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After Chevron: USDA Rules May Be Up In The Air

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As one surveys the changing landscape of the federal regulatory universe in the wake of the most recent U.S. Supreme Court term, the U.S. Department of Agriculture might not immediately leap to mind.

But in doing so, one might be overlooking the vast range of the USDA's responsibilities, extending beyond farm support payments and feeding programs, to oversight of the U.S. Forest Service, and into a variety of different agencies overseeing meat and poultry safety, plant biotechnology, and the organic foods program.

Since notice-and-comment rulemaking is an essential tool used by most such programs, the court raises the same sets of questions and concerns being raised elsewhere, most notably by its decision in Loper Bright Enterprise v. Raimondo.

As most readers of this publication are now probably aware, the case marked the end of the 40-year run of the Chevron doctrine, through which the federal courts were directed to defer to the judgments of federal regulators, so long as such judgments could be characterized as reasonable. In its wake, the judiciary has now been empowered to exercise more of its own judgment whenever such activity is challenged.

Exactly how this will play out in the real world is an open question. One might presume that the average federal district judge might pause before imposing his or her own views on a question involving

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oncology or nuclear physics.

But it is clear that the judiciary is now advertising that it is open to the business of challenging federal regulatory activity on terms more favorable to the average plaintiff than those that have been on offer for decades.

And an extra boost in that direction was further supplied by the court on the last day of its term through its ruling in the case of Corner Post Inc. v. Board of Governors of the Federal Reserve System this month, which waived various statute of limitation constraints upon new business entities.

If we return to the world of agriculture, a couple of pending regulatory initiatives might be worth submitting to a post-Chevron analysis. The first involves the USDA's continuation of its long-standing effort to alter the definition of "unfair trade practices" under the terms of the Packers and Stockyards Act.[1]

As the USDA asserts in its pending proposal,[2] the rise of vertically integrated contract agriculture and highly concentrated local markets has left many producers and growers vulnerable to a range of practices that undermine their economic opportunities in today's marketplace. If and when it is finalized, the proposed rule would prohibit certain unfair trade practices and strengthen the hand of affected parties in related litigation.

On its face, the phrase "unfair trade practice" would appear to provide an open invitation for a given judge to assume that an interpretation of its meaning lies well within their purview.

But the judge also would be confronted with a voluminous record stretching back over a decade, no small amount of contradictory economic analysis and over a century of precedent that tilts away from the USDA's present position. And here, as elsewhere, the significance of forum shopping cannot be underestimated, given the significant footprint of many producer groups within countless federal districts.

A second issue involves efforts by the USDA's Food Safety and Inspection Service to significantly alter its policies surrounding the regulation of the presence of salmonella in poultry products.

In what the FSIS terms its final determination and response to comments issued on May 1,[3] the agency, for the first time in its history, opted to classify salmonella as an adulterant in a particular group of poultry products. This group is relatively narrow, consisting of entrée products such as chicken cordon bleu stuffed with broccoli that are not fully cooked but might appear to be so.

The problem, historically, is that with such products — despite aggressive labeling that warns consumers of that fact and advises against things such as microwaving — warnings are occasionally ignored, and recalls tend to occur every few years. Despite the relative rarity of such events, the agency has concluded that this is no longer acceptable.

But in doing so, the agency was required to deal with decades of policy and case law suggesting otherwise. With the notable exception involving the presence of some strains of E. coli in ground beef and some related products, the USDA's position has always been that the presence of a pathogen such as salmonella in raw meat or poultry does not adulterate the product, since product cooking and handling is to be assumed.

To get to this result, the FSIS engages in quite a bit of interpretive sleight of hand in suggesting that salmonella in such products is both a naturally occurring substance and an added one at the same time, without ever really explaining how this condition would only be applicable to this particular category of product, thus creating a precedent with far broader implications for the wider food supply.

Exactly what our hypothetical post-Chevron jurist might make of all this is an open question. Once again, there would be a substantial record to comb through, and perhaps an understandable human reluctance to resist a food safety initiative.

On the other hand, the bounds of reasonableness here appear to have been strained. A few general comments here may be warranted.

If nothing else, it seems clear that within the world of agriculture and beyond, challenges to federal rulemaking through litigation will become more frequent, and that the odds in favor of the plaintiff have increased. It also seems clear that the Loper decision has been well received by most of the business community, and over time such enthusiasm may become warranted.

But one might give pause here for a couple of reasons. The courts are certainly not closed to a wide variety of nongovernment organizations with their own regulatory causes to pursue and their own friendly forums to pursue.

And, more generally, it is this writer's experience that most businesses can adjust and resign themselves to a fairly wide range of regulatory environments so long as those regulations are clear, predictable and consistently enforced.

Whether the court this term has moved the world closer to or further away from such a reality remains to be seen.

[1] 7 U.S.C. 181 et seq.

[2] 87 FR 60010.

[3] FR 35033.