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The Post–Chevron Future: Litigating Against Administrative Agencies Following Loper and Corner Post

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Over the last few weeks, the Supreme Court issued two long-awaited decisions that are each significant in their own right, but, together, will drastically reshape the future of litigation against administrative agencies—and should inform strategies for defending against investigations and enforcement actions.

On June 28, the Supreme Court issued a seminal 6-3 decision overruling *Chevron v. Natural Resources Defense Council*—striking down a decades-old doctrine that required federal courts to defer to administrative agencies' interpretation of the statutes from which they draw their authority, as long as the statute is ambiguous and the agency's interpretation is reasonable. Following last week's long-awaited decision in *Loper Bright Enterprises v. Raimondo*, the rules of the game have changed. The Supreme Court's elimination of the requirement of judicial deference to agencies' statutory interpretation has significant practical implications for businesses and industries challenging agency regulations, particularly in the area of complex statutory schemes. The decision also potentially implicates how agencies will interact with highly-regulated businesses going forward, even when those businesses are not challenging a particular rulemaking or agency regulation. *Loper* also will likely dictate how aggressively an agency pursues a particular regulatory position during an investigation, litigation, or settlement negotiations.

Only a few days after the *Loper Bright* decision was issued, the Supreme Court handed down another landmark Administrative Procedure Act ("APA") decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, which resolved a long-existing circuit split over the issue of when the six-year statute of limitations on an APA claim begins to run. In *Corner Post*, the Court held that a plaintiff has six years from the date of injury by a final agency action to bring a challenge to that agency's action. Further, the ability of a challenger to bring an APA claim is not precluded by the fact that the final agency action was previously challenged and upheld. The Supreme Court's decision raises the gate for litigants to challenge agency actions that were previously thought to be time-barred or precluded on account of an earlier unsuccessful challenge.

The Supreme Court's Decisions in *Loper* and *Corner Post*

In *Loper*, petitioners brought an APA challenge against the National Marine Fisheries Service's rule that imposed new requirements on certain types of fishing vessels. Like many APA plaintiffs in similar situations, the *Loper* petitioners argued that the agency's implementing statute did not authorize such

a mandate. The district court granted summary judgment in favor of the government, and a divided panel of the U.S. Court of Appeals for the District of Columbia affirmed, deferring to the agency's interpretation as a "reasonable" construction of the statute. The Supreme Court granted certiorari, limited to the question of whether *Chevron* should be overruled or clarified. In an opinion by Chief Justice Roberts, the Court held that *Chevron*'s requirement of deferring to an agency's interpretation of ambiguous statutes is inconsistent with the courts' obligation to exercise independent judgment when determining the meaning of statutory provisions and the framework of the Administrative Procedure Act. The Court also described all of those instances when its prior holdings had effectively chipped away at the core of the *Chevron* doctrine, effectively minimizing the doctrine's reach in numerous fact patterns. The Court also concluded that, notwithstanding the doctrine of *stare decisis*, which counsels judicial adherence to precedent, *Chevron*'s fundamental flaws and unworkability made it necessary to "leave *Chevron* behind."

In *Corner Post*, petitioner joined a 2021 lawsuit challenging the Federal Reserve Board's 2011 regulation that established a maximum interchange rate that card payment networks could charge merchants. The district court dismissed the lawsuit on the basis that the challenge was brought more than six years after the rule was promulgated, and the U.S. Court of Appeals for the Eighth Circuit affirmed. The Supreme Court granted certiorari to resolve a circuit split on the issue of when the when the six-year statute of limitations period begins to run. In another 6-3 decision, the Supreme Court reversed and held that the statute of limitations period begins run *only after* the date of the plaintiff's injury—and not the date of the final agency action. Critically, the Court also ruled that a similar lawsuit brought in 2014 challenging the same 2011 regulation, which the D.C. Circuit ultimately upheld under the *Chevron* doctrine and the Supreme Court declined to review, has no bearing on Corner Post's ability to bring its own challenge to the regulation several years later.

Implications of *Loper* and *Corner Post* for Regulatory Litigation

Loper and *Corner Post* have significant implications for regulatory litigation. Together, the Supreme Court's decisions lower the bar to challenging agency actions, including improper enforcement actions and unlawful regulations. By eliminating judicial deference to agency interpretations of ambiguous statutes, courts no longer have the option to declare the law ambiguous, and simply defer to an agency's interpretation on the grounds that it is "reasonable"—even as that interpretation is not the best reading of the statutory provision in question.

At the same time, many agencies anticipated that the Supreme Court may overrule—or significantly curtail—*Chevron*, and so eschewed reliance on the power to resolve statutory ambiguity in recent regulatory decision-making. Moreover, the Supreme Court over the years limited *Chevron*'s reach, most recently through the "major questions" doctrine, which presumes that Congress does not intend for administrative agencies to decide issues of major political or economic significance. And the Supreme Court in *Loper* explicitly reaffirmed the continuing vitality of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), which authorizes courts to credit an agency's interpretation of statutory provisions to the extent that interpretation is persuasive and reflects the agency's experience and expertise.

In the aftermath of *Loper*, therefore, a successful challenge to an agency's regulatory action will depend more on principles of statutory construction, since courts must now address—and resolve—any statutory ambiguity, even where the statute concerns a specialized, technical matter. That will be particularly so where—as the Supreme Court observed in *Loper*—Congress expressly granted an agency discretionary authority with respect to the statute's implementation.

Significantly, the Court held that past decisions applying *Chevron* deference to regulations would be entitled to *stare decisis*. The same rule would apply to court of appeals decisions applying *Chevron*. Notwithstanding the Court's attempt to limit the practical impact of its decision, regulated entities can still benefit from *Loper* by strategically bringing judicial challenges to the same regulations in different courts that have yet to review those regulations. Prior precedents from other circuits are not binding and would no longer be persuasive with the *Chevron* framework discarded.

The Supreme Court's decision in *Corner Post* will serve to intensify the effect of *Loper* by reviving challenges once thought to be time-barred and making it possible for litigants to bring challenges many years after an agency action has become final—so long as the lawsuit is brought within six years of the date of the plaintiff's injury. Furthermore, the fact that an agency action has already been unsuccessfully challenged will not preclude a new plaintiff from pursuing similar relief and achieving litigation success where others could not.

In this new post-*Chevron* world, sophisticated counsel familiar with the rules of statutory interpretation and the administrative law requirements will be essential for any successful regulatory challenge.

Implications of *Loper* and *Corner Post* for Agency Oversight Work

The Loper and *Corner Post* will also have an impact on agency investigations, enforcement actions, and settlement negotiations. Together, these decisions signal to agencies that their influence in the courtroom is decreasing and that this loss of influence is likely to result in loss of leverage in interactions with regulated parties as well as further motivate businesses subject to agency investigations or enforcement proceedings to challenge those agencies' civil investigative demands or actions.

An agency's ability to craft and implement novel legal arguments is now more tenuous than ever. Courts applying *Loper Bright* will be more skeptical of agency legal interpretation and, by extension, more receptive to challenges to agency action that rely on ambiguities in agency enforcement authority.

For similar reasons, agencies that have long relied on deference to their statutory interpretation may be less willing to escalate matters to litigation, where that has traditionally been their leverage in settlement negotiations.

To be clear, while these decisions may impact agency strategy and approach, they will not result in a halting or slowing of agency oversight work. In the past week alone, the Federal Trade Commission approved an unprecedented settlement order banning a social media company from marketing or offering its application to minors, and the Environmental Protection Agency announced the imposition of its largest ever Clean Air Act penalty.

Agencies will continue to initiate investigations and enforcement actions, and these authors will continue to work clients to navigate these familiar waters. However, the tides are undoubtedly changing in favor of regulated businesses and, with the right legal strategy, the most prudent course of action may be to bring the challenge to agencies, rather than simply play defense.

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