The Consumer Finance Podcast: Overruling _Chevron_: A Potential Double-Edged Sword for the Financial Services Industry
Host: Chris Willis
Guests: David Anthony and David Dove
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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. And today we're going to be talking about the good and the bad that might come if the Supreme Court overrules the Chevron case.

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Now, as I said, today we're going to be talking about Chevron. And in particular, the Supreme Court case of Loper Bright where the Supreme Court is set to decide whether or not to continue Chevron deference to agency interpretations of statutes they're charged with administering. And a lot of people in the industry sort of reflexively feel like that's going to be a great thing. But I think we're going to see through today's discussion that it's not necessarily all good news.

Joining me to talk about this today are two of my partners. I've got David Anthony, who's a member of our Consumer Financial Services Group and a longtime veteran of the industry. And David Dove, who's a member of our Regulatory Investigations, Strategy and Enforcement Group, or RISE Group, which does a lot of our state government-related work.

And so, we're going to be having a conversation about both the potential good and the potential bad that may come to the financial services industry from an overruling of the Chevron case in Loper Bright, assuming that the Supreme Court's going to do that later this term.

Gentlemen, welcome to the podcast. Thanks for being here.

David Anthony:

Glad to be here.

David Dove:

Yes. Great to be here. Thanks, Chris.

Chris Willis:

Okay. David Anthony, let me start with you. We've been in the consumer financial services world for a long time, both of us. And I think, reflexively, when people in the industry think about an overruling of Chevron, their mind is immediately drawn to whatever their least favorite provision of any regulation is. And they're thinking, "Oh, awesome. I'm going to be able to challenge this now." And, certainly, there is some opportunity for the industry to do that. I don't know if you want to do this or not. But I want to name my least favorite part of a regulation, which is regulation B, which says that applicants, as defined in regulation B, includes people who have not submitted an application but are merely prospective applicants. That's the same issue that's before the Seventh Circuit in the Townstone case. We'll see how they come out on that issue. But that seems like something that might be ripe for attack if Chevron deference is overruled. I don't know if you have a favorite or not. But if you have one, feel free.

David Anthony:

Yeah. I do a lot of work in the Fair Credit Reporting Act space. And whether it's a specific interpretation or, certainly, there's constantly a fight over the FTC's four-year guide and what the CFPB says. What some of these "advisory opinions" say? And to what extent? Is it the law? Is it not the law? But your point is well taken. People sort of have this visceral reaction to say you've got a bunch of fourth-branch administrative regulators that are creating policy and creating law. And that's not right. And that's not fair. Be careful what you wish for. Because there certainly will be some chaos that results from that.

Chris Willis:

Right. I mean, from the good side, certainly, if you have a piece of litigation where the plaintiff is relying on one of these policy statements, or advisory opinions, or even a formal rule, and you can argue that it's not consistent with the statute, that argument is there to be had now and may be strengthened by a good outcome in the Loper Bright case.

One thing I would hasten to point out though on the regulatory side is just because the Supreme Court overrules Chevron doesn't mean the administrative agencies are going to retreat in their regulatory activities from the positions that they've taken. They'll say, "Oh, I have interpreted the statute correctly." And it would take litigation with them to get them off of that position. It's not self-effectuating by any means with the regulators. Or at least I don't think it will be.

David Anthony:

No. It reminds me a lot, it's a completely different subject but it's a similar principle, which is the Roe v. Wade, which has been a 50-year battle for conservatives to get overturned. And it's gotten overturned. And one could argue that there wasn't a cohesive strategy for then what?

You've seen this sort of chaos that has fallen upon states where you have all these different rules. You have court challenges that go along with all this. You have different kinds of referendums that are being raised. And there's a lot of different conclusions that are coming out of that but as well from a political perspective, political consequences of that.

And so, if you think this through, there has been a similar effort for years for conservatives to do away with Chevron deference. Okay. They do away with on difference. Then what's going to happen? You're exactly right. The regulators aren't going to go away. The state legislatures are not going away. The plaintiff's counsel are not going to go away. And there's going to be a lot of disconcerting moments over the next three, four, five years while all the stuff gets sorted out. Much of it in the courts.

Chris Willis:

Yeah. And let's talk about how that might happen. Because there are interpretations of statutes that defendants, and we as their lawyers, don't like that plaintiffs will rely on or regulators will rely on. But the thing is Chevron deference isn't one way. All it says is that we're not going to defer to agency interpretations anymore.

And the thing is, if you sort of sweep away the ability to rely on agency interpretations, I think there's some on both sides. There are some that the industry doesn't like and would like to see go away perhaps. But there are others that the industry really relies on to give them the specificity they need to do business or to defend the way that they've set up their operations. And so, talk to the audience for a minute about how that could play out in private litigation.

David Anthony:

Yeah. And as you were just talking, I was thinking of the word defer. And I was thinking about this through the lens of an Article III District Judge who's very smart, who's appointed for life. And I can totally see an Article III judge say, "Yes, there is this interpretation from the federal agency. And I know I'm not supposed to defer to them. And I'm not going to defer to them. But I've considered it very carefully. And, oh by the way, I'm going to reach the same inclusion completely independently as far as what I think the law is and how this is all going to go down." It's not like you're going to go back to ground zero in terms of how that happens.

And then I've also seen it in many instances in the consumer finance space where there's a trade association. Let's say, the CDIA in Metro 2 and how that's operated. And from a technical perspective, folks say Metro 2 is not the law. And you have cases that are out there that say we complied with Metro 2. Then you have a judge who's saying, "Well, I don't care whether you comply with Metro 2. Somehow, some way, the plaintiff's counsel want it both ways." Whatever

is the right interpretation that's going to benefit them, that's the argument that they're going to make.

And so, if you think about this particularly through the litigation lens, I don't expect this to make it easier on the front end of cases, let's say, to grant a 12(b)(6) motion. This just may be an issue that gets kicked down the road later on. There's a judge who says, "Well, I'm not quite so certain. I'll let this go to a jury." And you can totally see how there's going to be real compliance challenges too. Because what is it that you should do? Should you comply with this agency interpretation? Should you say we're not going to comply to this. Are we going to have regulatory enforcement that comes out of all of this? There's a whole lot of different planks that our clients are going to have to walk as this sorts itself out.

Chris Willis:

Yeah. And I don't think it's very likely that the federal regulators are going to come in and say you broke the law because you followed my regulation. That's not going to happen. But what could happen is you have a situation where a company has structured its operations to comply with an interpretation in a regulation that's not evident from the statute itself. And then a plaintiff's lawyer comes in and says, "Oh, no, no, no. That's not consistent with the law itself. And there's no Chevron deference to the agency's interpretation." Article III Judge declare this to be a violation of law even though you followed what the regulator was telling you to do. And it might take a special district judge to do that. But it could happen.

David Anthony:

You could totally see that happening. And as well, one of the things that we've seen a lot for our clients – or there is a regulation that comes down, or there is an anticipated decision that's coming down, or there's a proposed rule that comes down. And most businesses stop and say, "Okay, what are we going to do? Are we going to be a first adopter? Are we going to be a middle adopter? Are we going to be a last adopter?"

And in many of these instances, take Obamacare, for example, businesses have gone ahead and aligned their business structure around these regulations. And so, are they all going to unwind all of these? And it can create a real dilemma in terms of exposure compliance predictability, which most of our clients really like that I unfortunately think this is going to provide less certainty than Chevron deference provides.

Chris Willis:

I think that's exactly the point that I wanted the audience to hear. And one great example of that is in the mortgage area. Congress and Title XIV of Dodd-Frank required qualified mortgages, and ability to repay, and TRID, and all these other things. But left a lot of the details of it to the CFPB's rulemaking efforts that were then required by Dodd-Frank and occurred shortly after the launch of the CFPB.

And in instances where the CFPB's constitutionality was challenged in the Supreme Court, like in the seal of law case, for example, you saw trade associations like the Mortgage Bankers

Association come in and say, "Do not undo those mortgage rules. Because we need those to do business. We have structured our operations around them." Well, if there's an opportunity for the plaintiff's lawyers to try to undo those rules through court challenges, it creates the same lack of predictability for the industry.

David Anthony:

Yeah. And the one thing too that I think sometimes people forget too is that, lots of times, there's this complaint that these regulators are not elected officials and they're running rogue for whichever party you think they are doing all this stuff.

Well, in many instances, the statute is a vague statute. If you play this out, and let's assume Chevron deference goes out, one possibility is that the legislature – let's say there is a predominant party that wins both houses and wins the presidency for them to not rely on a vague statute but to pass a very specific statute, then you've got a legislation that you're stuck with. And you've got to wait until – get that overturned by some other change in party votes as the thing goes down the line.

And I think that it's not going to just go along with the sort of status quo. I mean, it really will be a revolution in terms of how these things all shake out. Again, be careful what you wish for.

Chris Willis:

Yeah. And you're right to point that out, David. Because when an agency makes a rule, at least a formal rule, they're required by the APA to go through a notice and comment process. Where if something is really off the rails, industry has the opportunity to say, "Hey, this is really going to screw things up." And the agency has the opportunity and sometimes will adjust the regulation to take that public comment into play.

There's less of a direct line I think to comment on proposed legislation in that way. Because the APA doesn't apply to Congress, of course. And so, you're right to point out that we could get stuck with Congress trying to be more specific. But failing to take into account all the permutations of how different businesses work and then creating something that might actually put somebody out of business with no recourse.

David Anthony:

Right. It wouldn't be the first time that Congress reacted to a Supreme Court ruling or court's interpretation or regulations and provided clarity. The clarity could be a reinforcement of the existing rule or the changing of an existing rule. And you may not get, say, an overhaul of the Fair Credit Reporting Act. But you certainly could see in the mortgage space, in the Fair Credit Reporting Act space, in the debt collection space, rifle shot solutions to particular issues that come along with that that may not be consistent with the overall interpretation.

Chris Willis:

Yep. There's another angle to this that I want the audience to hear about. And that's why David Dove is on this podcast with us. And David recently came to us from being the general counsel to the Governor's Office of the State of Georgia. He has a very state government mindset in his mind because he's been around both our Georgia state government, where he and I live, but also in consultation with lots of other states.

And so, David and I have talked about some sort of litigation, private plaintiff and regulatory, federal regulatory issues with Chevron going away. But what would be the state perspective on this? And where could that sort of come into play?

David Dove:

Yeah. Chris, I think there are some states. And this has been reflected in amicus briefs filed by State Attorneys General as well as briefs filed by some Governors, that if Chevron goes away, there's going to be a lot of new opportunities for states to regulate in areas that may have previously been preempted through federal rulemakings.

Chris Willis:

And so, in the absence of Chevron – let's say Chevron goes away, as expected to occur in the Loper Bright case, how do you see states taking advantage of the opportunity that you just described?

David Dove:

Well, I think similar to the point that David made previously that plaintiff's counsel are going to come in and challenge some of these regulations, I think you're going to see states. Particularly states that might have a different view on how the federal agency is undertaking some of this regulation. They will have the opportunity in some of these circumstances to also adopt regulations that may be counter to the federal agency in order to create lawsuits to mold policy in a way that fits the political needs more for that particular state. And so, I think our listeners can definitely anticipate that there's going to be a proliferation of litigation around this that is policy-oriented and it is intentional by states trying to flex their influence within these spheres as well.

I mean, one of the things that I was thinking about when David was talking is the likelihood that we end up with various circuit splits around the country to the extent that states are passing rules or passing laws that may challenge some of these federal rulemakings and then you end up, particularly if your business is national in scope, where you're having to navigate what might be various circuit splits across the country with different ways that courts are viewing the federal statute.

To the extent that the Supreme Court is looking at overturning Chevron, they need to be ready for a lot more cert petitions. Because I think this is going to definitely impact their role as the final arbiter for these different policy directions that are going to come to the fore.

Chris Willis:

And David Anthony, one thing that's happening right now with respect to preemption and consumer finance is that you have the CFPB in particular trying very hard to say there's not much preemption.

David Anthony:

Yes.

Chris Willis:

And we've seen that particularly, for example, with the Fair Credit Reporting Act. And we've reported on it to this audience. But the thing is it wasn't always so. Sometimes, depending on who's in control of the administration, the federal agencies will take very aggressive preemption positions under the FCRA or with regard to servicing of federal student loans, for example.

And so, the thing is, right now, the states are being encouraged by the CFPB to legislate in the area of credit reporting. But you could have a CFPB with an opposite ideological bent that says, "Oh, no, no, no. This is all preempted." And then you have states who are now able to challenge that and saying, "Oh, we give no Chevron deference to that." And so, I think that is a danger for the industry.

David Anthony:

Yeah. And you can totally see how the credit reporting space is a perfect example where you have this mishmash of states who are coming up with their own view of what should and shouldn't be reported to credit reporting agencies. And one can make a legitimate argument that you shouldn't have sort of dysfunctionality in a single system. But the courts have gone different ways about that.

Getting to David Dove's point, you could have circuit splits on whether what extent preemption applies in this context. I think you are going to see sort of almost anti-preemption arguments. Because if there is no Chevron deference, then there's nothing that would necessarily stand in the way to cause the state to be able to adopt a regulation or statute that said the same thing. And I certainly would expect there to be coordination between the CFPB and states in order to do that, to do that at the regulatory enforcement level as well. And, again, it certainly I think can create a very splintered approach to compliance as all the stuff gets sorted out.

Chris Willis:

Yeah. And we discussed the FCRA as a likely battleground for that, which makes all the sense in the world based on the legislative activity we're seeing in states now. But another area that occurs to me where there's a significant federal regulation that deals with preemption is the OCC's preemption regulations. They're right there in the OCC's regulations. And they say, categorically, as a matter of our view, the following types of state laws are sort of presumptively preempted. Marketing and disclosure, licensing, terms of credit, things like that.

And if there's no more Chevron deference to the OCC's preemption regulation, could a state say, "No. I don't think that's preempted. I think I can regulate this, that, or the other operational aspect of a national bank." And maybe feel like they're going to have more success on it. I think it creates that risk for national banks too.

David Anthony:

Well there certainly has been a greater willingness for either state regulators or state legislators to take a crack at this kind of stuff. Sometimes they've been successful. Sometimes they've not. But whether it's the banks, or it's the fight in Texas over immigration, or you pick it, there is certainly some empowerment of states right now to sort of assert their 10th Amendment rights in this context. And I think there will be a vacuum perhaps created by the Chevron deference going away. And who's going to fill that?

Chris Willis:

Yeah. And so, I think the takeaway that I want the audience to hear from both David Anthony, and David Dove, and from me is the extinction of Chevron is not all sort of roses and champagne for us. In fact, it creates a lot of potential instability and uncertainty for us.

And so, what I'd like to close with is asking each of you to give sort of a parting comment of like we're going to maybe enter into this environment of greater unpredictability. What should clients do to prepare for it? David Dove, you go first.

David Dove:

Yeah. No. I think just following on your point, Chris, probably the chief lesson that I've learned through my career in government is that predictable government is the best government for business, right? And that's what we're talking about is ensuring that our clients and our listeners that are having to deal with these various regulations and potential challenges that they can plot out the most predictable path forward so that they have visibility on what's coming around the corner and their business.

To that end, it's going to require a significant amount more vigilance on behalf of the private sector. And that might involve intervening in cases at the district level where some of these issues are coming up to ensure that trial court judge is hearing these arguments. To your point earlier, it's not going to just be able to be resolved through notice and comment at a federal agency level. But it's also going to require vigilance even before that with looking and monitoring where states are headed in these various categories to ensure that, at the earliest possible level, these concerns are being addressed.

And that's something that we focus on within the RISE Practice Group here at Troutman is ensuring that we have a close view on kind of where states are headed in terms of regulatory environments for our clients. But that's going to become all the more critical as we move forward into this kind of new space of potentially having different silos across the country for how different sectors of our economy become regulated. And then how those regulations are challenged. And then what courts ultimately say is the rule.

And to your point earlier as well, I just want to touch on this, when you're dealing with a kind of single-party government that's passing very prescriptive statutes, as you noted, that becomes far more challenging to then address and insert considerations that may not have been considered by a legislative body on the back end.

I think vigilance is key here. It's going to require much more granular view. And I think, and I believe this point was made earlier as well, looking at where in your business are you relying very closely on a prescriptive regulation and noting those areas so that that can be the point that you're looking at as we move forward in this space.

To the extent that there are certain salient points within your business where there could be challenges because of how your business is set up to deal with specific regs, those are likely going to be ground zero for you, the business, in making sure that there's not instability that your voice isn't getting inserted in with that process.

Chris Willis:

All right. Thanks a lot. And, David Anthony, you're a many decades veteran of the consumer financial services industry. What should a financial services company do to prepare for this potential period of uncertainty that we're going to go through?

David Anthony:

Yeah. I mean, it's a really vexing problem for folks in the industry. And what I would say is that, for most of our clients, their to-do list, if they could do all the compliance projects that are on their list, exceeds their time and usually resources. And so, that's with predictability.

If you assume that you're going to have unpredictability or uncertainty, you can think about, "Okay. Well, what are we going to be doing on a compliance perspective?" And I would echo David Dove's point, which is to stop and think about what are your operations? And what are the underpinnings of those operations? And if those underpinnings are altered, what's that going to mean?

Chris, you and I gave a talk about too long ago to some folks about the possible FCRA rulemaking. And it's pretty clear that if the FCRA rulemaking gets adopted as proposed, which I don't think it will, but if it does, there will be people who have an existential crisis and their business in terms of whether their model is still going to work or not.

And so, I'm not suggesting that the sky should fall. But you certainly should be thinking about that. And having conversations and preparing just like you would for anything else that would be that kind of grave threat to your business that goes along with that.

I think, secondly, I would strongly encourage you to monitor the case law for a lot of the consumer financial statutes. They are very vague. And the case law ends up being guidance to folks on what it is that they should be doing. There's going to be all kinds of litigation about preemption and what's the scope of Chevron deference and what does this all mean to all of this. And so, I would encourage you to pay attention to that.

I also would encourage you to – except that you're active in a trade association, most of the trade associations that we work with are monitoring these issues and are trying to pick the issues that are of most concern to their particular industry. You can be supportive of those trade associations or having your own lawyers assist with that in terms of comments. If there's something that would come down; identification of issues, decisions whether to participate as a litigant, or to write an amicus brief, to provide your financial support. There's a lot of industries that are going to get rocked by this. And simply being passive and waiting for all of the dust to settle is not a wise strategy.

Chris Willis:

Very sage advice from both of you. David Anthony, David Dove, thank you both for being on today's podcast. And, of course, thanks to our audience for listening in as well. We'll, of course, stay tuned to see what happens with Loper Bright and then the aftermath of it.

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