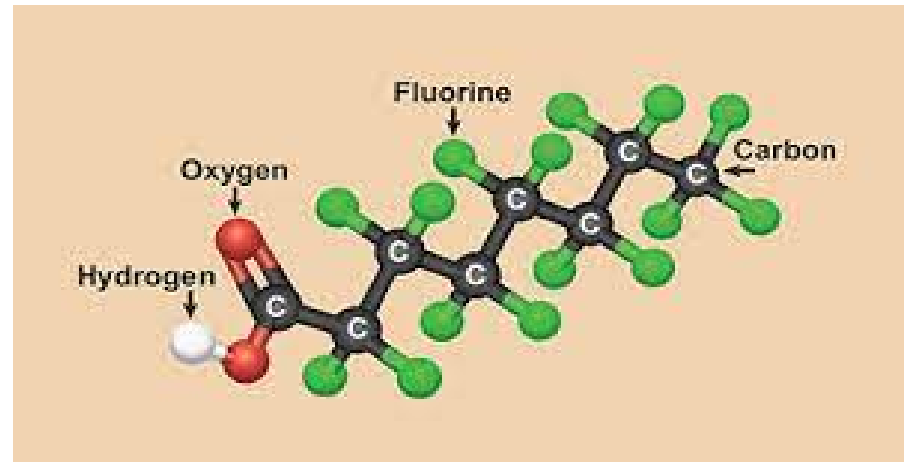
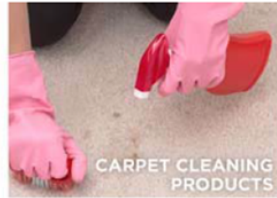
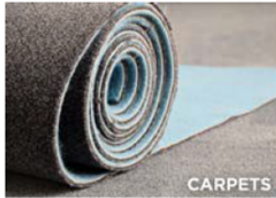


PFAS Chemicals (a/k/a “Forever Chemicals”)

- Per- and Polyfluoroalkyl Substances (15,000+)
 - PFOA
 - Perfluorooctanoic Acid
 - PFOS
 - Perfluorooctane Sulfonate



PFAS - Uses



Credit: www.sixclasses.org

PFAS – Potential Health Risks

- Human health concerns
 - Thyroid disease and disorders
 - Pregnancy related issues (preclampsia)
 - Kidney cancer
 - Testicular cancer
 - Ulcerative colitis
 - High cholesterol
- Toxic at low concentrations (parts per trillion)
- Bioaccumulation

PFAS Challenges

- Very low levels – Measured in parts per trillion (ppt)
1 ppt =
 - 1 drop of water in 20 olympic-sized swimming pools
 - 1 inch in 16 million miles (600+ times around the Earth)
 - 1 second in 32,000 years
- PFAS omnipresent (PFAS in rain)
- Testing Methods - Laboratory capability and capacity
- Treatment and Disposal challenges

PFAS Regulation - Reporting

- US EPA has identified PFAS as an Enforcement Priority
- PFAS Reporting Rule under TSCA
 - Any manufacturer or importer of PFAS containing articles since 2011
 - Report uses, quantities, disposal, exposures and hazards
 - Due May 2025 (or Nov 2025 for certain small businesses)
- Toxics Release Inventory (TRI) Reporting
 - Annual reporting, due July 1 every year

PFAS Regulation – Drinking Water

- Drinking Water Standards
 - First-time enforceable limits established April 2024
 - PFOA and PFOS – 4.0 ppt
 - Certain other PFAS – 10.0 ppt
 - Initial monitoring – by 2027
 - Meet limits – by 2029
 - More stringent than PA DEP’s limits (set in 2023 @ 14 ppt for PFOA and 18 ppt for PFOS)

PFAS Regulation – Hazardous Substance

- Designated CERCLA Hazardous Substance – April 2024
 - Just PFOA and PFOS
 - CERCLA (Superfund)
 - Retroactive joint and several liability
 - Triggers: Release Reporting and Site Cleanup/Liability
 - EPA enforcement discretion policy (April 2024)
 - Drinking water systems, sewer systems and POTWs, landfills, airports, farms

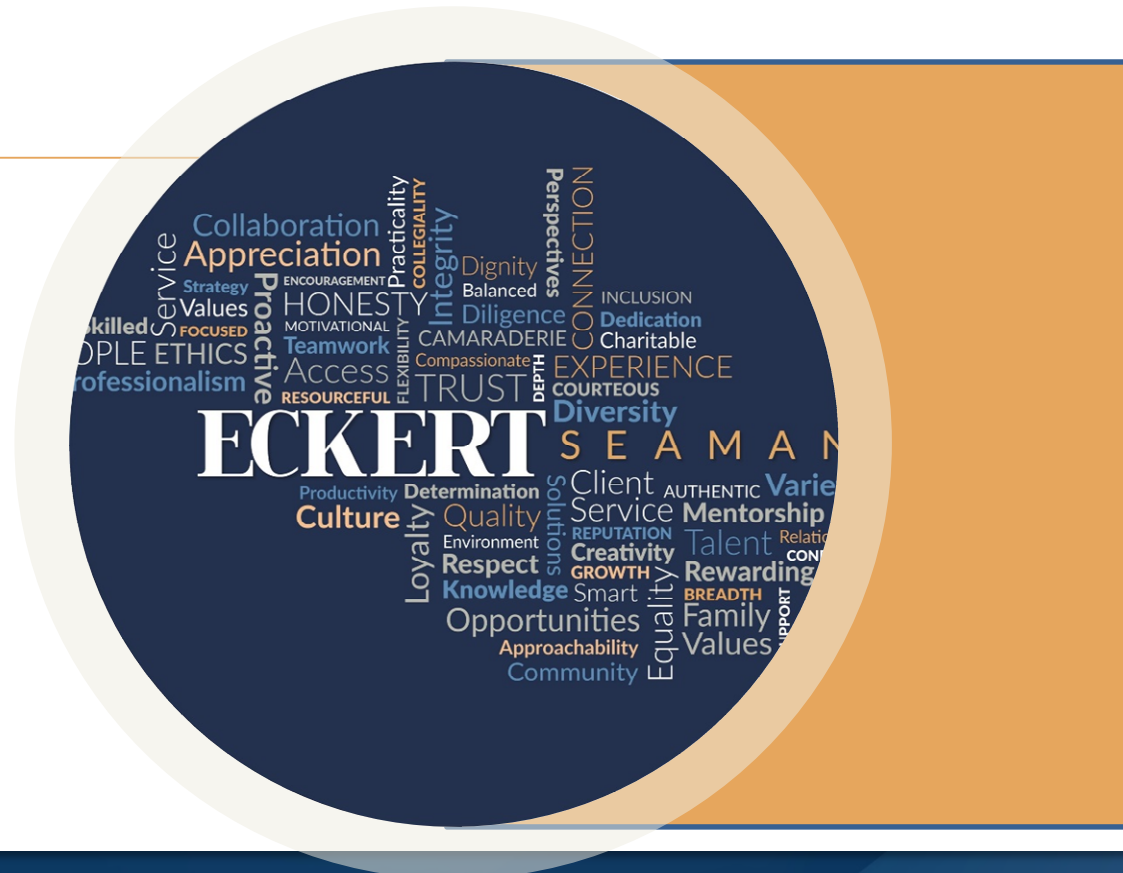
PFAS Litigation

- Initially, drinking water providers
 - consolidated in D.S.C.
 - Resulted in \$1.2 Billion DuPont settlement
- Second wave – personal injury
 - Firefighters – foam exposure and firefighting gear
- Next
 - Against manufacturers with PFAS containing products
 - Against retailers selling products with PFAS

PFAS – How does this Affect You

- Regulatory Requirements
- Property Due Diligence
 - PFAS now a component of Phase I Assessment
 - Ever had a fire?
- Contracts – Definition of “Hazardous Substances”
- Insurance (and Exclusions)
- Consumer Product Safety and Labeling

The Demise of *Chevron*



Chevron

Chevron U.S.A. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984)

Directed federal courts to defer to an administrative agency's "reasonable" interpretation of ambiguous terms in a Congressional statute authorizing the agency to act.

Chevron – 2 Part Test

- When interpreting a statute, has Congress directly spoken to the precise question at issue?
 - If Yes – the Congressional intent is clear – then the inquiry ends. *Id.* at 842.
 - If No – the statute is silent or ambiguous as to a specific issue – then the Court must defer to the agency’s interpretation if it is “based on a permissible construction of the statute.” *Id.* at 843.

Loper Bright Enterprises – June 28, 2024

“Chevron is overruled”

In *Loper Bright Enterprises et al. v. Raimondo, Secretary of Commerce, et al.*, 144 S. Ct. 2244 (2024), the Court held by a 6-3 vote that the Administrative Procedure Act (APA) requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous

Loper - Overview

- 35-page ruling by Chief Justice John Roberts, calling the *Chevron* doctrine “fundamentally misguided”
- Justice Kagan dissented, predicting that the ruling “will cause a massive shock to the legal system”

Loper – What was at issue?

- The Magnuson-Stevens Act (1976) requires fisheries operating within 200 nautical miles off the U.S. coast to allow federal agents – “observers” – onboard its vessels to collect data for preventing overfishing.
- In *Loper*, fisheries from New England challenged the National Marine Fisheries Service’s interpretation of the Magnuson-Stevens Act, asserting they are not required to pay the salaries of the observers.

Loper – In Sum

- Two federal courts of appeals had rebuffed challenges to the rules
- The Supreme Court granted certiorari limited to the question of whether *Chevron* should be overruled or clarified
- The Court vacated and remanded, overruling *Chevron*

Loper

- Roberts noted that the APA directs courts to “decide legal questions by applying their own judgment” and therefore makes clear that agency interpretations of statutes — like agency interpretations of the Constitution — are *not* entitled to deference. (slip op. at 14-15).
- Under the APA,” Roberts concluded, “it thus remains the responsibility of the court to decide whether the law means what the agency says.” (slip op. at 15).

Loper

- Courts must independently interpret the statute and effectuate the will of Congress.
- Courts must use the “traditional tools of statutory construction” to resolve statutory ambiguities and find the “best meaning” of the statute.
- In overturning *Chevron*, the Court explained that it was returning to “the traditional understanding of the judicial function.” (slip op. at 16).

Loper

- "In exercising such judgment, though, courts may — as they have from the start — seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the APA" (slip op. at 16).

Loper

- Congress retains the ability to delegate authority to federal agencies expressly, but it must clearly define the scope of that authority.
- Courts will honor such delegations when explicitly stated but will no longer infer delegation from statutory silence or ambiguity.
- Courts will also “police” the boundaries of any express delegations to ensure that agencies remain within the confines of the APA.

Loper

- The Court stated that it does "not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful — including the Clean Air Act holding of *Chevron* itself — are still subject to statutory *stare decisis* despite [the Court's] change in interpretive methodology" (slip op. at 34).

Loper - Impacts

- Virtually anything can be deemed “ambiguous”
- Increased leverage and litigation
- Uncertainty surrounding existing agency rules
- Scientific experts vs. Judges
- Congressional efforts to avoid ambiguity

