The Consumer Finance Podcast: The End of _Chevron_ Deference: Implications of the Supreme Court's _Loper Bright_ Decision
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Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. Today, we're going to be diving in to basically revisit the issue of the implications of the Supreme Court's decision in *Loper Bright*, where the court overruled the long-standing *Chevron* doctrine of court deference to agency interpretations of statutes.

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Now, as I said, today, we're going to be basically following up on an earlier episode that we did earlier this year where we were speculating about the potential of what may happen in the Supreme Court case involving Chevron deference, the *Lope Bright* case, and what the practical implications of that may be. Well, now, we have the decision from the Supreme Court, which was issued in June. So, I've brought back two of my partners to talk with me about what happened in the Supreme Court and what we think the implications are.

So, joining me today, I have David Dove, who's a partner in our Atlanta office. He used to work for the Government of Georgia and has a very unique insight into sort of state reactions to what's going on with Chevron deference. Also, joining me is my partner, Misha Tseytlin, who heads up our Supreme Court and Appellate Practice, and of course, himself, clerked on the Supreme Court. He, of course, has a great interest in all of these separations of powers cases, and is always a key team member in any case that we have that's challenging an agency action. David, Misha, thanks for coming back to the podcast to talk with me about this.

David Dove:

Chris, thanks for having us.

Chris Willis:

Misha, let me start with you, if you don't mind, just first, let's take the audience through exactly what the Supreme Court did in the *Loper Bright* case. What was the holding and basically, what was the rationale?

Misha Tseytlin:

Right. So, the US Supreme Court granted review in the *Loper Bright* case and the companion relentless case to take head on whether to overturn Chevron deference. I will take it that those who are listening to this podcast already have enough background so they know what Chevron deference is. The US Supreme Court did not mince words. It held by a six to three vote that Chevron deference is inconsistent with the statutory text of the Administrative Procedure Act, which is the act under which agency decisions are reviewed in federal court. Since it is inconsistent with that statute, the Supreme Court held definitively that *Chevron* was wrongly decided and that it is overruled. So, no longer will courts be permitted or required to defer to agency interpretations of allegedly ambiguous statutory text.

Chris Willis:

Now, Misha, you mentioned it was a six-three decision, and it looked like the court was divided among ideological lines, with sort of conservative justices in the majority, and the three dissenters being some of the more liberal justices. Why is this a conservative versus liberal issue? Because it's not immediately obvious to me why that should be the case.

Misha Tseytlin:

Originally, Chevron deference was put in place during the Reagan administration, and at that point, there was no real left, right valiant to the doctrine. However, as the doctrine lived in the real world, as a matter of fact, agencies tended to use the leeway given to them by *Chevron* to expand the regulatory scope much more than the fairest reading of statutory text is. Much more than agencies were using the leeway given to them by Chevron deference to contract their regulatory reach beyond what the fairest reading of what Congress enacted is.

So, as a practical matter, as *Chevron* became a tool in overwhelming part to expand agency power. And on the general notion that a bigger government, more agency power than Congress has prescribed is an ideological issue, at least, in large part, and it's not surprising that *Chevron* became a really disliked doctrine by judges on the right, and a really favorite doctrine by a lot of judges on the left.

Chris Willis:

Okay. That makes sense. Thanks for giving me that explanation. So, in overruling *Chevron*, we now no longer have deference to an agency interpretation of an ambiguous statute. But obviously Congress has presented us with lots of different scenarios here. Sometimes, Congress just passes a statute and then gives an agency the authority to enforce it, for example. But in other instances, Congress will specifically command an agency to make a policy decision through regulation or enact regulations that address this, that, or the other. So,

how did the court address those different permutations, and how a reviewing court faced with various of those situations should react?

Misha Tseytlin:

Yes. So, Chevron deference is limited to the notion to the situation where there's a particular statutory term that is not clear, that is ambiguous. The agency is picking between contested meanings of that term. A lot of disputes between regulated parties and agencies come up with that context, but a lot don't come up in that context. If you have a situation where it is clear by statutory text that the agency is supposed to do something, and it's not a matter of the ambiguity or claimed ambiguity of a statutory term, that you're not going to have a *Chevron* issue. You might have an Administrative Procedure Act, arbitrary and capricious issue. You might, depending on how aggressive this court gets, have a non-delegation doctrine issue, but you will not have a classical *Chevron* issue.

So, those kind of cases can still be won, but they'll need to be won in the way that they could be won before *Loper Bright*. It's important to understand, while *Loper Bright* is undoubtedly an earthquake in administrative law, the most important administrative law decision probably in the nation's history. It is not the entirety of administrative law, the entirety of what agencies do.

Chris Willis:

Yes, that's really helpful. We'll return, I think, to that in a little bit when we start talking about some of the practical implications. For that, I want to start with you, David. You have a unique background of having worked for the State of Georgia, essentially. On our previous podcast on this, you had commented on the potential opportunities that might be presented to states if *Chevron* were overruled. Let's revisit that topic now that it has been overruled. What do you think state governments will do with the new sort of legal doctrine of *Loper Bright* having eradicated Chevron deference?

David Dove:

Yes. Absolutely, Chris. I think there's essentially two veins where we're going to see direct impacts on state government, and one of which, we talked about, as you mentioned, on the last podcast on *Loper Bright*. That's in the context of cooperative federalism. One of the things that we saw in the various amicus briefs that were filed in the case, particularly from state actors, is this concern over federal preemption. And how through rulemaking at the federal agency level, there was a concern, at least among some parties, that the agencies were essentially taking vague areas of statutes and then using that to extrapolate into larger regulatory frameworks that could then be applied to states in areas where there may actually be the opportunity for cooperative federalism between states and the federal government.

I mean, this is obviously true in the healthcare context. It's also true in the telecommunication context. So, I think at least in terms of the impacts, at least in one camp, I think one of the things that we'll see is the ability for states to have increased regulatory authority over some of these areas, where, at least for the last 40 years, the federal government has been taking the lead on that. In the other camp, is really, what happens to states that have adopted a *Chevron* framework for interpreting their own state regulations? Right?

I mean, Misha actually filed an amicus brief and pointed this out as part of that, that you've essentially got 17 states that have never adopted *Chevron*, but that obviously leaves 33 states that have some degree of deference to state agencies. So, I think, from a practical context, is an individual that's impacted by regulation, a company that's impacted by regulation. When you think about, "All right, what does this mean for the bottom line in my business, or how this affects me?", there's a couple of things to be mindful of.

I think companies need to obviously be aware of the litigation that may and likely will transpire at the national level. Litigation against federal rulemaking, and how that's going to impact their business. But then, also, what is the litigation that's going to happen at the state level, particularly in states that rely on some degree of deference, or historically, for some degree of deference, and agency rulemaking. I think in that context, companies need to be thinking about what are the one, two, three regulations that really impact their business, which regulation costs them the most money to enact within their business, which regulation, or is there a regulation related to their business that actually preserves their business model, right? There might be a reg out there that a company relies on to maintain the reliable strength and growth in the market.

Third, is there a regulation out there that if eliminated, would enhance a company's bottom line? I think, thinking through those one, two, three types of regulations, and looking at it through this framework, businesses, individuals, just need to be vigilant as to how this changing deference standard is going to impact their bottom line and their day to day lives in that context.

Chris Willis:

That's a great point about state administrative deference, David. I think that's something very important for our listeners to take into account. Misha, let me turn to you and talk about some of the more obvious scenarios that our listeners might be thinking of. What does *Loper Bright* do to either help or not help various actions that are going on now, challenging agency actions? Like the CFPB credit card late fee rulemaking or the new Community Reinvestment Act rules that were promulgated by the federal banking agencies, or the 1071 Rule. There seems to be a feeling among industry that the *Loper Bright* decision sort of helps all those challenges in an unqualified way, but I feel like it's a more nuanced issue than that. Can you explain?

Misha Tseytlin:

Yes. So, I appreciate this a little bit earlier with some of my comments. Where you are going to get good use at a *Loper Bright* is a situation where the agency picks what claims to be a vague term. And then, says, because we are the agency and we have broad discretion, we're going to pick this meaning of this term rather than that meaning. If an agency has issued a rule like that, you're not going to have too much trouble saying that the agency's reasoning was unlawful, and the agency at minimum will have to redo its work, which would lead to the rule being thrown out.

If, however, you're dealing with an agency that's not improperly resolving an ambiguous term, but rather making a factual determination or making a discretionary determination as clearly within what Congress envisioned. But your point is that they have done it in a way that is beyond the bounds of rational decision making or in the terms of the APA, arbitrary, capricious. You're not going to get a lot of use out of *Chevron* drop as being thrown out. I mean, if you think back to the Trump administration, a lot of times, because they were not believers in *Chevron*,

they would not invoke Chevron deference at all in cases where even it could be applied. And yet, they still lost cases pretty regularly.

So, Chevron deference does not play a big role in every case. It should not be seen as a solo bullet. In every case, it is most important by far where the agency has identified an allegedly ambiguous term and purported to interpret that term within the range of what it claimed to be reasonable alternatives.

Chris Willis:

Yes. In particular, I wanted to talk with you. I mentioned the different instances of CFPB or federal banking regulations that are being challenged, like CRA, or 1071, or the credit card late fee rule. But there has also been a lot of reaction among the industry of, "Oh, this helps my position in my enforcement action with the agency. That is, the agency is contending that I committed an unfair and deceptive practice by doing X or Y. Now that there's no longer any Chevron deference, I can resist that more effectively. What's your reaction to that?

Misha Tseytlin:

I mean, it really depends on what exactly the CFPB is enforcing. For example, we're currently defending against a lawsuit in the Southern District of New York, where the CFPB is attempting to enforce a rule issued by the Department of Defense with regard to military lenders. There, the CFPB had actually relied on Chevron deference to DOD in opposing our motion before. Certainly, in that circumstance, the CFPB is in a good bit of trouble.

If, however, you don't have an underlying rulemaking that's attempting to define ambiguous term, and you have CFPB just bringing a claim saying something is a UDAP. There, the court is going to have to decide what a UDAP is. The agency wasn't ever going to get Chevron deference because there was no rulemaking in place most the time that the agency was enforcing. It was just saying, "We think this is unfair" and the courts will decide if it's in fact unfair. Then, that remains to be the state of play in those kinds of cases. If, however, the CFPB is leveraging a particular regulation, and that underlying regulation was issued in part under *Chevron*, then *Loper Bright* can be very helpful too. But it's important to separate the wheat from the chaff.

Chris Willis:

Yes. I definitely agree with that, because, as you said earlier, it's not a silver bullet for every time you're dealing with an agency now you win. But it does significantly constrain the agency's ability to interpret an ambiguous statute with some desired meaning based on the agency's current agenda, is sort of how I think about it.

Misha Tseytlin:

Yes. I mean, obviously agencies are not going to be invoking the now dead Chevron deference in new rules, where it's, I think going to be most useful is rules issued by agencies in reliance on *Chevron*, but had never been upheld in court before. So, you don't have any stare decisis on the meaning of the statute, or upholding the reg, rather you have a reg, issued and reliance of a

doctrine, that's no longer good law. That's going to be your most fruitful basis to really take advantage of *Loper Bright*.

Chris Willis:

Speaking of older regulation, Misha, there was another decision from the Supreme Court that I think is material to that point. The court made another decision this term, having to do with when the statute of limitations runs to challenge an agency regulation. Can you tell the audience briefly about that and how it implicates the vulnerability of older regulations to a challenge based on *Chevron* being gone?

Misha Tseytlin:

Yes. In the quarter post decision, the US Supreme Court held that the six-year statutory statute of limitations to challenge an agency rule begins to run when you are harmed by the rule. So, if the rule is long standing, and your company's long standing, you still have that six-year statute of limitations to bring an affirmative challenge to that rule saying, it's officially invalid, including because *Chevron* is gone.

If you're, however, a new company, or you have a new financial product, that wasn't impacted by the rule more than six years ago. Then, you can bring that kind of facial challenge. But I will also say that, even if you're outside the six-year window, your company has been around for a while, and has been putting out these kinds of impacted products for a while. Nothing in the six-year statute of limitations of *Loper Bright* prevents you from erasing the defense, including a *Loper Bright*-based defense against an enforcement action.

An enforcement action, you're harmed the moment that the rule is forced against you. So, you can still always defend against that by *Loper Bright*, but the tool going on the offensive against the CFPB has been now expanded by the US Supreme Court in *Loper Bright*, at least with regard to if you're a new company trying to challenge an old rule, or if you're an old company who has a new financial product, that is harmed by an old rule.

Chris Willis:

Yes. I think that's a very important aspect, because it really does make the back catalog of regulations that may have been promulgated over the last, say, 30 years, sort of open season on them, if somebody decides they want to challenge them. There won't be that six-year sort of absolute statute that the administration was arguing for in the case that you mentioned.

Misha Tseytlin:

Yes, but I will also say there is a counterpoint to that, as the US Supreme Court did say that regulation has already been upheld, including under Chevron deference. That is entitled to statutory stare decisis effect. So, if that has happened in your jurisdiction, your circuit has already upheld the statute and regulation, even under *Chevron*, you're probably going to be out of luck. We said that if you're in another jurisdiction, where that hasn't occurred, then statutory stare decisis isn't going to bind you, because stare decisis within the courts of appeals is only within that court of appeals, like the Ninth Circuit can't bind the Fifth Circuit and vice versa. If the regulation was upheld by US Supreme Court before *Chevron*, then you're definitely out of luck.

It's not completely open field because of that caveat the US Supreme Court put into *Loper Bright* decision.

David Dove:

I just want to jump in on kind of one point there, that even though Chevron deference, in and of itself, is no more, skid more is still good law. I think in kind of thinking through these challenges and what's going to move forward, I think it's an interesting consideration to say that we're going to have to look back before *Chevron* was adopted by the Supreme Court to this historic body of law that some states actually apply through their current frameworks of agency deference. But it doesn't necessarily mean that everything is going to be considered under de novo review moving forward.

Chris Willis:

Yes, that makes sense. Let me hit one final issue with you too, and that is, to what extent do you think it's likely that private litigants will challenge regulations now that there's no Chevron deference to support them, in support of various private litigation claims and demands? Is that going to happen a lot or is that going to be a rarity? What do you think?

David Dove:

I think, at least in terms of thinking about the two spheres of cases that are going to be impacted by this decision. I mean, obviously, you have the broad, sweeping federal cases that are going to get a lot of play time in the press, and a lot of notoriety, where larger federal regulatory frameworks may be challenged. But I think, for our listeners, when you're thinking about how this decision affects your business, I think it all comes back to thinking through what are the regulations that you're dealing with on a day-to-day basis. What is it that's making it harder for you to do business? What is it that preserves your ability to do business? What is it that, if it was eliminated, could add to your bottom line?

In a lot of instances, given how broad state regulatory frameworks are, those are not only more localized issues, but they're also far cheaper to litigate, particularly in states like in Georgia, where the courts and the legislature have adopted Chevron deference into Georgia case law. I mean, I think that presents a great opportunity for a business to challenge a reg in a cost-effective way that can have a direct impact on the bottom line.

Chris Willis:

Misha, what are your views on this?

Misha Tseytlin:

Sometimes regulations do come up in that context, and in that circumstance, you'd have the same kind of framework I talked about before. For example, she's not exactly analogous, but I noted that we're currently defending against the case brought by the CFPB, where the regulation was issued by the Department of Defense. So, we're arguing with the CFPB about what the Department of Defense unduly relied on Chevron deference. The same kind of thing can happen if you're fighting with another private party where your relationship was governed by

regulation. You could be talking about whether the DOD regulation is invalid, that you guys are fighting about, whether the CFPB regulation is invalid you're fighting about. To the extent that the regulation relied upon Chevron deference.

Chris Willis:

Got it. Well, I really appreciate the two of you joining me on the podcast today. I think it's very important for our listeners to understand exactly no matter how big of a deal *Loper Bright* is, and as you said, Misha, it is an earthquake, but it doesn't shake every foundation. It just shakes some of them. I think it's important for our listeners to understand that. So, thank you both for being on the podcast today, and thanks to our listeners for tuning into today's episode as well.

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