paint, home appliances, sporting goods and other consumer products.

This group has particular experience and capabilities in:

- **Advertising and marketing counseling** services that emphasize risk analysis and responsiveness.
- **Consumer class action defense** of unfair and deceptive trade practice allegations.
- **Lanham Act** false advertising litigation, on behalf of both plaintiffs and defendants.
- **Investigations and litigation** brought by the Federal Trade Commission and State Attorneys General.
- **National Advertising Division** and network challenges.
- **Counseling on privacy** and information security compliance.
- **Structuring and running promotions**, including sweepstakes, contests, gift cards and loyalty programs.

Kelley Drye's advertising attorneys are thought leaders and are active in organizations throughout the legal community. Our team includes the two editors-in-chief of the American Bar Association's (ABA) *Consumer Protection Law Developments* treatise, the chair and vice chair of the ABA Section of Antitrust Law's Consumer Protection Committee, the chair of the ABA's Privacy and Data Security Committee, and

the authors of *CCH's Advertising Law Guide* treatise, as well as many prolific writers and speakers.

From this foundation of substantive advertising law expertise, Kelley Drye takes specific steps to understand the unique goals and challenges of our clients' businesses. For example, the firm's junior attorneys spend time in clients' offices, working directly with marketers and in-house attorneys. This experience enables these associates to develop a practical business context to match their substantive legal skills – a combination that delivers dividends to clients and that reinforces the practice group's business – and client-focused philosophy.

Experience

Consumer Class Action Defense

- *Dick's Sporting Goods*
Representing Dick's Sporting Goods in the Western District of Kentucky in two putative class actions alleging a "bait and switch" advertising campaign.
- *Pinero v. Jackson Hewitt Tax Service Inc.* (E.D. La.)
Secured dismissal of virtually all claims arising from the allegedly improper disposal of customers' private information, including obtaining a ruling of first impression holding that commercial tax preparers are not subject to the privacy provisions (and potentially substantial statutory penalties) of the federal Tax Reform Act.
- *Sprint Nextel*
Kelley Drye has led the defense of more than 30 class action cases brought against Sprint, Nextel Communications, and Nextel Partners, Inc. In several related matters, we successfully petitioned for multidistrict litigation over the objections of several noted plaintiff class action firms, transferring over twenty cases to the Western District of Missouri.
- *America Online, Inc., CompuServe Interactive Services, Inc.*
Kelley Drye has represented AOL and CompuServe in several class action suits filed in Florida, California, Oklahoma, Illinois and New Jersey. Not one case advanced to class certification, let alone a decision on the merits.

FTC and State AG Investigations/Litigation

- Represent Dish Network in litigation initiated by the Department of Justice on behalf of the Federal Trade Commission and the States of North Carolina, Illinois, Ohio and California seeking civil penalties for violations of the FTC's Telemarketing Sales Rule by allegedly calling telephone numbers listed on the Do Not Call Registry. The case is pending in the United States District Court for the Central District of Illinois (Rock Island Division).
- Represent Next Click Media LLC in litigation filed by the U.S. Federal Trade Commission alleging insufficient disclosure of material terms and conditions made in connection with a negative option free trial offer. Litigation pending in the United States District Court for the Central District of California.
- Represent Gratis Internet, LLC in litigation initiated by the Attorney General of the State of New York seeking consumer redress, disgorgement of profits, and penalties for violations of Sections 349 and 350 of NY's General Business Law and Section 63(12) of New York's Executive Law in connection with an alleged breach of the company's privacy policy. Case pending in the Supreme Court of the State of New York (New York County).

- Represented an auto chemical manufacturer in an investigation by the U.S. Federal Trade Commission regarding substantiation for performance claims made for the product. Case initiated by a referral from the National Advertising Division of the Council of Better Business Bureaus, Inc. Case closed by the staff without formal action.
- Represented Sprint Nextel in an investigation by the U.S. Federal Trade Commission regarding pricing claims made by the carrier. Case closed by the Commission despite recommendation by the staff that the Commission file a lawsuit challenging the pricing claims.
- Represented a national retailer in an investigation by the U.S. Federal Trade Commission regarding compliance with the Fur Products Labeling Act. Case closed by the staff without formal action.
- Represented a domestic shoe and boot manufacturer in an investigation by the U.S. Federal Trade Commission regarding compliance with the Made in the USA standard. Case closed by the staff without formal action.
- Represented an insulation manufacturer in a NAD referral. Case closed by the staff without formal action.
- Represented an online behavioral advertising company in an FTC investigation under Section 5 of the FTC Act. Case closed by the staff without formal action.

Green Marketing

- On behalf of a *Fortune* 50 technology company, successfully challenged a competitor's claim that they sell the "world's greenest notebooks."
- Worked with a large food and beverage trade association to prepare comments concerning possible revisions to the FTC's Guides for the Use of Environmental Marketing Claims ("the Green Guides"). The comments focused on claims relating to the following issues: renewable energy, carbon offsets, renewable energy certificates, carbon neutrality, carbon footprint, sustainability, life cycle assessments, seals, logos, third party certifications and source reduction claims.
- Represented a leading manufacturer and marketer of building products in an investigation by the FTC concerning its advertising for fiber glass building insulation products. The case was initiated by a referral from the National Advertising Division of the Council of Better Business Bureaus, Inc. and was administratively closed by the FTC staff without formal action.

Lanham Act

- *POM Wonderful LLC v. Ocean Spray Cranberries*
Defending beverage producer in a false advertising case brought under the Lanham Act by POM Wonderful.
- *Valentino v. MGA Entertainment* (E.D.N.Y. 2007)
Defended toy manufacturer in a trade dress and copyright infringement action. Case was dismissed by the plaintiff following early discovery and motion practice.
- *Illinois Tool Works v. Pactiv* (S.D. Ind. 2007)
Defended manufacturer of packaging machinery against patent infringement claims. A global settlement was negotiated after Markman briefing and argument.
- *Google v. American Blind & Wallpaper* (N.D. Cal. 2007)

Served as litigation counsel in closely-watched search engine advertising case. Case settled after successful oppositions to both Google's motion to dismiss Lanham Act counterclaims and a subsequent motion for summary judgment.

- *Levi Strauss v. Polo Ralph Lauren* (S.D.N.Y. 2007)
Defended leading apparel company in trade dress infringement claims arising from pocket stitching designs.
- *The Hoover Company v. Bissell Homecare, Inc.* (N.D. Ill. 2007)
Defended manufacturer of carpet cleaners in false advertising case.

NAD

- *Bissell Homecare, Inc./Halo Technologies, Inc.*, NAD Case Rep. No. 0000AU (Feb. 13, 2008)
Challenged unqualified germ killing and health-related cleaning and performance claims, endorsement and testimonial claims for ultraviolet "UV-ST" vacuum made by Halo Technologies, Inc. The NAD recommended that several of Halo Technologies' claims be discontinued and expressly qualified.
- *Trane Residential Systems/Goodman Global, Inc.*, NAD Case Rep. No. 4755 (Nov. 26, 2007)
Challenged the truth and accuracy of Goodman Global's express and warranty disclosure claims for HVAC products and 10-year warranty. The NAD recommended that Goodman Global's advertisements be modified to clearly and conspicuously disclose the conditions of the warranty.
- *Sherwin-Williams Company*, NAD Case Rep. No. 4743 (Nov. 19, 2007)
Provided substantiation of performance and warranty claims for exterior coating, per the NAD's request. The NAD determined that a reasonable basis for substantiation of claims was provided by Sherwin-Williams.
- *Sony Electronics, Inc./Panasonic Corporation of North America*, NAD Case Rep. No. 4697 (July 16, 2007)
Defended Panasonic Corporation of North America in a challenge brought by Sony Electronics, Inc. regarding advertising claims comparing Panasonic plasma televisions to competing LCD televisions. The NAD determined that Panasonic had reasonable basis and substantiation for the principal claims, and recommended one modification.
- *The Procter & Gamble Company/McNeil-PPC, Inc.*, NAD Case Rep. No. 4697 (July 13, 2007)
Challenged the truth and accuracy of comparative advertising claims made by McNeil. The NAD determined that McNeil's comparative claims lacked substantiation.
- *The American Chemistry Council/Born Free LLC*, NAD Case Rep. No. 4626 (Feb. 1, 2007)
Challenged Born Free's health claims regarding Bisphenol-A free baby bottle. The NAD recommended that Born Free discontinue its various implied and express claims, and make modifications to others.

New Media Marketing

- Assisted various clients with contests involving consumer-generated content, including contests where consumers were invited to create commercials, develop software, and even design sneakers. We drafted rules for the promotions, helped protect our clients from problematic content, and secured rights to the winning submissions.
- Assisted various clients in designing sweepstakes that allow consumers to enter by sending text

messages via their mobile phones. We helped these clients structure the promotions in such a way as to avoid the lawsuits that have recently plagued other companies that have offered text-to-win sweepstakes.

- Advised clients on the risks associated with allowing consumers to post content on the clients' sites and drafted terms of service designed to protect the clients from the potential liability associated with content posted by consumers.
- Advised clients on the risks associated with employee blogs and helped clients develop internal policies addressing blogging by employees in order to minimize legal exposure to the company.

Privacy and Information Security

- Assisted a major retailer with a gap analysis for privacy compliance. This involved dividing the business units into discreet parts with similar privacy compliance issues. Our analysis then cataloged every applicable privacy law in the United States (federal and state) in the form of easy-to-follow questions for the business units to answer, which allowed the legal department to identify compliance gaps and most efficiently focus resources on those areas that needed it most.
- Represented a financial institution in an investigation by the FTC concerning an information security breach the business incurred, and whether the company's business practices complied with Section 5 of the FTC Act, the Gramm Leach Bliley Act (GLBA), the GLBA Safeguards Rule and the GLBA Privacy Rule. The case resolved with a settlement that included relatively narrow injunctive relief (compared to other similar FTC settlements), and no monetary damages or penalties.
- Counseled a *Fortune* 50 computer and technology company on global privacy and data security compliance, including assisting on compliance with the various U.S. state developments, enforcement trends and strategies for managing vendor relationships worldwide. Our work included drafting appropriate contractual language and developing and counseling on oversight and monitoring procedures for a company that maintains a very large and diverse set of vendors that raise varied data security compliance issues in the European Union and Asian countries in which they do business.
- Worked with an international retailer to review and certify its data practices under the Safe Harbor program, to permit it to lawfully transfer its European Union employee and customer data to the United States.
- Assisted a major consumer electronics retailer in connection with implementing a behavioral advertising initiative.
- Regularly advise a *Fortune* 1000 clothing retailer on privacy and data security matters, including working closely with the company in designing a tailored privacy and data security compliance program that meets federal and state regulatory requirements.
- Provide comprehensive privacy and data security advice for a major online retailer. This includes advising on compliance with the Children's Online Privacy Protection Act, CAN-SPAM, and relevant FTC and state consumer protection, privacy, and data security laws.
- Defending an apparel manufacturer in two major California class actions alleging violations of the Song-Beverly Act in the collection of customers' personal information.
- Counseled a *Fortune* 500 clothing manufacturer on enterprise-wide data security compliance. This included strategies for data protection compliance, legal policies, managing vendor relationships, negotiating privacy and data security terms in vendor contracts and exercising privacy and due

diligence in the company's acquisition of new businesses, data assets and service providers.

- Counseled numerous clients – retailers, financial service entities, and telecommunications providers – on appropriate responses to a data breach event in accordance with legal obligations and business risks.

Promotions

- Assisted leading quick service restaurant in structuring and advertising various instant win games offered in conjunction with the release of a major motion picture. As part of these projects, we assisted in drafting rules, reviewing ads, obtaining rights to movie content and negotiating agreements with various prize providers.
- Advised Converse regarding their role in promotions for the (RED)TM Campaign, in which a portion of proceeds from the sale of certain products are donated to The Global Fund to Fight AIDS, tuberculosis, and malaria.
- Regularly counsel Nike regarding its role in charitable promotions, including the sale of LIVESTRONG® bracelets and specially marked clothing to benefit the Lance Armstrong Foundation.
- Assisted 3M in a promotion to benefit The Susan G. Komen Breast Cancer Foundation.

Surveys

- Managed national and international taste tests, preference tests and other consumer surveys. We provide legal counseling based on the results of these tests and surveys to help businesses determine whether they have adequate substantiation for advertising claims.

For further information about Kelley Drye's Advertising and Marketing practice group, please contact:

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