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Husch Blackwell's Amicus Brief Aids in Eighth Circuit Win that Vacates FTC's 'Click-to-Cancel' Rule

The U.S. Court of Appeals for the Eighth Circuit vacated the Federal Trade Commission's Negative Option Rule, holding that the FTC failed to conduct a preliminary regulatory analysis in violation of Section 22 of the FTC Act.

In mid-October 2024, the FTC announced the finalized Rule, which sought to regulate all contracts that include an automatic renewal feature, which the FTC considers a negative option feature. The Rule would have applied to the more than one billion paid subscriptions in the U.S.—including those with an auto-renewal terms, imposing onerous requirements economy-wide that would result in substantial costs of compliance and difficulties in compliance—and would have required businesses to provide a cancellation method that was as simple as the signup process.

Later that month, various industry associations and individual businesses sought review of the Rule in four federal courts of appeal, claiming that in issuing the Rule the FTC exceeded statutory authority, failed to satisfy procedural requirements by declining to conduct a preliminary regulatory analysis, and acted arbitrarily and capriciously under the Administrative Procedure Act (APA). The four actions were consolidated and heard by the Eighth Circuit.

The litigation attracted national interest with various groups supporting and opposing the Rule in amicus curiae briefs. Husch Blackwell attorneys Marci Kawska and Lisa Lawless filed an amicus curiae brief on behalf of the Service Contract Industry Council, American Property Casualty Insurance Association, and Consumer Credit Industry Association in support of the challenge to the Rule. These associations are the leading national trade associations whose members offer service contracts, also known as extended warranties, home

warranties, or product protection plans, to consumers. Those contracts often include an automatic renewal feature.

A month after oral argument, the Court issued its decision vacating the Rule on July 8, just days before the compliance deadline, July 14, 2025.

The Court set aside the Rule on the ground the FTC did not conduct a preliminary regulatory analysis (PRA) during the rulemaking process and thus failed to follow the procedural requirements of FTC Act Section 22. The Court held that the FTC Act mandates a separate PRA in any case where the FTC issues a notice of proposed rulemaking and the estimated annual economic effect of the Rule is \$100 million or more. At the FTC hearing presided by an Administrative Law Judge (ALJ), the FTC's own ALJ determined that the Rule's annual effect would exceed \$100 million. The Court held that the failure to conduct a PRA was prejudicial because petitioners lost a notable opportunity to dissuade the FTC from adopting the Rule. The Court cited *National Automobile Dealers Association v. FTC*, the Fifth Circuit's decision vacating the CARS Rule , as providing additional support for the claim of prejudice from the procedural deficiencies in rulemaking.