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No More Blurred Lines?: Federal Courts Rule That Conditional Discovery Objections Are No Longer Proper Under Federal Rules of Civil Procedure

The US District Court for the Southern District of California recently issued a decision that highlights a growing trend among federal district court judges of overruling conditional objections to discovery on the grounds that they are improper, misleading, and not allowed under the Federal Rules of Civil Procedure. *See Fay Ave. Props., LLC v. Travelers Prop. Cas. Co. of Am.*, No. 11-2389-GPC, 2014 WL 2965316 at *1 (S.D.Cal. July 1, 2014). The *Fay Avenue* decision comes on the heels of the hotly litigated issues regarding waiver of privilege objections in *Sprint Comm. Co., L.P. v. Comcast Cable Comm., LLC*, No. 11–2684–JWL, 2014 WL 545544 at *1 (D.Kan. Feb. 11, 2014) ("*Sprint I*").

In *Fay Avenue*, as in *Sprint*, United States Magistrate Judge William Gallo was faced with a motion to compel discovery responses where counsel for the opposing party had responded to discovery requests by stating objections such as "vague," "overbroad" or "protected by the attorney client privilege" and followed with "subject to" and/or "without waiving these objections," the party will produce responsive, non-privileged documents. Following in the steps of Judge James O'Hara (*Sprint*), Judge Gallo ruled that responding to discovery requests "subject to" and "without waiving" objections is confusing and misleading, and has "no basis in the Federal Rules of Civil Procedure." *See* 2014 WL 2965316 at *1.

Although Judge Gallo recognized that it has long been common practice among attorneys to respond to discovery requests this way, he joins a number of federal district court judges from Arizona, Florida and Kansas in holding that responses such as these leave the requesting party to guess whether the producing party has produced all responsive documents and ultimately has the effect of waiving objections to the discovery requests. *See id.* at *2; *see also Sprint I*, 2014 WL 545544 at *2*; Pro Fit Management, Inc. v. Lady of America Franchise Corp.*, Civil Action No. 08-CV-2662, 2011 WL 939226 at *1 (D.Kan. Feb. 25, 2011); *Haeger v. Goodyear Tire and Rubber Co.,* 906 F.Supp.2d 938 (D.Ariz. 2012); *Tardif v. People for the Ethical Treatment of Animals,* No.2:09-cv-537-FtM-29SPC, 2011 WL 1627165 at *2 (M.D.Fla. Apr. 29, 2011).

Earlier this year, Judge James O'Hara of the United States District Court for the District of Kansas ruled that "whenever an answer accompanies an objection, the objection is deemed waived and the answer, if responsive, stands." 2014 WL 545544 at *3.

In *Sprint I*, Plaintiff Sprint objected on the basis of attorney-client privilege and work product doctrine with regard to three discovery requests, but stated in its response, "subject to and without waiver of the foregoing objections. . . [plaintiff] will produce nonprivileged responsive documents within its custody and control after a reasonably diligent search. . . ." Defendant Comcast filed a motion to compel the production of documents, which the United States District Court for the District of Kansas

granted, on the basis that the purported "reservation of rights" was improper under the Federal Rules of Civil Procedure, and effectively waived Sprint's objections to those specific requests. *Id.* at *2. In its reasoning, the Court looked to the language of Fed. R. Civ. P. 34(b)(2), which permits only three responses to a request for the production of documents:

> (1) produce the documents as requested;
> (2) state an objection to the request as a whole; or
> (3) state an objection to part of the request, provided that the response specifies the part objected to and responds to the non-objectionable portion.

Sprint filed a motion for reconsideration, which Comcast joined and argued that such a drastic remedy—albeit, granted in Comcast's favor— lacked "precedent in the relevant case law" and was "particularly problematic inasmuch as Sprint's responses followed a *widespread and commonly accepted practice*." Defs. Resp. to Sprint's Mot. for Recons. of the Ct.'s Holding that Sprint Waived Privilege Through Conditional Discovery Responses at 2, ECF No. 195 (emphasis added). Based on the unusual set of circumstances presented before the court, Judge O'Hara granted Sprint's motion for reconsideration of its holding that Sprint waived its objections through conditional responses. *Sprint Comm. Co., L.P. v. Comcast Cable Comm., LLC*, Nos. 11-2684-JWL, 2014 WL 1569963 at *3 (D.Kan. Apr. 18, 2014) ("*Sprint II*"). The court, however, made clear that it was upholding its *ruling* that when a party objects to discovery but nonetheless answers "subject to" the objection, the objection will be deemed waived. *Id.* The court cautioned that the practice of responding to discovery requests by asserting objections and then answering "subject to" or "without waiving" the objections is "confusing, unproductive, and in violation of the federal discovery rules." *Id.* at *2.

Given this growing trend, clients and their counsel should be wary of responding to discovery using boiler plate conditional language following the statement of an objection.

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