

7th Circ. Ruling Expands CFPB Power In Post-Chevron Era

By **Tom Laser, Francis Riley and Jason McElroy** (August 1, 2024)

On July 11, the U.S. Court of Appeals for the Seventh Circuit issued its decision in *Consumer Financial Protection Bureau v. Townstone Financial Inc.*

The Seventh Circuit reversed the decision of the U.S. District Court for the Northern District of Illinois and found that the Equal Credit Opportunity Act does not limit prohibited discriminatory conduct, comments or remarks when directed solely at actual applicants for credit.

Rather, a three-judge panel affirmed the Consumer Financial Protection Bureau's position that the Equal Credit Opportunity Act, or ECOA, prohibits such acts when directed at potential applicants as well.

Thus, the panel held that the CFPB has the right to proceed with this action against the defendants, and attempt to prove at trial that the alleged conduct did discourage applicants from seeking credit from the defendant mortgage loan broker, Townstone.

The CFPB brought this redlining suit against Townstone in 2022 claiming that certain remarks made by Townstone's co-founder and chief executive on a radio program unlawfully discouraged prospective African-American applicants from applying for mortgage loans from Townstone.

The decision is one of two recent consequential victories for the CFPB. The U.S. Supreme Court's May decision in *Consumer Financial Protection Bureau v. Community Financial Services Association of America* confirmed that the CFPB's funding structure complies with the appropriations clause of the U.S. Constitution, overturning a decision from the U.S. Court of Appeals for the Fifth Circuit that had ground many CFPB actions to a halt.[1]

The Seventh Circuit's decision in *Townstone* breathes new life into the CFPB's enforcement authority and its enforcement agenda.

With the Seventh Circuit's decision that the term "applicant" now covers both actual and prospective applicants, the CFPB's ECOA enforcement authority is stronger because — theoretically — any individual could be considered a prospective applicant.

This expansive interpretation will likely prompt new CFPB ECOA enforcement investigations as well as individual and class-plaintiff-driven actions.

The Seventh Circuit decision may also embolden other federal agencies tasked with furthering the Combatting Redlining Initiative, an October 2021 joint resolution by the CFPB, the U.S. Department of Justice, and the Office of the Comptroller of the Currency.



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The purpose of the initiative was to make mortgage credit and homeownership accessible to all Americans on the same terms, regardless of race or national origin, and regardless of the neighborhood in which they live.

With the definition of the term "applicant" newly expanded for discouragement purposes, we will likely see additional enforcement actions in furtherance of the initiative. These may include CFPB investigatory actions, and even civil lawsuits, brought by the U.S. attorney's offices or by state attorneys general.

Indeed, according to the CFPB's June 2024 fair lending report, the CFPB referred 18 ECOA violations to the DOJ for enforcement in 2023.[2]

With the benefit of a favorable ruling from the Seventh Circuit, and with reports that the CFPB is hiring a large cadre of new enforcement attorneys,[3] the CFPB may take some of these actions on itself.

The Seventh Circuit's holding also marks one of the first, if not the first, circuit court decisions to address regulations after the U.S. Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*,[4] which overruled *Chevron USA Inc. v. Natural Resources Defense Council Inc.*[5]

The district court decision notably employed *Chevron*'s analysis, finding that the bureau's interpretation required no deference because it could not proceed past step one — the statutory language was unambiguous, and thus the court could go no further.[6]

Acknowledging that the *Chevron* doctrine had been overruled by the Supreme Court, the Seventh Circuit approached "this case as presenting a question of statutory interpretation subject to our *de novo* review."

Conducting its *de novo* review, the Seventh Circuit held that the CFPB's interpretation of Section 1691(a) of the ECOA was the correct interpretation — based primarily on one sentence from Section 1691e(g) of the ECOA.[7]

Section 1691(a) requires the agencies charged with enforcement to refer to the attorney general instances in which the agency believes a creditor has "engaged in a pattern or practice of discouraging" applications.

Based on this, and on what the court found to be a broad delegation of authority to the CFPB, the court ruled that, when reading the entirety of the statute together, the prohibition encompasses discouragement of prospective applicants. The Seventh Circuit did not, however, address what many see as the crux of the statutory interpretation issue.

Indeed, the Seventh Circuit acknowledged it must consider the rule — together with the ECOA at large — as a whole, but does not reference at all the actual language in Section 1691's operative prohibition. That operative prohibition applies only to the statutorily defined term "applicant," which would not include potential or prospective applicants.

While the Seventh Circuit notes that it "cannot constrain artificially the ECOA to a single provision," its curious failure to address the operative prohibition in Section 1691 appears to have done just that.

As a result of the Seventh Circuit's interpretive approach, financial services companies defending such investigatory and enforcement actions may need to evolve as well.

Of course, the level of deference a court must apply to the CFPB's interpretation of its enumerated consumer protection authorities will be a significant factor dictating the strategies invoked by financial services companies dealing with the CFPB and other federal agencies, and companies must evaluate the strength of the regulator's interpretive position.

But if other circuit courts give such short shrift to statutory interpretation as the Seventh Circuit did here, the overturning of Chevron may end up being a win for agencies such as the CFPB with broad delegations of authority.

As a result, we may see financial services companies settle more frequently and earlier on in disputes than we have seen in the past few years —especially during the period when the constitutionality of the CFPB's funding mechanism was being reviewed by the Supreme Court.

Further, and apart from potentially prompting additional investigation and enforcement actions, the Seventh Circuit's decision in *Townstone* provides a notable preview as to how federal appeals courts — and district courts, for that matter — may conduct statutory interpretation analyses in the new post-Chevron world. Indeed, and while the Seventh Circuit did not mention this, the abdication of the Chevron doctrine did not affect its decision in *Skidmore v. Swift & Co.*[8]

According to the Supreme Court's 1944 decision in *Skidmore*, when presented with an issue of statutory interpretation, courts are to consider how persuasive an agency's interpretation of a given statute is.

The persuasiveness of that agency's interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." [9]

This tracks fairly closely the language of *Loper Bright*, in which the Supreme Court stated: "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority. ... Careful attention to the judgment of the Executive Branch may help inform that inquiry." [10]

The Seventh Circuit, while not explicitly relying on *Skidmore*, certainly placed great weight on the CFPB's position in its analysis. While the Chevron doctrine may no longer be with us, the *Townstone* decision demonstrates that courts still have deferential muscle memory, and that, at least with respect to the CFPB, agency positions may end up no worse for the wear.

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[1] 601 U.S. 416 (2024).

[2] Consumer Financial Protection Bureau, Fair Lending Report of the Consumer Financial Protection Bureau (June 2024), available at https://files.consumerfinance.gov/f/documents/cfpb_fair-lending-report_fy-2023.pdf.

[3] Kate Berry, CFPB plans to hire 50% more enforcement attorneys, support staff, American Banker, <https://www.americanbanker.com/news/cfpb-plans-to-hire-50-more-enforcement-attorneys-support-staff> (last visited July 27, 2024).

[4] Loper Bright Enterprises v. Raimondo, No. 22-451, 144 S.Ct. 2244 (2024).

[5] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[6] Townstone, No. 20-cv-4176, 2023 WL 1766484, *5 (N.D. Ill. Feb 21, 2023), rev'd No. 23-1654, 2024 WL 3370023 (7th Cir. July 11, 2024).

[7] Title 15 of the U.S. Code, Section 1691e(g).

[8] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[9] Skidmore, 323 U.S. at 140.

[10] Loper Bright Enterprises, 144 S.Ct. at 2273.