The “Settlement Privilege” The Sixth Circuit’s Expansion of Rule 408

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In an effort to encourage frank settlement negotiations, Rule 408 of the Federal Rules of Evidence prohibits the use settlement offers or statements made in furtherance of negotiating settlements to prove liability, validity of, or the amount of a claim that is in dispute, or to impeach by using statements made in settlement negotiations as prior inconsistent statements.

Rule 408, however, has very limited application when litigants in another action seek to discover communications made in furtherance of a settlement of a prior action. In 2003, the Sixth Circuit established a new privilege, the "Settlement Privilege". The Settlement Privilege greatly supplements the coverage of Rule 408 and allows parties to rely on the confidentiality of settlement communications long after a claim is either settled or adjudicated. It is important, however, to keep in mind that the Sixth Circuit is the only circuit court to formally recognize the Settlement Privilege and Tennessee state courts have yet to opine on the issue.

Rule 408

Before any substantive discussion of the Settlement Privilege can take place, it is important to understand the scope of Rule 408.[1]

The protections of Rule 408 are limited to prohibition of the use of settlement discussions to prove the validity, amount, or liability of a claim or to impeach by prior inconsistent/contradictory statement. Rule 408 does allow settlement discussions to be utilized for all other purposes, including bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 408 speaks to the admissibility of settlement discussions, not the discoverability of those discussions. That distinction is irrelevant to the parties to the settlement discussions, as there is no need for a party to seek discovery of discussions in which that party participated. The distinction, however, has created problems

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for parties in future actions.

The Settlement Privilege

In *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, the United States Court of Appeals, Sixth Circuit, held, "[t]he public policy favoring secret negotiations, combined with the inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist[.]" 332 F.3d 976, 981 (6th Cir. 2003). This filled in the gap of protection Rule 408 left open as it relates to future litigation.

In reaching this conclusion, the Sixth Circuit, perhaps recognizing the novelty of such a ruling, set forth its reasoning in detail. It began with a discussion of Rule 501 of the Federal Rule of Evidence, which authorizes federal courts to determine new privileges by examining common law principles. *Id*. at 979. In completing its Rule 501 analysis, the Court examined whether the Settlement Privilege served a public interest that "transcend[ed] the normally predominant prnicple of the utilizing all rational means for ascertaining truth." *Id*. at 981 (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)). In addition, the Court examined whether the Settlement Privilege "promote[s] a public interest that is 'sufficiently important … to outweigh the need for probative evidence…'" *Id*. (quoting *Trammel*, 445 U.S. at 51). According to the Sixth Circuit, settlement communications meet this standard.

More surprisingly, the Court went several steps further in its analysis. In addition to finding a new privilege, the Court spoke to the relevance, in the discoverability sense of the word, of settlement communications. The Court stated, "[m]oreover, one of the proposed rationales for the enactment of Fed.R.Evid. 408 was that statements made in furtherance of settlement are *never* relevant." *Id*. at 984. The Court reasoned that the exclusionary policy of Rule 408 was partly based on the fact that an offer of settlement is often motivated by a desire for peace rather than an admission of fault, making its discovery irrelevant to third parties. *Id*. In addition, the Court quoted a Ninth Circuit case stating, "[s]ettlement negotiations are typically punctuated with numerous instances of puffing and posturing[.]" *Id*. at 981 (citing *United States v. Contra*

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Costa County Water Dist., 678 F.2d 90, 92 (9th Cir.1982).).

With its holding in *Goodyear*, the Sixth Circuit did several things. First, inherent in its ruling is the fact that Rule 408 does not protect settlement communications from discovery in future actions. Second, it established a privilege previously non-existent, the Settlement Privilege. Third, it made a statement of the relevance and reliability of settlement communications that may prove helpful to parties in the future.

Goodyear represents a step in the right direction if the ultimate goal is to promote frank discussions in settlement negotiations and achieving settlement agreements. It is a case that could prove very useful to entities forced to defend numerous actions stemming from a related subject matter (think, Toyota).

[1] (a) Prohibited uses.– Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish–or accepting or offering or promising to accept–a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses.–This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

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