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US Supreme Court's October 2023 Term Administrative Law Trilogy – Holdings, Analyses and Implications of Jarkesy, Loper Bright and Corner Post

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The October 2023 term of the US Supreme Court (SCOTUS) saw a trilogy of decisions that challenge long-settled assumptions about the authority of federal agencies and upend long-standing doctrines of administrative law: *SEC v. Jarkesy (Jarkesy)*; *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Dept. of Commerce (Loper Bright)*; and *Corner Post, Inc. v. Board of Governors of the Federal Reserve System (Corner Post)*. As discussed below, each decision establishes new principles of administrative law and opens new avenues for entities regulated by federal agencies to challenge agency action in federal court.

The trilogy

I. *SEC v. Jarkesy*: The Seventh Amendment right to a jury trial bars administrative adjudication of civil penalties for certain types of claims

The decision: On June 27, 2024, SCOTUS issued its 6 – 3 decision in *Securities and Exchange Commission v. Jarkesy*, 144 S. Ct. 2117 (2024), which addressed whether the Seventh Amendment entitled the petitioner to a jury trial on claims alleging violations of the antifraud provisions of federal securities law brought by the Securities and Exchange Commission (SEC), for which the SEC sought civil penalties. The SEC had chosen to pursue adjudication of these claims pursuant to a statutory scheme that allowed the SEC to seek in-house adjudication governed by SEC discovery rules and presided over by a delegee of the SEC – specifically, an SEC administrative law judge (ALJ). The SEC's ALJ ultimately found the petitioner had violated the antifraud provisions and imposed civil penalties on the petitioner.

In the majority opinion by Chief Justice John Roberts, SCOTUS held that the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against the defendant for alleged securities fraud. SCOTUS affirmed the decision of the US Court of Appeals for the Fifth Circuit, which had vacated the SEC's final order imposing a civil penalty on the petitioner.

In reaching this holding, SCOTUS explained that the right to a jury trial secured by the Seventh Amendment is an important right and attempts to curtail that right should be scrutinized. SCOTUS explained that the Seventh Amendment applies to all claims that are "legal in nature," whatever form the claim may take; the statutory nature of a claim is "immaterial" to the analysis. Whether a claim is legal in nature depends on the cause of action and the remedy it provides, with the remedy being the "more important" consideration.

In applying this test to the civil penalties at issue, SCOTUS found that "the remedy is all but dispositive." SCOTUS explained that the SEC sought civil penalties, "a form of monetary relief" that can be legal or equitable in nature, but that "money damages are the prototypical common law remedy." SCOTUS further held that "what determines whether a monetary remedy is legal" turns on whether it is designed to punish or deter, rather than solely to restore the status quo.

In contrast to a court of equity, only a court of law can issue penalties to punish. In this case, the remedy for violations of the antifraud provisions of the federal securities laws was designed to punish and deter – particularly in light of the statutory criteria for the availability and size of civil penalties, and the fact that the SEC is not obligated to use the penalties to compensate victims. SCOTUS found the close relationship between the action and a common law fraud claim "confirm[ed]" that the suit implicated the Seventh Amendment because both targeted "misrepresenting or concealing material facts," and the relevant statutory and regulatory language imported common law terms of art related to fraud.

SCOTUS also addressed the government and the dissent's argument that the "public rights exception" to the Seventh Amendment applied to the federal securities antifraud provisions. Under that exception, Congress may

assign certain matters for decision by federal agencies without a jury, consistent with the Seventh Amendment. SCOTUS held, however, that the case did not fall within the exception, and thus, "Congress may not avoid a jury trial by preventing the case from being heard before an Article III tribunal."

Elaborating on why the "public rights" exception did not apply, SCOTUS explained that the Constitution prohibits Congress from withdrawing from Article III courts any matter which is the subject of a suit at common law, and matters involving "private rights may not be removed from Article III courts." SCOTUS declined to "definitively explain[] the distinction between public and private rights," but explained that a suit at common law "presumptively concerns private rights, and adjudication by an Article III court is mandatory." The "public rights" exception is narrow and, given the lack of any textual basis in the Constitution for it, the exception is limited to matters that historically could have been decided exclusively by the executive or legislative branches, citing examples of cases involving Native American tribes, administration of public lands, immigration and customs laws, and patent rights. SCOTUS further explained that the "public rights exception does not apply automatically whenever Congress assigns a matter to an agency for adjudication." The Seventh Amendment still applies to novel statutory regimes created by Congress "so long as the claims are akin to common law claims."

While SCOTUS had granted certiorari on two other constitutional issues raised by the petitioner in *Jarkesy* – whether Congress had violated the nondelegation doctrine by authorizing the SEC, without adequate guidance, to choose whether to litigate the action in an Article III court or in house, and whether the dual layers of removal protection between SEC ALJs and the president violate Article II of the US Constitution – it declined to address these issues given its determination that the Seventh Amendment issue resolved the case.

Implications of *Jarkesy*

The *Jarkesy* decision has several implications for pending and contemplated litigation.

First, although *Jarkesy* specifically addressed the SEC's in-house adjudication, SCOTUS' holding lays the groundwork for regulated entities to bring constitutional challenges to actions by other federal agencies to impose civil penalties through in-house agency adjudication, rather than in federal court. As SCOTUS explained in the *Axon Enterprises, Inc. v. Federal Trade Commission* decision from its October 2023 term, a party can bring suit in federal court to raise structural constitutional challenges against a federal agency without awaiting the conclusion (e.g., a "final order") of an agency proceeding. *Jarkesy*, in turn, underscores the fundamental importance of the Seventh Amendment right to a jury trial for common law claims and claims akin to common law claims. When an agency seeks civil penalties through an in-house adjudication that deprives the party of the right to a jury trial for a claim the Seventh Amendment reserves to a jury, there is likely a structural constitutional defect in the administrative proceeding. Taking *Jarkesy* and *Axon* together, regulated entities facing in-house adjudications in which an agency seeks to impose civil penalties, or that face such adjudications in the future, now have a tool to challenge the legality of such an agency adjudication in federal court.

Second, entities subject to the jurisdiction of federal enforcement agencies should evaluate whether the statutory or regulatory violations threatened or asserted are legal in nature, such that the Seventh Amendment would entitle the party to a jury trial. Although SCOTUS' analysis in *Jarkesy* considered only civil penalties for alleged violations of the antifraud provisions of the federal securities laws, other federal statutory and regulatory violations akin to common law fraud and for which a federal agency may seek civil penalties may be considered analogous to the claims considered in *Jarkesy*. SCOTUS did not attempt to catalogue the violations potentially subject to its reasoning, but the rationale plainly applies to actions at many federal agencies.

Third, though regulated entities now have a tool to challenge certain types of agency adjudications depending on the nature of the claim asserted, *Jarkesy* does not portend the end of all in-house agency adjudications. *Jarkesy* does not apply to claims that are equitable in nature, for example. Thus, regulated entities should be prepared for the possibility that federal agencies might shift to focus on equitable relief, such as restitution, for their in-house agency adjudications.

Fourth, regulated entities should be prepared for federal agencies to address *Jarkesy* by bringing enforcement actions in federal court in lieu of agency adjudications alone. As the dissenting justices pointed out, many agencies do not currently have authority to bring enforcement actions in federal court and can pursue civil penalties only in agency enforcement proceedings, which are no longer appropriate venues for such relief. While it remains to be seen how those federal agencies will proceed, regulated entities should consider that the Department of Justice (DOJ) – and perhaps other agencies – might have the ability to pursue enforcement actions in federal court where an agency does not itself have authority to bring an enforcement action. For example, while the dissent in *Jarkesy* stated that the Department of Agriculture (USDA) can seek penalties only in agency enforcement proceedings, there are statutory provisions that enable the USDA to request that the DOJ

institute proceedings to collect certain statutory penalties. Similarly, the Food and Drug Administration (FDA) can refer enforcement actions to the DOJ to enforce the Federal Food, Drug, and Cosmetic Act.[1] Regulated entities should be attentive to whether there is statutory authority that allows the DOJ or another agency to seek civil penalties in federal court on behalf of, or at the request of, a particular agency, as agencies may choose to enforce their operating statutes through federal court litigation as a way around the *Jarkesy* decision.

II. *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Dept. of Commerce*: The overruling of Chevron deference for agency interpretations of statutory authority

The decision: On June 28, 2024, SCOTUS issued a 6 – 3 decision in two related cases: *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Dept. of Commerce*, 144 S. Ct. 2244 (2024), which addressed whether SCOTUS should overrule the judicial doctrine that required Article III courts to defer to "reasonable interpretations" by federal agencies of ambiguous federal statutes, as set forth in the 1984 decision in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council (Chevron)*.

Writing for the majority, Chief Justice Roberts explained that the "*Chevron* doctrine requires courts to use a two-step framework to interpret statutes administered by federal agencies. After determining that a case satisfies the various preconditions we have set for *Chevron* to apply, a reviewing court must first assess 'whether Congress has directly spoken to the precise question at issue.' … If, and only if, congressional intent is 'clear,' that is the end of the inquiry. … But if the court determines that 'the statute is silent or ambiguous with respect to the specific issue' at hand, the court must, at *Chevron*'s second step, defer to the agency's interpretation if it 'is based on a permissible construction of the statute.'"

SCOTUS overruled the decades-old *Chevron* doctrine, holding that the "deference that *Chevron* requires of courts reviewing agency action cannot be squared with the [Administrative Procedure Act (APA)]" and directed courts to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."

After analyzing the history of judicial treatment of agency interpretations of Congress' actions, SCOTUS concluded that *Chevron* is inconsistent with Section 706 of the APA. Section 706 directs that "[t]o the extent necessary to decision and when presented, the **reviewing court** shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," 5 USC § 706 (emphasis added). SCOTUS explained that the APA "specifies that courts, not agencies, will decide 'all relevant questions of law' arising on review of agency action … even those involving ambiguous laws – and set aside any such action inconsistent with the law as they interpret it." SCOTUS further explained that the APA "prescribes no deferential standard for courts to employ in answering those legal questions." Thus, under the APA, the interpretation of statutes and statutory ambiguities is the province not of agencies but of the courts, applying their independent judgment "to interpret the statute and effectuate the will of Congress subject to constitutional limits."

Courts reviewing agency action may resort to agency interpretations for guidance. A reviewing court also may independently determine that Congress intended to delegate authority – including discretionary authority – to an agency, in which case the court's role is to ensure that an agency action is within the bounds of permissible delegated authority.

Having explained the requirements under the APA, SCOTUS determined that the doctrine of stare decisis (under which courts adhere to prior judicial decisions) did not preclude SCOTUS from overruling Chevron. SCOTUS explained that *Chevron* has been "unworkable" and unreliable in its application. However, SCOTUS noted that its decision does not "call into question prior cases that relied on the *Chevron* framework." SCOTUS explained that "[t]he holdings of those cases that specific agency actions are lawful – including the Clean Air Act holding of *Chevron* itself – are still subject to statutory stare decisis despite the Court's change in interpretive methodology."

Implications of *Loper Bright*

Loper Bright formally marks a sea change in how federal courts must evaluate statutes administered by federal agencies. The holding should come as little surprise to practitioners and anyone following the constitutional jurisprudence of SCOTUS. As Chief Justice Roberts noted, "[m]embers of this Court have long questioned its premises." And, as SCOTUS noted in its opinion, *Chevron* has long been inconsistently applied by lower courts. SCOTUS itself has not relied on it since 2016.

The *Loper Bright* decision raises several implications for regulated entities and litigants that seek review of agency action.

First, the *Loper Bright* decision levels the playing field in litigation against federal agencies, particularly where litigants seek to challenge agency actions for which the government has typically relied on an agency's interpretation of the statute to justify the action. In so doing, the decision lifts the thumb from the scale that favored federal agencies and will likely result in an increase in APA litigation. Litigants seeking review of federal agency actions can and should rely on the ordinary tools of statutory construction when presenting arguments to a federal court about how best to interpret a federal statute administered by an agency. With *Chevron* now interred, SCOTUS has called upon Article III courts reviewing APA challenges to apply their independent judgment to resolve such statutory questions.

Second, even though *Loper Bright* levels the playing field on questions of statutory interpretation, the decision does not mean that agency actions previously upheld due to Chevron deference no longer have any effect. In *Loper Bright*, SCOTUS overruled a particular methodology for interpreting statutes administered by federal agencies; it did not overrule prior decisions that relied on *Chevron* to hold specific agency action was lawful. As SCOTUS explained, its prior decisions that relied on *Chevron* are still subject to "statutory stare decisis." Stare decisis considerations include the quality of the precedent's reasoning, the workability of the rule it established and reliance on the decision. Litigants challenging agency action previously upheld in a prior decision because of *Chevron* deference should be prepared to explain why the prior decision fails one or more of these considerations.

In addition to stare decisis, a litigant seeking to challenge such an agency action previously reviewed by SCOTUS should be mindful of other considerations that may make it difficult to overturn a prior SCOTUS decision upholding specific agency action due to *Chevron* deference, including the relatively low rate with which SCOTUS grants petitions for a writ of certiorari. Litigants seeking to bring new challenges to agency action previously upheld only in a federal court of appeals decision (rather than in a SCOTUS decision) may still need to clear other hurdles, such as the "prior panel precedent" rule, which generally requires three-judge panels at the circuit level to follow prior decisions by other three-judge panels within that circuit. Litigants in such a circuit should consider the need to argue that prior circuit precedent is no longer binding in light of *Loper Bright*, as well as the need to potentially seek en banc review by the federal court of appeal on the particular agency action that the litigant contends is not authorized by statute.

Third, litigants should be aware that the decision does not entirely eliminate any role for consideration of agency interpretations of a statute. While SCOTUS held that federal courts are no longer required to defer to an agency's statutory interpretation, it noted that lower federal courts have always had the ability to consider an agency's "body of experience and informed judgment," as recognized in *Skidmore v. Swift & Co*., 323 US 134, 140 (1944). Under *Skidmore*, the "weight" of a federal agency's interpretation of a statute administered by the agency "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." Under *Loper Bright*, a court also may consider "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time." Practically, this means that litigants seeking review of agency action – particularly those seeking to challenge an agency interpretation of a statute – will need to show how the agency's interpretation is lacking in thoroughness, is not a valid interpretation and/or is inconsistent with prior interpretations of the statute, or is otherwise defective.

In addition, while SCOTUS overruled *Chevron* deference for statutory interpretations by an agency, it acknowledged that it would be appropriate for an Article III judge to defer to an agency where, subject to constitutional limits, Congress expressly allows for such deference. SCOTUS also did not disturb agency policymaking or fact-finding, explaining that the APA "mandat[es] deferential judicial review of agency policymaking and fact-finding." Moreover, SCOTUS acknowledged, consistent with the separation of powers arguments underpinning the majority opinion and Justice Clarence Thomas' concurrence, that it would be appropriate for an Article III judge to defer to an agency where Congress expressly allows for such deference. Thus, while SCOTUS' ruling may make it easier for parties to bring APA challenges to agency action, the result of more litigation may be a mixed bag for regulated entities. Because courts still have the ability to consider an agency's interpretations and expertise on matters squarely within the authority that Congress has provided to it, the outcomes of such litigation may not change all that much – though the reasoning for judicial decision-making certainly will in the wake of *Loper Bright*.

Finally, the impact of *Loper Bright* may be felt by regulated industries outside of the courts. Given the uncertainty introduced by the opinion regarding the validity of agency action, it would not be surprising if federal agencies move more slowly in rendering final actions, knowing that legal challenges under the APA may be more likely, and that the statutory basis on which the agency relies for its action will be more intensely scrutinized.

III. *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*: The six-year statute of limitations for an APA claim runs from the date a plaintiff is injured by final agency action

The decision: On July 1, 2024, SCOTUS issued its 6 – 3 decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440 (2024), in which it addressed when an APA claim asserting a facial challenge to a regulation accrues for purposes of applying the six-year statute of limitations for bringing a lawsuit against the United States under 28 USC § 2401(a). With Justice Amy Coney Barrett writing for the majority, SCOTUS held that an APA claim against an agency action does not accrue until the plaintiff is injured by the agency's final agency action. On the facts before it, SCOTUS applied this holding to reject the notion that the six-year statute of limitations in a facial challenge to a regulation ran from the date the final regulation was published.

In reaching this holding, SCOTUS disentangled the APA's "injury" requirement from its "final agency action" requirement, and then considered how the statute of limitations in § 2401(a) applies to an APA claim. SCOTUS explained that Section 702 of the APA authorizes persons injured by agency action to obtain judicial review by suing the United States, or one of its agencies, officers or employees. While Section 702 "equips injured parties with a cause of action," Section 704 of the APA "limits the agency actions that are subject to judicial review" – namely, by making review available only for "final agency action" unless another statute makes the agency action reviewable. Turning to the plain language of § 2401(a), SCOTUS held that "a right of action 'accrues' when the plaintiff has a 'complete and present cause of action' – i.e., when she has the right to 'file suit and obtain relief.' An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured."

SCOTUS rejected the board's contention that, for APA claims, a right of action accrues when the agency action is final, which the board asserted was the date that the federal agency published its regulation. SCOTUS explained that such a rule would "create a defendant-focused rule for agency suits while retaining the traditional challenger-specific accrual rule for other suits against the United States," giving "different meanings in different contexts" to the language in § 2401(a).

SCOTUS also rejected the board's policy argument that "agencies and regulated parties need the finality of a 6-year cutoff," reasoning that a contrary interpretation of § 2401(a) "would upset the reliance interests of those that have long operated under existing rules." SCOTUS explained that such "pleas of administrative convenience" by agencies do not warrant departure from the statute's clear text. Moreover, regulated parties may always challenge agency action as in excess of statutory authority in enforcement proceedings against the party. Thus, "a federal regulation that makes it six years without being contested does not enter a promised land free from legal challenge."

SCOTUS caveated that "the opportunity to challenge agency action does not mean that new plaintiffs will always win or that courts and agencies will need to expend significant resources to address each new suit," particularly when there is binding SCOTUS or circuit precedent, or persuasive circuit precedent. Where there is no authority upholding the agency action, a lower court "may have more work to do, but there is all the more reason for it to consider the merits of the newcomer's challenge."

Implications of *Corner Post*

Corner Post is a significant development in the ability of regulated entities to bring new APA challenges to agency actions. The *Corner Post* decision has several implications for litigants.

First, *Corner Post* now settles that a facial APA challenge to an agency regulation brought by a regulated entity well after the publication of the regulation may still be timely under § 2401(a), even if the regulation has been long-standing. As SCOTUS noted, before *Corner Post*, half of the federal circuit courts had held that the limitations period even for a facial challenge to an agency regulation began to run on the date of publication of the regulation, regardless of when the regulated entity seeking to challenge the regulation had experienced an injury. Thus, for the purposes of the six-year statute of limitations under § 2401(a), the decision opens the door to new facial challenges to regulations years after a regulation became final. The decision also opens the door for entities to bring timely challenges to other types of final agency action well after the action became final.

Regulated entities, however, should be aware that *Corner Post* does not call into question statutes of repose that impose specific time requirements for a litigant to challenge certain agency actions. For example, under the Hobbs Act, an "aggrieved party" must challenge a final agency order that is reviewable under the Hobbs Act within 60 days after agency's entry of the order (see 28 USC § 2344). The Hobbs Act applies to a range of final orders by several agencies, including the Federal Communications Commission.

Second, in light of *Corner Post*, a critical issue affecting the application of the six-year statute of limitations in § 2401(a) is whether and when the entity has suffered injury from the regulation. As examples only, such injuries could range from the time and expense of complying with reporting requirements to the substantial and potentially catastrophic costs of attempting to comply with a particular agency action that could put an entity out of business. Regulated entities should be attentive to **when** they begin to experience injury from an agency regulation for the purpose of bringing an APA action against the government, as the six-year clock begins upon the initial injury.

Although *Corner Post* did not address questions about when the injury begins for the purpose of applying the six-year statute of limitations under § 2401(a), a number of federal circuit courts have held that the statute of limitations runs from when the plaintiff either knew or should have known that it had a claim. See, for example, *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Eng'rs*, 888 F.3d 906 (8th Cir. 2018) and *Ute Distrib. Corp. v. Sec'y of the Interior of the United States*, 584 F.3d 1275, 1283 (10th Cir. 2009). The Sixth Circuit has opined that, in an APA action, this occurs when the plaintiff knows or has reason to know that the challenged agency action caused the plaintiff to suffer a legal wrong or adversely affected or aggrieved the party within the meaning of the relevant statute. See *Herr v. United States Forest Serv.*, 803 F.3d 809, 818 (6th Cir. 2015). Regulated entities should be mindful of any circuit-level differences in the application of the six-year statute of limitations under § 2401(a), specifically in the context of an APA claim.

Third, entities that wish to bring a challenge to an existing agency action should be mindful of the caveat in *Corner Post* that the ability to bring a lawsuit does not mean that such litigants should expect to prevail in the challenge merely because a lawsuit can be brought. There may be binding SCOTUS precedent or binding circuit-level precedent concerning a specific agency action that would render a challenge an uphill battle. Litigants should think critically about the grounds to challenge agency action, if any, and develop a litigation strategy for bringing a challenge.

Finally, *Corner Post* underscores that, notwithstanding the six-year statute of limitations under § 2401(a), parties can still challenge an agency regulation or other agency action in an as-applied challenge in an agency enforcement proceeding, even if the party is no longer able to bring a facial challenge under the APA against the regulation. Thus, parties that are in ongoing agency enforcement proceedings, or seeking judicial review under the APA of an agency enforcement proceeding, should ensure that their actions include challenges to any regulations at issue in such a proceeding.

Looking ahead

The ramifications of these three decisions for federal agencies and regulated parties cannot be overstated. SCOTUS' emphasis on separation of powers in these decisions portends further curtailment of the authority of administrative agencies. And, as Justice Ketanji Brown Jackson forecast in her dissent in *Corner Post*, these decisions "invite and enable a wave of regulatory challenges – decisions that carry with them the possibility that well-established agency rules will be upended in ways that were previously unimaginable. Doctrines that were once settled are now unsettled, and claims that lacked merit a year ago are suddenly up for grabs."

This is both a blessing and a curse. On the one hand, these decisions, when taken together, provide parties harmed by agency action with more tools to challenge agency action. On the other hand, by leaving more statutory interpretation in the hands of district courts, the decisions may result in less clarity on how to approach nationwide business decisions given the potential for federal courts to take different positions on how a regulated entity is to comply with the same statutory provisions. Much of the uncertainty these cases leave in their wake will be addressed in the course of litigation, likely over the next decade, as challenges to agency actions based on statutes and regulations are presented to federal courts.

Note

1. 21 USC 331, 333.

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