16TH JUDICIAL CONFERENCE
OF THE
UNITED STATES COURT OF INTERNATIONAL TRADE

THE COURT IN ITS FOURTH DECADE: ADDRESSING THE CHALLENGES OF CHANGE

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PANEL: ETHICAL ISSUES AND BEST PRACTICES BEFORE THE CIT

USE OF CONFIDENTIAL SETTLEMENT INFORMATION IN MOTION PRACTICE*

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USE OF CONFIDENTIAL SETTLEMENT INFORMATION IN MOTION PRACTICE

It is important to monitor that submissions made to the court do not contain inadmissible settlement information. For example, in several instances, parties recently based motions upon confidential conduct which occurred during settlement discussions. In order to support a claim in a motion, the party either reiterated the substantive content of settlement discussions, or, in one case, attached copies of emails the parties exchanged while attempting to settle the action. Because this settlement information is confidential and inadmissible, the Government filed motions to strike this information. In these motions, the Government first cited to Fed. R. Evid. 408. Rule 408 provides that:

> **Rule 408. Compromise and Offers to Compromise**
>
> (a) Prohibited uses. – Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> > (1) furnishing or offering or promising to furnish – or accepting or offering or promising to accept – a valuable consideration in compromising or attempting to compromise the claim; and

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> (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
>
> (b) Permitted uses. – This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408 (2004).

It is long settled that Rule 408 was intended to sweep broadly and "encompass the whole of the settlement evidence." Dow Chemical Co. v. United States, 250 F. Supp. 2d 748, 804 (E.D. Mich. 2003), modified in part on other grounds by Dow Chemical Co. v. United States, 278 F. Supp.2d 844 (E.D. Mich. 2003), reversed in part on other grounds by Dow Chemical Co. v. United States, 435 F.3d 594 (6th Cir. 2006) (quoting Overseas Motors, Inc. v. Import Motors, Ltd., Inc., 375 F. Supp. 499, 537 (E.D. Mich. 1974), aff'd, 519 F.2d 119 (6th Cir. 1975)). The key element of Rule 408 is its provision which excludes the introduction of all evidence of conduct or statements made in settlement negotiations when offered to prove to liability for or invalidity of a claim, or the merits of a claim. See Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652, 654 (1988).

The comprehensive rule even covers factual admissions made in the course of settlement negotiations. See Fed. R. Evid. 408 Advisory Comm. Notes (1972); EID v. Saint-Gobain Abrasives, Inc., 2010 WL 1923876 377 Fed. Appx. 438 (6th Cir. 2010). The rule also prohibits a party from seeking to admit its own settlement offer or statements made in settlement negotiations. See 23 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Evidence, R. 408 (1st ed.).

The primary policy behind Rule 408 is to encourage the parties' freedom of discussion with regard to compromise. "The fear is that settlement negotiations will be inhibited if the parties know that their statements may later be used as admissions of liability." Kritikos v. Palmer Johnson, Inc., 821 F.2d 418, 423 (7th Cir. 1987). Rule 408 also intends to exclude immaterial evidence, recognizing that "disputes are often settled for reasons having nothing do with the merits of a claim." Korn, Womack, Stern & Assocs. v. Fireman's Fund Ins. Co., 27 F.3d 566 (1994).

Rule 408 does not apply if the claim at issue is not in dispute. While an actual lawsuit need not be filed, there must be "at least an apparent difference of view between the parties [ ] concerning the validity or amount of the claim." Dow Chemical, 250 F. Supp. 2d at 804, quoting Weinstein's Federal Evidence § 408.06, at 408-23 (rev. 1998).

In determining whether to exclude evidence of settlement negotiations pursuant to Rule 408, courts "should weigh the need for such evidence against the potentiality of discouraging future settlement negotiations." See Starter Corp. v. Converse, Inc., 170 F.3d 286, 293 (2d Cir. 1999) citing Trebor Sportswear Co. v. The Limited Stores, Inc., 895 F.2d 506, 510 (2d Cir. 1989) (quoting Weinstein's Evidence, 408[05], at 408-31). When the applicability of Rule 408 is a close call, the court should lean toward excluding the evidence. Bradbury v. Phillips Petroleum Co., 815 F.2d 1356, 1364 (10th Cir. 1987).

According to Dow Chemical, 250 F. Supp. 2d at 804, courts must "find that the party seeking exclusion subjectively intended the statements to be part of negotiations toward compromise." The Dow Chemical court explained that, "[a]lthough it is tempting to define the existence of negotiations by an objective standard, courts generally agree that the proper inquiry

is whether the person making the statement believed that the statement was related to negotiations." Id. The belief, however, must be "both honest and reasonable; where a statement is made to induce reliance or made in bad faith, the Rule will not prohibit its introduction in evidence." Id.

In this vein, court have looked to the provisions of Rule 408(b) which state that the Rule "does not **require** exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution." Fed. R. Evid. 408(b), emphasis added. Courts have held that Rule 408 permits introduction of statements made in settlement negotiations for purposes other than proof of liability or amount of damages. Dow Chemical, 250 F. Supp. 2d at 804-805.

Because Rule 408 implicates this inherent tension regarding the purpose which settlement statements are introduced, courts have had to analyze the parties' intentions. Courts have found that the Rule was not intended, as noted previously, to "permit a party to induce detrimental reliance on a promise made during negotiations and then assert confidentiality when the victimized party claimed estoppel." Id. at 484. See also Starter Corp. v. Converse, Inc., 170 F.3d 286, 293-94 (2d Cir. 1999). The Dow Chemical court explained that, "the application of an estoppel exception to Rule 408 is quite consistent with its goal of encouraging settlement, as it is difficult to understand how protecting fraud and deception will in any way advance parties' confidence in the settlement process." Dow Chemical, 250 F. Supp. 2d at 805. The court went on to amplify that there was little difference "between use of a statement made for settlement purposes to impeach the denial of liability, and offering it as an admission of liability. Asserting

that a statement is offered as impeachment will not alone establish an exception to Rule 408." Id.

Dow Chemical continued that, rather, the appropriate approach required that the court "weigh the competing policy rationales of encouraging settlement versus the formation of a complete record to determine whether the impeaching evidence falls within Rule 408's exception. Starter, 170 F.3d at 293; see also Weinstein's Federal Evidence § 408.08[1], at 408-30 (rev. 2002)." Id.

Finally, when a court determines that a party improperly offered evidence of settlement negotiations to prove the validity of a claim prohibited by Rule 408, courts generally strike the evidence. See Anderson v. United States, 2009 WL 890094, at 1 (D. Md. Mar. 26, 2009) (striking plaintiff's references to the parties' settlement discussions attached to a motion to lift a stay); Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc., 227 Fed. Appx. 239 (4th Cir. 2007) (affirming lower court's striking portions of plaintiff's complaint, thereby excluding evidence relating to communications between the parties); St. Paul Fire and Marine Ins. Co. v. Brother Int'l. Corp., 2007 WL 2571960, at17 (D. N.J. Aug. 31, 2007) (striking evidence of settlement communications that were referenced in a cross-motion for summary judgment, statement of undisputed facts, and the certification of a witness). See also Burdick v. Koerner, 988 F. Supp. 1206, 1215-16 (E.D. Wis. 1998), however, where the court granted a motion in limine preventing the admission of correspondence reflecting the parties' attempts to settle the dispute.

In summary, parties should be wary of seeking to introduce substantive information obtained during settlement discussions as admission of this type of information is generally

prohibited. Attempts to introduce confidential settlement information are often met with successful motions to strike the information from the record of the case.

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