

Recent State Court Decisions Reaffirm Scope of State Attorney General Authority

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As we have recently noted [elsewhere](#), state attorneys general have actively increased their enforcement of both state and federal laws in recent years, and we expect the pace to continue to grow in 2022. A key reason for the prominence of state investigations and litigation can be found in the wide range of statutory authority granted to the state AGs, who have the ability to investigate and enforce laws — ranging from state consumer protection statutes to comprehensive federal laws like the Health Insurance Portability and Accountability Act. With such broad authority, the state AGs can and do exercise discretion in deciding which actions merit their attention.

Every once in a while, however, that discretion is challenged in court in the form of disputes about the state AG's decision to take on (or not) a certain matter. In two recent state supreme court decisions, courts upheld the authority of the attorney general to exercise discretion when determining when and how to conduct investigations — in one case, a criminal prosecution, and in the other, a civil subpoena. These cases serve as reminders that the decisions made in the offices of the state attorneys general have the power to significantly shape the priorities of the office and the state when it comes to enforcing the laws — whether state or federal, or civil or criminal. For this reason, it can be helpful to track the states' investigations and settlements for clues as to their priorities and the likely focus of their discretionary authority moving forward.

“The Sole and Sound Discretion of the Attorney General”

In one recent case out of Mississippi,[\[1\]](#) a challenge was brought as to whether a state attorney general had the discretion to decline to investigate and prosecute a criminal case. In October 2021, the Supreme Court of Mississippi unanimously confirmed that the state's attorney general, as Mississippi's chief legal officer, has been and remains an attorney vested with authority “to institute, conduct, and maintain all suits necessary for the enforcement of the laws of the state,” including criminal prosecution.[\[2\]](#)

The Mississippi Supreme Court's decision arose out of the 2014 shooting death of 21-year-old Christian Andreacchio, whose death was originally ruled a suicide but whose family believed that he was murdered. A grand jury heard the Andreacchio case in 2017 but did not hand down an indictment. The case continued to garner attention over the next several years, including being featured on the podcast *Culpable* and an episode of *48 Hours* in January 2021. After several district attorneys recused themselves, the trial court directed Mississippi Attorney General Lynn Fitch, who had been inaugurated in January 2020, to conduct additional prosecutorial review and to decide whether or not the investigation should be resubmitted to another grand jury. Fitch declined to do so and filed a petition for writs of mandamus and prohibition with the court.

In a one-page opinion, the Mississippi Supreme Court concluded that while the trial court properly accepted the disqualification of the district attorney, it improperly usurped the executive power of the attorney general by directing her to conduct a criminal investigation and by requiring the attorney general to report to the trial court the status of her investigation by a date certain. The Supreme Court referenced the broad discretion of the AG, stating that “any decision to investigate a case and present said case to a grand jury as well as a decision to decline prosecution as unwarranted is within the sole and sound discretion of the Attorney General or her designee.”^[3]

“The Determination ... Rests Squarely with the Attorney General.”

Meanwhile, the Hawaii Supreme Court recently affirmed the Hawaii attorney general’s discretion to determine when an investigation would be in the public interest in a case, discussing the AG’s legal authority to issue investigatory subpoenas. Specifically, the Supreme Court considered whether a trial court appropriately quashed an investigatory subpoena, seeking records from an environmental group (KAHEA) seeking to deter development on one of Hawaii’s dormant volcanoes.^[4] KAHEA challenged the subpoena as retaliatory harassment and, on appeal, as outside the attorney general’s statutory authority under Hawaii law.

In a unanimous opinion, the Supreme Court agreed with the state AG that the office’s investigatory powers validated the subpoena, although it disallowed certain requests as unreasonable. The relevant statute states that the “attorney general shall investigate alleged violations of the law ... when the attorney general determines that an investigation would be in the public interest,”^[5] including through the issuance of subpoenas. The Supreme Court noted that the attorney’s general subpoena power under the statute is broad but not unlimited, and it remains subject to safeguards established in the constitution and within the statute itself. However, the attorney general’s discretion to determine when an investigation is in the public interest is not subject to “second-guessing” by those who wish to challenge the subpoena. Instead, the Supreme Court wrote, “The determination of whether an investigation is ‘in the public interest’ rests squarely with the Attorney General. Not with KAHEA. And not with this court.”^[6]

As we wrote earlier this year, the U.S. Supreme Court will soon address the issue of a state attorney general’s authority in the context of determining [whether a state attorney general has the authority to intervene after a federal court of appeals invalidates a state statute when no other state actor will defend the law](#). Based on oral arguments, we believe that the Court will likely uphold the sovereign interest of a state — as vested in its attorney general — to control how it defends its own laws. As with the two state supreme court decisions cited above, such an opinion would only further solidify the significant scope of authority of the state’s top law enforcement official.

^[1] *In re Fitch*, No. 2021-M-00630, 2021 Miss. LEXIS 302, at *1 (Miss. Oct. 19, 2021) (en banc).

^[2] *Bell v. State*, 678 So. 2d 994, 996 (Miss. 1996) (quoting *Gandy v. Reserve Life Ins. Co.*, 279 So. 2d 648,649 (Miss. 1973)); *Moore v. State*, 309 So. 3d 7, 11 (Miss. Ct. App. 2020); see also Miss. Code Ann. § 7-5-1 (Rev. 2019) (listing powers of the Attorney General).

[3] *In re* Fitch, 2021 Miss. LEXIS 302, at *1-2.

[4] *In re* Investigation of KAHEA, 497 P. 3d 58 (Haw. 2021).

[5] H.R.S. § 28-2.5(a).

[6] *In re* Investigation of KAHEA, 497 P.3d at 66.

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