# *CONSUMER FINANCE PODCAST*: THE FUTURE OF *CHEVRON* DEFERENCE

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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 I'm really glad you've joined us for today's episode, where we're going to talk about a potentially groundbreaking case that the Supreme Court has taken review of that might determine the level of deference that federal courts give to administrative agency interpretations of the statutes that they're responsible for, that is the idea of *Chevron* deference.

But before we jump into that, let me remind you to visit our blogs. We have the consumerfinancialserviceslawmonitor.com and troutmanpepperfinancialservices.com, one for consumer finance and one for the financial services industry as a whole. And don't forget also our other podcasts. We have lots of them. We have the *FCRA Focus*, all about credit reporting. We have *Unauthorized Access*, which is our privacy and data security podcast. And we have *The Crypto Exchange*, which is about all things crypto. And those are available on all the popular podcast platforms. And speaking of those platforms, if you like this podcast, let us know. Leave us a review on your podcast platform of choice and let us know how we're doing.

Now since we're talking about an issue of the Supreme Court and appellate practice, we have our resident head of our appellate practice here at Troutman Pepper, Misha Tseytlin, who's been on this podcast before. So, Misha, welcome back. I really appreciate you being on the show today.

**Misha Tseytlin:**

Thanks for having me back on, Chris.

**Chris Willis:**

So, you may remember that Misha was the one to give us a lot of information about the CFPB'S lawsuit against CFSA, which is pending in the Supreme Court now. And of course, we'll be back to Misha when a decision comes out in that case. But for now, the Supreme Court's granted review in another really important case, specifically to decide whether *Chevron* deference is going to survive in the modern era of the Court's jurisprudence.

But before we get into talking about this case that the Supreme Court granted cert on at the beginning of May, Misha, could you give the audience some background on *Chevron* itself? It was decided in 1984, but what did it say? What were federal courts supposed to do when faced with an agency interpretation of a statute?

**Misha Tseytlin:**

Under the U.S. Supreme Court's decision in *Chevron*, when confronting a dispute about what a statute means, what the court does is engage in a two-step analysis when there is a claim that the agency interpreted the statute incorrectly. First, the court will look to see whether the statute is clear and unambiguous on the issue. If the statute is clear and unambiguous, then that clear and unambiguous

meaning controls, regardless of whether the agency adopted that interpretation or rejected that interpretation.

If, however, the court determines that the statute is ambiguous, that is to say the statute is not clear whether the agency's interpretation is correct or incorrect, then the court needs to move on to what's known as *Chevron* step two. Under that step, the court will ask whether the agency's interpretation of this now determined ambiguous text is reasonable. If the court determines the agency's interpretation of that ambiguous text is reasonable, the agency prevails in the case.

So, in a case where the statutory text is clear, *Chevron* theoretically should not have any importance to play. However, when you have an ambiguous statute, then *Chevron* is often outcome determinative, and at minimum, it puts a very big thumb on the scale in favor of the agency in the relevant case.

**Chris Willis:**

Yeah. And it seems like Congress has a real knack for passing ambiguous statutes, so it seems like *Chevron* deference would come into play a lot. But in the years since *Chevron* was decided, as I said in the 1980s, and particularly in more recent years, I feel like *Chevron* has sort of eroded a bit in practice. Can you give the audience your perspective on what's going on there?

**Misha Tseytlin:**

What's going on with *Chevron* deference is that it is clear that a significant number, and maybe a majority of the U.S. Supreme Court, is very skeptical of *Chevron* deference, but the Supreme Court has not yet overturned it. So, what the U.S. Supreme Court has been doing for about the last 15 years is deciding agency cases, including ones where *Chevron* deference played a big role in the lower courts without mentioning *Chevron*, just finding every statute to be unambiguous one way or the other. Sometimes the agency wins, sometimes the agency loses. So, *Chevron* has played no role at the U.S. Supreme Court for the last 15 years. And Judge Oldham of the Fifth Circuit referred to *Chevron* deference as the Lord Voldemort of administrative law because the U.S. Supreme Court won't say it.

However, *Chevron* deference has continued to play a very significant role in the lower courts, which are, of course, still bound by *Chevron* deference. Those of us who litigate agency cases before lower courts, including CFPB cases, you know that that thumb on the scale for the agency, if it can show any ambiguity in the statutory text, is always there. And *Chevron* is, under some counts, the most cited U.S. Supreme Court decision. And it's certainly the most important U.S. Supreme Court decision for the practical outcome of agency cases in the lower courts, even though at the U.S. Supreme Court, it has not been cited and has not been used by the U.S. Supreme Court in a decade and a half to decide any case.

**Chris Willis:**

That is really interesting. So, it's sitting there in the attic gathering cobwebs, but it's still there. Now the Supreme Court, on May 1st, I think, granted cert in a case explicitly with the idea of deciding whether *Chevron* should be thrown in the landfill or not. So, can you tell the audience a little bit about the case where cert was granted?

**Misha Tseytlin:**

A lot of justices have, in separate concurring opinions when they're on the U.S. Supreme Court or when they were on lower courts, expressed skepticism of *Chevron* deference. I think the most famous justice on this is perhaps Justice Gorsuch, who has long been a critic of *Chevron* deference.

And I will give a little funny story about the name *Chevron* deference and how it could have had a different name to begin with. The way the U.S. Supreme Court cases are named is they're named after the party that petitions for cert. So, the case where *Chevron* arose was originally NRDC versus the EPA, and Chevron was a party supporting EPA. Now, the administrator of the EPA at the time of the *Chevron* case was Neil Gorsuch's mother.

So, if EPA had petitioned for cert instead of Chevron, which EPA very well could have because they were also on the losing side of the D.C. Circuit decision, the doctrine of *Chevron* deference could be known as Gorsuch deference today. Which would be, I think, perhaps an even more poetic lead-up to this latest action by the U.S. Supreme Court in this *Loper* case, where the U.S. Supreme Court has granted cert, presumably with the vote of Justice Gorsuch, although his vote and the votes on cert are not public, on the question of whether *Chevron* deference should be overturned or implicit in that question whether it should be narrowed in some respect.

That case involved some regulations on fishing vessels, and the cert petition asked for two questions. One was, is the fishing vessel regulation valid? That was question one. And the second question was whether the court should reconsider *Chevron* deference. The U.S. Supreme Court rejected review on that first question. It is not interested in whether the fishing regulation itself is a correct interpretation of the statute, and instead grants review only in the second question, which is whether *Chevron* deference will continue to be the law of the land.

So that's a very clear signal that this is not a case like what has happened for the last 15 years at the Court, where the U.S. Supreme Court is consistently dodging the question of whether *Chevron* deference should still apply. Here, if the court answers the question presented, the only one it granted review on, it will need to decide what to do with *Chevron* deference in this traditional path that the Supreme Court has been taking, which is saying every statute that it confronts is unambiguous, or otherwise settled by some canon of statutory interpretation that precedes *Chevron* deference. It will not be an escape hatch the U.S. Supreme Court has in this case and not one that it wants, given the way that it granted cert on only the second question dealing with *Chevron*.

**Chris Willis:**

Got it. So, we know the Supreme Court's going to hit the *Chevron* issue head-on. And assuming that the Court either narrows or eliminates *Chevron* deference, what could the impact be on agency legal interpretation cases that then come later in the lower federal courts?

**Misha Tseytlin:**

A decision significantly cutting back or eliminating *Chevron* would be the most important development in administrative law in all of our lifetimes. And it would operate on two levels. One is the more obvious level and the more straightforward level that you just referenced, Chris, is that when you're going to be challenging, say CFPB regulations in federal court, you're going to have an even playing field. With *Chevron* on the books, what I tell clients is, "If you're challenging an agency interpretation of a statute,

you've got to be 90% right to win that in federal court. You've really got to be able to show that it's unambiguous."

With *Chevron* either significantly cut back or eliminated, it's a fair game. If you're 51% right, you have a 51% chance of success, more or less. So basically, significantly cutting back or eliminating *Chevron* deference will take the thumb off the scales on the part of agencies. Now, it's not going to put the thumb on the scale on the part of the regulated party. It's going to be just like a normal case where there's a statute, there's a fight over the meaning of the statute, and may the best statutory interpretation win.

Now, the second impact that the overruling or significantly narrowing *Chevron* will have on administrative law, and this one may be even more important, is that the way the agencies work now is they don't consider whether their reading of the statute is the best reading of the statute. They consider, as modified by *Chevron*, whether their reading of the statute is generally reasonable. And if they conclude that it is, and people being generally self-interested reasoners, generally convince themselves there's some ambiguity, then they say, "I'm going to interpret the statute to pursue the policy ends of my administrator, my commissioner, my president."

And so, what you have right now is *Chevron* deference has created a situation where agencies push the envelope as far as they believe a fair reading of the statutory text will allow, rather than interpreting the statute in its fairest way, the middle down the road, 50% way. And I think the elimination of *Chevron* deference, combined with the fact that agencies certainly don't like having their handiwork thrown out, will tend to clip the wings of agencies, cause them to be more implementing what Congress really intended were in active statutes, rather than what they believe the policy ends of their administration or their administrator would cause them to otherwise want the law to be.

**Chris Willis:**

Yeah. That is really fascinating, Misha. And I hadn't thought about the idea of how it would affect agencies' ongoing interpretations of their own statutes, but you're right. They do perceive and take advantage of this sort of zone of reasonableness that *Chevron* created for them, because if Chevron is the law, then the agency could literally interpret the statute either way. And if either is reasonable, the agency will always win. But here, if *Chevron* is swept away, as I understood you, if a party challenges an agency's interpretation of a statute, the court just proceeds to decide the issue itself with no deference to the agency, applying regular cannons of statutory construction and if necessary, a resort to legislative history. But there wouldn't be an idea of some presumption that the agency's interpretation is correct, right?

**Misha Tseytlin:**

That's exactly right. As I pointed out earlier, it just would not have a thumb on the scale in favor of the agency. And the agency knows that. In writing its regulations, it knows that it will not receive that thumb on the scale when a regulation is challenged in court.

**Chris Willis:**

Well, I bet our listeners can think of a large number of statutory interpretations by the CFPB and the other federal regulators that might be called into question by an abolition of *Chevron* deference. So now we're all going to be waiting with bated breath to see what the Supreme Court does. Can you tell the audience about what the expected timing will be on the resolution of the *Loper* case?

**Misha Tseytlin:**

The U.S. Supreme Court granted the *Loper* case a couple of weeks ago, which means that it will be argued very likely in the fall of 2023, with a decision issued about a year from now, May, June, 2024. The U.S. Supreme Court tends to have its most important consequential decisions issued in May or June. You'll sort of just see like if an election is going on. It's fair to say this case is going to be one of the most high-profile ones decided next term, very likely to be very sharply divided among the justices, so I would expect it to be a May/June case next year.

**Chris Willis:**

Got it. Roughly a year from now, we're going to have two Supreme Court cases potentially that'll be of interest to our audience; not only *Loper*, but of course, the *CFSA* case is probably going to come out around the same time too, right?

**Misha Tseytlin:**

That's right. They're going to be generally on the same schedule. I wouldn't be so shocked if they weren't argued and decided near the same time, maybe even the same day.

**Chris Willis:**

Got it. Well, Misha, we know we're going to have you back on the podcast when either or both of those cases is decided. So, I want to thank you for being on the podcast today and telling us all about *Loper*. It's a case we'll definitely be watching.

And of course, thanks to our audience for tuning in for today's show as well. Don't forget to visit and subscribe to our blogs, consumerfinancialserviceslawmonitor.com and troutmanpepperfinancialservices.com. And while you're at it, why don't you visit us over at troutman.com and add yourself to our Consumer Financial Services email list. That way you can get the alerts that we send out as well as invitations to our industry-only webinars that we have periodically. And of course, stay tuned for a great new episode of this podcast every Thursday afternoon. Thank you all for listening.