



## Magistrate Finds Proper Purpose for FTC Subpoena in Generic Drug Case

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Late last month, [we noted a highly unusual decision](#) by U.S. Magistrate Judge Alan Kay in the District of Columbia to order the Federal Trade Commission to respond to interrogatories about a subpoena it had issued to Paul Bisaro, the CEO of Watson Pharmaceuticals, in a generic-drug investigation.

Normally, that sort of inquiry into the motivations behind an FTC subpoena is off limits. The only exception, which is rarely invoked, is that limited discovery can be ordered to ensure that enforcement of the subpoena would not amount to an abuse of process.

Kay's inquiry seems to have found nothing terribly amiss in the FTC's motivations for the subpoena, as he has just recommended to U.S. District Judge Colleen Kollar-Kotelly that the subpoena to Bisaro should be enforced. Judge Kollar-Kotelly had referred the dispute to Kay, and his findings can now be appealed to Judge Kollar-Kotelly.

Kay said that the case law requires that the court enforce the subpoena, as long as the FTC could show a proper purpose for it, even though there were allegations that the subpoena also had an improper purpose.

Watson had contended that the FTC was using its investigative powers improperly. The commission says it is looking into whether there was a possibly anti-competitive agreement that could have kept a generic form of a sleep disorder drug off the market for a substantial period of time, thus harming consumers.

Watson and Bisaro had asserted that the FTC was using its investigative tools to try to pressure Watson, a generic-drug company, to enter into a deal with a third party and to relinquish its statutory rights to exclusivity for the drug.

However, Kay wrote in his August 17, 2010, report to Judge Kollar-Kotelly that Bisaro may still have information that would be relevant to a legitimate inquiry by the FTC and that "enforcement of a subpoena is called for as long as a proper purpose does exist."

Kay did call the FTC's approach "questionable" but said it is the business of the legislature, not the judiciary, to look into the practices of regulatory agencies.

It appears that a direct challenge to the FTC's practices has been averted. However, the commission may feel chastened by the fact that a federal magistrate chose to order interrogatories to flesh out the purpose behind a subpoena.



Watson might have done better to try to resolve the issue with the FTC after the first, favorable ruling, rather than letting the matter go back to Magistrate Kay for another ruling, especially after he too knew that a legitimate enforcement purpose existed.

For further thoughts on this matter, see [the Washington Legal Foundation's Legal Pulse commentary](#) on this case.

*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.*

*The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. We look forward to hearing your thoughts and comments!*