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Court Applies Rule 37(a)(5)(A) Fee-Shifting for Discovery Deficiencies

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Although the Federal Rules give litigants broad flexibility to create reasonable discovery search and review procedures, that flexibility carries with it an expectation that the chosen process will be executed with sufficient consistency, skill, and rigor to yield quality results. When the outcomes of a party's discovery efforts diverge markedly from what the record suggests should exist—or when the party's described methodology does not match its actual execution—courts may probe more deeply into the underlying process and order corrective measures.

A recent decision from the Northern District of Illinois demonstrates how such scrutiny can unfold when production results fail to align with either expectations or representations. In this matter, concerns did not stem from the choice of review technology, but rather from indications that the review process had not generated adequate results. In response, the court appointed a Special Master to investigate the reasonableness of the party's discovery efforts, ultimately leading to fee-shifting sanctions under Rule 37(a)(5)(A) after the extent of production deficiencies became clear.

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Contentious Discovery and Motion to Compel

In *BCBSM, Inc. v. Walgreen Co.*, 2025 WL 2765327 (N.D. Ill. Sept. 29, 2025), an initial group of insurers (Initial Plaintiffs) brought claims against retail pharmacy Walgreens, alleging fraudulent and deceptive trade practices and unjust enrichment; the case was subsequently consolidated with other similarly-situated plaintiffs. After the entry of an ESI protocol in June 2021, Initial Plaintiffs engaged a vendor to support their defensive discovery efforts. Starting in October 2021, they trained a TAR model and applied it to nearly three million documents, followed by a manual review of over 103,000 documents.

Discovery was contentious, with Walgreens challenging the “slow pace of document production.” By August 2022, Initial Plaintiffs advised the court in a joint status report that their productions were

“substantially complete[],” even though they had produced fewer than 18,000 documents—about 621 per plaintiff. Initial Plaintiffs also assured the court that they had “put *exceptional care* into collecting and reviewing documents to ensure that the documents produced *are truly responsive*.”

Walgreens questioned this production given their understanding that some of the “Initial Plaintiffs had produced 140,000 responsive documents in the [related] CVS litigation” and that these “documents were possessed by the custodians and hit on the search terms that the parties had agreed upon for Initial Plaintiffs’ review.” By November 2022, Walgreens identified specific documents from the CVS litigation that had not been produced by Initial Plaintiffs, who then “admitted to missing these documents because their coding system had scored them below the [responsiveness] threshold” of their TAR model. They then “adjusted the model so it would more liberally identify responsive documents.” A month later, Walgreens filed a motion to compel, seeking “clarity on Initial Plaintiffs’ use of TAR, the addition of new document custodians, and the production of all remaining responsive documents.” After the August 2022 joint status report, Initial Plaintiffs produced more than 280,000 additional documents and, in March 2023, “claimed again that they officially declared substantial completion of document production.

The Special Master, the PDP, and Remediation

In May 2023, the magistrate judge appointed a Special Master to investigate Initial Plaintiffs’ document review and production efforts. The Special Master “ordered Initial Plaintiffs to complete a Preliminary Diagnostic Protocol (PDP) to test their productions’ adequacy,” including “a diagnostic test relying on Initial Plaintiffs’ determinations of whether a document was responsive to Walgreens’ discovery requests.”

The PDP results, according to the Special Master, raised “serious questions about the adequacy” of the productions. The Special Master identified a “‘huge discrepancy’ between the number of responsive documents that Initial Plaintiffs had anticipated and the actual number produced” in their TAR process and therefore questioned Initial Plaintiffs’ declaration of substantial completion. The Special Master also questioned why the Initial Plaintiffs had significantly narrowed their responsiveness coding criteria during discovery; the Initial Plaintiffs admitted changing their coding formulas and described some previously unproduced documents as “material misses.”

In January 2024, after having consulted with both parties on its design, the Special Master implemented a remediation protocol whereby Walgreens “would review specified samples of documents in two sets and code for responsiveness using the definition set forth by Initial Plaintiffs in the beginning of discovery.” The Initial Plaintiffs would then update their “TAR model based solely on Walgreens’ responsiveness determinations” and produce any responsive documents previously missed, subject to privilege. By the close of the remediation protocol in February 2025, this process had identified another 77,003 responsive documents. The magistrate judge “recognized that the Court granted Walgreens’ First Motion to Compel on Jan. 5, 2024 to the extent that the Special Master ordered Initial Plaintiffs to complete the Remediation Protocol and produce all responsive documents identified through that process unless privileged.”

Motions for Sanctions

Here, both parties sought sanctions for the other’s conduct. Specifically, Walgreens sought discovery sanctions under “Rule 37(a)(5)(A), Rule 26(g), Rule 37(c), and the court’s inherent authority,” arguing that the Initial Plaintiffs “failed to meet their discovery obligations by withholding responsive documents and implementing an inadequate review process that systematically under-identified responsive documents.” Walgreens additionally sought “costs and fees from Initial Plaintiffs associated with the remediation process in the amount of \$4,100,747 or, in the alternative, for Initial Plaintiffs to pay Walgreens’ reasonable attorney’s fees and expenses incurred in connection with filing its Motion to Compel.” Initial Plaintiffs countered, seeking sanctions for their costs and fees in the amount of \$3,010,271.

The district court first resolved Walgreens’ request for reimbursement of attorney’s fees and expenses incurred in bringing the successful motion to compel. The court observed that under Federal Rule of Civil Procedure 37(a)(5)(A) “fee-shifting is automatic: if the motion to compel is granted a court *must* require the party to pay the movant’s reasonable expenses and attorney’s fees incurred in making the motion unless (1) the motion was filed before the parties attempted to resolve their discovery dispute without court intervention; (2) the opposing party’s nondisclosure, responses, or objections were substantially justified; or (3) other circumstances make the award of expenses unjust.”

There was no dispute here that Walgreens had conferred before moving to compel. And even though Initial Plaintiffs never argued that any other exception applied, thereby having “forfeited their objections to sanctions under this Rule,” the court nonetheless reviewed the other potential exceptions in the interests of completeness and having a clear record. In doing so, the court stated that it would focus “on the more than 350,000 responsive documents” eventually produced by Initial Plaintiffs after Walgreens filed the motion to compel. The court found that the multitude of issues and errors, and the three years of production delays, demonstrated “that Initial Plaintiffs were not substantially justified under” the rule. On unjustness, the court stressed that Initial Plaintiffs had repeatedly failed to produce relevant and responsive documents—both before and during the remediation process—even after being put on notice of their discovery deficiencies. It concluded there was “nothing unjust in requiring a party that has repeatedly failed to produce relevant and responsive documents to pay the attorneys’ fees of the party that was required to litigate the issue.”

Noting that “[a] key purpose of awarding fees and expenses under Rule 37(a)(5)(A) is to deter abuses of the discovery process,” the court granted Walgreens’ request for its reasonable expenses and attorneys’ fees associated with the first motion to compel. *Id.* In the subsequent bill-of-costs decision, *BCBSM, Inc. v. Walgreen Co.*, 2026 WL 63398 (N.D. Ill. Jan. 8, 2026), Walgreens was awarded nearly \$400,000 in fees and expenses under the rule. The court deemed other sanctions requested by Walgreens “either not warranted or not available under the law.” *Walgreen*, 2025 WL 2765327, *6.

The court then turned to Initial Plaintiffs’ motion accusing Walgreens of having “manipulat[ed] the special master process to its benefit,” and having “violated and manipulated the Remediation Protocol by overcoding documents as responsive.” Denying the motion for sanctions, the court stated, “This is a blatant attempt by Initial Plaintiffs to relitigate the definition of responsiveness and avoid blame for failing to timely identify and produce the tens of thousands of additional responsive documents uncovered through the Remediation Protocol. The court rejects these baseless allegations.”

Practical Takeaways

BCBSM v. Walgreen offers several important practical lessons for litigants and counsel navigating complex discovery disputes. First, courts are prepared to take decisive action when confronted with clear and concrete failures in the discovery process. While courts are generally cautious about engaging in “discovery on discovery” or exercising detailed oversight, they will intervene when presented with compelling evidence of deficiencies in document production.

Second, the case highlights that the fee-shifting provision in Rule 37(a)(5)(A) is both real and automatic. When a motion to compel is granted, the default outcome is that the losing party must pay the prevailing party’s reasonable expenses and attorneys’ fees incurred in bringing the motion. The exceptions to this rule are narrow, and the burden is on the resisting party to prove that any exception applies.

Third, discovery procedures must be genuinely defensible and not merely described as such. In *BCBSM v. Walgreen*, the problem did not stem from the use of technology in the review process, but from the multiple flaws in the overall review effort regarding both process and quality. Boilerplate assurances of “exceptional care” or declarations of “substantial completion” were insufficient, especially when the record revealed repeated and evident deficiencies.

Fourth, while the imposition of harsh sanctions usually requires proof of bad faith, this decision demonstrates that negligent or even reckless conduct can still result in significant consequences. Such conduct may lead to years of remediation, extensive court oversight, and substantial financial liability for fee awards under Rule 37(a)(5)(A).

And finally, the best protection lies in reasonable, defensible procedures. *BCBSM v. Walgreen* underscores that a core obligation in discovery is to make reasonable, good faith efforts consistent with both the Federal Rules and any representations to the court and opposing parties. This means thoughtful process design from the outset along with ongoing monitoring and oversight. Parties who can demonstrate such defensible practices are far less likely to find themselves subject to a PDP, a remediation protocol, or the kind of fee-shifting sanctions imposed in this case.