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Beck v. PACE International Union: A Mask of Unanimity to Conceal Disagreement and Confusion

By Sharon Hritz*

I. INTRODUCTION

When and how much deference should courts give to an agency's interpretation of its own enabling statutes? Does the form of the agency opinion—whether it is embodied in notice and comment rulemaking, an opinion letter, a brief or other form—affect the level of deference owed? Can an attorney, Article III Judge, or Administrative Law Judge determine with certainty the appropriate level of deference to be given and then apply that level of review clearly and consistently to determine if the agency's interpretation should ultimately prevail? These broad questions have surfaced repeatedly in many of the various substantive areas of administrative law and merit close attention.

Controversy surrounding the appropriate level of judicial deference to an agency's interpretation of its own enabling statutes is not a recent phenomenon. In fact, the two most commonly cited cases in this area of the law—*Skidmore v. Swift & Co.* and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*—were decided in 1944 and 1984, respectively.¹ However, these enduring landmark cases and the numerous cases that applied them have failed to provide concrete guidance. The ambiguity in this area of the law was recently exemplified in *Beck v. Pace International Union*, which the Supreme Court of the United States handed down in June 2007.²

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1. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

2. *Beck v. PACE Int'l Union*, 127 S. Ct. 2310 (2007).

The Court's decision in *Beck* is one of its most recent cases confronting the issue of applying judicial deference to agency interpretations. The deference question arose over the backdrop of an Employee Retirement Income Security Act (ERISA) fiduciary duty controversy.³ While the controversy originated between a private company and an employee union, the Court's decision relied entirely on the position of the Pension Benefit Guaranty Corporation (PBGC).⁴ The Court's deference to PBGC's interpretation illustrates an expansion of the application of judicial deference, which potentially includes agency positions presented for the first time in litigation.

Beck is noteworthy for holding that sponsors of defined-benefit pension plans do not have a fiduciary duty to consider mergers when implementing plan termination.⁵ Although the *Beck* opinion was unanimous, its legal analysis and the Court's deference to an agency interpretation, expressed for the first time in litigation, merit close attention and analysis.⁶ The Court's holding in *Beck* addresses two distinct areas of law, each with its own legal history and impact on the law and society. First, the *Beck* opinion has a significant impact on deference jurisprudence. Second, *Beck* clarifies an important point in ERISA fiduciary law.

This case note examines the deference and fiduciary duty issues raised by the *Beck* opinion. Part II illustrates the legal history of both the fiduciary and deference issues set forth in the case.⁷ Part III details the facts and procedural history of *Beck*.⁸ Part IV examines and critiques the Court's decision in *Beck*.⁹ Part V analyzes the legal

3. *Id.*

4. *Id.* For a description of the PBGC, see *infra* Part II and accompanying notes. The PBGC became involved in the controversy as amicus curiae at the district court level, expressing its interpretation of the statutory text being debated. *Beck v. PACE Int'l Union*, 127 S. Ct. 2310, 2310 (2007).

5. *Id.* at 2310.

6. See *id.*

7. See *infra* Part II and accompanying notes.

8. See *infra* Part III and accompanying notes.

9. See *infra* Part IV and accompanying notes.

significance of *Beck*¹⁰, and Part VI considers the societal impact of the case.¹¹ Finally Part VII concludes this note.¹²

II. HISTORICAL BACKGROUND

A. ERISA and Imposition of the Fiduciary Duty

In 1974, Congress enacted ERISA to “protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries.”¹³ Pursuant to this goal, ERISA established an insurance program for private pension plans.¹⁴ This insurance program is administered by the PBGC, a “body corporate” within the Department of Labor.¹⁵

ERISA requires retirement plan administrators to act as fiduciaries of plan participants.¹⁶ The fiduciary duty is commonly referred to as “the highest [duty] known to the law”¹⁷ and is formally defined as “a duty of utmost good faith, trust, confidence, and candor

10. See *infra* Part V and accompanying notes.

11. See *infra* Part VI and accompanying notes.

12. See *infra* Part VII and accompanying notes.

13. 29 U.S.C. §1001(b). ERISA accomplishes its goal to protect the interests of participants in employee benefit plans by: “requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.” *Id.*

14. See 29 U.S.C. §§ 1302, 1322 cmt.1.

15. Pension Benefit Guaranty Corp., <http://pbgc.gov/about/about.html> (last visited Jan. 20, 2008). The PBGC is headed by a Director who reports to a Board of Directors consisting of the Secretaries of Labor, Commerce, and Treasury, with the Secretary of Labor as Chairman. Rather than operate on tax funds, the PBGC operates on insurance premiums from employers sponsoring insured pension plans, investment returns, and funds from pensions it takes over. *Id.*

16. See generally 29 U.S.C. §1001. ERISA defines plan “administrator” as:

(i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

Id. at § 1002(16)(A) (2006).

17. *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982).

. . . a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person”¹⁸ In many instances, controversies have required courts to determine when ERISA imposes the fiduciary duty. The Court’s determination not only impacts the controversies before them, but how businesses and managers conduct themselves.

In single-employer pension plans, the employer may act in a dual capacity as both plan sponsor and plan administrator.¹⁹ This dual capacity is authorized by ERISA.²⁰ When performing settler functions, the employer is free to make decisions for the sole purpose of furthering its business interests, but when acting as plan administrator in a capacity that ERISA defines as fiduciary, the

18. Black’s Law Dictionary 545 (8th ed. 2004).

19. *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996). For a definition of the term “plan administrator,” see *supra* note 16. ERISA defines “plan sponsor” as:

(i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

29 U.S.C. § 1002(16)(B) (2006). A single employer plan is a plan “which is not a multi-employer plan.” 29 U.S.C. § 41 (2006). A multi-employer plan is defined as: “A plan (i) to which more than one employer is required to contribute, (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and (iii) which satisfies such other requirements as the Secretary may prescribe by regulation.” 29 U.S.C. § 37 (2006).

20. *Lockheed Corp. v. Spink*, 517 U.S. 882 (1988). The plaintiff-employee in *Lockheed* alleged that the respondent-employer violated ERISA’s fiduciary requirements by amending pension plans to create retirement plans. The Court held that the employer did not violate ERISA because the fiduciary duty did not apply to the employer’s decision to amend the plan. In so holding, the Court distinguished between settler and fiduciary actions, following the precedent that established that distinction in the context of welfare administration. *Id.* See *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). As the Court reasoned: “Given ERISA’s definition of fiduciary and the applicability of the duties that attend that status, we think that the rules regarding fiduciary capacity—including the settler-fiduciary distraction—should apply to pension and welfare plans alike.” *Spink*, 517 U.S. at 891.

employer must comply with ERISA's fiduciary duties.²¹ Consequently, when evaluating whether an employer owes a fiduciary duty, courts must consider if the employer is acting as a settler or plan administrator.²²

In *Curtiss-Wright Corp.*, the Court established that an employer's decision to terminate a plan is a settler action and, consequently, is immune from ERISA's fiduciary obligations.²³ The Court has consistently upheld the principal that employers may terminate their plans voluntarily, and that a decision terminating a plan is not subject to ERISA fiduciary standards.²⁴ Several circuit courts have similarly held that a decision to merge or consolidate a plan is not a fiduciary decision, but rather a business decision.²⁵ However, while a decision

21. *Pegram v. Herdrich*, 530 U.S. 211 (2000). In this case, the Court held that mixed eligibility and treatment decisions made by a health maintenance organization were not fiduciary within the meaning of ERISA and thus could not form the basis of a breach of fiduciary duty claim. *Id.* The Court emphasized that whether or not a defendant acted in a fiduciary capacity is always a precursory question in an ERISA breach of fiduciary duty claim:

Thus, in every case charging breach of ERISA fiduciary duty, the threshold question is not whether the actions of some person providing services under the plan adversely affected a *beneficiary's* interest, but whether that person was performing a fiduciary function when taking the action subject to complaint . . . Employers . . . can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries when they act as employers (e.g., firing a beneficiary for reasons unrelated to the ERISA plan), or even as plan sponsors (e.g., modifying the terms of a plan as allowed by ERISA to provide less generous benefits).

Id. at 212, 225.

22. See *supra* note 15. For a detailed discussion on when the fiduciary duty applies, see James Lockhart, Annotation, *When Is an Employer, Labor Union, Affiliated Entity or Person, or Pension or Welfare Plan "Fiduciary" Within Meaning of §3(21)(A)(i) or (iii) of Employee Retirement Income Security Act of 1974 (29 U.S.C.A. § 1002(21)(A)(i) or (iii))*, 178 A.L.R. FED. 129 (2002).

23. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

24. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990); *Lockheed Corp. v. Spink*, 517 U.S. 882; *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

25. *Malia v. General Elec. Co.*, 23 F.3d 828 (3d Cir. 1994) (holding that employer's efforts to merge two pension plans did not invoke fiduciary provisions of ERISA); *Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir. 1992) (employer did not have a duty to credit employees with additional participation in retirement plan

to merge or terminate a plan is a non-fiduciary business decision, the selection of an insurer or annuity provider in the termination of the plan is fiduciary.²⁶

Section 1341(b) of ERISA governs plan termination and states that the plan administrator shall provide all benefit liabilities under the plan either through the purchase of an irrevocable commitment from an insurer or in another manner.²⁷ The statute fails to

because employer did not adequately inform employees of the consequences of not contributing after employer merged what had been separate contributory and noncontributory retirement plans—the merger decision was a business decision).

26. There are several cases where courts have held the selection of an insurer or annuity provider to underwrite vested benefits to be fiduciary. *UAW v. Harper & Row, Publishers, Inc.*, 670 F. Supp. 550 (S.D.N.Y. 1987) (holding that employer's selection of an insurance company from which to purchase annuity was fiduciary—choice of insurer was a discretionary decision and separate from the precursory non-fiduciary decision to terminate); *Riley v. Murdock*, 890 F. Supp. 444 (E.D.N.C. 1995), *aff'd*, 83 F.3d 415 (4th Cir. 1996) (unpublished table decision) (held that employer owed a fiduciary duty in selecting an annuity upon plan termination, but that employer did not breach that duty when the plan he selected later became insolvent because employer's selection was well-investigated and reasonable at the time employer purchased the annuity); *Waller v. Blue Cross of Cal.*, 32 F.3d 1337 (9th Cir. 1994) (selection of annuity was a fiduciary act). Additionally, the PBGC made it explicitly clear that companies do act in a fiduciary capacity in selecting an annuity provider. 29 C.F.R. § 2509.95-1 (2008).

Pursuant to ERISA, section 404(a)(1), 29 U.S.C. 1104(a)(1), fiduciaries must discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries

The selection of an annuity provider for purposes of a pension benefit distribution, whether upon separation or retirement of a participant or upon the termination of a plan, is a fiduciary decision governed by the provisions of part 4 of Title I of ERISA. In discharging their obligations under section 404(a)(1), 29 U.S.C. 1104(a)(1), to act solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to the participants and beneficiaries as well as defraying reasonable expenses of administering the plan, fiduciaries choosing an annuity provider for the purpose of making a benefit distribution *must take steps calculated to obtain the safest annuity available*, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise.

Id. at 2509.95-1(b) (emphasis added).

27. 29 U.S.C. § 1341(b) (2006).

In connection with any final distribution of assets pursuant to the standard termination of the plan . . . the plan administrator

definitively indicate if merger is an acceptable form of termination.²⁸ This lack of clarity in the statute led to the controversy in *Beck* and the discussion of judicial deference.

B. Deference to Agency Interpretations

When a statute is unclear or susceptible to different interpretations, the Court gives deference to the pertinent administrative body's interpretation of the statute as evidenced in the agencies regulations.²⁹ How much deference should be given to the agency's interpretation and what factors should be considered in making that determination have been debated repeatedly by the Court.³⁰

1. The Landmark Cases: *Skidmore*, *Chevron* and *Mead*.

Skidmore v. Swift was not the first case to consider judicial deference to agency interpretations of this agency's own enabling statutes. Instead, *Skidmore* serves as a logical place to begin an analysis of the Court's deference jurisprudence because it established the first "test" to be used by courts to determine how much deference was due a particular agency's statutory interpretation.³¹ The Court in *Skidmore* considered how much deference should be given to an interpretive bulletin issued by the Department of Labor's Wage and

shall—(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

29 U.S.C. § 1341(b)(3)(A) (2006).

28. *Id.*

29. *See Ford Motor Co. v. Milhollin*, 444 U.S. 555, 568 (1980) ("[A] court that tries to chart a true course to the Act's purpose embarks on a voyage without a compass when it disregards the agency's views"). *See also Mead v. Tilley*, 490 U.S. 714 (1989).

30. *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

31. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Hour Administration.³² The Court concluded that the bulletin was not controlling by reason of its authority but did “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”³³ Therefore, according to the Court, the amount of weight given to an agency interpretation depends on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, the agency’s consistency, and all those factors which give it power to persuade, if lacking the power to control.”³⁴ The Court remanded the case to the lower court to decide on the agency’s interpretation, giving the Secretary’s opinion its appropriate weight.³⁵ The Court’s flexible standard in *Skidmore* contrasts rather dramatically with the Court’s later holding in *Chevron*, where the Court held that an agency’s interpretation of a statute can be controlling when the statute is ambiguous and the agency’s decision is reasonable.³⁶

Justice Stevens wrote the unanimous *Chevron* opinion in 1984.³⁷ The question in *Chevron* was whether the Environmental Protection

32. *Id.* at 140. The plaintiffs in *Skidmore* were employees of Swift & Co. who brought suit under the Fair Labor Standards Act, to recover overtime compensation, damages, and attorney’s fees. *Id.* at 135. The plaintiffs complained they were required to remain on Swift’s premises, in a dormitory provided and furnished by Swift, three to four nights per week without appropriate compensation. *Id.* While the employees performed no regular duties during these hours, they were “on call” in case a fire alarm sounded. *Id.* In interpreting the Fair Labor Standard Act to determine if plaintiffs were owed additional compensation, the Court considered the views of the agency’s Administrator. The Administrator had set forth his interpretations of various provisions of the Act in “interpretative bulletin[s] and in informal rulings,” designed to provide guidance regarding the law to both employers and employees. *Id.* at 137. One such bulletin opined that inactive duty required a “flexible solution” and suggested guidelines to be followed by employers, including how the employee uses his time and if he is free to pursue normal pursuits such as eating and sleeping. *Id.* at 138. Relying on the Administrator’s bulletin, the lower court categorized the employees’ “on call” time as non-working time. *Id.* The Supreme Court reversed, holding that the Administrator’s guidelines were not controlling, but should be given weight according to persuasiveness. *Id.* at 140.

33. *Id.* at 140.

34. *Id.*

35. *Id.*

36. *Chevron*, 467 U.S. 837.

37. *Id.*

Agency's (EPA) decision to allow states to treat all pollution-emitting devices in the same industrial group as a single "stationary source" (referred to as the "bubble" concept) was based on "a reasonable construction of the statutory term 'stationary source.'"³⁸ The Court found the EPA's interpretation reasonable, overruling the decision below.³⁹ In doing so, the Court established the rule that when the intent of Congress is "silent or ambiguous with respect to a specific issue, the [next] question for the court is whether the agency's answer is based on a permissible construction of the statute."⁴⁰ This analysis is commonly referred to as the "*Chevron* two-step."⁴¹ First, the court determines whether Congress has spoken on the specific question at issue.⁴² If Congress is silent or ambiguous, the court then determines if the agency interpretation is

38. *Id.* at 840. The pertinent portions of the Clean Air Act Amendments of 1997 require permits for all "new or modified stationary sources" and define a "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." See 42 U.S.C. § 7411(a)(3) (2006). Through notice and comment rulemaking, the EPA further defined the terms "building, structure, facility, or installation" to mean "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 C.F.R. §§ 51.18(j)(1)(i)-(ii) (1983).

39. *Chevron*, 467 U.S. at 841. The United States Court of Appeals for the District of Columbia Circuit based its decision on "the purposes" of the program, after concluding guidance was not available by looking at the legislative history, which did not address the specific question at issue. *Natural Res. Def. Council, Inc. v. Gorsuch*, 22 F.2d 268 (D.C. Cir. 1982). Because the purpose of the program was to reduce emissions (as opposed to simply maintaining current emission levels), the Court found the EPA definition "inappropriate," and set aside the regulations. *Id.* at 276.

40. *Chevron*, 467 U.S. at 843. The Court expanded on the meaning of a "permissible" construction of statute in a footnote, explaining that the court was not required to conclude that "the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* This footnote indicates that courts should not consider whether or not they think the agency made a good policy choice, but rather that courts should limit themselves to the legal question of whether the agencies interpretation was "permissible"—essentially, not contrary to the law. *Id.* at 843 n.11.

41. *Id.* See also WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 341 (4th ed. 2003).

42. *Chevron*, 467 U.S. at 840.

reasonable.⁴³ *Chevron* is significant because it establishes the rule that Courts are to defer to an agency's reasonable interpretation of the agency's own ambiguous enabling statute. The opinion extinguishes the judiciary's freedom to replace its own judgment for that of the agency unless the agency's interpretation is clearly in contention with Congressional intent.⁴⁴ If consistently applied,

43. *Id.* The Court's ruling in *Chevron* was significant. In the words of Justice Antonin Scalia, "*Chevron* has proven a highly important decision—perhaps the most important in the field of . . . administrative law since *Vermont Yankee Nuclear Power Corp. v. NRDC*." Antonin Scalia, *Judicial Deference to Administrative Interpretations or Law*, 1989 DUKE L.J. 511, 512 (1989). Justice Scalia goes on to point out that "in the first three and a half years after its announcement—up to the beginning of 1988—*Chevron* was cited by lower federal courts over 600 times." *Id.* See also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUM L. REV. 612 (1996). As one scholar summarized:

Accordingly, it should be unsurprising that *Chevron* deference rests . . . on the premises of constitutional derivation. *Chevron* embraces the assumption that if a silent or ambiguous statute leaves an interpreter room to choose among reasonable alternative understandings, the interpretive choice entails the exercise of substantial policymaking discretion . . . effect[ing] a delegation of lawmaking discretion. . . . Thus . . . when Congress has not clearly designated the judiciary as the repository of delegated lawmaking discretion, courts should presume that it has assigned that discretion to the agency charged with administering the statute.

Id. at 625-26.

44. *Id.* While in line with the Court's past decisions, *Chevron* was not the next step on the Court's jurisprudential path toward greater deference to agencies. Only one year prior to *Chevron*, the Court blatantly disregarded a statutory interpretation of Federal Energy Regulatory Commission (FERC) in a 5-4 decision. *Pub. Serv. Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983). The facts in that case involved FERC's interpretation of the Natural Gas Policy Act and FERC's decision to treat owners of both natural gas pipelines and wells differently than owners of only natural gas pipelines. *Id.* The dispute was known as the "first sale" dispute, and involved hundreds of millions of dollars. *Id.* The Court concluded that the agency's decision was "contrary to the history, structure and basic philosophy of the [Natural Gas Policy Act]." *Id.* However, several cases prior to *Chevron* indicated the Court's notable deference to agency decisions. See Scalia, *supra* note 43, at 513. "It should not be thought that the *Chevron* doctrine—except in the clarity and the seemingly categorical nature of its expression—is entirely new law. To the contrary, courts have been content to accept "reasonable" executive interpretations of law for some time." *Id.*

Chevron has the potential to create judicial consistency, and courts and litigants alike would recognize the automatic deference due to agencies in interpreting the agencies' own enabling statutes.⁴⁵

Unfortunately, *Chevron* has not been applied consistently as many would like—even by the Supreme Court.⁴⁶ In *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R. Co.*,⁴⁷ the Supreme Court overturned the Federal Railroad Administration's (FRA) interpretation of the Hours of Service Act (HSA) without even referencing *Chevron*.⁴⁸ The Court justified its conclusion based on

45. Even with the *Skidmore* analysis available, it was impossible to determine prior to the Court's *Chevron* decision just how much weight the Court would give the agency's interpretation. While *Chevron* does leave room for the Court to disregard an agency interpretation that is unreasonable, the bright-line two step test provided in *Chevron* makes it clear that a party opposing an agency's interpretation not only has to show that they offer a "better" interpretation—but that the agency's opinion itself is unreasonable—a far more difficult burden. Further, the Court's reasoning for giving deference to agency interpretation indicates a jurisprudence centered on the notion that agencies are better equipped to make important policy decisions as expert bodies politically accountable to the President. In the words of Justice Stevens:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments . . . When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.

Chevron, 467 U.S. at 865-66.

46. WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 342 (4th ed. 2003).

47. *Bhd. of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R.R. Co.*, 516 U.S. 152 (1996).

48. *Bhd. of Locomotive Eng'rs*, 516 U.S. at 152. This suit originated when nine major railroads brought an action challenging the FRA's interpretation of the HSA. *Id.* at 597. The purpose of the HSA was to promote railroad safety by limiting the number of consecutive hours crew members could work and requiring a minimum number of off-duty hours between shifts for rest. *Id.* at 596. One obstacle the railroads faced in complying with HSA requirements was changing shifts on trains traveling more than 12 hours—the maximum numbers of

its finding that the FRA's interpretation was contrary to legislative intent.⁴⁹ Why the Court failed to cite or apply *Chevron* is unknown, but it is possible that the Court wanted to avoid the strong deferential language in *Chevron* when it declined to defer to the FRA's statutory interpretation.⁵⁰ Regardless of the Court's reasons for ignoring *Chevron*, the Court's ignorance of firmly established precedent is unfortunate. Despite the Court's shortcoming in *Brotherhood of Locomotive Engineers*, *Chevron* has been successfully and carefully applied in numerous cases, and remains good law today.⁵¹

consecutive hours crew members were permitted to work—without any stops or convenient change points. *Id.* The solution was to have the train stop so that a new crew could replace the “outlaw” crew. *Id.* Transportation was provided for the new and “outlaw” crews to and from the stopping point of the train. The statute provided that time spent in transportation to a duty assignment was on-time on duty, while time spent in transportation “to place of final release is neither time on duty nor time off duty.” *Id.* The controversy was whether time the “outlaw” crew spent waiting for transportation to arrive was on-duty time. *Id.* The crews were paid for this time spent waiting, but were not required to perform any railroad functions. *Id.* The FRA originally said that this time should be classified as limbo time, but changed its interpretation to conform to a Ninth Circuit ruling classifying the time as “on-duty” for the sake of uniformity. *Id.* at 157. The Court struck down the FRA's revised interpretation, holding that time spent waiting for transportation from the duty site should be classified as limbo time. *Id.*

49. *Id.* at 162. The statute plainly states that “time spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on nor time off duty.” 49 U.S.C. § 2110(3)(b)(4). The Court was reviewing the FRA interpretation of its own enabling act as embodied in the Federal Regulations, which indicates an official position clearly entitled to *Chevron* deference if prongs one and two are satisfied. *Bhd. of Locomotive Eng'rs*, 516 U.S. 152.

50. *Bhd. of Locomotive Eng'rs*, 516 U.S. at 152. It may also be possible that the Court avoided the deference issue because the FRA's interpretive change was prompted in the first place by a Ninth Circuit decision. These complicated facts, however, should not have stopped the Court from discussing and clarifying the deference issue in the case.

51. *Id.* There is a long line of cases applying *Chevron*, some with the result of the Court upholding an agency's interpretation and others where the Court struck down the agency's interpretation based on a finding that one of the two prongs of *Chevron* was not satisfied. In *INS v. Cardoza-Fonseca*, the Court applied *Chevron* and struck down an interpretation by the Immigration and Naturalization Service (INS), concluding that the agency's interpretation was contrary to legislative intent. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The plaintiff in the case was an alien claiming asylum under §208(a) of the Refugee Act of 1980, which authorizes the Attorney General discretion to grant asylum to a “refugee” who is “unable or

After *Chevron* was decided, it was unclear how the *Chevron* opinion impacted the Court's earlier holding in *Skidmore*—was it *Chevron* or nothing, or did *Skidmore* still have a role to play?⁵² The Court in *United States v. Mead Corp.* implicitly answered this question when it directly addressed the issue of when *Skidmore* should be applied as opposed to *Chevron*.⁵³ In *Mead*, a challenge was brought against a tariff classification ruling by the United States Customs Services (Customs). The Court of International Trade and

unwilling to return to his home country because of a 'well founded fear' thereof on account of particular factors." *Id.* at 423 (citing 8 U.S.C. § 11019(a)(42)). The INS applied the standard of proof in § 243(h) of the act, which required plaintiff to show that it was "more likely than not" that her fears of returning to her country would materialize. *Cardoza-Fonseca*, 480 U.S. at 423. The Court struck down this interpretation, stating that the "clear probability" standard of proof does not apply to asylum claims under §208(a), and that the reference to "fear" indicated that it was the plaintiff's subjective mental state that mattered. *Id.* at 425. In so holding, the Court rejected the INS's argument that their interpretation was more reasonable because "it is anomalous for § 208(a) to have a less stringent eligibility standard than § 243(h) since § 208(a) affords greater benefits than § 243(h)." *Id.* While the Court did apply *Chevron* here, many argue that the opinion "may be a slight stepping back from the strong message of deference set out in *Chevron*." WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 339, 342 (4th ed. 2003). A few years later, the Court again applied *Chevron* and upheld an agency's interpretation of the its own statute as embodied in the agency's first substantive rule to be promulgated. *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991).

52. See *Mead*, 533 U.S. 218.

53. *Id.* at 218. One year prior to *Mead* the Court indicated that *Chevron* deference is not always appropriate, especially when the agency's opinion is expressed in a form lacking the force of law. *Christensen v. Harris County*, 529 U.S. 576 (2000). In *Christensen*, the Court declined to give *Chevron* deference to an opinion letter from the Fair Labor Standard Act's agency administrator. *Id.* The Court reasoned that opinion letters, unlike regulations, do not have the force of law because they are not formally adopted, instead they are informal expressions of agency interpretive authority. *Id.* Additionally, the Court suggested that the lack of formal adoption meant that the interpretation was not as carefully reasoned. *Id.* The Court then concluded that an opinion letter will be deferred to only if it has the power to persuade, and that courts should consider internal consistency, thoroughness, and the level of thoughtfulness in determining the weight to give agency opinion letters. *Id.* In the words of Justice Thomas: "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Id.* at 587. They are "entitled to respect" under the decision in *Skidmore*, but only to the extent that they are persuasive, which was not the case in *Christensen*. *Id.*

the district court on appeal both upheld the Custom's tariff classification ruling, applying *Chevron* deference.⁵⁴ On appeal, the Supreme Court vacated and remanded for the lower court to apply *Skidmore*, stating that the tariff classification ruling was not entitled to *Chevron* deference or any lesser degree of deference, but was only entitled to respect according to the degree of its persuasiveness under *Skidmore*.⁵⁵

54. *Mead*, 533 U.S. 218. The tariff classification was issued by the United States Customs Service pursuant to the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202, which provides that Customs shall "under the rules and regulations prescribed by the Secretary [of the Treasury] . . . fix the final classification and rate of duty applicable to . . . merchandise" under the HTSUS. *Mead*, 533 U.S. at 221-22 (citing 19 U.S.C. §1202). The Secretary provides tariff rulings in the form of "ruling letters," which "represent the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel . . . until modified or revoked." *Id.* (citing 19 C.F.R. § 177.8 (2000)). The ruling is then applied to transactions involving identical articles (§ 177.9(b)(2)), but is subject to modification without notice (§ 177.9(c)) and is to be applied to any transaction but the one described in the letter. *Id.* at 223. At issue here was the Secretary's classification of plaintiff-responder, the Mead Corporation's "day planners," described as "three-ring binders with pages having room for notes of daily schedules and phone numbers and addresses, together with a calendar and suchlike." *Id.* at 224. Between 1989 and 1993, Customs had treated Mead's binders as "other" items, which were not subject to any tariff. *Id.* at 224-25. The controversy arose in January 1993, when Customs re-categorized Mead's binders into a category for "[r]egisters, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles," which were subject to a tariff of 4.0%. *Id.* at 224-25. Customs supported this decision in an opinion letter, which stated that Customs had adopted the broader definition of "diary" as defined in the Oxford English Dictionary. *Id.* at 225. The broad Oxford definition defined "diary" as "a book including 'printed dates for daily memoranda and jottings; also . . . calendars.'" *Id.* (quoting OXFORD ENGLISH DICTIONARY 321 (Compact ed. 1982)). Mead challenged the Custom's ruling in the Court of International Trade, which adopted the Custom's reasoning without discussing deference. *Id.* Mead appealed to the United States Court of Appeals for the Federal Circuit which held that Customs' ruling was not entitled to *Chevron* deference and reversed the Court of International Trade. *Id.* at 225-26. The Supreme Court granted certiorari. *Id.* at 226.

55. *Id.* The Court stated concisely at the opening of the opinion in *Mead* that *Chevron* deference did not apply to Customs' ruling because the ruling was not "promulgated in the exercise of authority" delegated by Congress. *Id.* at 226-27. However, the Court later stated that "[t]he fact that the tariff classification here was not a product of such formal process [as notice-and comment] does not alone,

Despite the Court's intention to clarify the law, the *Mead* opinion was strongly criticized by Justice Scalia in his dissent.⁵⁶ Justice Scalia argued that the Court had rendered *Skidmore* "anachronistic" with its opinion in *Chevron*, and that the Court's present decision in *Mead* to reaffirm *Skidmore* and attempt to differentiate between *Skidmore* and *Chevron* was "neither sound in principle nor sustainable in practice."⁵⁷ Scalia's criticism focused on the difficulty that the lower courts would experience first in determining which test to apply, and later in attempting to apply the subject "totality of the circumstances" test established in *Skidmore* on the occasions they determined appropriate.⁵⁸ As an alternative to resurrecting *Skidmore*,

therefore, bar the application of *Chevron*." *Id.* at 231. The Court then expounds on the reasons *Chevron* is not applicable to all forms of agency interpretation, summarizing by stating that "classification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines . . . [and are] beyond the *Chevron* pale.'" *Id.* at 234 (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). Despite the fact that *Chevron* is inapplicable, the Court admonishes the lower courts that *Chevron* did not "eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Id.* at 234 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)) (internal citations omitted).

56. *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

57. *Id.* at 237. Scalia explained that *Skidmore* was sufficient in earlier times, but that in this era "when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation." *Id.* at 250.

58. *Id.* at 234, 250. Justice Scalia summarized the majority's holding, stating:

Only when agencies act through 'adjudication[,] notice-and-comment rulemaking, or . . . some other [procedure] indicat[ing] comparable congressional intent [whatever that means]' is *Chevron* deference applicable—because these 'relatively formal administrative procedure[s] [designed] to foster . . . fairness and deliberation bespeak (according to the Court) congressional willingness to have the agency, rather than the courts, resolve statutory ambiguities.

Id. at 240.

Justice Scalia proposed that all authoritative agency positions be accorded *Chevron* deference.⁵⁹

Justice Scalia's dissent may be viewed as a rather accurate predictor of the troubles to face the Court when it implemented its rule in *Mead*. Only one year after *Mead*, in *Barnhart v. Walton*, the Court retreated from its holding in *Mead* that only "formal" agency interpretations are entitled to deference.⁶⁰ The Court, citing *Mead*, stated that "[w]hether a court should give such [*Chevron*] deference depends in significant part upon the interpretive method used and the nature of the question at issue."⁶¹ The Court proceeded to list factors that led them to apply *Chevron* deference to the informal agency position at issue.⁶² In *AT&T Corp. v. City of Portland*, the Court decided to give deference to the Federal Communications Commission's (FCC) interpretation of the term "common carriers" even though the Ninth Circuit had already issued an opinion

59. *Id.* To be authoritative, Justice Scalia proposed that an agency interpretation "must represent the judgment of central agency management, approved at the highest levels." *Id.* at 258. He goes on to say that he would find an agency position "authoritative" when the position is attacked in court and is defended by the agency's general counsel. *Id.*

60. *Barnhart v. Walton*, 535 U.S. 212 (2002). At issue in *Barnhart* was the Social Security Administration's (SSA) interpretation of the term "disability" in the Social Security Act. *Id.* The SSA interpreted "disability" as requiring that the inability last or "be expected to last" at least twelve months. *Id.* at 214-15. Further, the SSA interpreted "expected to last" as applicable only when the inability had not yet lasted twelve months. *Id.* at 215. The result is that a person who was ultimately disabled for only eleven months when his inability had previously been expected to last at least twelve months was not "disabled." *Id.* The plaintiff challenging the suit had been disabled for eleven months, and denied benefits. *Id.* Plaintiff appealed, and the Fourth Circuit reversed, finding Walton entitled to benefits. *Id.* at 216. The Supreme Court granted certiorari, reversing the Fourth Circuit and giving *Chevron* deference to the longstanding agency interpretation. *Id.* at 222, 225. See John H. Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103 (2004).

61. *Barnhart*, 525 U.S. at 222 (citing *Mead*, 533 U.S. at 229-31).

62. *Barnhart*, 525 U.S. at 222. The court listed the factors to determine if *Chevron* should be applied to an agency's informal interpretation as including "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the agency has given to the question over a long period of time." *Id.*

interpreting the word in a different way, citing Justice Scalia's dissent in *Mead*⁶³ These cases indicate that the Court's holding in *Mead* is either difficult to correctly apply or has on occasion been completely ignored.

2. Deference to the PBGC

Within the broader questions regarding the level of appropriate deference to agency interpretations as expressed in *Skidmore*, *Chevron*, and *Mead*, the Court has issued several decisions specifically addressing deference to the PBGC's interpretation of ERISA. On many occasions, courts have given deference to PBGC interpretations,⁶⁴ which are generally upheld so long as they are based on a permissible construction of the statute.⁶⁵ Further, the

63. The opinion issued by the FCC contradicted an earlier interpretation of the same statute by the Ninth Circuit. *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). The Court held that the Ninth Circuit's prior interpretation did not preclude the agency from issuing a revised interpretation of the statutory language at issue, since that language was ambiguous. *Id.*

64. *See, e.g.,* *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359 (1980) (the Court accepted and affirmed PBGC's definition of the term "nonforfeitable" in concluding that plan provision limiting otherwise defined, vested benefits to the amounts provided by the assets of the fund did not prevent such benefits from being characterized as "nonforfeitable" within the meaning of ERISA and thus insured by PBGC under Title IV); *Boivin v. U.S. Airways, Inc.*, 446 F.3d 148 (D.C. Cir. 2006) (holding that the plaintiff beneficiaries must exhaust administrative remedies before challenging in court the PBGC's interpretation of an amendment to beneficiaries' plan as having become effective less than 60 months before the plan terminated); *Bridgestone Firestone, Inc. v. Pension Benefit Guar. Corp.*, 892 F.2d 105 (D.C. Cir. 1989) (holding that the regulation requiring employer to distribute excess earnings to its employees upon termination of contributory defined benefit plan was a reasonable interpretation of ERISA pension plan termination provisions); *Blessitt v. Ret. Plan For Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988) (deferring to PBGC interpretation that when a plan is terminated ERISA did not require that employees receive retirement benefits they would have received had they continued to work to normal retirement age).

65. *Cent. States, Se. and Sw. Areas Pension Fund v. Safeway, Inc.*, 229 F.3d 605 (7th Cir. 2000).

Court has held on several occasions that PBGC's interpretations of ERISA are owed "substantial deference."⁶⁶

The "landmark" case exemplifying judicial deference to the PBGC is *Pension Benefit Guaranty Corporation v. LTV Corp.*⁶⁷ The question presented in *LTV Corp.* was whether or not PBGC's policy of using its power to restore terminated pension plans, where the employer had implemented an abusive follow-on plan, was a permissible construction of the PBGC's restoration powers.⁶⁸ Applying *Chevron* deference, the Court affirmed PBGC's construction of ERISA, finding the construction reasonable and therefore entitled to deference. In doing so, the Court rejected LTV Corporation's arguments based on ERISA's legislative history and the considered amendments to ERISA by Congress that would have expressly authorized the PBGC to prohibit follow-on plans.⁶⁹

3. Deference to Agency Litigation Positions

The question of whether *Chevron* deference should be applied to an agency's interpretation expressed in the context of litigation has been considered repeatedly by courts and legal scholars, and is relevant here because the PBGC in *Beck* expressed its interpretation of ERISA as *amicus curiae*. However, most prior discussions on this

66. *Blessitt*, 848 F.2d at 1172 n.19. ("We note that we owe particularly great deference to PBGC interpretations of Title IV of ERISA, which encompasses the allocation and termination provisions addressed in this opinion."). See *Belland v. Pension Benefit Guar. Corp.*, 726 F.2d 839, 843 (D.C. Cir.1984) ("PBGC's interpretation of ERISA is entitled to great deference. We do not rely solely on great deference here, however, because PBGC's interpretation of section 1461(b) was consistent with the plain language of ERISA."). See also *U.S. Steelworkers of Am. v. Harris and Sons Steel Co.*, 706 F.2d 1289, 1296 (3d Cir.1983); *Connolly v. Pension Benefit Guar. Corp.*, 581 F.2d 729, 730 (9th Cir.1978), cert. denied, 440 U.S. 935 (1979) ("[T]he determination of the PBGC . . . is entitled to great deference in the construction and application of ERISA"). The Court accorded *Chevron* deference to the PBGC's interpretation in these cases, all of which were decided prior to *Mead*. *Blessitt*, 848 F.2d at 1172.

67. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

68. *Id.* See also 29 U.S.C. § 1347 (2006).

69. *LTV Corp.*, 496 U.S. 633. LTV Corporation argued that Congress's consideration of statutory amendments that would have expressly granted the PBGC the right to prohibit follow-on plans indicated that ERISA as enacted did not grant the PBGC these powers. *Id.*

issue focused on situations where the agency, itself, was a party to the litigation, as opposed to a situation like in *Beck*, where the agency was involved as *amicus curiae*. Considering statutory interpretations expressed in the context of litigation by an agency party to the litigation, one scholar wrote that:

It is hard to conceive that an interpretation put forward in argument, without previously having been laid down in a form bearing the force of law, could bind the court to which it is presented. An agency may not simply declaim 'this is our interpretation—under *Chevron* you must accept it,' and prevail. . . . It is one thing to extend special consideration to the agency view, even when it is expressed only in a litigation position . . . *Skidmore* counsels no less It is quite something else for a court to deem itself bound by [those words]. . . . Independent deliberation of the interpretive issue, joined with special consideration of the agency's views, is the proper judicial posture.⁷⁰

The debate on deference to an agency's interpretation presented in litigation has been joined by several circuit courts, with the general consensus that no deference is due such interpretations presented in litigation.⁷¹ The Ninth Circuit concluded that an interpretation first

70. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. on REG. 1, 60-61 (1990).

71. See *supra* note 55. While courts have declined to give deference to agency opinions expressed in litigation, they have on occasion applied *Chevron* to opinions expressed in formats other than formal rulemaking or adjudication. See Anthony, *supra* note 70. In *Mattox v. FTC* the Court applied *Chevron* deference to an interpretation expressed in an agency affidavit that was identical to an interpretation expressed by the agency in adjudication. *Id.* at 61. In *Chapman v. Dep't of HHS*, the Court even gave deference to explanatory material published alongside an agency regulation. *Id.* The application of *Chevron* deference in these cases may be criticized as inappropriate. As one scholar commented:

[A] more precise approach in [*Mattox* and *Chapman*] would have been to treat the agency interpretation as information entitled to special consideration as the court deliberates its own best estimate of the statute's meaning . . . [If] Congress has [not delegated the authority to issue interpretations having the force of law in the format used by the agency], the court generally

provided on the onset of litigation was “entitled to no more deference than is the interpretation of any party in the suit.”⁷² Similarly, the Eleventh Circuit declined to apply *Chevron* deference to an agency’s interpretation first presented in the context of litigation because to do otherwise would “effectively [deny the claimant] the right to appellate review.”⁷³ Finally, the D.C. Circuit, sitting en banc, also declined to apply *Chevron* deference, but declined to go so far as stating it would be inappropriate in every situation.⁷⁴ Concurring, Justice Silberman took an opposing stance on the deference issue and applied *Chevron* deference to the Internal Revenue Service’s position upon concluding that “it is enough that the agency, through its counsel, set forth its interpretation of the statute at the first moment when it was appropriate and relevant to do so.”⁷⁵ Justice Silberman further cautioned courts against refusing to give any deference to agency litigation positions because applying deference was not “excessive judicial intervention.”⁷⁶

should undertake an independent interpretation of the statute, granting the agency’s views the special consideration called for by *Skidmore*. For informal formats not carrying force of law *Chevron* . . . should not be used at all.

Id. at 63. In other words, under the *Mead* analysis, *Skidmore* would have been the more appropriate test to apply in these two cases.

72. *Bregal v. Brock*, 833 F.2d 763, 768 (9th Cir. 1987) (“The Department did not construe § 1802(3) in its amended form until the onset of this litigation. The Secretary’s construction is entitled to no more deference than is the interpretation of any party in the suit.”).

73. *William Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (“[W]e do not agree that the Director’s mere litigation position is due to be given deference. Common sense tells us that if deference were always to be given to the Director’s litigation position, then the claimant would be effectively denied the right to appellate review. . . . If the Secretary has a position he wishes to express, he can do it through the proper forum, i.e., the implantation of new clarifying regulations.”).

74. *Church of Scientology of Cal. v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (en banc).

75. *Id.* at 166 (Silberman, J., concurring).

76. *Id.* Consideration of the original language of Justice Silberman’s concurring opinion is helpful:

Were the rule to be otherwise—were the courts to withhold deference unless an agency asserted its interpretation of a statute in a formal adjudication or agency rulemaking—we would be creating a strong incentive for government agencies and departments to undertake their business strictly through formal

As this section indicates, there is a substantial body of law considering the appropriate level of deference due to agency interpretations, beginning with the framework established in *Chevron*, *Skidmore*, and *Mead*. In addition, there are several cases applying the *Chevron* framework in the specific context ERISA and the PBGC. Finally the Court has also considered the application of *Chevron* in the context of litigation. All of these cases are significant to the Court's holding in *Beck* and lay the foundation for understanding the current relationship between judicial review and deference.

III. FACTS AND PROCEDURAL HISTORY OF *BECK*

Crown Paper, a corporation, and its parent company, Crown Vantage (collectively Crown) were manufacturers of paper products with 2,600 employees in seven locations.⁷⁷ In March 2000, Crown filed for Chapter 11 bankruptcy and began liquidating assets.⁷⁸ During the liquidation process, PBGC filed proofs of claims totaling millions of dollars representing the liability it would have to assume in order to take over Crown's various pension plans.⁷⁹ To address the stumbling block to plan confirmation posed by the PBGC proofs of claim, Crown began investigating the possibility of effecting a "standard termination" of certain defined-benefit pension plans through the purchase of an annuities in July 2001.⁸⁰ Shortly after

procedures. Although judicial review of administrative action has seemed in recent times to push in that direction, I doubt that much good can come of this trend or, more importantly, that it is justified by congressional direction. We should take care that a doctrine developed to restrain the judiciary not be transformed to serve as a justification for excessive judicial intervention.

Id. at 166 (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978)).

77. *Beck*, 127 S. Ct. at 2314.

78. *Beck*, 127 S. Ct. at 2310.

79. *Id.*

80. *Beck*, 127 S. Ct. at 2314. A defined-benefit pension plan is one where "the employee, upon retirement, is entitled to a fixed periodic payment." *Id.* (citing *Comm'r v. Keystone Consol. Indust., Inc.*, 508 U.S. 152, 154 (1993)). In this type of plan, the employer is responsible for investment risks and must make up for any deficits in the plan. *Beck*, 127 S. Ct. at 2314 (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40 (1999)). It is also the employer, however, who

Crown began looking into effecting a “standard termination,” PACE International Union (PACE) instead proposed that Crown merge seventeen of Crown’s hourly employee plans into the Pace Industrial Union Management Pension Fund (PIUMPF), a multi-employer plan.⁸¹ Crown and PACE met to discuss the possibility of merger, and Crown subsequently requested and received additional information on PACE’s merger proposal.⁸²

In late September 2001, Crown reviewed preliminary annuitization bids.⁸³ Crown learned that the annuitization of certain pension plans was possible and that the process might also create a “reversion” of residual plan assets to the company for its creditors’ benefit.⁸⁴ The PBGC agreed to release its claims against the Crown bankruptcy estate if Crown annuitized its pension plans.⁸⁵ In October 2001, Crown received final annuitization bids and decided to merge eleven of its hourly-employee pension plans into a twelfth.⁸⁶ Crown then terminated the merged plan through the purchase of an \$84 million annuity from the Hartford Life Insurance Company.⁸⁷ The annuitization provided all plan participants with 100% of their accrued plan benefits and created a reversion of approximately \$5 million in surplus plan assets for Crown’s creditors.⁸⁸ Responsibility for Crown’s other five under-funded hourly plans reverted to Georgia Pacific Company—the successor of a prior sponsor of the

enjoys the benefits when a plan performs beyond expectations, by making reduced payments to the plan or receiving a reversion of plan assets. *Beck*, 127 S. Ct. at 2314.

81. *Beck*, 127 S. Ct. at 2314. A multi-employer plan is “a collectively-bargained plan maintained by more than one employer, usually within the same or related industries, and a labor union.” See 29 U.S.C. § 1301(a)(3) (2008).

82. *Beck*, 127 S. Ct. at 2314.

83. *Id.*

84. *Id.* Employers can recoup residual plan assets of over-funded plans under ERISA. 29 U.S.C. § 1344(d)(1)(A) (2008). When a company terminates a plan, no participant has a claim to any assets of the plan, but only to the defined level of benefits that the plan promises. *Hughes Aircraft v. Jacobson* 525 U.S. 432 (1999).

85. *Beck*, 127 S. Ct. at 2315.

86. *Id.*

87. *Id.*

88. *Id.* Employers can recoup residual plan assets of over-funded plans under ERISA. §1344(d)(1)(A).

plans—pursuant to a prior agreement between Georgia Pacific, Crown and PBGC.⁸⁹

PACE intervened in Crown's Chapter 11 bankruptcy on behalf of the employees covered by the single-employer defined-benefit pension plans (Plans) sponsored and administered by Crown (Employees).⁹⁰ PACE alleged that Crown's directors breached their fiduciary duty to their Employees by rejecting PACE's proposal to terminate the Plans by merging them with PACE's own multi-employer plan and electing instead for a standard termination through the purchase of annuities.⁹¹ PACE sought injunctive relief for two reasons: (1) rescinding the purchase of the Hartford annuity and (2) preventing Crown from distributing the \$5 million reversion to Crown creditors.⁹²

After an evidentiary hearing, the bankruptcy court issued oral findings of Fact on December 11, 2001.⁹³ The bankruptcy court concluded that Crown did violate its fiduciary duties by failing to adequately consider PACE's merger offer.⁹⁴ The Court held that Crown's decision between annuitizing the pension plans and merging them into PIUMPF constituted a discretionary act, and hence, Crown had a fiduciary duty to fully explore PACE's proposal, which Crown

89. Brief for Pet., *Beck v. PACE Int'l Union*, 127 S. Ct. 2310 (2007) (No. 05-1148).

90. *Beck*, 127 S. Ct. at 2316.

91. Brief for Pet., *Beck v. PACE Int'l Union*, 127 S. Ct. 2310 (2007) (No. 05-1148).

92. *Beck*, 127 S. Ct. 2310. PACE did not, however, seek the rescission of Crown's transfer of the five under-funded plans to Georgia Pacific. *Id.* Note that the case was generated by a dispute over where the five million dollar reversion resulting from the termination of the plan should go. Of course, the corporation wanted the reversion and was entitled to it under ERISA. *Id.* Additionally, it is interesting to note that Crown owed a fiduciary duty to its creditors, and it is worth questioning whether Crown would have violated this duty by simply giving the reversion to the Union or directly to the plan members, since neither party was legally entitled to the reversion. In the Court's own terms: "... by diligently funding its pension plans, Crown became bait for a union bent on obtaining a surplus that was rightfully Crown's. All this after Crown purchased an annuity that none dispute was sufficient to satisfy its commitments to plan participants and beneficiaries." *Beck*, 127 S. Ct. at 2321.

93. Brief for Pet., *Beck*, 127 S. Ct. 2310 (No. 05-1148).

94. *Id.* at 6.

failed to do.⁹⁵ The bankruptcy court partially granted PACE's motion for a preliminary injunction.⁹⁶

The district court concluded that "Crown's directors, failing to consider the merger option seriously while acting as the plan administrator, breached the fiduciary duties under ERISA."⁹⁷ Subsequently, Crown appealed.⁹⁸

The Ninth Circuit held that Crown had a fiduciary obligation to make the decision between the two "with an eye single to the interests of the participants and beneficiaries."⁹⁹ In so holding, the Ninth Circuit interpreted ERISA and the PBGC's own regulations as permitting merger as a form of termination.¹⁰⁰ The Ninth Circuit denied Crown's petition for a panel rehearing; instead, suggesting a

95. *Id.* at 7-8.

96. *Id.* at 6. The judge acknowledged that Crown would face penalties up to \$4 million if it tried to unwind its purchase of annuities from Hartford, Crown's selected insurance provider. Brief for Resp't at 2, *Beck*, 127 S. Ct. 2310 (2007) (No. 05-1148). Therefore, the judge allowed Crown's purchase of the Hartford annuity to go forward, but ordered that all remaining assets (in this case, \$5 million) of the terminated plans be placed in an interest-bearing account pending final decision on the matter. *Id.*

97. *Beck*, 127 S. Ct. at 2316.

98. *Id.*

99. Brief for Pet. at 9, *Beck*, 127 S. Ct. 2310 (2007) (No. 05-1148); Brief for Appellant at 16-17, *Beck*, 127 S. Ct. 2310 (2007) (No. 05-1148) (quoting *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1402 (9th Cir. 1995)).

100. Brief for Pet. at 9, *Beck*, 127 S. Ct. 2310 (2007) (No. 05-1148). The Ninth Circuit focused on the language of ERISA Section 4041(b)(3) which provides that "the plan administrator must in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or *in another permitted form.*" *Id.* (emphasis added). Additionally, the Court asserted that the PBGC's own regulations supported the conclusion that merger was a form of termination, citing 29 CFR § 4041.28(c)(1) which states that "the plan administrator shall—(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan." *Id.* The 9th Circuit's reasoning suggests that the Supreme Court in this case went somewhat beyond the norms of judicial deference to agency interpretations. *Id.* Here, the Court held PBGC's interpretation wasn't clear in a published agency regulation—it was simply presented in the course of litigation. *Id.* Additionally, the Ninth Circuit did not find an agency opinion in this form worthy of deference. *Id.*

rehearing en banc, even though both the Department of Labor and the PBGC supported the petition as separate amicus curiae.¹⁰¹

The Supreme Court of the United States granted certiorari and reversed, holding that Crown did not breach its fiduciary obligations in failing to consider PACE's merger proposal because merger is not a permissible form of termination.¹⁰²

IV. ANALYSIS OF THE COURT'S OPINION

Justice Scalia delivered the opinion for the unanimous Court, reversing the Ninth Circuit's decision and displaying remarkable deference to the PBGC's interpretation of ERISA. Because the Court identified the question of whether or not a merger is a form of termination as precursory to the fiduciary duty issues raised, the Court never reached the fiduciary duty issue despite a lengthy briefing and oral argument on the issue.¹⁰³

The Court's focus on the threshold legal question of whether or not merger is a form of termination is logical; upon concluding that merger is not a form of termination, the fiduciary duty question became purely hypothetical.¹⁰⁴ However, the contents of the opinion are somewhat surprising, because the Supreme Court hearing transcript and both parties' briefs paid particular attention to the application of the fiduciary duty standard, because the merger was assumed an acceptable form of termination.¹⁰⁵ Ultimately, it was the Court's consideration of the meaning of ERISA and deference to the PBGC's interpretation that directed the holding in *Beck*.

101. *Id.*

102. *Beck*, 127 S. Ct. at 2310.

103. *See id.*

104. *Id.* at 2316. Justice Scalia clearly stated that whether "merger is, in the first place, a *permissible* form of plan termination under ERISA" was an antecedent question to whether Crown owed a fiduciary duty to consider PACE's merger proposal. *Id.*

105. Brief for Pet. at 9, *Beck*, 127 S. Ct. 2310 (2007) (No. 05-1148). The attorney for PACE pursued two separate arguments for why the Court should overrule the Ninth Circuit: (1) employers owe no fiduciary duty to consider merger, and (2) the merger is not a valid form of termination in the first place. Transcript of Oral Argument at 11, *Beck*, 127 S. Ct. 2310 (No. 05-1148). Despite establishing these two independent arguments, Mr. Baker's discussion before the Court focused almost entirely on the fiduciary duty issue. *Id.*

It is important to note that while the Court unanimously deferred to PBGC's interpretation, it did acknowledge that "the phrase 'otherwise fully provide all benefit liabilities under the plan' [was] not without some teeth."¹⁰⁶ The Court reasoned that the language of the statute did not cover mergers with the "clarity necessary to disregard the PBGC's considered views."¹⁰⁷ The Court identified three points that persuaded it to accept the PBGC's interpretation.¹⁰⁸ First, terminating a plan through the purchase of annuities formally severs the applicability of ERISA to plan assets and employer obligation.¹⁰⁹ In contrast, ERISA continues to apply upon merger.¹¹⁰

106. *Beck*, 127 S. Ct. at 2318 (citing § 1341(b)(3)(A)(ii)). The Court, however, quickly stated that despite the phrase "otherwise provide," the PBGC interpretation that merger was not a form of termination could be reasonably based on a determination that it was "not like the purchase of annuities in its ability to fully provide all benefits" or that ERISA's distinct treatment of merger and termination showed that the two were separate and distinct options. *Id.* Earlier in its opinion (before switching its focus to whether or not merger is a form of termination), the Court commented that while PACE's argument was "an odd one," it did become "more plausible," once the Court realized that merger is "simply a transfer of assets and liabilities." *Id.* at 2316. The Court explains that an annuity is also "akin to a transfer of assets and liabilities to an insurance company, and if Crown was subject to fiduciary duties in selecting an annuity provider, why could it automatically disregard PIUMPF simply because PIUMPF happened to be a multiemployer plan?" *Id.*

107. *Beck*, 127 S. Ct. at 2318 (quoting *Tilley*, 490 U.S. at 725). The Court also quoted *Mead* to support the statement that the Court had "traditionally deferred to the PBGC when interpreting ERISA." *Beck*, 127 S. Ct. at 2317 (citing *Mead*, 490 U.S. at 722).

108. *Beck*, 127 S. Ct. at 2318.

109. *Id.* The language of the PBGC's regulations reinforces the significance that the purchase of an annuity severs the applicability of ERISA, while merger does not. *Id.* The regulations require that the notice of plan termination informs participants that the PBGC will no longer guarantee their benefits after distribution. 29 C.F.R. 4041.23(b)(9); see Brief for United States as Amicus Curiae Supporting Resp't at 22, *Beck*, 127 S. Ct. 2310 (No. 05-1148). Because the PBGC continues to guarantee benefits under a merged plan, a "termination by merger" as suggested by PACE, would be unable to satisfy 29 C.F.R. § 4041.23(b)(9). *Beck*, 127 S. Ct. at 2321. This argument was made clear by the United States in their brief, and is acknowledged by the Court, which cited the code section followed by a parenthetical describing that "this requirement of course has no relevance to a merger, because after a merger, the PBGC continues to guarantee plan benefits." *Id.* at 2320. The Court does not take this point any further; rather, it mentions in a long list of differences between the procedures involved in termination and those

Second, standard termination allows the employer to recoup surplus funds, which is not possible in merger.¹¹¹ Third, the structure of ERISA amply supports the conclusion that section 1342(b)(3)(A)(ii) does not cover merger.¹¹² The Court also concluded the PBGC's construction of the statute was "eminently reasonable" from a policy

involved in merger. *Id.* This is peculiar because PBGC's regulations specifically require notice that PBGC oversight ends upon termination and PBGC interpreted ERISA, through its own regulations, as not allowing merger as a form of termination. *Id.* at 2321. If it could have been established that PBGC clearly disallowed merger by its own regulations, there would have been a strong argument for greater deference to be given to PBGC's interpretation of ERISA, because it would have been an opinion that had withstood § 501 rulemaking, rather than an opinion presented in an *amicus* brief during the middle of litigation.

110. *Beck*, 127 S. Ct. at 2321. Because termination ends the applicability of ERISA, it also ends the PBGC's responsibility to insure the plan's assets. Consequently, upon termination, beneficiaries look solely to their annuity provider for funds. *Id.* In contrast, ERISA continues to apply upon merger, with the PBGC continuing to insure plan assets, however at a greatly reduced rate. *Id.* At first glance, minimal insurance by the PBGC may sound more secure than looking solely to an annuity provider—essentially an independent insurer. *Id.* However, merger of a single-employer pension plan with a multi-employer pension plan is probably the higher risk, because upon merger the assets of the solvent single-employer plan may be used to pay benefits to beneficiaries other than those under the original plan. *Id.* In addition, there is a real possibility the multi-employer plan could at some point in the future become insolvent. This raises an interesting question—why would an employer choose merger over termination through the purchase of annuities if its choice between the two was fiduciary? In other words, if PACE prevailed in establishing merger as a form of termination, how would PACE show that merger rather than termination was in the best interests of the Crown Plan beneficiaries? A full analysis of this question is beyond the scope of this note. However, it is interesting to note that Crown employee benefits would be the same (no more and no less) upon merger as they would upon termination, because plan benefits were fixed. Brief of Resp't at 19, *Beck*, 127 S. Ct. 2310 (2007) (No. 05-1148). Further, PACE pointed out that insurers, like multi-employer plans, do not segregate their funds. *Id.* Consequently, it is possible—and both the Department of Labor and the PBGC have recognized—that “due to poor investment choices . . . unexpected claims . . . or other contingencies” an insurance company will default on its promises to participants receiving annuity payments, and that these participants will not receive the full benefits promised to them. *Id.* at 25.

111. *Beck*, 127 S. Ct. at 2320.

112. *Id.*

standpoint.¹¹³ Finally, the Court dismissed PACE's argument that three PBGC opinion letters suggested that merger was an acceptable form of termination.¹¹⁴

Though the Court's analysis was focused on the reasonableness of PBGC's interpretation, the Court never even mentioned *Skidmore* or *Chevron*.¹¹⁵ Further, the Court never discussed the form of PBGC's opinion letter and the level of deference appropriate to that form. Instead, the Court cited *Mead v. Tilley*, for the principle that courts have "traditionally deferred to the [PBGC] when interpreting [ERISA]."¹¹⁶ This lack of discussion of the law of deference is surprising considering it is arguably the foundation for the Court's decision.

Despite the Court's failure to specifically state the level of deference being applied, it appears from the language used in Justice Scalia's opinion that the Court gave PBGC's interpretation *Chevron* deference.¹¹⁷ While this is in line with many prior decisions where the Court gave PBGC's interpretations of ERISA "great" deference, it is still noteworthy after the Court's decision in *U.S. v. Mead Corp.*,

113. *Id.* The Court reasoned that from a policy standpoint, merger as a form of termination may have detrimental consequences for the plan beneficiaries. *Id.* In this case, for example, the beneficiaries would receive their full benefits if Crown terminated the plan by purchasing annuities. However, if Crown decided to merge the Plan with PACE's multiemployer plan, the beneficiaries might be at risk because assets of the original plan could be used to satisfy commitments of the multi-employer plan to other participants of the multiemployer plan. If the multi-employer plan became under-funded, the beneficiaries may find their benefits threatened in view of the lesser guarantees the PBGC provides to multi-employer plans. Compare 29 U.S.C. § 1322 (2008) and 29 U.S.C. § 1322(a) (2008).

114. *Beck*, 127 S. Ct. at 2317. Petitioners strongly argued—and the Court agreed—these opinion letters did not support merger as a form of termination. *Beck*, 127 S. Ct. at 2317 n.3. The letters addressed a problem situation where employers would maneuver to "reach surplus assets in their pension plans without purchasing annuities for all plan participants and beneficiaries, which the employers would have been required to do if they entirely terminated the plans." Brief for the United States as Amicus Curiae Supporting Resp't at 25, *Beck*, 127 S. Ct. 2310 (2007) (No. 05-1148).

115. See generally *Beck*, 127 S. Ct. at 2310.

116. *Id.* at 2317. *Mead* established that *Skidmore* is the correct standard for the level of deference owed agency opinions issued informally and is only entitled to "respect according to degree of its persuasiveness." *Id.*

117. See generally *Beck*, 127 S. Ct. 2310. The Court's focus on the "reasonableness" of the PBGC's interpretation suggests *Chevron* deference.

where the Court differentiated between when to apply *Skidmore* and when to apply *Chevron*.¹¹⁸ The Court's reliance on *Chevron* is evidenced by the Court's language in several ways. First, the Court focused on whether or not the PBGC's interpretation was "reasonable," rather than "persuasive."¹¹⁹ If the Court was applying *Skidmore*, it would not have concerned itself with the reasonableness of PBGC's interpretation, but rather would have given the agency's opinion weight according to its persuasiveness. Second, the Court stated that in reviewing the Ninth Circuit's opinion, they would "examine whether the PBGC's policy is based upon a permissible construction of the statute," implying that the Court would have upheld the PBGC's interpretation so long as it was not contrary to the clear meaning of the statute.¹²⁰ Further, the Court stated that PACE had "failed to persuade [it] that the PBGC's views [were] unreasonable," again indicating *Chevron* deference.¹²¹

V. LEGAL IMPACT

There are several ways that members of the legal community may view the *Beck* opinion. If the viewer is a pension-plan sponsor or fiduciary counselor they will likely breathe a sigh of relief knowing that they do not owe a fiduciary duty to consider merger options in the course of plan termination.¹²² If they are affiliated with the PBGC or were otherwise involved as amicus curiae for the respondents in *Beck*, they will enjoy the victory of having their interpretation of ERISA prevail. If they are an employee union they will likely feel remorse. Despite the aforementioned mixed feelings, the legal community as a whole might overlook the legal significance of the Court's language as it gave deference to the PBGC's interpretation.

118. See *supra* note 39.

119. *Beck*, 127 S. Ct. at 2320.

120. *Id.* at 2317.

121. *Id.* at 2318.

122. Michael R. Maryn, ALI-ABA CONTINUING LEGAL EDUCATION COURSE OF STUDY MATERIALS, WHAT'S NEW IN EMPLOYEE BENEFITS: A SUMMARY OF CURRENT CASE AND OTHER DEVELOPMENTS, (Oct. 4-5 2007).

A. The Extreme Deference Given to the PBGC by the Court is the Most Compelling Aspect of Beck

While many parties were anxious for the Court to overturn the Ninth Circuit's decision in *Beck*, the Court's decision wasn't a "surprise," as its unanimity suggests.¹²³ The reasonableness of the Court's final conclusion consequently may mask the significant impact *Beck* may have on the future of administrative law. As noted recently in the American Law Reports, the "most compelling aspect" of *Beck* may perhaps be "the degree of deference the Court accorded the PBGC with respect to its interpretation of ERISA, particularly where . . . the agency's views [were] expressed in the context of litigation rather than under rulemaking subject to notice and comment."¹²⁴ The Court's opinion in *Beck* exemplifies the confusion surrounding when and how much deference is owed to administrative statutory interpretations.

The Court's failure to concretely state the level of deference and the mixed signals in the Court's language make it difficult, at first glance, to determine what standard of review the Court applied to PBGC's interpretation.¹²⁵ This ambiguity cannot be overlooked. As the Court acknowledged in *Mead*, there is a substantial difference between *Skidmore* and *Chevron* deference – there is a substantial difference between simply considering an agency's interpretation and deferring to that interpretation so long as it is reasonable.¹²⁶ Many times there is more than one reasonable interpretation of a statute—sometimes each interpretation is equally persuasive, but other times one position may stand out as "more probable." In *Beck*, the Court found PBGC's interpretation was "more probable."¹²⁷ The main question is, what would the Court have held if it had only found the PBGC's interpretation "equally probable," to other interpretations, or

123. *Id.*

124. 178 A.L.R. Fed. 129 § 23 Cumulative Supplement (2007).

125. See *supra* note 32 and accompanying text. While the Court applies *Skidmore* in *Beck*, the Court's analysis seems very close to the "reasonableness" inquiry under *Skidmore*. This ambiguity is compounded by the fact that the Court does not clearly state the level of deference they are giving to the PBGC in *Beck*.

126. *Beck*, 127 S. Ct. at 2320.

127. See *id.*

“less probable,” but still “reasonable?” Would the Court have still deferred to the PBGC?¹²⁸

B. The Court's Language in Beck May Indicate the Court's Consideration of Justice Scalia's Argument Not to Differentiate Between Skidmore and Chevron.

The fact that the PBGC's interpretation of ERISA was expressed through an amicus brief cannot be overemphasized. If the PBGC had instead expressed its views through formal rulemaking procedure, the Court's application of *Chevron* here would have been completely predictable. But the emphasis of the Court's opinion in *Mead* was that not all agency interpretations merit the same level of deference.¹²⁹ Consequently, the Court's imposition of *Chevron* here may indicate the abandonment of *Mead* and consistent application of *Chevron* deference to agency interpretations regardless of their form.¹³⁰

In attempting to assess the significance of the Court's decision in *Beck*, it is helpful to take a closer look of the views of Justice Scalia—*Beck's* author—on judicial deference to agency interpretations of their own statutes. In a speech at Duke Law School, Justice Scalia remarked: “It is not immediately apparent why a court should ever accept the judgment of an executive agency on a

128. The Court's language suggests that it would. See *supra* notes 116-18 and accompanying text.

129. *Mead*, 533 U.S. 218. As one scholar recently summarized the importance of the form of an agency's interpretation:

[I]n *Mead* the Court made clear that it is only when the agency actually employs its delegated authority to make a legal determination that it will be accorded *Chevron* deference Failure to exercise delegated authority to interpret in a format having the force of law leaves the agency with nothing except its executive power upon which to assert that its decision warrants deference. But *Christensen*, *Mead*, and *Alaska Department of Environmental Conservation* make it clear that such interpretations warrant only *Skidmore-Christensen* persuasive deference.

John H. Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 *FORDHAM L. REV.* 1103, 1196 (2004).

130. *Mead*, 533 U.S. 218 (Scalia, J., dissenting).

question of law.”¹³¹ He further explained, “to say that . . . [agency] views, if at least reasonable, will ever be *binding*—that is, seemingly, a striking abdication of judicial responsibility.”¹³² Justice Scalia emphasized that the courts do not defer because of their inability to make policy decisions:

Only when the court concludes that the policy furthered by *neither* textually possible interpretation will be clearly “better” (in the sense of achieving what Congress apparently wished to achieve) will it, pursuant to *Chevron*, yield to the agency’s choice. But the reason it yields is assuredly *not* that it has no constitutional competence to consider and evaluate policy.¹³³

Yet, Justice Scalia continued to quickly confirm his agreement with the *Chevron* decision, discussing the various legal foundations for the rule of deference.¹³⁴

131. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 989 DUKE L.J. 511, 513 (1989).

132. *Id.* at 514.

133. *Id.* at 515.

134. *Id.* Scalia first acknowledges that while the “expertise” of agencies is an attractive reason to give deference to their interpretations, it is not in and of itself a foundation or “valid theoretical justification” for doing so. *Id.* at 514. In addition, Justice Scalia states that deference is appropriate based on the constitutional principle of the separation of powers. *Id.* He summarizes the theory as follows:

When, in a statute to be implemented by an executive agency, Congress leaves an ambiguity that cannot be resolved by text or legislative history, the “traditional tools of statutory construction,” the resolution of that ambiguity necessarily involves policy judgment. Under our democratic system, policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it must be answered by the Executive.

Id. at 515. After acknowledging his “fond[ness] . . . of the separation of powers,” he states that he cannot agree with the majority’s approach to judicial deference. *Id.* He then gives the theory which he adopts—essentially that deference is appropriate because that is what Congress intended. *Id.* at 516. He acknowledges the line of pre-*Chevron* cases that acknowledge two possible intentions of Congress whenever there is an ambiguity in a statute: “(1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the

Scalia concluded that under *Chevron*, agency discretion is presumed and merits deference whenever Congress leaves an area of a law ambiguous because it is assumed that "Congress . . . meant to leave its resolution to the agency."¹³⁵ He then expounded on some of the positive impacts of *Chevron*, focusing on the opinion's allowance of agencies and courts to "ungrudgingly" accept changes to agency interpretations.¹³⁶ Additionally, Scalia pointed out the potential of the *Chevron* opinion to decrease the significance placed on the form of an agency's opinion is acknowledged—even to the extent of applying deference to agency interpretations first presented in the context of litigation.¹³⁷ Scalia points out that one's personal reaction

subject, but meant to leave its resolution to the agency." *Id.* Pre-*Chevron*, courts would consider agency's expertise, the complexity of the question presented, and the extent of the agency's rulemaking authority to determine if Congress intended the first or second alternative described. *Id.* As Scalia read the *Chevron* opinion, the result of *Chevron* was that all ambiguities are presumed to mean that Congress intended agency discretion. *Id.*

135. *Id.* Justice Scalia did not defend the presumption of congressional intent in *Chevron*, stating that it was beyond the scope of his lecture. *Id.* However, he did point out that "the quest for 'genuine' legislative intent [was] probably a wild-goose chase anyway." *Id.* He reasoned that in most cases "Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all." *Id.* at 517. He then argued that *Chevron* was sufficient for establishing a predictable process for the filling-in of legislative ambiguities. *Id.*

136. *Id.* at 518. Justice Scalia points out that one of the greatest advantages of *Chevron* from a political theory perspective is that it does not consider the length and consistency of the agency's view in considering what deference should be given. In turn this allows the agency greater flexibility to amend its interpretation when necessary to better serve the purpose of the statute and needs of the public. *Id.* In contrast, when a court makes an interpretation, only legislation can change it, unless the Court overrules its own interpretation—an act avoided whenever possible for purposes of *res judicata*. *Id.*

137. Scalia, *supra* note 134. In Scalia's words:

A position formulated not in the agency's adjudication process, nor in rulemaking, but in a brief to a court, does not seem like the last stage of an "expert" search for the truth. Once it is accepted, however, that there are various "right" answers, and that policy and indeed even political considerations (in the nonpartisan sense) can legitimately affect which one the agency may choose, then it seems less important whether the choice is made through rulemaking and adjudication, or rather through a formal presentation of the agency's position in court [If in the

to *Chevron* is often attributed to how often one finds statutes ambiguous, and consequently, how often one believes *Chevron* must be applied.¹³⁸ Justice Scalia concluded that it would likely take time for the full meaning of *Chevron* to be explored and understood by the courts, but expressed his belief that *Chevron* would endure. This was, in part, because *Chevron* was easier to follow than prior case law, but primarily because it “more accurately reflect[ed] the reality of government, and thus more adequately serve[d] its needs.”¹³⁹

While Justice Scalia’s comments are clearly the result of careful analysis and consideration, he made one comment that appears incongruent—a Court will only yield to an agency interpretation under *Chevron* when neither statutory interpretation is “better.” This seems at odds, both with the ruling in *Chevron* and his statement that when *Chevron* deference is due, Courts should only consider whether the agency has acted within the scope of its discretion.¹⁴⁰ It is important to acknowledge that by “better” Scalia meant “in the sense

context of litigation] the matter at issue is one for which the agency has responsibility, if all requisite procedures have been complied with, and if there is no doubt that the position urged has full and considered approval of the agency head, it is far from self-evident that the agency’s views should be denied their accustomed force simply because they are first presented in the prosecution of a lawsuit.

Id.

138. *Id.* Justice Scalia argues that strict-constructionists generally favor *Chevron* more than those who are more likely to find the meaning of statutes ambiguous. *See id.* at 521. The reason is that a strict constructionist will usually find the meaning of a statute clear on its face, and often will not be bound by an agency’s “reasonable” interpretation because the second prong of *Chevron* will rarely be reached. *Id.* In contrast, if a person finds statutes ambiguous, they will often find the first prong of *Chevron* satisfied, meaning they will have to accept “reasonable” interpretations of agencies with which they do not agree more often. *See Id.*

139. *Id.* at 521.

140. Scalia, *supra* note 134, at 515. It is difficult to reconcile Justice Scalia’s two statements, because under a true reasonableness test, the Court would not be concerned about whether there was another interpretation that was “better” than that chosen by the agency. Rather, the Court would limit itself to deciding if the agency’s interpretation itself was within the scope of its discretion and not contrary to law. As the Court itself said in *Chevron*, an agency’s interpretation can be reasonable when it is not the only permissible construction, and even when the court would have reached a different conclusion itself. *See supra* notes 37-38.

of achieving what Congress apparently wished to achieve.”¹⁴¹ Considering this definition of “better,” Scalia’s comment may be reconciled by attributing it to the analysis required by prong one of *Chevron*—if it was apparent what Congress wanted (if a “best” interpretation is clear), then there would be no room for agency discretion. This statement, however, still seems to indicate that *Chevron* part two will likely be applied in rare circumstances, as the “better” intent of Congress may often be apparent.¹⁴²

It is evident Justice Scalia, along with his eight fellow Supreme Court Justices, respect the Court’s decision in *Chevron* and support its holding.¹⁴³ However, Justice Scalia was the sole dissenting voice in the Court’s more recent *Mead* opinion, arguing that the Court should apply *Chevron* deference or nothing, rather than resurrect *Skidmore*.¹⁴⁴ Justice Scalia’s dissent laid several complaints against the *Mead* majority opinion, including that the opinion would: (1) lead to irrational results by according deference based on the *form* of the agencies decision;¹⁴⁵ (2) confuse lower courts and litigants with an uncertain and unpredictable test;¹⁴⁶ (3) “artificially” increase informal rulemaking as agencies maneuver to protect their

141. Scalia, *supra* note 134, at 515.

142. *See supra* notes 134-37 and accompanying text.

143. *See generally Beck*, 127 S. Ct. 2310.

144. *Mead*, 533 U.S. at 236-43; *see also supra* notes 57-58 and accompanying text. Scalia did not give his dissent light-heartedly. *Mead*, 533 U.S. at 236-43. He characterized the *Mead* majority opinion as “aversive.” *Mead*, 533 U.S. at 241 (Scalia, J., dissenting). He further described the majority opinion, stating, “The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): the whole ‘totality of the circumstances’ test.” *Id.*

145. *Mead*, 533 U.S. 218. Justice Scalia illustrates this point by listing examples of situations where decisions are “required to be made personally by a Cabinet Secretary, without any prescribed procedures.” *Mead*, 533 U.S. at 244 (Scalia, J., dissenting). He continues to note that under the majority’s view, these decisions will not be given any deference. *Id.* However, the opinions of an administrative law judge would be accorded deference, which Justice Scalia characterizes as “absurd, and not at all in accord with any plausible actual intent of Congress.” *Id.* at 245.

146. *Mead*, 533 U.S. 218. Scalia emphasized the ambiguity in the Court’s guidance that *Chevron* deference only be accorded to an “interpretation represent[ing] the authoritative position of the agency.” *Id.* at 246.

opinions;¹⁴⁷ and (4) prevent flexibility in statutory interpretation.¹⁴⁸ As the foundation of his argument, Justice Scalia appears to have reasoned that the form of an agency's statutory interpretation is distinct from whether or not the agency has the power to interpret the statute in the first place.¹⁴⁹ Accepting this view, it is logical that *Chevron* is the only standard required, and that the agency's power—

147. *Mead*, 533 U.S. 218. Scalia's argument that agencies would go through the process of informal rulemaking solely to ensure their interpretations are accorded deference is reasonable. Whether or not agencies actually responded in this way is unclear and unlikely (it would be a rather vain pursuit to try and identify all potentially vague phrases in a statute and clarify them all completely). But the point is well-made: distinguishing between agency opinions based on their form is placing undue significance on technicalities. Scalia's apparent frustration is seen in his presumptively sarcastic statement: "Buy stock in the GPO." *Id.* at 246.

148. See generally *Mead*, 533 U.S. 218. Scalia's concern that the *Mead* decision would prevent flexibility in statutory interpretation is well-founded, because "[o]nce the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed." *Id.* at 241. Because the Court is making its own independent interpretation of an ambiguous term under *Skidmore* (considering the agency's views, but not *deferring* to it) it is establishing its interpretation as precedent. In contrast, under *Chevron* the Court does not itself define the term or conclude that the agency's present interpretation is the best and only interpretation—it is simply confirming that the agency's present interpretation is reasonable. See *Chevron*, 467 U.S. at 853-59. In *Chevron* itself, the Court acknowledged this flexibility, holding that "the Environmental Protection Agency can interpret 'stationary source' to mean a single smokestack, can later replace that interpretation with the 'bubble concept' embracing an entire plant, and if that proves undesirable can return again." *Mead*, 533 U.S. at 247 (citing *Chevron*, 467 U.S. at 853-59).

149. *Mead*, 533 U.S. at 244 (Scalia, J., dissenting). In Scalia's words: "There is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law." *Id.* at 243. An important question is "what happens when an ambiguity in a statute first comes to light before the Court?" At that point, it would be too late for the agency to issue a formal interpretation—does that mean the Court will interpret the statute? According to the majority, this is the result, as the majority only gives deference when the agency has congressional authority to act through formal procedures and *does in fact employ such procedures*. *Id.* at 243 (emphasis added). This irrational result hardly seems in line with purposes of *Chevron* or congressional intent. For example, in *Beck*, the PBGC had not specifically issued any rules interpreting ERISA to clarify if merger was a form of termination. Applying Scalia's reasoning, the fact that the PBGC's opinion was consequently embodied in an amicus curiae brief should not bar application of *Chevron*.

and not the form of its interpretation—should be the sole focus of a reviewing court's inquiry.

A closer reading of *Mead* strongly suggests that Justice Scalia approved *Chevron* deference to an agency's statutory interpretation even when presented in a litigation brief.¹⁵⁰ In response to Justice Scalia's dissent in *Mead*, the majority first acknowledged Justice Scalia's proposal that *Chevron* deference should be applied to all "authoritative" agency interpretations.¹⁵¹ The majority pointed to what they believed to be a flaw in Justice Scalia's proposal: that applied to the facts at hand, Scalia's "authoritativeness" guide would lead to *Chevron* deference being denied to the Customs' ruling.¹⁵² The majority reasoned that because the Commissioner of Customs was the "highest level" at the agency, the Secretary's classification did not constitute the agency's "authoritative" position.¹⁵³ Consequently, if Justice Scalia had insisted on deferring to Customs' interpretation under the facts in *Mead*, he would under his own standard be giving deference to the Commissioner's "official" position as presented in his brief.¹⁵⁴ The majority found this unacceptable.¹⁵⁵ Justice Scalia vehemently defended his position, confirming the fact that "the General Counsel of the agency and the Solicitor General of the United States [had] assured [the] Court that the position represents the agency's authoritative view;" therefore, it should have entitled the Custom's ruling to deference by the Supreme Court, even if deference may not have been proper in the lower courts, prior to the involvement of the General Counsel and Solicitor

150. *See id.* at 259.

151. *See id.* at 258. An agency interpretation is authoritative if it "expresses the 'judgment of central agency management, approved at the highest levels.'" *Id.* at 238.

152. *Id.*

153. *Id.*

154. *Mead*, 533 U.S. at 238 (Scalia, J., dissenting).

155. *Id.* The fact that the majority finds Justice Scalia's position of giving deference to Custom's "authoritative" litigation position indicates that the majority does not fully understand the distinct line of reason Justice Scalia proposed. *Id.* Even under Justice Scalia's "authoritative" standard, deference could not be given to an official agency litigating position. This shows the majority's unwillingness to look past the form of the agency's opinion. *See id.*

General.¹⁵⁶ Thus, an agency's official position presented in litigation would have been within in the purview of *Chevron* deference as applied by Justice Scalia.¹⁵⁷

Scalia's feelings toward *Mead* and his authorship of the Court's opinion in *Beck* strongly support the conclusion that the Court applied *Chevron* deference in reaching its conclusion in *Beck*.¹⁵⁸ Accepting that the Court did apply *Chevron* in *Beck*, it becomes unfeasible to reconcile *Beck* with a continued application of *Mead*.¹⁵⁹ Courts may soon be acknowledging that *Mead* has been overruled, quite possibly to be replaced by the "authoritativeness" approach proposed by Justice Scalia in his *Mead* dissent.¹⁶⁰ Because the Court was not overt in its application of *Chevron*, it is possible that the significance of *Beck* may be overlooked for a period of time. It is

156. *Id.* at 258. Justice Scalia acknowledges the majority's attack on his conclusion that *Chevron* deference was appropriate to Customs by the Court at this stage in the litigation process, when *Chevron* deference may not have been appropriate in the lower Court's due to the absence of an "authoritative" position. *Id.* Justice Scalia states:

Contrary to the Court's suggestion, there would be nothing bizarre about the fact that this latter approach would entitle the ruling to deference here, though it would not have been entitled to deference in the lower courts. Affirmation of the official agency position before this court—if that is thought necessary—is no different from the agency's issuing a new rule after the Court of Appeals determination. It establishes a new legal basis for the decision, which this Court must take into account (or remand for that purpose), even though the Court of Appeals could not.

Id. at 259.

157. Justice Scalia acknowledges that "[t]he *authoritativeness* of the agency ruling may not be a bright-line standard" but asserts that it is "infinitely brighter" than the line the majority asks. *Id.* He clarifies that the "authoritativeness" line focuses on the question of "whether [that agency's challenged interpretation] is truly the agency's considered view, or just the opinions of some underlings, that are at issue." *Id.*

158. The language used in *Beck* further supports the conclusion that *Chevron* was applied. See *supra* notes 116-18 and accompanying text.

159. *Mead*, 533 U.S. at 238. The *Mead* majority balked at the idea of according *Chevron* deference to an agency litigation position. *Id.* In fact, the Court's unwillingness to give deference to the Secretary's position *because* it was embodied in a brief for the purpose of the litigation was "why the Court [did] not [accept] Justice Scalia's position." *Id.*

160. *Id.* at 247; see also *supra* note 146.

impractical to deny that *Mead* is on unstable ground, or fail to acknowledge that Scalia's campaign to disregard the form of agency interpretations and instead focus on the "authoritativeness" of the interpretation has gained significant ground in *Beck*.

One obstacle in determining *Beck*'s impact is that the facts in *Beck* did not present a "close call" between the interpretations of the agency and the party challenging the agency's interpretation. The Court itself stated that the PBGC's interpretation was the better interpretation, implying that the Court would have adopted the PBGC's views even applying *Skidmore*.¹⁶¹ Consequently, the Court's application of *Chevron* language to the PBGC's interpretation of ERISA is not immediately striking as a display of unusually heightened deference.

While many attributes of the *Beck* opinion indicate that the Court was applying *Chevron* deference to the PBGC's interpretation, the Court's concluding statement implies that the Court is not simply deferring to the PBGC, but rather has concluded on its own authority that merger is not a form of termination.¹⁶² However, language structurally similar to that used in *Beck* has been used when the Court was applying *Chevron*, and establishing that the language used to state the Court's holding is not dispositive for determining the

161. *Beck*, 127 S. Ct. at 2320-21.

162. The Court clearly stated its holding: "We hold that merger is not a permissible method of terminating a single-employer defined-benefit pension plan." *Id.* at 2321. Compare this language to the Court's holding in *Chevron*: "We hold that the EPA's definition of the term 'source' is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth." *Chevron*, 467 U.S. at 866. Compare with *Brotherhood of Locomotive Engineers* (not applying *Chevron*): "The text, structure, and purposes of the statute persuade us that Congress intended that time spent waiting for deadhead transportation form a duty site should be limbo time." *Bhd. of Locomotive Eng'rs*, 516 U.S. 152, 162 (1996). Compare *Pension Benefit Guar. Corp.*: "We conclude that the PBGC's anti-follow-on-policy, an asserted basis for the restoration decision, is not contrary to clear congressional intent and is based on a permissible construction of § 4047." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 656 (1990). The Court held in *Mead*: "We hold that § 4044(a)(6) does not create benefit entitlements but simply provides for the orderly distribution of plan assets required by the terms of a defined benefit plan or other provisions of ERISA." *Tilley*, 490 U.S. at 725.

Court's level of deference.¹⁶³ Considering the *Beck* opinion as a whole, it certainly appears more likely than not (despite the ambiguities) that the Court was applying *Chevron*. Thus, the *Beck* opinion highlights the need for greater clarity within the law of judicial deference.

*C. The Court's Opinion in Beck Places the Burden of
Persuasion on Any Party Opposing the PBGC's
Interpretation of ERISA*

There is a strong argument that *Beck* represents the Court's decision to place the burden of persuasion on any party that opposes an agency's interpretation of its own statute. Rather than an even-handed argument where the Court considers each side's legal arguments without bias, the Court arguably has established that there is something akin to a rebuttable presumption that an agency's interpretation of its own statute is reasonable and correct—even if it is only expressed in the context of litigation.¹⁶⁴ If this is in fact the result of *Beck*, the case will be known and cited continually—not for cases involving termination of ERISA benefit plans, but for establishing agency authority in all areas of administrative law.

This presumption in favor of an agency's own interpretation is acknowledged and encouraged by the judiciary, but generally only where the agency gave their interpretation formally, and generally prior to the commencement of litigation. In contrast, the PBGC did

163. See *supra* notes 116-17. The Court's holding in *Mead* is almost identical in structure to the Court's holding in *Beck*. Because the Court clearly applied *Chevron* in *Mead*, the Court's language in *Beck* should not be viewed as a persuasive indicator that *Chevron* was not applied. *Tilley*, 490 U.S. at 722 (citing *Chevron*, 467 U.S. at 837, 842-43).

164. The Court's statement that "PACE has 'failed to persuade us that the PBGC's views are unreasonable,'" is supportive of this proposition, making it appear that any party opposing an agency's interpretation of its statute bears the burden of proof and will lose in a fifty/fifty case. *Beck*, 121 S. Ct. at 2318 (citing *Tilley*, 490 U.S. at 725). Further, if the Court did in fact apply *Chevron* in *Beck*—and there is a strong argument it did—then no litigant challenging the "authoritative" position of an agency can prevail unless they can show that the interpretation fails *Chevron* as unreasonable. This is a much steeper burden than proving that, while the agency's interpretation may be reasonable or permissible, there is a "better" alternative.

not “weigh in” with its opinion in *Beck* until aroused by the bankruptcy court’s opinion accepting merger as a form of termination. While some may agree with the agency’s influence in *Beck*, stronger arguments can be made in support of the Court’s deference to the PBGC.¹⁶⁵

It is difficult—if not impossible—to blame an agency for not having the foresight to promulgate rules interpreting a portion of its statute it did not find ambiguous in the first place. To cast this blame would be to expect agencies to spend their time scouring their enabling statutes for any trace of ambiguity, just so they could promulgate official interpretations to ensure their opinions merit *Chevron* deference—which is unreasonable and arguably a poor use of always scarce government funds. Consider the specific facts in *Beck*.¹⁶⁶ The PBGC apparently had no interest in clarifying whether merger was a form of termination under ERISA prior to the issue being raised by PACE in bankruptcy court.¹⁶⁷ But once the issue was raised, the PBGC had a tremendous interest in ensuring its interpretation was not only acknowledged, but given deference. Because the American judicial system survives on the doctrine of *res judicata*, a contrary judicial interpretation of a statute would be binding on the agency and all future litigants until overturned by the courts.¹⁶⁸

165. At first glance, the idea of agencies essentially having a trump card to have their interpretation of a statute prevail even when that opinion is first expressed in the context of litigation may seem offensive to notions of fair play and too great an abdication of judicial authority. It is important to remember that agencies are experts in their fields and often have greater knowledge of the potential impact of different statutory interpretations on substantive law and society. More importantly, when the Court gives deference to an agency interpretation, that agency retains the ability to later modify their interpretation. This is a good thing in ambiguous areas of the law that may need to be tailor fitted to society’s needs in the moment. Further, it allows citizens unsatisfied with the agency’s decision, to put political pressure on the Executive to change the interpretation. In contrast, once the courts weigh in, the legal interpretation is locked in by the doctrine of *res judicata* and can only be modified through further legislation or a change in the courts jurisprudence—something to be strongly avoided.

166. *Mead*, 533 U.S. at 246 (Scalia, J., dissenting).

167. *See id.*

168. *See id.* at 239-61.

D. Three Proposed Solutions to the Confusion Surrounding Judicial Deference

The *Beck* opinion illustrates the confusion surrounding judicial deference, but does nothing to help solve the problem. At least three potential solutions are available to solve the problem of deference now facing the Court. First, Congress could pass legislation requiring the Court to review administrative rules and interpretations *de novo*. This suggestion was a hot topic in Congress several decades ago, but has now fallen by the wayside.¹⁶⁹ While this suggestion would certainly clarify the law, the benefits provided by increased clarity would be unable to counter the negative impact of requiring courts to review *de novo* complex areas of the law where agencies—as experts in their field—are better equipped to ensure a fair interpretation.¹⁷⁰ Additionally, requiring the courts to apply *de novo* review would likely increase litigation, as parties unhappy with agency interpretations experience increased hope that their challenge to the agency interpretation may prevail.¹⁷¹

Second, the Court could reaffirm *Mead* and establish a pattern of consistent application. This would require courts to clearly state and

169. WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 339 (4th ed. 2003). During the 97th Congress, Senator Bumpers introduced a bill that would have directed a court reviewing an agency action to: (1) determine the authority or jurisdiction of the agency on the basis of the language of the authorizing statute or other evidence of legislative intent; (2) accord no presumption in favor of or against agency action, but to give an agency's interpretation of a statutory provision such weight as it warrants; and (3) determine whether the factual basis of an agency rule has substantial support in the rulemaking file. *Id.* However, the bill did not survive, and the passage of legislation in this area is no longer a Congressional focus. *Id.*

170. Consider the complex decisions made by agencies such as the Environmental Protection Agency. If *de novo* review is required, the disputes raised by these controversies would demand a great deal of the Court's time.

171. This prediction is not empirical evidence, but is reasonable. To say that a statute is ambiguous in the first place is to say that it is capable of being interpreted in more than one way. When potential litigants know that there is a strong presumption in favor of the agency's interpretation, they will naturally be less likely to litigate a dispute "close to the line," and will be motivated to resort to the courts only if they believe they can demonstrate the agency's interpretation is unreasonable. In contrast, if there is no presumption in favor of the agency, there will be a much greater incentive for litigants of disputes with strong arguments on both sides to take their controversy to the courts.

explain the level of review being applied in cases such as *Beck*.¹⁷² The majority in *Mead* was confident they reached the right conclusion in holding that *Chevron* should only apply when Congress clearly delegated authority to an agency to interpret its statute, and the agency interpretation claiming deference was promulgated in the exercise of that authority.¹⁷³ However, cases applying *Mead* demonstrate that lower courts and even the Supreme Court have struggled to apply *Mead*'s standard.¹⁷⁴

Third, the Court could adopt Justice Scalia's opinion and consistently apply *Chevron* deference to "authoritative" agency positions.¹⁷⁵ While Justice Scalia himself acknowledges that this alternative does not provide a "bright line" test, Justice Scalia's approach has the potential to provide courts with greater clarity while at the same time reaching more logical results.¹⁷⁶ *Beck* is likely an indication that the majority is quickly moving in the direction of adopting Justice Scalia's "authoritativeness" test.¹⁷⁷ This movement of the Court, while it may create confusion in the moment, is likely the right direction—toward a more consistent and more rational application of the law of deference.

VI. SOCIETAL IMPACT

Beck's most immediate societal impact is on companies providing single-employer defined benefit plans to their employees. By clearly establishing that companies do not have to consider merger when deciding how to implement their decision to terminate a plan, the Court reaffirmed that decisions to merge or terminate plans are business decisions not subject to ERISA fiduciary duty

172. If the Court is going to apply *Mead* it needs to provide the lower courts with as much guidance as possible, by setting strong examples of when to apply *Chevron* as opposed to *Skidmore* and vice versa. Simplicity cannot always be the priority of the Court, but when the Court itself acknowledges that what it is providing is not a "bright-line" test, it must be cautious not to blur the line any more than necessary.

173. *Mead*, 533 U.S. 218.

174. *See id.*

175. *See id.* at 259.

176. *Id.*

177. *Id.*

requirements.¹⁷⁸ There are several reasons to support the notion that termination of a single-employer plan through the purchase of annuities is superior to merger.¹⁷⁹ In *Beck*, these reasons are specifically applicable.¹⁸⁰ It is possible to imagine a situation where public policy might support requiring a company to consider merger along with termination—i.e. in a situation where plan participants could continue to work and accrue benefits in the merged plan.¹⁸¹ But even if it were true that on some occasions it would be in the best of interests of the plan participants to merge the plan instead of terminate it, requiring an employer to consider this option would be a heavy burden.¹⁸² Consequently, it appears the Court in *Beck* did reach the best conclusion possible when considering the decision's immediate impact.¹⁸³

While *Beck*'s impact on ERISA fiduciary law is clear and immediate, its impact on administrative law and judicial deference is much less clear, although potentially much greater in scope. As discussed for its legal significance, it appears that the Court may be moving toward adopting Scalia's proposal to apply *Chevron* deference to all authoritative agency interpretations.¹⁸⁴ If this is the case, *Beck* will certainly impact society by setting new parameters for judicial deference to agency interpretations, which will in turn impact litigation between private entities and government agencies.¹⁸⁵

178. *Beck*, 127 S. Ct. at 2316.

179. *See id.* Many argue that plan assets are more secure in an annuity than merged with a multi-employer plan.

180. *See Beck*, 127 S. Ct. 2310.

181. In *Beck*, Crown was in bankruptcy and all employees and plan participants were no longer able to continue their employment with Crown. *See id.* at 2314-15. Consequently, even if Crown had selected merger, it is unlikely that the participants of the original plan could have been able to continue contributing to the merged plan. *See id.* However, if Crown was continuing to employ their plan participants, who could then contribute and enjoy the benefits of the multi-employer plan, merger might have been better for the employees than plan termination. A merger would allow the participants to continue to accrue benefits.

182. *See id.* Remember that with a merger, ERISA continues to apply. With termination, however, ERISA no longer covers the plan, and the employer no longer is subject to ERISA's fiduciary requirements.

183. *See Mead*, 533 U.S. at 258.

184. *See id.*; *see also* notes 57-58 and accompanying text.

185. *See generally* note 178 and accompanying text.

VII. CONCLUSION

In conclusion, the Court's opinion in *Beck* is notable for two separate reasons: (1) for confirming that merger is not a termination under ERISA meriting fiduciary consideration,¹⁸⁶ and (2) for highlighting the ambiguity surrounding the level of judicial deference owed to an agency in interpreting that agency's own enabling statutes and signaling a potentially considerable change in the Court's deference jurisprudence.¹⁸⁷ Most significant is the Court's shift in its deference jurisprudence, indicating consideration (if not adoption) of Justice Scalia's "authoritative" standard for applying *Chevron* as expressed in his dissenting opinion in *Mead*.¹⁸⁸ The next few years will demonstrate if the Court is willing to continue on its broad deferential path, especially when faced with cases consisting of facts more challenging to the application of *Chevron* than those in *Beck*.

186. *Beck*, 127 S. Ct. at 2324.

187. *See id.*

188. *See Mead*, 533 U.S. at 258.

