

## **The Future of Deference to Healthcare Sub-Regulatory Guidance Under *Kisor v. Wilkie***

In *Kisor v. Wilkie*, a divided Supreme Court upheld the doctrine, first announced in *Bowles v. Seminole Rock & Sand Co* and later upheld in *Auer v. Robbins*, that directs federal courts to defer to an agency's reasonable interpretation of its own regulations when resolving ambiguities in the meaning of those regulations. This article assesses the implications of that decision for the practice of healthcare law in the administrative law and regulatory areas. Justice Kagan's majority opinion lays out a complex checklist of threshold factors that courts must examine to determine the appropriate approach for addressing issues concerning potential ambiguities in regulations. Her opinion raises the question of whether *Auer/Seminole Rock* deference has now been refashioned to be equivalent to its putative competitor—the doctrine announced in *Skidmore v. Swift & Co* that courts must review agency interpretations of regulatory ambiguities but defer to them only to the extent the soundness of such interpretations has persuasive authority. As a result of *Kisor*, the force and effect of sub-regulatory guidance issued by health care agencies may be more precarious and subject to challenge. At the same time, regulatory agencies may react to such developments by altering the form and procedures used to issue regulatory interpretations and may even pull back from their reliance on sub-regulatory guidance as a policy tool. Health care attorneys should stay abreast of how federal courts interpret and apply *Kisor* due to the opportunities and challenges it may introduce for efficacious legal representation and advocacy.

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