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End of the Chevron Doctrine Will Cause Problems for CRE

There are big risks for businesses that want predictable regulatory futures.

By **Erik Sherman** | July 08, 2024 at 04:57 AM

A week ago, the Supreme Court, ruling in two cases — Relentless v. Department of Commerce and Loper Bright Enterprises v. Raimondo — struck down the Chevron deference. It represents a likely tidal wave of regulatory change.

Many people in business may be excited because they perceive this as a reduction of administrative regulation. It might be in some cases. However, it may open doors to bigger problems for corporations.

The Chevron deference came from the 1984 case, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. It was "one of the most important principles in administrative law for 40 years," as the **Legal Information Institute of the Cornell Law School put it.** Sometimes when Congress writes laws, there may be confusion in the structure of language. The Supreme Court set a test such that when an agency had administrative purview over an area of regulation and interpreted ambiguous language in a reasonable way, the court would give deference to the agency.

In cases of ambiguity in a statute, the "power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress," as **Justice John Paul Stevens wrote for the majority.**

Later decisions narrowed Chevron deference scope in various ways. But the core decision no longer stands. In this latest decision, Chief Justice John Roberts wrote in the court's decision, "Perhaps most fundamentally, Chevron's presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."

The decision opens many existing regulations to legal challenge and potential revisions.

"Because federal agencies no longer have their thumb on the scale, many predict that the Loper Bright opinion will result in fewer and less expansive federal rules and a rise in legal challenges to rules impacting the real estate industry, including challenges to regulations promulgated under, among others, the Fair Housing Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act," Wyatt Kendall, Partner, Morris, Manning & Martin, tells GlobeSt.com.

"There is likely to be less of an impact in this industry than others due to CRE being governed mostly by state and county laws, statutes, and ordinances and not federal law," Raul Gastesi, partner and co-founder of law firm Gastesi Lopez & Mestre, tells GlobeSt.com. "Federal Environmental laws may be impacted thus allowing further CRE development in undeveloped areas. Without Chevron, there will be an impact on regulations and oversight

by reducing the reach of federal agencies in regulating commercial industries which may allow for further CRE development. For the most part, those in the CRE field should wait and see what develops in other sectors/industries that are intertwined with real estate such as labor, environment, construction, etc."

However, as Kendall also noted, "While some in the real estate industry may applaud these outcomes, the real estate industry should also be cautious of courts playing a more significant role in interpreting statutes without agency deference as a less predictable regulatory environment may lie ahead."

Courts in various jurisdictions technically could rule differently on interpretations, creating a complex path to final resolution through appeals.