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60 Days After *Loper*: Health Care Impact of *Chevron* Deference's End

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The Supreme Court of the United States issued its highly anticipated ruling in a pair of cases challenging the long-standing *Chevron* doctrine on June 28, 2024. Foreshadowed by decisions in recent years slighting *Chevron*, it was widely expected that the Supreme Court would use its rulings in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce* to diminish if not entirely discard, *Chevron*'s precedent of judicial deference to agencies. The Supreme Court took decisive action, overruling *Chevron* and changing the way courts will review federal agency-related litigation for many years to come.

Sixty days after the publication of this monumental decision, *Loper Bright* has already begun to impact regulated industries nationwide. All three federal branches have responded to *Chevron*'s demise: agencies are reevaluating how they approach rulemaking; Congress has introduced legislation to address agency deference, and federal judges have begun to interpret ambiguous statutes using their own methods of statutory construction rather than defer to agencies' interpretations. In particular, the health care industry has felt the aftershocks of *Loper Bright* in several cases over the past 60 days. This Client Alert identifies some of the primary ways in which the end of *Chevron* deference has already affected health care.

A Brief Recap of *Chevron*'s Downfall

For four decades, federal agencies enjoyed significant deference from the courts regarding their interpretation of ambiguous laws and regulations applicable to the program(s) they administer, a principle known as "*Chevron* deference" after the 1984 decision in *Chevron v. National Resources Defense Council*. In short, courts gave deference to an agency's interpretation of an ambiguous federal statute so long as the interpretation was: (1) issued by the agency charged with administering it; (2) generally rational or reasonable; and (3) given in a form that would have the force of law, like an adjudication or formal notice-and-comment rulemaking. For 40 years, this framework was commonly referred to as "*Chevron* deference," until June 28, 2024.

In a 6-3 vote, the Supreme Court overruled the *Chevron* framework in *Loper Bright Enterprises v. Raimondo*. The Court reasoned *Chevron*: (1) violated Separation of Powers by stripping judges of their statutory interpretation role; (2) was contrary to the Administrative Procedure Act (APA); and (3) inappropriately allowed agencies to change positions as often as they wished, creating inconsistency and unreliability for industry actors. Following this groundbreaking decision, courts no longer defer to an agency's "permissible" interpretation of a statute just because it is ambiguous. Instead, courts must "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity," and thus determine whether an agency has acted within its statutory authority.

The *Loper Bright* dissent predicted that overturning *Chevron* would result in uncertainty in the regulatory landscape, disrupt settled expectations, and raise new doubts about agency interpretations, as courts will now be the interpretive decision-makers. In fact, the dissent made several references to health care generally to illustrate the scope of the uncertainty created by the majority's ruling:

- "Courts [will] have more say over regulation – over the *provision of health care*, the protection of the environment, the safety of consumer products, the efficacy of transportation systems, and so on"; and

- "What will the Nation's *health-care system* look like in the coming decades? Or the financial or transportation systems? What rules are going to constrain the development of AI? In every sphere of current or future federal regulation, expect courts from now on to play a commanding role."

Indeed, in just two months, the dissent's prophecy has already proven accurate: the overruling of *Chevron* has impacted administrative law and regulated industries, with health care being at the forefront.

Impacts on Health Care

Overruling *Chevron* restores the pre-*Chevron* standard, that is, allowing the judiciary to consider the agency's interpretation of an ambiguous statute without deferring to the agency, and enabling the judge to fashion his or her own reasonable interpretation of the statute at issue. This impacts ongoing and future litigation as litigants openly challenge agency statutory interpretation, and government attorneys are expected to justify an agency's interpretation based on traditional methods of statutory interpretation. The ruling has already resulted in litigation challenging federal rules and regulations governing health care. A court now *must* substitute its independent interpretation, derived via the rules of statutory construction, for an agency's interpretation, regardless of what the agency thinks is necessary to fulfill its legislative mission.

To illustrate *Loper Bright*'s swift impact on health care, below are examples of five areas of health care in which the decision has been cited and applied by federal judges and litigants within the first two months of *Chevron*'s downfall.

1. Contraception Non-Consent Rule Under the Public Health Service Act

The Biden administration, through the U.S. Department of Health and Human Services (HHS), issued a rule requiring entities receiving funding under Title X of the Public Health Service Act to dispense contraceptives to minors without parental consent. *See* 42 C.F.R. § 59.10(b). On July 25, 2024, the State of Texas filed suit to challenge the non-consent rule, claiming it violates Texas's parental consent laws and that HHS abused its authority in promulgating the rule. In its complaint, Texas invoked *Loper Bright* to argue the non-consent rule's prohibition on parental consent is unauthorized by the statute it purports to interpret and is not entitled to deference. Texas is requesting an injunction prohibiting HHS from enforcing the non-consent rule. *Loper Bright* renders the rule vulnerable, as the federal judge presiding over the case will conduct their own interpretation of the Public Health Service Act, without affording any deference to HHS.

2. Nondiscrimination Rule Under the ACA

Section 1557 of the Affordable Care Act (ACA) prohibits any health program or activity that receives federal assistance from discriminating on the basis of race, color, national origin, sex, age, or disability. The ACA incorporates the provisions of Title IX to address sex discrimination in health care. The past three presidential administrations have promulgated regulations interpreting this nondiscrimination requirement, and Section 1557 has been challenged in countless lawsuits over the prior administrations. Many such lawsuits have focused on religious freedom protections.

On May 6, 2024, HHS, the Centers for Medicare and Medicaid Services (CMS), and the Office for Civil Rights published a final rule implementing Section 1557, particularly as it applies to sexual orientation and gender identity and Limited English Proficiency requirements. The nondiscrimination rule has already been challenged in several cases, including one brought by the Florida Attorney General and a Catholic hospital group.

On July 3, 2024, two federal district judges in Mississippi and Texas stayed the nondiscrimination rule's effective date, both citing *Loper Bright* and reasoning HHS exceeded its statutory authority in promulgating the rule. In the Mississippi lawsuit, 15 states sued HHS to challenge the rule's provisions concerning gender identity. After citing *Loper Bright*'s holding that *Chevron* is overruled, the court proceeded to use methods of statutory construction to interpret the phrase "on the basis of sex" in Title IX. The district judge found that HHS's interpretation of this phrase to include gender identity was not persuasive; rather, the court determined that "[i]nterpreting the word 'sex' to include gender identity would create contradictions and ambiguity within Title IX and its regulations." Accordingly, the court issued a nationwide preliminary injunction prohibiting HHS from enforcing the rule's provisions concerning gender identity.

3. FTC Non-Compete Rule Under the FTC Act

The Federal Trade Commission's (FTC) rule prohibiting most post-employment non-competition agreements – a rule to which many health care employers would be subject – was set to take effect September 4, 2024, but it has already been successfully challenged in federal court. In fact, on August 20, 2024, a federal district judge set aside the rule as agency overreach under *Loper Bright*, and at least two courts had previously questioned the rule's enforceability and issued injunctions, citing *Loper Bright*. However, courts have been divided in their interpretations as to whether the rule is lawful, possibly highlighting how *Loper Bright*'s application can lead to inconsistency and unpredictability.

For instance, on August 20, 2024, a federal district judge for the Northern District of Texas set aside the non-compete rule, concluding the FTC did not have statutory authority to promulgate the rule and that the rule is arbitrary and capricious under the APA. Previously, on July 3, 2024, that same judge had granted the plaintiffs' motion to temporarily enjoin the non-compete rule from taking effect as applied to the plaintiffs. The court sided with the challengers, who argued that the Federal Trade Commission Act (FTC Act) authorizes the FTC to prosecute "unfair methods of competition" but not to determine what is "unfair competition." Non-competition agreements are not even mentioned in the FTC Act – a fact not uncommon in modern cases seeking to rein in alleged agency overreach. In analyzing whether the FTC Act authorizes the FTC to conduct substantive rulemaking, the court cited *Loper Bright*'s holding that "[t]he deference that Chevron requires of courts reviewing agency action cannot be squared with the APA." The court found that the text, structure, and history of the FTC Act reveal that the FTC lacks substantive rulemaking authority with respect to unfair methods of competition. Accordingly, in the August 20th Order, the court relied on *Loper Bright* in setting aside the rule and prohibiting it from going into effect or being enforced nationwide. Similarly, on August 15, 2024, a federal district judge in Florida issued a preliminary injunction halting the rule from going into effect against the plaintiff, a real estate broker. The Florida court concluded that the FTC Act did not authorize the FTC to issue rules regulating non-compete clauses, which have historically been reserved to state governments.

However, on July 23, 2024, a federal judge in Pennsylvania determined that the non-compete rule was lawful. In contrast to the Texas and Florida courts, the Pennsylvania court found that the FTC has substantive rulemaking authority and acted within its authority in promulgating the non-compete prohibition.

While all three district courts applied the *Loper Bright* standard, they did not reach a unanimous conclusion. The application of *Loper Bright* in this context shines light on the lack of uniformity caused by courts exercising their independent judgment in deciding whether an agency has acted within its statutory authority. The FTC is expected to appeal the Texas court's decision to the U.S. Court of Appeals for the Fifth Circuit. If the case is appealed, the Fifth Circuit will conduct its own judicial interpretation of the FTC Act, possibly providing yet another interpretation of the statute.

4. Disproportionate Share Hospital Payments

The same day as *Loper Bright*'s publication, a New Jersey-based hospital system filed suit in the U.S. District Court for the District of Columbia to challenge the way in which HHS/CMS calculates payments to

Disproportionate Share Hospitals (DSH) that serve many low-income patients. CMS determines a hospital's DSH payment based on a formula that includes how many of its patients get federal supplemental security income benefits. The 2003 Medicare Prescription Drug Improvement and Modernization Act mandates that CMS give hospitals data on the formula to verify CMS's calculations.

The hospital system argues that CMS has withheld some of this data and sought to set aside CMS's calculations for 2016. The hospital system contends that CMS underpaid the system by approximately $400,000 that year. Invoking *Loper Bright*, the hospital system is imploring the court to broadly interpret an ambiguous phrase in the Medicare statute, which CMS has interpreted narrowly to lower DSH payments. Specifically, the plaintiffs posit that CMS's interpretation of a key metric in the formula – supplemental security income (SSI) fraction – is irrational and unlawful. The hospital system is also asking the court to mandate that CMS disclose more data to hospitals.

In a similar vein, the U.S. Supreme Court has agreed to review a case in which more than 200 hospitals are challenging how HHS/CMS applies the formula for calculating DSH payments, likewise focusing on the SSI fraction. A lower court ruled in favor of HHS/CMS in 2022 under the *Chevron* standard. Similarly, in 2023 – before *Loper Bright*'s arrival – the U.S. Court of Appeals for the D.C. Circuit affirmed the district court's decision to uphold the agency's interpretation of the Medicare Act. Now, after *Chevron*'s demise, the plaintiffs have a stronger chance of persuading the highest Court to adopt their interpretation of the statutory language at issue.

5. Independent Dispute Resolution Under the No Surprises Act

In 2022, HHS, the Department of Labor, and the Department of the Treasury issued a final rule related to the No Surprises Act (NSA) Independent Dispute Resolution (IDR) process. The rule, among other things, prioritized the Qualifying Payment Amount (QPA) over the other factors the NSA specified were to be considered in IDR determinations. The Texas Medical Association challenged the rule, and the Federal District Court for the Eastern District of Texas vacated the challenged portions of the rule in 2023, prior to *Loper Bright*.

On August 2, 2024, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's decision to vacate the rule. The Fifth Circuit cited *Loper Bright* and proceeded to interpret the NSA's ambiguous language without giving deference to the Departments. The court held that the departments exceeded their delegated authority under the NSA when they impermissibly established substantive standards for the IDR entities to follow and when they promulgated rulemaking favoring the QPA over the other factors established in the NSA.

Conclusion

The Supreme Court, through *Loper Bright* and other agency-related opinions this term, has secured the roles of federal courts and ensured the courts have the last and best word on federal laws. The legal landscape has not simply reverted to a pre-*Chevron* standard; the Court has revealed new pathways to challenging agency action. Just two months following this landmark decision, challengers are using *Loper Bright* as a sword to strike down agency rules, and federal courts have already begun to find agency overreach using independent statutory interpretation. The federal government is facing tough decisions about how it will respond to these blows to core processes through which it has governed for decades. While *Loper Bright* is shaking up nearly every regulated industry, the health care sector is especially feeling the impacts of this shift. Health care will no doubt continue to see changes as rules are challenged, agencies reevaluate their rulemaking processes, and Congress carefully drafts health care related legislation.

If you have any questions, please contact the authors or a member of Baker Donelson's Health Law team.