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Bid To Swap Chevron For An Old Standby Raises Doubts

By **Katie Buehler**

Law360 (January 24, 2024, 9:43 PM EST) -- Last week, the U.S. Supreme Court debated whether a World War II-era doctrine encouraging courts to strongly consider agency statutory interpretations could replace the court's controversial so-called Chevron doctrine that requires judges to defer to those interpretations if a statute is ambiguous.

Attorneys for New England fish companies Loper Bright Enterprises and Relentless Inc., a subsidiary of Seafreeze Fleet LLC, championed the so-called Skidmore doctrine as an alternative to the court's 1984 rule that empowers federal agencies to determine the meaning of ambiguous statutes they're charged with enforcing. The much older 1944 rule would give judges the ultimate decision-making power when reviewing statutes, the attorneys argued.

"Of course, courts should pay special attention to what agencies say, but the agency ultimately has to bring its expertise to bear in a way that's persuasive," said Relentless' attorney Roman Martinez of Latham & Watkins LLP. "And if the court isn't [persuaded], if the court thinks that the law means X even though the agency thinks the law means Y, then the court needs to go with the best interpretation of the statute."

The court's conservative justices seemed to agree that revitalizing the Skidmore doctrine could be a solution to what some have described as an abdication of judicial review power to federal agencies, but struggled to agree on what the doctrine entails.

"If Skidmore is going to occupy a more prominent role going forward, I'd like to know exactly what your understanding of that principle is," Chief Justice John Roberts said.

Here, Law360 takes a look at the Skidmore doctrine and how a shift in its direction would affect the judicial system and the federal government as a whole.

'Very Old Idea'

In 1944, Justice Robert H. Jackson penned the Supreme Court's unanimous decision in Skidmore et al. v. Swift & Co., a case about the definition of "working time" that established a doctrine instructing judges to consider a federal agency's interpretation when deciding what a statute or term means. But the Skidmore doctrine wasn't a novel idea; it was a rebranding of judicial decision-making principles courts had used for more than a century.

The high court sided with Jim Skidmore and six other employees of the Swift & Co. packing plant in Fort Worth, Texas, holding that waiting time can be considered "working time" depending on case-specific facts. The plant was potentially required under the Fair Labor Standards Act to compensate Skidmore and his colleagues for the time they spent waiting to respond to fire alarms, the court ruled, even if the employees were allowed to sleep, eat and play games while they waited.

To reach that decision, the Supreme Court relied on interpretive bulletins and informal rules issued by the FLSA administrator at the time, who, based on their experience dealing with various employment issues, said the answer depends on the degree that an employee is free to engage in personal activities during waiting time.

"We consider that the rulings, interpretations and opinions of the administrator under this act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," Justice Jackson wrote.

He added that "the weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

The Skidmore doctrine instructs courts to do what they ought to be doing in the first place, Columbia Law School Professor Peter L. Strauss said.

"It wasn't his invention, it reflected 170 years of judicial decision-making," he said.

The doctrine emerged during a time of growth of the administrative state spurred by the enactment of the New Deal in the 1930s. While it has remained good case law — with very little criticism — for 80 years, Skidmore's popularity has ebbed and flowed. It was largely overshadowed by 1984's more regulator-friendly Chevron doctrine but used as a fallback in instances where regulators weren't entitled to Chevron's more robust deference.

It underwent a "revival" in 1991 when the Supreme Court ruled 6-3 in Equal Employment Opportunity Commission v. Arabian American Oil Co. that the commission wrongly interpreted Title VII of the Civil Rights Act's "broad jurisdictional language" to give the agency authority to regulate extraterritorial claims, according to a 1992 Duke Law Journal article by Jamie A. Yavelberg.

Another was in 2001, when eight justices ruled in United States v. Mead Corp. that a U.S. Customs Service tariff classification ruling was not entitled to Chevron deference. While the agency's decision wasn't binding, it was "eligible to claim respect according to its persuasiveness," Justice David H. Souter wrote for the court's majority.

But Justice Antonin Scalia claimed in a dissenting opinion that Skidmore was not a viable doctrine for the modern administrative state and that the Customs Service should've received Chevron deference. (Later on in his tenure, Justice Scalia would repudiate the Chevron deference doctrine.)

"It was possible to live with the indeterminacy of Skidmore deference in earlier times," Justice Scalia wrote in his dissent. "But in an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances Skidmore deference is a recipe for uncertainty,

unpredictability, and endless litigation."

Skidmore could once again, in 2024, emerge following a Chevron deference-related decision unscathed and revitalized.

"The idea that judges owe some sort of respect or deference to agency views of the law will not disappear," Cardozo School of Law Professor Michael Herz said. "That is a very old idea. It makes a lot of sense to everyone and it will survive."

'Always Meant Nothing'

But the viability of Skidmore itself as an alternative to Chevron is up for debate.

Justice Elena Kagan bluntly expressed a harsh view of the Skidmore doctrine during oral arguments on Jan. 17 in the Loper Bright case. Following an exchange between Justice Neil Gorsuch and Loper Bright attorney Paul D. Clement of Clement & Murphy PLLC over the doctrine's meaning and whether it's a "deference" doctrine, Justice Kagan chimed in to say that however one describes Skidmore, it's not a substitute for Chevron.

"What does Skidmore mean?" she said. "Skidmore means if we think you're right, we'll tell you you're right. So the idea that Skidmore is going to be a backup once you get rid of Chevron, that Skidmore means anything other than nothing — Skidmore has always meant nothing."

Justice Kagan's comment represents what Cardozo's Herz calls the "window dressing" school of thought around Skidmore, which is that in a world without Chevron deference, judges would ignore agency interpretations and rely on their own policy views when interpreting statutes.

Peter Karanjia, DLA Piper's administrative law appellate practice chair, agrees that Skidmore doesn't do a lot of work on its own, noting the doctrine is a suggestion and not a command, which means it could be easily disregarded. But Herz said there's more nuance to the debate over Skidmore's viability as an alternative to the Chevron doctrine.

"Justice Kagan totally dissed Skidmore, and a lot of people would agree with her," he said. "I still think it does some work, or at least can do some work, if judges are responsible and serious."

Federal agencies consider legal concerns earnestly and work hard to interpret statutes in the best way possible, Herz said. Most judges will likely continue to appreciate that and give an agency's interpretation significant weight when faced with a question of statutory interpretation. In a Skidmore regime, an agency's interpretation isn't dispositive but it's still important, he said.

However, the level of respect a court gives to an agency interpretation will vary among judges, and potentially require more Skidmore doctrine guidance from circuit courts and the Supreme Court, said Covington & Burling LLP Partner Kevin King.

"There's potential for lack of uniformity geographically," he said. "The law might be different in Texas than it is in California."

The Skidmore doctrine's flexibility would also allow certain courts that have heavily relied on the Chevron doctrine for decades to continue deferring most statutory interpretation decisions to

agencies, Crowell & Moring LLP Partner Amanda Shafer Berman said. The D.C. Circuit, for example, applies Chevron to the majority of its statutory interpretation cases and could continue to do so even under the Skidmore regime, she said.

"I'm sure some courts will still be kind of deferring even if they don't do it explicitly," she said. "Many judges will continue to believe that they shouldn't insert themselves into agency decisions."

Boies Schiller Flexner LLP Partner Jesse Panuccio agrees, adding there is always a certain degree of respect given to government attorneys.

"At the end of the day, I think federal courts are always going to give credence to what a U.S. attorney or a [U.S. Department of Justice] attorney is saying because it's the government," said Panuccio, a former assistant U.S. attorney general. "The government gets some benefit of the doubt."

'Meaningful But Not Transformative'

While there are several unknowns about how a potential shift from the Chevron deference doctrine to a Skidmore doctrine regime would affect the judicial system and the federal government as a whole, attorneys agree there will be at least one change: Federal agencies will lose more court battles.

As of 2013, federal agencies were 21.4% more likely to win circuit court cases when judges invoked Chevron deference than when courts relied on the Skidmore doctrine, according to a 2017 Michigan Law Review paper by Kent Barnett, a professor at the University of Georgia School of Law, and University of Michigan Law Professor Christopher J. Walker.

The paper analyzed 1,558 cases decided between 2003 and 2013 that asked courts to review agency statutory interpretations, and found agencies won 77.4% of cases that used the Chevron doctrine while they only won 56% of cases that cited Skidmore.

"You would expect the agency win rate to go down a bit and expect agencies to not be so aggressive or ferocious in their own interpretations, to be a little more cautious," Cardozo's Herz said.

But, he said, agency interpretations will continue to be taken seriously and agencies will still win more cases than not.

"There will be a meaningful but not transformative change," Herz said.

Attorneys for Loper Bright and Relentless told the Supreme Court during oral arguments that a shift to Skidmore would also force federal agencies to rein in aggressive statutory interpretations and kick-start Congress into addressing ambiguities in federal legislation. Those predictions, attorneys said, might not come true.

Covington's King, who spent four years as a legislative assistant in the U.S. Senate, said a Supreme Court ruling overturning Chevron would have some marginal effects, but it wouldn't result in an immediate change in how things work on Capitol Hill. Congress may be able to reach consensus on minute details in legislation, but ambiguities would probably remain.

A shift would also have minimal impact on how agencies develop their statutory interpretations, said Crowell & Moring's Berman, an alumna of the U.S. Department of Justice's Environment & Natural

Resources Division.

"It's not like agencies are out there pulling their punches on reasoning because of Chevron," she said.

Federal agencies would still strive to make the best statutory interpretation and to show their reasoning supporting it, Berman said. Some agencies that currently go through an overt Chevron analysis when promulgating interpretations might tweak the analysis to fit the Skidmore doctrine, including a focus on consistency over time, a major factor in Skidmore analyses.

On the other hand, a shift to Skidmore would create some new gamesmanship opportunities.

Boies Schiller's Panuccio said agencies could retreat farther away from formal rulemaking procedures to avoid judicial review. Instead of notice-and-comment rulemaking, agencies could issue informal guides or opinions, or use enforcement actions or threats of enforcement actions to influence companies they regulate.

"If they feel like they don't have winning arguments in court, they may structure arguments to avoid court," he said.

King added a Skidmore regime could also incentivize strategic changes to statutory interpretations. A key factor courts are told to consider in the Skidmore doctrine is whether an agency's interpretation is consistent and whether it was developed around the same time the statute at issue was enacted. A Republican administration could revise an agency interpretation to disable deference to a Democratic administration's previous interpretation, for instance.

As Loper Bright's attorney Clement said during oral arguments, "Flip-flopping is a huge Skidmore minus."

"It would be a really complex calculus for an agency to do that," King said. "It would essentially be giving away power from the agency to the courts, and in some ways to Congress. An agency wouldn't take that step except in unusual circumstances."

--Editing by Jay Jacskon Jr.
