

2. An order from the U.S. District Court for the Northern District of Indiana adopting a magistrate judge's recommendation granting a provisional award of fees and costs based on the finding that the defendant's opposition to the compelled discovery was not substantially justified under Federal Rule of Civil Procedure 37.

In *Axis Ins. Co. v. American Specialty Ins. & Risk Servs., Inc.*, 2021 WL 6012709 (N.D. Ind. December 6, 2021), U.S. District Judge Damon R. Leichty adopted a recommendation by a magistrate judge (previously reported in the August 2021 edition of this publication) compelling discovery and granting a provisional award of fees and costs based on the finding that the Defendant's opposition to the compelled discovery was not substantially justified under Federal Rule of Civil Procedure 37.

Plaintiff brought this matter asserting a single claim for breach of contract with respect to its agreement with Defendant to promote, underwrite, bind, and deliver its insurance policies to customers. See *Axis Ins. Co. v. American Specialty Ins. & Risk Servs., Inc.*, 2021 WL 2910814, at \*1 (N.D. Ind. July 12, 2021). During discovery, Plaintiff claimed that Defendant's responses omitted or included incorrect metadata, including missing "family" data and emails with altered subject lines and message content, and that responsive documents were omitted.

After unsuccessful attempts to meet and confer, Plaintiff had filed a motion to compel Defendant to produce all missing documents and to correct various metadata issues and also sought expenses in connection with the motion. *Id.* at \*2. The magistrate had granted the motion to compel production of missing documents and to correct metadata and had also provisionally granted the fee request. *Id.* at \*10.

In objecting to the magistrate's recommendation, Defendant challenged only the ruling provisionally awarding fees. 2021 WL 6012709, at \*1. Judge Leichty noted that the magistrate had used the appropriate standard, under which "a court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion ... to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees," unless "(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." *Id.* (quoting Rule 37(a)(5)(A)). An objection is substantially justified "if reasonable people could differ as to the appropriateness of the contested action." *Id.* (internal citations omitted).

Turning to the substance of the magistrate's opinion, Judge Leichty first found that Defendant failed to show clear error in the magistrate's findings. He noted that Defendant's objections to the original requests were "largely undeveloped" and inconsistent and that Plaintiff had raised legitimate concerns regarding the completeness of Defendant's production. Judge Leichty also noted that Defendant raised many of the same arguments it had made to the magistrate, each of which had been addressed and rejected. In short, Defendant did not show that the magistrate's findings were "dead wrong." *Id.* at \*2 (quoting *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 288, 233 (7th Cir. 1988)).

Judge Leichty next addressed Defendant's argument that some of Plaintiff's discovery requests included contention-based document requests. He explained that such requests can be

inappropriate if they invade counsel's mental impressions or require counsel to cull and compile documents in a way that exposes legal strategies and deliberative choices about the importance of certain documents to specific claims, defenses, or other contentions in the case. However, he found that the magistrate had committed no error in compelling the discovery because although Defendant had made a general work product objection, it had also agreed to produce responsive documents but had failed to do so. *Id.* at \*3.

Judge Leichty next addressed Defendant's arguments about its failure to produce metadata. Defendant had initially objected to the requested metadata fields, saying the parties had not agreed to an electronically stored information (ESI) protocol, but the magistrate rejected this argument, and Judge Leichty agreed. Defendant had argued that the objection requirement of Rule 34(b)(2)(C) did not apply to ESI production requests but had cited no authority for that proposition, which in any event was inconsistent with the rule's language. As Judge Leichty noted, a party's option to comply with Rule 34(b)(2)(D) (which permits a party to object to a requested form for producing ESI) does not obviate the need to comply with Rule 34(b)(2)(C). He found that Defendant's position was not substantially justified, and therefore it did not show clear error on this issue.

Defendant raised additional arguments related to the discovery requests that were compelled by the magistrate, but Judge Leichty rejected these arguments because they did not relate to the basis for the provisional fee award or were related to objections that had not been made to the underlying discovery requests and were therefore waived.