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Courts

High Court's View of EPA Deference Unclear After Mercury Pollution, Health Care Rulings

By Patrick Ambrosio

June 30 — It's unclear how much deference the Environmental Protection Agency should expect to receive in the future from courts when the agency interprets statutory language, attorneys told Bloomberg BNA.

A string of recent decisions from the Supreme Court has called into question how much leeway the EPA and other federal agencies have when interpreting ambiguous statutory language, which lawyers said may indicate a shift in how courts oversee agency decisions.

James Rubin, counsel at Dentons US LLP, said that it is “pretty plain to see” that recent decisions on the Affordable Care Act and the EPA's mercury and air toxics standards indicate a potential shift in the amount of deference agencies can expect.

“There is a lot more brewing with Chevron deference,” Rubin said.

For more than 30 years, since a 1984 decision in Chevron U.S.A. Inc. v. NRDC, courts have applied a two-part test for judicial review of agency actions. Under *Chevron*, a court must first decide whether the plain text of the law is clear.

If the law is ambiguous, then the court must decide whether the agency's interpretation of the law is permissible (*Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 843, 21 ERC 1049 (U.S.1984)).

Court Scrutinizes Agency Decisions

However, attorneys said a pair of 2015 rulings by the U.S. Supreme Court as well as a 2014 decision limiting the scope of the EPA's greenhouse gas permitting program could signal a shift in the court's willingness to defer to the EPA and other agencies.

The Supreme Court in King v. Burwell, a 6-3 opinion authored by Chief Justice John Roberts, didn't use the Chevron framework to uphold the federal government's decision to make federal tax credits available under the Affordable Care Act in states that didn't set up their own health care exchanges, despite statutory language indicating that such tax credits were only available to people who participated in exchanges set up by the state.

In the opinion, Roberts said it was an “extraordinary case” that was outside of Chevron's domain because the tax credit issue was of “deep economic and political significance.”

The court also declined to apply the Chevron doctrine because the court found it “especially unlikely” that Congress would mean to leave such an interpretation up to the Internal Revenue Service, an agency that has no expertise in crafting health care policy (*King v. Burwell*, 2015 BL 202885, U.S., No. 14-114, 6/25/15).

Case Called ‘Extraordinary Decision.'

“Burwell was an extraordinary decision in terms of statutory construction,” Peter Glaser, a partner at Troutman Sanders LLP, said during a June 30 webinar hosted by the Environmental Law Institute.

Glaser, who represented the National Mining Association in challenges to the mercury and air toxics standards, said the health care ruling is a “real negative” for the EPA's climate agenda because the agency is expecting to receive deference from the courts.

In Michigan v. EPA, a 5-4 decision with an opinion authored by Justice Antonin Scalia, the court found that the EPA's interpretation of the phrase “appropriate and necessary” in Section 112(n)(1)(A) of the Clean Air Act was unreasonable.

The court held the EPA was required to consider the cost of compliance when deciding whether it was appropriate and necessary to regulate emissions of mercury from power plants, a determination that triggered promulgation of the mercury and air toxics standards, a regulation the EPA estimated would cost the power industry $9.6 billion annually (*Michigan v. EPA* , 2015 BL 207163, U.S., No. 14-46, 6/29/15).

‘Cracks' Seen in Deference Doctrine

Thomas Lorenzen, a partner with Crowell & Moring LLP who formerly worked at the Justice Department, told Bloomberg BNA that both decisions show a potential shift in the amount of deference EPA should expect to receive in the future.

In the King v. Burwell opinion, the court decided not to defer to the IRS because the agency had no expertise and because the question was “simply too important” to defer to the agency, Lorenzen told Bloomberg BNA.

Meanwhile, in the Michigan v. EPA decision, the court declined to defer to the EPA on its interpretation of a “quintessentially ambiguous term,” Lorenzen said.

“We're starting to see cracks in Chevron deference,” Lorenzen said.

Both Lorenzen and Rubin highlighted a concurring opinion in Michigan v. EPA authored by Justice Clarence Thomas, which argued that the Chevron doctrine raises “serious separation-of-powers” questions. Thomas wrote that deferring to agency interpretation precludes judges from exercising independent judgment of what is the best reading of ambiguous statutory language in favor of an agency's construction.

Thomas advocated for the elimination of the Chevron doctrine, but no other justice signed onto his concurring opinion, indicating that he doesn't have a majority to support that, Lorenzen said.

Implications for Climate Agenda

Janet McCabe, EPA's acting assistant administrator for air and radiation, wrote in a June 30 blog post that the Supreme Court's decision on the mercury and air toxics standards won't affect the Clean Power Plan, the agency's rulemaking (RIN 2060-AR33) to limit carbon emissions from existing power plants.

However, a shift in the Supreme Court's view of deference could affect the legality of the Clean Power Plan once the agency issues its final regulation, expected by the end of August.

The agency has argued that it is due deference to interpret ambiguous language in Section 111(d) of the Clean Air Act as it has defended its proposed Clean Power Plan (see related story).

Conflicting amendments to Section 111(d) were signed into law in 1990, with language in the House amendments suggesting that the EPA would be barred from regulating sources under Section 111(d) that are already subject to Section 112 air toxics standards, as are power plants.

Lorenzen said the King v. Burwell decision, along with a 2014 decision that struck down the EPA's tailoring rule for greenhouse gas emissions, both hint that the Supreme Court will be skeptical of attempts by the agency to regulate vast segments of the economy (*Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 78 ERC 1585, 2014 BL 172973 (2014); 45 ER 1893, 6/27/14).

The EPA will have to proceed with “extreme caution” in its attempt to regulate carbon emissions from power plants, Lorenzen said.

Health Care Ruling More Significant

Attorneys said that the Supreme Court's health care ruling will have more of an effect on future EPA action than the mercury ruling.

Robert McKinstry, partner and practice leader of the Climate Change and Sustainability Initiative at Ballard Spahr LLP, agreed during the Environmental Law Institute webinar that the health care ruling would have a “more significant and lasting role” on

statutory construction than the “narrow” mercury ruling.

Ballard Spahr represented several power companies, including Calpine Corp. and Exelon Corp., that intervened in the mercury rule litigation on behalf of the EPA.

McKinstry said the “new Roberts rule” of statutory construction could benefit the EPA's defense of the Clean Power Plan because Roberts decided to eschew a Chevron analysis in order to look at the intent of the statute as a whole.

Looking at the overall structure of the Clean Air Act and the 1990 amendments would boost the EPA's arguments that the statute did not mean to bar regulation of power plant emissions of carbon dioxide because the plants are already subject to regulations for other pollutant emissions, he said.

Opponents Get ‘Brand New' Case to Cite

Lisa Heinzerling, the Justice William J. Brennan Jr. professor of law at the Georgetown University Law Center, said in a blog post that the King v. Burwell decision will give opponents of the Clean Power Plan a “brand-new, important, six-justice case” to cite in support of arguments that “sheer economic and political magnitude” of regulating carbon emissions means that the EPA should not use the Clean Air Act to do so.

“In proposing to regulate greenhouse gas emissions from power plants under section 111 of the Clean Air Act, EPA has thoroughly wrapped itself in Chevron's flag,” she wrote. “It is at least arresting, therefore, and maybe even startling, that in a brand-new case of huge importance, with six Justices on board, the Supreme Court was willing to dump the Chevron framework and go it alone, without the relevant agency.”

Mercury Ruling Stayed Within Framework

Several attorneys said it was notable that the Michigan v. EPA opinion stayed within the framework of Chevron.

John Walke, clean air director at the Natural Resources Defense Council, told Bloomberg BNA that there was “speculation and anxiety” in advance of the ruling, the last of the court's 2014-2015 term, that the court would ground its ruling on the mercury rule in the same exception as the health care decision.

A similar decision on the mercury rule, which the EPA estimated would cost industry $9.6 billion a year, could have opened up a whole new area of law by deeming such cases of “sufficient economic and political importance” to not defer to an agency's interpretation, he said.

“Thankfully, the decision was grounded in the Chevron framework,” Walke said.

Bicky Corman, a partner at Venable LLP who previously served as deputy general counsel at the EPA, agreed that it was notable that the Supreme Court did not use the same reasoning as it did in King v. Burwell to decide on the mercury rule. The court still “heeded what the agency had to say” on the cost issue, even though the court ruled it was an unreasonable interpretation, she said.

Future Implications Unclear

Walke said he believes the court “badly misapplied Chevron” in deciding the EPA was required to consider the cost of regulating power plant emissions of mercury. However, it remains “an open question” whether it's a one-time incident or whether it signals the beginning of a “broader intrusion” by the court to second guess agency action.

Resolution of that open question can only play out in future Supreme Court opinions and in how the Michigan v. EPA opinion is interpreted in lower courts, Walke said.

Kevin Desharnais, a partner at Mayer Brown LLP, said the Supreme Court's decision on the mercury and air toxics standards could serve as a “cautionary note” to the agency on how it views Chevron deference.

“They were viewing it as unbridled discretion,” Desharnais told Bloomberg BNA.

Decision May Set Outer Limits

While it is clear that “appropriate and necessary” was ambiguous language, the court found that the EPA's interpretation was

“well beyond” what is reasonable, Desharnais said.

The mercury and air toxics standards decision could help define the “outer limits” of deference that the courts will provide to agencies, Desharnais said, though an additional decision may be needed to define what the actual limits are.

“This certainly sets an outer bound,” Desharnais said.

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