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ERIC JASO - LEGAL Research
- Rule 408 - Settlement Negotiation

ATTORNEY WORK PRODUCT

RULE 408 - settlement negot.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. LR-CR-95-173
	)	
JAMES B. McDOUGAL,	)	
JIM GUY TUCKER, and	)	
SUSAN H. McDOUGAL	)	

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF ADMISSION OF TESTIMONY OF DANNY R. PITTS AND MARSHALL GRANT REGARDING STATEMENTS OF JOHN HALEY AND LETTERS WRITTEN ON BEHALF OF TUCKER BY HALEY

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this Memorandum of Law in support of the admission of testimony by witnesses Danny R. Pitts and Marshall Grant -- representatives of the Resolution Trust Corporation -- as well as certain letters received by Pitts and Grant. Defendant Jim Guy Tucker, through the oral and written communications of his personal attorney, John H. Haley, made admissions to Pitts and Grant in discussions regarding Tucker's outstanding $260,000 personal loan from Madison Guaranty Savings and Loan Association ("MGSL").

Pitts and Grant should be permitted to testify as to these statements, and the relevant documents should be admitted into evidence. Tucker specifically authorized his attorney, Haley, to communicate with Pitts and Grant regarding this debt and attempt to resolve any RTC claims against Tucker. As Tucker's authorized agent and attorney, Haley's written and oral statements to Pitts

and Grant constitute admissions of a party-opponent -- Tucker -- and are not hearsay.

BACKGROUND

Pitts and Grant were employees of Financial Conservators, Inc. ("FCI") of Tulsa, Oklahoma. FCI contracted with the Resolution Trust Corporation ("RTC") to attempt to recover unpaid commercial loans made by financial institutions held in receivership by the RTC, including Madison Guaranty Savings and Loan Association ("MGSL"). Among the outstanding debts FCI assigned Grant and Pitts to collect was a personal loan for $260,000 extended by MGSL to Tucker. In January 1992, Pitts contacted Tucker personally with regard to this debt. (Exh. 1) Over the next year, Haley communicated with Grant and Pitts on Tucker's behalf both orally and through written correspondence concerning Tucker's liability. (Exhs. 2 & 3) Tucker settled with the RTC in March 1993.

ARGUMENT

A. Haley's statements to Grant and Pitts constitute admissions of a party-opponent

As Tucker's attorney, specifically representing and speaking for Tucker, Haley's statements to representatives and agents of the RTC, in the course of Tucker's negotiations with the RTC, are not hearsay and are admissible as admissions of a party-opponent. Federal Rule of Evidence 801(d)(2) states that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a person authorized by the party to

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make a statement concerning the subject, or a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Plainly, Haley was Tucker's agent, authorized to make statements to the RTC on Tucker's behalf regarding Tucker's indebtedness to the RTC. See Letter, John H. Haley to Marshall K. Grant (Nov. 25, 1992) (Exhibit 3) ("Jim Guy Tucker has asked me to explore the possibilities of a settlement with you.").

Statements made by an attorney employed by a party-opponent in the course of representing his client in a particular matter therefore do not constitute hearsay, as attorneys are authorized to make statements and are considered agents of the party-opponent. See, e.g., Michael H. Graham, Federal Practice and Procedure § 6723 (1992) ("An attorney may, of course, act as an ordinary agent and as such make evidentiary admissions admissible against his principal, Rule 801(d)(2)(C) and (D)") (note omitted, collecting cases); McCormick on Evidence § 259 at 163-64 (4th ed. 1992) ("These admissions occur, for example, in letters or oral conversations made in the course of efforts for the collection or resistance of claims, or settlement negotiations, or the management of any other business in behalf of the client.") (note omitted, collecting cases).

The Eighth Circuit recognizes that statements of attorneys speaking on behalf of their clients do not constitute hearsay. United States v. Ojala, 544 F.2d 940, 946 (8th Cir. 1976) ("the statements were made in an unequivocal manner by one who was

acting as appellant's attorney at the time, and . . . they referred to a matter within the scope of the attorney's authority"); United States v. Scott, 804 F.2d 104, 108 (8th Cir. 1986) (following Ojala). As the cases collected in the treatises cited above illustrate, the federal courts consistently follow the same rule. See also, e.g., United States v. Brandon, 50 F.3d 464, 468-69 (7th Cir. 1995) (defendant's attorney's written response to subpoena admissible as admission of party-opponent under Fed. R. Evid. 801(d)(2)(D); statement did not implicate assistance of counsel, self-incrimination or privilege issues); United States v. Martin, 773 F.2d 579, 583-84 (4th Cir. 1985) (defendant's attorney's statements to IRS auditor admissible; attorney "was authorized to make statements concerning [defendant's] taxes in the scope of his representation").

CONCLUSION

For the foregoing reasons, the United States submits that the testimony of Marshall Grant and Danny R. Pitts regarding statements of John Haley, Defendant Jim Guy Tucker's attorney, made in the course of Haley's representation of Tucker concerning Tucker's debts to the RTC, should be admitted into evidence. Similarly, the Court should admit the letters written by Haley to representatives of the RTC in the course of that representation.

March 28, 1996
Little Rock, Arkansas

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eric H. Jaso, do hereby certify that on March 29, 1996, I caused a true and correct copy of the foregoing to be served by hand delivery on the following:

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CERTIFICATE OF SERVICE

I, Eric H. Jaso, do hereby certify that on April 1, 1996, I caused a true and correct copy of the foregoing to be served by hand delivery on the following:

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_____
Eric H. Jaso
Associate Counsel

From: Rod Rosenstein
To: EJASO
Date: 3/31/96 3:36pm
Subject: Rule 408 Issue

Communication with FCI began when they contacted Tucker personally by telephone in 1/92. Communication continued by phone, in person, and by letters until the debt was settled in 3/93.

The admissions we want to introduce by Tucker and Haley were in the course of these discussions, the goal of which was to settle the outstanding obligation. They include admissions that (1) the loan was tied to other financing; (2) Tucker did not want to buy the property; and (3) Tucker agreed to buy the property at an inflated price in order to obtain other financing.

Tucker may claim that Fed. R. Evidence 408 prohibits admission of "conduct or statements made in compromise negotiations." It would be very useful for us to have a case that stands for the proposition that although such statements are inadmissible in civil suits over the amount or legitimacy of the debt, they are admissible in collateral litigation in which the issue is not the legitimacy of the debt but the motivation for creating it. The Rule is not intended to immunize a defendant from criminal liability for statements that he makes in the course of settlement negotiations. The commentary to the Rule provides little help, however.

We are using this evidence to prove that (1) Tucker agreed to take out the loan only because it was tied to other financing within the scope of the conspiracy; (2) he did not ever intend to repay the loan personally; and (3) he knew the property was overvalued when he bought it.

Madison bought the 34 acres in 10/85 for $18,800. Tucker bought the property less than one month later for $125,000. As 2/3 owner of CSW Corporation Tucker bought the CSW utility in 2/86 for $1.2 million with 100% financing; $150,000 from CMS and $1.05 million from MGSL. By 7/86, CSW was insolvent and unable to make payments on its loans. Ultimately, the CSW loan balance was cut in half in 10/87. Tucker set up Southloop Construction Corp. as a subsidiary of CSW in 6/87 and then "sold" the 34 acre property to Southloop in 10/87. He obtained an additional $100,000 cash by arranging for Southloop to mortgage the property to CMS, which therefore had some $360,000 in debt against it.

When it came time to pay what was owed on the original $260,000 loan and he believed the scrutiny was over, Mr. Tucker gave an explanation of this loan that was completely inconsistent with the representations he previously had made to the MGSL Board, to his own law partners, to FHLBB examiners, and to auditors. His admissions reveal the true nature of the conspiracy. They also are inconsistent with the representations of Mr. Tucker in this courtroom, where he said that he was in good financial condition and didn't need to borrow money from Madison:

1. Mr. Sutton told jury in his opening statement that Mr. Tucker had willingly repaid his loans and that there was no fraud involved. We will prove that Mr. Sutton was mistaken. Mr. Tucker did not willingly repay the $260,000 loan, and he admitted that there was fraud involved.

2. Mr. Brown stated in his cross -examination of Mr. Denton that Mr. Tucker was in good financial condition in the fall of 1985. That also is untrue. Mr. Tucker admitted that he agreed to purchase property for an inflated price in return for financing that he needed from MGSL.

This is strong probative evidence of Mr. Tucker's intent in his own words and the words of his authorized agent. The jury deserves to hear the truth and F.R.E. 408 does not exclude such highly probative evidence.

CC: RAJLES, PR

Citation Rank(R) Page(P) Database Mode
710 F.2d 439 R 1 OF 2 P 1 OF 57 CTA8 Page
114 L.R.R.M. (BNA) 2257, 97 Lab.Cas. P 10,247, 13 Fed. R. Evid. Serv. 1163
(Cite as: 710 F.2d 439)

UNITED STATES of America, Appellee,
v.
Harry J. WILFORD, Appellant.
UNITED STATES of America, Appellee,
v.
Everett G. DAGUE, Appellant.
UNITED STATES of America, Appellee,
v.
Herman J. CASTEN, Appellant.
UNITED STATES of America, Appellee,
v.
Herman B. BOEDING, Appellant.
Nos. 82-1185 to 82-1188.
United States Court of Appeals,
Eighth Circuit.
Submitted Nov. 11, 1982.
Decided June 22, 1983.
Rehearing and Rehearing En Banc
Denied Aug. 1, 1983.
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FN20. Cf. United States v. Beechum, 582 F.2d 898 (5th Cir.1978), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979):
The standard for the admissibility of extrinsic offense evidence is that of [Fed.R.Evid.] 104(b): "the preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist."
582 F.2d at 913.

[14] In light of our discussion regarding the similarity of the prior acts to the acts in issue here, we find the other acts to be sufficiently "similar in kind and reasonably ***450** close in time to the charge at trial" to be admissible. See United States v. Two Eagle, 633 F.2d 93, 96 (8th Cir.1980). We find no error in the trial court's admission of evidence of prior acts.

VI. Local 238's Settlement Agreement with the NLRB.

[14] Before criminal charges were filed by the Department of Justice, the NLRB began an investigation into the activities of Local 238 at the D & A construction site. The investigation ended when the NLRB and Local 238 entered into a formal settlement stipulation, whereby Local 238 agreed to cease its disputed activities at the D & A site, and refund the fees paid by certain non-

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union drivers. Local 238 expressly noted in the stipulation that it was not admitting that it had violated the National Labor Relations Act.

At trial the government offered into evidence two exhibits containing the settlement agreement, and the testimony of an NLRB attorney concerning the circumstances surrounding the agreement. The trial court admitted the evidence over the defendants' objections.

The defendants argue on appeal that evidence of the settlement stipulation was irrelevant and immaterial, since the defendants were not parties to the agreement, and therefore should not have been admitted. Defendants also contend that evidence of the settlement stipulation was inadmissible under Fed.R.Evid. 408. [FN21] The government counters that the defendants, on cross-examination of drivers who had received the refunds, placed in issue the circumstances surrounding the refunds, and therefore the government was entitled to introduce evidence of the settlement stipulation to explain fully the circumstances in which Local 238 made the refunds. [FN22]

FN21. That rule provides:
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

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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 purpose, 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.

FN22. The government also argues on appeal that the defendants did not object on the ground that admission of the evidence would violate **rule 408**, and therefore the issue is not preserved for appeal. See Fed.R.Evid. 103(a)(1). Because we find that the evidence was admissible even assuming the defendants properly objected, we need not reach this issue.

To determine whether the trial court properly admitted evidence of the settlement stipulation, we must decide first, whether the evidence was relevant to an issue in the lawsuit, and second, whether **rule 408** prohibited admission of the evidence.

During the trial, on direct examination, the government asked driver J.W. Coon

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whether the money he used to pay Local 238's fee came from his own pocket or whether he was reimbursed for it. Coon responded that he was not "reimbursed" until some time later, when Local 238 mailed him a check refunding the fee he had paid at the D & A site.

The prosecutor asked another driver, Charles Boyd, whether he had received anything from Local 238 after he had paid the fee and had left the D & A site. Boyd responded that he was uncertain whether he had received a newsletter or anything similar, but Local 238 had sent him a refund of the fees he had paid. The prosecutor followed this response with a question as to whether Boyd had ever received anything else from Local 238, and whether he wanted to be a member of Local 238. On cross-examination, defense counsel asked Boyd whether he had sent the refund to the trucking company that had paid the fee. Boyd responded that when he received the ***451** refund he was no longer associated with the trucking company that paid the fee, so he kept the refund.

On the direct examination of Charles Higgs, another driver, the prosecutor asked him if he knew why he received a refund from the union, and if he knew from whom he had received the refund. Higgs answered "no" to both questions. On cross-examination, defense counsel showed Higgs a copy of the refund check, whereupon Higgs stated that he received the refund from the defendant Wilford, and from Local 238.

Subsequent to this testimony, the prosecutor sought to introduce evidence of

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the settlement stipulation "to explain the situation involving those [refunds], why the [refunds] were made, who they went to, the amount, and generally [to] explain to the jury under what circumstances [these refunds were] made to these truck drivers...."

Because the defense counsel placed the refunds in issue, the government was entitled to explain to the jury the circumstances surrounding the refunds. The prosecutor's questions on direct examination to drivers Coon and Boyd were not intended to examine whether and why the drivers had received refunds; the prosecutor inquired of Coon whether he had been reimbursed for the fee he had paid, and inquired of Boyd whether he had received any materials or benefits from Local 238, and whether he wanted to be a member of Local 238. When defense counsel on cross-examination inquired of the drivers whether they had kept the refunds themselves, and elicited a response from Higgs that the refund had come from Local 238 and the defendant Wilford, he placed in issue the matter of under what circumstances the refunds were made. As a result, the government was entitled to show that the refunds in fact stemmed from an agreement by Local 238 with the NLRB. Thus, we conclude the evidence of the settlement stipulation was relevant to an issue in the lawsuit.

We also find that **rule 408** does not bar admission of the evidence. That rule provides that evidence of compromise or offers to compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The rule

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expressly states that it "does not require exclusion when the evidence is offered for another purpose...." Fed.R.Evid. 408. In this case evidence of the settlement stipulation was offered to explain the circumstances surrounding the refunds, not to show that Local 238 violated the National Labor Relations Act. The defendants were further protected from any inference of guilt by the provision in the stipulation which stated that Local 238 did not admit to any violation by entering into the stipulation.

We therefore conclude that the trial court properly admitted evidence of the settlement stipulation.

VII. Denial of the Defendants' Request for Surrebuttal.

The defendants argue that a witness presented by the government during its rebuttal brought forward new facts not raised earlier, and that the defendants were entitled to present evidence on surrebuttal to counter the witness' testimony and to impeach his credibility. The trial court sustained the government's objection to surrebuttal by the defendants.

The witness, an investigator for the NLRB, testified as to his observation of events taking place at the Pittsburgh-Des Moines Steel Co. site (discussed in section V supra). The government's stated purpose in offering the investigator's testimony was to show the similarity of the Pittsburgh-Des Moines incident to the incident for which the defendants were being tried. The defendants argue that they were entitled to present evidence in surrebuttal

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INSTA-CITE

CITATION: 710 F.2d 439

Direct History

=> 1 **U.S. v. Wilford,** 710 F.2d 439, 114 L.R.R.M. (BNA) 2257, 97 Lab.Cas. P 10,247, 13 Fed. R. Evid. Serv. 1163 (8th Cir.(Iowa), Jun 22, 1983) (NO. 82-1185, 82-1186, 82-1187, 82-1188)

Certiorari Denied by

2 Wilford v. U.S., 464 U.S. 1039, 104 S.Ct. 701, 79 L.Ed.2d 166, 115 L.R.R.M. (BNA) 2248, 99 Lab.Cas. P 10,659 (U.S.Iowa, Jan 09, 1984) (NO. 83-496)

Negative Indirect History

Abrogation Recognized by

3 U.S. v. Gonzalez-Lira, 936 F.2d 184, 33 Fed. R. Evid. Serv. 1505 (5th Cir.(Tex.), Jul 09, 1991) (NO. 90-2609)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References

22 C.J.S. Criminal Law Sec.274 Note 34

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Citation | Page(P) | Database | Mode
718 F.2d 269 FOUND DOCUMENT P 1 OF 38 CTA Page
114 L.R.R.M. (BNA) 2745, 98 Lab.Cas. P 10,489, 14 Fed. R. Evid. Serv. 961
(Cite as: 718 F.2d 269)

VULCAN HART CORPORATION (ST. LOUIS DIVISION), Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, Respondent.
No. 82-1719.
United States Court of Appeals,
Eighth Circuit.
Submitted April 12, 1983.
Decided Oct. 4, 1983.

A petition was filed seeking review of an order of the National Labor Relations Board finding that an employer committed numerous unfair labor practices in connection with strike. The Court of Appeals, Bright, Circuit Judge, held that: (1) the employer was not denied a fair hearing on the unfair labor practice charges; (2) the sending of a letter was not an unfair labor practice where the letter did not necessarily operate as a discharge letter; (3) the denial of seniority to returning strikers was an unfair labor practice; (4) the employer's withdrawal of recognition converted an economic strike to an unfair labor practice strike; (5) the record supported the finding that the employer attempted to coerce an employee into restricting his participation in organizational activities; and (6) although

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after November 1, because the subject matter on the picket signs remained the same, and the strikers affirmed that they would not return until the Union and V-H agreed on a contract.

[12] Whatever goals the strikers hoped to accomplish by striking, V-H's withdrawal of recognition clearly prolonged the strike, because it put an end to contract negotiations. To our knowledge, this strike has never been formally settled, and that failure is directly attributable to V-H's premature withdrawal of recognition. Substantial evidence therefore supports the Board's finding of conversion to an unfair labor practice strike on November 1.

D. Lindhorst.

V-H disputes the Board's finding that it violated sections 8(a)(1) and (3) by making Lindhorst's reinstatement conditional on his resignation from union office. V-H contends that the violation is not supported by substantial evidence, but even if it were, V-H argues, the backpay award was inappropriate, because the complaint charged a violation of section 8(a)(1) only. [FN6]

FN6. In fact, at the hearing, the general counsel specifically denied that the Board sought backpay for Lindhorst on section 8(a)(3) grounds. We address the Board's failure to seek relief under section 8(a)(3) in our discussion of the appropriate remedy, Section E, infra.

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[13] With respect to the Board's findings of fact, this issue turns entirely on credibility determinations. The Board specifically ***277** credited Lindhorst's version of the reinstatement offer, and we find no ground for overturning the Board's credibility determinations in this case. The question has arisen also whether evidence relating to the reinstatement discussions should have been admitted at all, since one might characterize the discussions as compromise negotiations within the scope of Fed.R.Evid. 408. [FN7] But Rule 408 excludes evidence of settlement offers only if such evidence is offered to prove liability for or invalidity of the claim under negotiation. To the extent that the evidence is offered for another purpose, and to the extent that either party makes an independent admission of fact, the evidence is admissible.

FN7. Under 29 U.S.C. s 160(b), the NLRB must conduct its hearings in accordance with the Federal Rules of Evidence, "so far as [is] practicable." But though the federal rules carry great weight, they do not absolutely bind on the NLRB. See, e.g., NLRB v. Maywood Do-Nut Co., Inc., 659 F.2d 108, 110 (9th Cir.1981) (per curiam).

[14] In this case, the demand that Lindhorst resign his union office arose in the context of negotiations to settle his discharge grievance. The

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discharge claim is not at issue in this proceeding. Accordingly any statements V-H made in the course of the negotiations are not excludable under Rule 408. With the admission of those statements, the record clearly supports the finding that V-H attempted to coerce Lindhorst into restricting his participation in organizational activities, in violation of section 8(a)(1).

E. Remedy.

V-H contends that the remedy the NLRB imposed is punitive, not remedial, and therefore should not be enforced. V-H argues that Lindhorst is not entitled to backpay from October 3, and that none of those still on strike should receive either backpay or reinstatement. We think the remedy was overbroad with respect to Lindhorst, but not with respect to the other strikers.

[15][16] The NLRB's general counsel charged V-H on Lindhorst's account under section 8(a)(1) only, and specifically denied at the hearing that it sought backpay for Lindhorst from the time of the October 3 resignation demand. See n. 6 supra. The NLRB erred in awarding backpay and reinstatement from October 3, because the strike had not been abandoned at that point, and did not become an unfair labor practice strike until November 1. From November 1, however, all strikers including Lindhorst are entitled to reinstatement and backpay. V-H argues that the strikers who never abandoned the strike are not entitled to reinstatement or backpay. We disagree. V-H itself guaranteed that the strike would never be resolved when it withdrew its recognition of the Union. It

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cannot now escape responsibility for its unfair labor practices by arguing that the strikers did not settle, since V-H's refusal to negotiate is itself part of the reason they still remain on strike.

III. Conclusion.

We enforce the Board's order in part and deny enforcement in part, in accordance with this opinion.

END OF DOCUMENT

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INSTA-CITE

CITATION: 718 F.2d 269

Direct History

1 Vulcan-Hart Corp., 262 NLRB 167, 262 NLRB No. 17, 1982 WL 24582, 110 L.R.R.M. (BNA) 1302, 111 L.R.R.M. (BNA) 1022 (N.L.R.B., Jun 14, 1982) (NO. 14-CA-13129)
Decision Supplemented by
2 Vulcan-Hart Corporation, 263 NLRB 477, 263 NLRB No. 64, 1982 WL 23869, 111 L.R.R.M. (BNA) 1022 (N.L.R.B., Aug 17, 1982) (NO. 14-CA-13129)
Enforcement Granted in Part, Denied in Part by
=> 3 **Vulcan Hart Corp. (St. Louis Div.) v. N.L.R.B.,** 718 F.2d 269, 114 L.R.R.M. (BNA) 2745, 98 Lab.Cas. P 10,489, 14 Fed. R. Evid. Serv. 961 (8th Cir., Oct 04, 1983) (NO. 82-1719)

4 Vulcan-Hart Corp., 262 NLRB 167, 262 NLRB No. 17, 1982 WL 24582, 110 L.R.R.M. (BNA) 1302, 111 L.R.R.M. (BNA) 1022 (N.L.R.B., Jun 14, 1982) (NO. 14-CA-13129)
Enforcement Granted in Part, Denied in Part by
=> 5 **Vulcan Hart Corp. (St. Louis Div.) v. N.L.R.B.,** 718 F.2d 269, 114 L.R.R.M. (BNA) 2745, 98 Lab.Cas. P 10,489, 14 Fed. R. Evid. Serv. 961 (8th Cir., Oct 04, 1983) (NO. 82-1719)

Negative Indirect History

Declined to Follow by
6 N.L.R.B. v. Champ Corp., 913 F.2d 639, 59 USLW 2212, 116 Lab.Cas. P 10,268 (9th Cir., Aug 29, 1990) (NO. 89-70160) (Additional History)
7 Lo Bosco v. Kure Engineering Ltd., 891 F.Supp. 1035, 42 Fed. R. Evid. Serv. 637 (D.N.J., Jul 11, 1995) (NO. CIV. A. 93-2451) (Additional History)

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768 F.2d 230 | R 3 OF 8 | P 1 OF 27 | CTA8 | Page
18 Fed. R. Evid. Serv. 1247
(Cite as: 768 F.2d 230)

James T. CRUES, Appellant,
v.
KFC CORPORATION, Appellee.
No. 84-2317.
United States Court of Appeals,
Eighth Circuit.
Submitted April 12, 1985.
Decided July 16, 1985.

Action was filed for fraudulent misrepresentation in connection with purchase of restaurant franchise. On posttrial motions, the United States District Court for the Eastern District of Missouri, William N. Hungate, J., 546 F.Supp. 217, held, inter alia, that franchise had failed to submit evidence of legal malice sufficient to support punitive damages claim, that evidence of lost profits was not speculative, and that franchisee was liable for unpaid royalties. Both parties appealed. Following remand by the Court of Appeals, 729 F.2d 1145, the District Court, William S. Bahn, Magistrate Judge, entered judgment on jury verdict in favor of franchisor, and franchisee appealed. The Court of Appeals, John R. Gibson, Circuit Judge, held that: (1) instruction that jury could find that, even if franchisee had reasonably relied

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compromise under Fed.R.Evid. 408.

[6] [7] [8] The admission of this evidence is grounds for reversal only if the district court abused its discretion. There is abundant support for the court's decision. First, the evidence introduced by KFC was cumulative; Crues had proved the offer during his case-in-chief. Second, the initial offer was made more than three years before the lawsuit was filed. Rule 408 applies only to an offer to compromise a "claim," and it is not clear that Crues had a claim against KFC in August 1977. To the contrary, his actions at that time showed his intent to proceed with the fish franchise. That the same offer was made after litigation commenced is not a reason to exclude proof of the offer in its initial context. Third, Crues cites no federal cases holding that **Rule 408** applies to **admissions** of compromise against the offeree. The rule is concerned with excluding proof of compromise to show liability of the offeror. C. McCormick, McCormick on ***234** Evidence s 264, at 712 (E. Cleary 3d ed. 1984). KFC submitted the offer to show that Crues was unreasonable in relying on the initial representation in continuing the fish operation. This use of evidence violates neither the spirit nor the letter of Rule 408. See Vulcan Hart Corp. v. NLRB, 718 F.2d 269, 277 (8th Cir.1983).

IV.

[9] Finally, we deal with the issue of costs. On September 7, 1984, KFC filed a bill of costs for $7,628.74 with the district court. On September 9,

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INSTA-CITE

CITATION: 768 F.2d 230

Direct History

1 Crues v. KFC Corp., 546 F.Supp. 217 (E.D.Mo., Aug 03, 1982)
(NO. 81-0082C (4))
Affirmed in Part, Remanded in Part by
2 Crues v. KFC Corp., 729 F.2d 1145 (8th Cir.(Mo.), Mar 13, 1984)
(NO. 82-2050, 82-2085)
Appeal After Remand
=> 3 **Crues v. KFC Corp.,** 768 F.2d 230, 18 Fed. R. Evid. Serv. 1247
(8th Cir.(Mo.), Jul 16, 1985) (NO. 84-2317)

Negative Indirect History

Disagreed With by
4 Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175,
17 Fed.R.Serv.3d 1283 (9th Cir.(Cal.), Sep 13, 1990)
(NO. 89-56008) (Additional History)
Declined to Follow by
5 Griffith v. Mt. Carmel Medical Center, 157 F.R.D. 499
(D.Kan., Aug 26, 1994) (NO. CIV. A. 92-1141-MLB)
(Additional History)
6 Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc., 1995 WL 144554
(N.D.Ill., Mar 30, 1995) (NO. 91 C 7955) (Additional History)

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Ella FREIDUS, Appellant,
v.
FIRST NATIONAL BANK OF COUNCIL BLUFFS, a National Banking Corporation, Appellee.

No. 90-5182.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 11, 1990.

Decided March 8, 1991.

Contract vendee brought breach of contract suit against vendor for unreasonably withholding its consent to resale of property. The United States District Court for the District of South Dakota, Donald J. Porter, Chief Judge, entered judgment on jury verdict in favor of contract vendor, and vendee appealed. The Court of Appeals, Wollman, Circuit Judge, held that: (1) letters exchanged during settlement negotiations were admissible to rebut testimony that vendor never gave reasons for conditions it imposed on its consent to proposed resale, and (2) refusal to admit testimony of certified public accountant, who would have testified as to adverse tax consequences of vendor's proposals for obtaining its consent, was not error.

Affirmed.

[1] EVIDENCE ⇐ 213(4)
157k213(4)
Rule precluding documents manifesting attempts to settle litigation did not bar admission of letters exchanged during settlement negotiations in contract vendee's breach of contract suit against contract vendor to rebut testimony that vendor never gave reasons for conditions it had imposed on its consent to vendee's proposed resale of property; without letters, vendor would not have been able to rebut claim that it unduly delayed in giving its consent, which ultimately prevented completion of resale. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[1] WITNESSES ⇐ 406
410k406
Rule precluding documents manifesting attempts to settle litigation did not bar admission of letters exchanged during settlement negotiations in contract vendee's breach of contract suit against contract vendor to rebut testimony that vendor never gave reasons for conditions it had imposed on its consent to vendee's proposed resale of property; without letters, vendor would not have been able to rebut claim that it unduly delayed in giving its consent, which ultimately prevented completion of resale. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[2] EVIDENCE ⇐ 146
157k146
Testimony of certified public accountant was properly excluded in contract vendee's suit against contract vendor for breach of contract for unreasonably withholding consent to resale to another, as potentially confusing or misleading to jury; certified public accountant would have explained potentially adverse tax consequences of vendor's proposals for securing its consent, which had tenuous relevance at best to issues in suit. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

***793** William J. Srstka, Pierre, S.D., for appellant.

***794** Donald E. Covey, Winner, S.D., for appellee.

Before WOLLMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and FRIEDMAN, [FN*] Senior Circuit Judge.

FN* The HONORABLE DANIEL M. FRIEDMAN, United States Senior Circuit Judge for the Federal Circuit, sitting by designation.

WOLLMAN, Circuit Judge.

Ella Freidus appeals from the district court's [FN1] judgment entered upon a jury verdict in favor of the First National Bank of Council Bluffs, Iowa, in Freidus' diversity suit for breach of contract. We affirm.

FN1. The Honorable Donald J. Porter, Chief Judge, United States District Court for the District of South Dakota.

I.

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In 1987, Freidus, a resident of New York, purchased farm land in South Dakota from the bank on a contract for deed. In the summer of 1988, the bank commenced foreclosure because Freidus' annual payment was late. The parties settled the foreclosure action in March 1989. The settlement stipulation increased the interest rate on the contract from 7% to 8.5% and deleted the 60-day grace period on missed payments. Freidus collected a portion of the settlement money paid to the bank from a one-year lease of the land with an option to purchase held by Danielski Farming and Harvesting.

Upon reinstatement of the contract, Freidus requested consent from the bank to sell the land to Danielski as required by paragraph 16 of the contract for deed, which provides in part:

> Assignment. [Freidus] shall not assign this Contract or any interest therein, or any interest of the property purchased hereunder unless [the bank] first consents to such assignment in writing, which consent shall not be unreasonably withheld.

The bank responded to Freidus' request with terms for the sale in an April 20, 1989, letter that proposed that:

> (1) The bank would receive Danielski's down payment in the year of sale, approximately $400,000, and would credit that against the balance due on the contract.
>
> (2) The remaining balance on Freidus' contract would be reamortized to provide for a market rate of interest, not less than 10.5%, and the bank would receive all Danielski's payments until Freidus discharged its obligation to the bank in full.
>
> (3) Freidus would pay the bank a 1% processing fee and reimburse the bank for costs and attorney's fees.

Freidus perceived this proposal as an unreasonable refusal to consent to the sale of the land to Danielski and sued the bank for breach of contract. On May 9, 1989, the bank sent another letter indicating the bank's final position on consent to the sale would allow the interest rate to remain at 8.5% and require half of the down payment in the year of sale.

In August 1989, the parties attempted to settle the litigation through a series of letters. The proposed settlement was conditioned upon completing the sale to Danielski. In December 1989, Danielski refused to close the transaction because of delay and changes to the contract. The case went to trial in March 1990. The jury found that the bank had not withheld consent to the sale unreasonably, and the district court entered judgment for the bank.

II.

Freidus argues that several evidentiary rulings by the district court constituted an abuse of discretion. We give substantial deference to the district court's rulings on the admissibility of evidence, and we will not find error in the absence of a clear showing of abuse of discretion. Harris v. Mallinckrodt, Inc., 886 F.2d 170, 171 (8th Cir.1989).

[1] Freidus first challenges the district court's admission into evidence of two letters, Exhibits 19 and 20, exchanged during settlement negotiations between the parties in August 1989. Under Federal Rule of *795 Evidence 408, documents manifesting an attempt to settle litigation are not **admissible** to prove liability for or invalidity of a claim or its amount. **Rule 408** does not, however, exclude "evidence offered for another purpose, 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.

The bank offered Exhibits 19 and 20 to rebut the testimony of Jacob Freidus, Ella's husband and agent. Jacob Freidus testified that the bank never gave any reason for its conditions on consent to the sale, "even up to this date," meaning to the date of trial. Exhibit 19, a letter from the bank's attorney to Freidus' attorney, explained the financial information the bank required before accepting Danielski as the assignee of Freidus' interest in the land. Exhibit 20, a letter from Freidus' attorney to the bank's attorney, outlined Freidus' understanding of alternative ways to bring Danielski to close the sale and requested concessions from the bank on the interest rate and other terms. The district court reasoned that the letters "negativ[ed] a contention of undue delay" by Freidus, and therefore **admitted** the letters under **Rule 408.**

We conclude that the district court did not abuse its discretion in **admitting** the challenged exhibits. The jury could well find that the letters, when read together, constituted a plausible explanation for the bank's unwillingness to immediately accede to Freidus' requested consent to assignment of her

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interest in the contract. Without question, the letters served to rebut Jacob Freidus' testimony that "even up to this date" the bank had failed to give any reasons for the conditions it had imposed on giving its consent, testimony that left unrebutted would have been devastating to the bank's position that it had not unduly delayed giving its consent. Accordingly, the challenged evidence was properly **admissible** under **Rule 408.**

[2] Freidus next argues that the district court should have **admitted** the testimony of a certified public accountant explaining the potentially adverse tax consequences of the bank's April and May proposals. We agree with the district court that the relevance of such evidence was tenuous at best. Federal Rule of Evidence 403 permits a district court to exclude otherwise admissible evidence if its probative value is substantially outweighed by the danger that the evidence might confuse the issues or mislead the jury. We recognize the wide discretion placed in, and the deference that must be given to, a trial judge in making a ruling under Rule 403, Hicks v. Mickelson, 835 F.2d 721, 726 (8th Cir.1987), and accordingly will not disturb the district court's ruling here.

Finally, Freidus contends that the district court abused its discretion in revising jury instruction 13A and in answering a question from the jury as it did. We disagree with Freidus' contention that the instruction misdirected the jury. In fact, instruction as given is not materially different from Freidus' proposed instruction. Freidus' challenge to the district court's answer to the jury's question is without merit.

The district court's judgment is affirmed.

END OF DOCUMENT

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UNITED STATES of America, Plaintiff-Appellee,
v.
Jack R. PREWITT and Joseph V. Smillie,
Defendants-Appellants.

Nos. 93-3153, 93-3796.

United States Court of Appeals,
Seventh Circuit.

Argued June 9, 1994.

Decided Aug. 29, 1994.

Defendants were convicted in the United States District Court for the Southern District of Indiana, Sarah Evans Barker, Chief Judge, of mail fraud as either principals or aiders and abettors, and they appealed. The Court of Appeals, Shabaz, District Judge, sitting by designation, held that: (1) trial court did not abuse its discretion when it admitted statements defendant made during compromise negotiations with Securities Division of the Indiana Secretary of State's Office, and (2) defendant's prior mail fraud convictions were admissible.

Affirmed.

[1] CRIMINAL LAW ⚿ 1153(1)
110k1153(1)
District court's decisions admitting or excluding evidence will be reviewed for abuse of discretion, giving district court great deference.

[2] CRIMINAL LAW ⚿ 408
110k408
In prosecution of defendant for mail fraud, district court did not abuse its discretion when it admitted statements defendant made during compromise negotiations with Securities Division of the Indiana Secretary of State's Office; rule that evidence of statements made in compromise negotiations is not admissible was not applicable to criminal case and rule governing inadmissibility of pleas, plea discussions and related statements in criminal cases was not applicable. Fed.Rules Evid.Rule 408, 28 U.S.C.A.; Fed.Rules Cr.Proc.Rule 11(e)(6), 18 U.S.C.A.

[3] CRIMINAL LAW ⚿ 408
110k408
Rule providing that evidence of furnishing or accepting valuable consideration in compromising claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of claim or its amount and that evidence of statements made in compromise negotiations is likewise not admissible should not be applied to criminal cases; clear reading of rule suggests that it applies only to civil proceedings, specifically language concerning validity and amount of claim, nothing in rule specifically prohibits receipt of evidence in criminal proceedings concerning statements made at conference to settle claims of private parties, and public interest in prosecution of crime is greater than public interest in settlement of civil disputes. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[4] CRIMINAL LAW ⚿ 369.2(1)
110k369.2(1)
Evidence of prior crimes, wrongs or acts is only admissible if it is a matter in issue other than defendant's propensity to commit the offense charged, it is similar enough and close enough in time to be relevant to the matter in issue, it is clear and convincing, and its probative value is not substantially outweighed by the danger of unfair prejudice. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⚿ 370
110k370
Defendant's prior mail fraud convictions were admissible in his current prosecution for mail fraud because their probative value concerning intent, knowledge and plan was not outweighed by any possible prejudice to defendant. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⚿ 371(1)
110k371(1)
Defendant's prior mail fraud convictions were admissible in his current prosecution for mail fraud because their probative value concerning intent, knowledge and plan was not outweighed by any possible prejudice to defendant. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⚿ 372(14)
110k372(14)
Defendant's prior mail fraud convictions were

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admissible in his current prosecution for mail fraud because their probative value concerning intent, knowledge and plan was not outweighed by any possible prejudice to defendant. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[6] CRIMINAL LAW ⇐ 622.2(3)
110k622.2(3)
Defendant claiming that district court erred in denying his motion for severance must show that district court actually prejudiced him by depriving him of a fair joint trial.

[7] CRIMINAL LAW ⇐ 622.2(3)
110k622.2(3)
To show actual prejudice as result of joint trial of defendant and codefendant, defendant must show that one of the following was present: conflicting and irreconcilable defenses; a massive and complex amount of evidence that makes it almost impossible for jury to separate evidence as to each defendant; codefendant's statement that incriminates defendant; and gross disparity of evidence between defendants.

[8] CRIMINAL LAW ⇐ 622.2(8)
110k622.2(8)
Trial court did not abuse its discretion in denying defendant's motion for severance of his trial from that of codefendant; jury could easily separate evidence as it applied to each defendant, including codefendant's prior convictions, and were so instructed by trial court.

[9] CRIMINAL LAW ⇐ 1139
110k1139
District court's ruling on motion to dismiss indictment is a ruling on a question of law and is subject to de novo review.

[10] CRIMINAL LAW ⇐ 273.1(2)
110k273.1(2)
Plea agreement providing that defendant would not be charged in Northern District of Indiana was not binding on United States Attorney's Office for the Southern District of Indiana and thus, trial court's denial of defendant's motion to dismiss indictment brought by Southern District of Indiana was not an error of law.

[10] CRIMINAL LAW ⇐ 1134(3)
110k1134(3)
Plea agreement providing that defendant would not be charged in Northern District of Indiana was not binding on United States Attorney's Office for the Southern District of Indiana and thus, trial court's denial of defendant's motion to dismiss indictment brought by Southern District of Indiana was not an error of law.

***437** Christina McKee, Asst. U.S. Atty. (argued), Indianapolis, IN, for the U.S.

Lesa L. Johnson, Indianapolis, IN (argued), for Jack R. Prewitt.

Kevin McShane (argued), McShane & Gordon, Indianapolis, IN, for Joseph V. Smillie.

Before MANION and KANNE, Circuit Judges, and SHABAZ, District Judge. [FN*]

FN* The Honorable John C. Shabaz, of the Western District of Wisconsin, is sitting by designation.

SHABAZ, District Judge.

PROCEDURAL HISTORY

On October 28, 1992 defendants Joseph V. Smillie, Jack R. Prewitt and Donald F. Leuck were indicted by a federal grand jury in the United States District Court for the Southern District of Indiana on five counts of mail fraud as either principals or aiders and abettors pursuant to 18 U.S.C. §§ 1342 and 2. The case was assigned to the Honorable Sarah Evans Barker, United States District Judge.

The motion of defendant Jack R. Prewitt to dismiss the indictment against him was denied by the district court on March 16, 1993. The motion of defendant Joseph V. Smillie to sever his trial was denied on January 21, 1993, renewed on March 19, 1993, and once again denied on March 22, 1993.

Trial commenced March 22, 1993, and the jury returned a verdict of guilty on all counts on March 26, 1993. On August 11, 1993 Prewitt filed a motion to vacate convictions and/or motion to dismiss indictment which was denied by the district court on August 26, 1993. Defendants Smillie and Prewitt appeal their convictions.

***438** FACTS

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Defendant Jack R. Prewitt was indicted on June 6, 1988 in the United States District Court for the Northern District of Indiana on charges of mail fraud and filing a false tax return in Case No. S CR 88-37. On March 8, 1990, he was indicted in said district on mail fraud charges in Case No. S CR 90-11. On May 2, 1990 he pled guilty to two counts of mail fraud and one count of filing a false tax return pursuant to a plea agreement which contained the following language:

> The United States Attorney's Office for the Northern District of Indiana agrees that no further charges will be brought against me in the Northern District of Indiana arising out of my dealings in Mid-Continent, the Riley Agency or Chubb Insurance Group or any other affiliated companies.

On September 11, 1990 Thomas O. Plouff, Assistant United States Attorney for the Northern District of Indiana, advised defendant's attorney Patrick A. Tuite that the United States Attorney's Office for the Southern District of Indiana was investigating alleged criminal conduct by defendant Prewitt that victimized individuals in both the Northern and Southern Districts of Indiana. Plouff stated that his office would abide by the plea agreement and not prosecute defendant Prewitt in the Northern District of Indiana for any of this activity. Postal Inspector Thomas Burnham was employed in Indianapolis, Indiana, and investigated defendant Prewitt's activities in both the Northern and Southern Districts of Indiana.

On October 22, 1990 defendant Prewitt was convicted in the United States District Court for the Northern District of Indiana for two counts of mail fraud and one count of filing a false tax return pursuant to his aforesaid guilty plea. He was sentenced to concurrent prison terms of three years on the mail fraud counts and a sentence of three years probation on the tax count.

In 1987 defendant Jack V. Smillie founded Sterling American Financial Group, Inc. (Sterling), a corporation intended to oversee a group of businesses related to the insurance industry. Between December 1989 and April 1990 defendant Smillie, defendant Prewitt and Donald F. Leuck made a series of sales presentations to prospective investors in Sterling.

The Securities Division of the Indiana Secretary of State's Office began an investigation of Sterling in March 1990. The Division issued a cease and desist order against the defendants and Sterling on April 2, 1990. After receiving this order Sterling ceased doing business and commenced settlement and compromise efforts with the Securities Division. Defendant Smillie was interviewed by investigators from the Division on May 15, 1990 and July 2, 1990.

According to the October 28, 1992 indictment defendant Smillie withdrew approximately $281,000 of the $282,000 which Sterling had received from investors between December 1989 until May 1990. The majority of these funds were used for the personal benefit of defendants Smillie, Prewitt and Leuck.

At trial investors testified concerning their interactions with Sterling. Postal Inspector Burnham offered a number of financial records into evidence. Robert Lott, an Investigator for the Indiana Securities Division, testified concerning statements made to him by defendant Smillie on May 15, 1990 and July 2, 1990. At the first interview defendant Smillie stated that only operating expenses had been paid from the Sterling bank account. During the July 2, 1990 interview defendant Smillie acknowledged that a number of Sterling checks represented payments for his own use and benefit for a total of approximately $32,000.

Both defendants testified at trial. The district court admitted certified copies of the judgment and commitment orders of defendant Prewitt's prior mail fraud convictions with a limiting instruction that they should be considered only against defendant Prewitt and only on the question of his intent, plan, knowledge or absence of mistake or accident.

William Stalnaker, the President of Prime Financial Partners in Phoenix, Arizona, testified for the defense. He confirmed that he had discussions with Sterling about a business relationship designed to market 419 ***439** trusts. The district court did not allow Stalnaker to testify to that commission which would have been earned had binding contracts for the purchase of the trust been entered into. The court concluded such testimony would be too speculative.

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MEMORANDUM

[1] Defendants Smillie and Prewitt and appeal their convictions challenging evidentiary decisions made by the district court. The district court's decisions admitting or excluding evidence will be reviewed for abuse of discretion giving the district court great deference. United States v. Wilson, 973 F.2d 577, 580 (7th Cir.1992).

[2] Defendant Smillie principally contends that the district court abused its discretion in admitting his statements made during compromise negotiations with the Securities Division in violation of Rule 408, Federal Rules of Evidence. The district court admitted statements made on May 15 and July 2, 1990 by defendant Smillie to investigators for said division.

> Rule 408 provides in pertinent part 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.

[3] The clear reading of this rule suggests that it should apply only to civil proceedings, specifically the language concerning validity and amount of a claim. Rule 11(e)(6) of the Federal Rules of Criminal Procedure is of no help to this defendant. It applies to the inadmissibility of pleas, plea discussions, and related statements in criminal cases.

Nothing in Rule 408 specifically prohibits the receipt of evidence in criminal proceedings concerning the admissions and statements made at a conference to settle claims of private parties. United States v. Gonzalez, 748 F.2d 74, 78 (2d Cir.1984). The public interest in the prosecution of crime is greater than the public interest in the settlement of civil disputes. Id. Rule 408 should not be applied to criminal cases. United States v. Baker, 926 F.2d 179 (2d Cir.1991). The trial court did not abuse its discretion when admitting defendant Smillie's statements made to Investigator Lott on May 15 and July 2, 1990.

Defendant Prewitt claims that the district court abused its discretion in excluding certain testimony by witness Stalnaker. Defendant Prewitt asked Stalnaker what commission would have been earned had binding contracts been entered into for the purchase of the trust. The district court did not allow this testimony because it would be speculative. This was not an abuse of discretion.

Defendant Prewitt claims that his prior mail fraud convictions in the Northern District of Indiana should not have been admitted. Rule 404(b), Federal Rules of Evidence provides as follows:

> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent preparation, plan, knowledge, identity, or absence of mistake or accident ...

[4] Evidence of prior crimes, wrongs or acts is only admissible if:

> (1) [I]t is a matter in issue other than the defendant's propensity to commit the offense charged; (2) it is similar enough and close enough in time to be relevant to the matter in issue; (3) it is clear and convincing; and (4) its probative value is not substantially outweighed by the danger of unfair prejudice.

United States v. Lennartz, 948 F.2d 363, 366 (7th Cir.1991); United States v. Shackleford, 738 F.2d 776, 779 (7th Cir.1984).

Pursuant to proffer and balancing the district court admitted defendant Prewitt's two prior convictions of mail fraud to prove intent, ***440** knowledge and plan. The jury was provided a limiting instruction upon its admission.

[5] The prior convictions were admissible because their probative value concerning intent, knowledge and plan was not outweighed by any possible prejudice to defendant Prewitt. United States v. Torres, 977 F.2d 321, 328 (7th Cir.1992). The trial court did not abuse its discretion in admitting defendant Prewitt's prior convictions.

[6] Defendant Smillie further argues that the district court erred in denying his renewed motion for severance. He must show that the district court

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actually prejudiced him by depriving him of a fair joint trial. United States v. Hamilton, 19 F.3d 350 (7th Cir.1994).

[7][8] Defendant Smillie argued for severance because the evidence of Prewitt's two prior federal convictions for mail fraud was so prejudicial as to deprive him of a fair trial. To show actual prejudice defendant must show that one of the following was present:

> (1) conflicting and irreconcilable defenses; (2) a massive and complex amount of evidence that makes it almost impossible for the jury to separate evidence as to each defendant; (3) a codefendant's statement that incriminates the defendant; and (4) a gross disparity of evidence between the defendants.

United States v. Clark, 989 F.2d 1490, 1499 (7th Cir.1993). Defendant has not shown any of these circumstances to be present. The jury could easily separate the evidence as it applied to each defendant including defendant Prewitt's prior convictions and were so instructed by the district court. The trial court did not abuse its discretion in denying defendant Smillie's motion for severance.

[9] Defendant Prewitt principally argues that the district court erred in denying his motion to dismiss the indictment. The district court's ruling on a motion to dismiss the indictment is a ruling on a question of law and is subject to de novo review. United States v. Furlett, 974 F.2d 839, 841 (7th Cir.1992).

Defendant Prewitt argues that his plea agreement in the Northern District of Indiana precluded the charges from being brought against him in this case.

On its face the plea agreement is unambiguous. It bound only the United States Attorney's Office for the Northern District of Indiana from bringing charges in the Northern District of Indiana arising from defendant Prewitt's dealings with Mid Continent, the Riley Agency or Chubb Insurance Group or any other affiliated companies.

Defendant Prewitt argues that any other affiliated companies includes Sterling. Whether or not any other affiliated companies includes Sterling is not material to whether the plea agreement precluded the Southern District of Indiana from charging defendant Prewitt. The agreement precluded only prosecution in the Northern District of Indiana.

The September 11, 1990 letter written by Thomas O. Plouff prior to sentencing of Prewitt in the Northern District of Indiana clarifies the extent of the plea agreement. It advises defendant's counsel of the pending investigation in the Southern District of Indiana, his intent to abide by the plea agreement and not to prosecute defendant for any of the alleged criminal activity in the Northern District of Indiana. Prior to sentencing defendant Prewitt knew there was a strong possibility of future prosecution in the Southern District of Indiana and that the plea agreement only precluded Northern District of Indiana prosecutions.

Defendant Prewitt emphasizes that Postal inspector Thomas Burnham investigated both cases and that some of the activity for which he was indicted in the Southern District of Indiana occurred in the Northern District of Indiana. The record indicates, however, that three investors resided in the Southern District of Indiana and the charges in the Southern District arose from an investigation distinct from the Northern District of Indiana investigation. The plea agreement provided that defendant Prewitt would not be charged in the Northern District of Indiana for any of his dealings with Mid-Continent, the Riley Agency or Chubb Insurance Group or any other affiliated companies. ***441** The government complied with this agreement.

[10] The agreement did not preclude state charges or charges in other federal district courts. The agreement was not binding on the United States Attorney's Office for the Southern District of Indiana. See United States v. Ingram, 979 F.2d 1179, 1185 (7th Cir.1992), cert. denied, --- U.S. ---, 113 S.Ct. 1616, 123 L.Ed.2d 176 (1993). The denial of defendant's motion to dismiss the indictment was not an error of law.

Defendant Prewitt contends that the trial court erred by denying his August 11, 1993 motion to vacate the convictions and dismiss the indictment because the conduct used to enhance his offense level was utilized in both the Northern District of Indiana and here in violation of United States v. McCormick, 992 F.2d 437 (2d Cir.1993). The Northern District of Indiana conviction was not a sentencing guidelines case. The district court properly denied Prewitt's motion to vacate the

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convictions and dismiss the indictment because defendant did not suffer any double jeopardy violations. He was convicted and sentenced for separate crimes.

CONCLUSION

The district court did not abuse its discretion or err as a matter of law. Accordingly, the convictions of defendants Smillie and Prewitt are

AFFIRMED.

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INSTA-CITE

CITATION: 34 F.3d 436
=> 1 **U.S. v. Prewitt,** 34 F.3d 436, 41 Fed. R. Evid. Serv. 205 (7th Cir.(Ind.), Aug 29, 1994) (NO. 93-3153, 93-3796)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
23 C.J.S. Criminal Law Sec.889 Note 22 (Pocket Part)

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Citation | Rank(R) | Page(P) | Database | Mode
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(Cite as: 869 F.Supp. 1315)

Rob KOLSON, et al., Plaintiffs,
v.
Rajan V. VEMBU, et al., Defendants.
No. 93 C 5360.
United States District Court,
N.D. Illinois,
Eastern Division.
Nov. 28, 1994.
Decision Supplementing Opinion
Nov. 30, 1994.

Lenders brought suit against corporate guarantor of underlying indebtedness and guarantor's principal for their alleged breach of guaranty agreements and fraud in connection with loans. Plaintiffs also sought to hold corporate principal personally liable by piercing corporate veil. On party's cross-motions for summary judgment, the District Court, Shadur, J., Senior District Judge, held that: (1) parol evidence was not admissible to contradict express terms of continuing, absolute and unconditional guaranty; (2) corporate veil would be pierced in order to hold principal personally liable on guaranty; but (3) material questions of fact as to whether lenders justifiably relied on information contained in private placement memorandum, without taking steps to

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(Cite as: 869 F.Supp. 1315, *1331)

interest of completeness this Court has determined that genuine issues of material fact exist as to the precise time at which Kolson and Weinsteins discovered or should have discovered that they had been wronged. Hence the Vembu-Robex motion for summary judgment on the basis of the Illinois statute of limitations for fraud actions would have had to be denied in all events.

***1332** SUPPLEMENT TO MEMORANDUM OPINION AND ORDER [FN1]

FN1. Except for its recapitulation of the shorthand references to the parties litigant, this supplement will not repeat--but will utilize--defined terms in the Opinion.

This Court's November 28, 1994 memorandum opinion and order (the "Opinion") (1) determined that Rajan Vembu ("Vembu") and Robex USA, Ltd. ("Robex") were jointly and severally liable to Rob Kolson ("Kolson") and Eric and Irwin Weinstein (collectively "Weinsteins") in the principal sum of $150,000 plus interest and (2) directed the parties to submit interest calculations by November 29, to permit the entry of a final judgment on November 30. [FN2] Each side's counsel has timely provided such calculations, and this supplement to the Opinion reflects the resolution of their competing positions.

FN2. That timetable was not at all as hurried as the dates in the text

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would suggest. On November 23 this Court's chambers had advised counsel for each side of the decision that this Court had reached as to liability (at that time the lengthy Opinion was in the typing process) and also told counsel of their need to submit the interest calculations. Because of the intervention of the Thanksgiving holiday it was November 28 before the Opinion became available for signing and distribution.

Because the five promissory notes at issue have always been available to both sides (and they formed part of the record on the cross-motions for summary judgment), it is hardly surprising that the parties have not quarreled as to the notes' respective principal amounts and dates of issue, their collective extended date of maturity (December 15, 1989) and their prematurity (10% per annum) and postmaturity (13% per annum) interest rates. Instead, the litigants' interest calculations differ by more than $75,000 solely as a consequence of their dispute as to whether the notes bear only simple interest or interest compounded annually.

Neither side had even mentioned that facet of the interest calculation in their briefing of the summary judgment motions (indeed, the Kolson-Weinsteins GR 12(M) statement did not even include an assertion as to the amount that they claimed to be due (including interest), although their Mem. 23 did spell out the principal and interest figures on a basis that was derived via the compound

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interest route). Accordingly it was this Court that addressed the subject for the first time (Opinion 1331 n. 31), by correctly stating the Illinois rule that simple interest would apply in the absence of an agreement for compounding. [FN3]

FN3. Each note's provision that speaks of an interest rate simply in "per annum" terms is intrinsically ambiguous, for that could reflect either an old-style simple interest calculation or the more modern recognition that the true cost represented by the loss of the use of money requires compounding. What Opinion 36 n. 31 referred to as the Illinois rule is like most default rules in the law--it reflects what the law will presume in the absence of an express agreement between the parties.

Now counsel for Kolson and Weinsteins bring forward two documents that they say evidence just such an agreement:

1. On September 10, 1991 Kolson wrote a letter to Sylvester Whey, stating that he was writing at Vembu's request asking for a schedule of proposed debt reduction. After setting out the principal amounts and dates of the five notes, Kolson said in part:

The principal amount totals $150,000. The notes accrue interest at a rate of 10% compounded annually until December 15, 1989, and at a rate of 13%

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thereafter.

Immediately after that Kolson stated the amount of his calculations "which you are welcome to check"--and those calculations plainly reflected a fully compounded figure.

2. Another letter, this one addressed to Kolson and Weinsteins on November 11, 1992, was written by Sylvester Whey's Madison, Wisconsin lawyer Larry Libman of the Axley Brynelson law firm (with copies of the letter shown as having been sent to both Vembu and Sylvester Whey). That letter reflected and enclosed a proposed agreement between Sylvester Whey on the one hand and Kolson and Weinsteins on the other, which acknowledged the existing default in payment of the five notes and set out a proposed arrangement for the future liquidation of that obligation by payment of a percentage of Sylvester Whey's future cash flow. Among the recitals to that agreement was a statement of the then outstanding balance ***1333** that clearly reflected far more than a simple interest calculation--indeed, the figure was obviously the product of compounding:

> WHEREAS, as of October 31, 1992, the total outstanding balance, including principal and accrued interest, which is owed to the Lenders by SWPI on the Loan is $290,000.00 (the "Loan Balance")....

Counsel for Vembu and Robex counter that the documents on which Kolson and Weinsteins seek to rely cannot represent any agreement between the parties with

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regard to interest (Mem. 2). They point out that Kolson's letter is purely unilateral and that the document that had been enclosed with the letter from Sylvester Whey's lawyer was a "proposed settlement agreement [that] is not signed by any party involved in this litigation and must not be considered in determining whether the interest calculation be simple interest or compounded annually" (id. 2-3).

There is no dispute as to the authenticity of the two documents--where the parties part company is rather as to legal effect of those documents. As for the first document, Vembu and Robex are entirely correct: It sets out only Kolson-Weinsteins' understanding and intention (Kolson was also acting as the agent for Weinsteins in writing the letter), so it could not by itself constitute the necessary agreement. But as for the second document, Vembu and Robex are just as clearly wrong: It plainly satisfies the need for a showing of Sylvester Whey's agreement that the notes called for compound interest.

Fed.R.Evid. ("Rule") 408 is the well-known embodiment, plus an extension, of the common law rule that sought to encourage the settlement of disputes by rendering settlement offers as such inadmissible to show liability for, or the amount of, a claim. Where the second sentence in the following quotation from Rule 408 goes beyond the common law rule is in also excluding from admissibility statements that are made during negotiations for compromise: [FN4]

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FN4. See 2 Jack Weinstein & Margaret Berger, Weinstein's Evidence P 408 [03], at 408-24 (1994).

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.

Where the Vembu-Robex argument goes astray in its implicit invocation of Rule 408 (although their current memorandum cites no authority in support of their position, they obviously seek to rely on the rule of law that excludes evidence of the types described in the Rule) is that in this instance neither the validity nor the amount of the claim was in dispute (thus the proposed agreement's "WHEREAS" recital that immediately preceded the one quoted earlier in this supplement said "for various reasons, [Sylvester Whey] has been unable to pay the Loan as required under the Loan Documents and is technically in default under the Loan Documents"). Instead the parties' then-active settlement negotiations dealt only with the time and mechanism for payment of the undisputed claim. In that respect the last two sentences in the following

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quotation from 2 Weinstein & Berger P 408[01], at 408-12 to 408-13 (footnotes omitted) might well have been written for this very case (see also the cases cited there):

The Advisory Committee Note also states that "the **effort** ... to **induce** a **creditor** to **settle** an **admittedly** due amount for a lesser sum" would not further the underlying policy of the rule and is therefore not protected. Yet a careful distinction must be made between a frank disclosure during the course of negotiations--such as "All right, I was negligent. Let's talk about damages" (inadmissible)--and the less frequent situation where both the validity of the claim and the amount of damages are admitted--"Of course, I owe you the money, but unless you're willing to settle for less, you'll have to sue me for it" (admissible). Likewise, an admission of liability made during negotiations concerning the time of payment and involving neither the ***1334** validity nor amount of the claim is not within the rule's exclusionary protection.

Hence the earlier-quoted "WHEREAS" recital as to the total outstanding balance, including accrued interest, amounting to $290,000 comes squarely within the category of statements that are defined as nonhearsay and are rendered admissible by Rule 801(d)(2)(D):

The statement is offered against a party and is ... (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or

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employment, made during the existence of the relationship....

Attorney Libman was unquestionably Sylvester Whey's agent, and his statements were equally unquestionably made in the scope and during the existence of the agency relationship. [FN5] And the key statement here, the amount of accrued interest, was not made in the course of an offer of settlement but was rather a recital of an acknowledged fact--and so it represents a classic example of an admission (what at common law used to be termed the "admission against interest" exception to the hearsay rule, but has now been expanded by the Rule 801(d)(2) definition of nonhearsay). This Court is then entitled to consider that admission, which binds Vembu and Robex (see n. 5).

FN5. Robex as guarantor of Sylvester Whey's obligations is subject to liability that is coterminous with Sylvester Whey's. And Vembu's derivative obligation, either through piercing Robex' corporate veil or as that corporation's alter ego, is of course exactly the same. Hence the earlier-quoted argument by the Vembu-Robex lawyer that the 1992 document was not signed by either Vembu or Robex is entirely empty: They stand in the shoes of Sylvester Whey, and that corporation was and is bound by its lawyer's admission. Thus Vembu and Robex are equally bound.

In summary, Kolson and Weinsteins have demonstrated the necessary agreement of

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the parties for the compounding of interest. Because Vembu and Robex have not contested the accuracy of the Kolson-Weinsteins calculations if their legal theory is correct, this Court orders that judgment be entered in favor of Kolson and Weinsteins and against Vembu and Robex jointly and severally in the sum of $150,000 in principal plus $221,437.04 in interest, for a total judgment amount of $371,437.04.

END OF DOCUMENT

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INSTA-CITE

CITATION: 869 F.Supp. 1315

Direct History

=> 1 **Kolson v. Vembu,** 869 F.Supp. 1315 (N.D.Ill., Nov 28, 1994)
(NO. 93 C 5360), opinion supplemented (Nov 30, 1994)

Related References

2 Kolson v. Vembu, 1993 WL 348574 (N.D.Ill., Sep 08, 1993)
(NO. 93 C 5360)

3 Kolson v. Vembu, 1993 WL 515472 (N.D.Ill., Nov 24, 1993)
(NO. 93 C 5360)

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Citation | Rank(R) | Page(P) | Database | Mode
598 F.2d 984 | R 19 OF 37 | P 1 OF 33 | ALLFEDS | Page
4 Fed. R. Evid. Serv. 567
(Cite as: 598 F.2d 984)

UNITED STATES of America, Plaintiff-Appellee,
v.
Donald E. MEADOWS, Defendant-Appellant.
No. 78-5572.
United States Court of Appeals,
Fifth Circuit.
July 13, 1979.

Defendant was convicted before the United States District Court for the Northern District of Georgia, Richard C. Freeman, J., of obtaining by fraud funds which were the subject of a grant pursuant to the Comprehensive Employment and Training Act, and he appealed. The Court of Appeals, Tuttle, Circuit Judge, held that trial court committed reversible error in submitting jury instruction which, applying law to the facts, stated merely that "fraud may result from statements of half-truths or the concealment of material facts," without more, since trial court thereby understated principal of law by failing to remind jury of the intent required to convict.

Reversed and remanded.

Godbold, Circuit Judge, concurred in part and dissented in part and filed opinion.

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Control when he continued to claim the extra paychecks at City Hall for several months, and that the City relied on this misrepresentation by continuing to issue the duplicate checks. It would not be unreasonable for the jury to assume that if Meadows had left the checks unclaimed, the city would have realized the error and stopped issuing the checks. Alternatively, the jury could have found that, by failing to inform the proper city officials that he was no longer working at the Bureau of Pollution Control and was receiving paychecks from Black World, Meadows concealed a material fact; thus ensuring that the city would continue to issue the paychecks and that he would continue to benefit from the city's initial mistake. Although it is clear that Meadows made no false inducements to obtain the extra paychecks initially, his conduct in continuing to pick them up with knowledge of the obvious error came sufficiently within the broad sweep of 18 U.S.C. s 655 to go to the jury.

IV. **RULE 408** OFFER TO COMPROMISE.

[3] Meadows contends that the trial court committed reversible error by **admitting** certain statements he made to a government official when he was confronted ***989** with the fact of the overpayments, on the grounds that the statements were part of compromise negotiations and should have been excluded on the basis of Rule 408, Federal Rules of Evidence.[FN3] We disagree.

FN3. Rule 408 provides:

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> 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 purpose, 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.

These statements occurred in an interview between Meadows and a program analyst for the Labor Department named Goldsmith. Goldsmith had received a memorandum from Meadows' CETA supervisor with Black World, which indicated that Meadows had complained because he had not received his full bonus check. Goldsmith reviewed the records and found that while Meadows' Black World bonus check was deficient, Meadows had received a full bonus check from the Bureau of Pollution Control, and moreover, had been carried simultaneously on two departments' payrolls for several months. Based on these discoveries,

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Goldsmith decided to hold Meadows' checks and when Meadows came to Goldsmith's office, he was confronted with the problem. When testifying for the government on direct examination, Goldsmith stated that Meadows' immediate response was an admission that he knew after the first check that there was some sort of administrative error causing the duplicate checks to be issued, but declared that "if you were stupid enough or somebody else makes the mistake, I felt that I could benefit from it." On cross-examination, the defense counsel brought out that Meadows subsequently agreed to a repayment schedule.

Although the government contends that Rule 11(b), Federal Rules of Criminal Procedure, rather than **Rule 408,** Federal Rules of Evidence, governs the issue since this is a criminal case, we assume the applicability of **Rule 408** to govern the **admission** of related civil settlement negotiations in a criminal trial. F.R.Evid. 1101(b), See Ecklund v. United States, 159 F.2d 81 (6th Cir. 1947). We do not, however, find any violation of the rule. We do not feel that Meadows' remark to Goldsmith that he knew the checks were issued by mistake was in any sense an offer to compromise a claim. The conversation occurred during an informal investigation of the situation; thus, there was no claim to compromise at the time the two first met. The prosecution merely made use of a direct admission with respect to Meadows' intent, which is, of course, probative evidence of his state of mind. Although the testimony concerning the repayment schedule might otherwise have been barred by rule 408 as a settlement

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offer, this testimony was solicited by the defense counsel on cross-examination. We reject the appellant's contention that it was "forced" to introduce this testimony of the repayment schedule; it appears to us to be a calculated, tactical defense decision.

V. SUPPLEMENTAL CHARGE.

As we stated earlier, the jury requested additional instructions on the definition of fraud during the course of its deliberations. In response, the court merely repeated the small portion of its original charge describing the law of fraud and its application to these facts. The supplemental instructions contained no reference to the burden or quantum of proof, presumption of innocence, or any other matter necessarily favorable to the defendant. The defense counsel objected and requested some additional balancing instruction, but the trial court refused. The jury returned its verdict of guilty within fifteen minutes. Since the case will have to be retried, it may be helpful to comment on the procedure followed.

***990** It is well-established that in giving additional instructions to a jury; particularly in response to inquiries from the jury, a court must be especially careful not to give an unbalanced charge. Although the failure to give any presumption of innocence instruction does not mandate reversal in all criminal appeals, Kentucky v. Whorton, --- U.S. ----, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979), the particular significance of a supplemental charge when a

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INSTA-CITE

CITATION: 598 F.2d 984
=> 1 **U. S. v. Meadows,** 598 F.2d 984, 4 Fed. R. Evid. Serv. 567 (5th Cir.(Ga.), Jul 13, 1979) (NO. 78-5572)
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UNITED STATES of America, Appellee,
v.
Albert BAKER and Paul Mazzilli, Defendants,
Paul Mazzilli, Defendant-Appellant.

No. 500, Docket 89-1320.

United States Court of Appeals,
Second Circuit.

Argued Feb. 12, 1991.

Decided Feb. 13, 1991.

Defendant was convicted of offenses arising out of his possession of stolen electronic equipment following a trial in the United States District Court for the Eastern District of New York, and he appealed. The Court of Appeals, 848 F.2d 384, reversed on grounds of improper cross-examination by the trial judge. On remand, the defendant was convicted in the District Court, Joseph M. McLaughlin, J., of one count of possessing stolen goods and one count of receiving stolen goods, and he appealed. The Court of Appeals held that: (1) evidentiary rule dealing with compromise evidence applied only to civil litigation and did not bar evidence of defendant's prearrest attempt to make a "deal" involving possible criminal charges; (2) evidence was sufficient to support finding that defendant knew that merchandise was stolen; and (3) Government was properly allowed to present rebuttal evidence that invoices produced by defendant for stolen items could be purchased by the general public and were not documents from a real company.

Affirmed in part, vacated in part and remanded.

[1] CRIMINAL LAW ⇐ 408
110k408
Evidentiary rule precluding admission of attempts to compromise a claim applied only to civil litigation and did not bar evidence of a defendant's prearrest attempt to make a "deal" involving possible criminal charges. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[2] RECEIVING STOLEN GOODS ⇐ 8(4)
324k8(4)
Evidence that defendant could identify only as "Joey" the person from whom he purchased stolen electronic equipment on extremely favorable terms, that defendant was unaware of any invoice for the goods until an invoice was produced sometime after the agents discovered the stolen goods in his father's basement, and the fact that he tried to arrange a "deal" with the FBI when confronted by government investigators, was more than sufficient to allow the jury to conclude beyond reasonable doubt that defendant knew that merchandise was stolen.

[3] CRIMINAL LAW ⇐ 683(2)
110k683(2)
Permitting Government to present evidence in rebuttal that invoices of the type defendant produced for stolen goods could be purchased by the general public and were not documents from a real company bore directly on the issues raised by invoice introduced by defendant charged with possession of stolen goods and thus was a proper exercise of trial court's discretion.

***179** Roger Bennet Adler, New York City, for defendant-appellant.

Jack Wenik, Asst. U.S. Atty. (Andrew J. Maloney, U.S. Atty., E.D.N.Y., Emily Berger, Asst. U.S. Atty., of counsel), Brooklyn, N.Y., for appellee.

Before VAN GRAAFEILAND, WINTER and WALKER, Circuit Judges.

PER CURIAM:

Paul Mazzilli appeals from a judgment entered after a jury trial in the Eastern ***180** District convicting him of one count of possessing stolen goods, in violation of 18 U.S.C. § 659, and one count of receiving stolen goods, in violation of 18 U.S.C. § 2315. This trial was his second on the present indictment, his previous conviction having been reversed on grounds of improper cross-examination by the first trial judge. United States v. Mazzilli, 848 F.2d 384 (2d Cir.1988). On this appeal, he asserts multiple grounds for reversal, all but one of which are meritless. The government concedes that his conviction on both counts is multiplicitous. We therefore vacate the Section 2315 conviction and remand for resentencing on the Section 659 conviction alone.

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In November 1986, two truck trailers full of portable stereos, televisions, telephones, and electronic toys destined for North Carolina were stolen from a trucking yard in East Brunswick, New Jersey. Acting on information received from Albert Baker, the FBI began to investigate Mazzilli, a New York City firefighter and operator of a small video rental store in Brooklyn, in connection with the missing electronic equipment.

Special Agents Andrew Conlin and Coleen Nichols visited the home of Mazzilli's father in Brooklyn, where they encountered Mazzilli himself. Upon questioning, Mazzilli led the agents to the basement of the house, which was filled with boxes of the stolen electronic equipment. As the agents seized custody of the goods, Mazzilli asked Nichols whether she knew an FBI agent named George Hanna. After Nichols answered affirmatively, Mazzilli explained that he had heard that "Hanna has made deals for other people in the past" and "has a reputation in the neighborhood for making deals." Mazzilli proposed to Nichols that she "speak with George to see if ... maybe we can get together and make some sort of deal for myself."

[1] Mazzilli contends that the district court erred in admitting Nichols's testimony about what Mazzilli said to her. He claims that Fed.R.Evid. 408 precludes admission of his statements to Nichols. We disagree.

> Rule 408 states:
> 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 purpose, 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.

We believe it fairly evident that the Rule applies only to civil litigation. The reference to "a claim which was disputed as to either validity or amount" does not easily embrace an attempt to bargain over criminal charges. Negotiations over immunity from criminal charges or a plea bargain do not in ordinary parlance constitute discussions of a "claim" over which there is a dispute as to "validity" or "amount." Moreover, Fed.R.Crim.P. 11(e)(6) explicitly addresses the exclusion of plea bargain negotiations and limits the statements excluded to those made to an "attorney" for the government. The very existence of Rule 11(e)(6) strongly supports the conclusion that Rule 408 applies only to civil matters. We therefore hold that Rule 408 did not preclude testimony as to Mazzilli's statements to Nichols.

[2] We may quickly dispose of Mazzilli's other arguments. The evidence that Mazzilli could identify only as "Joey" the person from whom he purchased the stolen electronic equipment on extremely favorable terms, that he was unaware of any invoice for those goods until a "Global Imports" invoice was produced sometime after ***181** the agents discovered the stolen goods in his father's basement, and that he tried to arrange a "deal" with the FBI when confronted by the government investigators, was more than sufficient to allow the jury to conclude beyond a reasonable doubt that Mazzilli knew that the merchandise was stolen. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

[3] Permitting the government to present evidence in rebuttal that "Global Imports" invoices could be purchased by the general public and were not documents from a real company was within the discretion of the trial judge, see United States v. Casamento, 887 F.2d 1141, 1172 (2d Cir.1989), cert. denied, --- U.S. ----, 110 S.Ct. 1138, 107 L.Ed.2d 1043 (1990), because the rebuttal bore directly on the issues raised by the invoice introduced by Mazzilli. See United States v. Neary, 733 F.2d 210, 220 (2d Cir.1984). None of Mazzilli's claims of prosecutorial misconduct could have affected the outcome of the case. Finally, not only was a conscious avoidance charge proper, but, given Mazzilli's claimed ignorance that the goods were stolen in the face of such highly suspicious circumstances, this was a paradigmatic case in which to give such an instruction. See United States v. Mang Sun Wong, 884 F.2d 1537, 1541-43 (2d

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Cir.1989), cert. denied, --- U.S. ----, 110 S.Ct. 1140, 107 L.Ed.2d 1045 (1990).

The government concedes, however, that Mazzilli's convictions for possession of stolen goods and receiving stolen goods are multiplicitous and should be merged. See United States v. DiGeronimo, 598 F.2d 746, 749-51 (2d Cir.), cert. denied, 444 U.S. 886, 100 S.Ct. 180, 62 L.Ed.2d 117 (1979). We thus affirm the conviction for possession under Section 659, vacate the conviction for receipt under Section 2315, and remand the case for resentencing on the Section 659 conviction alone. See United States v. Sappe, 898 F.2d 878, 882 (2d Cir.1990).

END OF DOCUMENT

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INSTA-CITE

CITATION: 926 F.2d 179

Direct History

1 U.S. v. Mazzilli, 848 F.2d 384, 25 Fed. R. Evid. Serv. 1328
(2nd Cir.(N.Y.), Jun 06, 1988) (NO. 744, 87-1438)
Appeal After Remand

=> 2 **U.S. v. Baker,** 926 F.2d 179, 32 Fed. R. Evid. Serv. 414
(2nd Cir.(N.Y.), Feb 13, 1991) (NO. 500, 89-1320)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
23 C.J.S. Criminal Law Sec.889 Note 22 (Pocket Part)
76 C.J.S. Receiving Stolen Goods Sec.29 Note 41

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UNITED STATES of America, Plaintiff,
v.
Charles MCCORKLE and Katherine McCorkle, Defendants.

No. 93 C 6528.

United States District Court, N.D. Illinois, Eastern Division.

July 7, 1994.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

***1** The United States ("the government") sues Charles McCorkle ("Charles") and his wife, Katherine McCorkle ("Katherine"), (collectively "the McCorkles") to collect Charles' alleged outstanding income tax liabilities for the years 1966, 1967 and 1968. Both the McCorkles and the government move in limine to exclude certain evidence at trial.

The McCorkles move in limine to bar evidence concerning (1) Charles' 1975 misdemeanor conviction for failure to file income tax returns; (2) rescission of the 1986 settlement agreement between Charles and the government for mutual mistake of fact; (3) the civil action captioned United States of America v. Charles McCorkle, et al., 84 C 4674 (N.D.Ill.); (4) the testimony of Robert Kern; (5) the testimony of any government agent or employee regarding Charles' alleged assignment of income to Katherine; and (6) Katherine's income and lifestyle from 1986 to date. The government moves in limine to bar the McCorkles from offering any evidence or making any arguments with respect to the knowledge, opinions, or conclusions of Internal Revenue Service ("IRS") personnel.

DISCUSSION

Motions in limine are generally disfavored. This court excludes evidence on a motion in limine only if the evidence is clearly not admissible for any purpose. See Hawthorne Partners v. AT & T Technologies, Inc., 831 F.Supp. 1398, 1400 (N.D.Ill.1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. Id. at 1401. Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that without the context of trial the court is unable to determine whether the evidence in question should be excluded. See United States v. Connelly, 874 F.2d 412, 416 (7th Cir.1989). Both the McCorkles' and the government's motions in limine fail to meet this rigorous standard and must be denied.

First, the McCorkles seek to exclude any mention of Charles' 1975 criminal conviction for failure to file federal income taxes. Although Charles' conviction would be admissible since it involved dishonesty or false statements, see Fed.R.Evid. 609(a)(2), mention of the conviction is barred by Fed.R.Evid. 609(b) because the conviction is more than ten years old. However, Charles transferred his 80 percent stock interest in McCorkle Reporters to Katherine in 1975, the same year as his criminal conviction. Thus, the criminal conviction may be admissible under Fed.R.Evid. 404(b), which allows evidence of other crimes, because it may be probative of Charles' motive or plan to transfer his assets to Katherine in order to reduce his liability to the government.

Second, the McCorkles seek to prevent the government from advancing the legal theory that the settlement agreement is void due to mutual mistake. The McCorkles contend that the government's mutual mistake theory is new, and they profess uncertainty regarding the factual basis for this legal theory. However, the McCorkles were on notice that mutual mistake is a ground for rescinding the settlement agreement. Under 26 U.S.C. § 7122, both parties are bound by a compromise agreement except upon a showing of "(1) falsification or concealment of assets by the taxpayer, or (2) mutual mistake of a material fact sufficient to cause a contract to be reformed or set aside." 26 C.F.R. § 301.7122-1(c) (1993). Thus, the government may attempt to prove at trial that Charles' failure to disclose his 1975 transfer of his 80 percent stock interest in McCorkle Reporters to Katherine in his Form 433 constituted a fraudulent concealment. Alternatively, the government may seek to rescind the settlement based on mutual mistake, arguing that since Charles inadvertently omitted the transfer from his Form 433 and the government had no knowledge

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of the transfer, the settlement agreement is based on an inaccurate portrait of Charles' ability to pay and must be rescinded.

***2** Third, the McCorkles seek to exclude all documents relating to the government's 1984 case against the McCorkles that resulted in the 1986 settlement agreement, United States of America v. Charles McCorkle, et al., 84 C 4674 (N.D.Ill). The McCorkles do not submit these documents--trial briefs, the final pretrial order, correspondence containing settlement negotiations, etc.--with their motion in limine, so the court is unable to determine the admissibility of specific documents. It is premature to exclude all these documents since some or all of them may shed light on the parties' intent when they entered the 1986 settlement agreement.

The McCorkles' reliance on Fed.R. Evid 408 to exclude these documents is misplaced. Rule 408 precludes evidence of settlement discussions in a particular case from being mentioned at the trial of that case (with certain exceptions). However, **Rule 408** does not bar settlement information in one case from **admissibility** in another case. Here, the settlement discussions that resulted in the 1986 settlement agreement may be relevant to determining whether that agreement must be rescinded.

Fourth, the McCorkles seek to exclude the testimony of Robert Kern ("Kern"), the government lawyer in the 1984 case. The McCorkles contend the government did not disclose that it would call Kern as a witness before listing him as a trial witness, despite interrogatories propounded on the government that should have elicited this information. The McCorkles argue that Kern must be barred from testifying at trial because they have not had an opportunity to depose him. The government counters that the McCorkles did not propound interrogatories seeking the identities of government witnesses; instead, the government contends that the McCorkles themselves identified Kern as an individual with information relevant to this case. The government also avers that it offered to make arrangements for a telephone deposition of Kern, but the McCorkles responded that a deposition was unnecessary because all the information that could be ascertained from Kern was available in other government documents. Thus, the McCorkles' questionable assertion of unfair surprise at Kern's inclusion in the government's witness list does not appear to create undue prejudice.

Fifth and sixth, the McCorkles seek to exclude information relating to Katherine's income and lifestyle from both government agents and employees and other sources. However, one of the main issues in this case is whether Charles improperly assigned his income to Katherine after the 1986 settlement agreement. Information about Charles' work responsibilities and remuneration is relevant to whether Charles' salary was commensurate with his job. Similarly, information about Katherine's work responsibilities and remuneration is relevant to whether Katherine's salary was commensurate with her job. The government seeks to show that Charles earned too little and Katherine earned too much; information about Katherine's income and lifestyle is relevant to these inquiries.

***3** The government's motion in limine also fails. The government appears primarily concerned with excluding the notes from the IRS investigation conducted by Harold Taggert ("Taggert") in connection with the settlement agreement and Charles' Form 433. Taggert's notes summarize his investigation as follows:

> T/P [taxpayer] has transferred nearly everything to his wife.
>
> ... the four corps [corporations] were transferred between 1975 & 1977. Accurate Reporting now belongs to Sherman Katz and Nadine Gorski is the sole officer; Chicago Reporting Co. is 100% owned by Katherine McCorkle as is McCorkle Court Reporters and Official Records, Inc. These are basically service corps. It would be difficult to challenge the transfer in return for a small amount of money....

McCorkles' Resp. at 2. The government advances two arguments in its attempt to preclude Taggert's notes and other unspecified government documents and testimony. First, the government contends that the McCorkles may not offer evidence or argument that the government is estopped from denying the actions or knowledge of IRS employees, including Taggert. Second, the government invokes the deliberative process privilege.

First, it is correct that parties cannot usually raise estoppel arguments against the government. See Heckler v. Community Health Serv., 467 U.S. 51, 60-61 (1984). The government contends that since

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Taggert was not authorized to compromise Charles' tax liabilities, Taggert's knowledge that Charles had transferred assets to Katherine is irrelevant. Government's Mot. at 2. The government contends that allowing Taggert's testimony would amount to an attempt to improperly estop the government based on the actions of one government employee. Id. However, admitting evidence regarding the government's knowledge about Charles' financial situation at the time it entered into the settlement agreement is not equivalent to granting a government employee the power to bind the government to a legal position.

The government may not disavow the actions of its employees entirely. Knowledge possessed by a government agent with a duty to disclose is imputed to the government. Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1096 (7th Cir.1992), citing In re "Agent Orange" Product Liability Litigation, 597 F.Supp. 740, 796 (E.D.N.Y.1984), aff'd, 818 F.2d 145 (2d Cir.1987). Thus, the challenged evidence may show what Taggert or another government agent--and therefore the government itself--knew about Charles' 1975 transfer of his 80 percent interest in McCorkle Reporters to Katherine at the time of the settlement agreement. The McCorkles may attempt to use this evidence to rebut the government's mutual mistake theory.

Second, the deliberative process privilege protects communications that are part of the decision-making process of a government agency, i.e., communications made prior to and during an agency determination. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993) (citations omitted). However, what the government knew is not equivalent to its deliberations. Evidence regarding the government's knowledge of Charles' transfer of his 80 percent interest in McCorkle Reporters to Katherine or other information about Charles' financial situation is not protected from disclosure by the deliberative process privilege.

CONCLUSION

***4** The parties' motions in limine are denied.

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INSTA-CITE

CITATION: 1994 WL 329679

Direct History

=> 1 **U.S. v. McCorkle,** 1994 WL 329679 (N.D.Ill., Jul 07, 1994) (NO. 93 C 6528)

Related References

2 U.S. v. McCorkle, 1994 WL 186756, 73 A.F.T.R.2d 94-2243, 94-1 USTC P 50,258 (N.D.Ill., May 11, 1994) (NO. 93 C 6528)

3 U.S. v. McCorkle, 1994 WL 317702, 74 A.F.T.R.2d 94-5323, 94-2 USTC P 50,450 (N.D.Ill., Jun 23, 1994) (NO. 93 C 6528)

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UNITED STATES of America, Plaintiff-Appellee,
v.
Thomas E. HAUERT, Defendant-Appellant.

No. 93-3171.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 7, 1994.

Decided Nov. 14, 1994.

Defendant was convicted in the United States District Court for the Northern District of Illinois, William T. Hart, J., of tax evasion and failure to file tax returns, and he appealed. The Court of Appeals, Wellford, Circuit Judge, held that: (1) evidence of defendant's conduct during prior income tax audit was admissible to show that he knew what the law was and his legal duty thereunder; (2) lay opinion testimony regarding defendant's beliefs about propriety of his filing returns and paying taxes was excludable; (3) jury was adequately instructed on good-faith defense; and (4) charged misconduct by prosecutor was not reversible error.

Affirmed.

[1] CRIMINAL LAW ⇐ 370
110k370
Evidence of taxpayer's conduct during previous income tax audit, relating to his claim of tax exempt status, was admissible in subsequent criminal prosecution for tax evasion and for failure to file tax returns to show that taxpayer knew what the law was and knew his legal duty thereunder, to overcome his good-faith misunderstanding of the law defense, and was not excludable as conduct or statements made in compromise negotiations, having been offered for purpose other than to establish liability. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[1] CRIMINAL LAW ⇐ 408
110k408
Evidence of taxpayer's conduct during previous income tax audit, relating to his claim of tax exempt status, was admissible in subsequent criminal prosecution for tax evasion and for failure to file tax returns to show that taxpayer knew what the law was and knew his legal duty thereunder, to overcome his good-faith misunderstanding of the law defense, and was not excludable as conduct or statements made in compromise negotiations, having been offered for purpose other than to establish liability. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 449.2
110k449.2
Taxpayer's knowledge of federal law requirements was not proper subject for lay witness opinion testimony in criminal tax prosecution in which defendant raised good-faith misunderstanding of the law defense. Fed.Rules Evid.Rules 701, 704(a), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 449.2
110k449.2
Defendant's beliefs about propriety of his filing federal tax returns and paying federal taxes, which were closely related to defendant's knowledge about tax laws and defendant's state of mind in protesting his taxpayer status, were not proper subject for lay witness opinion testimony in criminal tax prosecution, in which defendant raised good-faith misunderstanding of the law defense, in absence of careful ground work and special circumstances, as such testimony would not be helpful to clear understanding of issues by jury. Fed.Rules Evid.Rules 701, 704(a), 28 U.S.C.A.

[4] INTERNAL REVENUE ⇐ 5317
220k5317
Jury charge that did not use term "subjective standard," but did not include any reference to objectively reasonable standard or to measure of conduct of reasonable taxpayer, adequately instructed jury on good-faith misunderstanding of the law defense in criminal prosecution for tax evasion and failure to file tax returns, where jury was additionally instructed on government's burden of proof and on standard of willfulness. 26 U.S.C.A. §§ 7201, 7203.

[5] CRIMINAL LAW ⇐ 778(6)
110k778(6)
District court's instruction that no person could intentionally avoid knowledge by closing his or her eyes to information or facts which would otherwise have been obvious did not improperly shift burden of proof to defendant in criminal prosecution for tax evasion and failure to file tax returns. 26 U.S.C.A.

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§§ 7201, 7203.

[6] CRIMINAL LAW ⊜ 713
110k713
Prosecutor's statement during closing argument in criminal tax prosecution that taxpayer was subject to the tax laws, just like the rest of us, was not improper, in light of defendant's claimed defense that in good faith he did not believe that federal tax laws were applicable to him and that he did not willfully violate these laws with respect to criminal charges made against him.

[7] CRIMINAL LAW ⊜ 1171.1(6)
110k1171.1(6)
Any error by prosecutor during closing argument in criminal tax prosecution in reminding jury that if they were not convinced that taxpayer was acting in good faith, taxpayer would be vindicated in his contentions and he would be getting a free ride, was not prejudicial in context of entire trial.

[8] CRIMINAL LAW ⊜ 1171.8(1)
110k1171.8(1)
Prosecutor's mere asking of question during cross-examination of defendant regarding whether defendant's friend, who tutored defendant and persuaded him to reach his position on nontaxability of his wages and not filing income tax returns, was convicted of income tax evasion was not basis for reversing defendant's convictions for tax evasion and for failure to file tax returns, where defendant's prompt objection to question was sustained.

[9] CRIMINAL LAW ⊜ 1171.3
110k1171.3
Prosecutor's misstatement during closing argument in criminal tax prosecution that defendant, raising good-faith misunderstanding of the law defense, had to convince jury of his good-faith belief was not reversible error, in light of district court's clear instructions that burden of proof remained with government.

***198** Barry Rand Elden, Robert Michels (argued), Asst. U.S. Attys., Crim. Receiving, Appellate Div., Chicago, IL, for plaintiff-appellee.

Raymond D. Pijon, Chicago, IL (argued), for defendant-appellant.

Before POSNER, Chief Judge, and EASTERBROOK and WELLFORD, [FN*] Circuit Judges.

FN* The Honorable Harry W. Wellford, United States Circuit Judge for the Sixth Circuit, sitting by designation.

WELLFORD, Circuit Judge.

After conviction by a jury in the district court for tax evasion (violation of 26 U.S.C. ***199** § 7201) and for failure to file tax returns for the calendar years 1988 through 1991 (violation of 26 U.S.C. § 7203), defendant, Thomas E. Hauert, has appealed his convictions and sentences to this court. Conceding that he had failed to file federal income tax returns since 1986, Hauert first maintains that the district court erred "in allowing the government to introduce evidence of defendant's compromise and settlement negotiations in a 1984 civil tax case." Next, he asserts error by the trial judge in "denying defendant an opportunity to present lay opinion testimony ... relevant to the issue of good faith." Hauert also challenges certain jury instructions given by the district court applicable to his claimed "good faith" defense. He avers, moreover, prosecutorial misconduct denying him a fair trial, and, finally, that the government erroneously shifted the burden of proof from the prosecution. We discuss these grounds of Hauert's appeal seriatim.

I. BACKGROUND

Hauert worked regularly for the Caterpillar Company for many years including the years in question, and received payment for his earnings that mandated filing a federal income tax return for each of the years in contention, unless "excused" from criminal liability for his failure to file by reason of his so-called "good faith misunderstanding of the law" defense. This court is aware at the outset that we decided in 1989, after argument in 1988, that an "objectively reasonable standard" was to be applied in this type of criminal tax liability situation involving charges of tax evasion and failure to file federal income tax returns. United States v. Cheek, 882 F.2d 1263, 1265 (7th Cir.1989), cert. granted, 493 U.S. 1068, 110 S.Ct. 1108, 107 L.Ed.2d 1016 (1990), vacated, 498 U.S. 192, 201, 111 S.Ct. 604, 610, 112 L.Ed.2d 617 (1991) (eliminating "objectively reasonable standard"). The tax years 1980 through 1986 were involved in the Cheek case.

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[FN1]

> FN1. Since the government concedes that Cheek principles, as enunciated by the Supreme Court in 1991, do not retroactively apply to all the tax years at issue in this indictment, we are not called upon to decide any possible retroactivity problem. We must apply Cheek, then, to all the issues involved in this case by reason of Hauert's "good faith misunderstanding of the law" defense.

II. EVIDENCE OF PRIOR TAX SETTLEMENT

[1] Hauert objected to the testimony and evidence involving his claimed tax exempt status asserted on W-4 withholding tax forms for his salary during 1980 and 1981. (Hauert maintains in his brief that he also claimed exempt status for the years 1988 through 1991.)

Hauert was audited by the Internal Revenue Service ("IRS") because of certain partnership income purportedly attributable to him in 1980 or 1981. During the course of the IRS' audit for those years, Hauert asserted in a letter that "I have abandoned my constitutional challenge for those years." Hauert claims that allowing the government to introduce this and other evidence of his dealings with IRS agents indicating an abandonment of any constitutional challenge to the taxability of his Caterpillar earnings was prejudicial error. There was also evidence admitted at trial, over defendant's objection, of his signing settlement documents in 1984 foregoing a contention that his wages or salary were not taxable.

Hauert does not contest that evidence of his prior compliance with the laws he later claimed to misunderstand in earlier tax years is not admissible. This evidence is relevant to his actual subjective intent and his understanding of his income tax obligations to file and to pay tax on earnings from employment. Defendant argues that the evidence of his conduct during the income tax audit during 1984 is "irrelevant," "cumulative," and "contrary to policy concerning settlement."

Defendant's reliance on United States v. Robertson, 582 F.2d 1356 (5th Cir.1978), in support of the above contention, is misplaced. Robertson, not a tax case, involved a drug charge and admissions made by a defendant to DEA agents in a parking lot. The Robertson court discussed FED.R.CRIM.P. 11(e)(6) and FED.R.EVID. 410 with regard to admissibility of statements " 'in connection with, and relevant to' an offer to plead guilty." 582 ***200** F.2d at 1364 (emphasis added). Among other things, in overruling defendant's contentions in that case, the en banc court observed that "[c]ourts have been very reluctant to allow an accused to withdraw a guilty plea merely on allegations of a misunderstanding resulting from an accused's purely subjective beliefs." Id. at 1367.

Nor do we believe that FED.R.EVID. 408 is of assistance to defendant in respect to this assertion of error. Among other things, while generally proscribing admissibility of "conduct or statements made in compromise negotiations," this rule adds that it "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations," and also "when the evidence is offered for another purpose." See FED.R.EVID. 408. In adopting this language, the Conference Committee Report explained that "evidence of facts disclosed during compromise negotiations is not inadmissible." See H.R.CONF.REP. No. 1597, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 7098, 7099.

The purpose of the evidence in question was to show Hauert's knowledge and intent regarding his obligation to report and pay taxes on his Caterpillar (and other) earnings. As stated in Cheek, "in deciding whether to credit [defendant's] good-faith belief claim, the jury would be free to consider any admissible evidence from any source showing that [defendant] was aware of his duty to file a return and to treat wages as income." Cheek, 498 U.S. at 202, 111 S.Ct. at 611. The evidence involving the earlier years may not have been admissible to show Hauert's civil tax liability in those earlier years or to his claims or the government's claims in the context of civil tax liability. This evidence was admissible under Rule 408 for "another purpose" in this case. See United States v. Birkenstock, 823 F.2d 1026, 1028 (7th Cir.1987).

As stated in a case cited by defendant, "Federal Rule of Evidence 408 permits evidence of settlement agreements for purposes other than proving liability." United States v. Hays, 872 F.2d 582, 588-89 (5th Cir.1989). [FN2] The evidence in

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question was admitted to show whether Hauert knew "what the law is" and his "legal duty" thereunder. See Cheek, 498 U.S. at 202, 203 n. 8, 111 S.Ct. at 611 n. 8. We find that the district court was acting within its sound discretion by admitting the evidence at issue. See also United States v. Farmer, 924 F.2d 647 (7th Cir.1991); Breuer Elec. Mfg. Co. v. Toronado Sys. of Am., Inc., 687 F.2d 182 (7th Cir.1982).

> FN2. Hays, also not a tax case, held that district courts have wide discretion in determining relevancy under Rule 401. Hays, 872 F.2d at 587. Hays also indicated that evidence that defendant was engaged in conspiratorial conduct could not be admitted under Rule 408 by introducing evidence of prior settlement agreements between defendant and others alleged to be co-conspirators. Id. at 589. Hays is otherwise distinguishable from the instant case, in our view.

We are not persuaded by Hauert's contentions in this regard.

III. LAY OPINION TESTIMONY

[2][3] Hauert recognizes "the special limitations imposed upon opinion evidence by expert witnesses under Rule [FED.R.EVID.] 704(b)," and thus does not appeal the district court's decision to preclude a proffered psychiatric opinion that he was "credible, sincere and manifests a good faith belief" with respect to IRC obligations. He argues, however, that it was prejudicial error under FED.R.EVID. 701 and 704(a) to prevent such testimony from lay witnesses who were fellow employees and long-time friends. In particular, Hauert sought to present these witnesses to attest to his sincerity about his income tax beliefs. He relies upon the following language of FED.R.EVID. 701:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

See FED.R.EVID. 701.

Hauert also relies upon that portion of FED.R.EVID. 704(a), which permits opinion evidence embracing an ultimate issue. The district court ruled that the lay opinion evidence sought to be introduced was substantially ***201** the same as the proffered expert evidence, which was barred under FED.R.EVID. 704(b). The district court barred such lay opinion testimony dealing with defendant's subjective sincerity, motivation, knowledge, or state of mind. The district court did not prevent the lay witnesses from testifying about the context of their association and contact with Hauert, but foreclosed their opinions about his sincerity and "good faith" belief. The government maintains that issue should be governed by Rule 701, rather than Rule 704, although it, of course, agrees with the result reached by the district court. Rule 701 deals generally with "opinion testimony by lay witnesses." Although a lay witness may, in appropriate circumstances, give an opinion on an "ultimate issue," we agree that the basic inquiry with respect to the district court's evidentiary rulings on lay witness testimony is governed by FED.R.EVID. 701.

In offering the testimony of these witnesses, defendant's lawyer described them as "credibility witnesses," and then there was discussion about FED.R.EVID. 608, regarding opinion about defendant's reputation, and limiting their testimony to opinion of Hauert's character and reputation as to truthfulness. Defendant's attorney objected to being limited so as not to ask these witnesses about Hauert's "sincerity." Defendant's attorney added that these witnesses had "numerous conversations and interactions" with Hauert "on the issue of taxation, and have formulated opinions as to whether he is sincere and believes his statements." The district court ruled, however, without specific reference to Rule 701, that these witnesses would not, under the circumstances, be permitted to give opinions about defendant's "mental state or condition constituting any element of the crime charged ... a totally subjective matter." The district court summarized its ruling by concluding that lay witness opinion testimony on Hauert's "state of mind" or the sincerity of his "good faith" defense "is not appropriate."

Defendant's counsel made no further specific proffer as to the content of the proposed testimony nor did he offer any witness outside the presence of the jury to make a record of it. These five witnesses did testify to Hauert's reputation for truthfulness, his employment, and his active church involvement. Witness Holman testified that Hauert was a "sincere

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and honest person." Witness Dobsczyle added that Hauert was "one of the most truthful, honest people that I have ever met." Witness Acosta, a close friend, supplemented the opinion of truthfulness to state: "I don't think you could find anybody that would say a bad thing about him." [FN3]

> FN3. Acosta also was permitted to testify, outside the jury's presence, that he had accompanied Hauert to an IRS office and that Hauert pursued many income tax questions that were not answered, but the district court reserved a ruling on the admissibility of this testimony. Hauert's counsel made no further motion to introduce this testimony before the jury.

On the issue of lay opinion testimony concerning Hauert's knowledge of tax law requirements, we agree with the opinion in United States v. Rea, 958 F.2d 1206, 1216 (2d Cir.1992), that opinion testimony on a party's knowledge of the law "in most instances ... will not meet the requirements of Rule 701." If offered, then, to show Hauert's knowledge, or lack thereof, about filing returns and reporting wages and other receipts as income, we believe the district court did not abuse its discretion in denying lay testimony to this effect.

The opinion testimony introduced by defendant that Hauert was "honest, sincere," and a good person generally did come into evidence. That evidence bore upon his "good faith" defense. Whether the evidence would be, as required by Rule 701, "helpful to a clear understanding" of Hauert's testimony and position is essentially a matter of sound judgment and within the discretion of the district court. "[U]ltimately, the question of whether a lay opinion falls into the category of 'meaningless assertion' or whether that opinion actually will help the jury decide an issue in the case is a judgment call for the district court." United States v. Allen, 10 F.3d 405, 415 (7th Cir.1993).

We consider here a ruling on admissibility of lay witness opinion, testimony about a defendant's state of mind, his intent or belief with particular reference to Rule 701(b)-- ***202** whether the evidence would be "helpful to a clear understanding" of the issues by a jury. United States v. Guzzino, 810 F.2d 687, 699 (7th Cir.), cert. denied, 481 U.S. 1030, 107 S.Ct. 1957, 95 L.Ed.2d 529 (1987). While the district court's analysis was not as clear as we would have liked, we find no abuse of discretion, no clear error, in the preclusion of this lay opinion evidence under the circumstances of this case. We believe that by the nature of a tax protestor case, defendant's beliefs about the propriety of his filing returns and paying taxes, which are closely related to defendant's knowledge about tax laws and defendant's state of mind in protesting his taxpayer status, are ordinarily not a proper subject for lay witness opinion testimony absent careful groundwork and special circumstances not present here. [FN4] In this case, such testimony was not helpful to the jury.

> FN4. Even if such lay witness opinion evidence were deemed helpful and relevant by the district judge, he may still consider, under FED.R.EVID. 403, whether such evidence should be excluded as "substantially outweighed by the danger of unfair prejudice ... or [the] needless presentation of cumulative evidence." See FED.R.EVID. 403.

IV. JURY INSTRUCTIONS

[4] Citing Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), defendant objects to the district court's instruction on the government's burden to prove that he acted "willfully" with respect to his charged violations of the income tax laws. [FN5] Hauert argued the Cheek case rationale to the jury, maintaining that his knowledge and belief are based upon subjective standards ("this calls for you [the jury] to enter into the mind and mental processes of this man"). The district court's instructions did not use the word, "subjective standard," as to Hauert's claim of good faith belief, but used the following language:

> FN5. In his closing argument, Hauert's counsel stated that the government had to prove beyond a reasonable doubt that "Mr. Hauert has willfully and with the intention to disobey the law done certain things."

If the defendant, in good faith, believed that tax laws did not require that he file individual tax returns for a particular year, then any failure to file any income tax return for that year cannot be found to be willful, even if such belief was incorrect. Similarly, if the defendant in good faith believed that under the law he did not have any income tax obligation for a particular year,

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> then any failure to pay income taxes for that year cannot be found to be willful, even if such belief was incorrect.
>
> However, a disagreement with the tax laws or a personal belief that the tax laws are unconstitutional, no matter how earnestly believed, will not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not.

Cheek referred to the holding of United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), that "defendant was entitled to an instruction with respect to whether he acted in good faith based on his actual belief." Cheek, 498 U.S. at 200, 111 S.Ct. at 610. Cheek also referred to United States v. Pomponio, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976) (per curiam), that the statutory language "required a finding of bad purpose or motive." Cheek, 498 U.S. at 200, 201, 111 S.Ct. at 609, 610. Cheek concluded that "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.' " Id. at 201, 111 S.Ct. at 610. Cheek, in our opinion, does not mandate the use of the word "subjective" or words "subjective standard" as argued by defendant. It does require the elimination of the words, "objectively reasonable," id., as applied to a willful violation of a known legal duty.

The district court did eliminate any reference in its instructions to an objectively reasonable standard or to the measure of the conduct of a reasonable taxpayer. We believe the instructions given, taken as a whole, conform to the Supreme Court's requirements in Cheek:

> In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding ***203** and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.

Id. at 202, 111 S.Ct. at 611.

The jury was adequately instructed about defendant's good faith belief defense, a belief "that tax laws did not require that he file individual tax returns for a particular year." The district court also instructed the jury that if the government failed to prove beyond a reasonable doubt that he had no such good faith belief, his failure to file a return or pay income taxes for a particular year was not a "willful" violation of his duty. The district court instructed the jury that the government was required to prove a "willful" violation, one that was "voluntary and intentional."

We are not prepared to adopt the reasoning of United States v. Pabisz, 936 F.2d 80, 83 (2d Cir.1991), that the district court, in dealing with the good faith defense, must either instruct the jury to consider "whether [defendant] subjectively believed that he did not need to file income tax returns or pay taxes," or "that defendant's beliefs need not be objectively reasonable." Pabisz may be distinguishable, however, because the prosecutor urged the jury to consider whether defendant "had to know objectively if whether [sic] he had to file," [FN6] and that was not done in this case. Id. (emphasis added).

> FN6. In Pabisz, the prosecutor also argued that defendant's beliefs were "totally unreasonable." Pabisz, 936 F.2d at 83. United States v. Powell, 936 F.2d 1056 (9th Cir.1991), also cited by defendant, is distinguishable because the district court there instructed the jury that to succeed in their good faith defense, defendants had to have an "objectively reasonable belief." Id. at 1061. (Powell was subsequently amended and superseded at 955 F.2d 1206 in light of Cheek).

[5] Nor do we find the district court's instructions on the definition of a known duty to be in error as contended by defendant. Finally, we find no error in the court's instruction that "[n]o person can intentionally avoid knowledge by closing his or her eyes to information or facts which would otherwise have been obvious." See, e.g., United States v. Ramsey, 785 F.2d 184, 190 (7th Cir.), cert. denied, 476 U.S. 1186, 106 S.Ct. 2924, 91 L.Ed.2d 552 (1986). [FN7] We do not agree with defendant that this instruction shifted the burden of proof to the defendant. United States v. White, 794 F.2d 367, 371 (8th Cir.1986).

> FN7. The facts of this case " 'support the inference that the defendant was aware of a high probability of the existence of the fact in question [tax liability] and purposely contrived to avoid learning all of the facts.' " United States v. de Francisco-Lopez, 939 F.2d 1405, 1409 (10th Cir.1991) (quoting United States v. Alvarado, 838 F.2d 311, 314 (9th Cir.1987), cert. denied, 487 U.S. 1222, 108 S.Ct.

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2880, 101 L.Ed.2d 915 (1988)).

We have examined the district court's instructions in their totality. We are not persuaded by defendant's contentions that these instructions dealing with good faith, willfulness and knowledge were "equivocal, conflicting and inaccurate." We, therefore, reject the assignment of error that we must reverse because of prejudicial error in the jury instructions.

V. PROSECUTORIAL MISCONDUCT

A. Argument

[6] Defendant recites a litany of actions by the prosecutor in this case, including principally, a "personal appeal to the jury" and "emphasis on each citizen's duty to pay income taxes." We have reviewed the record carefully and find no reversible error in this respect. In particular, we note no error in arguing that Hauert is "subject to the tax laws ... just like the rest of us." The issue raised by defendant was not the constitutionality or the validity of the tax laws; rather, he claimed that in "good faith" he did not believe that these laws were applicable to him, and that he did not "willfully violate these laws with respect to the criminal charges made against him."

[7] Hauert also complains that the prosecutor reminded the jury that if they were not convinced that Hauert was acting in good faith, Hauert would be "vindicated" in his contentions and would be getting "a free ride." The fact is that Hauert essentially was claiming that he should not be treated like others because of his own peculiar "good faith" convictions about not being under a ***204** duty to file tax returns and pay taxes in the fashion most taxpayers do.

If the prosecutor overstated the theme of the effect of vindication in some respects and urged that Hauert not go "home free," we are not convinced that such error, if any, was prejudicial in the context of the entire trial. We are satisfied, in short, that the prosecutor's conduct did not deprive Hauert of a fair trial, although we do not condone the prosecutor's impugning of defendant's patriotism. Defendant concedes that improper argument "rarely rise [s] to the level of reversible error," and we think it has not risen to that level here. As in Moylan v. Meadow Club, Inc., 979 F.2d 1246, 1251 (7th Cir.1992), "[w]e do not believe that counsel's characterizations in this case, even if untoward, were sufficiently egregious to require reversal of the verdict."

B. Gabe Thompson Episode

[8] Defendant admitted during his testimony that his friend and co-employee, Gabe Thompson, tutored him and persuaded him to reach his position on non-taxability of his wages and in not filing income tax returns. He claims it was reversible error for the prosecutor to ask him if he knew whether Thompson was convicted of income tax evasion. Defendant's prompt objection was sustained. We, again, find no reversible error in this respect. Indeed, we express no opinion as to whether such evidence may have been admissible under the circumstances of this case. The believability of Thompson, a close friend, associate and advisor, may well have been an appropriate subject of cross-examination. The district court precluded any answer and perhaps should have advised the jury that whether Thompson was convicted of tax evasion had no direct bearing on the guilt or innocence of defendant Hauert. The mere asking of this question is not, however, a basis for reversing Hauert's conviction.

C. Other Prosecutorial Conduct

[9] Hauert claims that the government attempted to shift the burden of proof in this case. The district court, however, gave the following clear instruction about the burden of proof:

> The indictment in this case is a formal method of accusing the defendant of a crime and placing him on trial. It is not evidence against the defendant and does not create any inference of guilt.
>
> The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The government has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove his innocence or to produce any

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evidence.

The district court further charged the jury that the government had to prove that defendant's actions were willful. The prosecutor made a misstatement of the law in argument indicating that Hauert had to convince the jury that he had a good faith belief, but added immediately: "If you think he has a good faith belief, then you are right, he is home free." Defendant's objection to this misstatement was promptly sustained by the trial court. The prosecution told the jury that they might consider whether Hauert's claim of good faith was "reasonable," [FN8] and reiterated the erroneous statement that defendant had to convince the jury of his good faith belief. Although this was an incorrect ***205** argument, the district court's instructions made it clear that the burden of proof remained with the government throughout. We find no reversible error by reason of the prosecutor's misstatement.

> FN8. See United States v. Cheek, 3 F.3d 1057, 1063 (7th Cir.1993), cert. denied, --- U.S. ----, 114 S.Ct. 1055, 127 L.Ed.2d 376 (1994). Cheek was convicted again by the jury after remand of his case by the Supreme Court. After the Supreme Court's 1991 decision in Cheek, one commentator observed: [T]he high Court's affirmance of the subjective standard will no doubt embolden at least some factions of the tax protestor movement into continuing their struggle ... [F]uture defendants [will] continue to attempt to circumvent the tax laws, and then defend their actions on the basis of beliefs subjectively held in good faith. Anthony Michael Sabino, Revising the Willfulness Standard for Federal Tax Crimes: The Road from Bishop to Cheek, 11 REV.LITIG. 1, 42 (1991).

For the reasons indicated, we AFFIRM the jury verdict and the judgment of the district court. The writer must add that Justice Blackmun's dissent in Cheek evidences considerable prescience: "This Court's opinion, today, I fear, will encourage taxpayers to cling to frivolous views of the law in the hope of convincing a jury of their sincerity." Cheek, 498 U.S. at 210, 111 S.Ct. at 615.

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INSTA-CITE

CITATION: 40 F.3d 197

Direct History

=> 1 **U.S. v. Hauert,** 40 F.3d 197, 74 A.F.T.R.2d 94-7004, 95-1 USTC P 50,045, 41 Fed. R. Evid. Serv. 654 (7th Cir.(Ill.), Nov 14, 1994) (NO. 93-3171)
Certiorari Denied by
2 Hauert v. U.S., 115 S.Ct. 1822, 131 L.Ed.2d 744, 63 USLW 3784, 63 USLW 3786 (U.S., May 01, 1995) (NO. 94-1392)

Related References

3 U.S. v. Hauert, 1995 WL 611839 (N.D.Ill., Oct 17, 1995) (NO. 93 CR 285, 95 C 5458)

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Federal Rules of Evidence
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Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5314. ---- OTHER

The listing of permissible uses of compromise evidence in Rule 408 is illustrative, not exhaustive. [FN1] Any use of such evidence that is beyond the scope of the rule is permissible even if not mentioned; for this reason it has been suggested that the last sentence is superfluous. [FN2] In determining the admissibility of evidence offered for some other purpose, courts will have to consider the language that delineates the scope of the rule [FN3] as well as the policy that supports it. [FN4] Reliance on common law precedents is risky because to some extent the Advisory Committee sought to change the pre-existing law. [FN5] Even where there was no explicit change in the common law rule, the shift in the underlying rationale may cast doubt on the vitality of the precedents. Often the old cases rely on a mixture of relevance and hearsay analysis that yields results quite different from those one might expect under a privilege analysis. For example, if the offer of compromise was used to show the effect of the offer on some third person or to prove a state of mind of the offeror other than consciousness of liability, [FN6] the evidence was admissible. [FN7] But since the use of the evidence for this purpose might tend to deter the making of offers of compromise, a pure privilege rationale would suggest that the evidence ought to be excluded.

A good illustration of the difficulty of reconciling prior authority with the language of Rule 408 is the use of compromise evidence to show agency, ownership, or control. [FN8] For example, suppose the issue is whether the driver of the car that struck the plaintiff was an employee of the defendant corporation and evidence is offered that the corporation tried to settle the plaintiff's claim for damage arising out of the accident. [FN9] The evidence was admissible at common law, perhaps because courts felt that the evidence was less ambiguous when offered for this purpose than as evidence of consciousness of fault, [FN10] perhaps because the implied assertion of agency was seen as an independent fact, [FN11] or perhaps as a result of a flawed analogy to the subsequent repairs and other crimes rules. [FN12] But whatever the ground, some writers have assumed that the same result would follow under Rule 408. [FN13] This is difficult to justify. It would seem that in proving agency, the plaintiff is attempting to prove the validity of his claim of respondeat superior. [FN14] It can be argued that the identity of the offeror is a prerequisite to compromise negotiations and not a part of them so that the rule is not applicable, [FN15] but the argument is weak both in terms of the language of the rule and its policy. [FN16]

Fortunately, it is not always this difficult to reconcile the common law cases with the language of Rule 408. Perhaps the largest group of precedents involves the use of compromise evidence where compromise is the basis for the claim rather than circumstantial evidence of the validity of the claim. [FN17] For example, if suit is brought for breach of the settlement contract, Rule 408 does not prevent the plaintiff from proving the agreement. [FN18] By parity of reasoning, the same result should follow when the defense to the original claim is predicated on a compromise; [FN19] e.g., when the defendant pleads the compromise as a release, [FN20] accord and satisfaction, [FN21] or novation. [FN22] Although it can be argued that this use of the compromise involves proof of the "invalidity of the claim", it does so not by using the compromise as circumstantial evidence of the opponent's belief in the invalidity of the claim but as proof of an act whose legal effect is to extinguish his right to recover. [FN23] Similarly, compromises with third persons can be proved when their legal effect is to release

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the defendant from liability or to reduce the amount of damages he must pay. [FN24]

Rule 408 is also inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions; [FN25] e.g., libel, assault, breach of contract, unfair labor practice, and the like. [FN26] Hence, if an insurer is sued for having breached its obligations under an indemnity policy by failing to make a reasonable settlement within policy limits, [FN27] Rule 408 does not prevent the plaintiff from proving his case; wrongful acts are not shielded because they took place during compromise negotiations. [FN28] Similarly, if an attorney sues to recover the value of his services in settling the case, he can show the nature of the negotiations. [FN29] And if a party's rights to costs are affected by his opponent's refusal to compromise this can be proven. [FN30] Finally, if the compromise agreement is itself illegal [FN31]--for example, where an antitrust claim is settled by making the plaintiff a member of the conspiracy--evidence of this is admissible under Rule 408.

Another category of permissible use involves cases in which the compromise activities result in a waiver of or an estoppel to assert some procedural or substantive right. [FN32] Here the evidence is offered not to prove the state of mind of the offeror but to explain conduct of the recipient of the offer. [FN33] So, for example, if the failure to demand the retraction of a libellous statement, or to mitigate damages, or to exhaust contract remedies is excused by compromise activities, they may be shown. [FN34] The use of compromise evidence to show the revival of a debt barred by the statute of frauds or statute of limitations may also fall under this category. [FN35]

The issue which has generated the most disagreement is whether compromise evidence may be used as a form of prior inconsistent statement to impeach a witness who testifies in a contrary fashion. [FN36] At common law, statements of fact made in compromise negotiations were admissible as evidence of liability. [FN37] So there was little reason to consider their use as prior inconsistent statements. [FN38] The same ambiguity that made an offer of compromise inadmissible to show consciousness of liability would also tend to defeat its use for impeachment. [FN39] Hence, statements that the common law did not admit compromise evidence for impeachment purposes cannot be taken at face value. [FN40]

The issue is of considerably greater significance now that Rule 408 makes evidence of statements made in the course of compromise negotiations inadmissible to prove the validity or invalidity of the claim. [FN41] A federal judge has argued that such statements are admissible to impeach, apparently on the theory that the use of the statement for impeachment purposes does not involve proof of liability or invalidity "substantively." [FN42] This analysis is not very convincing unless one takes the view that the rule does not forbid the use of compromise evidence to prove an evidentiary fact that tends to prove liability. [FN43] Moreover, it seems to rest on analogy to the hearsay rule and its distinction between "substantive" evidence and "impeachment," which is not wholly apt in the present context. [FN44]

Professors Louisell and Mueller take the same position: "Rule 408 does not bar statements in settlement talks when offered to impeach at trial." [FN45] Although it is possible that this is a reference to impeachment by showing of bias, [FN46] the context suggests otherwise. [FN47] They base their conclusion on a paragraph in the Advisory Committee's objection to the House version of Rule 408: [FN48] A further point raised by [government agencies] is that the result of extending the compromise principle to include statements of fact would be encouragement of the making of misrepresentations during the course of settlement negotiations by eliminating responsibility therefore. Of course that is not the case. Reference to the language of the rule discloses that its protection applies only when the evidence is offered for the purpose of establishing liability for or invalidity of a claim. This looks more like a calculated effort to obscure the issue than an endorsement of use of negotiation statements for impeachment purposes. [FN49] The argument to which this paragraph is a response is equally opaque but is subject to the interpretation that the "responsibility" alluded to is **criminal** liability for the false statement, [FN50] a use for which the compromise evidence would be admissible on the grounds stated by the Advisory Committee. [FN51]

Professors Redden and Saltzburg take the contrary position, stating that except where the person being impeached is not a party to the action, courts should "decide against admitting statements made during settlement negotiations as impeachment evidence." [FN52] Their position is based on the policy of the rule: "Opening the

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door to impeachment evidence on a regular basis may well result in more restricted negotiations." [FN53] But this argument ignores an equally important policy: "the end that truth may be ascertained." [FN54] A party who is impeached at trial by an inconsistent statement made during settlement negotiations, in the absence of some mistake, must have been lying at one time or the other. It is difficult to see why the law would care to encourage falsehood in either venue. [FN55] The purpose of Rule 408 is to foster "complete candor" between the parties, [FN56] not to protect false representations. [FN57]

Since the language of the rule cuts one way, policy another, and the legislative intent is unclear, courts will have to decide the question as best they can. [FN58] In this situation, it would seem that the injunction in Rule 102 to interpret the rules so as to foster the values of "fairness" and "truth" [FN59] should lead courts to conclude that prior inconsistent statements in the course of settlement negotiations should be admitted to impeach a party who testifies. [FN60] If so, then only the fact the statement was made should be admitted, not that it was made during settlement negotiations. The latter fact would still be barred by Rule 408 since it is unnecessary for the purpose for which the evidence is admitted. [FN61]

A related question concerns the admissibility of compromise evidence offered to show "spoliation" of a civil case. [FN62] The explicit provision in Rule 408 only applies to attempts to obstruct "a **criminal** investigation or prosecution." [FN63] Suppose, however, that the defendant should reach a compromise with one plaintiff that requires him to conceal or destroy evidence that would assist the other plaintiff to prove his case. [FN64] Though it is difficult to justify as a matter of policy, the fact that Rule 408 has a provision that limits the use of such evidence to cases where a **criminal** prosecution is the target might lead to the conclusion that the drafters intended to exclude the evidence in the example posed. [FN65] However, a better interpretation would be that an agreement to spoliate the case against another does not involve a "valuable consideration" [FN66] because of its illegality and is therefore beyond the protection of the rule for that reason. [FN67]

In addition to those cases in which compromise evidence is admissible because it is beyond the scope of Rule 408, there are also cases in which other rules permit it to be used. For example, it may come in as a preliminary fact for the admissibility of other evidence under Rule 104(a) [FN68] or to explain a statement taken out of context under Rule 106. [FN69] In addition, it is possible that the Erie doctrine may make the evidence admissible in some cases in which state law supplies the rule of decision. [FN70]

FN1. Not exhaustive Advisory Committee's Note, Rule 408.

FN2. Superfluous See N.Y. Trial Lawyers, Recommendation and Study of the Proposed Federal Rules of Evidence, 1970, p. 25, reprinted in 2 P.L.I., Federal Civil Practice 4th, 1972, p. 287 (suggesting deletion of the last sentence "since the first sentence of the rule clearly sets forth the limited purpose for which such evidence is inadmissible.").

FN3. Scope See ss 5303-5309.

FN4. Policy See s 5302.

FN5. Change pre-existing law The major changes were the expansion of the common law rule to cover completed compromises and statements made during negotiations. Ibid.

FN6. Other state of mind 2 Chamberlayne, The Modern Law of Evidence, 1911, s 1450.

FN7. Admissible The admissibility to show the state of mind of another follows from the hearsay notion that statements offered to show the effect on the hearer are not offered for the truth of the matter asserted. When offered to show some state of mind other than consciousness of liability, the evidence usually did not have the ambiguity that was the ground for exclusion under the relevance rationale.

FN8. Agency or control See Lloyd v. Thomas, C.A.7th, 1952, 195 F.2d 486, 491; Fidelity & Cas. Co. v. Southwest Bell Telephone Co., C.A.8th, 1944, 140 F.2d 724, 727; cf. National Battery Co. v. Levy, C.A.8th, 1942, 126 F.2d

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33, 36-37.

FN9. Example See also the dog-bite hypothetical case used in s 5307, text at note 66.

FN10. Less ambiguous Though it does not seem plausible today, courts may have thought, in the heyday of rugged individualism, that a person was more likely to make an offer of compromise even though he did not believe his actions were blameworthy than he would be to pay damages for the acts of another when there was reason to doubt his responsibility for those acts.

FN11. Independent fact See s 5307.

FN12. Flawed analogy The other crimes rule and the subsequent repair rule bar evidence only as proof of conduct in the first case and negligence in the second; hence, evidence to prove the identity of the actor is admissible under those rules. See s 5286; vol. 22, s 5246.

FN13. Same result under 408 2 Louisell & Mueller, Federal Evidence, 1978, p. 299; 2 Weinstein & Berger, Weinstein's Evidence, 1975, pp. 408-26.

FN14. Prove validity See s 5308.

FN15. Not part of compromise See s 5304.

FN16. Policy It seems difficult to argue that one would be deterred from making an offer of compromise by admissibility to prove direct liability but not when used to show vicarious liability.

FN17. Basis for claim Compare Model Code of Evidence, Rule 309(4) and U.R.E. 52(b), quoted s 5301 nn. 28, 29.

FN18. Breach of settlement See s 5308.

FN19. Defense on compromise See generally 2 Chamberlayne, The Modern Law of Evidence, 1911, s 1442.

FN20. Release Reporter's Note, Prop.Vt.R.Ev. 408.

FN21. Accord and satisfaction Cal.Evid.Code s 1152 does not bar evidence of a compromise offered as proof of an accord and satisfaction. Moving Picture Machine Operators Union Local No. 162 v. Glasgow Theatres, Inc., 1970, 86 Cal.Rptr. 33, 37, 6 Cal.App.3d 395 (dictum).

FN22. Novation The Wisconsin drafters added "accord and satisfaction, novation, or release" to the last sentence of Rule 408. See Wis.Stats.Ann. s 904.08, quoted in s 5031 n. 33.

FN23. Legal effect Under the hearsay analysis used at common law, the opponent's admission is offered not for the truth of the matter asserted but as legally operative conduct. See discussion under Rule 801.

FN24. Third persons Reporter's Note, Prop.Vt.R.Ev. 408: "Note that the rule is not intended to change Quesnel v. Raleigh * * * which held that any amount paid by a joint tortfeasor could be shown in mitigation of damages, nor to alter the more general proposition that unqualified release of one joint tortfeasor releases the others. These doctrines do not involve circumstantial use of the settlement which the rule seeks to prevent * * *."

FN25. Wrong in settlement This is because Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, not some other claim. See s 5308.

FN26. Unfair labor practice This list is suggested by a former member of the Advisory Committee, 2 Weinstein & Berger, Weinstein's Evidence, 1975, pp. 408-28.

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FN27. Failure to settle Ehrhardt, Florida Evidence, 1977, p. 92.

FN28. Wrongful acts not shielded Perhaps the most dramatic illustration of this is Fletcher v. Western Nat. Life Ins. Co., 1970, 89 Cal.Rptr. 78, 10 Cal.App.3d 376, where the court held that Cal.Evid.Code s 1152 did not exclude evidence of intentional infliction of emotional harm brought about when an insurer "embarked upon a concerted course of conduct to induce plaintiff to surrender his insurance policy or enter into a disadvantageous 'settlement' of a nonexistent dispute by means of false and threatening letters and the employment of economic pressure based upon his disabled and, therefore impecunious, condition (the very thing insured against) * * *."

FN29. Attorney's fees McCormick, Evidence, Cleary ed. 1972, s 274, p. 664.

FN30. Costs Rule 408 does not apply to a determination by the trial court as to whether to allow pre-judgment interest because of the defendant's refusal to settle. Iberian Tankers v. Gates Constr. Corp., D.C.N.Y.1975, 388 F.Supp. 1190, 1192. See also 2 Chamberlayne, The Modern Law of Evidence, 1911, p. 1836.

FN31. Illegal compromise Overseas Motors, Inc. v. Import Motors Ltd., Inc., D.C.Mich.1974, 375 F.Supp. 499 (dictum).

FN32. Waiver or estoppel If the conduct of the opponent in compromise is such as to constitute a waiver or estoppel with respect to some procedural right, it is probably also sufficient to estop him from asserting Rule 408 to bar proof of the conduct. See generally vol. 21, s 5039.

FN33. Explain conduct 2 Chamberlayne, The Modern Law of Evidence, 1911, p. 1836.

FN34. Mitigation or exhaustion Warner Constr. Corp. v. City of Los Angeles, 1970, 466 P.2d 996, 1104 n. 12, 2 Cal.3d 285, 297 n. 12, 85 Cal.Rptr. 444, 452 n. 12 (dictum; applying Cal.Evid.Code s 1152).

FN35. Revival of debt 2 Weinstein & Berger, Weinstein's Evidence, 1975, pp. 408-28; cf. Model Code of Evidence, Rule 309(4) and U.R.E. 52(b), quoted in s 5031 nn. 28, 29, both of which treat this use as an exception to the rule. For a criticism of the Model Code's treatment of this issue, see Likert, Precautionary Measures and Compromises, 1945 Wis.L.Rev. 399, 401.

FN36. Inconsistent statement Distinguish the use of the compromise to impeach by showing a bias in the witness toward the offeror, admissible because it is offered to show the effect of the compromise on the state of mind of the witness, not as evidence of consciousness of liability by the offeror. See s 5311. Distinguish also the use of the fact that the party had made an inconsistent claim, admissible because Rule 408 covers offers of compromise, not claims. See s 5304.

FN37. Statements of fact See ss 5302, 5307.

FN38. Little reason A statement in a settlement offer that certain bonds were owned by the defendant should have been admitted to impeach his testimony at trial that his son was the owner. U.S. v. Tuschman, C.A.6th, 1969, 405 F.2d 688.

FN39. Defeat use 2 Chamberlayne, The Modern Law of Evidence, 1911, p. 1827.

FN40. Did not admit Compare Wigmore's ambiguous treatment of the question. 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1062, n. 1.

FN41. Now inadmissible See ss 5307, 5308.

FN42. "Substantively" See Redden & Saltzburg, Federal Rules of Evidence Manual, 2d ed. 1977, p. 179.

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FN43. Evidentiary fact If the witness testifies to facts that are relevant to the validity or invalidity of the claim, evidence that impairs his credibility would also seem to bear on the same ultimate issue. One can escape this reading only by arguing that Rule 408 excludes statements only when offered as direct proof of the ultimate issue, not as circumstantial evidence in a line of proof that leads to validity or invalidity. For reasons stated in s 5308, this does not appear to be a proper interpretation of the rule.

FN44. Not wholly apt The purpose of the hearsay rule is to prevent the testimonial use of extrajudicial statements; the policy of that rule is satisfied when the use of the statement does not require any inference as to the truth of the matter asserted. In the context of prior inconsistent statements, this distinction is cast, in terms of "substantive use" and use for "impeachment" because in that context the use for impeachment does not require the testimonial use of the statement. But this distinction makes no sense even with other uses of hearsay statements for impeachment; for example, one could not prove that a witness was biased by a hearsay statement; i.e., one could not prove that a witness was biased by a hearsay statement of some third person to that effect. Rule 408, however, does not exclude statements made during settlement negotiations because of the fear that they will be used testimonially but because it is thought that admitting the statement will tend to discourage "freedom of communication" that is necessary for successful compromises. See Advisory Committee's Note, Rule 408. There is no reason to suppose that a party will be any less deterred from making the statement if it is only used for purposes of impeachment.

FN45. "Rule 408 does not bar" 2 Louisell & Mueller, Federal Evidence, 1978, p. 277.

FN46. Impeachment by bias A footnote appended to the quoted statement refers the reader to their discussion of impeachment by bias. Id. at n. 29.

FN47. Context The quoted statement purports to be a paraphrase of the Advisory Committee's argument referred to in the text; that argument is clearly not aimed at impeachment for bias, whatever it may mean.

FN48. Objection to House version Senate Hearings, p. 59.

FN49. Obscure "Responsibility" is surely an unusual way to characterize the susceptibility of a witness to impeachment by prior inconsistent statements. One suspects that the drafter of this paragraph felt that the government had clumsily attempted to raise a difficult question that the Advisory Committee did not want to or could not answer and therefore seized upon the inartfulness of his opponent as a device for evading the issue.

FN50. **Criminal** liability "I am aware of no **criminal** penalties for factual misrepresentations made during negotiations to settle a controversy between two private parties. On the other hand there is a strong public policy, implemented by various **criminal** sanctions, of discouraging false statements to federal Government agencies. * * * I do not suggest that enactment of Rule 408 would encourage direct violations of these **criminal** statutes. But the public policy they express would certainly be undermined by assuring taxpayers that, unless **criminal** intent can be shown, they have no responsibility for the accuracy of any factual representations they may make in the course of settlement negotiations with the Internal Revenue Service." 2 House Hearings, p. 302 (letter from General Counsel of the Treasury).

FN51. Admissible See s 5308.

FN52. "Decide against" Redden & Saltzburg, Federal Rules of Evidence Manual, 2d ed. 1977, p. 172.

FN53. "Restricted negotiations" Ibid.

FN54. "Truth ascertained" See Rule 102.

FN55. Either venue Since most falsehoods in negotiations would probably favor the party making them, it is doubtful that the opponent would ever care to use them to impeach an honest statement at trial. Hence, most cases in which the issue is likely to arise will be cases in which the party attempts to mislead his opponent with a spurious candor in negotiations or honestly admits a weakness during negotiations and attempts to cover it with a lie at trial.

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FN56. "Complete candor" Comment, Cal.Evid.Code s 1152. This section was the model for the provision in Rule 408 barring evidentiary use of negotiation statements.

FN57. False representations It might be claimed that the argument in the text fails to distinguish between the party who takes the stand on his own to testify contrary to his statement in negotiations and one who is called by the opponent for the express purpose of using the statement to impeach him if he does not testify in accordance with it. But the notion that the law ought to distinguish between a person who lies to carry his own burden of proof and one who testifies falsely so as to deny his opponent the right to prove his case seems to be based upon a supposedly outmoded theory of the nature of trials. Cf. discussion of "discoverable evidence" in s 5310.

FN58. Courts decide It would certainly seem to be an anomalous result if Rule 408 is interpreted to admit evidence of a compromise to show a possible reason for a witness to falsify under the rubric of "bias," despite the fact that this may unfairly prejudice the party's case, see s 5311, while a statement made in negotiations offered to show that the witness did lie is excluded, despite the lack of any unfairness to the party.

FN59. "Fairness" and "truth" See vol. 21, ss 5023, 5026.

FN60. Admitted to impeach Of course, if the party objecting to the statement was not a party to the compromise, he has no standing to object. See s 5315.

FN61. Unnecessary There would be no need to adhere to this distinction if the existence of compromise negotiations had already been disclosed to the jury for some other purpose permitted by Rule 408.

FN62. "Spoliation" See generally vol. 22, s 5178.

FN63. "**Criminal** investigation" See s 5313.

FN64. Conceal or destroy Rule 408 would not prevent the plaintiff from showing that the evidence was destroyed, but this will do him little good if he cannot show that it was done at the defendant's behest.

FN65. Intended to exclude Unless, of course, the agreement involved testimony the other plaintiff was to give; presumably the agreement would then be admissible to show "bias or prejudice." See s 5311.

FN66. "Valuable consideration" See s 5305.

FN67. That reason Alternatively, it can be argued that the evidence is admissible because it proves the invalidity of the defense not by an inference from the defendant's desire to settle the related case but as an inference from his desire to spoliate the present case.

FN68. Preliminary fact See vol. 21, s 5055.

FN69. Out of context See vol. 21, s 5078.

FN70. Erie doctrine See s 5315.

FPP s 5314 (R 408)

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1995 Supplement

Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5314. PERMISSIBLE USES--OTHER

FN1. Not exhaustive To explain absence of settling party: Kennon v. Slipstreamer, Inc., C.A.5th, 1986, 794 F.2d 1067, 1070; Belton v. Fibreboard Corp., C.A.5th, 1984, 724 F.2d 500, 505 (offered by settling plaintiff); Peterson v. Little-Giant Glencoe Portable Elevator Corp., Minn.1985, 366 N.W.2d 111 (midtrial settlement). To show knowledge: Johnson v. Hugo's Skateway, C.A.4th, 1992, 974 F.2d 1408, 1413 (of racial hostility); Breuer Electric Mfg. v. Toronado Systems of American, C.A.7th, 1982, 687 F.2d 182, 185 (awareness of issues); U.S. v. Gilbert, C.A.2d, 1981, 668 F.2d 94, 97 (of securities laws). Rule 408 does not bar use of settlement negotiations to prove the workings of the settling defendant's scheme. Broadcort Capital Corp. v. Summa Medical Corp., C.A.10th, 1992, 972 F.2d 1183, 1194 n. 16. District court did not err in admitting evidence of indemnity agreement to show that two parties were not adverse to each other. Brocklesby v. U.S., C.A.9th, 1985, 767 F.2d 1288, 1293. One court has held that evidence of a prior compromise is excluded under Rule 408 without any attention to the purpose for which the evidence was sought to be admissible. Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., D.C.N.Y.1980, 486 F.Supp. 414, 423. Ariz.R.Ev. 408 did not prevent the use of settlement between buyer and seller to determine whether it constituted a default by one party or a mutual recission where this fact was relevant to amount of commission due broker who had arranged the deal that was subject of dispute. Campbell v. Mahany, App.1980, 620 P.2d 711, 127 Ariz. 332. Evidence of defendant's prior settlement with class of which plaintiff was a member is not inadmissible under Cal.Evid.Code s 1154 when offered to prove that punitive and deterrent effects of exemplary damages had already been satisfied. Lemer v. Boise Cascade, Inc., 1980, 165 Cal.Rptr. 555, 107 Cal.App.3d 1. Evidence of compromise is admissible to show that employer's failure to pay was intentional and not inadvertent. Miller v. Component Homes, Inc., Iowa 1984, 356 N.W.2d 213, 216. Evidence of settlement offer of $85,000 is admissible to show why plaintiff thought that $10,000 repair to plane was inadequate. Dodson Aviation v. Rollins, 1991, 807 P.2d 1319, 1324, 15 Kan.App.2d 314. A similar statement appears in the Comment to Prop.N.Y.Evid.Code s 408. Personal injury plaintiff's settlement of prior injury claims was relevant to show preexisting injury but was properly excluded as likely to confuse the jury in case where prior injury had been conceded. Callihan v. Burlington Northern, Inc., 1982, 654 P.2d 972, 976, 201 Mont. 350. Shimola v. Cleveland, 1992, 625 N.E.2d 626, 630, 89 Ohio App.3d 505 (settlement of earlier suit on same issue admissible to show background of current dispute). Testimony that a client authorized his attorney to try to settle is not inadmissible under Rule 408 when offered to prove the client was aware of the claim. Cannell v. Rhodes, 1986, 509 N.E.2d 963, 967, 31 Ohio.App.3d 183. Gilman v. Towmotor Corp., 1992, 621 A.2d 1260, 1264, 160 Vt. 116 (admissible where it would be unfair and prejudicial to exclude).

But see Court assumes that list in last sentence of Rule 408 is exclusive and does not allow evidence of settlement of state court action against a third person to offset prejudice caused by admission into evidence of the pleading in that action. Vincent v. Louis Marx & Co., Inc., C.A.1st, 1989, 874 F.2d 36, 42.

FN2. Superfluous Since the third sentence of Rule 408 was either superfluous or redundant, its omission from a

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revision of the rule did not change its meaning. Harriman v. Maddocks, Me.1986, 518 A.2d 1027, 1031.

FN4. Policy Policy of Rule 408 precludes use of letters in settlement negotiations to satisfy the statute of frauds. Trebor Sportswear Co., Inc. v. The Limited Stores, Inc., C.A.2d, 1989, 865 F.2d 506, 510. Social policy of antitrust laws made it clear that Rule 408 was not intended to exclude proof of nolo contendere pleas to antitrust violation offered to show that defendant would engage in anticompetitive behavior if permitted to acquire the plaintiff. Crouse-Hinds Co. v. Internorth, Inc., D.C.N.Y.1980, 518 F.Supp. 413. Letters offering settlement and copy of movie "Poltergeist" delivered with plaintiff's demand letter were properly admitted where objections were inadequate to alert trial court that Rule 408 was being invoked. Haney v. Purcell Co., Inc., Tex.App.1990, 796 S.W.2d 782, 789.

FN6. Other state of mind Evidence of settlement of prior police brutality by city was admissible under Rule 408 to show that city was aware of practice to support "condoned custom" theory of liability. Spell v. McDaniel, C.A.4th, 1987, 824 F.2d 1380, 1400. Court assumes that Rule 408 would not bar use of document prepared for compromise negotiations to prove that party had notice of alleged defects in building. Ramada Development Co. v. Rauch, C.A.5th, 1981, 644 F.2d 1097, 1107.

FN7. Admissible In civil rights action against city for the shooting death of plaintiff's son, evidence of settlement negotiations between city and mother of another person beaten by the same officer were admissible to show knowledge of the officer's dangerous propensities. Gagliardi v. Flint, C.A.3d, 1977, 564 F.2d 112, 116. Evidence of settlement offer was admissible to prove mental state of employer in a suit for discrimination. Bulaich v. A.T. & T. Information Systems, 1989, 778 P.2d 1031, 1037, 113 Wn.2d 254.

FN8. Agency or control Statements in settlement negotiations by the defendant's insurance agent were not admissible under Rule 408 to show that plaintiff was an employee of defendant. Sortino v. Miller, 1983, 335 N.W.2d 284, 214 Neb. 592.

FN12. Flawed analogy Court assumes that since other crimes rule would not bar use of defendant's disregard of property rights of others to show intent in instant outrage, evidence of settlement of claims for such wrongs evidence is also admissible under Rule 408. Bradbury v. Phillips Petroleum Co., C.A.10th, 1987, 815 F.2d 1356, 1364. This overlooks the fact that the only way proof of settlement of other claims proves defendant's contempt for the law is through an assumption that the claims settled were valid, exactly the inference prohibited by Rule 408. Rule 404(b) on the other hand does not prohibit proof of bad acts offered to prove intent rather than conduct.

FN17. Basis for claim This seems to have been overlooked in Duse v. International Business Machines, D.C.Conn.1990, 748 F.Supp. 956, 962 (Rule 408 bars plaintiff's suit for interference with his attempt to settle dispute with third party). One court seems to have used Rule 408 to prevent one party from proving statements they claimed were a repudiation of the contract. Conroy v. Book Automation, Inc., Minn.App.1987, 398 N.W.2d 657, 660.

FN18. Breach of settlement Rule 408 would not bar evidence of settlement offered to prove breach of settlement agreement. Cates v. Morgan Portable Bldg. Corp., C.A.7th, 1985, 780 F.2d 683, 691.

FN19. Defense on compromise B & B Investment Club v. Kleinart's, Inc., D.C.Pa.1979, 472 F.Supp. 787 (to defeat corporate officer indemnity claim by showing not successful "on the merits").

FN21. Accord and satisfaction Welched accord and satisfaction was admissible in suit on original contract. Tag Resources v. Petroleum Well Services, Tex.App.1990, 791 S.W.2d 600, 606.

FN22. Novation West's Ann.Cal.Evid.Code s 1152 does not bar evidence of settlement of another lawsuit when offered as evidence of an account stated. Truestone, Inc. v. Simi West Industrial Park II, 1984, 209 Cal.Rptr. 757, 764, 163 Cal.App.3d 715.

FN24. Third persons Evidence of insurer's settlement with insured would not be barred by Rule 408 when offered to show that payment was voluntary and thus not a proper element of damages in subrogation claim against tortfeasor.

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Weir v. Federal Insurance Co., C.A.10th, 1987, 811 F.2d 1387, 1395. Rule 408 does not bar evidence of compromise of claim with third person to show costs that had been incurred by partners. Jensen v. Westberg, App.1988, 772 P.2d 228, 236, 115 Idaho 1021.

But see Wardell v. McMillan, Wyo.1992, 844 P.2d 1052, 1065 (admissibility not required by comparative negligence law).

FN25. Wrong in settlement Rule 408 does not bar the use of an affidavit submitted in settlement negotiations to impose Rule 11 sanctions. Eisenberg v. University of New Mexico, C.A.10th, 1991, 936 F.2d 1131, 1134. Evidence of settlement negotiations was properly admitted under Rule 408 on the issue of whether party acting on behalf of defendant had interfered with efforts of plaintiff to mitigate damages. Urico v. Parnell Oil Co., C.A.1st, 1983, 708 F.2d 852, 855. Rule 408 does not exclude evidence of settlement negotiations in proceeding under Civil Rule 23(e) to obtain judicial approval of class action settlement. In re General Motors Corporation Engine Interchange Litigation, C.A.7th, 1979, 594 F.2d 1106, 1124 n. 20. In action for malicious prosecution, evidence of insurer's statements in settlement negotiations were admissible to show that it filed an action in name of its insured that it knew to be meritless as a method of strongarming plaintiff into a settlement. Bradshaw v. State Farm Auto Ins., 1988, 758 P.2d 1313, 1322, 157 Ariz. 411. Trial judge properly ruled that letter sent to insurance company by lawyer was not admissible as proof of an attempt to inflate client's damages. Petersen v. State Farm Auto Ins. Co., La.App.1989, 543 So.2d 109, 115. Rule 408 permits use of statements in negotiation to show that release was signed as a result of fraud. Harriman v. Maddocks, Me.1986, 518 A.2d 1027, 1031. For a case in which the court used Rule 408 to prevent the plaintiff from proving what it claimed was the repudiation of the contract by the defendant, see Conroy v. Book Automation, Inc., Minn.App.1987, 398 N.W.2d 657, 660. Rule 408 did not bar use of evidence of settlement negotiations to prove that parties were fraudulently induced to enter agreement. Gorman v. Soble, 1982, 328 N.W.2d 119, 120 Mich.App. 831. Rule 408 does not bar proving representations made during settlement negotiations when these are the basis of claims of fraud being sued on. Portland Savings & Loan Association v. Bernstein, Tex.App.1985, 716 S.W.2d 532, 537. For an illustration of the sort of heavy-handed tactics that ought not to be shielded by Rule 408, see Goodman, All The Justice I Could Afford, 1983, p. 58 (employer opposed fired employee's claim for unemployment compensation benefits as tactic to coerce agreement on settlement of age discrimination action).

FN27. Failure to settle White v. Western Title Ins. Co., 1985, 221 Cal.Rptr. 509, 518, 40 Cal.3d 870, 710 P.2d 309; Pattison v. Valley Forge Ins. Co., La.App.1992, 599 So.2d 873, 877 (but excludible under Rule 403); Gelinas v. Metropolitan Property & Liability Ins. Co., 1988, 551 A.2d 962, 968, 131 N.H. 154; U.S. Fire Ins. Co. v. Millard, Tex.App.1993, 847 S.W.2d 668, 672. Offers to settle entire case were not admissible to refute bad faith claim with respect to only one element. Martin v. Principal Casualty Ins. Co., Colo.App.1991, 835 P.2d 505, 511. After a thorough review of the conflicting cases from other jurisdictions, court holds that a defendant cannot introduce evidence of its own offer to settle to mitigate a claim for punitive damages. Ettus v. Orkin Exterminating Co., Inc., 1983, 665 P.2d 730, 233 Kan. 555. Settlement negotiations are admissible in defense of claim for attorney's fees for failure to make a timely tender under an uninsured motorists policy. Benoit v. State Farm Auto Ins. Co., La.App.1992, 602 So.2d 53, 55. Rule 408 does not bar proof of settlement offers and discussions in a suit for wrongful failure to settle by insurer. Gelinas v. Metropolitan Property & Liability Ins. Co., 1988, 551 A.2d 962, 968, 131 N.H. 154.

FN28. Wrongful acts not shielded Rule 408 does not shield wrongful acts during settlement negotiations; a party can prove that he or she was induced to sign by fraudulent misrepresentations. Harriman v. Maddocks, Me. 1986, 518 A.2d 1027, 1031.

FN34. Mitigation or exhaustion Evidence of settlement negotiations was admissible to prove the plaintiff's failure to mitigate damages. Bhandari v. First National Bank of Commerce, C.A.5th, 1987, 808 F.2d 1082, 1103. Evidence of settlement negotiations was admissible to show that defendant's insurer had interfered with efforts of plaintiff to mitigate damages. Urico v. Parnell Oil Co., C.A.1st, 1983, 708 F.2d 852, 855. Rule 408 does not bar introduction of employer's offer to take back employee to prove failure to mitigate damages for wrongful discharge. Thomas v. Resort Health Related Facility, D.C.N.Y.1982, 539 F.Supp. 630. Rule 408 does not bar admission of offer to return converted property to show mitigation of damages. McKenzie v. Tom Gibson Ford, Inc., 1988, 749 S.W.2d 653, 657, 295 Ark. 326. Evidence of insurance company settlement offer was not admissible to show that plaintiff could have

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had money to repair truck and thus mitigate consequential damages. Waseca Sand & Gravel, Inc. v. Olson, Minn.App.1985, 379 N.W.2d 592, 594.

FN36. Inconsistent statement Where plaintiff claimed that another baseless libel suit had been settled, evidence that the suit had in fact been abandoned when the defendant agreed to publish a letter-to-the-editor it would have published anyway was admissible to impeach. American Family Life Assur. Co. v. Teasdale, C.A.8th, 1984, 733 F.2d 559, 568. After canvassing competing views, court holds that statements made in settlement negotiations may be admitted to impeach testimony given at trial. Davidson v. Beco Corp., App.1986, 733 P.2d 781, 786, 112 Idaho 560. Evidence of negotiations with insurance carrier could be admitted under Minn.R.Ev. 408 as impeachment of trial testimony concerning the loss. In re Commodore Hotel Fire and Explosion, Minn.1982, 324 N.W.2d 245. Defense offer to get "get" for $25,000 was admissible to show that refusal to obtain divorce was based on monetary rather than religious considerations. Burns v. Burns, 1987, 538 A.2d 438, 440, 223 N.J.Super. 219. A.B.A. Litigation Sec., Emerging Problems Under The Federal Rules of Evidence, 1983, p. 78.

FN52. "Decide against" After one-sided review of the literature, court concludes that letter in which defendant claimed that its mandatory retirement program was legal could not be used to impeach testimony of executives at trial that there was no such program. E.E.O.C. v. Gear Petroleum, Inc., C.A.10th, 1991, 948 F.2d 1542, 1545. "The clear import of the Conference Report as well as the general understanding among lawyers is that such conduct or statements may not be admitted for impeachment purposes." M. Graham, Handbook of Federal Evidence, 1981, pp. 255-256 (emphasis in original). This is the position taken in Tenn.R.Ev. 408, discussed in s 5301, note 33, this SUPPLEMENTnt. For a somewhat evasive embrace of this position, see Waltz & Huston, The Rules of Evidence in Settlement, 1981, 5 Litigation 11, 16 (courts should "almost never" admit compromise evidence to impeach).

FN56. "Complete candor" Cal.Evid.Code s 1155 justified exclusion of evidence of statement made by defendant's agent during settlement negotiations that would have impeached direct testimony of another agent. C & K Engineering Contractors v. Amber Steel Company, Inc., 1978, 151 Cal.Rptr. 323, 23 Cal.3d 1, 587 P.2d 1136.

FN58. Courts decide Court assumes that evidence of settlement from others was admissible to impeach the plaintiff's testimony that he could not afford needed surgical procedure. Williams v. Chevron U.S.A., Inc., C.A.5th, 1989, 875 F.2d 501, 504. F.R.Ev. 408 codifies a trend in the caselaw that permits evidence of settlement to be used to impeach. County of Hennepin v. AFG Industries, Inc., C.A.8th, 1984, 726 F.2d 149, 153. Court opines that First Circuit would not allow use of compromise statements for impeachment. Derderian v. Polaroid Corp., D.C.Mass.1988, 121 F.R.D. 9, 12 n. 1. Evidence that lawyer referred to purported will as a "shopping list" during settlement negotiations was admissible to impeach his testimony that he had never made such a reference. Matter of Estate of O'Donnell, 1991, 803 S.W.2d 530, 531, 304 Ark. 460. Almost all courts have held that statements made in compromise negotiations can be used for impeachment. Davidson v. Beco Corp., 1987, 753 P.2d 1253, 1255, 114 Idaho 107 (collecting cases). Rule 408 does not bar use of compromise evidence when offered to impeach. El Paso Electric Co. v. Real Estate Mart, Inc., App.1982, 651 P.2d 105, 109, 98 N.M. 570. Opinion, though vague, suggests that court is not sure if evidence of compromise ought to be admitted to impeach. Hursh Agency, Inc. v. Wigwam Homes, Inc., Wyo.1983, 664 P.2d 27, 36. It has been suggested that the rule should be amended to preclude the use of evidence for impeachment purposes. Kirkpatrick, Reforming Evidence Law in Oregon, 1980, 59 Ore.L.Rev. 43, 67.

FN60. Admitted to impeach Settlement documents were admissible to impeach by specific contradiction testimony that the bank never gave reasons for its actions regarding foreclosure. Freidus v. First National Bank of Council Bluffs, C.A.8th, 1991, 928 F.2d 793, 795. Where husband testified he was not aware of award of spousal maintenance until he was ordered to pay it, evidence of settlement agreement providing for award was admissible to impeach. DeForest v. DeForest, App.1985, 694 P.2d 1241, 1247, 143 Ariz. 627. The Rule 102 rationale is adopted in Davidson v. Beco Corp., 1987, 753 P.2d 1253, 114 Idaho 107 and Missouri Pacific Ry. Co. v. Arkansas Sheriff's Boys' Ranch, 1983, 655 S.W.2d 389, 280 Ark. 53. A prior inconsistent statement made during settlement negotiations should be admitted only if it strongly suggests that the witness has lied or if prejudice is likely to be slight. Davidson v. Beco Corp., App.1986, 733 P.2d 781, 787, 112 Idaho 560. Where plaintiff testified at trial that he never got any closer than 40 feet to escaped hamburgers-on-the-hoof, admission in demand letter that he came within ten feet of the steer was admissible to impeach him. Davidson v. Prince, Utah App.1991, 813 P.2d 1225, 1233 n. 9. This position is approved

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in Blakely, Article IV: Relevancy and Its Limits, 1983, 20 Hous.L.Rev. 151, 242.

FN64. Conceal or destroy Court assumes that Mary Carter agreement would be admissible under Rule 408 in Soria v. Sierra Pacific Airlines, Inc., 1986, 726 P.2d 706, 717, 111 Idaho 594. There is an exception to rule excluding evidence of settlement for "Mary Carter" agreements; i.e., agreements where party to the settlement continues in case as a pretended adversary while in fact having an interest in the putative adversary's victory. Turner v. Monsanto Co., Tex.App.1986, 717 S.W.2d 378, 380 (but finding agreement at issue did not qualify). Rule 408 does not bar revealing to jury that directed verdict on plaintiff's claim against one defendant was pursuant to a settlement in which that defendant had an interest in the plaintiff's recovery from remaining defendant. Sampson v. Karpinski, 1986, 515 A.2d 1066, 1069, 147 Vt. 315.

FN67. That reason Trial court properly admitted statement of cab company official on arriving on the scene of accident involving cab that he would give the other driver money "to forget about the incident." Frias v. Valle, 1985, 698 P.2d 875, 877, 101 Nev. 219 (apparently assuming Rule 408 did not apply).

FN68. Preliminary fact In determining trustworthiness of hearsay, the court can consider that party compromised a claim in reliance thereon despite Rule 408 as that rule does not apply to preliminary fact determinations under Rule 104. In re Japanese Electronic Products Antitrust Litigation, C.A.3d, 1983, 723 F.2d 238, 275, decision reversed on other grounds 1986, 106 S.Ct. 1348, 475 U.S. 574, 89 L.Ed.2d 538.

FPP s 5314 (R 408)

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Federal Rules of Evidence
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Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5313. ---- OBSTRUCTION OF JUSTICE

The last permissible use suggested by the Advisory Committee is "proving an effort to obstruct a **criminal** investigation or prosecution." [FN1] The scope and rationale of this provision is uncertain, in part because of the ambiguity in the common law rule. As codified by Wigmore, that rule was: In a **criminal** case, the accused's offer to pay value to a complaining witness for avoiding prosecution, being contrary to public policy, is receivable as evidence of an admission. [FN2] In his treatise, Wigmore speaks of this conduct as being admissible against an accused because it would be an "unlawful act" to "settle" the prosecution. [FN3] McCormick, however, attempted to distinguish between legitimate plea bargaining and attempts to "buy off" the prosecution. [FN4] The Advisory Committee Note seems to have followed McCormick's analysis: "An effort to 'buy off' the prosecution or a prosecuting witness in a **criminal** case is not within the policy of the rule of exclusion." [FN5]

However, this reliance on McCormick still leaves it unclear (a) exactly what sort of conduct is being proscribed, and (b) what evidentiary uses of that conduct are permissible. To illustrate, suppose a case in which the plaintiff has accused the defendant of violating the antitrust laws, both in testimony before a grand jury and in a civil suit filed against him. Which of the following acts is an attempt to "buy off" the prosecution?: (1) The defendant offers the plaintiff one million dollars to settle the civil action; (2) The defendant offers the prosecution a guilty plea, and a promise to make restitution of one million dollars to the victim in return for a favorable sentencing recommendation; (3) The defendant offers the plaintiff one million dollars to (a) leave the country, or (b) change his testimony, or (c) attempt to convince the prosecutor to drop **criminal** charges, or (d) write a favorable letter to the sentencing judge. There are countless other variations and the case may be made even more difficult by supposing, as sometimes occurs, that the government has both a civil claim for damages resulting from the **criminal** conduct and a duty to prosecute for the crime. However, the foregoing examples should suffice to portray the range of conduct that may be arguably claimed to be an attempt to "buy off" the prosecution.

Assuming that the conduct is that proscribed by the rule, in which of the following instances is it admissible?: (1) The evidence is offered against the defendant in a **criminal** prosecution for obstruction of justice; (2) The evidence is offered against the defendant in the **criminal** antitrust trial; (3) The evidence is offered against the defendant in the civil antitrust trial. Notice that the answer to the first question becomes much simpler if the evidence is admissible only in a **criminal** prosecution in which the conduct in question is the basis for the charges. In such cases the admissibility of the evidence would be determined by the same law that determines the criminality of the conduct.

Since the answer to the second question may simplify matters with respect to the first, let us begin with it. It is possible to read the last clause of Rule 408 as applying only to the case in which the claimed "compromise activities" are the basis of **criminal** charges against the party. [FN6] The evidence would be admissible in such a case because it is not being offered to prove the validity or invalidity of the claim being compromised; [FN7] in other words, the trier of fact is not being asked to treat the offer as an implied admission with respect to the underlying claim. [FN8] Although it simplifies the rule and some commentators seem to have accepted it, [FN9]

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this reading is difficult to reconcile with either Wigmore or McCormick's version of the common law rule or with policy.

In his proposed codification of the common law rule, Wigmore phrased it as making the attempt to compromise "receivable as evidence of an admission." [FN10] This language is not apt as a description of the use of the evidence to prove the charged crime in a prosecution for obstruction of justice; for such purposes the evidence would not be hearsay and there would be no reason to describe it as an "admission." [FN11] Moreover, the cases cited as authority for the rule in his treatise appear to be cases in which the evidence was admitted in a prosecution for the underlying charge, not obstruction of justice cases. [FN12] McCormick's discussion of the rule makes it clear that he views it as making the attempt to obstruct the prosecution admissible as spoliation evidence in a prosecution for the underlying offense. [FN13] Accordingly, some of the commentators have read Rule 408 as also permitting this. [FN14]

But if these writers are correct in their interpretation, then the rationale for admitting evidence of obstruction must be different than would be the case if it were only admissible in a prosecution for obstruction; evidence that the defendant attempted to "buy off" the victim in the case on trial is clearly being offered to prove the validity or invalidity of the claim. [FN15] The reason for admitting the evidence, at least under the privilege analysis of the rule, must be that it is not the policy of the rule to encourage such conduct; [FN16] or in other words, that the attempt to buy off a **criminal** prosecution is not a legitimate "compromise" and is not within the meaning of that term as used in the rule. [FN17] However, if this is the justification for admitting obstruction evidence, there does not seem to be any reason to limit such use to **criminal** prosecutions. [FN18] If the evidence would be admissible as proof of spoliation in the **criminal** case, surely it should also be admitted to prove the spoliator's lack of belief in his contentions in a civil case that involves the same event.

This brings us back, then, to our first question: the meaning of "an effort to obstruct a **criminal** investigation or prosecution." Here the common law cases must be used with some caution. [FN19] Some of them go back to the days in which there were no public officers charged with ferreting out crime and deciding which cases should be prosecuted; [FN20] since the enforcement of the **criminal** law was so dependent on the initiative of the victim or other concerned citizens, it is not surprising to find courts asserting the impropriety of attempts to "settle" a **criminal** case and railing about "compounding" of crimes. [FN21] Even in more recent times courts have been reluctant to acknowledge the legitimacy of "plea bargaining" by public officials. [FN22] Obviously the meaning of "obstruct" should be based on contemporary institutions and values, not the needs of another day.

Given the importance of negotiated dispositions in the administration of both civil and **criminal** justice, it seems obvious that a bona fide effort to settle either a civil or a **criminal** case is not "an effort to obstruct a **criminal** investigation or prosecution." Rule 410 makes it clear that the policy of the Evidence Rules is to protect, not to inhibit plea bargaining. [FN23] While the Wisconsin drafters have suggested that their version of Rule 408 would make admissible any effort to settle a **criminal** prosecution other than with the court or the prosecuting attorney, [FN24] this seems unrealistic. [FN25] The attitude of the victim is often controlling in the disposition of **criminal** cases, particularly for minor crimes. [FN26] So long as the discussions with the victim are within the limits of propriety, [FN27] there seems to be little reason to treat them as efforts to obstruct justice.

Similarly, if the act of the defendant gives rise to both civil and **criminal** liability, a legitimate attempt to compromise the civil claim should be protected under Rule 408. [FN28] While even a legitimate settlement of the civil claim can have some influence on the way in which the victim testifies in the **criminal** case, the fact that this can be shown under the provision of Rule 408 making compromise evidence admissible to prove bias or prejudice [FN29] of the witness should discourage efforts to make over-generous settlements of related civil litigation in an effort to soften-up the witness. Of course, if an express or implied provision of the offer of compromise requires some interference with the **criminal** case, [FN30] evidence of this would be admissible in either the civil or the **criminal** case.

Courts should have little difficulty in most cases in differentiating between genuine compromises that are protected by the rule and those acts that are designed to obstruct a **criminal** prosecution. [FN31] Any offer or

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agreement that involves the bribery of police or prosecutorial officers, that requires the party to testify in a particular fashion or to assert a privilege in the **criminal** trial, that calls for the destruction or concealment or fabrication of evidence of guilt or innocence, or that requires the intimidation or harassment of witnesses is not protected by Rule 408. [FN32] Similarly, any statement in compromise negotiations that suggests such an agreement or that reveals that an obstruction of justice has taken place is also admissible. [FN33]

FN1. "Obstruct prosecution" Although the Uniform Rules had no reference to this use, it has been asserted that such evidence would be admissible under U.R.E. 52. Falknor, Extrinsic Policies Affecting Admissibility, 1956, 10 Rutgers L.Rev. 574, 594.

FN2. "Contrary to public policy" Wigmore, Code of Evidence, 3d ed. 1942, s 1001 (emphasis in original).

FN3. "Unlawful act" "In a **criminal** prosecution, the accused's offer to pay money or otherwise to 'settle' the prosecution will be received against him, because that mode of stopping or obstructing the prosecution would be an unlawful act, and good policy could not encourage that mode of dealing with a **criminal** charge; * * *" 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, p. 46 (emphasis in original).

FN4. "Buy off" McCormick, Evidence, 1954, s 251, pp. 542-543.

FN5. "Not within policy" Advisory Committee's Note, Rule 408.

FN6. Basis of charges One simply reads "proving an effort to obstruct a **criminal** investigation or prosecution" as meaning only when those facts are the ultimate issues in a case.

FN7. Validity or invalidity In addition, it can be argued that the illegality of the proposed consideration means that it is not a "valuable consideration" under the rule. See s 5305.

FN8. Underlying claim See s 5308.

FN9. Commentators accept Waltz, The New Federal Rules of Evidence, 2d ed. 1975, p. 35; Schmertz, Relevance and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence, 1974, 33 Fed.B.J. 1, 17-18. It is also possible to read these writers as saying that the attempt to buy off the victim is admissible in the **criminal** action but not in the related civil action.

FN10. "An admission" See text at note 1 above.

FN11. Not hearsay While the attempt to buy off the case would constitute a "statement" by the defendant, that statement is not being used testimonially but as proof of the ultimate facts of the case; i.e., it is not offered to prove the truth of the matter asserted. See discussion under Rule 801.

FN12. Not obstruction cases 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, p. 46 n. 13.

FN13. Spoliation After stating that the common law compromise rule did not exclude evidence of attempts to "buy off" a **criminal** prosecution, McCormick continues: "Indeed, we have seen that it is classed as an implied admission and received in evidence as such." The footnote to this sentence is a cross-reference to his discussion of the doctrine of spoliation. McCormick, Evidence, Cleary ed. 1972, s 274, p. 665. For discussion of spoliation evidence, see vol. 22, s 5178.

FN14. Rule 408 permits 2 Louisell & Mueller, Federal Evidence, 1978, p. 297. It is also possible to read the writers cited in note 9 above, as reaching the same conclusion.

FN15. Validity being proved Since the civil plaintiff has no authority to compromise the **criminal** claim, efforts to settle that claim with him would not be within the rule for that reason. See s 5303. If the compromise can be

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characterized as an attempt to settle the civil claim, that claim is, of course, a different claim than the **criminal** claim. However, in order to be relevant in the **criminal** case, the civil compromise must be used first to infer the offeror's belief in the validity of the civil claim. See s 5308.

FN16. Not within the policy Cf. Advisory Committee's Note, Rule 408, quoted in the text at note 5 above.

FN17. Not "compromise" See s 5306.

FN18. Limit to **criminal** cases As seems to be argued by the writers cited in note 9 above.

FN19. Caution Cf. Slough, Relevancy Unraveled, 1957, 5 U.Kan.L.Rev. 675, 721, stating the common law rule this way: "For reasons quite apparent, in a **criminal** prosecution, offers to pay money or settle with the prosecution are generally received against the offeror."

FN20. No professional enforcement Friedman, A History of American Law, 1973, pp. 252-253.

FN21. "Compounding" See, e.g., State v. Soper, 1839, 16 Me. 293, 295; State v. Givens, 1911, 70 S.E. 162, 87 S.C. 525.

FN22. "Plea bargaining" See generally, Rosett & Cressey, Justice By Consent, 1976, pp. 53-58.

FN23. Protect plea bargaining See Advisory Committee's Note, Rule 410.

FN24. Court or prosecuting attorney Judicial Council Committee's Note, Wis.Stats.Ann. s 904.08 ("offers other than to the court or to the prosecuting attorney * * * to settle a **criminal** prosecution remain admissible;").

FN25. Unrealistic Very often in minor disputes in which the police are called, the officers will attempt to bring the parties to some private resolution rather than arrest or cite someone; if this is unsuccessful, then the **criminal** sanction is invoked. It seems ironic that under the Wisconsin interpretation, an attorney would be viewed as acting illegitimately for engaging in conduct that is quite common and thought unexceptionable when done by a rookie policeman.

FN26. Attitude of victim One of the authors once had the unhappy duty of prosecuting a **criminal** case that arose from the attempt of the defendant to operate a dog kennel as a nonconforming use in a rural area where his neighbors had prevailed upon the local authorities to alter the zoning laws after the kennel operation began. The judge who would have tried the case was elected by the voters of the affected area while the district attorney had a wider constituency that included a number of newspapers in neighboring communities that had been critical of the efforts of local officials to oust the kennel. Needless to say, the prosecutors in that case would have been only too happy to have had the defendant negotiate a settlement with the "victims"--even if it meant buying them off.

FN27. Limits of propriety In at least one area known to the authors, the practice of defense counsel dealing directly with the victim is so common that it is the subject of well-understood ground rules covering such matters as when and from whom consent to talk with the victim should be obtained, who may be present, and in what cases such negotiations are permissible.

FN28. Protected under Rule 408 2 Louisell & Mueller, Federal Evidence, 1978, p. 296; 2 Weinstein & Berger, Weinstein's Evidence, 1975, pp. 408-14.

FN29. Bias or prejudice See s 5311.

FN30. Interference required McCormick, Evidence, Cleary ed. 1972, s 274, p. 666 (compromise rule applies to efforts to settle civil liability "if no agreement to stifle the **criminal** prosecution is involved").

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FN31. Little difficulty The tough cases are those in which the agreement requires the person to do something that he could legitimately do, but might not do if he had not agreed to do so; e.g., write a truthful letter urging leniency in sentencing or assert a privilege not to testify. It would seem that where the question is not one of direct prohibition of these practices but rather of their admissibility as evidence, courts can afford to be excessively scrupulous. Compare, for example, the question of payments to witnesses in excess of the statutory witness fee, which are admissible in evidence even if not forbidden. If the party's motivations are pure, he could not be much prejudiced by the introduction of such evidence.

FN32. Not protected See McCormick, Evidence, Cleary ed. 1972, s 273. Of course, by the terms of Rule 408, the practice must be aimed at obstruction of the **criminal** case, not of some related civil trial. While a party might attempt to interfere with a civil case by an act of spoliation, it would seldom be the case that he would enter into an agreement with his opponent to suppress evidence. See also s 5314.

FN33. Negotiation statements Since this use of the evidence is based on the policy of not protecting acts of spoliation, it would seem that the rule should not apply to statements proposing or admitting such acts.

FPP s 5313 (R 408)

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Federal Practice and Procedure
Federal Rules of Evidence
Charles Alan Wright
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1995 Supplement

Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5313. PERMISSIBLE USES--OBSTRUCTION OF JUSTICE

FN4. "Buy off" Agreement by which one principal of corporate defendant agreed not to financially support defense or to voluntarily testify and to assign any benefits he might receive from corporate counterclaim to defendants was not an attempt to buy off a witness. Quad/Graphics, Inc. v. Fass, C.A.7th, 1985, 724 F.2d 1230, 1235.

FN14. Rule 408 permits In mail fraud prosecution, evidence that the defendant told the victim she would return the stolen dolls to her if victim would drop the fraud charges was not inadmissible under Rule 408 since it was an effort to obstruct a criminal charge, not a bona fide settlement of civil case. U.S. v. Peed, C.A.4th, 1983, 714 F.2d 7.

FN31. Little difficulty Where there was no civil suit pending and the defendant offered to return loot in exchange for dropping of charges by victim, this was akin to effort to obstruct justice and not a settlement protected by Rule 408. U.S. v. Peed, C.A.4th, 1983, 714 F.2d 7, 9.

FPP s 5313 (R 408)

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compare - breadth of conspiracy.

UNITED STATES of America, Plaintiff-Appellee,
v.
James L. HAYS and Weldon J. Hays, Defendants-Appellants.

No. 88-1366.

United States Court of Appeals,
Fifth Circuit.

April 25, 1989.

Defendants were convicted of conspiracy, misapplication of funds and making false entries in the records of federally insured savings and loan association by the United States District Court for the Northern District of Texas, Jerry Buchmeyer, J., by jury verdict. Defendants appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) admission of evidence involving events leading up to inception of savings and loan association, which had been granted provisional charter, impermissibly affected substantial rights of defendants; (2) error in admitting evidence pertaining to unidentified coconspirator named in indictment was not harmless; and (3) erroneous admission of evidence regarding settlement agreement entered into between defendants and federally insured savings and loan association was not harmless.

Reversed.

[1] CRIMINAL LAW ⇐ 1153(1)
110k1153(1)
District court's determination on either logical or legal relevancy of evidence will not be disturbed absent substantial abuse of discretion. Fed.Rules Evid.Rules 401, 403, 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 369.1
110k369.1
Evidence, which consisted of testimony of 11 witnesses, which required almost 200 pages of the record on appeal, and which involved defendant's allegedly improper activities during time defendant was attempting to secure sufficient deposits to ensure continued operation of provisionally chartered savings and loan association, was not admissible, in prosecution for conspiracy, misapplication of funds and making false entries in the records of federally insured savings and loan association; indictment charges involved different savings and loan association. Fed.Rules Evid.Rules 401, 403, 28 U.S.C.A.; 18 U.S.C.A. §§ 371, 657, 1006.

[3] CRIMINAL LAW ⇐ 1169.11
110k1169.11
Error in admitting evidence, which concerned one defendant's allegedly improper activities during time he was attempting to secure sufficient deposits to ensure continued operation of provisionally chartered savings and loan association, impermissibly affected substantial rights of defendants, in prosecution for conspiracy, misapplication of funds and making false entries in records of different federally insured savings and loan association; record indicated that the Government's motive in introducing the evidence was to attack the character of the defendants and that evidence was cumulative, unduly prejudicial and inflammatory. Fed.Rules Evid.Rules 401, 403, 404(b), 28 U.S.C.A.; 18 U.S.C.A. §§ 371, 657, 1006.

[4] CRIMINAL LAW ⇐ 1169.7
110k1169.7
Error in admitting mostly irrelevant evidence, which concerned activities of unidentified coconspirator named in indictment and which was in the form of several hundred pages of exhibits accessible to jury during deliberations, was not harmless, given voluminous quantity of the exhibits and nature of their content, in prosecution for conspiracy, misapplication of funds and making false entries in records of federally insured savings and loan association; evidence served merely to assassinate character of unnamed coconspirator and, in so doing, indirectly assassinate character of defendants, and reviewing court was unable to say that jury would have found defendants guilty even in the absence of the evidence. Fed.Rules Evid.Rules 401, 403, 404(b), 28 U.S.C.A.; 18 U.S.C.A. §§ 371, 657, 1006.

[5] CRIMINAL LAW ⇐ 408
110k408
Evidence regarding settlement agreement entered into between defendants and federally insured savings and loan association was not admissible in prosecution for conspiracy, misapplication of funds and making false entries in records of federally

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insured savings and loan association; the Government did not contend that evidence was offered for permissible purpose of proving liability, negativing contention of undue delay, or establishing obstruction of criminal investigation, but rather, the Government claimed that evidence of the agreement assisted jury in its understanding of breadth of the conspiracy. Fed.Rules Evid.Rule 408, 28 U.S.C.A.; 18 U.S.C.A. §§ 371, 657, 1006.

[6] CRIMINAL LAW ⊜ 1169.12
110k1169.12
Error in admitting evidence regarding settlement agreement entered into between defendants and federally insured savings and loan association was not harmless, in prosecution for conspiracy, misapplication of funds and making false entries in records of federally insured savings and loan association; it did not tax reviewing court's imagination to envision juror who retired to deliberate with notion that if defendants had done nothing wrong, they would not have paid the money back. Fed.Rules Evid.Rule 408, 28 U.S.C.A.; 18 U.S.C.A. §§ 371, 657, 1006.

***583** Michael S. Fawer, Herbert V. Larson, Jr., New Orleans, La., for defendants-appellants.

Delonia A. Watson, Terence J. Hart, Joseph Revesz, Asst. U.S. Attys., Marvin Collins, U.S. Atty., Dallas, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, POLITZ, and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

Defendants-appellants James L. Hays and Weldon J. Hays appeal their convictions for conspiracy, misapplication of funds and making false entries in the records of a federally insured savings and loan association. Concluding that the district court's admission of unnecessarily cumulative, prejudicial and irrelevant evidence impermissibly affected substantial rights of the defendants, we are constrained to reverse.

I. FACTS AND PROCEDURAL HISTORY

In 1982, an appellant-defendant in this case, James Hays, became the president of Lancaster First Federal Savings and Loan Association (hereinafter Lancaster) in Lancaster, Texas. Prior to assuming that position, James Hays, a former Texas Savings and Loan bank examiner, had been Lancaster's vice-president and a member of its board. James Hay's son, Weldon Hays, also a former Texas Savings and Loan bank examiner and the other appellant-defendant in this case, likewise was involved in the savings and loan business as an employee at Lancaster and also as president of the Colony Savings and Loan (hereinafter Colony). This appeal arises from the criminal convictions of James and Weldon Hays for improper activities regarding certain loans and deposits involving the Lancaster's funds. What follows is a brief description of the loans and deposits which are relevant to the issues presented by this appeal.

A. The Loans

1. "Hubbard I"

In early 1982, Francis Allen Clark (hereinafter Clark), a real estate developer, met Paul Jensen (hereinafter Jensen), the president of Mountain West Mortgage Company (hereinafter Mountain West), a mortgage brokerage company. Mountain West did not actually fund mortgages, but rather was in the business of putting together ***584** borrowers and lenders. As a result of Clark's acquaintance with Jensen, Clark tendered to Mountain West a proposal to purchase and develop a 22 1/2 acre tract of land near Lake Ray Hubbard near Dallas. Responding favorably to Clark's proposal, Jensen, through Mountain West, arranged the necessary financing for the venture from Lancaster. Accordingly, Lancaster loaned Clark $1.5 million and the land was purchased on July 22, 1982. In attendance at the closing were Jensen, Clark and James Hays. It was at that time that James Hays first met Clark. Thereafter, Mountain West and Clark formed Lake Ray Hubbard, Ltd., LL, a limited partnership, to pursue development of the Lake Ray Hubbard property.

2. "Hubbard II"

In August 1982, Lancaster made another loan, this time for construction on the 22 1/2 acre Lake Ray Hubbard tract which was previously purchased and

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described above. The proceeds of the Hubbard II loan, also in the amount of $1.5 million, went to another newly formed limited partnership, Lake Ray Hubbard Ltd. I. Lake Ray Hubbard Ltd. I was to provide the necessary construction on the Lake Ray Hubbard property. The partnership distribution of Lake Ray Hubbard Ltd. I was as follows: Clark, a general partner held 45.5% interest; Mountain West, a limited partner held 45.5% interest; James Hays, a limited partner held 4% interest; [FN1] and Richard Randall, a limited partner held 5% interest.

FN1. It is interesting to note that James Hays' capital contribution to the partnership was $10.00. It is also worth noting that the partnership agreement was not signed until after the closing of the August 1982 loan.

/

3. "Plano"

Later in 1982, Lancaster loaned Plano Ltd. I, another limited partnership, $3,000,000 for the purchase of a twenty-eight acre tract near Plano, Texas. Plano Ltd. I was structured as follows: Clark, a general partner held 41% interest; First Financial Mortgage Corporation, [FN2] a limited partner held 41% interest; James Hays, a limited partner held 4% interest; and Richard Randall, a limited partner held 10% interest. Allegedly, this loan was overfunded by approximately $300,000. [FN3]

FN2. First Financial Mortgage Corporation had three directors: Paul Jensen, Weldon Hays, and Van Zannis.

FN3. Two other loans made by Lancaster to two other limited partnerships, Lake Meadows, Ltd. I and Lake Meadows, Ltd. II, are not discussed here as both defendants were acquitted of any criminal conduct in connection with those loans.

4. "HLH Joint Venture Loans"

In August 1982, a partnership was formed by Weldon Hays, William O. Henry and Lawrence Moffitt as equal partners. Known as HLH Joint Venture, the partnership was created to purchase and develop land. Allegedly, Weldon Hays had been brought into the partnership by Henry and Moffitt because Weldon Hays had the ability to procure the necessary financing and appraisals through his father, James Hays, who was then president of the Lancaster. The HLH partnership agreement provided that any two of the three partners could sign documents for the partnership.

The loans made by Lancaster to the HLH Joint Venture were as follows: the first loan was for $1,000,000 and was made in August 1982; the second loan was for $840,000 and was made in December 1982; and the third loan was for $380,000 and was made in January 1983. The $1,000,000 loan was allegedly overfunded by $423,016 and the $380,000 loan by $19,782.

Weldon Hays never signed any of the loan agreements, although the other two partners did. According to the Government, the conspicuous absence of Weldon Hays' signature on the loan agreements reflected an intent to conceal his partnership interest in the HLH Joint Venture. Ultimately, the HLH Joint Venture was dissolved and Weldon Hays was paid $245,330 for his interest in the partnership.

B. The Deposits

Some time after Weldon Hays left his position as an examiner with the Texas ***585** Savings and Loan Department, he was approached by an individual by the name of Harry Hunsicker (hereinafter Hunsicker). Hunsicker, a real estate appraiser and investor, owned a shopping center in the Colony, a suburban community near Dallas. Seeking a new tenant for his shopping center, Hunsicker convinced Weldon Hays that the Colony needed its own savings and loan association which could be housed in Hunsicker's shopping center. It would be called the Colony Federal Savings and Loan.

After receiving advice from a regulatory consultant, Weldon Hays sought to acquire a provisional charter for his new savings and loan. The requisites for a provisional charter are not particularly cumbersome and are in fact, remarkably simple. First, marketing studies are required. Those studies must reflect that a new savings and loan association is not only needed in the community but that its presence would not have an adverse impact. Next, organizers must pledge $250,000 in deposits as protection against losses by initial depositors until insurance is obtained from the Federal Savings and Loan Insurance Corporation

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(FSLIC). The organizers' pledges are then attached to an application for a provisional charter to the Federal Home Loan Bank (hereinafter FHLB). Upon approval by the regional FHLB, the application is forwarded to the FHLB Board in Washington where, upon final approval, a provisional charter is issued. After the issue of the provisional charter, the organizers have six months to obtain deposits in the amount of $2,000,000 from 1,000 depositors, seventy-five percent of whom must be from the institution's market area. When the above requirements are met, and the appropriate insurance premiums are paid to the FSLIC, the new savings and loan may engage in a full range of services.

The Colony met the above described initial requirements and was granted a provisional charter. Unfortunately, however, Weldon Hays and the other organizers of the Colony were unable to meet the depository requirements for an unqualified charter. A six month extension was sought and granted. Nevertheless, Colony failed to secure the necessary deposits and the provisional charter expired. It was thereafter surrendered by Weldon Hays on November 4, 1982. Significantly, some $400,000 of Lancaster's funds were deposited in Colony before its demise even though the deposits of Colony had not been, nor ever were, federally insured.

C. Wheelers, Dealers or Conspirators?

The Government charged James and Weldon Hays with illegally receiving pecuniary benefits in connection with the above described loans. Those benefits are as follows: On September 9, 1982, First Financial Mortgage Company (hereinafter First Financial) paid James and Weldon Hays each $15,000 in fees earned by First Financial on the Plano loan. Later, on October 14, 1982, First Financial paid James Hays $12,500 for loan expenses on the Hubbard II loan. Additionally, James and Weldon Hays were paid $44,400 in commissions from First Financial for the HLH Joint Venture loans. On December 30, 1982, Lancaster issued a check that was signed and approved by James Hays in the amount of $22,008 to First Financial. That check was then used to purchase another check in the amount of $22,008 which was payable to Weldon Hays. Despite receiving these benefits, James Hays, on January 11, 1983, signed a "representation letter" in which he failed to disclose his receipt of fees as well as his ownership interest in an entity to which Lancaster had loaned money.

In addition to the above mentioned benefits in connection with the loans made by Lancaster, the government charged Weldon and James Hays with receiving other improper benefits as a result of their savings and loan activities. Namely, in October 1982, $46,000 of Lancaster's funds were used to purchase two Cadillacs which were used by James and Weldon Hays. Moreover, Weldon Hays used his Cadillac before he was employed by Lancaster and the automobile was later purchased by the HLH Joint Venture from Lancaster. Finally, as mentioned previously, Weldon Hays received $245,330 for his interest in the ***586** HLH Joint Venture Partnership upon its dissolution.

On October 28, 1987, a federal grand jury returned an eleven count indictment against James Hays and Weldon Hays. Count 1 of the indictment charged James and Weldon Hays under 18 U.S.C. § 371 with conspiring to violate 18 U.S.C. §§ 657 and 1006. The remaining ten counts charged James Hays with the misapplication of funds belonging to a savings and loan institution, making false entries and the illegal receipt of loan proceeds in violation of 18 U.S.C. §§ 657 and 1006. Weldon Hays was charged with aiding and abetting in all of the above counts with the exception of Count 9.

The defendants entered pleas of not guilty to all counts. A jury trial ensued during which the Government called forty-one witnesses and offered somewhere in the neighborhood of 300 exhibits. Thereafter, the jury found James Hays guilty on all counts of the indictment except for Counts 5 and 6. Weldon Hays was convicted on all counts with which he was charged except for Counts 5 and 6. James Hays was sentenced to five years' imprisonment on both Counts 1 and 2 with the sentences to run consecutively. On each of the remaining counts, James Hays was sentenced to five years' imprisonment with the sentences to run concurrently with each other and the Count 1 sentence. James Hays was fined $60,000. Weldon Hays was sentenced in an identical manner, except that his fine was assessed at $55,000. The defendants thereafter timely appealed.

II. DISCUSSION

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On appeal the appellants contend that the district court made a substantial number of evidentiary rulings that were in error. Specifically, appellants contend that the trial court improperly allowed the Government to introduce an overwhelming amount of irrelevant evidence. They also argue that even if some of the challenged evidence was relevant, that it was highly prejudicial, and as such was improperly admitted under Fed.R.Evid. 403. As a second assignment of error, the appellants maintain that the repeated references to, and extraordinary emphasis that was placed upon, their alleged violations of civil banking regulations was a violation of their constitutional rights to due process of law under the fifth amendment. Because we conclude that the appellants' first point of error has merit and warrants reversal, we do not reach appellants' second point of error.

The appellants argue the district court erred in allowing into evidence some 200 pages of testimony and numerous exhibits which had no bearing on the charges alleged in the indictment. To determine whether the evidence challenged by the appellants was, in fact, irrelevant, recourse must be had to the wording of the indictment. As the appellants correctly contend, under the indictment, the Government needed only to establish the existence of the Hubbard I loan, the Hubbard II loan, the Plano loan, the HLH Joint Venture loans, the representation letter signed by James Hays, and the existence of a conspiratorial relationship between James Hays, Weldon Hays, and Paul Jensen. The appellants urge that had the Government been limited to introducing only the evidence necessary to establish those facts, then the length of the trial would have been reduced substantially and the number of exhibits which were introduced would have been cut by almost one third. More importantly, the appellants contend that the introduction of such irrelevant and prejudicial evidence was reversible error.

As defined by the Federal Rules of Evidence, relevant evidence is that evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Evidence which meets this broad standard is known as "logically relevant" evidence. The Federal Rules of Evidence further provide that "[a]ll relevant evidence is admissible," and that "[e]vidence which is not relevant is not admissible." Fed.R.Evid. 402.

In determining whether evidence should be admitted or excluded on the basis of ***587** relevancy, however, the trial court's decision does not always turn upon a simple determination that the standard enunciated in Rule 401 is satisfied. Instead, the focus may turn to a determination of whether the proferred evidence is "legally relevant." Fed.R.Evid. 403 provides that "[relevant] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Thus, while the trial court's discretion in admitting evidence under Rule 401 is necessarily quite broad, Rule 403 requires a balancing of interests to determine whether logically relevant evidence is also legally relevant evidence.

[1] In reviewing the district court's rulings on matters of relevancy, this Court is guided by the principle that district courts have wide discretion in determining relevancy under Rule 401. The district court's decision will not be disturbed absent a substantial abuse of discretion. United States v. Brown, 692 F.2d 345, 349 (5th Cir.1982). Similarly, the decision of the district court with regard to the admissibility of evidence under the standards set forth in Rule 403 is subject to considerable deference. In the absence of an abuse of discretion, the district court's ruling on matters involving Rule 403 will not be overruled. United States v. Kalish, 690 F.2d 1144, 1155 (5th Cir.1982), cert. denied, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958 (1983).

Nevertheless, our review of erroneous evidentiary rulings in criminal trials is necessarily heightened. As the Supreme Court has instructed, evidence in criminal trials must be "strictly relevant to the particular offense charged." Williams v. New York, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed.2d 1337 (1949). "The admission of irrelevant facts that have a prejudicial tendency is fatal to a conviction, even though there was sufficient relevant evidence to sustain the verdict." United States v. Allison, 474 F.2d 286, 289 (5th Cir.1973) (citing Williams v. United States, 168 U.S. 382, 18 S.Ct. 92, 42 L.Ed. 509 (1897)). Thus, when viewing the

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error alleged, we must examine the consequences of the error in light of the entirety of the proceedings. To that end, we are constrained to take into account "what effect the error had or reasonably may be taken to have had upon the jury's decision." Kotteakos v. United States, 328 U.S. 750, 764, 66 S.Ct. 1239, 1247, 90 L.Ed. 1557 (1946). While we realize that it is indeed a rare case that is reversed on the basis of erroneous evidentiary rulings under Fed.R.Evid. 401 and 403, we nevertheless emphasize that we are bound to zealously guard against emasculation of the important protections that those rules afford the defendants in criminal cases.

We turn now to the record and the challenged evidence. That evidence may be divided into three categories: 1) evidence which involves the events leading up to the inception of Colony, 2) evidence which concerns the activities of Paul Jensen, and 3) evidence regarding a settlement agreement between the Hays and Lancaster. We first address the evidence which was introduced by the Government concerning Colony.

[2] At trial, the Government presented eleven witnesses who testified at length regarding Weldon Hays' allegedly improper activities during the time he was attempting to secure sufficient deposits to ensure the continued operation of Colony. The testimony of those eleven witnesses required almost 200 pages of the record on appeal. Little, if any, of that testimony is relevant to the offenses with which either Weldon Hays or his father were charged. Instead, the evidence consists primarily of testimony regarding the unscrupulous conduct of Weldon Hays at or about the time he was attempting to get Colony chartered.

Specifically the challenged testimony accused Weldon Hays of generating fictitious lists of depositors, forging pledges, receiving a clandestine salary and engaging in other misconduct relative to the formation of Colony. We fail to see how these matters relate to the specific offenses charged in the indictment since the charged offenses occurred years later and were in connection with Lancaster. According to ***588** the indictment, James and Weldon Hays conspired to misapply Lancaster's funds, not Colony's funds. The indictment alleged conspiracy to make false entries in Lancaster's books, not Colony's books. The indictment alleged misapplication of Lancaster's funds and making false entries in Lancaster's books, not Colony's. Accordingly, the only glimmer of possible relevance of this testimony to the offenses charged is fleeting at best. Thus, we must conclude that its admission was error.

[3] A review of the record leaves us with the distinct impression that the Government's motive in introducing such evidence was to attack the character of Weldon and James Hays. As such, the admission of the evidence was also violative of Fed.R.Evid. 404(b). Likewise, a review of the record leaves us with the impression that the evidence was cumulative, unduly prejudicial and inflammatory. Had the evidence been restricted to a limited number of witnesses, or had the testimony taken a more modest number of pages of the record, the result might have been different. However, such was not the case. Under the appropriate standard of review, and on this record, we are unable to conclude that the error had no effect, or only a slight effect on the jury's decision. Kotteakos, 328 U.S. 750, 66 S.Ct. 1239. Having so concluded, we must view the error as having impermissibly affected substantial rights of the defendants. Id.

[4] Next, we focus on the evidence pertaining to Paul Jensen. Although never explicitly recognized as such by the district court, a review of the record in light of the indictment leaves the clear impression that Paul Jensen was one of the "unidentified co-conspirators" named in the indictment. Unlike the Colony evidence, the evidence concerning Paul Jensen was in the form of several hundred pages of exhibits accessible to the members of the jury during their deliberations. Among those pages could be found Paul Jensen's income tax return revealing a gross income of several million dollars, documentation of a federal investigation of several of Jensen's companies, evidence that Jensen was being investigated by a Federal Grand Jury assisted by a prosecutor in the instant case, and accounting records which showed that Jensen, through Snowball Investments, had issued a check for $272,000 to Colony. The check was purportedly to cover losses incurred by Colony, and the $272,000 was taken as a personal deduction by Jensen against his income tax obligations.

While the $272,000 matter is logically relevant to the conspiracy charges since Colony could not pay

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Lancaster its deposits without that money, the evidence gleaned from the other several hundred pages was, in large part, irrelevant. The information contained in those pages served merely to assassinate the character of Paul Jensen, and in so doing, indirectly assassinate the character of James and Weldon Hays. The Hays contend that such "guilt by association" is improper. The Government on the other hand argues that the evidence was necessary in order for the jury to understand the "scope of the conspiracy" and how the appellants were able to misapply Lancaster's funds.

While we are inclined to view the evidence regarding Jensen as less improper than the evidence regarding Colony addressed above, we nevertheless are unable to conclude that the error did not impermissibly affect the jury's deliberations as contemplated by Kotteakos given the voluminous quantity of the exhibits and the nature of their content. Nor are we prepared to say that the jury would have found James and Weldon Hays guilty even in the absence of that evidence. See United States v. Lay, 644 F.2d 1087, 1091 (5th Cir.1981).

[5] Finally, the appellants complain the Government was improperly allowed to introduce evidence regarding a settlement agreement entered into between James Hays, Weldon Hays and Lancaster. Additionally, the appellants argue that the district court committed reversible error by allowing the Government to read several excerpts from civil depositions in which James and Weldon Hays state their reasons for entering into the settlement agreement. Federal Rule of Evidence 408 permits ***589** evidence of settlement agreements for purposes other than proving liability, such as demonstrating the prejudice of a witness, negativing a contention of undue delay, or establishing the obstruction of a **criminal** investigation. The Government does not contend that it offered this evidence for any of the permissible purposes contemplated by **Rule 408.** Rather, the Government urges that evidence of the settlement agreement assisted the jury in its understanding of the breadth of the conspiracy. In our view, this purpose stands at direct odds with the clear mandates of Rule 408, and therefore the admission of the evidence regarding the settlement agreement between the Hays and Lancaster was error.

[6] As the appellants correctly contend in brief, and as the framers of Rule 408 clearly contemplated, the potential impact of evidence regarding a settlement agreement with regard to a determination of liability is profound. It does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendants had done nothing wrong, they would not have paid the money back. Accordingly, we cannot say that the admission of the evidence of the Hays' settlement with Lancaster did not affect their substantial rights under the plain error standard first enunciated in Kotteakos.

III. CONCLUSION

Having concluded that much of the challenged evidence introduced by the Government during the course of the trial of the appellants was admitted erroneously, and having determined that the cumulative effect of that evidence was prejudicial and affected substantial rights of the defendants, we are constrained to reverse the convictions. Because we have so concluded, we do not reach appellants' arguments regarding the violation of their due process rights under the fifth amendment.

REVERSED.

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INSTA-CITE

CITATION: 872 F.2d 582

Direct History

=> 1 **U.S. v. Hays,** 872 F.2d 582, 28 Fed. R. Evid. Serv. 300 (5th Cir.(Tex.), Apr 25, 1989) (NO. 88-1366)

Negative Indirect History

Declined to Follow by
2 Mayes v. State, 887 P.2d 1288 (Okla.Crim.App., Jun 24, 1994) (NO. F-90-776), as corrected on denial of rehearing (Aug 04, 1994) (Additional History)

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Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5302. POLICY OF **RULE 408**

The common law rule on the admissibility of statements made in an effort to reach some non-litigious resolution of a controversy was based on the distinction between "express" and "implied" admissions. [FN1] The general rule, as Wigmore would have codified it, was: An offer by one party to the other, i.e. if by a plaintiff to accept compensation, and if by a defendant, to make compensation, being open to the inference that it proceeds only from a desire to end controversy and not from a concession of the correctness of the opponent's case, is not an implied admission, and is not receivable. [FN2] But, on the other hand, an "express admission, though made in course of negotiations for settlement of a claim, is receivable." [FN3]

But if courts were in agreement on the nature of the rule, there was no such consensus on its justification. The rationale for the rule has varied from time to time and place to place. The writers have recognized at least three reasons for excluding evidence of compromise: relevance, implied contract, and privilege. [FN4] This theoretical question has a significant practical impact because the underlying theory will shape the application of the rule to particular cases and will have profound consequences for the procedure to be used in administering the rule. [FN5]

Like the rule dealing with evidence of subsequent repairs, [FN6] the rule on evidence of compromise was originally approached from the direction of the hearsay rule. [FN7] The oldest justification, [FN8] what Wigmore called the "true reason", [FN9] for the rule was that such evidence was irrelevant. When the proponent offered evidence of an offer of compromise, he was seen as offering an out-of-court statement, not for the truth of the matter asserted, but to prove an implied statement that the offeror believed that his case was weak. But the courts rejected the implication, [FN10] pointing out that even a party who believed that he would win at trial might be willing to pay something to "buy peace" and avoid the expense of litigation. This justification did not apply when the admission was express rather than implied; hence "independent" admissions of fact were received in evidence. [FN11]

In England, the relevance theory was soon displaced by a contract rationale. [FN12] If the offeror prefaced the presentation of his compromise proposal with the magic words "without prejudice" [FN13] this created a unilateral implied contract that the offer and related matter was not to be used in evidence. [FN14] Although a few American cases adopted the contract theory, [FN15] most courts followed Wigmore in rejecting it. [FN16]

A third and most recent justification for the rule excluding evidence of offers of compromise argues that the rule is one of privilege, [FN17] not relevance. Under this rationale, exclusion is based on the strong public policy favoring negotiated resolution of disputes. [FN18] Since parties may be inhibited in making offers of compromise by the fear that these will be used against them if the compromise efforts fail, the law alleviates that fear and encourages the making of offers of compromise by making them privileged. [FN19] Although Wigmore rejected this reasoning, arguing that it did not serve to explain the cases and that another privilege was not needed, [FN20] McCormick argued strongly in favor of this justification, [FN21] convincing a few courts [FN22] and most of the

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other writers. [FN23]

There is another justification for the rule, one that has received much less attention than the first three. This is "fairness" to the person who offers a compromise. [FN24] Litigants are often exhorted to settle and the willingness to compromise one's difference is usually considered a virtue. The person who attempts to settle a claim he believes to be well-founded is likely to feel that it is not fair that his opponent should be permitted to introduce evidence of his good deed to support an inference that he is insincere in pressing his case. [FN25] This sense of unfairness may be stronger if he believes that his opponent has lured him into making the offer. Although the argument has merit, fairness will not serve as the sole justification for the rule since courts usually bar evidence of compromise without any inquiry into the motives of the offeror, [FN26] thus protecting not only the person who attempts a good faith compromise but also parties whose motives will not bear scrutiny. [FN27]

However, none of the other three justifications for excluding evidence of compromise is without its defects. Although the relevance theory may serve to explain most of the cases, it has been criticized for the artificiality of the distinction between "express" and "implied" admissions. [FN28] It has been pointed out that often the implication that the offeror does not believe in his case is quite strong; [FN29] e.g., when he offers to pay all that his opponent demands minus his costs of suing to recover it. Moreover, an express admission of fact may sometimes be made not out of a belief in its truth but only as a device to encourage agreement. If, as the relevance theory would seem to suggest, the admissibility of the evidence of compromise should turn on the intent of the person making the offer, [FN30] it is difficult to see why that is not a preliminary fact best left to the jury to determine. [FN31]

The English contractual theory eliminated the problem of determining intent [FN32] by making admissibility turn on whether the party making the offer used the phrase "without prejudice." [FN33] If the words were used, then the courts would exclude not only the offer but also any statements of fact made in connection with it. [FN34] However, the contract theory did not explain all of the cases in which the English courts had excluded evidence of compromise negotiations. [FN35] Moreover, the talismanic use of "without prejudice" has been thought too mechanical [FN36] and unfair to an unsophisticated person attempting to compromise disputes without legal assistance. [FN37]

The privilege theory appeals to many writers because it promises better protection for statements of fact made during compromise negotiations. [FN38] It eliminates the need for the court to search for the intent of the parties [FN39] or for the parties to cast their statements in any particular form. [FN40] Finally, it justifies giving the task of determining admissibility to the judge rather than the jury. [FN41] The major difficulty with the privilege theory is that it depends upon an assumption of fact that has never been empirically demonstrated, [FN42] viz., that exclusion of the evidence is required in order to settle cases. This seems like a dubious assumption with respect to the proposed expansion of the rule to cover independent statements of fact since the common law courts seem to have settled many cases while admitting such statements in evidence. Moreover, it has never been satisfactorily explained why the policy of favoring settlement should prevail over the policy of admitting all relevant evidence. [FN43] Finally, the privilege rationale can produce unjust results [FN44] unless it is tempered by a series of exceptions that will be as difficult to administer as the relevance theory.

Because the Advisory Committee had earlier abandoned Wigmore's concept of "legal relevance" [FN45] in favor of a broad definition of relevance coupled with a discretionary power to exclude, it would have been very difficult to explain Rule 408 as an application of the doctrine of relevance. Hence, the Advisory Committee's Note embraces McCormick's rationale, [FN46] making the rule, in the words of the Reporter, a "species of privilege." [FN47] This change in the underlying rationale makes it somewhat misleading to state, as one former member of the Advisory Committee has, that the rule states "the generally accepted" law. [FN48] Adoption of the privilege rationale has a number of implications for the administration of Rule 408. First, since it is no longer a question of relevance, disputed preliminary facts are to be decided by the judge, [FN49] not the jury. Second, if the rule is truly one of privilege, it can be argued that an offer of compromise or statements made in compromise negotiations cannot be used to prove preliminary facts that support the admissibility of other evidence. [FN50] Third, the privilege rationale restricts the scope of the rule by limiting the number of people who can invoke it;

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[FN51] anyone can object to irrelevant evidence, but if the party who made the offer is willing to have it introduced, the privilege rationale does not provide any basis for objections by others. [FN52] Finally, it may be argued that the privilege theory means that the offers of compromise are not discoverable because of the exception in Civil Rule 26(b)(1) for "privileged" matter. [FN53]

But the Advisory Committee did more to the common law rule than merely shift its underlying rationale. [FN54] Rule 408 expands the common law prohibition on the use of evidence of offers of compromise to encompass as well any statements or conduct made during compromise negotiations. This change was justified on the grounds that "the practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact", a limitation that had "an inevitable effect" on "freedom of communication with respect to compromise." [FN55] But the Advisory Committee offered no empirical support for these claims and, so far as is known, none exists. [FN56] Nor did the Committee trouble to explain why, under its privilege rationale, it was thought necessary for parties to make statements of fact in conducting compromise negotiations. [FN57]

The Advisory Committee also felt that it was necessary to expand the common law rule in order to eliminate "controversy over whether a given statement falls within or without the protected areas." [FN58] But it would seem that changing the size of the protected area would have little impact on the extent of controversy as to just where its borders were. [FN59] Moreover, since the Advisory Committee chose to follow the example of California [FN60] rather than the other prior codifications, all of which found no reason to change the common law rule, [FN61] there is very little by way of precedent to guide courts in determining just what statements and conduct are to be protected by Rule 408.

Therefore, in interpreting Rule 408, courts will be unable to rely on any policy of codifying the common law. [FN62] Rule 408 will require a good deal of careful interpretation because the novel phrasing of the rule, [FN63] some expansive claims for its scope, [FN64] and the uncertain meaning of the Congressional alteration [FN65] of the rule all provide ammunition for claims that the rule makes other changes in the pre-existing law on the use of evidence of compromise. [FN66] The policy of Rule 408 is best described as one of confused reform.

FN1. Common law rule 4 Wigmore, Evidence, Chadbourn rev. 1972, ss 1061, 1062.

FN2. "Not implied admission" Wigmore, Code of Evidence, 3d ed. 1942, p. 204.

FN3. "Express admission" Ibid.

FN4. Three reasons Morgan, Basic Problems of Evidence, 1961, p. 209.

FN5. Procedural consequences Falknor, Extrinsic Policies Affecting Admissibility, 1956, 10 Rutgers L.Rev. 574, 593.

FN6. Subsequent repairs See s 5282.

FN7. Hearsay rule Even today there are writers that treat the rule under the heading of "admissions by conduct." See, e.g., McCormick Evidence, Cleary ed. 1972, s 274; Schmertz, Relevance and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence, 1974, 33 Fed.B.J. 1, 15, 16.

FN8. Oldest justification For discussion of the earliest common law cases, see Vaver, "Without Prejudice" Communications--Their Admissibility and Effect, 1974, 9 U.B.C.L.Rev. 85, 86-88.

FN9. "True reason" 4 Wigmore, Evidence, Chadbourn rev. 1972, p. 36.

FN10. Rejected implication Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 241-246.

FN11. "Independent" admissions Comment, Evidence--Admissibility of Statements of Fact Made During Negotiation

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for Compromise, 1936, 34 Mich.L.Rev. 524.

FN12. Contract rationale Vaver, "Without Prejudice" Communications--Their Admissibility and Effect, 1974, 9 U.B.C.L.Rev., 85, 89.

FN13. "Without prejudice" For the modern application of the doctrine, see Cross, Evidence, 3d ed. 1967, p. 247.

FN14. Implied contract Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 238, 246.

FN15. American cases Slough, Relevancy, Unraveled, 1957, 5 U.Kan.L.Rev. 675, 719. New Jersey apparently followed the English rule down to the time when the Uniform Rules were adopted in that state. See, N.J.Sup.Ct., Committee on Evidence, Report, 1963, p. 98; N.J.Sup.Ct., Committee on Revision of the Law of Evidence, Report, 1955, p. 104.

FN16. Followed Wigmore 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, pp. 35-36.

FN17. Rule of privilege Comment, Evidence--Admissibility of Statements of Fact Made During Negotiation for Compromise, 1936, 34 Mich.L.Rev. 524, 525.

FN18. Public policy Vaver, "Without Prejudice" Communications--Their Admissibility and Effect, 1974, 9 U.B.C.L.Rev. 85, 94.

FN19. Encourages compromise Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 251.

FN20. Privilege not needed 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, pp. 34-35.

FN21. McCormick favored McCormick, Evidence, 1954, s 76. For reasons that do not appear, in the revised edition of his work, "McCormick" is made to say almost the direct opposite. McCormick, Evidence, Cleary ed. 1972, s 74.

FN22. Courts Schmertz, Relevance and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence, 1974, 33 Fed.B.J. 1, 17 n. 94.

FN23. Most writers Slough, Relevancy Unraveled, 1957, 5 U.Kan.L.Rev. 675, 719-720.

FN24. "Fairness" Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 249-250.

FN25. Insincere claim Compare the analogous argument in behalf of the rule excluding evidence of subsequent repairs. See s 5282.

FN26. Inquiry into motives The argument also runs counter to the general preference in American courts for instrumental justifications. See vol. 21, s 5023, pp. 134-135.

FN27. Bad motives However, courts sometimes attempt to avoid injustice by manipulating the definition of "compromise." See s 5306.

FN28. Criticized Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 241-246.

FN29. Implication strong McCormick, Evidence, 1954, s 76.

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FN30. Intent of offeror 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, p. 36.

FN31. Left to jury See, e.g., Phoenix Assur. Co., Ltd. v. Davis, C.C.A.5th, 1933, 67 F.2d 824, 825-826.

FN32. Determining intent Morgan, Basic Problems of Evidence, 1961, pp. 210-211.

FN33. "Without prejudice" Comment, Evidence--Admissibility of Statements of Fact Made During Negotiations for Compromise, 1936, 34 Mich.L.Rev. 524, 525.

FN34. Covers statements of fact Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 246 n. 26.

FN35. Did not explain cases Vaver, "Without Prejudice" Communications--Their Admissibility and Effect, 1974, 9 U.B.C.L.Rev. 85, 99-104.

FN36. Too mechanical 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, p. 42 ("cabalistic phrase"). But compare those decisions that make the admissibility of statements made in compromise turn on whether or not they were made in hypothetical form. Schmertz, Relevance and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence, 1974, 33 Fed.B.J. 1, 17.

FN37. Unfair to unsophisticated Field & Murray, Maine Evidence, 1976, pp. 81-82.

FN38. Statements of fact Exclusion of express statements of fact is incompatible with the relevance theory. 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, p. 39 n. 5. Although it is sometimes said that the privilege theory requires protection for statements of fact made during compromise negotiations, see e.g., Falknor, Extrinsic Policies Affecting Admissibility, 1956, 10 Rutgers L.Rev. 574, 593, this is true only if such statements are necessary to reach a compromise, a point usually assumed rather than demonstrated.

FN39. Intent of parties Peterfreund, Relevancy and Its Limits in the Proposed Rules of Evidence for the United States District Courts: Article IV, 1960, 25 Record of N.Y.C.B.A. 80, 92.

FN40. Particular form Cf. Comment, Cal.Evid.Code s 1152.

FN41. Not to jury For a pre-Code decision holding that the jury is to determine whether a statement of fact is an admission or part of a compromise effort, see People v. Anderson, 1965, 46 Cal.Rptr. 377, 384, 236 Cal.App.2d 683, 693.

FN42. Not empirically demonstrated Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 252.

FN43. Policy of admission Courts admitting evidence of independent statements of fact often did so on grounds that the policy of admission prevailed over the justifications for exclusion. See, e.g., Gagne v. New Haven Road Constr. Co., 1934, 175 A. 818, 87 N.H. 163.

FN44. Unjust results For example, suppose that in the course of compromise negotiations, one party threatens to follow a "scorched earth" method of defense, conceding that this opponent can win but promising to prolong the litigation so as to make the victory very expensive. It is difficult to see why the law would want to encourage such threats. One method to permit the introduction of such statements is to argue that the statement was not made "in compromise" because there was no real dispute. See s 5306. But this reopens the issue of subjective intent of the party, a question that the broader rule of exclusion was supposed to foreclose.

FN45. Abandoned Wigmore See vol. 22, s 5162.

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FN46. McCormick's rationale See Advisory Committee's Note, Rule 408 (citing McCormick, Evidence, 1954, ss 76, 251). As previously mentioned, McCormick's argument for the privilege rationale has been deleted in the revision of the book. The states adopting the rule have been less explicit, see Committee Commentary, No.Dak.R.Ev. 408, or have argued that the rule can be justified on both relevance and privilege grounds. See Reporter's Note, Prop.Vt.R.Ev. 408. The Model Code also favored the privilege rationale. See Comment, Model Code of Evidence, Rule 309. Although the Comment is silent, one writer has said that Uniform Rule 52 also embodies this rationale. Slough, Relevancy Unraveled, 1957, 5 U.Kan.L.Rev. 675-719.

FN47. "Species of privilege" 2 Louisell & Mueller, Federal Evidence, p. 278 n. 33.

FN48. "Generally accepted" Green, Relevancy and Its Limits, 1969 Law & Soc.Ord. 533, 553.

FN49. Decided by judge Field & Murray, Maine Evidence, 1976, p. 81

FN50. Prove preliminary facts For the contrary argument, see vol. 21, s 5053, p. 256.

FN51. Who can invoke See s 5315.

FN52. No basis for objection McCormick, Evidence, 1954, s 76.

FN53. Not discoverable Prior to the effective date of the Evidence Rules, one court relied on the Wigmorean rationale in holding that settlement negotiations were discoverable. Oliver v. Committee for the Re-election of the President, D.C.D.C., 1975, 66 F.R.D. 553, 556. One writer has asserted that the same result would follow under Rule 408, but without any supporting argument. Phillips, A Guide to the Proposed Ohio Rules of Evidence, 1978, 5 Ohio North.L.Rev. 28, 39.

FN54. Did more Most of the state codifiers have recognized that in adopting Rule 408 they were altering the pre-existing law. See, e.g., Sponsor's Note, Fla.Evid.Code s 90.408; Comment, Minn.R.Ev. 408; Committee Commentary, No.Dak.R.Ev. 408. See also, Ehrhardt, Florida Evidence, 1977, p. 91; Clarke, Montana Rules of Evidence: A General Survey, 1978, 39 Mont.L.Rev. 79, 109.

FN55. "Freedom of communication" Advisory Committee's Note, F.R.Ev. 408.

FN56. None exists Similar unsupported claims are made in behalf of the equivalent provisions in the California Evidence Code. See Comment, Cal.Evid.Code s 1152.

FN57. Necessary to make In the experience of one of the authors, the most memorable of such statements run along the lines: "Sure, we know that X is true but have fits trying to prove it." In if the case goes to trial you will such cases it would seem that the policy of avoiding a waste of valuable court time in trying undisputed issues of fact would be more important than the policy of encouraging compromise. The only persons who would be deterred from making such statements are those who are attempting to conduct a war of attrition against an impecunious adversary. There would seem to be little reason to encourage such bad faith efforts at settlement.

FN58. "Protected area" Advisory Committee's Note, F.R.Ev. 408. For similar arguments, see Judicial Council Committee's Note, Wis.Stats.Ann. s 904.08; Waltz, The New Federal Rules of Evidence, 1975, pp. 33-34.

FN59. Little impact Under the common law rule, one could make a colorable claim for exclusion only if the statement was hypothetical in form or so connected with the offer of compromise that proof of the admission would prove the offer. Rule 408 saves courts the trouble of looking at such questions, but now requires courts to decide whether or not a statement or conduct was "made in compromise negotiations", an issue that can be raised at least as frequently as the claim for exclusion under the common law rule. See s 5307.

FN60. California The California precedents are not very helpful because of the propensity of courts in that state to

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disregard the Code and decide cases in accordance with pre-existing caselaw. See, e.g., Moving Picture Machine Operators Union Local No. 162 v. Glasgow Theatres, Inc., 1970, 86 Cal.Rptr. 33, 6 Cal.App.3d 395.

FN61. No reason to change The Model Code, the Uniform Rules of Evidence, and the state codes based thereon all, with the sole exception of California, left the common law rule unchanged. See s 5301. But see, N.J.Sup.Ct., Committee on Evidence, Report, 1963, p. 99 (stating that N.J.R.Ev. 52 would exclude evidence of statements made in compromise negotiations).

FN62. Policy The Advisory Committee's Note also points out that the rule is intended to change the common law rule with respect to completed compromises. See s 5303.

FN63. Novel phrasing Rule 408 does not resemble any of the prior codifications, though it borrows bits and pieces from some of them. The distinctive feature of Rule 408 is its attempt to provide an illustrative list of permissible uses of evidence of compromise, a listing that is strangely incomplete. See ss 5310-5314.

FN64. Expansive claims The most extravagant claims for the scope of the rule can be found in 2 Louisell & Mueller, Federal Evidence, 1978, pp. 271-272, 280-282.

FN65. Congressional alteration See ss 5301, 53110.

FN66. Other changes E.g., changes in the meaning of the requirement that the claim be one that is "disputed." See s 5306.

FPP s 5302 (R 408)

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23 Fed. Prac. & Proc. Evid. s 5302 (R 408)
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1995 Supplement

Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5302. POLICY OF RULE 408

FN1. Common law rule Offers to compromise are generally inadmissible to prove liability, but they are admissible for other purposes. Petersen v. State Farm Auto Ins. Co., La.App.1989, 543 So.2d 109, 115 (collecting state cases). For a case in which state law had not dealt with what seems like a fairly obvious issue under the rule, thus illustrating the rudimentary nature of the "common law" on use of compromise evidence, see Cleere v. United Parcel Service, Inc., Okl.App.1983, 669 P.2d 785. Smith & Phelps, District of Columbia Annotations to the Proposed Federal Rules of Evidence, 1973, 32 Fed.B.J. 270, 301-303. Illinois law is considered in Note, Post-Accident Repairs and Offers of Compromise: Shaping Exclusionary Rules to Public Policy, 1979, 10 Loy.U.(Chi.) L.Rev. 487, 495.

4. Three reasons There are several reasons for excluding evidence of compromise; among these are relevance and public policy of encouraging settlements. Miller v. Component Homes, Inc., Iowa 1984, 356 N.W.2d 213. The relevance and instrumental rationales are embraced in Czuj v. Toresco Enterprises, 1989, 570 A.2d 1049, 239 N.J.Super. 123.

FN7. Hearsay rule For an opinion holding, probably erroneously, that evidence of settlement is not hearsay under the modern codes, see Wyatt by Caldwell v. Wyatt, 1987, 526 A.2d 719, 721, 217 N.J.Super. 580.

FN12. Contract rationale Coote, "Without Prejudice" Communications--Another Red Light for Practitioners, 1979 N.Z.L.J. 87.

FN17. Rule of privilege Rule 408 does not create a privilege within the meaning of state freedom of information act. Guy Gannett Publishing Co. v. University of Maine, Me.1989, 555 A.2d 470, 472.

FN18. Public policy Winchester Packaging, Inc. v. Mobil Chemical Co., C.A.7th, 1994, 14 F.3d 316, 320 (expressing some doubt about the rationale); Lytle v. Stearns, 1992, 830 P.2d 1197, 1203, 250 Kan. 783; DeTienne Associates v. Montana Rail Link, 1994, 869 P.2d 258, 262, 264 Mont. 16; Delicious Foods v. Millard Warehouse, 1993, 507 N.W.2d 631, 640, 244 Neb. 449; Haderlie v. Sondgeroth, Wyo.1993, 866 P.2d 703, 713.

FN25. Insincere claim An additional justification for excluding evidence of settlements of the fear that a juror may think that the plaintiff has already received adequate compensation so that further award from remaining defendants is unjustified. Byerly v. Madsen, 1985, 704 P.2d 1236, 1240, 41 Wn.App. 495.

FN33. "Without prejudice" Accord: Czuj v. Toresco Enterprises, 1989, 570 A.2d 1049, 239 N.J.Super. 123.

FN46. McCormick's rationale N.J.R.Ev. 52 rejects Wigmore's rationale in favor of that of McCormick. Wyatt by

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Caldwell v. Wyatt, 1987, 526 A.2d 719, 722, 217 N.J.Super. 580. Rule 408 reflects a belief that offer to compromise does not necessarily reflect strength of case and a desire to encourage compromise. Fireman's Fund Insurance Co. v. BPS Co., 1985, 491 N.E.2d 365, 372, 23 Ohio App.3d 56. The Advisory Committee's Note is paraphrased in Commentary, Ore.R.Ev. 408. The Comment to Prop.N.Y.Evid.Code s 408 adds another novel basis for the rule; it suggests that liability is an opinion of law that the party is not qualified to express and is therefore irrelevant.

FN50. Stipulations In re Cluck, D.C.Tex.1993, 165 B.R. 1005, 1009 (Rule 408 not applicable to stipulation that was basis of Tax Court final judgment).

FN52. No basis for objection One court has held that the defendant has standing to object to evidence of plaintiff's settlements with third persons. Kennon v. Slipstreamer, Inc., C.A.5th, 1986, 794 F.2d 1067, 1071. The contrary position is taken over vigorous dissent in Kennon v. Slipstreamer, Inc., C.A.5th, 1986, 794 F.2d 1067, 1071.

FN54. Did more Accord: Derderian v. Polaroid Corp., D.C.Mass.1988, 121 F.R.D. 9, 11.

FN57. Necessary to make For the justice of the rule, see Stanley v. DeCesere, Me.1988, 540 A.2d 767, 770 (in suit between builder and homeowner, Rule 408 precludes builders admission of shoddy construction made during settlement talks).

FN62. Policy Brazil, Protecting The Confidentiality of Settlement Negotiations, 1988, 39 Hast.L.J. 955. For an excellent summary of Rule 408 which highlights some of the problems in its interpretation, see Waltz & Huston, The Rules of Evidence in Settlement, 1981, 5 Litigation 11. Annot., Evidence Involving Compromise or Offer of Compromise as Inadmissible Under Rule 408 of Federal Rules of Evidence, 1985, 72 ALR Fed. 592.

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Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5301. STATUTORY HISTORY

Rule 408 apparently gave the Advisory Committee little difficulty. Unlike most of the other rules, it remained unchanged [FN1] from the time it first appeared in the Preliminary Draft [FN2] until it was finally promulgated by the Supreme Court. [FN3]

The history of the rule in Congress is a much different story. It was initially labeled "noncontroversial" [FN4] and the first subcommittee draft of the rules did not propose any changes. [FN5] But controversy erupted when several government agencies launched an attack [FN6] on the provision in the rule that required the exclusion of admissions of fact made during settlement negotiations. [FN7] The thrust of these objections was that in the administrative handling of disputes between the Government and citizens, e.g., in a tax case, it was often difficult to say just when investigation stopped and efforts to settle began. [FN8] It was feared that a taxpayer might concede a number of facts to government investigators, then claim that these admissions were made during settlement negotiations. [FN9] It was argued that at best this meant that the government would have to go after the information again, perhaps through formal discovery. [FN10] At worst, the government lawyers claimed that the rule might be read as permitting the taxpayer to deny what he had once admitted, without fear of impeachment, [FN11] and even immunizing documents that had been disclosed to government investigators during what a court later determined to be settlement negotiations rather than investigation. [FN12]

The Hungate subcommittee responded to these fears by amending Rule 408. [FN13] First, the second sentence of the rule was changed so that the quasi-privilege only applied to admissions or opinions of liability and not to statements of fact. [FN14] Second, a new sentence was added to make clear that the rule did not require exclusion of information disclosed during settlement negotiations, but only applied to the statements made at that time. [FN15] Finally, the last sentence of the rule was amended to no apparent purpose. [FN16] The full committee endorsed these changes, relying on the arguments of the government lawyers. [FN17] The House approved the amended rule without debate. [FN18]

The House amendments underwent a spirited attack in the Senate. The Advisory Committee charged that the sponsoring agencies wished to use settlement negotiations to elicit admissions from unsophisticated parties, [FN19] pointing out that in the case of the Equal Employment Opportunity Commission this was a violation of statute. [FN20] The draftsmanship of the amendments was also criticized, [FN21] one commentator going so far as to say that the House had reduced the law to "hopeless confusion." [FN22] Finally, it was argued that the House had undermined the policy of the rule--to encourage compromise--by writing back into the rule the common law provisions on the use of admissions made during negotiations. The Senate agreed with these arguments by changing Rule 408 to its present form. [FN23] The Senate version was then accepted by the House. [FN24]

The admissibility of offers of compromise was covered in only two of the 19th Century codes; [FN25] the Field Code [FN26] incorporated the American common law rule and India Evidence Act codified the English version of

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the rule. [FN27] Both the Model Code [FN28] and the Uniform Rules [FN29] of Evidence were based on the common law. Most of the states adopting the Uniform Rules made no change in the provision dealing with offers of compromise, [FN30] but California provided the model for Rule 408 by expanding the Uniform Rule to include statements made in compromise negotiations. [FN31] Many of the states adopting the Evidence Rules have adopted Rule 408 verbatim, [FN32] but others have drafted their own provision [FN33] or enacted Rule 408 of the Uniform Rules of Evidence, Second. [FN34]

FN1. Unchanged In accordance with a general change in the numbering system, the rule went from Rule 4-08 in the Preliminary Draft to Rule 408 in the Revised Draft. See Prop.F.R.Ev. 408, 1971, 51 F.R.D. 315, 353.

FN2. Preliminary Draft Prop.F.R.Ev. 4-08, 1969, 46 F.R.D. 161, 237-238: "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 exclusion when the evidence is offered for another purpose, 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."

FN3. Promulgated See Prop.F.R.Ev. 408, 1973, 56 F.R.D. 183, 226-227.

FN4. "Noncontroversial" 1 House Hearings, p. 190.

FN5. First draft Committee Print, H.R. 5463, June 28, 1974, 2 House Hearings at p. 155.

FN6. Agency attack See 2 House Hearings, p. 301 (letter from General Counsel of the Treasury), p. 311 (letter from General Counsel of the Equal Employment Opportunity Commission), p. 345 (Justice Department analysis of proposed bill).

FN7. Settlement negotiations See s 5307.

FN8. Difficult to say "Carrying the example of tax litigation further, it should be noted that settlement negotiations are undertaken at different levels and are so often interwoven with the investigative process (in the Internal Revenue Service) and the discovery process (in the federal courts) that one could anticipate considerable litigation is [sic] to what statements were submitted as part of the investigative or discovery procedures." 2 House Hearings, p. 345.

FN9. Taxpayer claim "Under this rule the trial of a **criminal** tax case could deteriorate into a series of motions, hearings, and rulings by the Court upon taxpayers (defendant) objection(s) that each document, statement or admission was submitted only in furtherance of compromise negotiations. * * * On the civil side there would be the threshold problem of defining the point where compromise negotiations begin. The second sentence of Rule 408 would undoubtedly have the undesirable effect of generating controversies as to whether statements of fact were 'made in compromise negotiations' or not. I can foresee the argument by taxpayers that any statements made by them to revenue agents during the course of an audit were for the purpose of compromising the agent's proposed adjustments to their reported tax liabilities. * * * The administrative consideration of the issues raised on audit of tax returns is so often partly investigative and partly settlement oriented that any privilege accorded to statements of fact made in compromise negotiations might well be a severe handicap to the later development of facts in litigation of tax cases." 2 House Hearings, p. 301.

FN10. Go after again "Factual information obtained during conciliation attempts is normally of type which would be subject to later discovery, and admissible, in connection with litigation following an unsuccessful conciliation process. At the very least, the Proposed Rule may be detrimental to the Commission's enforcement efforts by requiring it to initiate costly, duplicative and time consuming discovery proceedings to obtain information which it already has in its possession." 2 House Hearings, p. 311.

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FN11. Deny without fear "But * * * public policy * * * would certainly be undermined by assuring taxpayers that, unless **criminal** intent can be shown, they have no responsibility for the accuracy of any factual representations they may make in the course of settlement negotiations with the Internal Revenue Service." 2 House Hearings, p. 302. "* * * [T]he proposed rule would encourage frivolous and misleading, if not outright false, representations in the settlement process." 2 House Hearings, p. 345.

FN12. Immunizing "Our objection to the Rule is that it * * * could also be interpreted as meaning the exclusion of pre-existing documents submitted in connection with settlement proceedings." 2 House Hearings, p. 345. "It may reasonably be anticipated that employers and unions charged with violations will withold as much information as possible from Commission investigators and then make it available during conciliation in an attempt to immunize themselves from the presentation of such information during litigation." 2 House Hearings, p. 311.

FN13. Amending Rule 408. See 2 House Hearings, p. 367.

FN14. Second sentence The amendment was as follows (new matter shown in italics, deleted material in strikeover): "Evidence of admissions of liability or opinions given during compromise negotiations is likewise not admissible." Ibid.

FN15. New sentence "Evidence of facts disclosed during compromise negotiations, however, is not inadmissible by virtue of having been first disclosed in those negotiations." Ibid.

FN16. No apparent purpose The initial clause was amended as follows (new matter in italics, deletions in strikeover): "This rule does not require exclusion when evidence of conduct or statements made in compromise negotiations is offered for another purpose, such as * * *." Ibid.

FN17. Endorsed House Report, p. 8: "Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in subsequent litigation between the parties. The second sentence of Rule 408 as submitted by the Supreme Court proposed to reverse that doctrine in the interest of further promoting non-judicial settlement of disputes. Some agencies of government expressed the view that the Court formulation was likely to impede rather than assist efforts to achieve settlement of disputes. For one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end. Also, parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until 'compromise negotiations' began and thus hopefully effect an immunity for themselves with respect to the evidence supplied. In light of these considerations, the Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of unqualified factual assertions is admissible. The latter aspect of the Rule is drafted, however, so as to preserve other possible objections to the introduction of such evidence. The Committee intends no modification of current law whereby a party may protect himself from future use of his statements by couching them in hypothetical conditional form."

FN18. Approved without debate 1974, 120 Cong.Rec. 2370.

FN19. Elicit admissions "I think maybe a crude but nevertheless true statement of the objective sought to be reached by the letters from those two departments, and by the Department of Justice, is simply that they want to use statements made by somebody trying to settle a dispute with the Government to make out a case against him if his efforts to settle the dispute fail." Senate Hearings, p. 49 (testimony of Professor Cleary, Reporter for the Advisory Committee).

FN20. Violation of statute Senate Hearings, p. 59.

FN21. Draftsmanship Senate Hearings, pp. 59-60.

FN22. "Hopeless confusion" Senate Hearings, p. 269.

FN23. Agreed with arguments Senate Report, p. 10: "This rule as reported makes evidence of settlement or attempted

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settlement of a disputed claim inadmissible when offered as an admission of liability or the amount of liability. The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible. "Under present law, in most jurisdictions, statements of fact made during settlement negotiations, however, are expected from this ban and are admissible. The only escape from admissibility of statements of fact made in a settlement negotiation is if the declarant or his representative expressly states that the statement is hypothetical in nature or is made without prejudice. Rule 408 as submitted by the Court reversed the traditional rule. It would have brought statements of fact within the ban and made them, as well as an offer of settlement, inadmissible. "The House amended the rule and would continue to make evidence of facts disclosed during compromise negotiations admissible. It thus reverted to the traditional rule. The House committee report states that the committee intends to preserve current law under which a party may protect himself by couching his statements in hypothetical form. The real impact of this amendment, however, is to deprive the rule of much of its salutary effect. The exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements--the encouragement of which is the purpose of the rule. Further, by protecting hypothetically phrased statements, it constituted a preference for the sophisticated, and a trap for the unwary. "Three States which had adopted rules of evidence patterned after the proposed rules prescribed by the Supreme Court opted for versions of rule 408 identical with the Supreme Court draft with respect to the inadmissibility of conduct or statements made in compromise negotiations. "For these reasons, the committee has deleted the House amendment and restored the rule to the version submitted by the Supreme Court with one additional amendment. This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation."

FN24. Accepted by House Conference Report, p. 6: "The House bill provides that evidence of admissions of liability or opinions given during compromise negotiations is not admissible, but that evidence of facts disclosed during compromise negotiations is not inadmissible by virtue of having been first disclosed in the compromise negotiations. The Senate amendment provides that evidence of conduct or statements made in compromise negotiations is not admissible. The Senate amendment also provides that the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. "The House bill was drafted to meet the objection of executive agencies that under the rule as proposed by the Supreme Court, a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial even though such evidence was obtained from independent sources. The Senate amendment expressly precludes this result. The Conference adopts the Senate amendment."

FN25. 19th Century codes See generally, vol. 21, s 5005.

FN26. Field Code N.Y.Comm. on Practice & Pleading, Code of Civil Procedure, 1850, s 1863: "An offer of compromise is not an admission that any thing is due; but admissions of particular facts, made in negotiation for a compromise, may be proved, unless otherwise agreed at the time."

FN27. English version India Evidence Act, 1972, s 23: "In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given." See also, Stephen, Digest of the Law of Evidence, 1870, pp. 27-28.

FN28. Model Code Model Code of Evidence, Rule 309: "(1) Subject to Paragraphs (3) and (4) hereof, evidence that a person has paid or furnished money or any other thing or has offered or promised to do so on account of any loss or damage of any kind sustained or claimed to have been sustained, whether or not in compromise of a claim, is inadmissible as probative of any matter tending to establish his civil liability for the loss or damage or any part of it. "(2) Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing in satisfaction of a claim is inadmissible as tending to establish the invalidity of the claim or of any part of it. "(3) Evidence that a person has partially satisfied an asserted claim of another on demand of the other without questioning the validity of the claim is admissible as tending to prove the validity of the claim. "(4) Evidence of a debtor's promise to pay all or part of his preexisting debt is admissible as tending to prove the creation of a new duty on his part, or a

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revival of his preexisting duty, to pay all or part of the debt." See also, Missouri Bar, Prop.Mo.Evid.Code s 9.03: "a. Evidence that a person has offered to pay or has paid money or has offered to give or has given anything of value or has performed or agreed to perform any act in compromise of any claim or cause of action asserted or lodged against him is inadmissible either as an admission or proof of any matter tending to establish his civil liability upon such claim or cause of action, and is inadmissible generally, except 1. when the fact of such offer of compromise or compromise is relevant to a controverted issue being tried, including, by way of example but not exclusively, when a compromise agreement itself is directly in issue between the parties, and when the amount paid in compromise is relevant to the amount of damages that may be recovered, or 2. when the fact of such offer of compromise or compromise affects either the credibility of a non-party witness or the weight to be given to his testimony, in which event such evidence may be used by way of impeachment on cross-examination by the adverse party or to rehabilitate the witness on redirect examination. "b. Nothing in this section contained shall be construed to exclude fact admissions or statements against interest made as a part of, or in connection with, an offer of compromise or a compromise agreement."

FN29. Uniform Rules U.R.E. 52: "Evidence that a person has, in compromise or from humanitarian motives furnished or offered or promised to furnish money, or any other thing, act or service to another who has sustained or claims to have sustained loss or damage, is inadmissible to prove his liability for the loss of damage or any part of it. This rule shall not affect the admissibility of evidence (a) of partial satisfaction of an asserted claim on demand without questioning its validity, [FNa] as tending to prove the validity of the claim, or (b) of a debtor's payment or promise to pay all or a part of his pre-existing debt as tending to prove the creation of a new duty on his part, or a revival of his pre-existing duty." *In the official print this word is spelled "valadity." See N.C.C.U.S.L., Handbook, 1953, p. 192. U.R.E. 53: "Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act or service in satisfaction of a claim, is inadmissible to prove the invalidity of the claim or any part of it."

FN30. U.R.E. states Kan.Stats.Ann. ss 60-452, 60-453, and Utah R.Ev. 52, 53 are identical with the Uniform Rules, note 29, above. N.J.R.Ev. 52(1) is identical with U.R.E. 52. N.J.R.Ev. 52(2) reads: "Evidence that the defendant offered to plead guilty of a lesser offense or upon terms, is inadmissible against him in that **criminal** proceeding." N.J.R.Ev. 53: "Evidence that a person has in compromise accepted, or offered or promised to accept, a sum of money or any other thing, act, or service in satisfaction of a claim, is inadmissible to prove the invalidity of the claim or any part of it, but it is admissible to prove an accord and satisfaction or other material fact."

FN31. California Cal.Evid.Code s 1152: "(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it. (b) This section does not affect the admissibility of evidence of: (1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim; or (2) A debtor's payment or promise to pay all or a part of his pre-existing debt when such evidence is offered to prove the creation of a new duty on his part or a revival of his pre-existing duty." Cal.Evid.Code s 1154: "Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it."

FN32. Adopted verbatim See Ariz.R.Ev. 408; Mich.R.Ev. 408; Minn.R.Ev. 408; Mont.R.Ev. 408; Neb.Rev.Stats. s 27-408; Prop.Ohio R.Ev. 408; So.Dak.R.Ev. 408.

FN33. Drafted own

Alaska

Alaska R.Ev. 408: "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

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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 purpose, 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, but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement."

Florida

Fla.Evid.Code s 90.408: "Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value."

Nevada

Nev.Rev.Stats. s 48.105 is substantially the same as the Advisory Committee's version of Rule 408, note 1, above: "1. Evidence of: (a) Furnishing or offering or promising to furnish; or (b) 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. "2. This section does not require exclusion when the evidence is offered for another purpose, 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."

New Mexico

N.Mex.R.Ev. 408 was originally identical with the Advisory Committee's version of Rule 408, note 1, above. See, 1973, 84 N.Mex. xxxix. In 1976 it was amended to conform with the Congressional version of the rule. See, 1976, 88 N.Mex. 851.

North Dakota

No.Dak.R.Ev. 408: "Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, 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, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. Exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations is not required. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, disproving a contention of undue delay, or proving an effort to obstruct a **criminal** investigation or prosecution."

Oklahoma

12 Okla.Stats.Ann. s 2408 is identical with F.R.Ev. 408 except for the following changes: the last clause of the first sentence reads "liability for the claim, invalidity of the claim or the amount of the claim."; the word "likewise" is omitted from the second sentence; the word "section" rather than "rule" is used in the last two sentences; the phrase "discoverable evidence" rather than "any evidence otherwise discoverable" appears in the third sentence; the word "revealed" rather than "presented" is used in the third sentence; the word "including" replaces the phrase "such as" in the fourth sentence; and the phrase "proof of" is used instead of "proving" in the fourth sentence.

Vermont

Prop.Vt.R.Ev. 408 is identical with U.R.E.2d 408, note 34 below, but adds the third sentence from F.R.Ev. 408.

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Washington

Wash.R.Ev. 408 is identical with F.R.Ev. 408, except that it uses the word "negating" rather than "negativing" in the last sentence.

Wisconsin

Wis.Stats.Ann. s 904.08 is the same as the Advisory Committee's version of Rule 408, note 1, above, except that in the list of permissible uses in the last sentence the words "proving accord and satisfaction, novation or release" are added after the word "delay", and the words "compromise or" are inserted before "obstruct."

Wyoming

Wyo.R.Ev. 408 is identical with F.R.Ev. 408, except that the third sentence has been deleted.

FN34. U.R.E.2d See Ark.R.Ev. 408, Me.R.Ev. 408. U.R.E.2d 408 is a modification of the Advisory Committee's version of Rule 408 (additions shown in italics, deletions shown in strikeover): "Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, 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, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion if the evidence is offered for another purpose, 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." 1975, 13 U.L.A., p. 216.

FPP s 5301 (R 408)

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1995 Supplement

Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5301. STATUTORY HISTORY

FN17. Endorsed One court has cited and quoted this report as if it referred to Rule 408 as it was finally adopted. Eisenberg v. University of New Mexico, C.A.10th, 1991, 936 F.2d 1131, 1134.

FN30. U.R.E. states New Jersey and Utah have now adopted the Federal Rules of Evidence. See notes 32 and 33, below. N.J.R.Ev. 52 has now been interpreted to exclude statements made during compromise negotiations. Czuj v. Toresco Enterprises, 1989, 570 A.2d 1049, 239 N.J.Super. 123.

FN32. Adopted verbatim The following provisions are identical with Rule 408: Colo.R.Ev. 408; Mil. R.Ev. 408; Del.R.Ev. 408; Haw.R.Ev. 408; Iowa R.Ev. 408; Ky.R.Ev. 408; Miss.R.Ev. 408; Ohio R.Ev. 408; R.I.R.Ev. 408; Utah R.Ev. 408; W.Va.R.Ev. 408.

FN33. Drafted own

Idaho Ida.R.Ev. 408 is identical with U.R.E.2d 408, note 34 in the main volume, but inserts the third sentence of F.R.Ev. 408 concerning "otherwise discoverable" evidence presented during settlement negotiations.

Indiana Ind.R.Ev. 408 is identical with F.R.Ev. 408, except that it omits the sentence on "otherwise discoverable" evidence and adds this sentence at the end: "Compromise negotiations encompass alternative dispute resolution."

Maine Effective January 31, 1985, Me.R.Ev. 408 was amended to read: "(a) Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromise or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is also not admissible on any substantive issue in dispute between the parties. "(b) Evidence of conduct or statements by any party or mediator at a court-sponsored domestic relations session is not admissible for any purpose." The words "or in mediation" in the last sentence of Me.R.Ev. 408 were added, effective February 15, 1993. It has been suggested that the failure to include the third sentence in the original (dealing with permissible uses) may have been an oversight, though one that does not affect the meaning of the rule. Harriman v. Maddocks, Me.1986, 518 A.2d 1027, 1031.

Louisiana La.Evid.Code Art. 408(A) is identical with F.R.Ev. 408, except that the clause "in a civil case" is added at the beginning, "a valuable consideration" is replaced by "anything of value", "rule" is replaced by "Article" in two places, and "discoverable" is replaced by "admissible" in the second sentence. La.Evid.Code

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Art. 408(B) reads: "This Article does not require the exclusion in a criminal case of evidence of the actions or statements described in Paragraph A, above, or of a giving or offer to give anything of value by the accused in direct or indirect restitution to a victim." La.Evid.Code, Art. 413: "Any amount paid in settlement or by tender shall not be admitted into evidence unless the failure to make a settlement or tender is an issue in the case."

Massachusetts Prop.Mass.R.Ev. 408 is identical with F.R.Ev. 408, except that the third sentence is deleted and in the first sentence after the phrase "prove liability for" is amended to read: "invalidity of, or amount of the claim or any other claim."

New Hampshire N.H.R.Ev. 408: "Evidence of (1) a settlement with or the giving of a release or covenant not to sue to or, (2) furnishing or offering or promising to furnish or accepting or offering or promising to accept, a valuable consideration in compromising a disputed claim with one or more persons liable in tort for the same injury to person or property or for the same wrongful death shall not be introduced in evidence in a subsequent trial of an action against any other tortfeasor to recover damages for the injury or wrongful death. Upon the return of a verdict, the court shall inquire of the attorneys for the parties the amount of the consideration paid for any settlement, release or covenant not to sue, and shall reduce the verdict by that amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. However, this rule does not require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for a purpose other than the proof of liability for or invalidity of the claim or its amount, 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."

New Jersey N.J.R.Ev. 408: "When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, including offers of compromise, shall not be admissible to prove liability for, or invalidity of, or amount of the claim. Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations."

New York Prop.N.Y.Evid.Code, 1991, s 408: "Evidence of (a) furnishing or offering or promising to furnish, or (b) 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 civil or criminal liability for, invalidity of, or the amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not, however, require the exclusion of evidence existing before the compromise negotiations merely because it is presented in the course of compromise negotiations. This section also does not require exclusion when the evidence is offered for another purpose, such as proving the bias or prejudice of a witness, controverting a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

North Carolina N.C.R.Ev. 408 is identical with F.R.Ev. 408, except that the words "evidence of" are added before the words "statement" in the second sentence.

Oregon Ore.R.Ev. 408: "Compromise and offers to compromise. (1)(a) Evidence of furnishing or offering or promising to furnish, or 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. "(b) Evidence of conduct or statements made in compromise negotiations is likewise not admissible. "(2)(a) Subsection (1) of this section does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. "(b) Subsection (1) of this section also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." The drafters of this provision say that it is based on the federal rule but has been restructured "for the sake of clarity." Commentary, Ore.R.Ev. 408.

Puerto Rico P.R.R.Ev. 22(B): "Evidence that a person has furnished or offered or promised to furnish or that a

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person has accepted or offered or promised to accept money or any other thing in compromising a claim is not admissible to prove liability for or invalidity of the claim or part of it. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for other purposes."

Tennessee Tenn.R.Ev. 408 is identical with F.R.Ev. 408, except that it deletes the phrase "or promising" from 408(1) and (2), adds the phrase "whether in the present litigation or related litigation" after the word "claim" in the first sentence and adds "which claim" before "was disputed" and after that phrase adds "or was reasonably expected to be disputed", modifies "claim" by the phrase "a civil" and adds "or a criminal charge or its punishment" at the end of the first sentence. In the third sentence "actually obtained during discovery" replaces "otherwise discoverable." At the end of the last sentence, this is added: "however, a party may not be impeached by a prior inconsistent statement made in compromise negotiations."

Texas Tex.R.Ev. 408 is identical with F.R.Ev. 408, except that in the last sentence the phrase "or interest" is inserted after "prejudice" and the phrase "or a party" is inserted after the word "witness." Tex.R.Cr.Ev. 408 is identical with Tex.R.Ev. 408. Blakely, Article IV: Relevancy and Its Limits, 1983, 20 Hous.L.Rev. 151, 221.

Vermont Vt.R.Ev. 408 has been amended by inserting the phrase "including mediation" after the word "negotiations" in the second sentence. Vt.R.Ev. 408 alters F.R.Ev. 408 is several respects. In the first sentence, "or" is replaced with a comma in three places, "its amount" is changed to "the amount of the claim" and the phrase "or any other claim" is added at the end. In the third sentence, "discoverable" is changed to "obtainable from independent sources." The description of Prop.Vt.R.Ev. 408 that appears in the main volume is inaccurate. The third sentence was not a copy of F.R.Ev. 408 but was an amendment in the same form that appears in the version of the Vermont rule as promulgated.

FPP s 5301 (R 408)

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UNITED STATES of America, Appellee,
v.
Maynard John VERDOORN et al., Appellants.

Nos. 75--1644, 75--1659 and 75--1665.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 12, 1975.

Decided Jan. 13, 1976.

Defendants were convicted in the United States District Court for the Northern District of Iowa, Edward J. McManus, Chief Judge, of conspiracy and possession of an interstate shipment of beef, and they appealed. The Court of Appeals, Stephenson, Circuit Judge, held, inter alia, that the evidence was sufficient to support one defendant's conviction of both possession and conspiracy; that severance of the prosecutions was properly denied; and that an instruction given with respect to the inference which might be drawn from the possession of recently stolen property was proper.

Affirmed.

[1] CONSPIRACY ⚿ 47(11)
91k47(11)
Evidence supported defendant's conviction of conspiracy and possession of stolen interstate shipment of beef. 18 U.S.C.A. §§ 371, 659, 2314, 2315, 4208(a)(2).

[1] RECEIVING STOLEN GOODS ⚿ 8(3)
324k8(3)
Evidence supported defendant's conviction of conspiracy and possession of stolen interstate shipment of beef. 18 U.S.C.A. §§ 371, 659, 2314, 2315, 4208(a)(2).

[2] INDICTMENT AND INFORMATION ⚿ 124(1)
210k124(1)
Joinder of multiple defendants in prosecution for conspiracy and possession of stolen interstate shipment of beef was proper where indictment charged and record disclosed that all defendants had participated in same act or transaction or in same series of acts or transactions constituting offense or offenses which constituted parts of common scheme or plan. 18 U.S.C.A. §§ 371, 659, 2314, 2315, 4208(a)(2); Fed.Rules Crim.Proc. rule 8(a, b), 18 U.S.C.A.

[3] CRIMINAL LAW ⚿ 622.5
110k622.5
Formerly 110k622(5)
Failure to renew pretrial motion for separate trial either at close of Government's case or at close of all evidence ordinarily constitutes waiver of severance claim.

[4] CRIMINAL LAW ⚿ 622.2(4)
110k622.2(4)
Formerly 110k622(2)
In absence of any showing of prejudice, trial court did not abuse its discretion in denying motion for separate trial of defendants jointly charged with conspiracy and possession of stolen interstate shipment of beef. 18 U.S.C.A. §§ 371, 659, 2314; Fed.Rules Crim.Proc. rule 8(a, b), 18 U.S.C.A.

[5] CRIMINAL LAW ⚿ 620(1)
110k620(1)
Formerly 110k618
In absence of showing of real prejudice to individual defendant, persons charged in conspiracy shall be tried together.

[5] CRIMINAL LAW ⚿ 622
110k622
In absence of showing of real prejudice to individual defendant, persons charged in conspiracy shall be tried together.

[6] CRIMINAL LAW ⚿ 394.6(4)
110k394.6(4)
Record did not support contention that evidence obtained from defendant's storm cellar should have been suppressed on grounds that defendant's spouse, who gave consent for search, was not advised of her constitutional rights nor permitted to talk to her attorney prior to search.

[7] CRIMINAL LAW ⚿ 747
110k747
Inconsistencies in government agent's testimony in multiple prosecution for conspiracy and possession of stolen interstate shipment of beef presented matter for jury to weigh in crediting testimony of witness,

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and was not ground for mistrial. 18 U.S.C.A. §§ 371, 659, 2314.

[7] CRIMINAL LAW ⇐ 867
110k867
Inconsistencies in government agent's testimony in multiple prosecution for conspiracy and possession of stolen interstate shipment of beef presented matter for jury to weigh in crediting testimony of witness, and was not ground for mistrial. 18 U.S.C.A. §§ 371, 659, 2314.

[8] LARCENY ⇐ 77(1)
234k77(1)
Trial court, in prosecution for conspiracy and possession of stolen interstate shipment of beef, gave correct instruction concerning inference which may be drawn from possession of property recently stolen. 18 U.S.C.A. §§ 371, 659, 2314.

[9] WITNESSES ⇐ 366
410k366
Trial court properly permitted counsel to thoroughly cross-examine alleged coconspirator with respect to his guilty plea and his expectations as to leniency, in view of coconspirator's plea and testimony in behalf of Government. 18 U.S.C.A. § 371.

[10] CRIMINAL LAW ⇐ 408
110k408
Defendants were properly prevented from introducing evidence as to plea bargaining despite their contention that such evidence would tend to show lengths to which Government went in attempting to obtain vital testimony to prosecute its case. Fed.Rules Crim.Proc. rule 11(e), (e)(6), 18 U.S.C.A.; Federal Rules of Evidence, rule 408, 28 U.S.C.A.

[11] CRIMINAL LAW ⇐ 778(5)
110k778(5)
In prosecution for conspiracy and possession of stolen interstate shipment of beef, instruction with respect to inference which may be drawn from possession of property recently stolen was not improper on ground that it did not properly apprise theory of defendant's presumption of innocence and his right not to testify or present evidence, thereby shifting burden of proof from government to defendant. 18 U.S.C.A. §§ 371, 659, 2314.

***104** Donald W. Sylvester, Sioux City, Iowa, for Maynard John and David verdoorn.

P. D. Furlong, Sioux City, Iowa, for Van Maanen.

Gary E. Wenell, U.S. Asst. Atty., Sioux City, Iowa, for appellee.

Before GIBSON, Chief Judge, and STEPHENSON and WEBSTER, Circuit Judges.

STEPHENSON, Circuit Judge.

These appeals are taken from jury convictions of three appellants who were charged in Count I with conspiracy (18 U.S.C. s 371) and in Count II with possession (18 U.S.C. s 659) arising out of the theft and possession of an interstate shipment of beef. In addition, the two Verdoorn appellants were charged in Count III with transporting a stolen semi-trailer in interstate commerce (18 U.S.C. s 2314) and in Count IV with receiving and concealing beef knowingly stolen while moving in interstate commerce (18 U.S.C. s 2315).[FN1] The district court[FN2] imposed concurrent sentences under Title 18, U.S.C. s 4208(a)(2), as follows: Albert Leon Van Maanen, three years; Maynard John Verdoorn, five ***105** years; and David Verdoorn, four years. The appeals raise numerous pretrial and trial errors which will be considered seriatim. We affirm the convictions.

FN1. A fourth defendant, Eugene Heck, was convicted on Count V, charging possession of stolen beef from the same shipment, but did not appeal. Co-conspirator LeRoy Miller pled guilty to a possession count the first day of the trial and testified in behalf of the prosecution.

FN2. The Honorable Edward J. McManus, Chief Judge, Northern District of Iowa, presiding.

In summary, the evidence favorable to the government discloses that appellants David Verdoorn and Maynard John Verdoorn (referred to in the record as John or Maynard) and co-conspirator LeRoy Miller on January 19, 1975, went to a truck terminal in the Council Bluffs, Iowa, area and stole a semi-trailer load of 232 beef quarters originating in Grand Island, Nebraska, and to be delivered to Buffalo, New York. They transported the stolen tractor and trailer loaded with

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beef to the Sioux City, Iowa, area. Thereafter, a portion of the stolen beef was delivered to co-defendant Eugene Heck, who owned and operated a retail meat store; a portion was stored on a farm owned by appellant Van Maanen; and the remaining part of the load was transferred onto another trailer and stored at a truck stop parking lot in North Sioux City, South Dakota. On January 28, 1975, all three appellants and co-conspirator LeRoy Miller loaded a portion of the meat from a storm cellar on appellant Van Maanen's farm onto a truck for the purpose of transporting it to a prospective buyer. After leaving the farm with the meat, appellant Maynard Verdoorn was arrested, and about the same time appellant Van Maanen and co-conspirator Miller were also arrested. Appellant David Verdoorn was arrested a couple of days later.

Appellant Van Maanen in his testimony denied any knowledge concerning the theft of the meat or the storage of the stolen meat on his farm. Appellant David Verdoorn denied any knowledge or participation in the theft or possession of the meat in question. Appellant Maynard Verdoorn did not testify. Both Verdoorns called witnesses for the purpose of establishing alibi defenses with respect to various events described by government witnesses. In this appeal only appellant Van Maanen attacks the sufficiency of the evidence to support his conviction.

[1] Van Maanen's contention that the court erred in not sustaining his motion for judgment of acquittal because there was insufficient evidence to support his conviction on either the conspiracy or possession count merits little discussion. We, of course, in reviewing the record, must view the evidence in the light most favorable to the jury's verdict and accept as established all reasonable inferences therefrom which support the verdict. United States v. Baumgarten, 517 F.2d 1020, 1026--27 (8th Cir. 1975).

The government's evidence, direct and circumstantial, as to the existence of the conspiracy in this case was strong. 'Moreover, once the government has established the existence of a conspiracy, even slight evidence connecting a particular defendant to the conspiracy may be substantial and therefore sufficient proof of the defendant's involvement in the scheme.' United States v. Overshon, 494 F.2d 894, 896 (8th Cir. 1974). Here the testimony of co-conspirator LeRoy Miller alone was sufficient to establish appellant Van Maanen's participation in both the conspiracy and the substantive charge of knowingly having in his possession on his farm the meat which he knew had been stolen. Miller's credibility was for the jury. In addition, his testimony was corroborated by other evidence in the case.

Van Maanen urges that the trial court erred in denying his motion for severance and separate trial made prior to trial. The motion to sever, in substance, claimed that two of the defendants had prior convictions for similar offenses and this would deprive him of a fair and impartial trial; that evidence might be introduced which was inadmissible as to him; and that there was a misjoinder of defendants and offenses in the indictment.

[2] The misjoinder allegation is devoid of merit. The indictment charged and the record discloses that all of the defendants had 'participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses' which constituted ***106** 'parts of a common scheme or plan' in conformity with Fed.R.Crim.P. 8(a) and (b). Scruggs v. United States, 450 F.2d 359, 363 (8th Cir. 1971).

[3][4][5] Appellant Van Maanen did not renew his pretrial motion for a separate trial either at the close of the government's case or at the close of all the evidence. Such failure ordinarily constitutes a waiver of the severance claim. United States v. West, 517 F.2d 483, 484 (8th Cir. 1975); United States v. Porter, 441 F.2d 1204, 1212 (8th Cir. 1971). In any event, we are satisfied that the trial court did not abuse its discretion in denying the motion for a separate trial. United States v. Scott, 511 F.2d 15 (8th Cir. 1975). In the absence of a showing of real prejudice to an individual defendant, persons charged in a conspiracy shall be tried together. United States v. Hutchinson, 488 F.2d 484, 492 (8th Cir. 1973). Here there was no such showing of prejudice.

[6] Appellant Van Maanen claims the court erred in denying his motion to suppress the evidence obtained from the storm cellar for the reason that his spouse, who gave the consent for the search, was not advised of her constitutional rights nor permitted

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to talk to her attorney prior to the search. The record fails to support this claim.

Special Agent Oxler testified that during the early morning hours of January 29, 1975, he conversed with Mrs. Van Maanen at the Van Maanen farm and that he informed her of her constitutional rights that 'she had a right to refuse at any time, to prevent us from going on her property.' She refused to sign a form with respect thereto without consulting her attorney but said 'she would have no objection whatsoever to us looking at the outbuildings located on their farm.' In fact, Mrs. Van Maanen herself testified, 'I said, 'Feel free to search the house, the out of doors, whatever pleases. I have nothing to hide. " She admitted furnishing the agent with a flashlight because the batteries in his flashlight were out, and she also turned the outside lights on. She recalled that 'he (the agent) said the main thing they were interested in was the cave and I told him to go ahead and look.' Her authority to consent to the search is not contested. United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). The trial court properly denied the motion to suppress.

[7] All of the appellants urge that the trial court erred in denying their motion for mistrial based on alleged inconsistent statements made by Special Agent O'Kuniewicz. Appellants' complaint is that at trial the special agent identified David Verdoorn as being in the area of the Van Maanen farm, whereas in the preliminary hearing he testified he could not identify and individual in 'that area' that night. The government argues that the testimony was not actually inconsistent because the 'area' involved was not defined. The matter does not merit further discussion. Assuming there was some inconsistency in the testimony, this is a matter for the jury to weigh in crediting the testimony of the witness. The motion for mistrial is devoid of merit.

[8] Appellants David Verdoorn and Maynard Verdoorn assert trial court error in giving Instruction 15A with respect to the inference which may be drawn from possession of property recently stolen. The instruction follows the suggested instruction set out in I E. Devitt & C. Blackmar, Federal Jury Practice and Instructions s 13.11 (2d ed. 1970, Supp.1974). The instruction cautions that 'recently' is a relative term; the longer the period of time since the theft, the more doubtful becomes the inference. It reminds the jury that, in the exercise of constitutional rights, the accused need not take the stand and testify. There may be opportunities to explain possession by showing other facts and circumstances, independent of the testimony of the defendant. It cautions, 'You will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.'

***107** The instruction is similar to that approved by the Supreme Court in Barnes v. United States, 412 U.S. 837, 840 n. 3, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); United States v. Neville, 516 F.2d 1302 (8th Cir. 1975); United States v. Garofalo, 496 F.2d 510 (8th Cir. 1974); United States v. Tucker, 486 F.2d 1040 (8th Cir. 1973). We are satisfied the proper instruction was given in this case.

[9][10] Appellants David Verdoorn and Maynard Verdoorn claim the trial court erred in refusing to admit evidence with respect to plea bargaining by representatives of the government with each of the defendants. It should first be noted that this contention is not made with respect to co-conspirator Miller. The trial court properly permitted counsel to thoroughly cross-examine Miller with respect to his guilty plea and his expectations as to leniency in view of his plea and testimony in behalf of the government. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974). Appellants contend they should have been permitted to show that all defendants were offered possible reduced counts and/or lighter sentences in exchange for their testimony. Appellants theorize that this evidence would challenge the credibility of the government's entire case, i.e., disclose the lengths to which the government went in attempting to obtain vital testimony to prosecute its case, and thus this evidence should have been admitted. We disagree.

Plea bargaining is sanctioned by recent amendments to the Federal Rules of Criminal Procedure. See Fed.R.Crim.P. 11(e) (effective December 1, 1975). Further, Fed.R.Crim.P. 11(e)(6) (effective August 1, 1975) provides for the general inadmissibility of offers to plea and related statements in connection therewith. Under the rationale of Fed.R.Evid. 408, which relates to the general inadmissibility of compromises and offers to

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compromise, government proposals concerning pleas should be excludable.

Plea bargaining has been recognized as an essential component of the administration of justice. 'Properly administered, it is to be encouraged.' Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). If such a policy is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful. Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence.

[11] Finally, appellant Maynard Verdoorn, who exercised his right not to testify, contends that Instruction 15A, with reference to the inference which may be drawn from possession of property recently stolen, did not properly apprise the jury of his presumption of innocence and his right not to testify or present evidence and consequently shifted the burden of proof from the government to appellant. We have already discussed the propriety of this instruction. The jury was fully informed that defendant need not testify or produce any evidence. In another instruction (Instruction 4) the court gave the standard instruction on the presumption of innocence accorded a defendant and the burden resting on the government to establish guilt beyond a reasonable doubt. No further instructions were requested by appellant. Appellant's contention is without merit.

We are satisfied that each of the defendants received a fair trial, no error of law appears, and the verdicts of guilt are amply supported by the evidence.

Affirmed.

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INSTA-CITE

CITATION: 528 F.2d 103
=> 1 **U. S. v. Verdoorn,** 528 F.2d 103, 1 Fed. R. Evid. Serv. 1093 (8th Cir.(Iowa), Jan 13, 1976) (NO. 75-1644, 75-1659, 75-1665)

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