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Lenity, Chevron Deference And Consumer Protection Laws

Law360, New York (January 16, 2014, 12:48 AM ET) -- "When lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner." —William Shakespeare, Henry V

Several federal statutes, including the Real Estate Settlement Procedures Act ("RESPA"), the Truth in Lending Act ("TILA") and the Servicemembers Civil Relief Act ("SCRA") permit the government to seek either civil or criminal penalties for the same conduct. While the executive branch has used its ability to promulgate regulations, publish policy statements and initiate enforcement actions to expand the scope of these laws, a recent decision from the Sixth Circuit should give the government pause.

In Carter v. Welles-Bowen Realty Inc., no. 10-3922 (6th Cir. Nov. 27, 2013), the plaintiffs purchased a home through Welles-Bowen Realty and used Welles-Bowen's title company, WB Title, for title search services. Dissatisfied with the fact that WB Title contracted out some of the title work to a third company, the plaintiffs sued all three companies under Section 8 of RESPA. Section 8 prohibits the payment of referral fees in connection with real estate settlement services, including title searches.

In 1983, Congress created a "safe harbor" under RESPA for affiliated business arrangements in which the referring company has an affiliate or ownership arrangement with the company receiving the referral. Under the statute, this safe harbor applies if (1) the arrangement is disclosed to the client, (2) the client is free to reject the referral and (3) the person making the referral cannot receive anything of value other than a return on the ownership interest.

In 1996, the Department of Housing and Urban Development published a policy statement in which HUD added a fourth requirement for safe harbor protection. In the policy statement, HUD stated that the receiver of the referral must be a "bona fide" provider of settlement services. HUD listed 10 factors that it would weigh to determine if the provider of settlement services was "bona fide." HUD's policy statement was neither part of the statutory text, nor produced through the Administrative Procedures Act rulemaking process.

In Carter, all parties agreed that the relationship between Welles-Bowen and WB met all three statutory requirements for the safe harbor; however, the plaintiffs insisted that the arrangement was not a "bona fide" provider of settlement services under HUD's policy statement. Therefore, the plaintiffs argued, the defendants' fee arrangement violated Section 8 of RESPA. Seeking to defend HUD's policy statement, the U.S. Department of Justice filed as an intervenor on the plaintiffs' behalf.

In drafting the unanimous opinion, Judge Jeffrey Sutton rejected the plaintiffs' and DOJ's position. Judge Sutton declined to grant Chevron deference to HUD's policy statement; rather than clarifying an ambiguous statute, HUD's multifactor weighing test further confused the issue of whether a business

arrangement qualifies for the safe harbor. Judge Sutton also refused to apply Chevron because the HUD policy statement was not a rulemaking "with the force of law," but rather a discussion of how HUD would evaluate affiliated entities. Furthermore, Judge Sutton declined to apply Skidmore deference because the policy statement only provided "guidelines that the agency intends to consider," rather than HUD's official interpretation of RESPA.

Looking beyond Chevron and Skidmore, Judge Sutton emphasized that a RESPA violation can lead to either civil or criminal penalties. Citing case law holding that "[a] single statute with civil and criminal penalties receives a single interpretation," Judge Sutton looked to how RESPA would be interpreted in the criminal context. Since due process requires that individuals receive fair notice of what actions may be deemed crimes, a "mere policy statement" cannot add additional elements to a criminal statute, and thus cannot add additional elements when the statute is applied in a civil action.

Although the court resolved this case based exclusively on Chevron, Skidmore and due process grounds, Judge Sutton took this opportunity to explore an increasingly relevant area of law: how courts should balance the rule of lenity and Chevron deference. The rule of lenity — one of the most fundamental and long-standing interpretive canons — requires courts to "interpret ambiguous criminal laws in favor of criminal defendants." Because the meaning of a statute must be the same in all instances and the "lowest common denominator" interpretation must control, a court must first apply the rule of lenity in either a civil or criminal context. Only after applying lenity (and all other relevant interpretive canons) to minimize statutory ambiguity should a court consider an agency's interpretation under Chevron. Otherwise, criminal defendants would be "one agency interpretation away from being incarcerated."

Importantly, RESPA is not the only consumer protection statute which contains both civil and criminal penalties. The government can seek either criminal or civil penalties under TILA, SCRA and the Internal Revenue Code, among other state and federal laws. Because of these statutes' dual civil and criminal natures, the reasoning in Carter should apply here, as well. Accordingly, the rule of lenity and criminal due process requirements — which are firmly rooted in constitutional case law — should limit the application of the 30-year-old Chevron doctrine. For all of these statutes, courts must apply Chevron and Skidmore deference carefully, lest the executive branch both create and enforce the law.

How courts will apply Carter to these and other consumer protection statutes remains to be seen, but this decision and Judge Sutton's concurrence lay bare the tension between regulatory guidance, civil enforcement and criminal prosecution under a single statute.

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