# Use of Confidential Information in Motion Practice

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It is important to monitor that submissions made to the Court of International Trade do not contain inadmissible settlement information. For example, in several instances, parties recently based motions upon confidential conduct which occurred during settlement discussions. In order to support a claim in a motion, the party either reiterated the substantive content of settlement discussions, or, in one case, attached copies of e-mails the parties exchanged while attempting to settle the action.[1] Because this settlement information is confidential and inadmissible, the government filed motions to strike this information.[2] In these motions, the government first cited to Federal Rule of Evidence (FRE) 408. Rule 408 provides:

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

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1. BP Oil Supply Co. v. United States, No. 04-00321, 2010 WL 3199882, at *1 (Ct. Int'l Trade Aug. 13, 2010).

2. *Id.* at *2.

> in the exercise of regulatory, investigative, or enforcement authority.
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> (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.[3]

It is long settled that "Rule 408 was intended to sweep broadly and encompasses the whole of the settlement evidence."[4] The key element of Rule 408 is its provision which excludes the introduction of all evidence of conduct or statements made in settlement negotiations when offered to prove liability for or invalidity of a claim, or the merits of a claim.[5]

The comprehensive rule even covers factual admissions made in the course of settlement negotiations.[6] The rule also prohibits a party from seeking to admit its own settlement offer or statements made in settlement negotiations.[7]

The primary policy behind Rule 408 is to encourage the parties' freedom of discussion with regard to compromise.[8] "The fear is that settlement negotiations will be inhibited if the parties know that their statements may later be used as admissions of liability."[9] Rule 408 also intends to exclude immaterial evidence, recognizing that "disputes are often settled for reasons having nothing to do with the merits of a claim."[10]

"Rule 408 . . . does not apply if the claim at issue is not in dispute."[11] While "[a]n actual lawsuit need not have been filed, . . . there must be at least an apparent difference of view between the parties[] concerning the validity or amount of the claim."[12]

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3. FED. R. EVID. 408.

4. Dow Chem. Co. v. United States, 250 F. Supp. 2d 748, 804 (E.D. Mich. 2003), *modified in part on other grounds by* Dow Chem. Co. v. United States, 278 F. Supp. 2d 844 (E.D. Mich. 2003), *rev'd in part on other grounds by* Dow Chem. Co. v. United States, 435 F.3d 594 (6th Cir. 2006) (internal quotation marks omitted).

5. *See* Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652, 654 (4th Cir. 1988).

6. *See* FED. R. EVID. 408 advisory committee's notes (1972); Eid v. Saint-Gobain Abrasives, Inc., No. 08-2081, 2010 WL 1923876, at *6 (6th Cir. May 12, 2010).

7. *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE EVIDENCE 158 (1980).

8. Kritikos v. Palmer Johnson, Inc., 821 F.2d 418, 423 (7th Cir. 1987).

9. *Id.* (internal quotation marks omitted).

10. Korn, Womack, Stern & Assocs. v. Fireman's Fund Ins. Co., No. 92-2509, 1994 WL 264263, at *6 (6th Cir. June 15, 1994).

11. Dow Chemical Co. v. United States, 250 F. Supp. 2d 748, 804 (E.D. Mich. 2003).

12. *Id.* (internal quotation marks omitted).

In determining whether to exclude evidence of settlement negotiations pursuant to Rule 408, courts "should weigh the need for such evidence against the potentiality of discouraging future settlement negotiations."[13] When the applicability of Rule 408 is a close call, the court should lean toward excluding the evidence.[14]

According to *Dow Chemical Co. v. United States*, courts "must find that the party seeking exclusion subjectively intended the statements to be part of negotiations toward compromise."[15] The *Dow Chemical* court explained:

> Although it is tempting to define the existence of negotiations by an objective standard, courts generally agree that the proper inquiry is whether the person making the statement *believed* that the statement was related to negotiations. . . . The belief, however, must be both honest and reasonable; where a statement is made to induce reliance or made in bad faith, the Rule will not prohibit its introduction in evidence.[16]

In this vein, courts have looked to the provisions of Rule 408(b) which state that the rule "does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution."[17] Courts have held that Rule 408 permits introduction of statements made in settlement negotiations "for purposes other than proof of liability or amount of damages."[18]

Because Rule 408 implicates this inherent tension regarding the purpose for which settlement statements are introduced, courts have had to analyze the parties' intentions.[19] Courts have found that the Rule was not intended, as noted previously, "to permit a party to induce detrimental reliance on a promise made during negotiations and then assert confidentiality when the victimized party claimed estoppel."[20] The *Dow Chemical* court explained that, "[t]he application of an estoppel exception to Rule 408 is quite consistent with its goal of encouraging settlement, as it is difficult to understand how protecting fraud and

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13. Starter Corp. v. Converse, Inc., 170 F.3d 286, 293 (2d Cir. 1999) (internal quotation marks omitted).

14. Bradbury v. Phillips Petroleum Co., 815 F.2d 1356, 1364 (10th Cir. 1987).

15. *Dow Chem.*, 250 F. Supp. 2d at 804.

16. *Id.*

17. FED. R. EVID. 408(b).

18. *Dow Chem.*, 250 F. Supp. 2d at 805.

19. *Id.* at 801.

20. *Id.* at 805; *see also* Starter Corp. v. Converse, Inc., 170 F.3d 286, 293-94 (2d Cir. 1999).

deception will in any way advance parties' confidence in the settlement process."[21] The court went on to amplify that there was "little difference . . . between use of a statement made for settlement purposes to impeach the denial of liability, and offering it as an admission of liability. Asserting that a statement is offered as impeachment will not alone establish an exception to Rule 408."[22]

*Dow Chemical* continued that, rather, the appropriate approach required that the court "weigh the competing policy rationales of encouraging settlement versus the formation of a complete record to determine whether the impeaching evidence falls within Rule 408's exception."[23]

Finally, when a court determines that a party improperly offered evidence of settlement negotiations to prove the validity of a claim prohibited by Rule 408, courts generally strike the evidence.[24]

A perfect example of the improper inclusion of confidential settlement information in a document occurred in *BP Oil Supply Co. v. United States*.[25] In that action, BP Oil Supply Company (BP Oil) sought drawback on imported crude petroleum.[26] During the pendency of the action, the parties attempted to ascertain which facts were actually disputed.[27] After the close of discovery, BP Oil moved to serve requests for admission on the defendant.[28] Instead of providing grounds for its motion, BP Oil included a short narrative of events concerning the parties' recent discussion of the facts.[29] The narrative included block-quoted e-mails from government counsel expressing disagreement with, in part, BP Oil's proposed stipulation of facts.[30]

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21. *Dow Chem.*, 250 F. Supp. 2d at 805.
22. *Id.*
23. *Id.* (citing *Starter*, 170 F.3d at 293).
24. *See, e.g.*, Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc., No. 06-1131, 2007 WL 1031703, at *7 (4th Cir. Mar. 30, 2007) (affirming lower court's order to strike portions of plaintiff's complaint, thereby excluding evidence relating to communications between the parties); St. Paul Fire & Marine Ins. Co. v. Brother Int'l Corp., No. 06-2759 (FLW), 2007 WL 2571960, at *17-19 (D.N.J. Aug. 31, 2007) (striking evidence of settlement communications that were referenced in a cross-motion for summary judgment, a statement of undisputed material facts, and the certification of a witness); Burdick v. Koerner, 988 F. Supp. 1206, 1215-16 (E.D. Wis. 1998) (granting a motion in limine preventing the admission of correspondence reflecting the parties' attempts to settle the dispute).
25. BP Oil Supply Co. v. United States, No. 04-00321, 2010 WL 3199882 (Ct. Int'l Trade Aug. 13, 2010).
26. *Id.* at *1.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

The court noted that in the substance of the motion, BP Oil appeared frustrated by the government's refusal to concede certain facts regarding crude oil, despite the allegedly contrary views expressed by the government's own expert witnesses.[31] The court then noted that BP Oil attached to its motion a letter from it to government counsel discussing reports prepared by government expert witnesses; a proposed "Stipulated Judgment on Agreed Statement of Facts"; a letter from BP Oil to government counsel debating proposed United States Customs and Border Protection actions; and, a schedule of certain claims.[32]

The government moved to have BP Oil's motion stricken from the record on the ground that it contained evidence inadmissible under Rule 408.[33] In particular, the government argued that BP Oil offered improper evidence of confidential settlement communications as a justification for its request to reopen discovery, and as a basis for obtaining admissions, and that BP Oil justified its proposed request for admissions upon the theory that the confidential settlement negotiations demonstrate the merits of its claims.[34]

In finding for the government, the court reiterated that

> [t]he rationale underlying Rule 408 [was] twofold: First, [to] promote[] the settlement of disputes prior to litigation by recognizing that compromises are more likely to result when parties are free to speak openly during settlement negotiations and are not inhibited by the fear that statements made therein may later be used against them[; and s]econd, . . . irrelevant or unreliable evidence [is excluded because] parties will often settle disputes for reasons completely unrelated to the merits of a claim.[35]

The court also noted the exceptions to Rule 408, such as proving bias or prejudice, negating a contention of undue delay, or that a party breached the settlement agreement.[36]

Turning to the merits of the case at bar, the court explained that two questions must be resolved: first, "whether the evidence set forth in BP's motion constitutes 'confidential settlement communications'"; second, "if so, whether that evidence is being offered for an improper purpose," such as to prove liability for a claim.[37] The court additionally noted that it "may consider whether admitting the evidence would be contrary to the

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31. *Id.*
32. *Id.* at *2.
33. *Id.* at *2.
34. *Id.*
35. *Id.*
36. *Id.* at *3.
37. *Id.*

public policy of encouraging settlements and avoiding wasteful litigation."[38]

As to the letters, the court found that they did not fall within the prohibitions of Rule 408.[39] Although most of the letters were settlement communications, they contained information regarding expert witnesses, which was otherwise admissible.[40] A final letter simply included BP Oil's views on a purely legal question.[41]

The court, however, found that BP Oil's "direct quotation of emails sent by government counsel in response to certain of BP's proposals . . . divulge the government's position regarding which concessions it was willing and unwilling to make."[42] The court explained that the discussion was focused on the government's disagreement with BP Oil on several issues, including BP's proposed stipulation of material facts.[43] The court concluded that the e-mails were "'made in compromise negotiations regarding the claim.'"[44]

Examining BP Oil's proposed stipulated judgment and related documents, the court determined that these were "in the nature of a proposed settlement as applied to certain crudes and appears to be precisely the type of communication described in FRE 408(a). If used for a prohibited purpose, proposals of this nature are inadmissible even if offered by the party making the proposal."[45]

Then, dismissing BP Oil's contention that the evidence was submitted to negate a contention of undue delay, the court observed that the evidence provided in BP's motion was offered, at least in part, to show good cause for its motion to serve discovery on the government.[46] Recognizing that settlement-negotiation evidence might be permissible for that purpose under certain circumstances, the court stated that here, the evidence does not pertain solely, or even necessarily, to demonstrating "good cause" under the United States Court of International Trade Rule 16.[47] Rather, the court continued, the evidence appeared to be mostly intended as "proof" of BP Oils' substantive claims.[48] In rejecting this as an exception to Rule 408, the court held:

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38. *Id.* (internal quotation marks omitted).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* (quoting FED. R. EVID. 408(a)(2)).
45. *Id.*
46. *Id.* at *4.
47. *Id.*
48. *Id.*

> The burden is on the plaintiff to prove its case. In the legal course thereof, the government has every right, within reason, to dispute a fact as to its legal conclusion. . . . Prudence therefore dictates that it would be exceedingly unwise for the court to give any consideration to these materials or to allow them to become part of the record.[49]

The court concluded, therefore, that the e-mails, proposed stipulation of facts, and related documents were inadmissible pursuant to Rule 408 and its underlying policies.[50]

In summary, parties should be wary of seeking to introduce substantive information obtained during settlement discussions as admission of this type of information is generally prohibited. Attempts to introduce confidential settlement information are often met with successful motions to strike the information from the record of the case.

49. *Id.*
50. *Id.*