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CHALLENGING THE ADMINISTRATIVE SUBPOENA

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A considerable amount of any insurance company's time is spent working with regulatory agencies in the states where its business is transacted. In the course of implementing state insurance laws and protecting the public, state agencies scrutinize every aspect of an insurer's business, from its rates to its claims practices to its surplus. The most frequently used (and sometimes misused) tool that agencies possess for gathering information on an insurer's business is the administrative subpoena.

At times, the administrative subpoena is misunderstood by both the agency issuing it and the company subject to it. This article examines the administrative subpoena from a recipient company's perspective and demonstrates the limited ways in which any company can oppose an administrative subpoena. In the discussion of the applicable case law on this subject, it is the intent of the authors to focus on both the state of the law generally, as well as to note particular points of interest in Florida law. Despite the specific references to insurance companies, the procedure outlined below applies equally to any person or entity receiving an administrative subpoena from any federal or state agency.

What is an Administrative Subpoena?

A crucial part of any state's regulation of the insurance industry is its ability to investigate regulated activities. The authority to gather information and evidence allows an agency to take a more proactive approach to regulation. An agency's investigatory authority, which varies depending upon its enabling statute, generally includes the power to require the production of documents and the furnishing of testimony. This power, however, is not without limitation.

For example, in Florida, the Department of Insurance is endowed with investigatory authority pursuant to section 624.307(3), Florida Statutes. This provision authorizes the Department to "conduct such investigations of insurance matters . . . as it may deem proper to determine whether any person has violated any provision of this code." Then, in order to assist the Department in conducting such investigations, section 624.321(1)(b), Florida Statutes, gives the Department "the power to subpoena witnesses, compel their attendance and testimony, and require by subpoena the production of books, papers, records, files, correspondence, documents, or other evidence which is relevant to the inquiry."

Like the Florida Department of Insurance, most agencies are statutorily empowered to subpoena witnesses and documents in the course of their investigations. However, an agency's subpoena power is different than the subpoena power of a court. Most noteworthy, administrative subpoenas are generally not self-executing. Thus, a recipient of an administrative subpoena is not required to comply until the agency seeks judicial enforcement of the subpoena. Furthermore, because agencies are creatures of statute, an administrative subpoena can only do what its enabling statute authorizes. In that regard, certain agencies are entrusted with much stronger investigatory power than others. For example, an agency like the Florida Department of Insurance, is authorized by statute to initiate investigations on its own, while others, like the Equal Employment Opportunity Commission, may only investigate after someone first files a charge or complaint with the agency.⁽¹⁾

Opposing the Administrative Subpoena

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In the majority of cases, companies receiving administrative subpoenas voluntarily comply with the agency's request. Voluntary compliance occurs either because the recipient wants to exhibit a cooperative attitude toward the agency or, perhaps, because the recipient doesn't know that it has a choice. Notwithstanding the type of agency at issue, compliance with an administrative subpoena can at times be a significant invasion of the recipient's privacy and a costly endeavor. In such cases, the company receiving the subpoena may not wish to produce the information or testimony to the agency. Fortunately, there is a large body of federal case law which permits the recipient of an administrative subpoena to question its validity in a court of law prior to compliance. And, due to the lack of a developed body of case law in most states, as in Florida, state courts will not hesitate to refer to the federal cases for guidance.

Morton Salt and Powell

Generally, before enforcement, an agency's subpoena must be shown to possess certain characteristics, or procedural safeguards, which are designed to ensure that the recipient's fourth amendment rights are protected.⁽²⁾ The impetus for the development of these procedural safeguards was the lack of guidance that the federal APA provided for determining the validity of agency subpoenas.⁽³⁾ Leading the charge for reform of administrative law were two instrumental United States Supreme Court decisions, United States v. Morton Salt, 338 U.S. 632 (1950) and United States v. Powell, 379 U.S. 48 (1964).

In Morton Salt, the Supreme Court announced a three-part test which, to this day, governs the enforcement of federal agency subpoenas. The test inquired whether: (1) the inquiry was within the authority of the agency, (2) the demand was not too indefinite, and (3) the information sought was reasonably relevant to the investigation.⁽⁴⁾

In Powell, the Supreme Court elaborated on Morton Salt by requiring that the agency meet four criteria before enforcing a subpoena. This test inquired whether: (1) the investigation will be conducted pursuant to a legitimate purpose, (2) the inquiry is relevant to that purpose, (3) the information sought is not already in the agency's possession, and (4) the administrative steps required by law have been followed.⁽⁵⁾

In similar fashion, the Florida legislature has adopted a procedure whereby a recipient may request that the issuing agency quash its subpoena based on criteria similar to the test set out in Morton Salt. The Florida APA, at section 120.569(i)1., Florida Statutes, provides that:

Any person subject to a subpoena may, before compliance and on timely petition, request the presiding officer having jurisdiction of the dispute to invalidate the subpoena on the ground that it **was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material.**

Thereafter, pursuant to section 120.569(i)2., Florida Statutes, a "party may seek enforcement of a subpoena . . . by filing a petition for enforcement in the circuit court . . ."

Thus, the recipient of an agency subpoena may safely challenge the validity of the subpoena on the limited grounds set forth in the Morton Salt and Powell tests. However, in Florida, as indicated by section 120.569(i)1, Florida Statutes, the recipient of an agency subpoena must *first* request the agency to invalidate the subpoena before going to court. This gives the agency the opportunity to correct any alleged error in its subpoena prior to utilizing judicial resources.

While it may appear that Morton Salt and Powell provide a party with an arsenal of defenses against administrative subpoenas, in reality enforcement proceedings are intended to be quite summary in nature.⁽⁶⁾ For example, the first prong of Morton Salt (asking whether the agency has authority to issue the subpoena) is generally limited to an inquiry as to whether the legislative body creating the agency granted it subpoena power in its enabling statute.⁽⁷⁾ In other words, as long as the agency has the statutory power to issue a subpoena, prong number one is satisfied. Further, the relevancy prong of Morton Salt is deemed satisfied as long as the material requested "touches a matter under investigation."⁽⁸⁾ In fact, some courts have held that as long as there is "some plausible ground for jurisdiction" or if the evidence sought is not "plainly incompetent or irrelevant to any legal purpose of the agency" a court should enforce an administrative subpoena.⁽⁹⁾ This is not to say, however, that courts will completely surrender their independent role and rubber-stamp any subpoena that the agency puts before it.⁽¹⁰⁾

before it.⁽¹⁰⁾

Considering the fact that administrative subpoenas are rarely opposed (and routinely enforced when they are), agencies often take the position that those under their regulatory control should not dare challenge their subpoena powers. For those who may be reluctant to question an administrative subpoena for fear of retaliation or sanction, Florida law specifically provides that a party shall not be in contempt while an administrative subpoena is being challenged.⁽¹¹⁾ Moreover, Florida courts have held that agencies may not impose administrative penalties or initiate disciplinary proceedings on a party properly opposing an agency subpoena.⁽¹²⁾

The Jurisdiction Defense

Knowing that agencies are statutorily created for specialized regulatory purposes, one might think that the most logical defense to an administrative subpoena would be the argument that the agency does not have jurisdiction to conduct its investigation or inquiry. For example, if the Department of Labor (DOL) issued subpoenas to a publishing company requesting information relating to that publisher's business, the publisher should be permitted to argue that the First Amendment prevents DOL from having jurisdiction over it, right? Wrong. Despite the logic in this argument, there is a widely recognized general rule which prohibits recipients of administrative subpoenas from raising jurisdictional defenses at enforcement proceedings.

This seemingly illogical rule was born in Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943). In Endicott, the Secretary of Labor, under authority of the Walsh-Healy Public Contracts Act (which requires that those who furnish materials to the government under contract meet certain labor standards), issued a subpoena to Endicott seeking information from one of its plants *not* connected to its government contract. Endicott challenged the subpoena, arguing that the Secretary did not have jurisdiction to seek information from a plant not connected with its government contract. The District Court agreed, but the Supreme Court reversed. The Supreme Court enforced the subpoenas and held that the issue of coverage under its jurisdiction was primarily a decision to be made by the Secretary of Labor.⁽¹³⁾

Three years later, the Supreme Court, in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), held the Endicott rule to be generally applicable in all subpoena enforcement cases. Since then, countless courts have relied on the Endicott/Oklahoma Press rule to prohibit subpoena recipients from raising a jurisdictional argument at enforcement proceedings.⁽¹⁴⁾

If this rule seems counter-intuitive to you, you're not alone. For example, one commentator noted:

If Justice Harlan had been asked what were the legal reasons that might be set up as a defense in [an] enforcement proceeding . . . he certainly would have included among them the defense that the administrative agency was without authority over the person to whom the subpoena had been issued. It is basic in our law that an administrative agency may act only within the area of "jurisdiction" marked out for it by law. If an individual does not come within the coverage of the particular agency's enabling legislation, the agency is without power to take any action that affects him.⁽¹⁵⁾

In addition, Justice Murphy, dissenting in Endicott, wrote:

If petitioner is not subject to the Act as to the plants in question, the Secretary has no right to start proceedings or to require production of records with regard to those plants. In other words, there would be no lawful subject of inquiry, and under present statutes giving the courts jurisdiction to enforce administrative subpoenas, petitioner is entitled to a judicial determination of this issue before its privacy is invaded.⁽¹⁶⁾

Despite its illogical nature, there are three justifications for the Endicott/Oklahoma Press rule. First, the rule is essential to the effective exercise of administrative investigatory power. Without the rule, it would be practically impossible for an agency to conduct an investigation because the jurisdiction issue would be raised and litigated in every case.⁽¹⁷⁾ Second, courts prohibit the jurisdiction defense because of the assumption that there is no legal injury at such an early stage in the process. Courts rationalize that denying a full blown hearing on the jurisdiction issue causes no injury because at the investigatory stage of the proceedings, no substantive action has yet occurred (such as the filing of an administrative complaint).

The third rationale for the Endicott rule is that proper division of labor requires that the agency perform fact-finding instead of the courts. This, of course, is why specialized agencies were created in the first place. To permit the jurisdiction issue to be litigated and decided by a court, agencies would be denied the opportunity to apply their expertise to the facts of each case under investigation.⁽¹⁸⁾

The practical effect of the Endicott/Oklahoma Press rule is that subpoena enforcement proceedings are limited in terms of the arguments that may be raised, which results in courts erring on the side of enforcing agency subpoenas.⁽¹⁹⁾

Exceptions to the Endicott/Oklahoma Press Rule

The Endicott/Oklahoma Press rule is a broad, far-reaching prohibition on litigating the jurisdiction issue at a subpoena enforcement proceeding. Luckily, however, as with most rules, there are a few very limited exceptions to this general rule.

The most noteworthy exception was born in the case of Federal Trade Commission v. Miller, 549 F.2d 452 (7th Cir. 1977). There, the court permitted the recipient of an Federal Trade Commission (FTC) subpoena to raise the defense that it fell within the common carrier exemption from investigation. According to its enabling act, the FTC's investigatory power extends to "any . . . corporation engaged in or whose business affects commerce, excepting banks and common carriers . . ." The FTC conceded that respondent was a common carrier, but urged the court to extend its investigatory power according to its interpretation of the enabling act. The court refused to extend the investigatory power.

Citing FTC v. Feldman, 532 F.2d 1092 (6th Cir. 1976), the Miller the court enunciated three situations where the Endicott/Oklahoma Press rule would not apply:

- (1) Where the agency has clearly violated a right secured by statute or agency regulation,
- (2) Where the issue involved is a purely legal one not involving the agency's expertise or factual determinations, or,
- (3) Where the issue cannot be raised upon judicial review of a later order of the agency.⁽²⁰⁾

Determining that the case at bar met all three standards, the Miller court allowed the jurisdictional defense. In reaching its decision, the court noted, significantly, that the recipient of the FTC subpoena was asserting "the right to be free from *investigation* - and not from *regulation* . . ." ⁽²¹⁾

More recently, in FTC v. Manufacturers Hanover Consumer Services, Inc., 543 F. Supp. 1071 (E.D. Penn. 1982), the Eastern District Court of Pennsylvania found the Miller exceptions to apply to consumer finance companies claiming that they were exempt from an FTC investigation because they were engaged in the "business of insurance." Because the McCarran-Ferguson Act and the FTC's enabling act provide that the "business of insurance" is subject to the laws of the states and not the FTC's investigatory power, the recipients of administrative subpoenas sought to raise the jurisdictional defense at the enforcement proceeding. The court permitted the defense as two of the three Miller factors were present:

The last factor is clearly present here. The statutory exemption involves the right to be free from investigation, as opposed to regulation; the respondents cannot be effectively protected by judicial review of a subsequent agency action. The second Miller factor is also present, for the determination of whether the respondents' suspect practices constitute the business of insurance requires no further factual determination or FTC expertise. . . . [T]he jurisdictional defense is properly raised in this enforcement action. The FTC's assertion of investigatory authority rests upon an interpretation of the FTC Act which does not depend on any facts sought to be obtained by subpoena.⁽²²⁾

Affirming Manufacturers Hanover, Judge Posner stated "there is no doubt that a court asked to enforce a subpoena will refuse to do so if the subpoena exceeds an express statutory limitation on the agency's investigatory powers."⁽²³⁾

Additionally, based on dicta in Miller and Manufacturers Hanover, one could argue that a subpoena recipient can raise the jurisdiction defense under the rationale that it is objecting to the agency's *investigation* rather than its *regulation*. In essence, the challenging party's argument would be that the agency lacks jurisdiction over the *subject matter* of the investigation rather than arguing that the agency lacks jurisdiction to regulate the party. In support of this view, it has been held that it is a court's duty to "assure itself that the *subject matter* of the investigation is within the statutory jurisdiction of the subpoena-

court's duty to "assure itself that the *subject matter* of the investigation is within the statutory jurisdiction of the subpoena-issuing agency."⁽²⁴⁾

For example, in Federal Election Commission v. Machinist's Non-Partisan Political League, 655 F.2d 380 (D.C. Cir. 1981), the Federal Election Commission (FEC), in response to a complaint filed by the Carter-Mondale Presidential Committee, attempted to investigate several "draft-Kennedy" groups which had formed for the purpose of promoting the candidacy of Senator Edward Kennedy for President. In its investigation, the FEC issued a broad, sweeping subpoena that sought information and documents relating to *all* activities of the "draft Kennedy groups", including numerous aspects of the groups' activities not related to the draft Kennedy movement. In denying enforcement of the FEC subpoena, the court stated that it was especially important to assure itself of subject matter jurisdiction of the FEC because the FEC had never before attempted to investigate the targeted group for the stated purposes. Expressing the concern that such situations warrant "extra-careful scrutiny from the [reviewing] court", the court stated:

[o]bviously the mere fact of registration [with the Commission] cannot suffice as a jurisdictional basis for an FEC investigation *into any or all activities of a registrant*, any more than registration before the SEC can suffice as a legal basis for an SEC investigation into any or all of a corporate registrant's activities, e.g., its equal employment or labor relations practices.⁽²⁵⁾

As the above cases illustrate, a subpoena recipient wishing to raise a jurisdictional defense at an enforcement proceeding may do so only in certain limited situations. First, the subpoena recipient should examine the agency's statutory grant of investigatory power to see if there are any express limitations on that power. If there are, Miller clearly permits raising that jurisdictional defense. Second, a subpoena recipient should determine whether the decision to enforce the subpoena requires any factual development. If it does not, but is simply a question of law, a court will be more willing to hear a jurisdiction defense because there will not be the fear that a court is performing the fact-finding function of the agency.⁽²⁶⁾

Third, a subpoena recipient should determine whether or not it can raise the issue on judicial review of subsequent agency action. If it cannot, the recipient should argue that Miller permits it to raise a jurisdictional defense at the enforcement proceeding. Lastly, a subpoena recipient should ask whether the subject matter of the agency investigation is a matter appropriately within its statutory authority. If it is not, the recipient should argue that Machinist's requires the court to scrutinize the agency's subpoena. It should be noted, however, that any argument based on Miller or Machinist's should clearly indicate that the subpoena recipient is asserting its right to be free from the agency's investigation as opposed to the agency's regulatory control.

Abuse of Process Defense

In addition to the defenses enumerated in the Morton Salt and Powell tests, and the jurisdiction defenses under Miller and Machinist's cases, subpoena recipients may also defeat an agency subpoena on the ground that the agency issued the subpoena for an improper purpose. This defense can be characterized as the "abuse of process" defense. Once the agency has made its threshold showing of the Morton Salt/Powell factors, which generally establishes that its investigation is in good faith, then the subpoena recipient can defeat the subpoena by showing that it was issued for an improper purpose such that enforcement of it would constitute an abuse of the court's process.⁽²⁷⁾ According to the Supreme Court in Powell, an agency is acting for an improper purpose when subpoenas are issued solely to harass a party or to pressure settlement in a collateral matter.⁽²⁸⁾

More recently, the Supreme Court has held that an investigatory summons is issued for an improper purpose if it can be shown that there is no valid civil goal to be served by the investigation.⁽²⁹⁾ In that regard, the gathering of evidence solely for criminal investigation is a course which agencies may not in good faith pursue through subpoenas.⁽³⁰⁾

Thus, subpoena recipients wishing to defeat the subpoena should gather any evidence which proves that the agency is simply attempting to harass them or that proves that there is no valid civil goal to be served by the subpoena. However, before this strategy is employed it should be noted that success has been minimal based on the argument that an agency is seeking information of solely criminal nature. This is due, in large part, to the fact that agencies are authorized by statute to seek information of a criminal nature as long as they also have a parallel regulatory purpose.

In fact, in Florida, the First District Court of Appeal recently determined that violations of the Florida Insurance Code may also transgress the criminal law.⁽³¹⁾ Moreover, this court also held that the Florida Insurance Code explicitly authorizes

also transgress the criminal law.⁽³¹⁾ Moreover, this court also held that the Florida Insurance Code explicitly authorizes Departmental action in the event of a regulated insurer's "illegal activity," which include violations of the criminal law that the Department is able to establish administratively.⁽³²⁾

Conclusion

From the above discussion, it is apparent that defeating an administrative subpoena is not an easy task. Due to the summary nature of enforcement proceedings, agencies are rarely turned away at the threshold of their investigations. Further, courts are often quick to conclude that a subpoena recipient will not be legally injured by the enforcement of an administrative subpoena (as long as the Morton Salt factors are present) due to the fact that no formal charges are pending against the recipient. Unfortunately, courts are not persuaded by the argument that enforcement of the subpoena might subsequently cause the recipient to be served with an administrative complaint.

Nevertheless, there are a few limited defenses which can be raised by an unwilling subpoena recipient. Although an enforcement proceeding does not provide a challenger with the opportunity for a full blown hearing, it does ensure that basic elements of relevancy and jurisdiction are present. In that limited regard, courts are willing to curtail an agency investigation if an administrative subpoena is shown to be deficient under the Supreme Court's framework or the narrow exceptions described above.

Endnotes

1. 42 U.S.C.S. 2000e-5; *see also E.E.O.C. v. Air Products and Chemicals, Inc.*, 652 F. Supp. 113 (N.D. Fla. 1986).
2. Administrative subpoenas used to be subject to challenge under the Fourth Amendment for lack of probable cause. However, more recently, courts have held that the enforcement of an agency subpoena is not a "search and seizure" within the meaning of the Fourth Amendment. Rather, the purpose of the administrative subpoena is simply to discover evidence (which *may* lead to an administrative complaint), not to prove a case against a party. *See Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).
3. *See* John W. Bagby, *Administrative Investigations: Preserving a Reasonable Balance Between Agency Powers and Target Rights*, 23 Amer. Business L. J. 319, 320 (1985).
4. *Id.* at 652; The Eleventh Circuit reaffirmed the *Morton Salt* test in *Federal Election Commission v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284 (11th Cir. 1982).
5. *Powell*, 379 U.S. at 57.
6. Martin v. Gard, 811 F. Supp. 616, 621 (D. Kan. 1993).
7. *See* Resolution Trust Corp. v. American Casualty, Co., 787 F. Supp. 5, 8 (D. D.C. 1992); Phillips Petroleum Co. v. Lujan, 951 F.2d 257 (10th Cir. 1991).
8. Gard, 811 F. Supp. at 621.
9. Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985); EEOC v. Delaware State Police, 618 F. Supp. 451 (D.C. Del. 1985); EEOC v. Tempel Steel, 814 F.2d 482 (7th Cir. 1987); EEOC v. Children's Hospital, 719 F.2d 1426 (9th Cir. 1983); Phillips Petroleum Co., 951 F.2d at 260.
10. *See* Sunshine Gas Co. v. United States Department of Energy, 524 F. Supp. 834, 841 (N.D. Tex. 1981).
11. Section 120.569(i)(2), Florida Statutes.
12. *See* Carrow v. Department of Professional Regulation, 453 So. 2d 842, 843 (Fla. 1st DCA 1984) (holding that doctor could not be subject to disciplinary proceedings or administrative complaint for failure to comply with administrative

could not be subject to disciplinary proceedings or administrative complaint for failure to comply with administrative subpoena when doctor requested that the agency quash its subpoena).

13. Id. at 509.

14. See EEOC v. Children's Hospital Medical Center of Northern California, 719 F.2d 1426 (9th Cir. 1983).

15. Scwhartz at 133.

16. Endicott, 317 U.S. at 513.

17. Oklahoma Press, 327 U.S. at 213.

18. Id.

19. Gard, 811 F. Supp. at 620.

20. Miller, 549 F.2d at 460.

21. Id. (emphasis added).

22. Id.

23. General Finance Corp. v. FTC, 700 F.2d 366 (7th Cir. 1983)

24. Federal Election Commission v. Machinist's Non-Partisan Political League, 655 F.2d 380, 386 (D.C. Cir. 1981).

25. Id.

26. See Federal Election Commission v. Florida For Kennedy Committee, 681 F.2d 1282, 1286 (11th Cir. 1982) (citing NLRB v. Brown, 380 U.S. 278, 290-92) (recognizing the Miller exception to the Endicott/Oklahoma rule and explaining "when judicial review is not of a factual issue but is one of legal interpretation there is less justification for deference to agency determination.").

27. Powell, 379 U.S. at 58 (1964); Resolution Trust Corp., 787 F. Supp. at 7.

28. Id. at 58; see also Gard, 811 F. Supp. at 620; Resolution Trust Corp., 787 F. Supp. at 7.

29. See United States v. La Salle National Bank, 437 U.S. 298, 314 (1977).

30. Id.

31. Etheridge v. Florida Department of Insurance, 22 Fla. L. Weekly D565 (Fla. 1st DCA Feb. 25, 1997).

32. Id.

