DREHER TOMKIES LLP ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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SUPREME COURT OVERRULES *CHEVRON*, SENDS THE SEC TO COURT AND CALIBRATES THE APA CLOCK

In a term that ran down to the wire, the Supreme Court announced two decisions last week and another decision this week that rebuke regulators and will be felt throughout the financial services industry. In a joint opinion in *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce*, the Court eliminated *Chevron* deference, bringing an end to courts' "mechanical application" of "binding deference to agency interpretation" of ambiguous law. In *Securities and Exchange Commission v. Jarkesy*, the Court limited the ability of the SEC to impose fines in administrative proceedings before an administrative law judge, holding that the Seventh Amendment entitles a defendant facing civil penalties for securities fraud to a jury trial. In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the Court held that a claim under the Administrative Procedures Act does not accrue for purposes of the statute of limitations until the plaintiff is injured by the final agency action.

The End of Chevron Deference

On June 28, 2024, the Supreme Court sounded the death knell for Chevron deference when it announced the 6-3 decision in *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce* (Justice Jackson took no part in the consideration or decision of *Raimondo*). "Chevron deference" refers to the interpretive methodology prescribed in the 1984 case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984), where the Court held that when the text of a statute is ambiguous as to a precise question, judicial deference to a federal agency's interpretation of federal law is appropriate so long as the agency's interpretation was not unreasonable.

In *Raimondo*, the Court held that *Chevron* cannot be squared with the Administrative Procedures Act ("APA"), which requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is said to be ambiguous. The APA specifies that courts, not agencies, will decide all relevant questions of law arising on review of agency action – even those involving arguably ambiguous laws – and prescribes no deferential standard for courts to employ in answering those legal questions, despite mandating deferential judicial review of agency policymaking and factfinding. According to the Court, *Chevron* insists on more than the "respect" historically given to executive branch interpretations; it demands that courts mechanically afford binding deference to agency interpretations, including those that have been inconsistent over time, and even when a pre-existing judicial precedent holds that an ambiguous statute means something else. Because *Chevron* cannot be squared with the APA and historical understandings of the role of the executive branch and the judiciary, the Court states that the doctrine, which was a judicial invention that required judges to disregard their statutory duties, must now be left behind.

The Court explicitly notes, however, that the decision to overrule *Chevron* does not call into question prior cases that rely on the *Chevron* framework. Holdings that specific agency actions are lawful, including the Clean Air Act holding of *Chevron*, are still subject to *stare decisis*. The holding in *Raimondo* represents a change in "interpretive methodology" and mere reliance on *Chevron* cannot constitute a "special justification" for overruling the prior holdings. Nevertheless, it is not clear that issues previously decided based on *Chevron* deference cannot be relitigated on the merits.

The Court's decision to overrule *Chevron* is unsurprising. During oral arguments for these cases, the Court's conservative justices appeared inclined to cut back the regulatory power of federal agencies at the very least, with several justices indicating they were prepared to overturn *Chevron*. *See* our ALERT of Jan. 26, 2024. The original interpretive methodology described in *Chevron* has been refined many times throughout the 40 years that have passed since the decision was handed down. The Supreme Court has not deferred to an agency interpretation under *Chevron* since 2016, and lower courts' application of *Chevron* has been inconsistent.

The Court's decision to overrule *Chevron* but protect prior decisions that relied on *Chevron* is good news for the industry (for now). With *Chevron* deference gone, it will be easier for the industry to successfully challenge the actions of overzealous regulators, including the CFPB and FTC. However, the industry will continue to benefit from those precedential cases that relied on *Chevron* to the industry's advantage [*see, e.g. Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996)].

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The SEC Gets Sent to Court

On June 26, 2024 a 6-3 majority of the Supreme Court held in *Securities and Exchange Commission v. Jarkesy* that the Seventh Amendment right to a jury trial in all "suits at common law" forecloses the SEC from seeking civil penalties before administrative law judges. Instead, if the SEC wishes to obtain civil penalties as authorized by statute in claims modeled after common law, those claims must be brought in federal court.

In *Jarkesy* the SEC sought civil penalties against George Jarkesy, Jr. and Patriot28, LLC for alleged securities fraud. The SEC chose to adjudicate the claims in front of an administrative law judge pursuant to the authority granted to the Commission under the Dodd-Frank Act, which made the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in federal court. The SEC's administrative law judge issued a final order levying a civil penalty of $300,000 against Jarkesy and Patriot28. Jarkesy and Patriot28 petitioned for judicial review and the Fifth Circuit held that the agency's decision to adjudicate the matter in administrative court violated Jarkesy and Patriot28's Seventh Amendment right to a jury trial. The Supreme Court agreed, effectively limiting the authority conferred to the SEC by the Dodd-Frank Act regarding civil penalties.

The Court held that the Seventh Amendment right to a jury trial in civil actions is not limited to the "common-law forms of action recognized when the Seventh Amendment was ratified" but extends to any "statutory claim if the claim is 'legal in nature.'" To determine whether a suit is "legal in nature," courts must consider whether the cause of action resembles a common law cause of action and whether the remedy is the sort that was traditionally obtained in a court of law. What matters most, according to the Court, is the *substance* of the action, regardless of whether the action originates in a "newly fashioned regulatory scheme." Because statutory securities fraud is modeled after common law fraud and civil monetary penalties designed to punish or deter behavior are a type of remedy at common law that could only be enforced in courts of law, defendants are entitled to a jury trial when the SEC seeks civil penalties against them for securities fraud.

The Seventh Amendment right to a jury trial in civil actions is judicially limited by a "public rights" exception. The "public rights" exception applies to matters that historically could have been determined exclusively by the executive and legislative branches. For example, the Court states that public rights have historically included the collection of revenue and certain aspects of customs law. The Supreme Court holds that the public rights exception does not apply to antifraud claims brought by the SEC because those statutory antifraud claims are modeled on common law fraud claims, for which adjudication by an Article III court is mandatory.

Many agencies, including the CFPB, rely on administrative enforcement mechanisms to impose civil monetary penalties for statutory violations. This decision throws those agencies' ability to enforce civil penalties into doubt. Pursuant to this decision, if the underlying claim resembles a common law cause of action and is "legal in nature", defendants will have a Seventh Amendment right to a trial by jury in federal court. Agencies will then have to decide whether to settle the claim out of court or face a federal judge, who may not be as favorable as an in-house administrative law judge.

The APA Clock Starts at the Moment of Injury

On July 1, 2024 a 6-3 majority of the Supreme Court held in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* that the statute of limitations on a claim for injury under the APA begins to run when the plaintiff is injured. Therefore, final agency actions (including rules) can be challenged at any point in time as long as the specific plaintiff's claim is within the statute of limitations period.

In *Corner Post* a business that opened in 2018 joined a lawsuit challenging Regulation II ("Reg II") on the grounds that the regulation sets a higher interchange fee than permitted under the Durbin Amendment. The Durbin Amendment was passed in 2010 and Reg II was promulgated by the Federal Reserve Board in 2011. The district court dismissed the suit as time barred by the applicable statute of limitations, which is the general six year statute of limitations for claims brought against the government. Under the district court's logic, the statute of limitations began to run upon the promulgation of Reg II.

The Supreme Court disagreed, holding that for claims under the APA, the statute of limitations begins to accrue when the plaintiff has a "complete and present cause of action," which is when the plaintiff has the right to "file suit and obtain relief." As claims under the APA cannot be filed until a party suffers an injury from a final agency action, the six year statute of limitations does not begin to run until that particular party has suffered an injury. Consequently Corner Post, a business that did not exist when Reg II was promulgated, can challenge Reg II at any point within six years of its injury, which in this case occurred when Corner Post was charged an interchange fee.

Under *Corner Post* regulations and other final agency actions arguably are not subject to a particularly meaningful statute of limitations under the APA because the clock starts ticking again each time a new entity is injured by a particular regulation or final action. This decision could lead to increased litigation of what was previously considered to be settled law.

Consequences

These three cases mark the end of a remarkable October 2023 term for the administrative state. In *Loper Bright*, *Jarkesy* and *Corner Post*, the Supreme Court majority reclaimed power for the judiciary, which will likely increase litigation moving forward. How regulators respond to this attack on their power remains to be seen. The ways that regulators regulate, through both rulemaking and enforcement, will almost certainly be affected by these decisions. That does not mean that regulators or their regulations are going away. We will simply need to continue to monitor the effect these decisions will have on the administrative state moving forward. ❑

✧ *Mike Tomkies, Elizabeth Anstaett and Mercedes Ramsey*