Civil Procedure

Challenging Boilerplate Discovery Objections: Procedures and Remedies Refined

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Boilerplate discovery objections. We've all seen 'em a million times, and perhaps used them ourselves in a lapse of good judgment. Reviled by most, these objections inevitably lead to ugly discovery battles if one side decides to press. And when the trial courts are beckoned to enter the fray, they typically do so only reluctantly.

The exception to this rule, of course, is when a court decides to take a hard line and challenge the objecting party to "put up or produce." But even then, as illustrated by the recent decision of *Best Products v. Superior Court* (2004 *Daily Journal D.A.R.* 7883), the relief the trial court can grant is circumscribed not only by what the propounding party requests in its motion to compel, but also by the plain language of the discovery statutes themselves. Thus, the *Best Products* case is not only instructive on how – from a procedural perspective – to overcome boilerplate objections, but also is another embodiment of that old bromide about being careful what you ask for in the process.

Facts of *Best Products*

The facts of the *Best Products v. Superior Court* case play like a well-worn record: plaintiff's attorney propounds discovery (interrogatories and requests for production) to the

defense attorney, who responds primarily with boilerplate privilege objections (both attorney-client and work product). An informal meet-and-confer goes nowhere, forcing plaintiff's attorney to file two motions to compel (one for the interrogatories, one for the production request). The defense attorney attempted to "moot" those motions by "supplementing its prior responses," but did not withdraw his privilege objections. Plaintiff's attorney then asked the trial court to compel full responses and a full production without further objection, since the defense attorney never explained how the discovery invaded any privilege and, to that end, never provided a privilege log. *Best Products v. Superior Court, supra,* 2004 *Daily Journal D.A.R.* at 7883. Any of this sounding familiar yet?

The unfamiliar twist on this all-too-familiar-saga is that the trial court in *Best Products* actually "took the wood" (so to speak) to the defense attorney for what it clearly believed were evasive responses and abusive privilege objections. Specifically, notwithstanding the defense attorney's lament at the inevitable motion hearing that "it was necessary to assert those objections" because he "did not have the time" to provide full responses before they were due, and he was "in the process" of putting together a privilege log, the trial court pushed the defense to substantiate its objections. Noting, however, that the defense could not meet this burden, the trial court overruled the objections in their entirety and granted the plaintiff's motions to compel, as if the privilege objections had never been made. *Id.* at 7883-7884.

The defense attorney responded, of course, not with the ordered responses or production, mind you, but with a writ petition. And so enticed, the Second District decided whether the trial court could compel the discovery responses over the defense attorney's privilege objections. That inquiry, as we shall see, turned on a demanding examination of the exact language of the discovery statutes contained in the Code of Civil Procedure.

Be Careful What You Ask For . . .

While the appellate court in *Best Products* recognized that the party raising a privilege objection has the affirmative duty to substantiate such a privilege, it took a very restrictive view of the remedies available to the courts – found at C.C.P. §2031 (for requests for production) and C.C.P. §2030 (for interrogatories) – when the objecting party fails to do so. Specifically, the *Best Products* court reasoned that among all of the options provided to trial courts when privilege objections cannot be substantiated, "waiving" those objections by requiring a full production or interrogatory response is not one of them. *Id.* at 7884-7885. Rather, the *Best Products* court goes to great lengths to clarify that the only time that such an objection can technically be "waived" is when it is not timely asserted. *Id.*

The *Best Products* court then down-played the use of privilege logs, noting somewhat perversely that the term "privilege log" is nowhere found in the discovery statutes. *Id.* at 7885. Rather, it suggested that such a term was "jargon, commonly used by courts and attorneys" to express the requirement on the objecting party under C.C.P. §2031(g)(3) "to provide a specific factual description of documents in aid of substantiating a claim of privilege" so as to "permit judicial evaluation of the claim of privilege." *Id.* Which – for all of you still playing at home – sounds like a "privilege log" to me, but I digress.

The real hook, however, for the *Best Products* case was what the plaintiff asked for: a full production **without further objection**. Instead, the court suggested that had plaintiff's attorney only moved to compel "**further responses** to contest defendant's conclusory attorney-client and work product objections" under C.C.P. §2031(m), the need for a privilege log would then have arisen, and the burden thereby shifted to the defense attorney to substantiate those objections. *Id.* at 7885. Not surprisingly, the *Best Products* court tracked this same analysis with the companion sections of the discovery statutes dealing with defense attorney's interrogatory responses, namely C.C.P. § 2030(l), suggesting that the plaintiff, under that section, should have likewise compelled

further responses. *Id.* It did so, however, after finding that no claim of privilege relieves a responding party from sufficiently **identifying** documents in response to interrogatories, although it may later refuse to **produce** those documents in the future based upon some privilege objection. *Id.*

At the end of the day, the gripe the *Best Products* court had with the trial court's order really came down to the penalty it imposed on the defense attorney for failing to substantiate its boilerplate privilege objections. Harkening back, once again, to a strict construction of the Code of Civil Procedure, the *Best Products* court essentially told trial courts that overruling a privilege objection is not the same as considering it "waived". *Id.* Rather, when an objecting party cannot substantiate such an objection, the only remedy provided in the discovery statutes is **sanctions** (of the monetary, evidence or issue variety), or a big, bad **terminating sanction** (of the "your case is over" variety).

On that basis, the *Best Products* court then ordered that upon remand, the defense attorney shall provide: (a) "further responses" to the request for production, including a "particularized identification of all documents" – the form of which was likely a "privilege log" (oh, the irony) – and (b) "further responses," without objection, identifying all documents called for in plaintiffs' interrogatories, even though defense attorney may later object to their actual production. Adding insult to injury, the *Best Products* court even awarded the objecting defendant its costs on appeal. *Id.* at 7886.

Conclusion

Okay. Deep breaths everyone; deep breaths. What have we learned from *Best Products*? Well, first off, when you move to compel discovery responses over claims of privilege, ask for the right relief under the Code. In other words, request **further responses** under C.C.P. §2031(m) for

requests to produce, and **further responses** under C.C.P. §2030(l) for interrogatories. Like it or not, the *Best Products* decision dictates that these are the only Code sections which will properly square the issue for the trial court (and, perhaps most importantly), provide an adequate record to support any order in your favor.

Second, we learned that there is no such animal as a privilege objection to an interrogatory that simply asks the responding party to **identify** a document. The *Best Products* decision tells us that such an identification must be made – **without any privilege objection** – notwithstanding the fact that such an objection may be well-founded if production of that particular document, so identified, is subsequently sought.

And third, the remedies for trial courts analyzing privilege objections is narrowly circumscribed, limited primarily to the sanctions (of varying degrees) contained in the discovery statutes. Evisceration of a timely privilege objection – even of the boilerplate variety – will not lead to a full production. So bear that in mind when you draft your discovery plan, recognizing that if the other side has something to hide (legitimately or not), you shouldn't expect to have it produced, but only to have your opponent sanctioned or its case eviscerated when it continues to stand on that objection.

In the final analysis, much of the *Best Products* decision seems to have elevated form over substance, thereby encouraging the incorrigible to drag-out discovery proceedings by placing an inordinate burden on propounding parties to overcome boilerplate privilege objections. Indeed, the trial judge's commendable decisiveness on these issues in *Best Products* should have been lauded and encouraged by the appellate court, not reprimanded and relegated to strict statutory construction. Yet the Code is what the Code is, and so when facing similar objections, the better option is to make sure you can hit the objecting party where it hurts by giving the trial court sufficient statutory ammunition to do so.