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The Intersection of *Chevron* and Federal Prosecution: Courts Shouldn't Assist Agency Overcriminalization

by John Lauro

Much has been written about the "*Chevron* Doctrine" and its impact on administrative law. In *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), decided over a generation ago, the U.S. Supreme Court established a principle of judicial deference to an administrative agency's interpretation of its operating statute where the agency reached a "reasonable" construction of an otherwise ambiguous statute. *Chevron* presumes that modern life has become so complicated that experts within agencies need latitude to fill in the details of how a legislative scheme should operate. The ruling became engrained in modern administrative law, while relegating the courts to a secondary role in statutory construction.

Less has been written about how *Chevron* deference has crept into federal criminal law and how the courts often give wide latitude to agencies to define criminal liability for regulated entities and their employees.[1] Indeed, it is not unusual for a court in a criminal case to "defer" to an agency's interpretation of a statute and accord that interpretation the force of law, even where the agency has not acted through formal rulemaking.

I was counsel in such a case several years ago where healthcare executives were convicted under the federal healthcare fraud statutes for failing to abide by an agency's "informal guidance" regarding its interpretation of a Florida healthcare statute. The case, *U.S. v. Clay*, 832 F.3d 1259 (11th Cir. 2016), cert. denied, 137 S. Ct. 1814 (2017), illustrates how criminal liability can be created when the courts go too far in deferring to the administrative state.

Clay involved WellCare Health Plans, Inc., a Tampa-based public holding company for certain HMO plans ("WellCare") providing healthcare services to Florida Medicaid patients. The Agency for Healthcare Administration ("AHCA") administered the Florida Medicaid program. In the early 2000s, the Florida legislature decided to engage HMOs in providing health care to Medicare patients under a managed-care system, rather than using an inefficient fee-for-service reimbursement scheme. Florida intended to contain healthcare costs that consumed a substantial part of the state's budget each year and shift that

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[1] *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989 (2006), http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2010/04/barkow-1.pdf; Jeffrey B. Wall and Owen R. Wolfe, *Why* Chevron *Deference for Hybrid Statutes Might Be a No-no*, WLF Legal Opinion Letter, June 24, 2016, https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/legalopinionletter/062416LOL_Wall.pdf.

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economic risk to HMOs, while providing a broader array of clinicians for Medicaid recipients.[2]

In connection with this new regulatory scheme, the Florida legislature passed an "80/20 Statute," Fla. Stat § 409.912(4)(b) (2006), requiring recipients of Medicaid funds to report back to the state expenditures for the provision of behavioral health care. Under the statute, if an HMO spent less than 80% of the dollars received for the provision of behavioral health care, then it had to return the difference to the state each year. For example, if an HMO received $100 for behavioral health care, but spent only $75 for the provision of that care, then $5 would be returned to the state.[3]

Although AHCA was responsible for administering this new statute, it chose not to engage in formal rulemaking to determine how to complete the calculation. The agency itself was deeply divided, and many bureaucrats resisted the use of HMOs in the provision of behavioral health care. Instead of engaging in rulemaking, AHCA merely incorporated the legislative language in its contracts with HMOs and then sent out informal letters and templates suggesting how to complete the calculation. This critical decision to use "informal guidance" led to federal criminal prosecution.

WellCare had established a specialized behavioral healthcare organization ("BHO") to coordinate all behavioral healthcare services and to hire frontline clinicians such as psychiatrists and community mental health centers. The care the BHO delivered was not in question and state auditors noted that the BHO "exceeded requirements" in providing clinical care. WellCare, in turn, counted the total amounts it paid to the BHO for its "80/20 calculations." AHCA never adopted a rule prohibiting this methodology and WellCare's counsel advised the company that other healthcare companies had safely taken a similar approach. Over several years of reporting, AHCA never specifically asked, and WellCare never specifically informed the agency that it was using a BHO for the calculation.

Federal prosecutors indicted the CFO of the company, along with four other executives, including WellCare's CEO Todd Farha. The prosecution argued that WellCare had misled AHCA by including in its "80/20 calculation" payments made to an affiliated BHO, rather than including only the payments made to "frontline" providers. The prosecution did not rely on the "80/20 Statute" or the Medicaid contracts that actually supported WellCare's method of calculation. Instead, they pointed to AHCA's informal "guidance," which included letters and calculation templates. Testimony from attorneys who had represented WellCare and a medical economics expert, however, confirmed that WellCare's calculation methodology was "reasonable."

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[2] For more information on *Clay*, including links to the briefs in the case, *see* https://overcriminalization.org/todd-farha-wellcare-united-states-v-clay/. *See also* John Lauro, *Supreme Court Cert Grant in* Farha v. US *Can Clarify Level of Criminal Intent Needed to Prove "Knowledge"*, WLF Legal Pulse, Apr. 18, 2017, https://www.wlf.org/2017/04/18/wlf-legal-pulse/supreme-court-cert-grant-in-farha-v-us-can-clarify-level-of-criminal-intent-needed-to-prove-knowledge/; Matthew G. Kaiser, Clay v. United States: *When Executives Receive Jail Time for Ordinary Business Decisions*, WLF Legal Backgrounder, Mar. 13, 2015, https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/legalbackgrounder/031315LB_Kaiser.pdf.

[3] The relevant language of the statute is as follows: "all contracts issued pursuant to this paragraph shall require 80 percent of the capitation paid to the managed care plan, including health maintenance organizations, to be expended for the provision of behavioral health care services. In the event the managed care plan expends less than 80 percent of the capitation . . . for the provision of behavioral health care services, the difference shall be returned to the agency. Fla. Stat. § 409.912(4)(b) (2006)."

Following a three-month trial and a deliberation spanning nearly a month, the jury rendered a mixed verdict. Although it convicted three of the executives of healthcare fraud for one of the "80/20 calculations," the jury acquitted all the defendants of the primary conspiracy charge. The trial judge, recognizing that the case was very unique in that WellCare provided outstanding healthcare, sentenced the defendants to probation and 1-3 years—well below the draconian sentences of over 15 years recommended by the prosecutors. The defendants appealed.

The Eleventh Circuit rendered a problematic decision that upheld the convictions. The court rejected the defendants' defense articulated in an Eleventh Circuit decision, *U.S. v. Whiteside*, 285 F. 3d 1345 (11th Cir. 2002), that the government had not proven beyond a reasonable doubt that their interpretation of governing legal authority was not objectively unreasonable. In *Whiteside*, the Eleventh Circuit held that "where the truth or falsity of the statement centers on an interpretative question of law, the government bears the burden of proving beyond a reasonable doubt that the defendant's statement is not true under any reasonable interpretation of the law." *Whiteside*, 285 F. 3d at 1351.

Not finding any inconsistencies between WellCare's calculations and the "80/20 Statute" or WellCare's Medicaid contracts, the *Clay* court held instead that the defendants had not scrupulously followed AHCA's informal "guidance" found in its letters and calculation templates. Despite trial testimony from a former high-ranking AHCA official who had advised WellCare that, under Florida law, regulated entities did not have to follow informal guidance that had not been subjected to formal rulemaking, the Eleventh Circuit accorded these informal communications the status of governing law. The court concluded that failing to follow the "strict" interpretation of these informal communications constituted a crime. In other words, administrative agencies could make binding law through informal "guidance" that failing to follow informal agency guidance while not expressly informing the agency of that course of action, could be a criminal violation.

The defendants' *certiorari* petition focused on the Eleventh Circuit's watered-down interpretation of *mens rea* from a "knowing" violation to "deliberate indifference."[4] Although the Court denied review, one wonders how the Court would address deference to agency interpretations in connection with criminal law. Justices Thomas, Gorsuch, and Kavanaugh have expressed doubt that *Chevron* deference can be squared with a republican form of government based upon separation of powers in the administrative and civil context.[5] It is likely, therefore, that at least three justices, and perhaps more given the criminal context, would be even less tolerant of administrative agencies "making" federal criminal law.

Providing defense attorneys with some ammunition, the Justice Department issued a memorandum in January 2018[6] that agency "[g]uidance documents cannot create binding requirements that do not already exist by statute or regulations. . . the Department may not use its enforcement authority to effectively convert agency guidance documents into binding rules." Although the memorandum was directed primarily at civil enforcement, it has equal (if not more) force with regard to criminal prosecutions, which result in the deprivation of liberty. The memorandum warns federal

[4]Lauro, *supra* note 1.

[5] Valerie C. Brannon and Jared P. Cole, *Deference and its Discontents: Will the Supreme Court Overrule* Chevron*?*, CONG. RESEARCH SERV. (Oct. 11, 2018), https://fas.org/sgp/crs/misc/LSB10204.pdf.

[6] Mem. of the Associate Attorney General, Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases, at 1-2 (Jan. 25, 2018), https://www.justice.gov/file/1028756/download.

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prosecutors that if "a party fails to comply with agency guidance expanding upon statutory or regulatory requirements [that] does not mean that the party violated those underlying legal requirements; agency guidance documents cannot create any additional legal obligations." Under current DOJ policy, then, government prosecutors would be precluded—as they did in the *Clay* case—from arguing that informal agency letters could constitute binding authority on the regulated public.

Deference to informal agency guidance is yet another manifestation of the scourge of overcriminalization, which includes prosecutorial misconduct;[7] relaxed standards for *mens rea*/criminal intent;[8] ambiguous jury instructions[9] and the use of negligence or conscious avoidance concepts to convict individuals.[10]

Chevron deference emanated from the belief that administrative agencies are simply following the law and carrying out the directions of elected official in a politically neutral way. Those days are plainly over. Defense attorneys know all too well that the entrenched bureaucracy has its own agenda—often at odds with elected legislatures. The judiciary should not imbue unaccountable bureaucrats with the authority to create law—let alone criminal law. Citizens' lives and freedom are at stake. Just ask the WellCare executives.

[7] Richard O. Faulk, Chevron *Deference Conflicts with the Administrative Procedure Act*, WLF Legal Pulse, Sept. 18, 2015, https://www.wlf.org/2015/09/18/wlf-legal-pulse/chevron-deference-conflicts-with-the-administrative-procedure-act/.

[8] Lauro, *supra* note 2.

[9] Jeffrey Bossert Clark, Sr., Chevron *Doctrine Is Opposed to Administrative Procedure Act's Text and Legislative History*, WLF Legal Opinion Letter, Aug. 26, 2016, https://www.wlf.org/2016/08/26/publishing/chevron-doctrine-is-opposed-to-administrative-procedure-acts-text-and-legislative-history/.

[10] Christine Hurt, *Is 'Conscious Avoidance' the Next 'Honest Services'?*, The Conglomerate, July 13, 2010, https://www.theconglomerate.org/2010/07/is-conscious-avoidance-the-next-honest-services.html.

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