

## Cost-Shifting Mandatory when Non-Party Subpoena Cost of Compliance is “Significant”

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In *United States v Blue Cross Blue Shield of Michigan*, the U.S. Department of Justice (DOJ) filed suit against Blue Cross alleging violations of federal antitrust laws. The DOJ issued non-party subpoenas to two hospitals under Rule 45 of the Federal Rules of Civil Procedure. The hospitals objected to producing responsive documents in part on the grounds that the production would impose an undue burden.

Addressing a motion to compel by the DOJ, Magistrate Judge Majzoub of the Eastern District of Michigan ordered the documents produced, but acknowledged that under Rule 45 she had an obligation to “protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.” Finding that the production would cause the hospitals to incur costs which might be “significant,” she ordered the hospitals to submit cost estimates for complying with the subpoenas. The hospitals submitted estimates averaging out to approximately \$15,000.

To determine the significance of these costs for purposes of Rule 45, and without finding binding Sixth Circuit precedent, the court looked to a line of cases from the U.S. District Court for the District of Columbia. According to this line of cases, “[w]hether costs are ‘significant’ is at the discretion of the court,” and cost-shifting is mandatory upon a finding of “significant” costs.

The court then relied on several opinions from other jurisdictions interpreting Rule 45 to determine the significance of the hospitals’ costs to comply with the subpoenas. The cases relied on found costs ranging anywhere from \$9,000 to \$200,000 to be “significant.” Based on these cases, the court concluded that the hospitals’ costs of compliance were “significant.” The court went on to balance the equities and concluded that a percentage of the hospitals’ costs should be shifted to the United States.

Under this interpretation of Rule 45, non-parties are protected “against significant expense resulting from involuntary assistance to the court.” The threshold at which such expenses become “significant” is discretionary, thus requiring a case-by-case determination. As a consequence, both the requesting party and the responding non-party should keep in mind that cost shifting may be available under certain circumstances.