

Litigator of the Week: Eugene Scalia Scores Again

Gibson, Dunn & Crutcher partner Eugene Scalia took out a truly monster-sized regulation: the Department of Labor's fiduciary rule.

By **C. Ryan Barber**

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When the Labor Department brought the fiduciary rule back from the dead in the final year of the Obama presidency, reviving a controversial proposal the agency had tabled in 2011, Gibson, Dunn & Crutcher partner Eugene Scalia considered it a privilege to challenge the retirement-savings regulation.

For the industry, the rule threatened to usher in some of the most sweeping regulatory changes in 50 years. For Scalia, co-chairman of Gibson Dunn's administrative law and regulatory practice group, it represented "one of the broadest, most aggressive regulatory maneuvers I've ever seen by an agency," he said.

But before he could explain any of that to the U.S. Court of Appeals for the Fifth Circuit, Scalia had to explain to his family why he would be missing at least a portion of their planned vacation to the Mediterranean.

"We moved the Fifth Circuit to expedite the case, and the court promptly announced that argument would be the week I was scheduled to be on a cruise in the Mediterranean with my family. I had a difficult conversation with my wife, explaining that I couldn't go back and tell the court the case was important—but not that important," Scalia recounted in an interview this week.

After a conversation with the clerk, the Fifth Circuit scheduled the argument for the beginning of that week, allowing Scalia to fly from New Orleans to catch up with the cruise in Nice, Italy. And so, within 24 hours of arguing about administrative law, the tax code and arcane regulations for private sector pension plans, Scalia was enjoying perhaps the perfect antidote to



Eugene Scalia.

that tumbleweed of legal issues: a Mai Tai by the pool on the deck of a cruise ship.

Vacation aside, it turned out there was cause for celebration. On March 15, a divided three-judge panel of the Fifth Circuit sided with Scalia and struck down the regulation, ruling that the Labor Department overreached by requiring retirement investment advisers to work in their clients' best interests.

In her opinion for the panel, Judge Edith Jones wrote that the Labor Department, under former Secretary Thomas Perez, "made no secret of its intent to transform the trillion-dollar market for [Individual Retirement Account] investments, annuities and insurance

products, and to regulate in a new way the thousands of people and organizations working in that market.”

Although the Labor Department has the option of appealing the panel ruling, either to an en banc Fifth Circuit or the Supreme Court, Jones’ opinion last week likely marked the end of Scalia’s nearly two-year challenge on behalf of nine trade groups, including the U.S. Chamber of Commerce and Financial Services Roundtable.

The rule had been championed by Perez and President Barack Obama’s White House. Then the election happened. Under the Trump administration, the Labor Department continued defending the fiduciary rule—but held its nose while doing so. Trump ordered the agency last year to reconsider the fiduciary rule, a move expected to result in revisions or a repeal of the rule.

The 2016 election, and the ensuing regulatory whiplash, was hardly the first curveball thrown to Scalia. Within weeks of suing to undo the rule, in June 2016, Scalia effectively picked up more than a dozen additional clients when the case was combined with two separate challenges brought by Sidley Austin and Wilmer Cutler Pickering Hale and Dorr in the U.S. District Court for the Northern District of Texas.

Scalia, working closely with fellow Gibson Dunn partner Jason Mendro, entered the case with nine trade associations—groups with the, at times, unenviable task of moving in unison with competing member businesses that all want to be heard. With the consolidation of the three cases, the fiduciary rule challenge required coordination with 13 more trade groups, along with “a number of really fine lawyers” at Sidley Austin and Wilmer Hale, Scalia said.

“All of our clients — both the clients represented by Gibson Dunn and the other firms — had a shared goal of getting the court to see all the problems with this rule. We also saw, legally, many of the same problems. There were certain legal arguments that were given more emphasis by one firm, other arguments by another. But they formed a consistent whole and together gave the court a clear picture of an unprecedented rule that wasn’t even in an area of the Labor Department’s responsibility,” Scalia said.

The toughest challenge, Scalia said, was painting a clear picture of the fiduciary rule’s flaws and the related regulatory landscape. The task involved taking a complicated area of the law and a rule that was “gargantuan in scope,” Scalia said, “and helping explain to the court in a simple, straightforward way how sweeping and problematic the implications were.”

As part of that strategy, the lawyers and their clients agreed they would be most effective with a single voice during the arguments before the Fifth Circuit panel. Scalia was chosen. The “overarching theme,” he said, was that the fiduciary rule represented a “serious overreach and abuse of authority by the Department of Labor.”

“Whenever you’re going into oral argument, it’s preferable to be able to weave the arguments together,” Scalia said. “That gets harder when you split the argument into pieces. I think we all came to recognize we could most effectively help the court see the missteps the department made if we could present them as a coherent narrative.”

The victory before the Fifth Circuit, which reversed a loss before Chief Judge Barbara M.G. Lynn in federal district court, leaves the fiduciary rule’s future uncertain. Just days before the Fifth Circuit’s ruling, the U.S. Court of Appeals for the 10th Circuit upheld a portion of the regulation, in an opinion so narrow that Scalia disputes the existence of a split among the federal appeals courts. A challenge in the U.S. Court of Appeals for the D.C. Circuit is pending.

Scalia said the Fifth Circuit’s ruling makes it easy for the Labor Department to walk away from the fiduciary rule.

“I think the Fifth Circuit has thoroughly addressed the concerns presented by this rule. It’s vacated the rule. It’s provided the very relief the plaintiff in the D.C. Circuit has sought,” Scalia said. “From my perspective, there’s no point of the D.C. Circuit case continuing.”

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