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# Precomplaint Investigations Under the Kentucky Consumer Protection Act: Validity and Scope of the Civil Investigative Demand

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# COMMENTS

## PRECOMPLAINT INVESTIGATIONS UNDER THE KENTUCKY CONSUMER PROTECTION ACT: VALIDITY AND SCOPE OF THE CIVIL INVESTIGATIVE DEMAND

### INTRODUCTION

With the enactment of the Consumer Protection Act[1] in 1972, Kentucky embarked on its first serious attempt at protecting the consuming public.[2] The Act established a Division of Consumer Protection under the Attorney General in the Department of Law[3] with power to conduct investigations of matters affecting the marketplace and to take appropriate action.[4] False, misleading, or deceptive acts or practices in the conduct of any trade or commerce were declared unlawful,[5] and injunctive[6] and restitutionary[7] remedies as well as civil penalties[8] for violations of the statute were provided.[9]

Since the Act's inception, the Division of Consumer Protection has increasingly expanded its activities on behalf of Kentucky consumers.[10] This expansion, while statutorily au-

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[1] KY. REV. STAT. §§ 367.110-.300 (Supp. 1976) [hereinafter cited as KRS].

[2] For analysis of the state of consumer protection in Kentucky prior to the adoption of the Consumer Protection Act, see Note, *Can the Kentucky Consumer Forget Caveat Emptor and Find True Happiness?*, 58 KY. L.J. 325 (1970).

[3] KRS § 367.120 (Supp. 1976). A Division of Consumer Protection has been operating in the Attorney General's Office since 1965, but without specific statutory recognition until the adoption of the Consumer Protection Act.

[4] KRS § 367.150(3) (Supp. 1976).

[5] KRS § 367.170 (Supp. 1976). This section was amended in 1976 to prohibit also "unfair" acts or practices. A new section, KRS § 367.175, was added to the Consumer Protection Act in 1976 declaring contracts, combinations, and conspiracies in restraint of trade or commerce unlawful. *See* note 12 *infra*.

[6] KRS § 367.190 (Supp. 1976).

[7] KRS § 367.200-.220 (Supp. 1976).

[8] KRS § 367.990 (Supp. 1976).

[9] For an in-depth analysis of the Kentucky Consumer Protection Act, see Comment, *The Kentucky Consumer Protection Act—True Happiness?*, 61 KY. L.J. 793 (1973).

[10] The Division exercises a wide variety of functions, powers, and duties authorized by KRS § 367.150. In addition to enforcing the prohibition against unfair, false, misleading, or deceptive acts or practices, the Division drafts and recommends consumer legislation; appears before legislative and administrative committees; inter-

thorized, has resulted primarily from external forces not likely to wane. Increased public contact with the Division[11] and the General Assembly's further adoption of wide-ranging consumer legislation[12] signal a growing awareness of the need for consumer protection in the marketplace and insure a concomitant increase in the activities and responsibilities of the Division of Consumer Protection.

Coexistent with the Division's functions and duties are broad investigative powers[13] delegated to the Attorney General as a necessary component of law enforcement and administration. These powers are an essential means of protecting both the consumer and the honest businessman, for an effective and

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venes on behalf of consumers in utility ratemaking proceedings; promotes consumer education programs; and operates a consumer complaint mediation service. This activity has been channeled into three distinct sections of the Division: fraud litigation, utility intervention, and consumer services. At present the full-time Division staff is composed of 10 attorneys, 2 paralegal consumer protection specialists to mediate consumer complaints, 1 consumer education specialist, 1 research analyst for utility intervention, 2 investigators, and 12 secretarial and clerical assistants. To appreciate fully the growth of the Division staff in the past 4 years, *cf.* Comment, *supra* note 9, at 795.

[11] In 1971, the year before the Consumer Protection Act was adopted, the Division received 279 consumer complaints. CONSUMERS' ADVISORY COUNCIL, STATE OF CONSUMER AFFAIRS IN KENTUCKY 31 (1973). By 1975, during the third year of operation under the statute, the number of written complaints had increased to 3,949. In addition to these written complaints, the Division also received 15,143 telephone calls from its statewide tollfree consumer "hotline." CONSUMERS' ADVISORY COUNCIL, STATE OF CONSUMER AFFAIRS IN KENTUCKY 43 (1975).

[12] In 1976 the General Assembly passed the following bills commonly referred to as the "Consumer Package": HB 114, prohibiting "unfair" acts or practices in trade or commerce; HB 194, requiring a pharmacist to select the least expensive generic drug therapeutically equivalent to the one prescribed by a physician; HB 322, prohibiting tampering with odometers in motor vehicles; HB 371, prohibiting home solicitation sales of hearing aids; HB 644, repealing the Fair Trade Law and prohibiting contracts, combinations, and other agreements in restraint of trade; HB 652, requiring an automobile dealer to furnish the prospective purchaser of a used car with the name, address, and phone number, if available, of the previous consumer-owner of the car; SB 188, providing consumer relief for purchase of mobile homes deemed nonmerchantable; SB 220, abolishing the holder-in-due-course defense in consumer credit contracts; SB 346, providing citizen members for state professional and occupational licensing boards and commissions; SB 367, limiting payments to professional fund raisers for charities to 15 percent of the amount contributed. In addition HJR 73 authorized the Department of Education to study and evaluate the effectiveness of consumer education in Kentucky. A comprehensive antitrust bill (HB 646) was passed by the General Assembly but was vetoed by Governor Carroll. *See generally* LEGISLATIVE RESEARCH COMMISSION, GENERAL ASSEMBLY ACTION, REGULAR SESSION, 1976 (Informational Bulletin No. 113. 1976). *See also* note 114 *infra.*

[13] KRS § 367.240-.290 (Supp. 1976).

responsible consumer protection program is grounded on its ability to obtain the facts on which to act.[14]

Despite the growing public and legislative awareness of the need for effective consumer protection, and despite the broad range of powers conferred by the Consumer Protection Act, the Attorney General's investigative authority under the Act has been the subject of recent litigation in Kentucky courts. This litigation has focused on the Attorney General's authority to issue a civil investigative demand to determine whether unfair, false, misleading, or deceptive acts or practices have been committed.[15] The Kentucky Supreme Court's recent interpretation of this authority will have significant effects not only on the Consumer Protection Division's investigative power but also on the investigated party's due process rights. This Comment will examine the statutory and case authority for the Attorney General's power under the Consumer Protection Act to issue civil investigative demands and will analyze the Supreme Court's interpretation of that authority.

## I. CIVIL INVESTIGATIVE DEMANDS: THE STATUTORY SCHEME

The civil investigative demand is a relatively new investigative discovery device. Similar to an administrative subpoena,[16] the investigative demand provides a precomplaint pro-

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[14] The Attorney General's alternatives, if such power were not available, have been previously summarized:

> (1) [H]e can cease pursuing those schemes whose violation of the law is most difficult to prove, thereby allowing even more citizens to be defrauded; (2) he can bring court action with insufficient evidence and risk not only failing his burden of proof but also injuring the reputation of an innocent corporation; (3) he can allow the fraudulent company to continue to deceive and damage its customers while his staff diligently pieces together the necessary proof from the victims after they had been harmed; or (4) he can appropriate the bulk of his budget to hiring investigators even though the money comes from the same people being defrauded by those under investigation, the public.

Note, *supra* note 2, at 365. *See also* Comment, *supra* note 9, at 809-10.

[15] KRS § 367.240 (Supp. 1976).

[16] Subpoena power is frequently granted administrative agencies by statute to compel the attendance and testimony of witnesses and the production of books, records, papers, and other documentary evidence relevant to matters under investigation. Depending on the statute, such power may be granted for general administrative investigations as well as administrative hearings in aid of investigation. *See generally* 1 F. COOPER, STATE ADMINISTRATIVE LAW 294-96 (1965) [hereinafter cited as COOPER];

cedure by which the Attorney General can obtain relevant information, documentary material, and physical evidence from any person or business under investigation to determine whether a violation of law has been committed. While the civil investigative demand was originally conceived to enable the federal Department of Justice to obtain documentary evidence during the course of civil antitrust investigations,[17] more recently the device has been included in state consumer protection statutes to facilitate the enforcement of consumer protection laws.

An investigative demand enables a consumer protection agency to obtain information *before* a determination is made to bring suit without the need for formal adversary confrontation.[18] Furthermore, an investigative demand operates rather informally and confidentially between the agency and the business community, thereby protecting the legitimate interests of honest businessmen.[19] As a result, explicit provision for investigative demands has been included in the Unfair Trade Practices and Consumer Protection Law,[20] which has become a model for most consumer protection legislation. The vast majority of states currently provide for an investigative demand[21]

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Davis, *The Administrative Power of Investigation,* 56 YALE L.J. 1111 (1947) [hereinafter cited as Davis]; 1 AM. JUR. 2d *Administrative Law* § 89 (1962).

[17] The Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14 (1962), gave the Attorney General this authority. For the legislative history of the Act and discussion of earlier attempts to authorize civil investigative demands in antitrust investigations, see 1962 U.S. CODE CONG. & ADM. NEWS 2568; *see also* Perry and Simon, *The Civil Investigative Demand: New Fact-Finding Powers for the Antitrust Division,* 58 MICH. L. REV. 855 (1960); Petition of Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963). Prior to the adoption of the Antitrust Civil Process Act, Washington and Hawaii provided for civil investigative demands in their antitrust statutes, while 15 other states provided for some means of precomplaint antitrust investigation. Comment, *Recent Antitrust Developments: Civil Investigative Demand—Needed Weapon or Undue Power for Prosecuting Agencies?,* 37 WASH. L. REV. 278 (1962).

[18] 1962 U.S. CODE CONG. & ADM. NEWS 2568.

[19] Brief for Appellant at 6, Commonwealth *ex rel.* Hancock v. Pineur, 533 S.W. 2d 527 (Ky. 1976).

[20] This Act, initially proposed by the Federal Trade Commission, was included in the 1970 Suggested State Legislation of the Council of State Governments. *See* COUNCIL OF STATE GOVERNMENTS, CONSUMER PROTECTION IN THE STATES 31-39 (1970).

[21] CONN. GEN. STAT. § 42-110d (Rev. 1975); DEL. CODE ANN. tit. 6, § 2514 (Rev. 1974); GA. CODE ANN. § 106-1213 (Supp. 1976); IDAHO CODE § 48-611 (Supp. 1975); KRS § 367.240 (Supp. 1976); LA. STAT. ANN. § 51:1411 (Supp. 1976); MISS. CODE ANN. § 75-24-17 (Cum. Supp. 1975); MO. STAT. ANN. § 407.040 (Vernon Supp. 1976); MONT. REV. CODE § 85-410 (Supp. 1975); NEB. REV. STAT. § 59-1611 (Cum. Supp. 1974); NEV. REV.

or similar precomplaint procedure[22] as an integral part of the investigative powers of their consumer protection statutes.

Under Kentucky's Consumer Protection Act, the Attorney General can serve an investigative demand in either one of two instances: (1) When he "has reason to believe" that a person has engaged in an act or practice declared unlawful by KRS § 367.110-.300; or (2) when he "believes it to be in the public interest" that an investigation should be made to determine whether a person has engaged in an act or practice declared unlawful by KRS § 367.110-.300.[23] While the statute supplements this investigative authority with provisions for administrative subpoenas[24] and judicial impoundment of evidence,[25] the investigative demand represents the initial fact-finding capability of the Division of Consumer Protection.[26]

Although the statute provides the Attorney General with

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STAT. § 598A-100 (1975); N.M. STAT. ANN. § 49-15-10 (Supp. 1975); OKLA. STAT. ANN. tit. 15, § 757 (Supp. 1976); ORE. REV. STAT. § 646.618 (1975); PA. STAT. ANN. tit. 73, § 201-6 (Purdon 1971); R.I. GEN. LAWS § 6-13.1-7 (Supp. 1975); S.D.C.L. § 37-24-12 (Rev. 1972); TEX. BUS. & COM. CODE ANN. § 17.61 (Vernon Supp. 1975); VA. CODE ANN. § 59.1-9.10 (Supp. 1976); WASH. REV. CODE § 19.86.110 (1974).

[22] States not explicitly providing for an investigative demand generally rely on subpoenas, requests for written statements under oath, and orders for production of documentary material to obtain information relevant to an investigation. ALAS. STAT. § 45.50.495 (Supp. 1975); ARIZ. REV. STAT. ANN. § 44-1524 (Supp. 1975); ARK. STAT. § 70-909 (Supp. 1975); COLO. REV. STAT. ANN. § 6-1-107 (1973); FLA. STAT. ANN. § 501.206 (Supp. 1976); HAWAII REV. STAT. § 487-9 (Supp. 1975); ILL. ANN. STAT. ch. 121 ½, § 263 (Smith-Hurd Supp. 1976); IOWA CODE ANN. § 713.24 (Supp. 1976); KAN. STAT. ANN. § 50-631 (Supp. 1975); ME. REV. STAT. ANN. tit. 5, § 211 (Supp. 1976); MD. CODE ANN. § 13-405 (1975); MASS. ANN. LAWS ch. 93A, § 6 (1975); MINN. STAT. ANN. § 325.907 (Supp. 1976); N.H. REV. STAT. ANN. § 358-A:8 (Supp. 1973); N.J. STAT. ANN. § 56:8-3 (1964); N.Y. EXEC. LAW § 63(12) (McKinney Supp. 1975); N.C. GEN. STAT. § 75-9 (1975); N.D. CENT. CODE ANN. § 51-15-04 (1974); OHIO REV. CODE ANN. § 1345.06 (Page Supp. 1976); S.C. CODE § 8-800.376 (Supp. 1975); UTAH CODE ANN. § 13-11-16 (Supp. 1975); VT. STAT. ANN. tit. 9, § 2460 (Supp. 1976); W. VA. CODE ANN. § 46A-7-104 (1976); WIS. STAT. ANN. § 426.106 (1974).

[23] KRS § 367.240 (Supp. 1976).

[24] KRS § 367.250 (Supp. 1976).

[25] KRS § 367.270 (Supp. 1976). To impound evidence the Attorney General must show "probable cause" to believe that a violation of the Act has occurred and that the information requested cannot be obtained during the course of an investigation. *See* note 66 *infra*.

[26] In addition to the Attorney General's authority to issue investigative demands, an Investigations Unit for the Attorney General's Office was established in 1974 to investigate, among other things, matters indicating false, misleading, or deceptive acts or practices. CONSUMERS' ADVISORY COUNCIL, STATE OF CONSUMER AFFAIRS IN KENTUCKY 13 (1974).

authority to seek judicial enforcement of investigative demands,[27] the investigated party is provided with safeguards to protect him from abuse. The party under investigation may apply to a circuit court for judicial protection against any unreasonable investigative action of the Attorney General,[28] or for a court order setting aside, modifying, or extending the return date of a demand.[29] Information obtained pursuant to a demand shall not be made public or disclosed beyond the extent necessary for law enforcement purposes in the public interest.[30] Finally any person charged with failing to answer the investigative demand shall be afforded an opportunity for a hearing on the merits of the demand before issuance of any final order.[31]

Despite the similarity in procedure, Kentucky's provision for issuance of investigative demands differs in three important respects from other typical statutes. The Kentucky Act does not require an investigative demand to be issued upon "probable cause" that a violation of law has occurred[32] or to state the nature of the alleged violation under investigation.[33] Nor does the Kentucky Act disqualify use of information obtained pursuant to the investigation in any criminal prosecution of the witness.[34] The fourth and fifth amendment[35] issues raised by

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[27] KRS § 367.290 (Supp. 1976).

[28] KRS § 367.260 (Supp. 1976).

[29] KRS § 367.240(2) (Supp. 1976).

[30] KRS § 367.250 (Supp. 1976).

[31] KRS § 367.290(2) (Supp. 1976).

[32] *See, e.g.*, IDAHO CODE § 48-611 (Supp. 1975); OHIO REV. CODE ANN. § 1345.06 (Page Supp. 1976); S.C. CODE § 8-800.376 (Supp. 1975); W. VA. CODE ANN. § 46A-7-104 (1976). The Kentucky statute requires only that the Attorney General have "reason to believe" that a violation has occurred or that an investigation is in the public interest. KRS § 367.240 (Supp. 1976).

[33] *See, e.g.*, DEL. CODE ANN. tit. 6, § 2514 (Rev. 1974); PA. STAT. ANN. tit. 73, § 201-6 (Purdon 1971); VA. CODE ANN. § 59.1-9.10 (Supp. 1976); WASH. REV. CODE § 19.86.110 (1974).

[34] *See, e.g.*, LA. STAT. ANN. § 51:1411 (Supp. 1976); MO. STAT. ANN. § 407.040 (Vernon Supp. 1976); NEB. REV. STAT. § 59-1611 (Cum. Supp. 1974); N.M. STAT. ANN. § 49-15-10 (Supp. 1975).

[35] U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. V:

these omissions form the backdrop for the development of constitutional standards by which valid administrative investigations are judged.

## II. ADMINISTRATIVE INVESTIGATIONS: THE MODERN TEST OF VALIDITY

Although the investigative powers of an administrative agency are dependent upon statutory authority, such power has been viewed as essential to the proper performance of administrative tasks.[36] The proper scope of such authority, however, has been the subject of countless judicial decisions, evolving from a narrow conception of administrative authority to a recognition of the pervasive influence of administrative bodies.[37]

Early decisions, reflecting concern for fourth amendment protections of privacy, confined investigative authority to formal adjudication or complaint proceedings[38] or where there was probable cause to believe the law had been violated.[39] These

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No person shall . . . be compelled in any criminal case to be a witness against himself.

[36] Davis, *supra* note 16, at 1111:

Investigations are useful for all administrative functions, not only for rule-making, adjudication, and licensing, but also for prosecuting, for supervising and directing, for determining general policy, for recommending legislation, and for purposes no more specific than illuminating obscure areas to find out what if anything should be done.

[37] For more thorough discussions of this development, *see, e.g.*, Benton, *Administrative Subpoena Enforcement*, 41 TEX. L. REV. 874 (1963); Davis, *supra* note 16; Hoffman, *Industry Reports to Administrative Agencies—Some Legal Problems*, 18 ADM. L. REV. 80 (1965); Withrow, *Investigatory Powers of the Federal Trade Commission—Constitutional and Statutory Limitations*, 24 FED. BAR J. 456 (1964); Comment, *Enforcement of the Administrative Subpoena: An Abdication of Judicial Inquiry*, 27 ALBANY L. REV. 239 (1963); Comment, *Investigatory Power of an Administrative Agency*, 44 CHI.-KENT L. REV. 50 (1967). *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW §§ 3.01-.14 (1958); 1 AM. JUR.2d *Administrative Law* §§ 85-91 (1962).

[38] In Harriman v. ICC, 211 U.S. 407 (1908), the Supreme Court held the Interstate Commerce Commission could not issue subpoenas in investigations authorized to aid in recommending legislation. In FTC v. Baltimore Grain Co., 284 Fed. 886 (D. Md. 1922), *aff'd*, 267 U.S. 586 (1924), the Federal Trade Commission was denied authority to compel production of records in a Senate-authorized general investigation into the relationship between prices of grain at the farm and export prices. *See also* FTC v. Claire Furnace Co., 285 Fed. 936 (App. D.C. 1923), *rev'd on other grounds*, 274 U.S. 160 (1927).

[39] In FTC v. American Tobacco Co., 264 U.S. 298 (1924), the Supreme Court held that absent a showing of materiality or relevancy, the Federal Trade Commission had

decisions, applying the limitations of judicial investigatory power to administrative agencies, concluded that the right to privacy could be sacrificed only when the investigation concerned a specific breach of the law.[40] The proliferation of administrative agencies and Congress' repeated authorization of administrative investigations unrelated to law enforcement and adjudication[41] provoked a reappraisal of administrative investigative power, influencing later court decisions to concentrate not on whether there was probable cause to believe the information demanded would prove a violation of law,[42] but whether the subject matter of the inquiry pertained to a topic the official had been empowered to investigate.[43]

This changing judicial attitude was climaxed by two Supreme Court cases, *Oklahoma Press Publishing Co. v. Walling*[44] and *United States v. Morton Salt Co.*,[45] which defined the conceptual and constitutional limits of administrative investigative power. Although 4 years separated the two decisions, common issues in both cases[46] welded their holdings

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no right of access to requested materials to determine existence of statutory violations. Investigations not based on specific grounds were struck down as "fishing expeditions." *See also* Jones v. SEC, 298 U.S. 1 (1936).

[40] Harriman v. ICC, 211 U.S. at 419-20.

[41] As administrative agencies increased in number, Congress repeatedly conferred upon these agencies investigative power related not only to law enforcement and adjudication but also to rule-making, recommending legislation, and other purposes. Davis, *supra* note 16, at 1122.

[42] In Fleming v. Montgomery Ward & Co., 114 F.2d 384 (7th Cir. 1940), *cert. denied*, 311 U.S. 690 (1940), the Seventh Circuit Court of Appeals held that when an administrative agency was authorized to regulate and supervise the acts and practices of an industry, it could investigate regardless of whether there was any pre-existing probable cause to believe that there had been violations of the law.

[43] In Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943), the Supreme Court departed from its past limitations on administrative investigations and upheld a subpoena issued by the Secretary of Labor, holding that "[t]he evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act." *Id.* at 509.

[44] 327 U.S. 186 (1946).

[45] 338 U.S. 632 (1950).

[46] In *Oklahoma Press*, the administrator of the Wage and Hour Division of the Department of Labor sought judicial enforcement of a subpoena duces tecum, seeking records to determine whether certain newspaper publishing corporations were violating the Fair Labor Standards Act. In *Morton Salt*, several salt producers were required to submit compliance reports to the Federal Trade Commission in conjunction with a court decree ordering them to cease and desist from stated practices in connection with the pricing, producing, and marketing of salt. The Commission ordered additional and

into a comprehensive test for judging the validity of administrative investigations. Accordingly, the two cases should be examined together rather than chronologically.

The underlying theme of *Oklahoma Press* and *Morton Salt* was a basic distinction between the fact-finding capabilities of the judicial process and those of the administrative process. Both decisions departed from the early judicial limitations placed on administrative investigations, and in so doing, constructed a new theory of the nature of administrative investigative authority.

In *Oklahoma Press,* the Court viewed administrative investigatory authority as power delegated by the legislative branch to investigate possible violations of law.[47] This investigative function was compared to general legislative investigative power[48] and grand jury inquisitorial authority to search out violations of the law. In the Court's view, valid administrative investigative authority, as derived from delegated legislative power, should be judged not by the pendency of a complaint or specific charge of violation of the law or the probable outcome of the investigation, but rather by a determination that the investigation "is for a lawfully authorized purpose within the power of Congress to command."[49]

*Morton Salt* made the nature of this authority even more explicit. The Court drew a distinction between the *accusatorial* nature of the judicial process and the *inquisitorial* nature of the administrative process. Since judicial power is restricted to adjudication of cases and controversies, judicial investigative powers are likewise confined to those ends. The administrative agency, however, is expected to take the lead in ascertaining what proceedings should be set in motion and follow through to effective results.[50] In analyzing administrative investigative

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highly particularized reports not authorized by the decree and sought judicial enforcement of the order.

> [47] The very purpose of the . . . authorized investigation is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so.

327 U.S. at 201.

[48] Legislative investigatory power, like administrative investigatory power, is of relatively recent vintage. *See* McGrain v. Daugherty, 273 U.S. 135 (1927).

[49] 327 U.S. at 209.

[50] 338 U.S. at 640-42.

authority, the Court adopted the grand jury analogy suggested in *Oklahoma Press*.[51] This inquisitorial theory of administrative investigations, alluded to in *Oklahoma Press* and given explicit sanction in *Morton Salt*, underscored the Court's basic conception of administrative investigatory power.

Having conceptually removed administrative investigations from the restrictions inherent in the judicial process, the cases sought to square administrative investigations with the fourth amendment. Defendants in both cases argued that informational demands in the absence of a prior charge or complaint constituted "fishing expeditions" to see if evidence of guilt could be uncovered and thus violated the fourth amendment prohibition against unreasonable searches and seizures.

The *Morton Salt* decision completely destroyed the vitality of the "fishing expedition" argument. The Court bottomed its opinion on the assumption that the Federal Trade Commission was only seeking information to see if it could find violations of law. The Court nevertheless upheld the order in the broadest of language.[52]

The Court in *Oklahoma Press* directly approached the fourth amendment issue. The Court disagreed that the informational demands created an actual search and seizure.[53]

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[51] The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

*Id.* at 642-43.

[52] Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

*Id.* at 652.

[53] No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records, or papers without their assent, otherwise than pursuant to orders of court

Agency requests for information, said the Court, are only "figurative" or "constructive" searches and seizures and thus only analogically and tangentially bound by the fourth amendment. Following the rationale of the inquisitorial nature of administrative investigative authority, the Court dismissed the requirement of probable cause and framed the elements sufficient to satisfy the prohibition against unreasonable searches and seizures in a three-fold test: (1) The investigation is one the agency is authorized by law to make; (2) the documents sought are relevant to the inquiry; and (3) the documents are particularized with adequate specificity.[54]

*Oklahoma Press* and *Morton Salt* marked a watershed in the development of administrative investigative power. Departing from the early limitations applied to administrative investigations, *Oklahoma Press* and *Morton Salt* established guidelines which reflected the modern concept of administrative enforcement of laws committed to agency administration. After *Oklahoma Press* and *Morton Salt,* an administrative agency need not show a prior charge or complaint or pending administrative proceeding to authorize an investigation, nor must the agency establish probable cause that a violation of law has occurred. The range of investigative power given to an administrative body is sufficient "if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant."[55] A quarter of a century later, this test has become the controlling guide in judging the validity of all types of administrative investigations.[56]

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and made after opportunity to present objections, which in fact were made. 327 U.S. at 195.

[54] *Id.* at 208-09.

[55] United States v. Morton Salt Co., 338 U.S. at 652.

[56] The commentaries cited *supra* note 37 provide discussions of several cases which have applied the *Oklahoma Press—Morton Salt* test. To appreciate the enduring nature of this test, as applied in more recent cases, *see, e.g.,* United States v. Powell, 379 U.S. 48 (1964); SEC v. Howatt, 525 F.2d 226 (1st Cir. 1975); Federal Maritime Comm'n v. Port of Seattle, 521 F.2d 431 (9th Cir. 1975); SEC v. Savage, 513 F.2d 188 (7th Cir. 1975); Equal Employment Opportunity Comm'n v. University of New Mexico, 504 F.2d 1296 (10th Cir. 1974); SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047 (2d Cir. 1973); Genuine Parts Co. v. FTC, 445 F.2d 1382 (5th Cir. 1971); SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir. 1970); Petition of Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), *aff'd,* 325 F.2d 1018 (8th Cir. 1964);

## III. CIVIL INVESTIGATIVE DEMANDS: THE KENTUCKY PERSPECTIVE

The civil investigative demand, designed as a precomplaint, preadjudicative device for obtaining information, is a product of the modern approach to administrative investigations. Since the investigative demand is such a recent discovery tool, courts interpreting the validity of investigative demands have cast their decisions within the modern judicial perspective.[57] This judicial attitude toward administrative investigations,[58] particularly with investigative demands, has produced a settled rule not to burden the agency with requirements other than to show agency authority to investigate and to request reasonably definite and relevant information.

Despite the widespread application of the *Oklahoma Press—Morton Salt* standard to administrative investigations, two recent Kentucky circuit court decisions refusing to enforce civil investigative demands issued by the Attorney General under the Consumer Protection Act apparently rejected or ignored the modern standard established by *Oklahoma Press, Morton Salt,* and their progeny. The Kentucky Supreme Court's reversal of these decisions embraced the modern standard and insured the Attorney General the full sweep of his investigative powers under the Consumer Protection Act.

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Fielder v. Berkeley Properties Co., 99 Cal. Rptr. 791 (Cal. App. 1972); Ajello v. Hartford Fed. Sav. & Loan, 347 A.2d 113 (Conn. 1975); Mobile Oil Corp. v. Killian, 301 A.2d 562 (Conn. 1973); In re Blue Hen Country Network, Inc., 314 A.2d 197 (Del. 1973); Atchison, Topeka, & Santa Fe Ry. v. Lopez, 531 P.2d 455 (Kan. 1975); Commonwealth *ex rel.* Hancock v. Pineur, 533 S.W.2d 527 (Ky. 1976); Commonwealth *ex rel.* Stephens v. Herb Jones Chevrolet, Inc., No. 76-144 (Ky. S. Ct. Oct. 15, 1976); Myers v. Holshouser, 214 S.E.2d 630 (N.C. 1975); Steele v. State *ex rel.* Gorton, 537 P.2d 782 (Wash. 1975).

[57] The validity of the civil investigative demand procedure of the Antitrust Civil Process Act, 15 U.S.C. § 1312 (1962), was upheld in Petition of Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), *aff'd,* 325 F.2d 1018 (8th Cir. 1964), relying on *Oklahoma Press* and *Morton Salt.* For other cases construing civil investigative demands under the Antitrust Civil Process Act, see ANNOT., 10 A.L.R.Fed. 677 (1972). In Steele v. State *ex rel.* Gorton, 537 P.2d 782 (Wash. 1975), the civil investigative demand procedure of the Washington Consumer Protection Act, similar to Kentucky's Consumer Protection Act, was upheld on the basis of the *Oklahoma Press—Morton Salt* standard.

[58] For a concise, albeit partisan, discussion of the development of administrative investigative authority, see Brief for Appellant at 10-24, Commonwealth *ex rel.* Hancock v. Pineur, 533 S.W.2d 527 (Ky. 1976).

A. *Commonwealth ex rel. Hancock v. Pineur*

On July 25, 1975, Madison Circuit Court Judge James Chenault granted a protective order[59] to Louis Pineur as corporation officer or process agent for several Whitehall Trailer concerns after an investigative demand was issued[60] following 38 separate complaints made to the Division of Consumer Protection about the sales and service practices of the concerns. Judge Chenault held that the Attorney General's failure to state his "reasonable belief" on the face of the demand in the form of a complaint or charge that the investigated party had engaged in a false, misleading, or deceptive act or practice made the investigative demand defective and thereby unenforceable.[61] The thrust of Judge Chenault's opinion was that the recipient of an investigative demand must "have at least a knowledge of the charge leveled against him or the claim made against him before he is required to answer."[62]

The Kentucky Supreme Court, in *Commonwealth ex rel. Hancock v. Pineur*[63] reversed Judge Chenault's decision, holding that neither the statutory provision of KRS § 367.240[64] nor constitutional standards[65] required a showing of grounds or factual details on the face of an investigative demand[66] "in order

[59] Pineur v. Commonwealth *ex rel.* Hancock, Civil No. 8475 (Madison Cir. Ct., July 25, 1975).

[60] The investigative demand requested *inter alia* a statement of all officers of Whitehall Trailer concerns; lists of manufacturers and suppliers; names and addresses of banks and finance companies to which consumer contracts were assigned; copies of promotional information and advertisements used by the business; names, addresses, and telephone numbers of salespersons, agents, employees, repairmen, and representatives employed since June 16, 1972, and reason for their termination from employment if no longer employed; names, addresses, and telephone numbers of all Kentucky consumers who purchased mobile homes from Whitehall concerns; copies of all correspondence from Kentucky consumers; and copies of all warranty claims or repair requests. In addition the demand requested that a representative of the various Whitehall concerns be made available for questioning concerning the sales, repair, and delivery aspects of the business. Record at 7-8, Pineur v. Commonwealth *ex rel.* Hancock, Civil No. 8475 (Madison Cir. Ct. July 25, 1975).

[61] *Id.* at 46-47.

[62] *Id.* at 46.

[63] 533 S.W.2d 527 (Ky. 1976).

[64] *See* note 23 *supra* and accompanying text.

[65] The Court per Justice Palmore quoted extensively from United States v. Morton Salt Co. and cited with approval its threefold test for the validity of administrative investigations.

[66] *Compare* KRS § 367.240 (Supp. 1976) *with* KRS § 367.270 (Supp. 1976) which

that it may be determined . . . that the grounds upon which the Attorney General has acted are in fact reasonable."[67] The Court's holding was buttressed by the statutory provision for court review of challenged investigative demands.[68] To the Court, this provision negated the argument that a determination of the reasonableness of a demand would be confined to what is shown on its face.

> Nothing in this procedure denies an aggrieved party access to a court of law before he is deprived of anything. And, as in any other case in which a plaintiff has been or is about to be injured in his person or property, once he makes a prima facie showing of facts entitling him to relief the defendant agency has the onus of coming forward with a showing of reasonable justification, else it runs the risk of an adverse judgment.[69]

In adopting the *Morton Salt* requirement for valid administrative investigations, the Court ruled that Kentucky courts could determine the reasonableness of an investigative demand based on the *Morton Salt* standard and need not be shown reasonable grounds on the face of the demand.

The *Pineur* decision clearly cast the Kentucky civil investigative demand procedure within the modern perspective regarding administrative investigations. In its rush to correct errors of law,[70] however, the Court failed to consider the investigated party's right to notice and apprisal of the purpose and nature of the investigation.[71]

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requires the Attorney General to state in writing on his motion to the court for impoundment of evidence his grounds constituting "probable cause" to believe that a person has engaged in an unlawful act or practice under the Consumer Protection Act and that the information sought to be impounded will not be obtainable during the course of any investigation authorized by the statute.

[67] 533 S.W.2d at 528.

[68] KRS § 367.260 (Supp. 1976).

[69] 533 S.W.2d at 530.

[70] In equating the reasonableness of the demand with a showing of charge or complaint made against the investigated party, Judge Chenault seemed to apply a probable cause requirement to the issuance of the investigative demand long since abandoned by the *Oklahoma Press—Morton Salt* line of cases. The court ignored not only the *Oklahoma Press* and *Morton Salt* cases but also more recent cases upholding the investigative powers of an Attorney General to issue an investigative demand under state consumer protection statutes similar to Kentucky's. *See, e.g.*, Steele v. State *ex rel.* Gorton, 537 P.2d 782 (Wash. 1975); *cf.* State *ex rel.* Sanborn v. Koscot Interplanetary, Inc., 512 P.2d 416 (Kan. 1973).

[71] *See generally* Russell v. United States, 369 U.S. 749 (1962); Deutsch v. United

In *Montship Lines, Ltd. v. Federal Maritime Board,*[72] the D.C. Circuit Court of Appeals per Judge Bazelon held that the reasonableness of an order to produce evidence by an agency "is dependent upon the relevancy of the information demanded, and that cannot be determined in the absence of a statement of purpose. . . ."[73] In a companion case, *Hellenic Lines, Ltd. v. Federal Maritime Board,*[74] the court held that mere recitals of statutory authority would not suffice as a purpose for which the information was demanded.[75] These cases indicate that the relevance requirement of *Oklahoma Press* and *Morton Salt* presupposes that the investigated party will have been apprised of the nature and purpose of the investigation in order to determine the relevance of the information demanded.[76]

In *Petition of Gold Bond Stamp Co.,*[77] the court upheld a civil investigative demand which stated in general terms the nature of the conduct under investigation,[78] holding that "the test is whether the statement in the demand as to the nature

States, 367 U.S. 456 (1961); Watkins v. United States, 354 U.S. 178 (1957).

[72] 295 F.2d 147 (D.C. Cir. 1961).

[73] *Id.* at 155.

[74] 295 F.2d 138 (D.C. Cir. 1961).

[75] In *Hellenic Lines,* the order to produce documentary material was prefaced with the following statement:

> That pursuant to the responsibilities vested in the Board by the aforementioned Shipping Act, 1916, and in the effectuation in the public interest of the Board's regulatory duties under that Act, the Board needs the reports, accounts, notes, charges, and memoranda of facts and transactions hereinafter described.

*Id.* at 140. *Compare* that defective statement of purpose *with* the prefatory statement in the investigative demand issued to Louis Pineur:

> Pursuant to KRS 367.240 you are hereby ordered to present, in writing and under oath, at the time and place indicated below the following information, documentary and/or physical evidence.

Record at 7, Pineur v. Commonwealth *ex rel.* Hancock, Civil No. 8475 (Madison Cir. Ct. July 25, 1975). *See also* Record at 3, Herb Jones Chevrolet, Inc. v. Commonwealth *ex rel.* Hancock, Civil No. 13,566-C (Hardin Cir. Ct., Oct. 28, 1975).

[76] W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 495 (1974) [hereinafter cited as GELLHORN & BYSE].

[77] 221 F. Supp. 391 (D. Minn. 1963), *aff'd,* 325 F.2d 1018 (8th Cir. 1964).

[78] The Antitrust Civil Process Act § 1312(b) requires an investigative demand to state the nature of the conduct under investigation and the provision of law applicable. The investigative demand in *Gold Bond* stated that the conduct under investigation was restrictive practices in the dispensing and supplying of trading stamps. 221 F. Supp. at 397.

of the investigation is sufficient to inform adequately the person being investigated and sufficient to determine the relevancy of the documents demanded for inspection."[79] More recently, in *Material Handling Institute, Inc. v. McLaren*,[80] the Third Circuit Court of Appeals upheld a civil investigative demand issued to determine possible violations of the antitrust laws by a "contract or combination in unreasonable restraint of trade."[81] In holding this was a sufficient description of the conduct under investigation as required by statute, the court found that the Institute understood what conduct was under investigation since there had been prior correspondence between the Justice Department and the business concerning anticompetitive effects of the Institute's restrictive membership practices.

The trial record in *Pineur* indicated that the complaints received by the Division of Consumer Protection had been made known to the Whitehall concerns through correspondence initiated by the Division's mediation service[82] in attempting to mediate the complaints. Thus, while the demand itself was silent about the nature of the conduct under investigation, the substance of the requests in the demand coupled with Whitehall's knowledge of the complaints would have been sufficient to insure that the company knew what conduct was under investigation. Thus the Court could have upheld the investigative demand on the rationale of the *Gold Bond-Material Handling Institute* cases without foreclosing the need for some showing of the nature and purpose of the investigative

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[79] *Id.*

[80] 426 F.2d 90 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970).

[81] *Id.* at 92.

[82] The Division's mediation service attempts to resolve differences between consumers and businesses without recourse to the judicial process. After the Division receives a consumer complaint, generally the complaint is made available to the business through written correspondence from the Division to inform the business that the consumer has a grievance. After the business responds to this initial correspondence, the Division can offer suggestions on resolving the complaint. If the Division cannot mediate a settlement of the consumer complaint, the Division must close the case and refer the consumer to a private attorney of the consumer's choice. However, if there are numerous complaints of business conduct, the Division can initiate an investigation to determine whether the conduct may be in violation of the Consumer Protection Act. CONSUMERS' ADVISORY COUNCIL, STATE OF CONSUMER AFFAIRS IN KENTUCKY 25-29 (1975).

demand. The Court's holding was unnecessarily broad and will undoubtedly cause hardship to those persons who have not had contact with the Division of Consumer Protection prior to the issuance of an investigative demand.

B. *Commonwealth ex rel. Stephens v. Herb Jones Chevrolet, Inc.*

On October 28, 1975, Hardin Circuit Court Judge J. Howard Holbert granted a protective order[83] to Herb Jones Chevrolet, Inc. after a civil investigative demand was issued[84] to determine whether the automobile dealership had engaged in overcharging consumers for sales and usage tax on the purchase of used automobiles. Judge Holbert held the investigative demand void and unenforceable because it was a type of search warrant issued without probable cause by a non-judicial officer, and because it violated the corporation's privilege against self-incrimination.[85]

In a memorandum opinion per curiam[86] the Kentucky Supreme Court reversed Judge Holbert's decision, holding that an investigative demand is not a search warrant and that fifth amendment rights are not involved in a civil investigative demand proceeding. In holding an investigative demand analogous to a subpoena duces tecum, the Court quoted the *Morton Salt* requirements for administrative investigations and concluded that the *Pineur* decision was dispositive of the issues in the case.

The Court's lack of analysis requires further discussion of the fourth and fifth amendment issues raised in *Herb Jones*

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[83] Herb Jones Chevrolet, Inc. v. Commonwealth *ex rel.* Hancock, Civil No. 13,566-C (Hardin Cir. Ct., Oct. 28, 1975).

[84] The investigative demand requested *inter alia* names and addresses of sales management and personnel, copies of interoffice memos or writings relating to practices of charging car buyers for sales or use taxes, and copies of interoffice audits or accounting reports pertaining to dollar effect of charging car buyers for sales or use tax. The demand also requested the company to make Mr. Herb Jones available for questioning concerning the company's practice of charging car buyers for sales and use tax, and to make available for inspection all records pertaining to used car sales since June 16, 1972. Record at 3, Herb Jones Chevrolet, Inc. v. Commonwealth *ex rel.* Hancock, Civil No. 13,566-C (Hardin Cir. Ct., Oct. 28, 1975).

[85] *Id.* at 81-83.

[86] Commonwealth *ex rel.* Stephens v. Herb Jones Chevrolet, Inc., No. 76-144 (Ky. S. Ct. Oct. 15, 1976).

*Chevrolet*. The Court correctly resolved the fourth amendment issue, but swept too broadly in resolving the fifth amendment question raised by the civil investigative demand procedure.

The difference between administrative demands and search warrants was definitively discussed in *Oklahoma Press* in determining probable cause was not necessary for the issuance of an administrative subpoena.[87]

> It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. . . . The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry.[88]

The investigative demand is in the nature of an administrative subpoena and analogous to discovery proceedings with attendant procedural safeguards for judicial protection of the investigated party.[89] The Kentucky Supreme Court in *Pineur* recognized that investigative demands must be considered under the *Morton Salt* standard and are not bound within the strict confines of establishing probable cause.[90]

The issue of a corporation's self-incrimination privileges has long since been settled by the courts.[91] A corporation is not a "person" within the meaning of the self-incrimination provi-

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[87] *Cf.* Camara v. Municipal Court, 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967).

[88] 327 U.S. at 208-09.

[89] *See* notes 28-31 *supra* and accompanying text.

[90] *Accord*, 68 AM. JUR. 2d *Searches and Seizure* § 27 (1973).

[91] In Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), the self-incrimination argument was rather summarily dismissed by the Court, applying the well-settled rule that corporations are not entitled to the privilege against self-incrimination. United States v. White, 322 U.S. 694 (1944); Essgee Co. v. United States, 262 U.S. 151 (1924); Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906).

sions of the fifth amendment, nor may Herb Jones, as a corporate officer, assert his personal fifth amendment privilege on behalf of the corporation.[92] The Kentucky Supreme Court in *Pineur* alluded to the difference between constitutional protections for natural persons and corporations, indicating a corporation's inability to assert all constitutional rights of natural persons.[93] Thus, Herb Jones Chevrolet, Inc. is foreclosed from challenging the investigative demand on fifth amendment grounds.

A corporation's inability to raise the self-incrimination issue does not, however, resolve the problem of potential individual self-incrimination. The Kentucky statute is silent as to use of information obtained from an investigative demand in any subsequent criminal prosecution of a witness.[94] Furthermore, the statute provides for issuance of demands not only to those persons suspected of committing unfair, false, misleading, or deceptive acts or practices, but also to "any person who is believed to have information, documentary material, or physical evidence relevant to the alleged or suspected violation."[95] While most cases have revolved around the self-incrimination issue as raised by a corporate witness, Kentucky's statute leaves open the self-incrimination issue as it relates to a natural person.

Although the Kentucky Consumer Protection Act is a civil statute,[96] the United States Supreme Court has held that the privilege against self-incrimination can be asserted "in any proceeding, civil or criminal, administrative or judicial, inves-

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[92] *See* cases cited, note 91 *supra*. *See* George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968); Curcio v. United States, 354 U.S. 118 (1957); United States v. Peter, 479 F.2d 147 (6th Cir. 1973); Hyster Co. v. United States, 338 F.2d 183 (9th Cir. 1964). *See also* Bellis v. United States, 417 U.S. 85 (1974).

[93] 533 S.W.2d at 528 n.1.

[94] *See* note 34 *supra* and accompanying text.

[95] KRS § 367.240 (Supp. 1976).

[96] The Consumer Protection Act provides for traditional civil and equitable remedies, injunctive relief under KRS § 367.190 as well as restitutionary and restorative measures under KRS § 367.200. Furthermore, the Act provides for civil actions by persons injured by violations of KRS § 367.170 to recover actual damages. KRS § 367.220. The statute does provide penalties; however it specifically provides that they are "civil penalties." KRS § 367.990. *See* State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 510 P.2d 233 (Wash. 1973), holding that the existence of civil penalties in a statute does not make the act a criminal statute; *accord*, Kugler v. Romain, 266 A.2d 144 (N.J. 1970), *aff'd as modified*, 279 A.2d 640 (N.J. 1971).

tigatory or adjudicatory."[97] Thus the Kentucky Supreme Court incorrectly held that fifth amendment rights are not involved in a civil investigative demand proceeding. In *Maness v. Meyers,*[98] the United States Supreme Court held that in a civil case, a witness could assert the privilege if there were a reasonable basis to assume that a risk of criminal prosecution existed.[99]

> The fifth amendment privilege against self-incrimination assures that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action. . . . The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.[100]

Since a violation of the Consumer Protection Act would not subject a person to a criminal or penal sanction under the Act, the mere issuance of an investigative demand would not violate the privilege against self-incrimination. Nevertheless, if a specific question were asked and if there were a reasonable belief that the answer would tend to incriminate a person individually in a subsequent criminal prosecution, the question could be challenged by objection,[101] and the court could then determine if the objection were proper.[102] Since the danger of criminal self-incrimination must be a substantial probability, the validity of such a claim in an investigation of possible

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[97] Maness v. Meyers, 419 U.S. 449, 464 (1975); Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); Kastigar v. United States, 406 U.S. 441, 444 (1972).

[98] 419 U.S. 449 (1975).

[99] The precise holding in the case was that a lawyer may not be held in contempt for advising his client during the trial of a civil case to refuse to produce material demanded by a subpoena duces tecum when the lawyer believes in good faith the material may tend to incriminate his client. *Id.* at 468.

[100] *Id.* at 461.

[101] Objections to an investigative demand can be presented to a court in at least three ways. Under KRS § 367.240(2) a petition to modify or set aside a demand, stating good cause, can be filed in court. Under KRS § 367.260 an application for a protective order from unreasonable investigative action taken by the Attorney General can be presented to the court. If the Attorney General seeks to enforce an investigative demand by a court order under KRS § 367.290(2), a hearing on the merits of an investigative demand must be held before issuance of a final order.

[102] 81 AM. JUR. 2d *Witnesses* § 36 (1975).

unfair, false, misleading, or deceptive acts or practices is remote indeed. The Court's decision in *Herb Jones Chevrolet*, however, appears to foreclose raising the fifth amendment issue in a civil investigative demand proceeding.

Despite the widespread approval of *Oklahoma Press* and *Morton Salt*, the distinction between accusatorial and inquisitorial fact-finding, which is the foundation of the *Oklahoma Press-Morton Salt* theory of administrative investigations, has not gone unchallenged. The grand jury analogy[103] has been criticized as improper since the grand jury is a body of citizens standing between other citizens and the government, while an administrative agency is an arm of the state staffed by government employees.[104] Furthermore, the accusatorial/inquisitorial dichotomy[105] has not been so significant since the rise of administrative "due process."[106] In light of these factors, the Court should have confined its fifth amendment holding in *Herb Jones Chevrolet* to the rights of the corporation without generally eliminating self-incrimination protections from the civil investigative demand procedure.

*Pineur* and *Herb Jones Chevrolet* have left the Attorney General with broad power to seek information regarding possible violations of the Consumer Protection Act. These cases follow the rationale of *Oklahoma Press* and *Morton Salt* and to that extent are not novel or unexpected. The Court, however,

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[103] *See* note 51 *supra* and accompanying text.

[104] *See* Hannah v. Larche, 363 U.S. 420, 498 (1959) (Douglas, J., dissenting); Brief for Appellee at 13-16, Commonwealth *ex rel.* Hancock v. Pineur, 533 S.W.2d 527 (Ky. 1976).

[105] For further discussion of the inquisitorial/accusatorial dichotomy in administrative proceedings, see Jenkins v. McKeithen, 395 U.S. 411 (1969); Hannah v. Larche, 363 U.S. 420 (1959); Haines v. Askew, 368 F. Supp. 369 (M.D. Fla. 1973), *aff'd*, 417 U.S. 901 (1974); Atchison, Topeka & Santa Fe Ry. v. Lopez, 531 P.2d 455 (Kan. 1975).

[106] For thorough discussions of the need for due process in administrative investigations, *see, e.g.*, Chaney, *The Need for Constitutional Protection for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974); Rogge, *An Overview of Administrative Due Process*, 19 VILL. L. REV. 1 (1973); Murchison, *Rights of Persons Compelled to Appear in Federal Agency Investigational Hearings*, 62 MICH. L. REV. 485 (1964); Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations*, 47 MINN. L. REV. 939 (1963), 48 MINN. L. REV. 557, 1081 (1964); Newman, *Due Process, Investigations, and Civil Rights*, 8 U.C.L.A. L. REV. 735 (1961); Note, *Constitutional Rights and Administrative Investigations: Suggested Limitations on the Inquisitorial Powers of the Federal Agencies*, 58 GEORGETOWN L. J. 345 (1969).

need not have reached as far in its decisions in wiping out self-incrimination protections and apprisal rights in investigative demand proceedings.

Although the Court has resolved the issue of the validity of investigative demands, the Court in both *Pineur* and *Herb Jones Chevrolet* left open the question of the proper scope of investigative demands.[107] This issue requires analysis of the *Oklahoma Press-Morton Salt* standard for judging administrative investigations.

## IV. SCOPE OF AN INVESTIGATIVE DEMAND

While the three-part test in *Oklahoma Press* and *Morton Salt* defined the parameters of administrative investigative authority, that test should not be regarded as a talisman.[108] Unfortunately, most courts have been unwilling to analyze and appraise informational demands critically, leaving administrative agencies with an almost unbridled authority to investigate.[109] Because the courts have been reluctant to restrict administrative investigations, there may be little comfort to one challenging an investigative demand that relief from arbitrary administrative action is provided by way of court review. This concern by those being investigated is even more understandable since the Kentucky Supreme Court's decision in *Pineur* that the courts would determine the reasonableness of a demand in light of the standards established by *Morton Salt.* Thus, in defining the reasonableness of a demand,[110] the court not only should place emphasis on the three-part test of *Oklahoma Press-Morton Salt* but also should balance the interest of the Attorney General and the Division of Consumer Protection in issuing an investigative demand and the rights and obligations of an investigated party in responding to a demand.

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[107] Although the Court did provide standards to determine the proper scope of a demand, the Court declined to review the reasonableness of the demand issued to Pineur and the possible overbreadth of the demand issued to Herb Jones Chevrolet since the lower courts had not made a finding on these questions.

[108] *Cf.* Hanna v. Plumer, 380 U.S. 460 (1965).

[109] *See, e.g.*, Note, *Resisting Enforcement of Administrative Subpoenas Duces Tecum: Another Look at CAB v. Hermann,* 69 YALE L. J. 131 (1959); Comment, *Enforcement of the Administrative Subpoena: An Abdication of Judicial Inquiry,* 27 ALBANY L. REV. 239 (1963).

[110] *See generally* GELLHORN & BYSE, *supra* note 76, at 490-504; COOPER, *supra* note 16.

A. *Agency Authority to Investigate*

Two aspects of the Consumer Protection Act are pertinent to this factor. The statute buttresses the functions, powers, and duties of the Division of Consumer Protection with investigative authority over matters affecting consumer affairs.[111] However, the issuance of an investigative demand is much more limited to determinations of whether violations of the Act have been committed or are about to be committed.[112] Thus the broad scope of investigative authority over matters affecting consumer affairs would not sanction the issuance of an investigative demand.[113] Absent a showing that the investigation related to a determination of unlawful acts or practices,[114] the investigative demand would be void. If the proper showing were made, however, the demand could be issued to any person with relevant information.[115]

B. *Relevancy*

The relevancy issue is difficult for the recipient of the demand to overcome. The court's inquiry is usually limited to whether the requested information might possibly be useful, not that it will in fact be useful.[116] Once an initial showing of

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[111] KRS § 367.150(3) (Supp. 1976).

[112] KRS § 367.240 (Supp. 1976).

[113] For example, the Consumers' Advisory Council established by KRS § 367.130 acts in an advisory capacity on consumer affairs, making recommendations to the governor, attorney general, and legislative branch of the government. The Council frequently holds hearings on proposed consumer legislation and makes recommendations for passage. Although the Consumers' Advisory Council is aided in information gathering by the Division of Consumer Protection, issuance of an investigative demand to aid in Council hearings or acquisitions of information would clearly be beyond the statutory authority of the investigative demand. *See* CONSUMERS' ADVISORY COUNCIL, STATE OF CONSUMER AFFAIRS IN KENTUCKY 3-4 (1975).

[114] KRS § 367.175 was added to the Consumer Protection Act in 1976 declaring contracts, combinations, and conspiracies in restraint of trade or commerce unlawful. Since prohibition of unlawful antitrust activity has been included in the Consumer Protection Act, investigative demands will be available for antitrust investigations. Ironically, Governor Carroll vetoed a similar antitrust bill which provided for issuance of investigative demands in antitrust investigations. The bill also provided for investigative powers of subpoena and impoundment of evidence similar to those in the Consumer Protection Act. The bill was vetoed apparently because the investigative powers were thought too broad. *See* Louisville Courier Journal & Times, March 21, 1976, § A at 1, 24.

[115] KRS § 367.240 (Supp. 1976). *See* note 95 *supra* and accompanying text.

[116] GELLHORN & BYSE, *supra* note 76, at 496.

reasonable relevance has been made by the agency, a heavy burden of persuasion is shifted to the recipient to establish irrelevancy.[117]

The *Pineur* decision indicated in essence that the relevance of the Attorney General's request for information need not be shown on the face of the demand in the form of grounds or factual details. Certainly this view does not conflict with the judicial role since the court must make a factual determination of relevance regardless of whether any grounds are stated on the face of the demand. The disturbing aspect of *Pineur* is that unless the recipient has been apprised of the nature of the investigation, there is no ground for the *recipient* to determine whether the information sought is relevant or not. This is undesirable for two reasons. The recipient may answer an improper demand "solely because of the air of authority with which the demand is made,"[118] thus waiving his constitutional rights. Or the recipient may needlessly challenge a relevant investigative demand, causing undue delay and expense in resolving the matter under investigation.

To avoid either of these possibilities, the Division of Consumer Protection should adopt a procedure similar to that employed by the Federal Trade Commission: "Any person under investigation compelled or requested to furnish information or documentary material shall be advised with respect to the purpose and scope of the investigation."[119] Such a procedure would not burden the Division,[120] but could possibly avoid unnecessary challenges to investigative demands and expedite investigations of unfair, false, misleading, and deceptive acts or practices.[121] Whether the Division would choose to adopt as

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[117] COOPER, *supra* note 16, at 301.

[118] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 219 (1946) (Murphy, J., dissenting).

[119] 16 C.F.R. § 2.6 (1976).

[120] A prefatory statement of purpose would be sufficient. Consider the following example:

> The Attorney General, pursuant to KRS § 367.240 has reason to believe that Herb Jones Chevrolet, Inc. may have engaged in unfair, false, misleading, and deceptive acts or practices in violation of KRS § 367.170, in its charges for sales and use tax in the purchase of used automobiles, and the Attorney General believes it to be in the public interest to investigate Herb Jones Chevrolet, Inc. with respect to its charges for sales and use tax.

[121] The investigative demand to Herb Jones Chevrolet, Inc. was issued on January 21, 1974. Three years later, the demand still remains unanswered.

policy that which it has successfully opposed as law is another matter.

### C. *Specificity*

This final requirement of the *Oklahoma Press-Morton Salt* test has been perhaps the least analyzed aspect of administrative investigations. Since investigative demands involve requests for information at a preliminary stage of investigation, the demands are frequently challenged as being either too broadly drawn or too loosely identified. The requirement of adequate specificity is usually not difficult for the agency to meet since a description is sufficiently specific if the requested document can be identified by the recipient of the demand.[122] Likewise, the claim of overbreadth or undue burden is usually dismissed unless there is a showing that the request was designed for harassment rather than discovery.[123]

Since the courts appear unwilling to invalidate sweeping demands for information, the recipient should frame his challenge in terms of modifying rather than invalidating the demand. In this context, courts should be more active in examining the requests in the demand. Rather than taking all informational demands at face value, courts should frame the demand to satisfy the interests of both the Division of Consumer Protection and the business community.

While courts are empowered to modify demands considered overbroad, burdensome, or vague,[124] initial requests for modification or extension of time to answer should be made to the Division itself. Such procedure not only expedites communication between the Division and the recipient, but also prevents the formal adversary relationship inherent in seeking a court order.[125] This good faith attempt at compromise can protect the interests of both the consuming public and the business community while insuring a cooperative and confidential

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[122] COOPER, *supra* note 16, at 310.

[123] *Id.* at 304.

[124] KRS § 367.240(2) (Supp. 1976).

[125] The uncertainty as to how courts will apply the *Morton Salt* standard coupled with the Supreme Court's broad approval of the civil investigative demand procedure should encourage recipients of demands to negotiate. The Division should also be more willing to negotiate rather than subjecting investigative demands to lower court review.

procedure in defining the proper scope of an investigative demand.[126]

## CONCLUSION

The principles guiding the enforceability of civil investigative demands have their genesis in the decisions of *Oklahoma Press Publishing Co. v. Walling* and *United States v. Morton Salt Co.* Those cases provide a broad framework through which administrative agencies, like the Kentucky Division of Consumer Protection, can investigate and make determinations of fact essential to the ongoing character of their responsibilities and duties.

The Consumer Protection Act provides for issuance of a civil investigative demand in a precomplaint investigation of possible unfair, false, misleading, or deceptive acts or practices. The Kentucky Supreme Court's recent decisions in *Commonwealth ex rel. Hancock v. Pineur* and *Commonwealth ex rel. Stephens v. Herb Jones Chevrolet, Inc.* cast that procedure within the standards established by *Morton Salt* for judging the validity of a precomplaint, preadjudicative investigation. Those standards require only that the informational demand be made within the authority of the agency and that the information sought be reasonably relevant and not too indefinite.

While courts will be called upon to determine the reasonableness of investigative demands, informal procedures between the Division of Consumer Protection and the business community suggest a more constructive approach to resolving disputes over the contents of investigative demands. The Division should routinely inform the recipient of an investigative demand of the nature or purpose of the investigation, even though this is not statutorily required. Initially the recipient of a demand should attempt compromise with the Division rather than invoking the formal authority of the court if a demand is deemed objectionable. Finally the court, when called upon to examine an investigative demand, should disregard an all-or-nothing approach, and if necessary should revise informational

[126] *See* Davis, *Investigations By the Department of Justice—As Seen By the Potential Defendant*, 29 A.B.A. ANTITRUST SECTION 54 (1965).

requests in light of the modern standards, so as to best serve the interests of the consuming public and the business community.

With the increased responsibilities of the Division of Consumer Protection, the fact-finding capabilities provided in the Consumer Protection Act should not be restricted.

> The words of the Consumer Protection Act do not describe the Attorney General as a passive bystander, but, rather, as an aggressive and determined protector of the interests of the consuming public and the reputable business community. To be true to the provisions of the Act, to be able to properly educate the public about consumer issues, to be in a knowledgeable position to recommend better consumer protection legislation to the General Assembly, and to be able to clearly frame issues of [unfair,] fraudulent, misleading, or deceptive business practices in Kentucky, it is necessary that the Attorney General be able to act on his own initiative and with the aid of an effective investigative power in order to provide more preventive than remedial public services and to make the Consumer Protection Act an effective servant of honest consumers and businessmen alike.[127]

The authority to issue a civil investigative demand is an integral part of this investigative power.[128] The Kentucky Supreme Court's decisions in *Pineur* and *Herb Jones Chevrolet* are a welcomed reaffirmation of the Attorney General's precomplaint investigative authority under the Consumer Protection Act. Unfortunately, the Court unnecessarily restricted the investigated party's privilege against self-incrimination and right to notice of the nature and purpose of the investigation. If the Consumer Protection Act is to be an effective servant of both consumers and honest businessmen, future decisions will have to account not only for the Attorney General's need for information but also for the investigated party's right to administrative and constitutional due process.

*Jon E. Pancake*

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[127] Brief for Appellant at 21, Commonwealth *ex rel.* Hancock v. Pineur, 533 S.W.2d 527 (Ky. 1976).

[128] In 1975, 291 investigations were initiated by the Division of Consumer Protection. While not all of these investigations resulted in the issuance of an investigative demand, all were concerned with possible false, misleading, or deceptive acts or practices. CONSUMERS' ADVISORY COUNCIL, STATE OF CONSUMER AFFAIRS IN KENTUCKY 8 (1975).