

THE
AM LAW LITIGATION DAILYLitigators of the Week: Putting the Kibosh on
the FTC's 'Click to Cancel' Rule

By Ross Todd

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Our Litigators of the Week are a **Gibson, Dunn & Crutcher** team led by partners **Helgi Walker** and **Lucas Townsend** and associate **Michael Corcoran**.

We previously recognized them as Runners-Up in November after they secured a writ of mandamus from the Fifth Circuit ordering the Federal Trade Commission to comply with the federal lottery statute requiring the agency to alert the Judicial Panel on Multidistrict Litigation about challenges to the proposed "click to cancel" rule—a rule aimed at making recurring subscriptions easier to cancel.

With the challenges consolidated and routed to Eighth Circuit, this week the Gibson Dunn team secured a ruling blocking the rule just seven days before it was set to go into effect. A unanimous panel of the court held that the FTC exceeded its statutory authority and failed to conduct the required preliminary regulatory analysis during the rulemaking process.

Lit Daily: Who were your clients and what was at stake here?



Courtesy photos

(l-r) Gibson Dunn partners Helgi C. Walker and Lucas C. Townsend, and associate Michael P. Corcoran.

Helgi Walker: Our clients were seven trade associations representing a broad cross-section of the American economy and a family-owned home alarm company in Minnesota. All of these clients and the companies they represented were deeply concerned about the impact of the FTC's Negative Option Rule on their businesses and relationships with customers. Consumers value the convenience and certainty of knowing that important things like their newspaper subscriptions, security services, lawn care services and pet food deliveries will continue uninterrupted, until

they choose to cancel. Recurring subscriptions have long been an important contractual alternative and business model for consumers and businesses alike. But the Rule would have made those agreements unworkable, requiring companies to put their customers through layers of unwieldy disclosures and consent mechanisms, and consumers were at risk of losing critical services they depend on—for example, if terminating a subscription was too “easy,” an unauthorized person—or worse, a criminal—could just “click to cancel” your home alarm or internet service. Service providers would lose customer goodwill, and consumers ultimately would bear the costs. These were some of the pressing concerns that brought together so many diverse entities from across the economy to take on this oppressive rule.

How did this matter come to you and the firm?

Lucas Townsend: Gibson Dunn has long-standing ties to many businesses and industries that would have been hurt by the Rule. Helgi was approached by several long-term clients familiar with her work on regulatory challenges; we brought together other parties from different industries who also wanted to challenge the Rule.

Who was on your team and how have you divided the work?

Michael Corcoran: We had an amazing team of talented lawyers who live and breathe the law and excel in cutting-edge administrative law matters. Helgi is a co-chair of Gibson Dunn’s administrative law and regulatory practice group and has won countless fights with

administrative agencies; she led the matter and delivered the winning argument in the Eighth Circuit. Lucas is an appellate and administrative law partner who supervised the day-to-day work and kept our broad coalition of clients working together. I am a senior associate, joining the firm two years ago after my clerkship with U.S. Supreme Court Justice Clarence Thomas, and had the opportunity to serve as the lead associate on the matter, working to help draft the briefs and build out our arguments with the team.

Our Dallas-based colleagues **Allyson Ho**, **Brad Hubbard** and **Brian Richman** gave invaluable assistance on the mandamus petition in the Fifth Circuit after the FTC refused to notify the Judicial Panel on Multidistrict Litigation of the multi-circuit petitions for review. **Connor Mui** in D.C. helped with critical research and analysis for that petition on an emergency timeline and our moot courts.

When the FTC didn’t transmit the petitions filed in multiple circuits challenging this rule to the JPML, how did that shape how this litigation unfolded?

Townsend: Ultimately, that refusal only helped to underscore that the FTC was not taking its procedural obligations seriously. The lottery statute requires agencies to notify the JPML of multi-circuit petitions for review, and in our experience, other agencies do this all the time, even when they think a petition is problematic. The FTC’s refusal to simply transmit the petitions to the JPML was unprecedented. And it delayed all petitioners from presenting a unified request for relief to a single court of appeals.

While it was unfortunate that we had to spend precious litigation time and resources fighting the FTC on this issue, the Fifth Circuit granted our request and compelled the FTC to do its job, and we ultimately got to press our case for the coalition in the Eighth Circuit and persuade the court that the FTC had ignored yet another important procedural requirement—the requirement to perform a preliminary regulatory analysis—that was fatal to the Rule itself.

You raised issues concerning the FTC’s statutory authority as well as other Administrative Procedure Act arguments in your briefs, but going into oral argument, you focused on the substantive and procedural limits that Congress put on the FTC in Section 22. Why focus there?

Walker: We deliberately raised a strong suite of arguments in our briefing to show the many legal and practical problems with the Rule. Going into argument, we trained our fire on Section 22 because it’s such a unique statute: It imposes limits on the FTC that were purposely designed to rein in the agency’s rulemaking power, above and beyond the normal Administrative Procedure Act requirements. As I told the panel, the procedural violation under Section 22 was the narrowest and cleanest ground for decision that would resolve the case and result in vacatur of the entire Rule. We thought that targeted approach might have broad appeal to the entire panel, and indeed that is the path the panel took in its unanimous decision.

What’s important in this decision for companies that use these types of contracts?

Townsend: Vacating this Rule was critical for the many companies across the economy that

offer these contracts. While some aspects of the Rule might sound good in theory, the reality is much more complex. Because the Rule indiscriminately covered any kind of recurring subscription, whether it was about medical monitoring devices or lawncare services, it was impossible to implement in a way that would not frustrate or annoy customers and crush this business model. Of course, the FTC can continue taking enforcement action where appropriate under statutes like the Restore Online Shoppers’ Confidence Act or pursuant to its existing cease-and-desist authority, but without imposing a one-size-fits-all straitjacket on American business.

Let me echo something Judge Ralph Erickson said during oral argument: “My experience tells me that when you’re sitting at your keyboard trying to cancel one of these things, they ask you 14 questions, but when you signed up, they asked you one.” How do you respond to that?

Walker: No matter how good (or bad) an idea is as a policy matter, agencies must always follow the law. That’s the entire point of the APA. Here, the FTC completely skipped a critical procedural step that was designed to give the public a chance to help the FTC shape its rules and avoid overburdening businesses. And while there are always bad actors who may abuse this particular type of contract—just as any contract can be abused—there are many respected companies, like our clients and their members, that do the right thing and whose customers are happy with their services. But at the end of the day,

the law is the law. I can't say it better than the panel opinion did: "While we certainly do not endorse the use of unfair and deceptive practices in negative option marketing, the procedural deficiencies of the Commission's rulemaking process are fatal here."

Helgi, with this decision in hand, are there any other moments from the oral argument that stick out to you?

Walker: The panel asked many good and probing questions of both sides that showed a real understanding of the issues in play, and it's always a pleasure to appear before such a well-prepared and engaged panel. But my ears definitely perked up when one of the judges asked at the end of the argument when the Rule would take effect. That seemed to be a clue that the panel might be considering ruling before the Rule's compliance deadline. And sure enough, that's what happened: The court issued a decision just 29 days after oral argument and seven days before the deadline, which indicated that the panel understood the need to provide certainty to regulated entities before the Rule kicked in and caused massive disruption for them and for consumers.

What will you remember most about this matter?

Corcoran: I will never forget Helgi first calling me to ask if I'd be interested in working on a rule challenge—to which I responded "love to!"; the invaluable mentorship she and Lucas offered throughout the whole case; pivoting to an unexpected, all-hands-on-deck emergency mandamus petition because of the FTC's curveball; and traveling to St. Paul to watch Helgi deliver a spectacular oral argument before the Eighth Circuit panel.

Townsend: I will always remember working with such a broad cross-section of the economy. We partnered with lawn care companies, home security companies, newspapers and many other businesses of varying sizes and industries. It's not every day you get to work with, and successfully manage, such a varied client base.

Walker: I will cherish the memory of the esprit de corps we had as a team, here at Gibson Dunn and with our fantastic client group, all collaborating closely to put together our strategic plan and then executing with precision and determination. And the famous wild rice soup at the St. Paul Hotel, a delicious Minnesota specialty!