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In Rare Ruling, Court Permits Discovery Into Motives Behind FTC Subpoena

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When a U.S. magistrate judge in the District of Columbia issued his ruling in *Federal Trade Commission v. Bisaro* on July 13, 2010, permitting limited discovery of certain FTC officials regarding an agency subpoena, it had been more than three decades since the D.C. Circuit had found that "extraordinary circumstances" were present that warranted discovery in a subpoena enforcement action. Subpoena enforcement proceedings are typically "summary procedures." However, upon a finding that extraordinary circumstances exist, the court may order limited discovery to ensure that enforcement of the subpoena would not amount to an abuse of process.

In opposing the FTC's petition to enforce a subpoena requiring him to testify under oath, Paul M. Bisaro, CEO of Watson Pharmaceuticals, moved to compel limited discovery on whether the FTC was acting with an improper purpose in issuing the subpoena. Bisaro argued that the FTC had acted outside the scope of its regulatory and enforcement authority by using the subpoena to pressure Watson to enter a deal with another generic pharmaceutical company.

U.S. Magistrate Judge Alan Kay found the facts in *Bisaro* "extraordinary enough to grant very limited discovery."

In a finding that will no doubt be embarrassing to the Commission, Kay found that the FTC may have exceeded its authority by using its investigative power to pressure Watson to enter into a business deal that the FTC considers desirable. Citing the U.S. Supreme Court's 1964 decision in *United States v. Powell,* Kay said it is an abuse of process to enforce an agency summons that "had been issued for an improper purpose, such as to harass the [recipient] or to put pressure on him to settle a collateral dispute." Kay ordered the FTC to answer interrogatories but stopped short of requiring a key agency official, Markus Meier, to sit for a deposition.

The case will likely fuel the debate as to just how far the FTC will go to achieve a ban on so-called reverse-payment patent settlements between generic and branded drug firms. Bisaro argued that Meier, the assistant director of the FTC's Bureau of Competition's Health Care Division, expressly warned Watson's counsel that failure to pursue the FTC's suggested course would likely cause the FTC "Front Office" to initiate an investigation.

Kay found this credible and noted that the FTC had admitted, "If Watson had just agreed to [do what the FTC wanted] it never would have pursued this investigation."

Kay rejected the FTC's argument that "an administrative subpoena must be enforced whenever a valid purpose appears, even if an otherwise improper purpose also appeared."

Prior to the *Bisaro* decision, the D.C. Circuit had only found one instance where extraordinary circumstances existed to warrant discovery. See *United States v. Fensterwald,* 553 F.2d 231, 232 (D.C. Cir. 1977) (finding limited discovery into IRS audit selection procedure appropriate where lawyer who headed a committee investigating the IRS was then selected for special audit).

FTC Beat is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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