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PERSPECTIVE

Case is rare example of sanctions against federal agency

By Peter Boutin

In an event almost as rare as the "supermoon" earlier this month, a federal judge recently sanctioned a government agency — the Securities and Exchange Commission — for issuing an overbroad subpoena.

In 2012, the SEC filed a complaint against Louis Schooler and his financial planning corporation for violating numerous federal securities laws. Louis Schooler allegedly bought undeveloped land in the American Southwest and sold it at grossly inflated prices to general partnerships comprised of unsophisticated investors. After granting the SEC's motion for partial summary judgment, the court ordered Louis Schooler to disgorge $147,610,280, along with a civil penalty of $1,050,000, to the SEC.

Before the SEC was able to collect its massive judgment, Louis Schooler was found dead outside the country. Thereafter, the SEC issued a subpoena to his wife, Linda Schooler, from whom he was legally separated. Linda Schooler had never been a party to the action against her husband. However, rather than limiting its investigation to Louis Schooler's personal assets or transfers of assets between husband and wife, the subpoena sought 51 different categories of documents. Many of these documents pertained to Linda Schooler's personal assets and expenditures, as well as her likelihood of receiving an inheritance. After multiple unsuccessful attempts at meeting and conferring with SEC attorneys, Linda Schooler filed in the U.S. District Court for the District of Nevada an emergency motion to quash the subpoena under Federal Rules of Civil Procedure 26 and 45, or in the alternative, a motion for a protective order.

Extensively amended in 2013, Rule 45 enables parties to serve subpoenas commanding a person to "attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises." Arguing that the SEC had issued an "overbroad, burdensome, and prejudicial [s]ubpoena," Linda Schooler moved the court to impose sanctions under Rule 45(d)(1), which states, "A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney fees — on a party or attorney who fails to comply." In September, the court granted Linda *Schooler*'s motion in part and ordered the parties to meet and confer further. The SEC subsequently agreed to narrow the majority of its requests, and Linda Schooler filed a motion for discovery sanctions against the SEC for being forced to file her original emergency motion.

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On Nov. 17, Magistrate Judge William G. Cobb issued an order sanctioning the SEC for its conduct. Noting the scant authority for when it is appropriate to impose sanctions under Rule 45(d) (1), Cobb looked to two 9th U.S. Circuit Court of Appeals cases for guidance. In *Mount Hope Church v. Bash Back*, 705 F.3d 418 (9th Cir. 2012), the court ruled that sanctions are appropriate "when a party issues a subpoena in bad faith, for an improper purpose, or in a manner inconsistent with existing law." In *Mattel Inc. v. Walking Mountain Products*, 353 F.3d 792 (9th Cir. 2003), the court affirmed an award of sanctions in the form of attorney fees for a "very broad" subpoena where "no attempt had been made to try to tailor the information request[ed] to the immediate needs of the case."

Although Cobb did not find that the SEC had acted in bad faith, he found the subpoena "blatantly overbroad," and that the agency "did not take reasonable steps to avoid imposing an undue burden on Linda Schooler in responding to the subpoena." The judge was especially disappointed that the SEC made "absolutely no effort" to narrow its requests until "faced with a hearing on a motion to quash the subpoena and order to meet and confer." Quoting *Boston Scientific Corp. v. Lee*, 2014 U.S. Dist. LEXIS 107584 (N.D. Cal. Aug. 4, 2014), Cobb lamented the all-too familiar scenario when, before the court, "the recalcitrant party possesses newfound flexibility and a willingness to compromise. Think Eddie Haskell singing the Beaver's praises to June Cleaver, only moments after giving him the business in private." Cobb granted Linda Schooler's motion and awarded her attorney fees in the amount of $10,661.

So, what can we learn from *Schooler*?

The immediate lesson is perhaps that no litigant — not even the SEC — is above the law. *Schooler* is unique in that it appears to be the only case in which Rule 45(d)(1) sanctions have been imposed on a federal agency. However, there is precedent for other government entities being sanctioned. In *Builders Association of Greater Chicago v. City of Chicago*, 215 F.R.D. 550 (N.D. Ill. Mar. 20, 2003), a magistrate judge quashed over 500 subpoenas issued by the city of Chicago and ordered the city to pay the subpoenaed parties' attorney fees and costs.

But there are other important lessons. First, a litigant considering the issuance of a subpoena under Rule 45 must realistically assess its own needs and refrain from requesting more than is necessary to gather the required information. Second, the litigant must consider the burdens the subpoena might place on a third party who is not involved in the litigation. Will the subpoena violate her right to privacy? Will it cost her thousands of dollars in legal fees, not to mention her own time and effort and aggravation, to find and produce the documents? Will these documents even serve any purpose in the lawsuit? Third, the litigant should consider the timing of the subpoena, to the extent possible. In *Schooler*, the SEC served it on Linda Schooler just three days after French authorities informed her that her husband had been found dead on his boat. Perhaps a couple of weeks later would have been a better time to serve a grieving widow.

The bottom line is that litigants should act reasonably when engaged in federal subpoena practice. To that end, the litigant issuing the subpoena should remember to remain flexible and not wait to get in front of a judge before offering to narrow its requests. After all, the next "supermoon" may be 18 years away. However, we can be certain that the next Rule 45 sanctions order will arrive much sooner.

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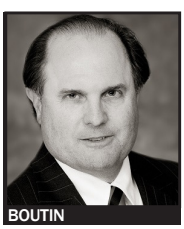
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