Conditional and Other "Nonspecific" Objections to Discovery Are No Objections At All in an Insurance (or in Any Other) Case*

by Dennis J. Wall, Esquire**

*Expanded beyond the title of a post with a similar name on September 8, 2011 on Insurance Claims and Bad Faith Law Blog, http://www.abajournal.com/blawg/insurance_claims_bad_faith_law_blog/. Like the post, however, this article focuses on the holdings reached by Federal Courts under the Federal Rules of Civil Procedure. The treatment of Conditional Objections to Discovery in State Courts will be the subject of another article.

**Dennis Wall is a sole practitioner with a unique practice. For thirty-three (33) years, his expertise and knowledge in Insurance Coverage and Bad Faith have led attorneys and companies across the United States to retain his services as an Expert Witness, Counsel and Consultant concerning Insurance Questions.

Elected to the American Law Institute in 2009, he has consistently been selected by his peers as a Florida Super Lawyer in "Insurance Coverage".

Dennis Wall is the author of the leading book on Bad Faith, "Litigation and Prevention of Insurer Bad Faith" (Shepard's/McGraw-Hill Second Edition; West Publishing Company 2010 Supplement and Third Edition 2011 in process). This Book is the product of three decades of research and analysis. Updated annually, to date in it Mr. Wall reviews over 4,250 cases, statutes, and other legal authorities in two volumes, in print and on-line. The Third Edition of "Litigation and Prevention of Insurer Bad Faith" totals 1,383 pages and 368 sections in two volumes, cover to cover.

In her decision in the case of *Pepperwood of Naples Condominium Ass'n v. Nationwide Mutual Fire Insurance Co.,* 2011 WL 3841557 (M.D. Fla. August 29, 2011), a U.S. Magistrate Judge entered an Order compelling production of Civil Remedy Notices in a statutory Bad Faith case in Florida.[1] This is a common holding when discovery of Civil Remedy Notices in other, similar cases is determined to be objectionable by the defendant insurance company in statutory First-Party Bad Faith actions in Florida.

The reasoning the Federal Court followed in order to reach its holding in this First-Party Insurance Bad Faith case is not unique to statutory First-Party Bad Faith cases, or to cases involving insurance companies in Florida. The reasoning of this Federal Court in this case affects *Insurance Bad Faith litigation*, certainly, but in addition its effects extend to the conduct of discovery in *all* Federal cases. The ramifications of this and similar holdings are outcome-determinative in Florida, but they are also likely to be decisive in cases filed in jurisdictions beyond the Florida borders. I have discussed this holding and its reasoning with defense and policyholder Insurance Lawyers in Florida, and they tend to agree with it. It reflects the results they experience in their own practice not to raise objections, for example, unless they intend to pursue them and have the Judge resolve the issue if need be. As one Policyholder Attorney said to me, "That's what Courthouses are for."

THE DISCOVERY REQUESTS AND RESPONSES IN *Pepperwood*

The plaintiff in *Pepperwood* is a Condominium Association. According to the Court's summary of the underlying liability and damages allegations in the opinion, the Condominium Association claims "substantial damages as a result of hurricane and/or hurricane force winds and ensuing damages" from 2004. (According to its Complaint, however, the Condominium Association claims damage from "on or about August 24, 2004, and October 24, 2005." Complaint, paragraph 6. The Complaint is available on PACER, the electronic online docket of the Federal Courts, for Middle District of Florida Case No. 2:10-cv-753, Docket No. 2.)

The Condominium Association alleges in its Complaint that Nationwide Mutual Fire Insurance Company "acknowledged that the loss was covered,

1. By the terms of Subsection (3)(a), a Civil Remedy Notice in accordance with the statute is a condition precedent to a section 624.155 cause of action. Statutory Bad Faith causes of action are available under Fla. Stat. § 624.155.

but wrongfully failed and/or refused to promptly tender all insurance benefits, undisputed or otherwise, due and owing PEPPERWOOD. NATIONWIDE closed its file, over PEPPERWOOD'S objections." (*Id.*, paragraph 13.) Seemingly before Nationwide closed its file on the Condominium Association's claim, Nationwide allegedly "tendered" $30,270.20. *Pepperwood of Naples Condominium Association v. Nationwide Mutual Fire Insurance Co.*, 2011 WL 3841557 at *1.

After hiring a public adjuster to interface with Nationwide (unsuccessfully), and following a (seemingly successful) appraisal in Pepperwood's favor for "$1,901,645.06 (Replacement Cost) and $1,535,468.28 (Actual Cash Value)," Nationwide "tendered an additional $1,391,674.64 in owed insurance benefits". Pepperwood then sued Nationwide for alleged breach of contract, and for Statutory Bad Faith under Section 624.155 of the Florida Statutes. *Id.*

The Condominium Association-Policyholder commenced discovery. Its discovery requests included "Plaintiff's Second Request for Production." The request for production of Civil Remedy Notices concerning similar claims, and Nationwide's response to that particular request, were quoted together by the Court as follows:

> **Request No. 1:** A copy of any and all civil remedy notices ("CRN") and related correspondence, including Nationwide's responses to the CRN, regarding similarly situated policy holders as Pepperwood from January 2004 until the present.
>
> * * *
>
> **Nationwide's Response:** Objection. This request is overbroad in temporal and subject scope; this request is vague with respect to the phrase "similarly situated policy holders"; this request is burdensome and harassing; this request seeks irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections and without waiver of the same, this request seeks information that is publicly available online from the Florida Department of Financial Services [FDFS], and can be obtained from that source as easily by Plaintiff as by the Defendant.

Id. at *2. [Boldface in original.]

The focus of this article is on the defendant's response, for reasons which will become apparent. The Court, too, focused on the response and objections actually interposed by the defendant in this case. The court did not go beyond those objections and responses, nor did the Court reframe the policyholder-plaintiff's discovery requests.

As can be seen from the above quotations, the defendant's response to requested production of other Civil Remedy Notices involved four (4) sets of objections. All four are addressed here in the order in which the Court addressed them, which was not the order in which Nationwide made them.

PRESUMPTION AGAINST CONDITIONAL OBJECTIONS

The first of four sets of objections: Conditional objections with answers result in waiver of the objections

The first objection that the Court addressed in the *Pepperwood* discovery decision was that the defendant's response providing discovery was conditioned on its objections. The defendant registered an objection that its production was only "[s]ubject to these objections and without waiver of the same". The *Pepperwood* Court began its decision with a warning shot across the bow of conditional objectors (which includes most attorneys and may have once included the author in the distant past before achieving enlightenment in this regard), to the effect that "this court is reluctant to sustain the objection." *Id.* In doing so, the Court in this case followed a presumption against the validity of conditional objections which is now well-established in the Federal Courts.

Despite the fact that "this seems to be an increasingly common approach to discovery," and "[e]ven though the practice has become common here and elsewhere," it has not received favorable treatment from the Federal Courts which have considered them. *Id.* The Federal Courts in all types of lawsuits, including but not limited to insurance coverage and Insurance Bad Faith cases, almost without exception reject all conditional objections

interposed against discovery.

The Magistrate Judge who decided the *Pepperwood* discovery dispute has for example reached the same decisions in other cases in nearly identical words. *Tardif v. People for the Ethical Treatment of Animals,* 2011 WL 1627165 (M.D. Fla. April 29, 2011)(Polster Chappell, USMJ); *Sewell v. D'Alessandro & Woodyard, Inc.,* 2011 1232347 (M.D. Fla. March 30, 2011)(Polster Chappell, USMJ). This is not a phenomenon limited to one United States Magistrate Judge or to one United States District Court, located in the Middle District of Florida, however.

The presumption against conditional objections to discovery under the Federal Rules of Civil Procedure originated in other Courts. In addition to the next section of this article considering the origins of the rule, *see, e.g., Mann v. Island Resorts Dev., Inc.,* 2009 WL 6409113 *3 (N.D. Fla. Feb. 27, 2009; Timothy, USMJ)("Finally, if an objection to a discovery request is raised, and then the question is answered 'subject to' or 'without waiving' the objection, this court is reluctant to sustain the objection."); *Consumer Electronics Ass'n v. Compras & Buys Magazine, Inc.,* 2011 4327253 *3 (S.D. Fla. September 18, 2008; Simonton, USMJ)("It has become common practice for a Party to object on the basis of any of the above reasons, and then state that 'notwithstanding the above,' the Party will respond to the discovery request, subject to or without waiving such objections. Such an objection and answer preserves nothing and serves only to waste the time and resources of both the Parties and the Court."); *Mullins v. Encore Senior Living II, LLC,* 2007 WL 4098851 *1 n.1 (N.D. Fla. Nov. 16, 2007; Timothy, USMJ)("Magistrate Judge Miles Davis recently published an article in *The Summation*, a publication of the Escambia/Santa Rosa Bar Association, forewarning lawyers practicing in this district that such boilerplate-type objections are not looked upon favorably.... Moreover, to the extent that material was produced 'subject to' or 'without waiving' an objection, Plaintiff should not expect the objection to be sustained by this court."); R. Jason Richards, "Answering Discovery 'Subject To' Objections: Lessons From Florida's District Courts" 35 So. Ill. U. L.J. 127, 127-28 (2010)(recognizing that Florida's Federal Courts are not alone in building this presumption in established case law, despite the article's title).

There is some authority for contending that striking down conditional objections can be a matter of judicial discretion, but it is suspect given the context of the Court's decision in that one case. The decision came in the case of *Moses v. State Farm Mutual Auto. Insurance Co.,* 104 F.R.D. 55, 58 (N.D. Ga. 1984). The Court recognized that the procedure of stating conditional objections while providing discovery is "improper." The Court in that case further recognized that it "could simply treat the objection as waived" in that situation. However, "it elects not to do so." *Id.* The *Moses* case involved the defendant insurance company's "alleged failure/refusal to pay $519 in chiropractic expenses and $2,108.75 in lost income, and whether such refusal/failure to pay was done in good faith under O.C.G.A. § 33-34-6." *Id.* at 56.

The reason that this one decision is suspect authority, if cited in favor of making conditional objections, is that if the Court had upheld the presumption against conditional objections in that case, then the objections that would have been waived as a result would have been a party's attorney-client privilege and work product immunity which it did not specifically state at the time of its response. *Id.* at 57-58. A waiver of attorney-client privilege, or a waiver of work product immunity, are like a called third strike on some batters when a baseball or softball game is tied or close, especially in the final innings of regulation play: Unless the pitch is too good not to call it a strike, the umpire will likely call the pitch a ball and leave it to the batter to either become a runner or an out (unless the pitch is too close to take and would be an undeserved "ball four").

In other words, a judicial finding that a party has impliedly waived its potentially available privilege or immunity objections to discovery, will ordinarily rest on more than conditional objections of counsel in the decided cases. Even the failure to provide a proper Privilege log, parenthetically, will often result in a "do-over" in order to provide the party with "one last chance" to assert, or to waive, its attorney-client privilege and work product immunity objections to discovery. This explains the reluctance of Federal Courts to deem privilege and immunity objections "waived" by a lawyer's failure to file a proper privilege log detailing those objections as required by the current Rules.[2]

The interrogatory to which State Farm answered, "yes," and also attempted to reserve the right to make future objections including claims of privilege or

immunity, also illustrates how the outcome was impelled by the circumstances in the *Moses* case:

> Interrogatory # 12 states:
>
> Did State Farm Mutual Automobile Insurance Company receive or does State Farm Mutual Automobile Insurance Company have possession of any recommendations with respect to Plaintiff's no-fault claim, evaluations as to liability, amount of coverage, when payment would be overdue or any factual summaries from any of your officers, adjusters, claims personnel, agents or any person hired by State Farm to investigate or evaluate Plaintiff's claim?
>
> Defendant's response states:
>
> Defendant objects to Interrogatory No. 12 to the extent that it seeks information covered by the attorney-client privilege. Defendant objects further to Interrogatory No. 12 to the extent that it seeks information regarding documents prepared in anticipation of litigation or subsequent to litigation. Subject to this objection, Defendant responds to Interrogatory No. 12 as follows: Yes.

Moses v. State Farm Mutual Auto. Insurance Co., 104 F.R.D. at 57.

So, then, why do lawyers including Insurance Lawyers follow the practice of making conditional objections in any case at all? Perhaps they are generally unsure of the judicial presumption against conditional objections, at least in Federal Court. Perhaps also, or instead, lawyers who raise conditional objections and then proceed to provide discovery anyway, think that there is a basis in the Federal Rules of Civil Procedure for this practice. Or perhaps the explanation for the motivation lies elsewhere. *See* Richards, *supra,* at 129-30 ("The rationale most often asserted for reserving objections is to protect against the possibility that any objection not made will be deemed waived.... This is not to say that a party may not object to a portion of discovery and also provide an answer to the non-objectionable portion. It simply means that an objecting party cannot have it both ways.").

In an ordinary case, the presumption that conditional objections to discovery are likely to result in a waiver of all objections is a presumption too great for counsel to ignore.

NO RULE BASIS FOR CONDITIONAL OBJECTIONS

Another ground for decision in the *Pepperwood* discovery dispute is the lack of any basis in the Federal Rules of Civil Procedure—on which many State Court Rules of Civil Procedure are actually based—for making conditional objections at all. "[I]f a party objects to a question or request but then answers, has the objection been waived despite the claimed reservation of the objection? This court cannot logically conclude that the objection survives the answer. Simply put, the rules do not on their face give a party that option." *Pepperwood of Naples Condominium Association v. Nationwide Mutual Fire Insurance Co.*, 2011 WL 3841557 at *2. [Emphasis added.]

The same observations were made previously in non-Insurance cases. *See, e.g., Mann v. Island Resorts Dev., Inc.,* 2009 WL 6409113 *3 (N.D. Fla. Feb. 27, 2009; Timothy, USMJ):

> Although this seems to be an increasingly common approach to discovery, it raises a fairly straightforward question: if a party objects to a question or request but then

2. *See, e.g., Desoto Health & Rehab., LLC v. Philadelphia Indemnity Insurance Co.,* 2010 WL 2330286 *3 (M.D. Fla. June 10, 2010)(insurance company failed to assert objections as required by the Federal Rules of Civil Procedure but was nonetheless allowed to provide a proper privilege log in the future in support of its privilege/immunity objections to interrogatories); *Pensacola Firefighters' Relief Pension Fund Bd. of Trustees v. Merrill Lynch Pierce Fenner & Smith, Inc.,* 265 F.R.D. 589, 592-94 & 592 n.1 (N.D. Fla. 2010)(reviewing numerous cases in considering defendant "retained adviser's" motion for reconsideration of an order requiring production after its asserted noncompliance with a previous order requiring a privilege log; failure to file a privilege log as required by the Rules of Procedure may not be a per se waiver of privileges and immunities, but under the circumstances of this case it ultimately was a waiver); *Consumer Electronics Ass'n v. Compras & Buys Magazine, Inc.,* 2008 WL 4327253 *2 (S.D. Fla. September 18, 2008)("Although Plaintiff seeks an order which compels production within seven days, and finds that all objections have been waived, the undersigned believes that it is more appropriate to permit Defendant to lodge specific objections, including claims of privilege.").

> answers, has the objection been waived despite the claimed reservation of the objection? This court cannot logically conclude that the objection survives the answer. First, the rules do not on their face give a party that option.[3]

Further, other Federal Courts have noticed the absence of any Rule basis for conditional objections for nearly half a century. *See Meese v. Eaton Mg. Co.,* 35 F.R.D. 162, 166 (N.D. Ohio 1964):

> Interrogatories 45 through 50 seek to discover what part each plaintiff played in the conception and formulation of their patented hose clamp. The plaintiffs object, but simultaneously state that the 'contributions of one of the joint inventors cannot be separated from the contributions of the others.' The Court regards this as an answer so as to waive the objection. Whenever an answer accompanies an objection, the objection is deemed waived and the answer, if responsive, stands. Here the plaintiffs claim that their individual contributions are indivisible, so the Court accepts that as the answer to interrogatories 45 through 50.

3. *Cf. Maplewood Ptrs., L.P. v. Indian Harbor Insurance Co.,* 2011 WL 3918597 *6 -*9 (S.D. Fla. September 6, 2011)(Hoeveler, J.; case involved claim for alleged breach of contract of Director's and Officer's Insurance Policy; holding that when a party puts something "at issue," it has thereby waived work product immunity which would shield information relating to that issue from discovery in that case):

> Plaintiffs have brought a breach of contract suit alleging that Defendant did not make a fair and appropriate allocation of coverage. The insurance policy that Plaintiffs are suing upon requires the insurer and insured to weigh the legal and financial exposures and benefits of defending or settling lawsuits, when making an allocation. It follows then, that the reasoning behind the assessments made by Plaintiffs' attorneys is extremely relevant to the issue of what a fair and appropriate allocation would be. The attorneys' opinions regarding the nature of the underlying parties and claims, as well as the apportionment of legal exposure that contributed to final settlement amounts, go directly to the issue of allocating what matters and parties are covered. Therefore, by challenging Defendant's allocation of coverage, Plaintiffs have put at-issue their attorneys' assessments of legal liability in the Underlying Matters.

Id. at *8.

The *Meese* discovery decision came in a patent case. The discovery decision, however, was made in reference to the Federal Rules of Civil Procedure then extant. In the years since *Meese* was decided, no decision has been found in which that decision was limited to discovery in patent cases. However, in the intervening half century, one U.S. Magistrate Judge has claimed that *Meese* was changed by the 1993 Amendments to Federal Rule of Civil Procedure 33 which governs discovery by interrogatories in Federal Courts. According to the Magistrate Judge in a case presenting Federal Employers' Liability Act and common law negligence claims in Kansas, "the *Meese* decision is no longer good law." *Schipper v. BNSF Railway Co.,* 2008 WL 2358748 *1 (D. Kan. June 6, 2008)(Waxse, USMJ).

Although it is true that Federal Rule 33 was amended in 1993, *the 1993 amendments did not change but instead reinforced the decision that "[w]henever an answer accompanies an objection, the objection is deemed waived and the answer, if responsive, stands." Meese,* 35 F.R.D. at 166. [Emphasis added.] This is true not only of Rule 33 concerning interrogatories, but of Rule 34 governing requests for production and Rule 36 governing requests for admission.

Rule 33 provides that each interrogatory must be "answered separately and fully in writing under oath" to the extent that "it is *not* objected to". Fed. R. Civ. P. 33(b)(3). [Emphasis added.] The 1993 Amendments to Rule 33 added the following to the existing Rule. If any part of an interrogatory *is objected to,* then "[t]he grounds for objecting to an interrogatory must be stated with specificity." Fed. R. Civ. P. (b)(4). The Advisory Committee Notes to the 1993 Amendments to Rule 33 advised accordingly that "[p]aragraph (4) is added *to make clear* that objections must be specifically justified, *and that unstated or untimely grounds for objection ordinarily are waived."* [Emphasis added.]

Rule 34 governing requests for production similarly provides that parties must elect between objections or production, but responding with both is legally insufficient. *See* Fed. R. Civ. P. 34(b)(2)(B) & (C). As the Advisory Committee Notes made clear as far back as the *1970 Amendments* to Rule 34, "[t]he procedure provided in Rule 34 is essentially the same as that in Rule 33, as amended, and the discussion in the note appended to that rule is relevant to Rule 34

as well."

Rule 36 regulating requests for admission in Federal Court was written consistently with Rules 33 and 34 in rejecting a practice of making conditional objections in any case governed by the Rules of Civil Procedure. *See* Fed. R. Civ. P. 36(a)(3)("A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party *a written answer or objection* addressed to the matter and signed by the party or its attorney." [emphasis added]); Fed. R. Civ. P. 36(a)(5)("The *grounds* for *objecting* to a request *must be stated*." [emphasis added]).

An excellent summary of the practice sanctioned by the Federal Rules of Civil Procedure as to conditional objections interposed to all forms of discovery, whether interrogatories, requests for production, or requests for admission, was provided by U.S. Magistrate Judge Timothy in *Mann v. Island Resorts Dev., Inc.,* 2009 WL 6409113 *2 (N.D. Fla. Feb. 27, 2009):

> Thus, a responding party is given only two choices: to answer or to object. Objecting but answering subject to the objection is not one of the allowed choices. Second, although the practice is common, the only reported decision this court has found that directly addresses the question is *Meese v. Eaton Mfg. Co.,* 35 F.R.D. 162, 166 (N.D. Ohio 1964), which held that "[w]henever an answer accompanies an objection, the objection is deemed waived, and the answer, if responsive, stands." .... Third, answering subject to an objection lacks any rational basis. There is either a sustainable objection to a question or request or there is not. What this response really says is that counsel does not know for sure whether the objection is sustainable, that it probably is not, but thinks it is wise to cover all bets anyway, just in case. In this court, however, no objections are "reserved" under the rules; they are either raised or they are waived.

Cf. Diaz v. Big Lots Stores, Inc., 2010 WL 6793850 *3 (M.D. Fla. Nov. 5, 2010; Corrigan, J.)("Courts have held that answering a discovery request waives any objection thereto."; the Court in this case held that a plaintiff's response to a request for admission propounded after removal of his lawsuit to Federal Court based on diversity jurisdiction including an amount in controversy greater than $75,000.00, in which the plaintiff *denied* that the amount in controversy in his lawsuit was *less than* $75,000.00, *but also objected* to the request, *waived the objections and left the response standing*, so that the plaintiff's motion to remand was denied).

Not only is there no "Rule" basis for the practice of making conditional objections to discovery, but the Magistrate Judge in *Mann*, quoted above, has not been the only Judge to observe that there is no "rational basis" for making them, either. "There is either a sustainable objection to a question or request or there is not." *Pepperwood of Naples Condominium Association v. Nationwide Mutual Fire Insurance Co.*, 2011 WL 3841557 at *3. To like effect, *see, e.g., Martin v. Zale Delaware, Inc.,* 2008 WL 5255555 *2 (M.D. Fla. Dec. 15, 2008; Jenkins, USMJ); *Consumer Electronics Ass'n v. Compras & Buys Magazine, Inc.,* 2008 WL 4327253 *3 (S.D. Fla. September 18, 2008; Simonton, USMJ).

SPECIFICITY REQUIRED FOR DISCOVERY OBJECTIONS; ONLY ONE RECOGNIZED POSSIBLE EXCEPTION FOR "BLANKET," "BOILERPLATE," OR "GENERAL" DISCOVERY OBJECTIONS TO EVEN BE CONSIDERED IN FEDERAL COURTS

> **Second and third sets of Discovery Objections at issue in Pepperwood:**
>
> **(2) "Overbroad in temporal and subject scope;" vague; burdensome; and harassing;**
>
> **and**
>
> **(3) Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.**

Many Courts, including the *Pepperwood* Court, refer to objections of this kind, which are offered without substantiation, as "boilerplate". Federal Judges and Magistrate Judges may also refer to such objections as "general objections" when they are made in response to an entire discovery request, without individuality, or "blanket objections" when they are repeated in response to many paragraphs in

the same discovery request. Sometimes both "boilerplate" and "general" or "blanket" objections appear in the same case. *See, e.g., Badger v. Southern Farm Bureau Life Insurance Co.,* 2008 WL 906561 *1 (M.D. Fla. April 2, 2008)("In response to the interrogatories, Southern Life asserted ten general objections. It [also] asserted separate objections that each interrogatory at issue was vague, overly broad, unduly burdensome and/or not reasonably calculated to lead to the discovery of admissible evidence.").

Boilerplate objections share some common characteristics with general objections and blanket objections. They are all generally overruled because they are "nonspecific". *Consumer Electronics Ass'n v. Compras & Buys Magazine, Inc.,* 2008 WL 4327253 *2 (S.D. Fla. September 18, 2008). Boilerplate and general and blanket objections are "thoughtless," in the view of the Federal Courts called upon to decide them. *See Mullins v. Encore Senior Living II, LLC,* 2007 WL 4098851 *1 n.1 (N.D. Fla. Nov. 16, 2007). Any "boilerplate objection/response ... is not well taken. Defendant must state specific grounds for each objection." *Pepperwood of Naples Condominium Association v. Nationwide Mutual Fire Insurance Co.*, 2011 WL 3841557 at *3.

Objections that are *generally* stated as "irrelevant," or "not reasonably calculated to lead to the discovery of admissible evidence," or "overbroad," or "vague" or "burdensome" or "harassing," will not even be considered by Federal Courts unless the statement of objections on these grounds includes a *specific explanation saying why*. If they do not include a specific explanation of why a given discovery request is objectionable on these grounds in the particular case, then they face the near-certainty of being overruled in each and every Federal case and in addition they will run the risk of a Federal Judge or Magistrate Judge describing them as "improper," *id.* at *4, with only one possible exception allowed in the prevailing case law.

The one exception allowed when boilerplate or blanket or general objections have been considered by the Federal Courts is when those objections are made to *all* discovery requests. In every other instance, specific objections have been required by the Federal Courts, including in cases which involved Insurance issues. *See, e.g., Desoto Health & Rehab, L.L.C. v. Philadelphia Indemnity Insurance Co.,* 2010 WL 2330286 *1 (M.D. Fla. June 10, 2010; Polster Chappell, USMJ) (blanket objections must be made to all discovery requests in order to be considered; in all other cases, blanket objections will be overruled and specific objections must be matched to specific discovery requests in order to be considered by the Courts); *Badger v. Southern Farm Bureau Life Insurance Co.,* 2008 WL 906561 *1 (M.D. Fla. April 2, 2008; Spaulding, USMJ) (blanket objections by defendant insurance company to all interrogatories and to all requests for production, but producing some of the requested things and answering some of the interrogatories, resulted in a holding that this was evidence that the Insurance Company's blanket objections were not properly asserted); *Jackson v. Geometrica, Inc.,* 2011 WL 213860 *1 (M.D. Fla. Jan. 27, 2006; Snyder, Magistrate Judge) (establishing principle based on Federal Rules of Civil Procedure and Middle District of Florida Discovery manual).

In general terms that apply to discovery requests and responses in all Federal cases, including Insurance cases, when objections are made they must be made with specificity even to be considered by the Courts. Being specific does not guarantee success, of course. Making "blanket," "boilerplate," and "general" objections to discovery almost guarantees that the objections will be *overruled* in Federal Court, however.

LAST BUT NOT LEAST: THE "EQUALLY AVAILABLE" DISCOVERY RESPONSE, OR, "GO GET IT YOURSELF"

The "equally available" response to discovery is when the responding party informs the discovering party that the response to the request or the answer to the interrogatory is at least equally available to the discovering party as to the responding party, so that the responding party asserts that it has no duty to respond or to answer further. In the *Pepperwood* discovery dispute over an Insurance Claim based on asserted Hurricane Damage, this type of response by Nationwide was treated in this case as another objection, just as most Federal Courts treat this sort of response as an objection in reality.

In the *Pepperwood* case, the Court first pointed out that "[t]his assertion made by the Defendant is incorrect. Only the CRN [Civil Remedy Notice] is available online, the other information contained within Plaintiff's request is solely within the control of the Defendant and unavailable to Plaintiff." *Pepperwood of Naples Condominium Association v.*

Nationwide Mutual Fire Insurance Co., 2011 WL 3841557 at *4.

Second, even if the Response had been accurate in this regard, "'this exact objection is insufficient to resist a discovery request.'" *Id.*

The same holding has been reached in other cases in which the "equally available" response was presented in an attempt to bar discovery concerning Insurance issues, as well as in every other kind of case. In fact, Rule 33(d) contains the *only* exception found by the Federal Courts which allows the limited option to produce business records instead of answering an interrogatory "if the burden of deriving or ascertaining the answer will be substantially the same for either party". Even where Rule 33(d) applies, on its face the Rule only applies to *interrogatories.* It clearly does not apply to other forms of discovery including requests for production under Rule 34, or requests for admission under Rule 36.

In any case, the limited option to produce business records instead of providing an answer to an interrogatory is just that, a *limited* option:

> A party may respond to an interrogatory by identifying specific business records from which the answer may be derived only when "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." *See* Fed. R. Civ. P. 33(d). Reliance on Rule 33(d) is appropriate when the interrogatory requests objective facts that are obvious from the specified documents, but is generally inappropriate when the interrogatory asks a party to state its contentions or to state facts supporting its allegations.

Morock v. Chautauqua Airlines, Inc., 2007 WL 4247767 * 2 (M.D. Fla. Dec. 3, 2007; Pizzo, USMJ).[4]

CONCLUSION

The *Pepperwood* Court's decision in this Federal case is not unique to Insurance cases or to whether a plaintiff or a defendant was the party responding to discovery requests. The *Pepperwood* decision is equally available to support discovery requests to plaintiffs as well as to defendants.

Whether discovery will be compelled in a given Insurance Bad Faith case pending in Federal Court, as in any other Federal case in this respect, depends largely on how experienced counsel frame their clients' responses including objections to the discovery requests.

Whether discovery will be compelled in similar situations in litigation pending in State Courts, including in States whose rules of civil procedure are based on the Federal Rules of Civil Procedure, will be the subject of a future article.

---

4. In addition, *see, e.g., Hawn v. Shoreline Towers Phase I Condominium Ass'n,* 2007 WL 2298009 *2 (N.D. Fla. Aug. 9, 2007)(business records option of Rule 33[d] is improper in response to contention interrogatories, here, in response by plaintiff); *Jackson v. Geometrica, Inc.,* 2006 WL 213860 *4 (M.D. Fla. Jan. 27, 2006)(referring the discovering party to his deposition and to his employer's insurance policies were neither one within the range of records which may be produced under Rule 33[d] in response to and instead of answering an interrogatory; "'Only business records may be used in lieu of interrogatory answers.'").