Podcast Transcript

To Defer or Not to Defer: Courts and the FTC after Loper Bright

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Rubenking: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Randall Rubenking, and you're listening to BakerHosts. We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives.

On today's episode of AD Nauseam, Amy and Daniel have a returning special guest, Randy Shaheen, their partner at BakerHostetler in the Advertising, Marketing, and Digital Media practice. Randy also teaches advertising law at Washington and Lee and will put on his professor hat to guide the discussion on the Supreme Court's *Loper Bright* decision that overturned *Chevron*, a long-standing doctrine that gave considerable deference to agencies, including the FTC. How this impacts advertisers on a practical level right away, and in the future, is today's topic. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Kaufman: Welcome back to AD Nauseam and thank you so much for joining us. We have a big topic for you today, and that is the Supreme Court's *Loper Bright* decision, which struck down the *Chevron* doctrine. And for us, that means we got to bring out the big legal guns for this discussion, our very own Randy Shaheen.

Mudge: Professor Shaheen is in the house again.

Shaheen: Thanks, Amy and Daniel. Not sure about the big gun description, but I'm always happy to join the two of you. And I'm really glad we scheduled this, because it gave me an excuse to sit down and really go through all the different opinions here. Quick bit of trivia with respect to administrative law, I had Justice Breyer for that subject when he was still a Circuit Court judge. But I have to confess, I've pretty much long since forgotten everything he had to say on the topic.

Mudge: Okay. You two giant nerds, I happen to know for a fact that you both dove into this decision the second it came out and probably started going back and forth, I think it was a Friday, like all weekend. So, you can play it all cool, but I know you have been chomping on *Chevron* or *Loper Bright* since it came out. But look, we've all been reading quite a lot about the decision and what it means and, needless to say, there is a lot of misunderstanding out there about what the immediate impact of this thing is going to be. As well as what it means for the future, particularly with regard to our beloved agency, the Federal Trade Commission.

Kaufman: Yeah. Amy, I was watching a hearing and I saw one member of Congress suggesting that the decision somehow meant that agencies would just automatically start rescinding rules. Well, that is, of course, not the case. But I figure, look, given that we're going to be quite loyally, we're going to be a little scholarly today, I thought the question I would ask today, favorite TV or movie focused on lawyers? And let us kick it off with Randy.

Shaheen: So, I'm going to date myself here again, but I have to go with Paper Chase. I love Professor Kingsfield.

Mudge: Okay. I don't even know if I know what that is. No, kidding. Kidding. Alright, I have, I loved L.A. Law. But Ally McBeal, baby. That was my jam when I started practicing law. I'm sure there are a few pictures of me selecting my wardrobe so I look just like Ally McBeal. I will say, I don't get the recent obsession with Suits. I'm like, eh, on Suits. I think that is a millennial thing and just not loving that one. What about you, Daniel?

Kaufman: Wow. I had not thought of Ally McBeal for years, and that is where Portia de Rossi got her start there. No, I was a huge Ally McBeal fan. But for me, Better Call Saul. I did the whole…

Mudge: Oh yeah.

Kaufman: …Breaking Bad thing years ago, and then I turned to Better Call Saul. And I will say, it took me a few efforts, a few times to get into it. But once I got into it, I was fully hooked. I just, it was an amazing show. Again, not exactly a positive portrayal of lawyers, to be clear. But really well done.

Mudge: I thought you were going Night Court. I thought you were going old-school, '80s Night Court. But, good to be…

Kaufman: I love me Night Court also. But Better Call Saul, just spectacular.

Mudge: Alright. So, now that you've got your AD Nauseam TV recommendations out of the way, let's get back to this topic. Randy, let's set the stage. Remember, we've only got about 20 minutes. But in a pithy fashion, what is that *Chevron* doctrine and why do we, or did we, care about it?

Shaheen: Sure. So, as Daniel was saying, there's been a lot of conversation out there about this. And I think to some people, it just means courts aren't going to defer to agencies anymore, full stop. But the *Chevron* deference is really a specific kind of deference, and it is deference by a court to how an agency interprets a statute that it is supposed to administer. And when a statute is ambiguous, as sometimes they are, a court would defer to any reasonable interpretation that the Agency put out for that statute, such as here at the FTC. And as I said, this is particularly significant, or used to be significant, because Congress rarely legislates with sufficient precision. Right? You've got people trying to strike compromises, and they use kind of fuzzy language and figure we'll fight about it later. So, it was not all that unusual for statutes to be ambiguous.

Kaufman: So, *Chevron* was decided 40 years ago. But certainly, for the last few years, have we seen more decisions where courts have been certainly less inclined to defer to certain agency actions or interpretations. We all have been wondering how long the doctrine would actually survive, and certainly on June 28, we got a very clear answer.

Shaheen: Yeah, it is interesting. I think folks have thought for quite a while the writing was on the wall. And the majority opinion notes that the Supreme Court, at least, has not used *Chevron* deference since 2016. So, quite a long time ago. But then, once we got to this this case and cert being granted, I think everyone was predicting something was going to happen to *Chevron*. But what would it be? Would the court set up some other standard for deference, strike it all together? And we have the answer, where the majority opinion strikes it down completely. Saying basically, look, it is the job of judges. Judges are good at interpreting laws and that is their job, and there is just not going to be any more deference to administrative agencies in that regard.

Mudge: So, where will the FTC continue to be given deference, if anywhere?

Shaheen: So, I think that is where it is important to focus on exactly what *Chevron* deference was. Right? And certainly, as the Supreme Court has been no friend of federal agencies generally, and the FTC specifically, in recent years. So, who else knows where they may cut back on the agency. But I think, for now, here, there is no reason why courts won't continue to defer to FTC factual findings. Right? *Chevron* is about deference to legal interpretations, not factual interpretations.

So, if the agency finds that an advertiser has engaged in a particular course of conduct, that finding will be given deference as a factual finding. But whether Section 5 or some other statute that the FTC administers should be interpreted to make that course of conduct unlawful, in other words, okay, here is the facts as we find them, does that make out a violation of law? That is what implicates *Chevron* deference. And so, the courts are not going to defer to that second piece, do the facts constitute a violation of law in terms of how the law should be interpreted.

Mudge: So, the impact of the decision really is quite broad, although it is not unlimited. Most of the stuff that I've read, the focus seems to be on issues involving environmental regulations, fair bit about financial regulations. But for today, kind of narrowing in on our slice of the pie. Mainly, how will this play out or not play out, with respect to FTC rulemaking, and then its legal enforcement. The first shoe actually just dropped for the FTC just a few days after *Loper Bright* was announced. Daniel, why don't you tell us what happened down in Texas?

Kaufman: Yeah. No, it is really interesting. So, as we probably all know, the FTC issued this non-compete rule. Which has been highly controversial, immediately challenged through several different court actions. And a few days after *Loper Bright* comes out, Texas District Court invalidates, generally, the new FTC non-compete rule. And, among other things, the court cites to *Loper Bright* in reaching that decision. But of course, what is also really interesting is, a week or two later, we've got another decision from a different federal court, this one in Pennsylvania, reaching a completely opposite conclusion with respect to the non-compete rule. And I can guarantee by the time this podcast is posted, we're going to hear probably again by the Texas Court. But again, it is being cited already frequently in court decisions.

Shaheen: Yeah. And I saw just the other day or just yesterday, another case has been filed in yet another venue. So, we'll see how the scorecard goes in this regard. But I think the key thing to remember about the non-compete rule, it is kind of an unusual animal. Right? It was premised upon assessed short provision of the FTC Act that doesn't usually get much attention, Section 6G, and whether the FTC could even promulgate substantive rules under that provision.

Most of the Commission's work that we're all familiar with is done under Section 5, which regulates deception and unfairness. And there really hasn't been much controversy, over the years, about what makes up the legal elements of deception. Right? People aren't arguing over exactly what the legal interpretation of deception is, as opposed to whether the facts constitute deception.

But with respect to unfairness, over the years, there has been a lot of back and forth about the scope of the FTC's unfairness authority. What constitutes unfairness? It is pretty ambiguous, as ambiguity goes. And the FTC, this particular FTC has been pretty aggressive about looking at unfairness in a very expansive way. So, with respect to privacy, for example, and whether non-monetary injury is the type of injury that satisfies or that constitutes unfairness under the law. So, I could certainly see some arguments, some invoking of *Loper* on the unfairness piece of Section 5.

Mudge: Okay. Randy, I think when you're talking about the non-monetary injury, you're talking about the *Kochava* case. Daniel is going to have drool coming down, we're going to have to gag him and put him in the corner, because that is his absolutely favorite case. I'm not sure if we've had a podcast where Daniel hasn't tried to take us off into a *Kochava* tangent, so.

Kaufman: And I think I read the other day, somewhere, that there were settlement talks going on in *Kochava* and I was very upset because like…

Shaheen: Oh no, they might need a decision. Right?

Mudge: Alright. Daniel, you got to go back and get some of that pull back you had at the FTC, your...

Kaufman: Yeah, I…

Mudge: …but any, we will, Daniel, I will give you a *Kochava* future podcast, if we will…

Kaufman: Excellent.

Mudge: …but we are staying on track for this one. So, but Randy, you raised an interesting point about the FTC's authority. And the FTC's rulemaking authority actually falls under even a different statute. Not Section 5, but Section 18 of the FTC Act. And currently, the FTC, I mean, they were on a rulemaking binge. Alright? They finalized the imposter rule using that authority. Their proposed rules on junk fees, on consumer reviews, on updating the negative option rule. And farther down in the pipeline, we've got rulemaking on earnings claims and then this kind of amorphous commercial surveillance rulemaking.

But let's be clear, the general statutory language in Section 18, and I'll quote it, is pretty clear. The Commission quote, may prescribe rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce. Now, that is a pretty clear grant of giving the FTC some rulemaking authority. But how broad will courts let the FTC go with this language now?

Kaufman: Right. And of course, look, we can't just look at *Loper Bright* in a vacuum. I mean, this is where we also have to keep in mind other recent decisions from the Supreme Court. Most notably, *West Virginia v. EPA*, where the Court basically said it was going to be looking really closely at the specific grant of authority at issue to see, had Congress properly delegated that scope and amount of authority? Particularly when we're involving issues of major questions.

Shaheen: Yeah, and no one's challenged the imposter rule yet. And it may end up being one of the few that that doesn't get challenged. But when rules do get challenged, I think we can expect that rules that kind of stay in their lane, that narrowly target known deception issues, are likely to survive. Or more likely to survive, at least. The court is not going to defer any more to the FTC's interpretation of what Section 18 means from a legal standpoint. But again, if they're staying narrowly focused on something like the imposter rule, I can see that making the cut because it sticks very closely to what Congress presumably intended when they drafted Section 18.

But if the FTC starts to use Section 18's language to draft, to promulgate some broad, overreaching rule, like the proposed privacy rule, that may end up quite differently in court. Or maybe, to Daniel's point about the *West Virginia v. EPA*, someone will file a challenge in the aggregate to this huge flurry of rulemaking that is putting, if all of them were finalized but put, essentially, every consumer transaction under a rule and argue that can't be what Congress intended when it gave the FTC rulemaking authority.

Kaufman: And look, I can also imagine a challenge to the FTC's expansive use of these penalty notice letters and a question being raised as to whether that also falls within what Congress intended, perhaps.

Mudge: Oh Daniel, that is really interesting. I mean, I think we've talked about that notice of penalty offense letters being attacked from day one, since the first time they came out. I think, I guess they, FTC probably hasn't tried to use them in ways they've threatened. But yeah, this will give another really good avenue to go after that.

But you know what, let's turn to cases and enforcement. And it is not like the *Chevron* case was regularly cited in the FTC's litigated cases. The courts evaluating a regular Section 5 case really weren't looking to *Chevron* to help understand how the FTC was interpreting Section 5. So, it might be an issue when the FTC is stretching the bounds of FTC. But for more run-of-the-mill deception or unfairness cases, *Loper Bright* probably is not going to be any kind of game changer.

Kaufman: Yeah. Look, I think it might have much more of an impact in other areas where the FTC is enforcing other specific statutes or rules. Certainly, *COPPA* comes to mind. And certainly, for our purposes, *ROSCA* is probably leading the pack. *ROSCA*, of course, is a pretty simple statute. It doesn't have a huge amount of specificity, but it has three basic requirements that companies must meet when selling products or services online with a recurring billing feature. Statute requires material information be disclosed, that the seller obtain the consumer's affirmative consent, and that there be a simple method of cancellation.

Shaheen: And that last one, the simple method of cancellation is where it gets interesting. Because all the statute literally says is that the seller has to provide a simple mechanism for a consumer to stop recurring charges from being placed on a consumer's credit card, debit card, bank account, or other financial account. That is it. But all of the guidance and policy statements that the FTC has been putting out lately about what it means to be a simple mechanism for cancellation is no longer going to get any deference from a court. And that is a pretty big deal here, because I think a lot of us believe that the FTC has perhaps strayed from simply requiring a simple method of cancellation.

Mudge: Absolutely. Now, we're not suggesting you rip up your copy of the FTC's negative option policy statement. It does sound though like *Loper Bright*, at minimum, expands the zone of advocacy in some of these areas. And maybe, and it is a big if, maybe the FTC might think twice about whether to bring some of these closer call cases. Or in some of the cases that are pending right now, hopefully the FTC will consider settlement on some more reasoned grounds.

Kaufman: There is some wishful hoping and thinking there. But no, I totally agree with you, Amy.

Mudge: I'm an eternal optimistic. You know that. You know it.

Kaufman: You are, and I am totally the glass is empty. But look here, too. The FTC is also attempting to create a rule involving negative options that would put most of those interpretations of *ROSCA* into a rule. And that is perhaps an insurance policy now for the FTC against the lack of *Chevron* deference to how it's been interpreting *ROSCA*. But if a new rule is viewed by courts as stricter than what *ROSCA* requires, it is a real open question. How are courts going to react to the FTC using its rulemaking authority to craft restrictions that go further than what Congress thought was necessary when they were regulating on that very specific, same issue?

So, Randy, there is so much that is going to evolve here. As we see courts interpreting *Loper Bright*, and as we see whether the FTC changes course at all in any areas or continues to broadly interpret all its authorities. So, what are your takeaways that companies should be thinking about vis-à-vis the FTC and this very significant decision?

Shaheen: Thanks, Daniel. I'd say, for now, three things. First, don't dramatically change how you consider and evaluate FTC risks and concerns. Continue, as Amy said, to pay close attention to FTC guidance. But if there are areas, and there may be some, where you think FTC guidance has gone a little bit too far – it is at odds with specific statutory authority or language – then, yeah, on the margins you might want to take a closer look at what the real risk might be here. Again, as Amy said, the FTC may be reluctant to push things too far, given this development.

Second, talk to your marketing people, make sure they know. Right? Who knows what they're listening to, or what they've heard on social media or elsewhere. Make sure they understand that things have not dramatically changed. Consumer protection rules and laws survive. The FTC is still very active. Nothing is happening dramatic overnight.

And then, third, if you are in litigation with the FTC, or just in an investigation, this is certainly another kind of arrow in the quiver to think about. Right? Are there issues you can raise, in terms of how the agency is interpreting its statutory authority, that you might be able to assert in a white paper or elsewhere to try to gain a little leverage in negotiating or a settlement?

Mudge: Randy, thank you so much for joining us. I have to say, I make fun of these heady topics. But it is important that we take them on, along with things like puffery. And it is awesome to have a partner like you who can help break these things down in a simple way. It makes hard things easier to understand. So, we're always grateful to have you joining me and Daniel Kaufman for another episode of AD Nauseam.

Rubenking: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in ad law, visit our ADventures in Law blog at www.adventures-in-law.com, and check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.