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Judicial Review of PHMSA Order: Limitations of Agency Deference

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The 5th Circuit U.S. Court of Appeals ***reversed*** several key aspects of a PHMSA Final Order in a ***recent opinion*** issued on August 14, 2017. That decision is significant for the fact that few final actions by this agency have been presented for judicial review, and, of those, even fewer have been successful. The decision is based on a complex set of facts and legal issues that went through several years of administrative appeals before the agency. As with most complex cases, many of the factual issues were unique, and are not likely to be repeated. There are a few larger, procedural themes to be gleaned from the decision that apply more broadly, however, both to this agency and administrative law generally.

The central issue presented in the case was whether an administrative agency can bring an enforcement action based on an interpretation of a rule not articulated previously. Four general themes can be drawn from the 5th Circuit decision, including: (1) deference to agency interpretations of statutes and regulations is coming under increasing scrutiny by courts (and Congress); (2) at the same time, Fair Notice and post hoc rationalization are being recognized more frequently as threshold concerns before considering agency deference; (3) narrative (performance based) rules can be more difficult to enforce than prescriptive rules; and (4) courts may view agency attempts to force a specific technology as suspect when reliable technology does not yet exist.

Agency Deference Is Increasingly Subject to More Scrutiny

The 5th Circuit decision joins a growing number of cases challenging whether and how much deference should be given to federal agency decision making during judicial review. The concept of judicial deference to administrative decision making was articulated in the case of Chevron v. NRDC 467 U.S. 837 (1984). Chevron arose from an EPA rule interpreting amendments to the Clean Air Act. For more than 30 years, Chevron and its progeny have been applied by courts in cases involving statutory and regulatory interpretation by agencies. In that case, the Supreme Court ultimately upheld EPA's interpretation, stating that "If…the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 842-43 (requiring that if Congress has addressed the question at issue, the court must give effect to that intent).

The Supreme Court has reviewed and slightly modified its holding in Chevron over the years with respect to agency deference. In particular, the Auer case held that an agency's interpretation of an ambiguous regulation is controlling unless it is "plainly erroneous or inconsistent with regulation." Auer v. Robbins, 519 U.S. 452 (1997); see also Bowles v. Seminole Rock, 325 U.S. 410 (1945). Both the Auer and Chevron doctrines have granted federal agencies wide latitude in interpreting statutes and regulations that they administer.

There has been extensive debate over the years about whether the courts have given too much deference to rulemaking and agency interpretations, or whether agencies should have more discretion because courts do not have the expertise, time, or resources to fully understand the technical issues often presented. The problem is made more acute where statutes direct judicial review straight to the U.S. Courts of Appeal, rather than District Courts. That requires the court to rely solely on the administrative record, without further fact finding allowed in appeal. The Pipeline Safety Act is such a statute, where appeals of final agency action go direct to the Courts of Appeal.

In recent years, support for Chevron agency deference has been waning, and an increasing number of courts and others are questioning the constitutionality of these doctrines with respect to ensuring separation of powers. Then Judge, now Justice, Neil Gorsuch noted in a 10th Circuit decision "Chevron … permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016). In addition, earlier this year, the House introduced and passed H.R. 5, "The Regulatory Accountability Act of 2017," which proposes to amend the Administrative Procedure Act to set forth a "de novo" standard for questions of law, including the interpretation of statutes and rules by agencies and would prohibit a court from interpreting a gap or ambiguity as justification for deferring to the agency's interpretation of questions of law (thereby diminishing, if not eliminating, both Chevron and Auer deference).

Due Process and Fair Notice Limitations to Agency Deference

Even if agency deference remains unchanged, in recent years courts have identified limitations to the agency deference doctrine where an agency failed to provide due process and fair notice of its interpretation. Specific exceptions to Auer deference arise in relevant part when (1) the interpretation subjects an entity to unfair surprise, especially where penalties are involved; (2) an interpretation is offered for the first time in an enforcement proceeding and threatens substantial liability for prior conduct; and (3) an interpretation reflects an agency's post hoc rationalization. Christopher v. SmithKline Beecham, 132 S. Ct. 2156, 2166 (2012). Courts have noted the risk associated with agencies who issue "vague and open-ended regulation that they can later interpret as they see fit, thereby 'frustrating the notice and predictability purposes of rulemaking.'" Id. at 2168 (2012). In the recent 5th Circuit decision, the Court explained "We have warned that fair notice requires the agency to have 'state[d] with ascertainable certainty what is meant by standards [it] has promulgated.' " ExxonMobil Pipeline Co v. U.S. DOT, No. 16-60448, 2017 U.S. App. LEXIS 15144 (5th Cir. Aug. 14, 2017) (citing Diamond Roofing Co. Inc. v. Occupational Safety and Health Review Comm'n, 528 F.2d 654 (1976). The 5th Circuit did not apply deference because the agency's "post hoc litigation derived" interpretation of its regulation deprived the petitioner of fair notice. Id.

Vague Narrative Rules Are More Difficult to Enforce than Prescriptive Standards

Administrative rules can be narrative in form, or prescriptive. The former provides only general guidelines, while the latter sets out specific and measurable standards. Not surprisingly, it is easier to enforce prescriptive standards, because there are metrics that show compliance or non-compliance. Most agencies use both types of rules, and some regulatory topics evolve from narrative to prescriptive over time. Storm water regulations, for example, largely began as aspirational narrative standards (such as 'no taste, odor or color producing effects'), but evolved to include measurable criteria (such as 'nephelometric turbidity units' or NTUs). PHMSA regulations include more narrative performance-based standards than prescriptive, although not exclusively (construction criteria and cathodic protection are primarily prescriptive, for example).

In the recent 5th Circuit case, the primary issue revolved around a narrative rule that simply requires pipeline operators "to consider" whether a certain type of pipe may present a threat of accident. The pipe in issue – called "pre-1970 LF-ERW" welded pipe – is used in roughly one fourth of all liquid/oil pipelines in the U.S. It is not deemed dangerous in itself, as PHMSA has neither banned or even limited its use. There have been some incidents since the late 1980s involving this type of pipe and the development of certain defects on long seam welds, however, thus PHMSA requires that operators should consider that threat along with various other threats that are evaluated routinely.

As reflected in the administrative record, the Agency inspected this operator for its integrity management program many times before the Pegasus incident, and the operator evaluated the pipe many times for a variety of potential threats, including LF-ERW long seam failure, but it was not until after the incident occurred that PHMSA alleged the operator "failed" to identify the threat of long seam failure and in turn the anomaly that caused the incident. As the 5th Circuit concluded, the operator complied with the narrative rule because it clearly had "considered" the threat. Further, the fact that a release occurred, "does not necessarily mean that [the operator] failed to abide by the pipeline integrity regulations…If it did, then an operator […] could never escape liability […], thus nullifying the regulations and creating a strict-liability regime that Congress has not authorized. The unfortunate fact of the matter is that, despite adherence to safety guidelines and regulations, oil spills still do occur." ExxonMobil Pipeline Co v. U.S. DOT, No. 16-60448, 2017 U.S. App. LEXIS 15144 (5th Cir. Aug. 14, 2017). In this instance, the court questioned the agency's reliance on a new interpretation of general narrative rule after an incident, calling it a "post hoc litigation-derived standard."

Agency Requirements Not Yet Supported by Technology Are Difficult to Enforce

It may seem illogical for any agency to require the regulated community to achieve results that are not yet possible with existing technology. Yet that has been done for decades, often defended as 'technology forcing' rulemakings (e.g., EPA's evolving efforts to require increasingly efficient Clean Air Act controls, moving from rules requiring "Best Conventional Technology" to "Reasonable Available Control Technology" to "Maximum Achievable" (BCT-RACT-MACT), etc.). In the recent 5th Circuit case, PHMSA asserted after the fact that the operator should have been able to identify a defect that the Agency's own internal research reports and studies acknowledged were not yet capable of reliable identification using current technology. For the same reasons noted above, agency requirements to force actions that are not yet supported by technology may be viewed by courts as suspect.

Summary

The courts have never deferred blindly to all administrative agency decision making, but under the Supreme Court precedents in Chevron and Auer many courts have deferred to agency action in cases presenting complex facts and technology. Some lower courts in recent years have started to chip away at agency deference, however, whether through dicta questioning the doctrine or by creating or upholding exceptions to it. The Supreme Court now seems poised to amend Chevron and its progeny. As noted above, a bill was introduced in Congress earlier this year to legislatively limit agency deference, indicating the growing pressure to change long standing principles of administrative law. HR 5 passed the House and is presently being considered by the Senate Committee on Small Business and Entrepreneurship.

Non-prescriptive rules are typically more difficult to enforce, and they should be, because narrative rules can be subject to broad interpretation. Without clear guidance from an agency – not interpretations made after the fact of an incident or alleged violation – it is difficult for both an agency and the regulated community to define compliance. In those areas where Congress or administrative agencies expressly want to 'force' technology, it should be done in a manner that encourages innovation without punishing the regulated community where no technology yet exists to achieve the desired result.

Taken together, these themes from the recent 5th Circuit PHMSA opinion reflect several trends. Courts are increasingly reviewng agency action more closely, especially where rules are either vague or subject to broad interpretation. Deference is not due when an agency fails to provide fair notice of its interpretation and/or relies on a post incident rationalization. Finally, agency deference may not be afforded where no technology yet exists to achieve the agency's basis for alleging non-compliance.