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Rule 408: Maintaining the Sheild for Negotiation in Federal and Bankruptcy Courts

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Rule 408: Maintaining the Shield for Negotiation in Federal and Bankruptcy Courts

I. INTRODUCTION

Rule 408 bans the introduction at trial of statements or conduct made during compromise or settlement negotiations.[1] Prior to the enactment of the rule, the common law proscribed only admissions of proposed or accepted compromises[2] and did not include admissions of fact made in the course of compromise negotiations.[3]

In 1973, the Supreme Court, influenced by policy considerations for encouraging disclosure during settlement, promulgated rule 408.[4] The rule was passed, as amended, by Congress in 1975.[5]

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1. The rule in its entirety is as follows:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purposes, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

2. *See, e.g.*, West v. Smith, 101 U.S. 263, 271-73 (1979) (proposed or accepted compromise is not evidence of an admission and is therefore irrelevant); Insurance Cos. v. Weides, 81 U.S. (14 Wall.) 375, 381 (1872) (evidence of a compromise, proposed or accepted, is not an admission of amount of debt). *See also* J. WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE 202 (1935). An offer by the opponent . . . is not evidence of an admission that the claim is valid; for experience shows that such an offer may proceed . . . merely from the desire to avoid tedious and expensive litigation, and may not signify any consciousness of liability." *Id.*

3. Admissions of fact were admissible unless they were espoused hypothetically or "stated to be 'without prejudice,' or so connected with the offer as to be inseparable from it." 2 J. WEINSTEIN & M. MERGER, WEINSTEIN'S EVIDENCE ¶ 408-[01], at 408-10 (1988) [hereinafter WEINSTEIN'S EVIDENCE]. This exception for factual admissions caused concern with the advisory committee because its effect was to hamper communication and thus limit the effectiveness of the exclusionary rule. *Id.* at 408-3.

4. *See Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 226-27 (1973).

5. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1933 (1985). The final enactment by Congress slightly deviates from the rule as promulgated by the Supreme Court. The only changes were the addition of a sentence stating that the "rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations," and the addition of the word

Rule 408, as enacted, contains many exceptions and loopholes which potentially limit its applications. The rule was intended to create an intricate balance between the desire to include all relevant evidence and the policy to encourage settlement of disputes. In the bankruptcy courts, this balance is particularly hard to achieve because the bankruptcy forum is traditionally known for its leniency in hearing all appropriate evidence to settle the dispute. Conversely, the bankruptcy forum is also known for its aggressive promotion of dispute resolution through settlement or compromise.

However, rule 408 was designed to aid in the compromise and settlement of disputes. The advisory committee itself states that the exclusion is based on irrelevance and "promotion of the public policy favoring . . . compromise and settlement . . . ."[6] This justification has been clearly espoused by the courts as well. In a Southern District of New York bankruptcy case, Judge Brieant stated that "[t]he public policy . . . behind [rule 408] is to encourage settlement discussions. If settlement discussions are later to be brought in question in the context of litigation, the free exchange of ideas between lawyers necessary to adjust and compromise disputes would be severely chilled."[7] Similarly, McCormick notes that, under a restrictive reading of rule 408, an attorney who is contemplating a settlement offer would consider the possible damage which could result if such an offer is not accepted but is later used against him at trial. This may influence his decision as to whether he should proceed with the offer.[8]

The above interests, coupled with the existing congestion of court dockets, mandates a liberal interpretation of rule 408 so as to foster settlement discussions. Full disclosure is crucial during the settlement process. Without it, parties will not entertain meaningful discussion, and far more potentially settled cases will proceed to a possibly unnecessary trial. However, courts are presently in disagreement as to the intended scope of the rule. Although the above interests play a part, so does the policy of including all relevant evidence. Thus, at present, the direction of rule 408 remains unclear.

This comment will first discuss the policies behind rule 408. Next,

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'also' between 'rule' and 'does' in the final sentence. This amendment was to ensure that a party could not "immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation." S. REP. NO. 1277, 93d Cong., 2d Sess. 10 (1974). *See* WEINSTEIN'S EVIDENCE, *supra* note 3, at 408-2 to 408-8; 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5301, at 160-63 (1980) [hereinafter FEDERAL PRACTICE] (analysis of extensive controversies and concerns prior to final enactment).

6. FED. R. EVID 408 advisory committee's note.

7. Although District Court Judge Brieant's statements were originally contained in an unreported opinion, they were later reiterated in the related case of *In re* Silverman, 13 Bankr. 270, 272 (Bankr. S.D.N.Y. 1981).

8. MCCORMICK, EVIDENCE § 76, at 158 (1954) (cited in WEINSTEIN'S EVIDENCE, *supra* note 3, at 408-20 n.8).

an analysis of the rule's application in the courts will be undertaken, focusing on those courts furthering a broad interpretation and noting the exceptions used to admit negotiation evidence under a more restrictive approach. Finally, a summary of the rule as it stands in the federal courts today will emphasize whether the optimum balance between admissibility of evidence and encouragement of dispute resolution is being properly achieved.

II. JUSTIFICATIONS FOR THE RULE

At least three justifications support excluding offers of compromise at trial. The oldest justification and the common law view is that an offer of compromise is irrelevant because the offer ". . . implies merely a desire for peace, not a concession of wrong done."[9] This theory emphasized that an offer is not akin to an admission, since benefits such as avoidance of litigation expense may justify the offer even if the offeror truly believes there is no liability. Thus, only express admissions under this theory are admissible.[10]

This theory, known as Wigmore's relevance theory, has been severely criticized and in fact, has been impliedly rejected by rule 408. The criticisms center around the premise that a defendant offering to pay nine-tenths of an asserted claim is highly unlikely to believe the claim to be unfounded.[11] Additionally, it requires the court to undertake an analysis of the offeror's intent in order to determine whether he believes in his liability. Under the modern rule of relevance, evidence need only have "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence."[12] An offer of compromise clearly meets this liberal test.

A second rationale, originating from England, is the contract theory whereby the magic words "without prejudice" are used to convey that the offer is confidential.[13] Letters of compromise not containing these words are admissible. This theory has generally been dis-

9. 4 J. WIGMORE, EVIDENCE § 1061, at 36 (Chadbourn rev. 1972).

10. *Id.* at 39. "What is important is the *form* of the statement, whether it is *explicit* and *absolute*." *Id.* at 41 (emphasis in original).

11. MCCORMICK, *supra* note 8, § 76, at 158 (1954); *accord* MORGAN, BASIC PROBLEMS OF EVIDENCE 210-11 (1962). *See also* FED. R. EVID. 408 advisory committee's note ("The validity of this position will vary as the amount of the offer varies in relation to the size of the claim.").

12. FED. R. EVID. 401.

13. FEDERAL PRACTICE, *supra* note 5, at 169; WEINSTEIN'S EVIDENCE, *supra* note 3, at 408-21. *See generally* Coote, *"Without Prejudice" Communication—Another Red Light for Practitioners*, 1979 N.Z.L.J. 87 (1979).

counted by courts of the United States[14] as being too mechanical and thus a trap for the unwary. However, inclusion of the "without prejudice" language is often used as an additional guarantee that the evidence will be inadmissible.[15]

The final and most recent justification claims that the exclusionary rule is a rule of privilege.[16] This rationale is probably the most expansive of the three; it would allow negotiating parties to waive the privilege and introduce the statements if desired. Thus, negotiation statements made between a party and a third party would not be excluded if the involved party was advocating the admission of these statements because a privilege may not be asserted by a nonsettling party.[17] However, the court would still have the option to exclude the evidence if irrelevant.[18]

The privilege justification, although the most expansive, is still arguably subject to the many exceptions and loopholes contained within the rule. This author advocates the use of this policy justification because it provides a means for limiting some of rule 408's exceptions.

II. APPLICATION IN THE COURTS

Some courts have established a liberal interpretation of rule 408. Other courts, however, have so diluted the rule with exceptions that they virtually swallow the rule itself. These exceptions include: (1) the requirement of a dispute; (2) the admissibility of otherwise discoverable evidence; and (3) the allowance of evidence when offered for another purpose. Although the basis for these exceptions are contained within the text of the rule,[19] some courts have so extended their application that the policy of encouraging negotiation is being severely frustrated.

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14. West v. Smith, 101 U.S. 263, 273 (1879) (presumed without prejudice); Outlook Hotel Co. v. St. John, 287 F. 115, 116-17 (3d Cir. 1923). *See generally* WEINSTEIN'S EVIDENCE, *supra* note 3, at 408-21 (discussion of early cases adopting the English rule).

15. *In re* Evansville Television Inc., 286 F.2d 65, 70 (7th Cir.), *cert. denied sub nom.* Schepp v. Producers Inc., 366 U.S. 903 (1961) (negotiations conditioned on inadmissibility); S. Leo Harmonay Inc. v. Binks Mfg. Co., 597 F.2d 990 (2d Cir. 1985) (use of "without prejudice" language held conclusive evidence that letter was effort at compromise and thus excludable).

16. MCCORMICK, *supra* note 8, § 76 (1954).

17. *See* Esser v. Brophey, 212 Minn. 194, 3 N.W.2d 3 (1942) (court applied privilege rationale and found defendant waived the exclusion of statements made in negotiation with a third party). *But see* Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1071 (5th Cir. 1986) (evidence favoring settling party held inadmissible for purpose other than liability or invalidity of claim when objected to by nonsettling party).

18. This option is limited, because the modern rule of relevancy is very expansive. *See* FED. R. EVID. 403. Evidence could also be excluded on prejudicial grounds at the court's discretion. *See* FED. R. EVID. 801(d).

19. See *supra* note 1 for the full text of the rule.

A. Liberal Interpretations

Many courts have applied a liberal interpretation of rule 408 merely by citing the general rule of excludability. In *Overseas Motors, Inc. v. Import Motors Ltd.*,[20] the court stated that "the exclusion must extend to all '[e]vidence of conduct or statements made in compromise negotiations,' and this encompasses the whole of the settlement evidence."[21] Similarly, in *In re Golden Plan of California, Inc.*,[22] the bankruptcy court held that "[i]t is well-settled that statements made during the course of settlement negotiations are inadmissible."[23]

These cases follow an expansive reading of rule 408. The importance of negotiation is emphasized and the availability of the exceptions downplayed or ignored. The Ninth Circuit has implemented this approach. In *United States v. Contra Costa County Water District*,[24] the United States sued the water district for the cost of a retaining wall. A settlement with a third party generated $75,000 for the United States. However, this settlement was offset and resulted in $30,000 actually being received. The water district requested disclosure of the settlement negotiations with the third party so as to receive the full $75,000 offset in their payment rather than the $30,000 actually received. The Ninth Circuit, however, summarily dismissed the requests of the water district, holding that the "general rule of inadmissibility" mandated exclusion.[25] Emphasized were the public policies favoring out-of-court settlements and the encouragement of open and frank discussion.[26]

Conversely, the Bankruptcy Appellate Panel in *In re Cecchini*,[27] although affirming the bankruptcy court's declaration of excludability, implied that the statements could have been admitted as in-

20. 375 F. Supp. 499 (E.D. Mich. 1974) (action for violation of Sherman Act and Clayton Act), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

21. *Overseas*, 325 F. Supp. at 537.

22. 39 Bankr. 551 (Bankr. E.D. Cal. 1984).

23. *Id.* at 554. The bankruptcy court determined that the trustee had not abandoned his interest in the subject property even though a written statement was made during negotiations that the trustee no longer asserted an interest in the property.

24. 678 F.2d 90 (9th Cir. 1982).

25. *Id.* at 92. The court based its decision on Factor v. Commissioner, 281 F.2d 100, 125 (9th Cir. 1960), *cert. denied*, 364 U.S. 933 (1961), which also applied a broad interpretation of rule 408.

26. *Contra Costa*, 678 F.2d at 92. Additionally, the court noted as further support for exclusion, that the applicant was not a party to the settlement conference. *See supra* notes 36-38 and accompanying text for similar analysis in other cases.

27. 37 Bankr. 671 (Bankr. 9th Cir. 1984).

dependent statements of fact.[28] However, no analysis of the law was undertaken; thus, the precedent value of this decision is limited.

Another recent bankruptcy case on point is *In re Richardson*,[29] wherein the court determined that, because the offer in question occurred after the court's turnover order, it "had to constitute in some respect an offer of compromise and settlement which the court cannot consider . . . ."[30] A broad interpretation of rule 408, as in the above cases, promotes settlement negotiations. Although the exceptions to the rule are necessary to *prevent* abuses, these exceptions cannot be so expanded as to *promote* abuse of the settlement process.

Another method of extending rule 408 is to include conduct or statements made in prior related negotiations between the parties, or in negotiations with third parties, rather than limiting application of the rule to the parties and issues presently at trial. Many recent circuit cases espouse this view.

In *Fiberglass Insulators, Inc. v. Dupuy*,[31] the Fourth Circuit held that statements made by party attorneys during earlier related negotiations were insulated from inclusion under rule 408. The court felt that attorneys needed "wide latitude" to effectively conduct settlement negotiations.[32] Unfortunately, a contrasting disposition occurred in the Sixth Circuit in *Trans Union Credit Information Co. v. Associated Credit Services, Inc.*,[33] where the court stated that certain conduct and statements made *during the negotiation meeting* may not be excludable if determined to be unrelated to the negotiation process.[34] This analysis illustrates a tendency by many courts to pro-

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28. *Id.* at 674. At issue was the statement by debtor's counsel in the state court action that the debt would not be dischargeable in bankruptcy due to the debtor's willful and fraudulent actions. The court determined that the statements were made during compromise negotiations but declined to rule on whether the statement was actually two separate statements, the first being an opinion on dischargeability and the second an admission as to fraudulent conduct. The plaintiff wanted the alleged second statement declared inadmissible. The court instead stated that "[t]he trial court may have incorrectly characterized the testimony. However, any such error was harmless." *Id.* The court did not discuss the question of the plaintiff's alleged entitlement to inclusion had the statements been declared independent statements of fact.

29. 85 Bankr. 1008 (Bankr. W.D. Mo. 1988).

30. *Id.* at 1014 n.13. The plaintiff attempted to establish that the debtor offered $3500 to purchase a tractor as evidence that the defendant may have had an ability to pay the money requested in the turnover order.

31. 865 F.2d 652 (4th Cir. 1988).

32. *Id.* at 654. The court stated that "the fact that offering an item of evidence is not in terms barred by Rule 408 does not make it otherwise admissible." *Id.* at 655. Finding the earlier negotiations to be all part of the general breakup of the business association enabled the court to include those statements as arising out of the same transaction. *Id. See* WEINSTEIN'S EVIDENCE *supra* note 3, ¶ 408[4], at 408-27.

33. 805 F.2d 188 (6th Cir. 1986) (action for specific performance of credit reporting service agreement).

34. The court, however, determined the statements at issue to be related to the negotiation process, and thus found them inadmissible. *Id.* at 192.

tect only those statements which are explicit offers of compromise, this interpretation may be inconsistent with the rule as enacted. Rule 408 clearly mandates protection to more than just explicit offers of compromise.[35] Therefore, the Sixth Circuit appears to have applied an incorrect interpretation. However, since the Fourth Circuit case is more recent, this may be indicative of a trend towards a more liberal interpretation.

A more common scenario is the attempt to introduce settlement agreements made with third parties. For instance, a nonsettling defendant may wish to include settlements made with other defendants in hopes of lessening their liability.[36] Cases in the federal circuit are in agreement that this situation must be covered by the rule.[37] Nonsettling defendants cannot be provided an advantage which may in practice encourage *litigation* rather than settlement.[38]

In *Bradbury v. Phillips Petroleum Co.*,[39] the Tenth Circuit went one step further in determining that prior settlement agreements in seven similar cases against the defendant were included within the rule 408 umbrella, because they arose out of the same large scale transaction as that between the third party and the party to the present suit.[40] Again, the strong policy of encouraging settlement was

35. *See* WEINSTEIN'S EVIDENCE, *supra* note 3, at 408-3.

36. Note that under the privilege justification, this information would be excluded because the nonsettling defendant was not a party to the negotiation. The plaintiff, on the other hand, would have the option of including the negotiation statements. *See supra* notes 16-18 and accompanying text.

37. *See* Branch v. Fidelity & Casualty Co., 783 F.2d 1289, 1294 (5th Cir. 1986) (admissibility at trial of nonsettling defendant, of settlement agreements between plaintiffs and settling defendant held to be clear error); McInnis v. A.M.F. Inc., 765 F.2d 240 (1st Cir. 1985) (admission of release obtained by motorist from motorcyclist was prejudicial error); McHann v. Firestone Tire & Rubber Co., 713 F.2d 161 (5th Cir. 1983) (evidence of covenant not to sue between owner of tire and service station which employed plaintiff was inadmissible); *see also* Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1069 (5th Cir. 1986) (even where evidence favors settling party, inadmissible to prove liability or invalidity of claim); United States v. Contra Costa County Water Dist., 678 F.2d 90 (9th Cir. 1982) (court considered evidence especially excludable as appellant was not a party to settlement negotiations).

38. If a defendant is permitted to introduce evidence of settlements with codefendants, a jury might be easily convinced to reduce the plaintiff's award—a result inconsistent with the promotion of settlement.

39. 815 F.2d 1356 (10th Cir. 1987).

40. *Id.* at 1363. The court based its determination on Weinstein's discussion of the matter wherein the evidence expert stated that a compromise of a claim "arising out of the same transaction" was excluded under rule 408. *See* WEINSTEIN'S EVIDENCE, *supra* note 3, ¶ 408[04], at 408-27. However, the evidence was ultimately held admissible under the other purposes doctrine. *Bradbury*, 815 F.2d at 1364. See *infra* notes 55-68 and accompanying text for a discussion of the other purposes doctrine.

enough to encompass these separate claims.

B. Requirement of Dispute and Intent to Settle

Rule 408 requires the compromise or attempt to compromise to pertain to a claim *disputed* as to either validity or amount.[41] The problem arises in determining the point at which a dispute comes into existence. A number of cases have severely limited the application of rule 408 by declaring that a dispute does not exist until formally initiated. For instance, the Ninth Circuit in *Cassino v. Reichhold Chemicals, Inc.*,[42] held that rule 408 only applies to existing disputes. Thus, a general release of potential claims was determined admissible because the plaintiff had not yet asserted any claim for relief.[43]

Similarly in *In re B.D. International Discount Group*,[44] the Second Circuit held that a damaging entry in the debtor's financial statements was not excludable under rule 408. The court, in a footnote, determined that because the debtor did not dispute the creditor's claim at the time of the negotiations, but rather simply wanted more time to pay, no dispute was in existence.[45] No factual support was provided for this conclusion.

Information obtained from accounting firms hired for an examination of the debtor's finances has also been determined to be uncovered by rule 408. In *SEC v. Touche Ross & Co.*,[46] the district court held that the nature of the accounting firm's retainer by the creditor was not to engage in compromise negotiations, but rather to engage in conduct more akin to an arbitrator or expert appraiser. The sole purpose was to ascertain facts to support a cause of action and not to compromise or settle any such claims.

This line of reasoning was also adopted by the Seventh Circuit in *General Leaseways, Inc. v. National Truck Leasing Association*,[47] where the court determined that statements made in a telephone call were admissible because the intent of the call was not to settle or compromise a claim. Thus, even though the telephone call was followed by a settlement proposal, the call was held to be admissible.[48] Although rule 408 is intended to cover more than just explicit offers

41. *See* FED. R. EVID. 408; *see also supra* note 1 (complete text of rule).
42. 817 F.2d 1338 (9th Cir. 1987) (discriminatory termination of employment).
43. *Id.* at 1342-43.
44. 701 F.2d 1071 (2d Cir. 1983).
45. *Id.* at 1074 n.5. The court provided no factual support for its determination that, at that time of the negotiation, the claim was undisputed. However, even requesting more time to pay a debt should give rise to coverage under rule 408 because it can significantly affect the amount of the claim by changing its present value.
46. 438 F. Supp. 259, 262 (S.D.N.Y. 1977).
47. 830 F.2d 716 (7th Cir. 1987) (antitrust case).
48. *Id.* at 724. The settlement proposal, however, was not admitted into evidence.

of compromise, it is difficult to delineate a specific time when a dispute comes into existence. Thus, in a case decided the same year, the same circuit reached a different conclusion with regard to two letters sent by the plaintiff to the defendant.[49] The court adopted plaintiff's argument that the letters involved feelings, comments, opinions, and recommendations for settlement, even though there was no formal dispute or intent to settle in existence at the time of the writing.[50]

Settlement negotiations are frequently undertaken prior to the initiation of a formal dispute. By restricting rule 408 to statements made after a formal complaint filing, early casual settlement is significantly jeopardized. Indeed, one of the main justifications for implementing the rule was to extend coverage beyond explicit offers of compromise in order to protect the entire settlement environment.[51] This cannot be satisfactorily achieved without including negotiations occurring prior to formal dispute initiation.

C. Information Otherwise Discoverable

The amended version of the rule, passed by Congress in 1975, clearly and correctly provides an exception for otherwise discoverable evidence. The rule is applied only where the document or statement would not have existed but for the negotiations.[52] Additionally, rule 408 is intended to restrict admissibility of settlement negotiations at trial, but does not affect a party's right to discovery proceedings.[53] Negotiations cannot be "used as a device to thwart discovery by making existing documents unreachable."[54] The policy of liberal discovery must exist in concert with settlement encouragement.

This case can be construed to be incorrect, because rule 408 is intended to cover more than just explicit offers of compromise.

49. Kritikos v. Palmer Johnson, Inc., 821 F.2d 418 (7th Cir. 1987) (delay in construction of yacht).

50. *Id.* at 423. The court based its holdings on the policy favoring the encouragement of settlement discussions.

51. *See supra* notes 3-8 and accompanying text. *See generally* THE CENTER FOR PUBLIC RESOURCES, CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT 18-20 (1988) (discussion of rule 408 justifications).

52. Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1107 (5th Cir. 1981).

53. *In re* Contemporary Mission, Inc., 44 B.R. 940 (D. Conn. 1984) (motion to compel answers to interrogatories granted); *see also* WEINSTEIN'S EVIDENCE *supra* note 3, ¶ 408[01], at 408-16 ("not intended to conflict with the liberal rules of discovery embodied in the Federal Rules of Civil Procedure").

54. *Ramada*, 644 F.2d at 1107; *see also In re* B.D. Int'l Discount Corp., 701 F.2d at 1073 (statement in financial records is admissible even though presented during negotiations because information was otherwise discoverable). *See generally* S. REP. NO. 1277, 93d Cong., 2d Sess. 10 (1974).

D. Other Purposes Doctrine

The most potentially abused of the exceptions is the other purposes doctrine contained in the last sentence of the rule.[55] In certain scenarios, the necessity of this exception is clear; in other cases, courts will search for another purpose in order to include helpful evidence, thus jeopardizing the settlement process. The trial judge should carefully weigh the need for such evidence against the potential for discouraging future settlement negotiations. When the evidence is merely corroborative, admission must not be allowed.[56] The Eighth Circuit in *National Battery Co. v. Levy*[57] makes clear that if *any* other proof is available, exclusion must be upheld. Furthermore, when the issue is doubtful, the policy of exclusion should override.[58]

The last sentence of rule 408 was drafted in a very open-ended fashion. Because of this, the other purposes doctrine has the potential to completely override the policies of settlement negotiation. However, the law is not completely devoid of direction. In fact, the rule itself contains examples where the other purposes doctrine is to come into effect. Although these are not intended to be exhaustive, all of the examples cited relate to either rebutting an allegation or attacking credibility in some form.[59] Thus, this author submits that the other purposes doctrine should be limited to those contexts, or at the very least, that any other scenario be confronted with a heightened scrutiny requirement.[60]

Examples of other purposes which have been allowed in various courts include: (1) showing the relationship between the parties;[61] (2) attacking credibility of witnesses or parties;[62] (3) proving a party's understanding of obligations under an agreement;[63] (4) determining

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55. *See supra* note 1 for text of rule.

56. National Battery Co. v. Levy, 126 F.2d 33, 36-37 (8th Cir.), *cert. denied*, 316 U.S. 697 (1942) (where other uncontroverted proof available, evidence is merely corroborative and thus inadmissible).

57. *Id.*

58. Bradbury v. Phillips Petroleum Co., 815 F.2d 1356, 1364 (10th Cir. 1987) (trespass, assault, and outrageous conduct action).

59. *See supra* note 1 for text of rule.

60. *See Bradbury*, 815 F.2d at 1364 ("[W]hen the issue is doubtful, the better practice is to exclude evidence of compromises or compromise offers. . . .").

61. Brocklesby v. United States, 767 F.2d 1288, 1292-93 (9th Cir.), *cert. denied*, 474 U.S. 1101 (1985) (indemnity agreement properly admitted to show relationship of parties and to attack credibility of witnesses).

62. *Id.*; County of Hennepin v. AFG Industries, Inc., 726 F.2d 149, 152-53 (8th Cir. 1984) (properly admitted to impeach testimony of plaintiff's witness); United States v. Gilbert, 668 F.2d 94 (2d Cir. 1981), *cert. denied*, 456 U.S. 946 (1982) (earlier consent decree admissible to prove defendant's knowledge of SEC's reporting requirements).

63. Bituminous Constr., Inc. v. Rucker Enters., Inc., 816 F.2d 965, 968-69 (4th Cir. 1987) (in action for fraud and breach of contract, court properly exercised discretion in admitting letters discussing settlement negotiations to show defendant's understanding of his obligations under the agreement); United States v. Wilford, 710 F.2d 439, 450-51

whether a plaintiff has failed to mitigate damages;[64] and (5) avoiding jury confusion.[65] Attacking credibility and defending a failure to mitigate allegation are seemingly contemplated by the other purposes doctrine.[66] However, even in these areas, the judge should guard against needless concern over issues which unnecessarily undercut the rule against inclusion. Conversely, application in other contexts does not seem to be specifically contemplated by Congress and thus a heightened scrutiny should apply. Under *Bradbury v. Phillips Petroleum Co.*,[67] "when the issue is doubtful, the better practice is to exclude [the] evidence . . . ."[68]

Evidence should be admitted to prevent *abuse* of the negotiation practice when bad bargaining tactics are in question.[69] Although this situation is not specifically mentioned, the policy of rule 408 is to prevent, not encourage, abuse. In line with this policy, a mere allegation of improper bargaining should not be enough to allow admission of settlement conduct.[70]

IV. THE OPTIMUM BALANCE

Presently, there is no consensus in the federal courts regarding what constitutes the optimum balance. However, increased court congestion can only be prevented by maintaining a high level of set-

(8th Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984) (settlement offered to show circumstances surrounding refunds).

64. Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082, 1103 (5th Cir. 1987) (violation of Equal Credit Opportunity Act); Urico v. Parnell Oil Co., 708 F.2d 852 (1st Cir. 1983) (negotiation evidence admissible to show defendant unreasonably prevented plaintiff from mitigating damages).

65. Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1070 (5th Cir. 1986) (disclosing *fact* that other defendants had settled with plaintiff acceptable to quell jury confusion but disclosure of *amount* of settlement held a violation); *accord* Belton v. Fibreboard Corp., 724 F.2d 500, 504-05 (5th Cir. 1984); MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

66. These situations either concern credibility or involve rebutting an allegation made at trial. *See supra* note 58 and accompanying text.

67. 815 F.2d 1356 (10th Cir. 1987).

68. *Id.* at 1364.

69. *In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir.), *cert. denied*, 441 U.S. 870 (1979) (conduct of negotiations relevant in class action where fairness of settlement was basis of appeal); *In re* Grant Broadcasting, 71 Bankr. 376 (Bankr. E.D. Pa. 1987) (extending *General Motors*, court allowed conduct of debtor's officers to *develop* any possible evidence of collusion or bad bargaining even though no impropriety was alleged in proceeding).

70. It is easy to see how such an extension could lead to considerable abuse. *But see In re* Grant Broadcasting, 71 Bankr. 376, 390 (Bankr. E.D. Pa. 1987) (court decided "close evidentiary issue" and allowed evidence to come in even though no allegation of impropriety).

tlement probability. A high level of settlement probability can only be achieved if the rules of evidence are strictly adhered to. This, of course, does not mean that rule 408 should be devoid of exceptions. A trial judge must be acutely aware of the effect of loophole expansion on later settlement proceedings both within the case itself, as well as in the context of later cases once precedent is set.

Viewing the right to withhold settlement information as a rule of privilege helps to lessen the judge's role of prejudicial balancing. Under the rule of privilege, the evidence simply should not come in unless it was offered in the settlement context, or unless the information is otherwise obtainable or being used for another purpose.

With regard to the requirement of a dispute, a formal initiation requirement seems inappropriate, as settlement can often occur; settlement should be encouraged to develop prior to such initiation. However, evidence of an intent to settle is more reasonable. The policy of encouraging compromise is not undermined by the inclusion of evidence which was not offered with settlement in mind. Caution should be exercised, though, to exclude *all* statements and conduct surrounding the settlement so as to not limit the rule's applicability only to express offers of compromise.

The otherwise discoverable limitation is necessary to prevent abuse of the discovery process. The liberal rules of discovery mandate that documents cannot be determined unreachable simply because they have been mentioned in the settlement context. A rule to the contrary would easily lead to considerable abuse.

In contrast, the other purposes doctrine is not so easily defended. Although the author would agree that some information obtained during settlement must necessarily be heard, when the evidence could *also* be used for determining the liability and/or validity of a claim, a *strong* presumption of exclusion should apply. Particularly when a jury is employed, the prejudicial impact of such evidence far outweighs the benefits of inclusion unless no other evidence will sufficiently support the other purpose. The privilege of exclusion should thus extend to *all* information which could be used to prove liability or validity of a claim unless offered for another valid purpose *and* no other evidence is available.

With regard to the requirement of a valid other purpose, more deference needs to be given to the suggested direction in the rule itself. Congress's main concern appears to be abuse related. Thus, if credibility is at issue, the doctrine should be applied. Similarly, a party cannot be permitted to use the protection of settlement negotiation in order to leave its opponent without a defense to a trial allegation. In fact, bad faith in general should rise to admissibility, since the rule was not intended to protect bad faith negotiations. However, situa-

tions outside of these scenarios should be subjected to a heightened scrutiny requirement, because they were not specifically contemplated by Congress in enacting rule 408.

By maintaining these strict guidelines, attorneys will not be dissuaded from offering settlement proposals and many litigation expenses may be properly avoided. The optimum balance can thus be achieved.

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