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The Rising Tide Against Deference

Will the high court finally revisit Auer deference or have rumors of its impending demise been exaggerated?

Allyson Ho and John Sullivan, Morgan Lewis & Bockius LLP
Allyson Ho is co-chair of the appellate group at Morgan Lewis. She represented the respondent in Mortgage Bankers Association and the petitioner in United Student Aid Funds Inc. referenced in this article. John Sullivan is an associate at Morgan Lewis who was on brief in both cases.

Under the U.S. Supreme Court's decisions in Bowles v. Seminole Rock & Sand Co.1 and Auer v. Robbins,2 courts are required to defer to an agency's interpretation of its own regulation "unless that interpretation is plainly erroneous or inconsistent with the regulation."3

While that may seem reasonable at first glance, Justice Antonin Scalia — the author of Auer — later came to believe that the doctrine is "contrary to fundamental principles of separation of powers" because it "permit[s] the person who promulgates a law to interpret it as well."4 Auer seemingly creates a loophole whereby agencies can issue vague regulations and then "interpret" them without the strictures of the Administrative Procedure Act.

The Supreme Court has had several opportunities to re-examine the Auer doctrine over the past few terms. For example, in Perez v. Mortgage Bankers Association,5 the U.S. Department of Labor had offered one interpretation of its regulation on who received overtime, and then "clarified" that interpretation years later to mean the opposite thing. While the court there upheld the agency action because it was merely an "interpretive rule" under the APA — and not a "legislative rule" — several justices wrote separately to question the continued vitality of Auer, including Justice Scalia.

Although Mortgage Bankers did not present the court with an opportunity to revisit Auer, a petition for certiorari last term did just that. The petition asked the court to review a decision in which the court of appeals panel had asked the U.S. Department of Education to file an amicus brief on the department's interpretation of a regulation that had been on the books for years.6

Even though the interpretation the department provided in the amicus brief was directly contrary to the agency's own previous guidance — contrary even to the current guidance on the department's website

— the court of appeals deferred to the department's interpretation. The panel split three ways — one judge agreed with the department that its interpretation was clearly right, the second judge agreed with USA Funds that the department's interpretation was clearly wrong, and the third judge broke the "tie" by voting to apply Auer deference to the department's interpretation.

The Seventh Circuit denied full-court review, with Judge Frank Easterbrook writing separately that he agreed with that decision because Auer "may not be long for this world" — citing, among other things, the concurrences in Mortgage Bankers. After the cert petition was filed in Bible — but before the Supreme Court considered it — Justice Scalia passed away and the petition was denied.

The upcoming term provides the Supreme Court with several more opportunities to revisit Auer. It is squarely at issue in Gloucester County School Board v. G.G. — a case that has garnered national attention as the Supreme Court's first potential foray into sexual orientation and gender identity laws.

In Gloucester, the Department of Education opined that Title IX's prohibition on sex discrimination included gender identity and that, when it comes to facilities such as bathrooms and locker rooms, students must be treated consistent with their gender identity, even when that identity does not align with their biological sex. The Fourth Circuit gave the department's interpretation controlling deference under Auer and, on remand, the district court entered a preliminary injunction requiring the school board to allow G.G. — born a girl but who identifies as a boy — to use the boys' restrooms at school.

The school board asked the Supreme Court for a stay of the circuit court's ruling pending a petition for certiorari. The motion was granted, with Justice Stephen Breyer providing a fifth "courtesy" vote. Briefing is now complete and the petition has been distributed for conference on Oct. 14.

Second, the court could take a fresh look at Auer deference in Hyosung D&P Co. Ltd. v. United States. In addition to asking the Supreme Court to overrule Auer and Seminole Rock, petitioners there seek clarification on the deference afforded to the interpretation of an agency regulation offered by the agency's lawyers in a case where the agency itself is a party.

In Hyosung, the U.S. Department of Commerce altered — through notice and comment — its method for calculating margins on foreign companies selling products in U.S. markets at less than fair value. The change was to apply to all current and future investigations. An investigation into the petitioner's sales was terminated before the rule took effect, but reinstated after the rule took effect. Upon reinstatement, the department failed to apply the new method of calculation, and the Federal Circuit upheld that decision — ruling that the Order was ambiguous as to whether it should apply and the agency should therefore receive Auer deference. The petition in Hyosung was filed on July 29 and the response deadline has been reset twice, now to Oct. 31.

Finally, the Supreme Court has been asked in Foster v. Vilsack to narrow the scope of Auer deference. The case involves a ruling by the U.S. Department of Agriculture about what constitutes a wetland — but the difficult question it presents is known as second-level Auer deference.

Occasionally, an agency will offer an interpretation of its own regulation — an interpretive field manual in Foster — and then offer another interpretation to explain the first interpretation — thus adding another layer of potential ambiguity. The field manual in this case instructs that wetlands are identified by vegetation and, when the vegetation has been altered, by looking to similar land in the "local area."

Subsequently, the agency interpreted its "local area" interpretation to allow it to pull a proxy site from

33 miles away that had wetland vegetation and deem petitioners' farm a protected wetland. The Eighth Circuit upheld that determination by giving the agency Auer deference on its interpretation of the prior interpretation. (Don't be confused — it's just deference all the way down.) While the court could take this opportunity simply to narrow Auer, at least one amicus brief is asking for the doctrine to be overturned entirely. The petition was filed on Aug. 8, but respondents have been granted an extension for filing a response until Nov. 14.

As even this small sample of cases illustrates, Auer deference plays a key role in cases involving a broad spectrum of issues and industries. And as federal regulation continues unabated, Auer's impact can only increase. It will be interesting to see whether the court finally decides to revisit the doctrine this term — or whether rumors of Auer's impending demise have been greatly exaggerated.

—By Allyson N. Ho and John C. Sullivan, Morgan Lewis & Bockius LLP

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1. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)

2. Auer v. Robbins, 512 U.S. 452 (1997)

3. Decker v. Northwest Environmental Defense Center, 133 S. Ct. 1326, 1337 (2013).

4. Talk America Inc. v. Michigan Bell Telephone Co., 131 S. Ct. 2254, 2266 (Scalia, J., concurring)

5. Perez v. Mortgage Bankers Association, 135 S. Ct. 1199 (2015)

6. Bible v. United Student Aid Funds Inc., 799 F.3d 633 (7th Cir. 2015), reh'g denied, 807 F.3d 839 (7th Cir. 2015), cert denied sub nom., United Student Aid Funds Inc. v. Bible, 136 S. Ct. 1607 (2016).
