Insight

Loper Bright and the FTC

FRED ASHTON | JULY 24, 2024

Executive Summary

- The Supreme Court's 6-3 opinion in *Loper Bright v. Raimondo* held that *Chevron* deference – a cornerstone of administrative law directing courts to defer to agency interpretation of ambiguous or silent statutes – is overruled.
- Courts have sparingly applied *Chevron* to matters of antitrust and competition, yet the decision could affect the Federal Trade Commission's aggressive expansion of its Section 5 enforcement and rulemaking agenda.
- The full ramifications of *Loper Bright* remain uncertain, but Congress could alleviate the potential onslaught of litigation by clarifying ambiguous statutes previously subject to *Chevron*, generally, and could codify the consumer welfare standard as the guiding principle of antitrust enforcement, specifically.

Introduction

In a 6-3 opinion in the case of *Loper Bright v. Raimondo*, the Supreme Court struck down the *Chevron* deference doctrine. This cornerstone of administrative law directed the courts to defer to agency interpretation of ambiguous statutes, likely extending the reach of the regulatory bureaucracy.

While the ramifications of the decision are still unclear, it is certain that some agencies will be affected more than others. Courts have rarely applied *Chevron* to matters of antitrust and competition, yet the ruling in *Loper Bright* could inhibit the Federal Trade Commission's (FTC) expansive Section 5 enforcement – a section of the FTC Act prohibiting unfair methods of competition – and rulemaking agenda.

Congress could reduce the potential for increased litigation over agency interpretation of ambiguous or silent statutes by clearly outlining agency responsibilities and authorities. Moreover, the Court's decision could be an impetus for Congress to codify the consumer welfare standard as the guiding principle of antitrust law to foster a more transparent, predictable, and credible enforcement regime.

Background on *Chevron*

In the 1984 ruling in *Chevron v. Natural Resources Defense Council*, the Supreme Court instructed courts to defer to agency interpretation of ambiguous statutes, a practice known as *Chevron* deference.

As previously explained in an American Action Forum (AAF) insight:

> [T]he Court set forth a two-part test to determine whether agencies should be afforded deference in their interpretations of a statute that was enacted by Congress. First, if Congress has clearly addressed the precise question at issue, then the agency must abide by the legislature's stated interpretation thereof. If, however, the statute does not address the precise question or if its treatment thereof is ambiguous, courts must defer to the agency's interpretation of the statute provided that its interpretation is "reasonable."

Since the ruling, *Chevron* deference has been a cornerstone of administrative law, and likely extended the reach of the regulatory bureaucracy. AAF tracks the burgeoning role of the federal agencies.

Loper Bright **Decision**

In the *Loper Bright v. Raimondo* decision, the Supreme Court's primary holding was that:

The Administrative Procedure Act requires courts to exercise their independent judgement 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; *Chevron* is overruled.

With other deference doctrines on the books including *Skidmore* – which holds that an "agency's interpretation of statute 'cannot bind a court,' but may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise'" – the full effect of the Court's decision in *Loper Bright* is still unclear.

Nevertheless, there are several plausible scenarios that could take shape. The first, and perhaps the most probable, is increased litigation over future agency rulemaking. Without *Chevron*, agency rules and regulations based on the interpretation of ambiguous statutes will undoubtedly face more legal challenges. A second scenario involves Congress clarifying ambiguous statutes or writing legislation to fill the gaps where statute is silent. Absent Congress taking on this role, a third scenario, in which the agencies become more cautious when engaging in rulemaking beyond the clearly defined terms of the statute, is possible.

Chevron **and the FTC**

Courts have sparingly applied *Chevron* to matters of competition and antitrust. AAF insights previously discussed research that found *Chevron* was applied in just 36.4 percent of court cases involving the FTC's statutory interpretations. By comparison, the Surface Transportation Board was afforded the most deference, with *Chevron* being applied in 81.3 percent of cases.

The ruling in *Loper Bright* could inhibit the FTC's recent aggressive expansion of its Section 5 enforcement and rulemaking agenda. Section 5 of the FTC Act prohibits "unfair methods of competition." The term "unfair methods of competition" is loaded with ambiguity and thus could have been afforded *Chevron* deference – though the agency has not used *Chevron* to support Section 5 rulemaking authority – prior to the *Loper Bright* decision.

Historically, the FTC has sought to clarify its enforcement authority under Section 5 using policy statements rather than engaging in substantive rulemaking. In 2015, the FTC issued a statement regarding "Unfair Methods of Competition" under Section 5 of the FTC Act seeking to clarify the scope of enforcement. The agency concluded that enforcement would be guided by the consumer welfare standard and any business act or practice would be evaluated using a sliding-scale framework that weighs the procompetitive benefits against anticompetitive harms known as the rule of reason.

In July 2021, the FTC rescinded the 2015 policy statement and replaced it with a new one in November 2022. In the replacement statement, the FTC argued that "Congress intended for the FTC to be entitled to deference from the courts as an independent, expert agency." *Loper Bright* will likely limit the agency's ability to enforce an expanded definition of what the agency considers "unfair methods of competition."

More recently, the FTC issued a final rule banning the overwhelming majority of noncompete agreements as unfair methods of competition. The agency has long avoided issuing substantive competition rules because of its questionable authority to do so. Yet FTC Chair Lina Khan and former Commissioner Rohit Chopra argued that Section 6(g) – a historically contentious part of the FTC Act that gives the FTC the ability to make rules – affords the agency unfair methods of competition rulemaking authority and renders it eligible for *Chevron* deference.

In dissenting statements from FTC Commissioners Melissa Holyoak and Andrew Ferguson, both agreed that Section 6(g) of the FTC Act does not "authorize the Commission to make substantive rules regulating private conduct…. The best interpretation of Section 6(g) is that it authorizes the Commission to make rules governing its internal affairs and procedures."

Since the final rule was announced, a U.S. District Court for the Northern District of Texas temporarily blocked the noncompete ban. The court ruled that the FTC lacked substantive rulemaking authority with respect to unfair methods of competition based on the "text, structure, and history" of the FTC Act, a direct rebuke of Chair Khan's assertion that her expansive understanding of the powers available under Section 6(g) are eligible for *Chevron* deference. The court order is preliminary, with a full ruling expected on or before August 30, 2024.

Just two weeks later, on July 23, 2024, a judge for the U.S. District Court for the Eastern District of Pennsylvania found that the FTC had "clear legal authority to issue 'procedural and substantive rules as is necessary to prevent unfair methods of competition,'" a ruling directly in conflict with the Texas court.

The opposing rulings leave businesses in a state of uncertainty as the effective date of the nationwide ban on noncompete agreements is set for September 4.

What Congress Can Do

In a post-*Chevron* environment, Congress will need to craft legislation that includes more concrete directives to agencies and clarify the ambiguities in existing statutes.

With respect to antitrust, codifying the consumer welfare standard as the guiding principle of enforcement is a reasonable starting point. Doing so would relieve enforcers at both the FTC and the Department of Justice of the ambiguity inherent in antitrust law and would prevent the agencies from weaponizing enforcement to serve political outcomes or to protect rival firms.

In an event hosted by AAF earlier this year, former Commissioner Christine Wilson spoke to this idea, stating that "enshrin[ing] the consumer welfare standard in a law" is necessary to prevent the FTC from using "antitrust

law to benefit groups other than consumers."

Enshrining the consumer welfare standard into law would limit Section 5 enforcement actions to those where consumers are harmed. In her dissent to the FTC's new policy statement, Commissioner Wilson warned that the policy would give the agency authority "to condemn essentially any business conduct it finds distasteful." She added that the new policy "adopts an 'I know it when I see it' approach premised on a list of nefarious-sounding adjectives, many of which have no antitrust or economic meaning."

The consumer welfare standard would foster an enforcement regime that is more transparent, credible, and predictable.

Moreover, as the appetite for competition rulemaking at the FTC has grown, it is incumbent upon Congress to clarify whether the FTC has such authority. Section 6(g) should be changed to expressly grant or prohibit competition rulemaking authority.

Conclusion

The Supreme Court's decision in *Loper Bright* throws the regulatory bureaucracy into a state of uncertainty. Agencies that were afforded the most *Chevron* deference will likely see their authorities curtailed. While courts have seldom applied *Chevron* to antitrust and competition matters, the decision will likely inhibit the FTC's aggressive expansion of its Section 5 enforcement and rulemaking agenda.

Broadly, Congress could address these concerns through more clearly defined objectives and authorities bestowed on agencies and by filling in gaps where statutes are silent. Specific to antitrust, codifying the consumer welfare standard as the guiding principle would likely rid some of the ambiguity present in antitrust law and could prevent mission creep by the enforcement agencies.