

Eastern District of Texas Latest Court to Criticize "Subject To" Language in Discovery Objections

IN SHORT

The Situation: Courts have increased their scrutiny of parties responding to discovery requests "subject to" objections.

The Result: The Eastern District of Texas recently became another court that criticized discovery responses that are made "subject to" discovery objections, discussing that such a practice may waive the objections.

Looking Ahead: Parties responding to written discovery should consider these rulings and the increased emphasis on clarity in both objections and responses, including what is, or is not, being withheld from a document production.

The Eastern District of Texas recently criticized a party's statement in its written discovery responses that it would produce documents "subject to" its objections. *See Realpage, Inc. v. Enterprise Risk Control, LLC*, No. 4:16-cv-00737, 2017 WL 1165688 (E.D. Tex. March 27, 2017). According to the court, such "belts and suspenders" language creates ambiguity with no basis in the revised Federal Rules of Civil Procedure.

These statements are not outliers. Rather, they are part of a growing trend among federal courts with a renewed focus on the specificity of objections and responses. Litigants should carefully consider these opinions and the call for increased specificity of written discovery responses to avoid unwanted consequences, including arguments over the waiver of objections.

Discovery Responses and Court's Ruling

The plaintiffs in *Realpage* sought to enjoin the defendants from using the plaintiffs' trade secrets and confidential information. In late 2016, the plaintiffs moved to compel and overrule the defendants' objections to their requests for production. Many of the defendants' discovery responses were made "subject to" objections.

The practice of including "subject to" statements, according to the court, is both widespread and improper. Such language is "manifestly confusing (at best) and misleading (at worse)" and leaves the requesting party "uncertain as to whether the question has actually been fully answered." *Id.* at *2 (quotations omitted). The court noted that Rule 34 does not allow this type of hedging; it requires parties to state "with specificity" the grounds for the objections *and* specify the part of a request that is objectionable.

The court also condemned the defendants' use of boilerplate objections, which make it "impossible to know whether information has been withheld and, if so, why." *Id.* at *3. The court noted that the defendants used the same standardized text in 18 of their 25 responses and rejected the argument that the language was not boilerplate because the text contained slight variations.

Although the court stated that the defendants waived certain objections by using "subject to" language and boilerplate objections, the court nevertheless did sustain other objections and made specific rulings on which documents should be produced. *Id.* at *4-9. And, the court did *not* hold that the defendants waived their privilege objections.



Given this growing line of cases, litigants in federal court should carefully consider their written discovery responses, the bases for any objections, and whether a court will understand what is being withheld based on the objection.



Other Recent Decisions Show a Growing Trend

The *Realpage* case is the latest in a growing list of courts to criticize the practice of responding "subject to" objections. *See, e.g., Keycorp v. Holland*, No. 3:16-cv-1948-D, 2016 WL 6277813 (N.D. Tex. Oct. 26, 2012) (objections waived by responding "subject to" objections and using boilerplate objections); *Consumer Elecs. Ass'n v. Compras & Buys Magazine, Inc.*, No. 08-21085-CIV, 2008 WL 4327253 (S.D. Fla. Sept. 2008) (ordering parties to refrain from stating "notwithstanding the above" after making objections).

One of the more extreme examples in this line of cases is *Sprint Commc'ns Co. v. Comcast Cable Commc'ns, LLC*, No. 11-2684-JWL, 2014 WL 545544 (D. Kan. Feb. 11, 2014). In *Sprint*, a patent infringement case, the court similarly degraded the "common practice" of using "subject to" or "without waiving" language. *Id.* at *2. But, the *Sprint* court held that the plaintiff waived its *privilege objections* by stating it would produce documents "subject to and without waiver of the foregoing objections." *Id.* The court ordered the plaintiff to produce certain documents, including assessments by the plaintiff's legal department.

Practical Implications

Given this growing line of cases, litigants in federal court should carefully consider their written discovery responses, the bases for any objections, and whether a court will understand what is being withheld based on the objection. In general, these cases suggest that responses to document requests should avoid boilerplate objections, identify the specific part(s) of the request that are objected to, state that documents are not being produced (or not searched for) in response to the objected-to portions of the request, identify what documents are being produced, and identify the portions of the request the documents are being produced in response. One thought is to specifically identify what is being produced and to expressly and clearly state that the party is objecting to, and not producing or searching for, the other parts of the request.

Regardless, the goal is clarity on what is, and what is not, being produced, which should help avoid the argument that the requesting party does not know if documents are being withheld and on what grounds, prevent unnecessary discovery disputes, and—most importantly—avoid waiving critical discovery objections, including claims of privilege.

THREE KEY TAKEAWAYS

1. Boilerplate objections to discovery requests continue to be disfavored and may result in sweeping rulings overruling those objections.
2. The practice of responding "subject to" discovery objections is coming under increased scrutiny.
3. Recent court cases suggest that parties responding to document requests in discovery need to place an increased emphasis on clearly identifying what is and what is not being produced, identify the specific part(s) of the request that are objected to, state that documents are not being produced (or not searched for) in response to the objected-to portions of the request, identify what documents are being produced, and identify the portions of the request in response to which the documents are being produced.

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