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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Securities MVP: Gibson Dunn's Eugene Scalia

By **Stewart Bishop**

Eugene Scalia

Law360, New York (December 12, 2012) -- With a swath of regulatory victories already in his column, Gibson Dunn & Crutcher LLP's Eugene Scalia got a court this year to block the U.S. Commodities Futures Trading Commission's so-called position limits rule, a historic win in a closely watched case that landed him a spot among Law360's 2012 Securities MVPs.

Retained by two financial industry trade groups, Scalia and his Gibson Dunn team moved aggressively to beat back the CFTC's regulation, which was prompted by the Dodd-Frank Act.

The rule was aimed to limit the position investors can take on 28 referenced commodities in the agricultural, energy and metals markets in an attempt to limit speculation.

In a February hearing, Scalia told U.S. District Judge Robert L. Wilkins that the rule would raise prices for commodities that consumers buy daily and require immediate, costly compliance efforts by market participants, including the potentially irreversible restructuring of corporate relationships.

He also asserted separately that the CFTC was not in fact required to adopt the rule, noting that Dodd-Frank provided that the commission can establish limits on the amounts of positions, but only where appropriate.

“In adopting the new position limits, the commission made no finding that they were necessary; it made no finding that they were appropriate; and it conducted no meaningful cost-benefit analysis,” Scalia and his team argued in court documents.

Judge Wilkins ultimately sided with Gibson Dunn, and in granting the plaintiffs' move for summary judgment, ruled that the CFTC had for decades provided justification before enacting position limits on speculative behavior and that there was no reason to believe Congress intended otherwise when passing Dodd-Frank.

It was just the latest high-profile win against financial regulators that Scalia has chalked up for his clients, coming after last year's hotly contested challenge of the U.S. Securities and Exchange Commission's “proxy access” rule, which was also created under Dodd-Frank.

Stepping up to the plate for the U.S. Chamber of Commerce and the Business Roundtable, Scalia argued that the SEC's rule, which would make it easier for large shareholders or groups of shareholders to replace corporate board members, had a flawed cost-benefit analysis and that the SEC failed to adequately consider alternatives to its proposal.

Scalia also contended the rule failed to take into account the collective will of shareholders.

“Our argument was in part, let the shareholders decide,” Scalia said. “If the vast majority of shareholders oppose it, then it isn't right to force the proxy access mechanism onto companies."

Once again, regulators found themselves outmatched by Scalia, and in a stinging opinion, a D.C. Circuit panel found that the SEC had violated the Administrative Procedure Act by failing to adequately assess the economic effects the proxy access rule would have on corporations.

“Here the commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters,” the panel found.

It was a harsh rebuke to the SEC, one that Scalia concedes was rather satisfying.

“It was a gratifying win,” he said. “It's always gratifying when a client comes to you and feels the government has abused its power and a panel of judges agrees with you that the agency was unreasonable in taking the action that it did.”

Striking down SEC rules is becoming an old hat for Scalia, who also secured a win for insurers in 2010, when the D.C. Circuit invalidated a proposed SEC rule to regulate the fixed indexed annuities industry. Prior to that, Scalia successfully challenged key provisions of the SEC's mutual fund governance rule both in 2005 and 2006.

The son of U.S. Supreme Court Justice Antonin Scalia and a graduate of the University of Chicago Law School, Scalia has spent most of his career at Gibson Dunn, apart from a stint working for former U.S. Attorney General William P. Barr and his time spent as the solicitor of the U.S. Department of Labor during the early years of the George W. Bush administration.

In addition to his regulatory practice, Scalia is also a seasoned labor and employment attorney, who recently helped The Boeing Co. dodge a National Labor Relations Board complaint that claimed the company's decision to place the assembly line for its 787 Dreamliner at a nonunion facility in South Carolina was illegal retaliation for past strikes by unionized workers in Washington state.

Lately, Scalia is lending his talents to a coalition of heavy hitters including the American Petroleum Institute in yet another challenge to an SEC rule adopted pursuant to Dodd-Frank, which would compel companies listed on U.S. stock exchanges to publicly report payments made to foreign governments for the rights to develop oil, gas and minerals.

It's a rule Scalia says could cost companies and investors in excess of $14 billion in initial and ongoing costs.

“Dodd-Frank required the adoption of some kind of extractive industry transparency rule. What we're saying is that there were ways to adopt a rule that was more narrowly tailored and far less burdensome,” he said.

In taking on regulatory agencies, Scalia cautions that it's important for people and companies that are concerned about a proposed rule to pay close attention to the evidence for and against the rule that's put into the agency rulemaking record. The devil is apparently still in the details.

“A lot of people view participating in a rulemaking as an election — whichever side submits the most comments wins. But it's not an election. I view it as more like a trial,” Scalia said. “You want to get all your evidence and arguments in before the agency in the hope that you'll change its mind. But if not, you've established a record to serve as a basis for a [court challenge].”

--Additional reporting by Max Stendahl and Evan Weinberger. Editing by Andrew Park.

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