GIBSON DUNN

Gibson Dunn Wins Vacatur of FTC's "Click-to-Cancel" Rule on Behalf of Broad Coalition of Trade Associations and Companies

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Gibson Dunn has scored a groundbreaking win for seven trade associations and a small business representing a broad coalition of American industries by obtaining vacatur of the U.S. Federal Trade Commission's "Click-to-Cancel" Rule for recurring subscriptions — a Rule that would have imposed new, burdensome obligations on hundreds of thousands of companies offering commonly available, convenient subscriptions to customers for everything from newspapers and pet food deliveries to security and medical monitoring services. The Eighth Circuit Court of Appeals unanimously held that the FTC failed to comply with a critical procedural requirement by issuing the Rule. This is Gibson Dunn's second major victory against the FTC in the litigation over this Rule. The FTC Act allows the Commission to promulgate rules that define "unfair or deceptive acts or practices," but only after following a number of procedures that go above and beyond the typical APA requirements for other agencies. These requirements include issuing a "preliminary regulatory analysis" for public comment if a proposed rule amendment will affect the national economy by $100 million or more annually. Although the proposed Rule here would affect a type of contract that over three-quarters of consumers use, the FTC initially claimed that the Rule wouldn't affect the economy by $100 million or more. Even though an ALJ later found otherwise and the FTC admitted that the Rule would have such effects, it never issued a preliminary regulatory analysis for public comment. Gibson Dunn petitioned for review of the Rule in four different courts of appeal. When multiple petitions are filed in multiple courts of appeal, the federal "lottery statute" requires the agency to transmit those petitions to the Judicial Panel on Multidistrict Litigation for consolidation in one randomly chosen court. But the FTC refused to transmit the petitions, saying it had not yet "issued" the Rule. Gibson Dunn asked the Fifth Circuit Court of Appeals for an emergency writ of mandamus, which the Fifth Circuit unanimously granted. The Gibson Dunn team then proceeded to the merits. The cases were consolidated in the Eighth Circuit Court of Appeals, where our lawyers argued, among other things, that the FTC's procedural failure mandated vacatur of the Rule. Less than a month after oral argument and one week before the Rule was set to take effect, the Eighth Circuit panel unanimously agreed with Gibson Dunn and, in a groundbreaking opinion about the FTC's procedural obligations, vacated the Rule in full, rejecting all the FTC's arguments. This ruling preserves the recurring subscription business model that serves business and customers, and it affords much-needed relief to companies spanning almost all industries that would have otherwise been subject to the new Rule. The case is *Custom Alarm v. Federal Trade Commission*, No. 24-3137. The Gibson Dunn team includes partners Helgi Walker, Lucas Townsend, Allyson Ho, and Brad Hubbard and associates Michael Corcoran, Brian Richman, and Connor Mui.

Related People

Helgi C. Walker

Lucas C. Townsend

Allyson N. Ho

Brad G. Hubbard

Michael Corcoran

Brian Richman

Connor P. Mui

Related Capabilities

Appellate and Constitutional Law

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