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Administrative Law Bulletin: *Christopher v. SmithKline Beecham*—A New Limit on the Deference Accorded to an Agency's Interpretation of Its Own Regulations

June 20, 2012

In a June 18 decision, the Supreme Court of the United States placed an important new limit on the deference courts should accord to a federal administrative agency's interpretation of its own regulations. *Christopher v. SmithKline Beecham Corp.*, No. 11-204 (June 18, 2012). More than sixty years ago, the Court held in *Bowles v. Seminole Rock & Sand Co.* that an agency's interpretation of its own ambiguous regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. 410, 414 (1945). The Court has imposed some limitations on that deference over the years and, as Wiley Rein attorneys Elbert Lin and Brendan Morrissey noted earlier this year, *Christopher* presented the Court an opportunity to cut back further. Invoking principles of "fair warning" and "unfair surprise," the Court held Monday that *Seminole Rock* deference does not apply, at least retrospectively, where an agency's "interpretation of ambiguous regulations [would] impose potentially massive liability on [a regulated entity] for conduct that occurred well before that interpretation was announced." Slip op. at 10.

Seminole Rock **Deference**

Seminole Rock deference has been a mainstay of administrative law since 1945, though its high-water mark arguably came in *Auer v. Robbins*, 519 U.S. 452, 462 (1997), the decision to which the *Seminole Rock* rule is usually attributed today. In *Auer*, the Secretary of Labor filed an *amicus* brief setting forth its interpretation of his own regulation, and the Court deferred to that interpretation. The Court

Authors

Bert W. Rein
Founder
202.719.7080
brein@wiley.law

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held that *Seminole Rock* deference applies even when an agency's interpretation "comes to [a court] in the form of a legal brief." *Id.* at 462.

The practical import of *Seminole Rock* deference—especially as extended by *Auer*—is substantial for private parties involved in litigation that turns on the meaning of an agency regulation. Obtaining the support of the agency may be dispositive where *Auer* applies. Indeed, as the Supreme Court noted in *Christopher*, the Department of Labor (DOL) has developed an *amicus* "program," inviting interested parties to solicit the agency's *amicus* support in interpreting the agency's rules. Slip op. at 8 n.11.

The Supreme Court's Decision in *Christopher*

At issue in *Christopher* was whether pharmaceutical detailers (employees of pharmaceutical companies who visit doctors and engage in marketing efforts relating to pharmaceutical products) were entitled under the Fair Labor Standards Act (FLSA) to overtime pay. The FLSA and certain DOL regulations exempt "outside salesm[e]n" from the Act's overtime wage requirement. The petitioners, who were once employed as pharmaceutical detailers for the respondent SmithKline Beecham, claimed that they were entitled to overtime pay and disputed their employer's contention that they fell within the exemption for "outside salesm[e]n." The U.S. Court of Appeals for the Ninth Circuit declined to defer to an *amicus* brief filed by the Secretary of Labor in support of the petitioners and ruled against them.

Like the Ninth Circuit, the Supreme Court refused to defer to a DOL *amicus* brief setting forth the Department's interpretation of its own relevant regulations. Writing for a five-justice majority, Justice Alito explained that the Court had previously found a number of circumstances in which *Seminole Rock* deference was inapplicable and concluded that this case presented yet another. In the Court's view, the DOL first announced its current interpretation of the relevant regulations in an *amicus* brief filed in the Second Circuit in 2009. Until then, the pharmaceutical industry had "little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA." Slip op. at 12. The statute and regulations did not provide "clear notice," and the DOL "never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully." *Id.* In short, the petitioners "invoke[d] the DOL's interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced." *Id.* at 10.

The Court determined that applying *Seminole Rock* deference would simply be unfair:

It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Id. at 14. To apply the *Seminole Rock* rule would result in "unfair surprise" and "seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Id.* at 10-11 (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)).

Faced then with resolving the parties' dispute under DOL's regulations without applying *Seminole Rock* deference to the Department's later interpretation, the Court accorded the agency only the "measure of deference proportional to 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"—*i.e.*, *Skidmore* deference—and found the agency undeserving of *any* deference. *Id.* at 14 (internal quotations omitted). The Court highlighted in particular the fact that the DOL's interpretation changed between the Ninth Circuit and the Supreme Court. Moreover, the Court explained, the new interpretation was "flatly inconsistent with the FLSA." *Id.* at 15.

Resorting to its own reading of the statute and relevant regulations, the Court ruled against the petitioners. The Court found that the petitioners "made sales for purposes of the FLSA and therefore are exempt outside salesmen within the meaning of the DOL's regulations." *Id.* at 20. Writing for the four dissenting justices, Justice Breyer reached a different interpretation of the FLSA and the DOL's regulations, but he neither addressed nor expressly disagreed with any of the majority's conclusions about *Auer* deference.

Implications of *Christopher*

The immediate import of *Christopher* is clear: agencies should not expect to receive *Seminole Rock* deference for an interpretation of ambiguous regulations that would impose retroactive liability on those reasonably relying on a contrary interpretation. Regulated entities are not obligated to "divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *Id.* at 14. The precise contours of "unfair surprise" and "fair warning" will be left to the lower courts to sort out, though much of that sorting out has already occurred. As the Court recognized in a lengthy string-cite in *Christopher*, many lower courts have already adopted this sort of limitation on the *Seminole Rock* rule. *Id.* at 11 n.15. The D.C. Circuit, for example, has long refused to defer to an agency's interpretation of its own ambiguous rule where the agency seeks to punish a regulated entity but has failed to give fair notice of its interpretation. *See, e.g.*, *Satellite Broadcasting Co. v. Federal Communications Commission*, 824 F.2d 1 (D.C. Cir. 1987).

On the other hand, rejection of *Seminole Rock* deference does not necessarily give regulated entities a free pass because the courts may independently concur with the agency's reading of the ambiguous regulations, as the dissenters in *Christopher* did. Whether a court's recognition of regulatory ambiguity alone is sufficient to shield past conduct from liability remains an open question.

Similarly, whether *Christopher* foretells a considerable scaling back, or even the demise, of *Seminole Rock* deference is unclear. Last term, Justice Scalia (the author of *Auer*) stated in a concurring opinion that he is "receptive" to reconsidering *Seminole Rock* deference entirely, having "become increasingly doubtful of its

validity." *Talk America Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). The majority in *Christopher*, which includes Justice Scalia, was not prepared to go that far. It did, however, acknowledge Justice Scalia's criticism that the *Seminole Rock* rule "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat [ing] the notice and predictability purposes of rulemaking.'" Slip op. at 13 (quoting *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring)). The dissent's silence on this issue may suggest that a significant number of justices harbor some doubts generally about the propriety of the *Seminole Rock* rule and specifically about the propriety of sanctioning past conduct without fair warning in the regulatory process.

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