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§4.25 Civil Settlement Offers Generally Excluded

Christopher B. Mueller
University of Colorado Law School

Laird Kirkpatrick
George Washington University Law School, lkirkpatrick@law.gwu.edu

Liesa Richter
University of Oklahoma College of Law

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§4.25 Civil Settlement Offers Generally Excluded

Settlement negotiations play a vital role in the American litigation process. They enable parties to resolve lawsuits themselves and thereby reduce unnecessary court congestion, delay, and costs. The overwhelming majority of lawsuits filed are settled rather than tried.¹ FRE 408 furthers the strong social policy in favor of private resolution of disputes by making settlements or offers of compromise generally inadmissible on the issues of liability or damages.² If a case does not settle, litigants are protected from having their settlement efforts used against them at trial.³

Offers of settlement sometimes also lack relevancy under FRE 401.⁴ An offer to pay very low or nominal damages may demonstrate only the defendant's desire to avoid the nuisance costs of defending against a meritless claim rather than consciousness of fault.⁵ Similarly, where a plaintiff offers to accept a sum only slightly below the amount claimed, such an offer has little tendency to prove invalidity of the claim. Admitting such offers could result in unfair prejudice, confusion of issues, and misleading of the jury, thus justifying exclusion under FRE 403.

Defining a claim

FRE 408 applies only to offers made in an attempt to compromise a disputed "claim," but the Rule does not define a "claim." Clearly the filing of a lawsuit is the assertion of a claim, but FRE 408 also applies to settlement offers made in response to oral or written claims made before suit is filed.⁶

Properly understood, FRE 408 does not apply to offers made before a claim is asserted.⁷ Even

§4.25 1. See McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. Rev. 833, 838 (1990).

2. FRE 408 is consistent with FRCP 68, which generally prohibits introduction into evidence of offers of judgment that are not accepted.

3. *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046, 1050 (Fed. Cir. 1986) (error for court to base judgment on unaccepted settlement agreement negotiated between attorneys), *cert. denied*, 482 U.S. 913.

4. *United States v. Contra Costa Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982) (evidence of settlement may be "irrelevant as being motivated by a desire for peace rather than from a concession of the merits of the claim").

5. ACN, FRE 408 (a settlement offer does not necessarily reflect "weakness of position").

6. *Pierce v. F. R. Tripler & Co.*, 955 F.2d 820, 827 (2d Cir. 1992) (where a party threatens litigation and has initiated the first steps, "any offer made between attorneys will be presumed to be an offer within the scope of Rule 408").

7. *Rodriguez-Garcia v. Municipality of Caguas*, 495 F.3d 1, 11-12 (1st Cir. 2007) (error to apply FRE 408 to pre-controversy correspondence).

if it is obvious that one party has caused injury to another under circumstances that might result in liability, the “implicit” or potential claim does not mean that all offers of aid or compensation are necessarily covered by FRE 408.⁸

Claim must be disputed

FRE 408 applies only to offers to settle claims disputed as to validity or amount.⁹ Thus if a debtor concedes the amount of debt but offers to pay a lesser sum, evidence of such an offer is not barred by FRE 408.¹⁰ Similarly, if a tortfeasor concedes liability and offers to pay damages in full, evidence of such an offer is not barred by FRE 408.¹¹ Where no dispute between the parties has emerged, their ongoing discussions may be viewed as “business communications” rather than settlement negotiations.¹² Still, it is not necessary for a discussion to reach the point of threatened litigation before a dispute may be found.¹³

8. *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1342-1343 (9th Cir. 1987) (FRE 408 does not bar evidence of termination package where employer offers to give severance pay in exchange for release of potential age discrimination claim because plaintiff “had not asserted any claim at the time [defendant] asked for the release”), *cert. denied*, 484 U.S. 1047; *Deere & Co. v. International Harvester Co.*, 710 F.2d 1551, 1556-1557 (Fed. Cir. 1983) (FRE 408 not applicable to offer to license patent because no dispute existed, despite “probability” of eventual dispute).

9. *Schlossman & Gunkelman, Inc. v. Tallman*, 593 N.W.2d 374, 378 (N.D. 1999) (whether dispute exists depends on party intent and whether there is “a difference in interests or views” that parties seek to resolve); *S. A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 50 F.3d 476, 480 (7th Cir. 1995) (dispute arises only when claim is rejected “at the initial or some subsequent level”; no dispute would have arisen if defendant had accepted claim).

10. *Molinos Valle Del Cibao v. Lama*, 633 F.3d 1330 (11th Cir. 2011) (whether claim is disputed for purposes of FRE 408 is preliminary question for court under FRE 104(a); court found that defendant did not dispute debt, so court could admit statements in “discussions” and “talks” between parties). *See also* ACN, FRE 408 (policies behind encouraging settlements “do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum”).

11. *Greenstreet v. Brown*, 623 A.2d 1270, 1272 (Me. 1993) (attorney’s admission of malpractice and promise to compensate client admissible under state counterpart to FRE 408; “there is no evidence that a dispute existed about the validity of a claim or the amount claimed”).

12. *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365, 1372-1373 (10th Cir. 1977) (statements were part of “business communications” rather than compromise negotiations because “discussions had not crystallized to the point of threatened litigation, a clear cutoff point”), *cert. dismissed*, 434 U.S. 1052 (1978). *But see* *Olin Corp. v. Insurance Co. of North America*, 603 F. Supp. 445, 450 (S.D.N.Y. 1985) (FRE 408 applied because plaintiff reasonably “contemplated that litigation might be necessary”).

13. *Weems v. Tyson Foods, Inc.*, 665 F.3d 958, 964-966 (8th Cir. 2011) (error to admit “separation agreement” proffered by plaintiff; dispute existed even though suit had not been filed or threatened; plaintiff had been placed on leave, and had informed superior of her gender discrimination concerns); *Affiliated Mfrs., Inc. v. Aluminum Co. of*

Intent to compromise required

The underlying policy of FRE 408 is to encourage parties to make concessions in order to settle the dispute and to protect them as they do so, including making an internal assessment of a disputed claim.¹⁴ If the offeror is not making a concession or attempting to compromise but merely stating his position, FRE 408 is inapplicable.¹⁵ FRE 408 should apply only where one party makes some movement away from the original boundaries of the dispute and toward the other's position.

First offers

FRE 408 should not be so rigidly applied, however, that a party's first offer is always found to be a position statement rather than an offer to compromise. Often the true positions of the parties are not fully developed or expressed because they recognize that concessions are necessary for settlement. Thus a party's first offer may indeed represent an attempt to compromise.¹⁶

Party's own offer

The Rule generally precludes a party from introducing evidence of its own settlement offer on the theory that "this could itself reveal the fact that the adversary entered into settlement discussions."¹⁷ Moreover, proof of such offers would often require calling counsel as witnesses,

America, 56 F.3d 521, 527 (3d Cir. 1995) (FRE 408 "applies where an actual dispute or a difference of opinion exists, rather than when discussions crystallize to the point of threatened litigation").

14. *Affiliated Mfrs., Inc. v. Aluminum Co. of America*, 56 F.3d 521, 529 (3d Cir. 1995) (FRE 408 reaches internal memoranda evaluating claims). *See also* *Blu-J Inc. v. Kemper C.P.A. Group*, 916 F.2d 637, 642 (11th Cir. 1990) (excluding accountant's evaluation "prepared by mutual agreement [of parties] as part of their settlement negotiations").

15. *United States v. Hooper*, 596 F.2d 219, 225 (7th Cir. 1979) (because check was intended as payment in full and not as offer of compromise, it was properly received as an admission).

16. *Winchester Packaging, Inc. v. Mobil Chem. Co.*, 14 F.3d 316, 320 (7th Cir. 1994) (reasonable to interpret a bill submitted "in an atmosphere in which the threat of a lawsuit was looming" as a compromise offer intended to head off litigation rather than a true statement of full amount claimed, so it was properly excluded). *See generally* Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 *Hastings L.J.* 955, 973 (1988) (opening offers "are often in fact 'compromise' proposals, made in an environment in which everyone knows that parties do not see eye-to-eye about how a particular matter should be resolved").

17. ACN to FRE 408. *See also* *Bridgeport Music, Inc. v. Justin Combs Publ'g.*, 507 F.3d 470 (6th Cir. 2007) (no error in barring defendant from introducing its own settlement offer to prove lack of a "malicious" state of mind in copyright infringement case; evidence not relevant to issue of whether defendants infringed willfully).

thereby inviting motions for disqualification.¹⁸ A party may be allowed to offer evidence of its own settlement initiatives for a purpose other than proving validity or invalidity of a claim or its amount.¹⁹

Sometimes in employment cases where a claim of discrimination or wrongful discharge has been made, the employer offers to reinstate the plaintiff or place her in another position. Here it is often the employer who seeks to prove the offer at trial to demonstrate good faith and, where the offer is refused, failure of the plaintiff to mitigate damages. Courts are divided on whether evidence offered on the issue of mitigation should be excluded as bearing on the “amount” of a disputed claim or admitted for a permissible “other purpose.”²⁰ FRE 408 applies only where the offer was made to settle the pending claim, and therefore courts look to whether the employer sought a release as a condition of the offer.²¹

Settlements with third parties

FRE 408 excludes evidence that a party or witness settled or offered to settle a claim with a third person if offered to prove the validity or invalidity of the claim or its amount in the instant case.²² Thus in an action against driver *D*, passenger *A* cannot introduce evidence that *D* settled with passenger *B* as evidence of *D*'s liability to passenger *A*. Similarly, *D* cannot introduce evidence that passenger *A* settled a claim against another driver involved in the same collision as evidence of the invalidity of passenger *A*'s claim against *D*.²³ And of course statements made in

18. *Pierce v. F. R. Tripler & Co.*, 955 F.2d 820, 827 (2d Cir. 1992) (allowing offeror to introduce its own settlement offers “could inhibit settlement discussions and interfere with the effective administration of justice” because attorneys for both sides might be required to testify on such offers, thereby disqualifying them as trial counsel).

19. *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1069 (5th Cir. 1986) (FRE 408 bars even evidence that “favors the settling party,” unless it is relevant for purpose other than proving “liability for or invalidity of the claim or its amount”).

20. *Compare Coutard v. Municipal Credit Union*, 848 F.3d 102, 114 (2d Cir. 2017) (in employee’s suit, employer could not use its own settlement offer in support of contention that plaintiff failed to mitigate damages) *with Bhandari v. First Natl. Bank of Commerce*, 808 F.2d 1082, 1103 (5th Cir. 1987), *cert. denied*, 494 U.S. 1061 (evidence offered on issue of mitigation is for a permissible “other purpose”).

21. *Thomas v. Resort Health Related Facility*, 539 F. Supp. 630 (E.D.N.Y. 1982) (employer’s offer of reinstatement was unconditional and did not require release of pending claim, so it was admissible to show that any lost pay subsequent to time of offer of reinstatement was not attributable to defendant).

22. *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1069 (5th Cir. 1986) (judge erred, in product liability suit, in telling jury that plaintiff settled with wholesaler, retailer, and material supplier for \$10 apiece, because this low amount tended to point finger at manufacturer). *See also* ACN, FRE 408 (specifically contemplating application of Rule in situations where “a party to the present litigation has compromised with a third person”).

23. *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 247-251 (1st Cir. 1985) (settlement with third party inadmissible to show invalidity of plaintiff’s claim against defendant).

the course of such negotiations with third parties are normally not admissible on the issue of liability or damages in the instant case.²⁴

Evidence of settlements with third parties may, however, be admissible to show bias or prejudice of a witness or party,²⁵ to demonstrate the existence of a nonadversarial relationship between certain parties,²⁶ or to explain why certain defendants are not in court.²⁷ Not surprisingly, FRE 408 applies not only to testimony and other evidence of settlement, but also when information about settlement is conveyed by jury instructions.²⁸

Settlement discussions

As noted above, FRE 408 excludes evidence of conduct or statements made during the course of “compromise negotiations,”²⁹ and clearly the rule of exclusion applies to statements made during settlement negotiations in other lawsuits.³⁰ FRE 408 allows lawyers and parties to negotiate freely, without concern that what they say can be introduced against them as admissions, and the language is broad enough to cover background memoranda and studies prepared by a party in order to present or assess settlement proposals.³¹

24. *Missouri Pacific Ry. v. Arkansas Sheriff Boy’s Ranch*, 655 S.W.2d 389, 394-395 (Ark. 1983) (statements by agent of defendant in settling similar claim of third party inadmissible under Rule 408).

25. *See* §4.26, *infra*.

26. *Brocklesby v. United States*, 767 F.2d 1288, 1292-1293 (9th Cir. 1985) (plaintiff could prove indemnity agreement between two defendants to show lack of adverse relationship between them and also to attack credibility of their witnesses), *cert. denied*, 474 U.S. 1101. *Cf. Reichenbach v. Smith*, 528 F.2d 1072, 1073 n.7 (5th Cir. 1976) (no abuse of discretion to reject evidence of a “Mary Carter” agreement, defined as “a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants”) (but better practice is to admit such agreements).

27. *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1070 (5th Cir. 1986) (trial court could disclose fact of settlement, but not its amount, to avoid jury confusion about absence of defendants previously in court).

28. *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1069-1071 (5th Cir. 1986) (FRE 408 applies to bar trial judge from telling jury amount of plaintiff’s settlements with third parties).

29. *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1107 (5th Cir. 1981) (FRE 408 applies to report specifically prepared for settlement negotiations to help parties evaluate claim).

30. *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654-655 (4th Cir. 1988) (proper to exclude statements made in settlement negotiations in earlier litigation).

31. *Affiliated Mfrs., Inc. v. Aluminum Co. of America*, 56 F.3d 521, 529 (3d Cir. 1995) (FRE 408 covers internal memoranda).

FRE 408 is intended to apply to settlement negotiations in civil cases, as indicated by the reference to compromising a “claim” rather than a “charge.” Plea bargaining in criminal cases is addressed by FRE 410. The language of FRE 410, however, refers only to plea bargaining statements by the accused, not those by the prosecutor. Hence some courts cite the policy of FRE 408 as justification for excluding plea bargain offers or statements by the prosecutor, such as a proposal to drop certain charges in exchange for a plea to other charges.³²

Application to criminal cases

Subject to one important qualification, the Rule provides that statements made during compromise negotiations in a civil case are not admissible against a party in a later criminal prosecution, at least when offered for the purposes prohibited by FRE 408(a). If the Rule permitted use of compromise statements in subsequent criminal prosecutions, it would undoubtedly chill civil settlement discussions.³³ The exception to this protection arises in negotiations with a public office or agency acting “in the exercise of its regulatory, investigative, or enforcement authority.” Here a party’s statements made in the course of civil settlement negotiations (although not settlement offers themselves) are admissible in a later criminal prosecution to prove liability for or the validity or invalidity of a disputed claim or its amount, and also may be admitted to impeach a party.³⁴ Thus caution is warranted in civil settlement negotiations with a government agency, and a party would be wise to seek an agreement protecting against subsequent disclosure before beginning negotiations. In certain situations, such as where an individual negotiated with a government agency without counsel or under other circumstances suggesting unfairness, the court has discretion to exclude the statements under FRE 403.³⁵

32. *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (under rationale of FRE 408 government proposals concerning pleas should be excluded). *But see* *United States v. Baker*, 926 F.2d 179 (2d Cir. 1991).

33. *United States v. Arias*, 431 F.3d 1327, 1336-1337 (11th Cir. 2005) (in criminal trial, error to admit statement by defendant seeking to compromise civil claim; application in criminal cases “furthers the policy interests” of the Rule); *United States v. Bailey*, 327 F.3d 1131, 1144-1146 (10th Cir. 2003) (evidence of civil settlement efforts “can be more devastating to a criminal defendant than to a civil litigant”).

34. *United States v. Logan*, 250 F.3d 350, 366-367 (6th Cir. 2001) (in trial of mortgage lenders for fraud, admitting evidence of settlement negotiations between defendants and HUD); *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (in mail fraud prosecution, admitting civil compromise negotiations with SEC).

35. *See* ACN to FRE 408 (“[I]f an individual was unrepresented at the time the statement was made . . . its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by Rule 408.”).