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Impact of the 'Loper Bright' Decision on New Jersey State Deference

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On Friday June 28, 2024, the U.S. Supreme Court issued its highly anticipated and consequential decision in *Loper Bright Enterprises v. Raimondo*, eliminating the decades-old *Chevron* deference standard, and therefore, severely limiting the ability of federal administrative agencies in the development, implementation and enforcement of their regulatory authorities.

While the immediate impact of *Loper Bright* is limited to the matter challenged, the Supreme Court's holding marks a fundamental change to the ability of federal agencies to interpret their enabling authorities and is sure to result in myriad challenges to agency actions related to new, and in some cases, long-standing regulatory structures based on a lack of clear statutory authority and delegation. In short, with the elimination of *Chevron* deference, nearly every federal regulation and action taken thereunder may be subject to non-deferential, or de novo, judicial review of its underlying statutory charge.

While the federal impacts are obvious, agencies, regulated entities and practitioners must now turn to an assessment of the applicability of the Supreme Court's ruling to state-level deference standards. Where parallels exist, the reverberations from *Loper Bright* will be felt at nearly every administrative and regulatory level.

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The U.S. Supreme Court.

In this article we examine whether, and to what effect, the *Loper Bright* decision will impact New Jersey state administrative agencies and the long-standing practice of affording agencies substantial deference in their actions and interpretations of law. While the outcome is yet to be seen, the *Loper Bright* decision creates new challenges for agencies and, in turn, potential opportunities

for regulated entities to push back against regulatory applications.

'Loper Bright': A Farewell to Deference

The *Chevron* doctrine, which was established by the Supreme Court in the 1984 case *Chevron v. Natural Resources Defense Council*, instructed federal courts to defer to and uphold an administrative agency's reasonable interpretation of ambiguous and open-ended statutory language, even if the court would have read the statute differently. As applied over the past four decades, this standard provided agencies with the flexibility to develop new, extend or even cut back on existing areas of regulatory oversight based on long-standing or general statutory authorities. In some instances, this approach was viewed as regulatory overreach and lead to challenges, such as *Loper Bright*, based on fundamental concepts of statutory interpretation and authority.

In *Loper Bright*, the court leaned in on the issue and held that the *Chevron* doctrine was improper and in conflict with the language of the Administrative Procedure Act (APA) insofar as it deprived the judiciary of its traditional role in deciding matters of law. Specifically, the court relied on the plain language of the APA, which provides that when reviewing agency action, "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action." 5 U.S.C. Section 706.

The court found that this provision did not contemplate agency deference when answering legal questions, and therefore, seats that responsibility exclusively with federal courts. A court exercising independent judgment may, consistent with the APA, still seek aid from an agency interpretation of a statute, but will no longer be bound by it. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Is State-Level Deference Next?

New Jersey is one of the several states that, similar to *Chevron*, applies substantial deference to agency actions and interpretations of law. Since *Loper Bright* is facially limited to federal matters, New Jersey is likely to continue to defer to state agency actions and interpretations in its aftermath.

However, a careful review of state law reveals significant similarities between New Jersey agency deference and *Chevron* that will likely lead to similar challenges and a newfound ability to push back against state regulatory actions.

Under New Jersey law, judicial review of agency actions is limited in scope and depends on the type of action being reviewed. An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious or unreasonable. *Allstars Auto Group v. New Jersey Motor Vehicle Commissions*, 234 N.J. 150, 157 (2018). This is based on a theory of agency competency where a reviewing court "must be mindful of, and deferential to, the agency's expertise and superior knowledge of a particular field," and "may not substitute its own judgment for the agency's, even though the court might have reached a different result." Id. at 158.

Taken a step further, New Jersey courts also give considerable weight to a state agency's interpretation of a statute the Legislature has entrusted the agency to administer, and regulations promulgated in furtherance of the statute are presumed to be valid. *In re Election Law Enforcement Com'n Advisory Opinion No. 01-2008*, 201 N.J. 254, 262 (2010); *New Jersey Ass'n of School Adm'rs v. Schundler*, 211 N.J. 535, 549 (2012). Courts will defer to an agency's

interpretation of both a statute and implementing regulation, within the sphere of the agency's authority, unless the interpretation is "plainly unreasonable." *East Bay Drywall v. Department of Labor and Workforce Development*, 251 N.J. 477, 493 (2022).

While a court is not bound by an agency's interpretation that is contrary to the statutory language or undermines the Legislature's intent, the practice of affording agencies substantial deference in their actions and interpretations has withstood the test of time and is arguably stronger than ever. In a recent pronouncement of the deference afforded to agencies, the New Jersey Supreme Court explained that agency decisions are reviewed under an enhanced deferential standard, which comes from the understanding that a state agency brings experience and specialized knowledge within its field of expertise. Id. This, of course, stands in contrast to the Supreme Court's focus on specifically-granted delegation of authority under *Loper Bright*.

Similar deference has even been extended to certain decisions by municipalities due to their "peculiar knowledge of local conditions." *Pierce Ests. v. Bridgewater Twp. Zoning Bd.,* 303 N.J. Super 507, 514 (App. Div. 1997); *Price v. Himeji*, 214 N.J. 263, 284 (2013).

While the deference granted to agencies in New Jersey may be analogous to that of the *Chevron* doctrine, any challenge to state deference will likely need to employ arguments distinct from those relied on by the Supreme Court in *Loper Bright*, as the New Jersey Administrative Procedures Act, N.J.S.A. 52:14B, (New Jersey APA) does not contain language identical to that of the Federal APA, prescribing the role of the court in reviewing agency action. In fact, the only reference to judicial review is in Section 12 of the New Jersey APA, which merely provides "any judicial review shall be from the final action of the agency." N.J.S.A. 52:14B-12.

Rather, in New Jersey, judicial review authority flows directly from the state's constitution, meaning challenges must rely on a separation of powers argument. See N.J. Const. Art. VI, Section 5, Paragraph 4. While Article III of the U.S. Constitution was addressed in *Loper Bright* and the basic principle of separation of powers was discussed at length in *Loper Bright's* concurring opinions, the majority ultimately relied on the language of the federal APA in its holding. Still, this argument follows the well-worn constitutional principle that the powers of the government are divided into three distinct branches with no branch able to exercise the powers belonging to the others. See N.J. Const. Art. III. Arguably, the federal APA provision relied upon by the Supreme Court is merely a codification of this principle.

Therefore, arguments similar to *Loper Bright* are likely to apply—namely, that an agency has no specialized knowledge in interpreting a statute—as this is exclusively a function of the courts, and any deference provided to an agency interpretation is arguably an infringement on judicial power and unconstitutional under the doctrine of separation of powers.

While a challenge on these grounds is almost guaranteed, it will take years for New Jersey courts to resolve the issue. In the meantime, however, *Loper Bright* has injected an air of uncertainly in a previously well-settled area. Regulated entities that adeptly wield that uncertainty may find new advantages when working with agency policies, regulations and enforcement actions.

Skillful Uncertainty

When assessing whether and how to leverage *Loper Bright* in agency dealings, consider the following:

1. Persuasion v. Aggression: First and foremost, and particularly where resolution or reconsideration of an issue is desired, regulated entities should not expect to force agencies to change their positions through demands or threats of legal action. This will result, at best, in delayed resolution and, in most instances, a further entrenching and discontinuation of conversation. Take the time to carefully assess the issue, explain your position in a collaborative fashion and rely on persuasion over aggression. Exercise discretion—your credibility matters.

2. Identify the Right Audience: As discussed above, the potential impact of *Loper Bright* on a state agency position may raise complicated questions of legislative interpretation and constitutional law. Regulated entities should not expect to gain much traction with project staff and should endeavor to identify the appropriate point of contact within the agency's counsel office to help guide the conversation and look critically at the issues presented.

3. Assess Your Regulatory Burden: Regulated entities should carefully assess the regulations that currently, or at some point in the future may, impact their operations to identify potential areas of negotiation or challenge.

4. Language v. Intent: When advancing new and/or innovative positions—whether in regulation, litigation or policy—agencies often lean on the notion of "intent" in support. Where confronted with this approach, regulated entities are wise to look critically (and request specific justification) for any such position based on the plain language of the guiding statutory provision.

5. Statute v. Regulation: In assessing an agency position and the potential impact of *Loper Bright*, regulated entities are reminded that it is applicable to agency interpretations of statutory rather than regulatory provisions. Notwithstanding *Loper Bright*, agencies are likely to continue to receive substantial deference in interpretation and application of their own regulations, provided they are within its statutory charge.

6. Embrace Compromise: The threat of *Loper Bright* is unlikely to cause agencies to abandon long-held or important regulatory and policy positions. It will, however, play into an agency's assessment of risks associated with its defense of a given position. As such, regulated entities should advance their positions with an eye towards gaining a more advantageous posture to facilitate resolution, not to be relieved of their regulatory obligations.

Loper Bright is almost certain to mark a fundamental change in how federal agencies interpret their enabling authorities and is sure to result in myriad challenges to federal agency actions. Although the impact of *Loper Bright* is facially limited to federal matters, some of the arguments advanced by the petitioners in that case may be utilized in states like New Jersey in an effort to erode deference afforded to state administrative agencies.

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