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Litigator of the Week: Eugene Scalia of Gibson, Dunn & Crutcher

By Jenna Greene
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Eugene Scalia has long been known as a regulation killer, the go-to lawyer for attacking government overreach. This week, the Gibson, Dunn & Crutcher partner slayed one of his biggest dragons yet: the designation of MetLife Inc. as a "systemically important financial institution."

The suit challenged one of the pillars of the Dodd-Frank Act--the ability of regulators to impose heightened requirements on nonbanks whose failure could lead to a widespread economic crisis.

Many predicted that MetLife's suit would fail. The phrase "uphill battle" appeared repeatedly in coverage everywhere from The Wall Street Journal to Law360 to The New York Times.

But to Scalia, the eldest of the late Justice Antonin Scalia's nine children, the case harkened back to a legal touchstone: "Agencies have a solemn obligation to pay attention to evidence in the record and give a fair hearing," he said. "From a legal perspective, if you understand the mistakes the government made, it's not a surprising decision at all."

On Wednesday, U.S. District Judge Rosemary Collyer of the District of Columbia issued a bare-bones two-page order siding with MetLife. (A redacted version of her full opinion is expected to be unsealed sometime after April 6.)

She rejected MetLife's constitutional argument but backed the company's contention that the government violated the Administrative Procedure Act.

"I would not characterize it as a narrow decision," Scalia said.

Administrative Procedure Act challenges are a Scalia speciality. He's successfully invoked the law, which governs

Eugene Scalia

how federal agencies enact regulations, to chip away at Dodd Frank rules on proxy access, position limits and disclosure of oil and gas payments to foreign governments, for example.

In the MetLife case, Collyer granted the insurer summary judgment on three counts, holding that the government arbitrarily and capriciously failed to consider MetLife's vulnerability to material financial distress, relied on speculation and indefinite assumptions in designating MetLife as systemically important and failed to consider the economic effects of the designation on MetLife.

When onlookers "opined this was not a winnable case, they didn't understand the record that was built before the agency

or the significant ways in which the government overlooked evidence and arguments put before it," Scalia said.

Gibson Dunn partner Amir Tayrani and associates Ashley Boizelle and Indraneel Sur assisted on the case. MetLife has also been represented in the matter by Sullivan & Cromwell.

The U.S. Department of the Treasury in a statement did not specifically say that it would appeal the decision, but said, "We are confident that [the government's] determination was lawful and will continue to defend the council's designations process vigorously."

The case began in December 2014, when MetLife was declared a systemically important financial institution, or SIFI, by the Financial Stability Oversight Council.

Created by the Dodd-Frank Act, the council is a sort of virtual überagency led by the Treasury secretary. It consists of the heads of all of the major federal financial regulatory agencies.

MetLife was the fourth (and to date, the last) company to get the SIFI label--the others are American International Group Inc., General Electric Capital Corp. and Prudential Financial Inc. The designation means that the companies are subject to higher capital requirements and supervision by the Federal Reserve Board of Governors.

Why did MetLife make the list? The council found that the insurer, which as of Sept. 30, 2014, had $909 billion in consolidated assets, "is a significant participant in the U.S. economy and in financial markets [and] is interconnected to other financial firms through its insurance products and capital markets activities."

Further, the feds found that if MetLife was in material financial distress, it could "inflict significant damage on the broader economy."

But Scalia in court papers argued that the government was blinded by MetLife's size, and made a series of unsupported assumptions.

The SIFI designation "was predicated on unbounded speculation, ahistorical analysis, shifting standards and undisclosed evidentiary material," he wrote. The council "focused myopically on MetLife's size and exaggerated its interconnections with other financial companies, while discounting almost entirely the safeguards built into the existing, comprehensive oversight of MetLife's subsidiaries by state, federal and international regulators."

For example, he pointed out that the council supposed that state insurance regulators would fail to intervene if MetLife was in trouble. Or, if they did, they would make matters worse by triggering a loss of confidence that would cause people to surrender their life insurance policies en masse. What the feds didn't consider was "evidence that customers do not hold insurance policies for liquidity purposes and would face adverse tax consequences and contractual penalties associated with surrender," he wrote.

Nor did the council properly consider how vulnerable MetLife actually is to material financial distress, Scalia argued. Instead, the feds just assumed this "with no consideration at all of its likelihood," he wrote.

He continued, "[The council's] failure to define even a single scenario on which it purported to base its designation decision--denying MetLife the ability to address the scenarios and their likelihood--is a heretofore unknown mode of analysis that resembles sheer guesswork and fearmongering more than accepted principles of risk analysis."

Collyer's decision is sure to be of keen interest to the three other SIFIs. GE on Thursday asked the council to rescind its designation, arguing that it is no longer appropriate. The company says it has "completely transformed itself" by selling off most of its financial services businesses to escape the too-big-to-fail label. Earlier this year, MetLife said that it would break off a large portion of its U.S. retail segment for the same reason. (It's not clear if the legal victory will affect those plans.)

The case may also inspire others to challenge the council. The decision "holds these powerful regulators to the same standard as other agencies," Scalia said. "There's a myth that certain federal regulators are so authoritative that they can't be held accountable in court. … Banks and other financial institutions are probably looking at the decision and saying, 'This is a reminder that we do have legal protection under the statute.'"

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