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News Alert

2024 Litigation Look Ahead Series: 40 Years of *Chevron* Deference, Administrative Law Precedent Hangs in the Balance

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B&D is pleased to present our 2024 Litigation Look Ahead series. In this compilation, our litigation team highlights recently decided or pending cases, many before the U.S. Supreme Court, that could carry significant outcomes and ramifications for our current and potential clients.

Chevron Deference: The "*Voldemort*" of Administrative Law

This first installment examines two U.S. Supreme Court cases that call into question 40 years of precedent related to judicial deference granted to agency rulemakings (*Loper Bright Enterprises, et al. v. Raimondo*, No. 22-451, and *Relentless, Inc. v. U.S. Dep't of Commerce*, No. 33-219). In reviewing these cases, there are indications the Court may overturn its landmark decision in *Chevron v. Natural Resources Defense Council*, placing new limits on agency power and making it easier for businesses to challenge federal — including environmental — regulations.

Last year, John Cruden, Principal and Co-Chair of B&D's Litigation practice, said, "*Chevron* in the Supreme Court has been like the Dark Lord Voldemort in the *Harry Potter* books — not to be mentioned by name." Our specific analysis follows.

Case Summary

On January 17, 2024, the Supreme Court heard highly anticipated oral arguments in the consolidated cases *Loper Bright Enterprises, et al. v. Raimondo* and *Relentless, Inc. v. U.S. Dep't of Commerce*. Though the cases arise under the Magnuson-Stevens Act, a law intended to promote sustainable fisheries and aquatic conservation, they center on the Supreme Court's decision in *Chevron v. Natural Resources Defense Council*.

In 1984, the Court in *Chevron* set forth a legal test known as the "*Chevron* deference," articulating when and how courts must defer to a government agency's interpretation of a law. Under *Chevron*, when a statute is ambiguous on a particular issue, a court may not substitute its interpretation of the statute; instead, an agency's interpretation of that statute must be upheld so long as it is "reasonable." This doctrine has shaped administrative law for decades, with the underlying notion that a government agency has the particular expertise to fill the gaps in complex laws.

In *Loper Bright* and *Relentless*, Petitioners are family-operated fishing companies challenging a provision of the Magnuson-Stevens Act, which requires commercial fishing vessels to carry onboard observers who

monitor fishermen's catch. The National Marine Fisheries Service, a federal agency, interpreted the law to require the fishermen to pay for the observers. In challenging this rule, Petitioners have asked the Court to overrule *Chevron* after both the U.S. Court of Appeals for the District of Columbia in *Loper Bright* and the U.S. Court of Appeals for the First Circuit in *Relentless* found the agency's interpretation of the law "reasonable." Because Justice Ketanji Brown Jackson previously served on the panel that decided *Loper Bright* at the D.C. Circuit, she recused herself, risking a 4-4 tie. The grant of certiorari in *Relentless,* permits the full bench to decide on the issue.

Implications

Administrative law is the bedrock of the legal environmental world, and under Chevron, courts favor agency interpretations of highly technical statutes. Should the Court overturn or undercut the holding of *Chevron*, federal agencies, including environmental regulators, will likely face a tougher battle in court against rulemakings challenges. Therefore the *Loper Bright* and *Relentless* decisions could have far-reaching impacts on stakeholders and governmental regulators in the environmental sphere.

Arguments have been made forcefully on both sides. Conservative members of the Court have vocalized their opposition to *Chevron*; Justice Clarence Thomas wrote in 2015 that *Chevron* "wrests from Courts the ultimate interpretive authority…and hands it over to the Executive." Solicitor General Elizabeth B. Prelogar, representing Respondents in *Loper Bright*, wrote in Court filings that altering Chevron would "draw federal courts into resolving policy questions and exacerbate the potential for inconsistent results," which would be a "convulsive shock to the legal system."

Without *Chevron*, courts may revert to case-by-case decision-making, which could limit or call into question federal regulations affecting every sector of the national economy, including environmental regulations, where statutory language is often less than clear. In such circumstances, regulated industries will likely bring and win more challenges to federal regulatory actions, potentially to their benefit and potentially to the detriment of regulatory stability and legal certainty. In fact, businesses may desire more certainty on some issues than the agency regulatory process can afford, but that may be difficult to accomplish through legislation in a closely divided Congress.

Although agencies would no longer be entitled to the same level of deference if *Chevron* is overturned, there is a wide range of potential tests that could be implemented in its place. For example, during oral arguments, the Petitioners suggested that *Skidmore* would be the standing precedent if nothing new is implemented, which acknowledges the agency's important role and knowledge of policy in considering an agency position.

Furthermore, the Court generally has not relied on *Chevron* deference in recent years. In the 2019 *Kisor decision*, the Court evaluated *Auer* deference, which applies when an agency is interpreting its own regulations. Following clarifications in *Kisor* about circumstances warranting deference in regulatory interpretations, the Court has also focused on step one in its analysis of ambiguity in statutory interpretation, stopping short of the step two analysis that would require deference to an agency's reading. This might suggest that the practical impact is lessened—if the courts are not finding statutes ambiguous, then there is nothing to defer to.

As one of the most-cited Supreme Court cases, *Chevron* has been instrumental in environmental law for the past 40 years, particularly with respect to federal statutes like the Clean Air Act and Clean Water Act. If overturned or substantially modified, there is no doubt it will have a profound impact on environmental jurisprudence for years to come.

Coming Soon

Other noteworthy cases featured in upcoming installments of the *2024 Litigation Look Ahead* series will examine the "major questions doctrine" and the scope of regulatory authority, the constitutionality of appointed administrative law judges, the judicial review process of Administrative Procedure Act actions, Fifth Amendment takings, the Commerce Clause, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and natural resource law.

We're highlighting cases – environmental and otherwise – that we think could have significant impacts on the regulated community or that could lead to changed approaches by regulators.

B&D's litigators are actively involved in and monitor cases in courts nationwide. With decades of experience in toxic torts, class actions, Superfund and site remediation, enforcement defense, regulatory challenges, and business and contract disputes, our litigation team is well-equipped to handle diverse legal matters.

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