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Supreme Court's Remand of FDIC Enforcement Action: Any Larger Impact on Agency Deference?

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While we wait for the U.S. Supreme Court to decide the fate of the *Chevron* doctrine governing courts' deference to agencies' interpretations of law, its recent decision in another case has flown under the radar. In *Calcutt, III v. FDIC*, 598 U.S. ____ (2023), decided on May 22, 2023, the Court broke little new ground, but sent a reminder that even the elimination of *Chevron* deference would not spell the end of agency discretion in enforcement actions within the financial industry and elsewhere.

In *Calcutt*, the FDIC brought an enforcement action against a former CEO of a community bank, alleging that he mismanaged a series of loans to one entity that went bad during the Great Recession, by failing to comply with the Bank's internal loan policy or to accurately respond to the FDIC's inquiries about the transaction. The FDIC Administrative Law Judge (ALJ) recommended that the former CEO be barred from the banking industry and assessed a \$125,000 civil penalty. The former CEO appealed the decision to the FDIC's Board, which agreed with the ALJ's penalties. The former CEO then appealed the decision to the Sixth Circuit.

A key issue before the Sixth Circuit was whether imposition of the penalties against the former CEO required showing that his actions were the proximate cause of the bank's or its depositors' harm. While the FDIC Board had concluded that a showing of proximate cause was not needed, the Sixth Circuit disagreed, holding that a showing of proximate cause was required. Nonetheless, the Sixth Circuit concluded that the record included enough evidence of probable cause to support the Board's decision, and affirmed on that basis.

The Supreme Court reversed. As it explained, a "fundamental rule of administrative law" provides that a court can only uphold a federal agency's order on the same ground on which the agency itself relied. If the agency's legal analysis was wrong, the matter should be remanded to the agency—here, the FDIC Board—to reconsider the matter under the correct rule. The Court further observed that because decisions regarding sanctions are discretionary, as well as "highly fact-specific and contextual," reviewing courts should allow them the "flexibility" to make their own decisions based on the facts and the correct legal standard. The Court thus ordered the Sixth Circuit to remand the case to the FDIC Board for further proceedings.

Ultimately, the decision is a mixed bag for executive agency authority, whether in the financial regulatory sphere or elsewhere. On the one hand, it has made it more difficult for courts to affirm agency decisions

that contain legal errors but that the courts may still deem defensible. On the other, it has reaffirmed agencies' authority in adjudicating regulatory disputes based on their view of the facts, which is often more important than abstract legal principles in determining the outcome of agency enforcement actions. Thus, even if and when *Chevron* falls, agency enforcement discretion will remain considerable, and disputes about the limits of that discretion will live on.

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