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"Blanket Objections"

By Jerold S. Solovy & Robert Byman June 6, 2005

Multiple choice: A "blanket objection" is: (a) a frequent but futile lament about the falling snow; (b) a marital dispute over the disproportionate amount of bed comforter arrogated by one spouse over the other; or (c) no comfort at all. The answer -- in the Ninth U. S. Circuit Court of Appeals and maybe everywhere -- is (c): a blanket objection may be no objection at all; it may waive otherwise valid privileges. In a recent and notable opinion, the Ninths have held, in *Burlington Northern & Santa Fe Railway Co. v. Kapsner*, 2005 U.S. App. LEXIS 5150 (Mar. 31, 2005), that "boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege." *Id*. at *14.

What? You assert a timely objection to the production of privileged material, a court later determines that the objection is too generic, and the result is that the privilege is blown? Can that be? Yep, it can. Objector beware.

A Blanket Objection Is No Objection At All

The Kapsners filed a toxic tort action and attendant discovery on Burlington. Burlington timely responded, offering to produce responsive documents but generally objecting to the production of privileged documents. Burlington did not supply a privilege log until several months later. The Kapsners were not satisfied with the detail in the log, and asked for production of all withheld documents. The trial court granted that request, holding that Burlington had "waived its privilege objections by failing to provide a privilege log at the time it served its discovery responses." *Id*. at *7. Burlington ran, via writ of mandamus, to the Ninth Circuit, hoping for mercy. Hope may spring eternal, but Burlington's train had left the station. Mercy withheld. Writ denied. Privilege lost.

The *Burlington* Court analyzed the interplay between Federal Rules 26 and 34. Rule 34 requires a written response to a discovery request within 30 days. Of course, Rule 34 allows a shorter or longer time if ordered by the Court or if agreed in writing among the parties; but absent order or agreement, 30 days. Not 30 days or so, 30 days. Bright-line, black and white. And Rule 34 requires that the response must state the reasons for any objections. But nothing in Rule 34 addresses the level of detail that must be provided in support of the objection, nothing expressly makes blanket objections improper or untimely. "I object to producing privileged documents" is an objection and it is accompanied by a reason. Rule 34 is satisfied.

Ah, but Rule 26(b)(5) remains hungry. "When a party withholds information . . . by claiming that it is privileged . . . , the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." The Rule doesn't expressly say "privilege log" but what else would you call something that describes the nature of the withheld materials sufficiently enough to determine the propriety of the claim of privilege? So a privilege log is required. But nothing in Rule 26 imposes any timetable nor incorporates the Rule 34 30 day deadline.

Putting the two rules together, the Court put it to Burlington. The *Burlington* court could not find (nor could we, but we probably didn't look as hard as their clerks did) any other Circuit Court authority on point. "No Circuit has explicitly weighed in on the precise content of *Rule 26(b)(5)*'s notice requirement, nor on its relationship to *Rule 34*'s deadline." *Id*. at *11.

The Ninth Circuit might have simply denied the writ -- after all, the standard on mandamus is exceedingly high. But it did not take that path, making a case-specific ruling on this single case; instead, it chose to articulate a holding that sets the bar in that Circuit and perhaps elsewhere: "We hold that boilerplate objections or blanket refusals inserted into a response to a *Rule 34* request for production of documents are insufficient to assert a privilege." *Id*. at *14.

The Court might have gone even further. The *Burlington* Court

rejected the *per se* rule imposed by the District Court that would deem the privilege waived simply by failing to serve a privilege log within the 30 day period. Instead, the Ninth Circuit held that 30 days is the default guideline; waiver should be determined on a case-by-case basis taking into account (1) how blanket was the blanket objection; (2) how late was the late privilege log; and (3) how hard would it have been to comply within the default 30 days. But note -- the *Burlington* Court held that the mere fact of the 5 month delay in the production of a log was -- in the absence of mitigating factors -- fully sufficient reason to find waiver.

Strangely, the Court characterized its holding as though it were a moderate act: "we now chart a middle road through the wide spectrum of caselaw regulating discovery." *Id*. at *14. Ironically, the Court did not actually discuss the status of that alluded-to caselaw, simply making the *blanket* observation that "much ink has been spilled" on the subject. But make no mistake about it. This decision is not middle-road; it rides the right shoulder of a six lane highway. And it ought to tighten the sphincters of recalcitrant discovery respondents everywhere.

That's not to say that it wrongly decided. The decision makes perfect sense. And it's not to say that this holding should not have been anticipated by earlier district court opinions.

Now, some courts have gone distinctly the other way. A good part of the work which populates the Ninth Circuit hails from California, whose state courts of appeal have come to a totally different conclusion. In *Best Products, Inc. v. Grantenelli Motorsports, Inc.*, 119 Cal. App. 4th 1181 (Ct. App. 2d. Dist. 2004), the same issue was hoisted on the same procedural lever. As in *Burlington*, the trial court found that a failure to timely file a privilege log resulted in the waiver of privilege objections; as in *Burlington*, the privilege-seeker sought mandamus.

But the Court granted the writ, restoring the privilege to its asserter. The Court found that only the objection need be made in a timely fashion, and the objection can be boilerplate; if the information that should have been supplied ala privilege log is not provided, there may be sanctions, but waiver of privilege is not one of them. A court may enter orders compelling further responses; it can impose issues sanctions, evidence sanctions, monetary sanctions, or even terminating sanctions. But a judicial privilege waiver is not an appropriate sanction. *Id*. *See also, People v. Lockyer*, 122 Cal. App. 4th 1060, 1072-76 (Ct. App. 4th Dist. 2004).

So boilerplate offenders may take comfort in California. In state court cases. But the California Rules of Procedure are quite different than the Federal Rules (California's State Motto: "Everything is different here!"). The California Rules specifically address the waiver of privileges, so any analogy to Federal procedural law is problematic. And, of course, Federal judges sitting in California will follow Ninth Circuit authority.

But *Best Products* aside, it should come as no surprise that blanket objections could throw a wet blanket on otherwise legitimate claims of privilege. In *Hobley v. Burge*, 2003 U.S. Dist. 20585 (N.D. Ill. 2003), counsel argued that his blanket "legal" objections to all discovery were not the "real" objections, but rather had been raised to avoid any waiver until the "actual" objections could be posed. Holding that the Federal Rules do not afford a foe a fulcrum for a faux (go on, say that out loud) response, the court held "Objections must not only be timely, they must be proper, or the result is waiver." *Id*. at *11. The objections were waived; and counsel was sanctioned for the faux pas of faux objections.

Courts Hold Boilerplate Objections Are Insufficient

Other district courts have held four square that a boilerplate objection is insufficient to raise a valid objection. *See, e.g., United States ex rel. Fisher v. Network Software Assocs.*, 217 F.R.D. 240, 249 (D.D.C. 2003). And that a failure to raise a valid objection waives an attempt to later assert what might otherwise be a valid objection. *See, e.g., PLX, Inc. v. Prosystems, Inc.*, 220 F.R.D. 291, 293 (D. W.Va. 2004). But most courts have been reluctant to let waiver equate to loss of attorney client privilege. *Haring v. Eckerd Corp.*, 2002 U.S. Dist. LEXIS 11654, *3-4 (D. Pa. 2002)(boilerplate objections overruled and waived, but defendant given one last chance to move for a protective order with details establishing privilege). Most courts have been reluctant to find privilege waiver, that is, in the world prior to the *Burlington* opinion. With Ninth Circuit authority to back them, expect courts to become increasingly less sympathetic to blanket objections.

When you get hit with oppressive discovery requests (often the result of tem- if not boiler- plate requests created for the express purpose of making discovery painful), there is an understandable temptation to respond with boilerplate objections. Resist the temptation. First, get enough time to do it right, either by agreement or by court order. Second, do it right. Make specific objections, detailed objections, proper objections. Don't be a blanket waiver.

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