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## Rule 408: Compromise and Offers to Compromise

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## RULE 408: COMPROMISE AND OFFERS TO COMPROMISE

Federal Rule of Evidence 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, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.<sup>1</sup>

Under the federal common law, admissions of fact made during settlement negotiations were only inadmissible if phrased or preceded with statements such as “without prejudice.” or “for the sake of the discussion only.”<sup>2</sup> Additionally, admissions made during settlement negotiations were inadmissible if they were so intertwined with the offer of settlement that they could not be separated and could not be understood unless they were read simultaneously.<sup>3</sup> Rule 408 expands the common law rule by

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1. FED. R. EVID. 408.

2. 2 MCCORMICK ON EVIDENCE § 266, at 195 (John William Strong ed., 4th ed. 1992). See FED. R. EVID. 408 advisory committee’s note.

3. MCCORMICK, *supra* note 2, § 266 at 195. See FED. R. EVID. 408 advisory committee’s note. The common law rule has been criticized because [t]he practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact. . . . An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself.

*Id.*

excluding evidence of all conduct and statements made during settlement negotiations in civil suits for the purpose of proving "liability for or invalidity of the claim or its amount," regardless of the existence of any qualifying statements or inseparability.<sup>4</sup> Completed compromises, offers to compromise, and suggestions of settlement are likewise inadmissible pursuant to this rule.<sup>5</sup>

There are two primary rationales for excluding this type of evidence. First, evidence of an offer to compromise or acceptance of an offer is irrelevant, since it could be based on a desire to achieve a resolution of the dispute as opposed to an

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4. FED. R. EVID. 408. In discussing whether or not admissions of fact made during compromise negotiations remained admissible pursuant to the common law rule or if they were now inadmissible pursuant to Rule 408, the House Judiciary Committee stated that "the Rule is drafted . . . to preserve . . . possible objections to the introduction of . . . evidence [of unqualified factual assertions]" made during negotiations. H.R. REP. NO. 650, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7081. In addition, the Senate Judiciary Committee stated that "Rule 408 as submitted by the Court reverse[s] the traditional rule. It [brings] statements of fact within the ban and ma[kes] them, as well as an offer of settlement, inadmissible." S. REP. NO. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7057. This was the version of the rule that was subsequently implemented. *Id.* Thus, it seems as though admissions of fact are inadmissible pursuant to Rule 408, and cannot be used to prove liability, invalidity of a claim, or invalidity of the amount of a claim. *See* *United States v. Gonzales*, 748 F.2d 74 (2d Cir. 1984). In *Gonzales*, the court admitted evidence of the defendant's statements made during settlement negotiations at his criminal trial in order to prove he had engaged in the criminal activity. *Id.* at 78. The Second Circuit, in deciding that Rule 408 did not prevent admission of the evidence, stated that the policy reasons for Rule 408 are inapplicable in criminal prosecutions because "[t]he public interest in the disclosure and prosecution of crime is surely greater than the public interest in the settlement of civil disputes." *Id.* Thus, a defendant's admission of guilt made during settlement negotiations in a civil dispute is admissible at the defendant's subsequent criminal trial. *Id.* *See also* FED. R. EVID. 408 advisory committee's note. The Advisory Committee has also recognized that since "[t]he policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. . . . the rule requires that the claim be disputed as to either validity or amount." *Id.*

5. FED. R. EVID. 408 advisory committee's note; MCCORMICK, *supra* note 2, § 266 at 195.

admission of liability.<sup>6</sup> Second and more importantly, public policy encourages the settling of disputes.<sup>7</sup> If evidence from settlement negotiations was admissible, parties would be reluctant to engage in negotiations because they would fear that what took place during the negotiations could be used against them later.<sup>8</sup> Thus, the rule promotes unrestrained discussions concerning compromise.<sup>9</sup>

In *Pierce v. F.R. Tripler & Co.*,<sup>10</sup> the Second Circuit applied Rule 408 to exclude evidence of the defendant's job offer to the plaintiff, even though the defendant sought to introduce the evidence.<sup>11</sup> The court of appeals held that the offer was made during the course of settlement negotiations.<sup>12</sup> In excluding the evidence, the court stated that "[w]e believe that admission into evidence of settlement offers, even by the offeror, could inhibit

6. FED. R. EVID. 408 advisory committee's note. A compromise offer should not "*imply a specific belief that the adversary's claim is well founded*, but rather [should imply] a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered." 4 WIGMORE ON EVIDENCE § 1061, at 36 (Chadbourn rev. 1972). However, this evidence has the potential for being relevant:

[T]he relevancy of the offer will vary according to circumstances, with a very small offer of payment to settle a very large claim being much more readily construed as a desire for peace rather than an admission of weakness of position. Relevancy would increase, however, as the amount of the offer approaches the amount claimed.

MCCORMICK, *supra* note 2, § 266 at 194.

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

8. See MCCORMICK, *supra* note 2, § 266 at 194.

9. See *Affiliated Mfr., Inc. v. Aluminum Co. of Am.*, 56 F.3d 521, 526 (3d Cir. 1995).

10. 955 F.2d 820 (2d Cir. 1992). In *Pierce*, the plaintiff, a former employee of the defendant, brought an action under the Age Discrimination in Employment Act for the defendant's failure to promote the plaintiff. *Id.* at 823. Prior to the commencement of the suit, the defendant offered the plaintiff a job in return for an agreement not to proceed with the lawsuit. *Id.* at 823-24. The district court decided that the offer was "not 'unambiguously unconditional'" and therefore not admissible. *Id.* at 826.

11. *Id.* at 829.

12. *Id.*

settlement discussions and interfere with the effective administration of justice.”<sup>13</sup> The court recognized that extensive admissibility of settlement offers could result in a “rash of motions for disqualification of a party’s chosen counsel who would likely become a witness at trial.”<sup>14</sup>

Rule 408 is applicable only if the “validity or amount . . . of the claim” is in dispute.<sup>15</sup> As a result, “[a]n offer to pay an admitted claim is not privileged since there is no policy of encouraging compromises of undisputed claims. They should be paid in full.”<sup>16</sup>

There is a difference of opinion among the federal circuits as to the meaning of the word “dispute” as it relates to Rule 408. It is clear that a lawsuit does not have to be filed in order for the rule to be applicable.<sup>17</sup> However, how close the parties must be to actual litigation is unclear. The Tenth Circuit has held that discussions have to “crystallize[] to the point of threatened litigation” in order to be excluded under Rule 408 as “compromise negotiations.”<sup>18</sup> The Third Circuit, on the other

13. *Id.* at 827-28.

14. *Id.* at 828.

15. FED. R. EVID. 408.

16. MCCORMICK, *supra* note 2, § 266, at 195. McCormick explains that “[i]f the validity of the claim or the amount due are undisputed, an offer to pay a lesser sum in settlement or to pay in installments would accordingly be admissible.” *Id.* Further, where an offering party later reneges on the accepted offer, he or she is foreclosed from the Rule’s protection since “the privilege does not extend to the protection of those who repudiate the agreements, which the privilege is designed to encourage.” *Id.* at 198. *See, e.g.,* Cates v. Morgan Portable Bldg. Corp., 780 F.2d 683, 691 (7th Cir. 1985) (affirming the district court’s decision to admit a settlement agreement into evidence to prove that the party breached the agreement).

17. *See* Affiliated Mfr., Inc. v. Aluminum Co. of Am., 56 F.3d 521, 527 (3d Cir. 1995); *see also* Alpex Computer Corp. v. Nintendo Co., Ltd., 770 F. Supp. 161, 163 (S.D.N.Y. 1991) (asserting that “litigation need not have actually commenced for Rule 408 to apply”).

18. Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1373 (10th Cir. 1977), *cert. dismissed*, 434 U.S. 1052 (1978). The Tenth Circuit found that the discussions between the parties were “simply business communications” that were “relevant and material to show knowledge, willful infringement, and misconduct by [the appellant].” *Id.* at

hand, has explicitly declined to adopt the definition of dispute advanced by the Tenth Circuit.<sup>19</sup> In *Affiliated Manufacturers, Inc. v. Aluminum Co. of America*,<sup>20</sup> the appellant argued that the district court should not have granted appellee's motion in limine to exclude certain documents, because those documents "merely evidenc[ed] discussions that had not yet reached the 'dispute' stage for Rule 408 purposes."<sup>21</sup> In determining that the evidence was properly excluded, the court held that a dispute exists where there is a "clear difference of opinion between the parties."<sup>22</sup> The court also stated that "the meaning of 'dispute' as employed in the rule includes both litigation and less formal stages of a dispute."<sup>23</sup>

Rule 408 further provides that if evidence introduced during compromise negotiations is otherwise discoverable, then the introduction of such evidence in the course of negotiations does not make it subsequently inadmissible at trial.<sup>24</sup> The rationale behind this exception to the rule is to prevent negotiating parties from introducing otherwise admissible documentary and physical evidence during compromise negotiations in an attempt to render

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1372. The discussions could have been categorized as compromise negotiations had they reached a point of "threatened litigation." *Id.* at 1373.

19. *See Affiliated Mfr., Inc. v. Aluminum Co. of Am.*, 56 F.3d 521 (1995).

20. *Id.* In *Affiliated Mfr.*, the district court granted defendant's motion in limine to exclude certain letters, memoranda, and depositions concerning settlement negotiations from being admitted at trial. *Id.* at 523.

21. *Id.* at 526.

22. *Id.* at 528. The district court refused to apply the Tenth Circuit's restrictive interpretation of the word "dispute," which required that the parties reach a point where litigation is threatened before applying the principles of Rule 408. *Id.* at 526-27. *See Dallis v. Aetna Life Ins. Co.*, 768 F.2d 1303, 1307 (11th Cir. 1985) (stating that "[f]or Rule 408 to apply, there must be an actual dispute, or at least an apparent difference of opinion between the parties, as to the validity of a claim"); *Alpex Computer Corp. v. Nintendo Co., Ltd.*, 770 F. Supp. 161, 163 (S.D.N.Y. 1991) (stating that "[a]ll that is needed for Rule 408 to apply is an actual dispute, or at least an apparent difference of opinion between the parties as to the validity of a claim").

23. *Affiliated Mfr.*, 56 F.3d at 528.

24. FED. R. EVID. 408.

the evidence inadmissible.<sup>25</sup> However, this exception does not apply to documentary evidence specifically created for use during settlement negotiations, and such evidence will be inadmissible.<sup>26</sup> In *Ramada Development Co. v. Rauch*,<sup>27</sup> the Fifth Circuit noted that the policy reason behind this exception does not extend to cases where “the document, or statement, would not have existed but for the negotiations, [because] the negotiations are not being used as a device to thwart discovery by making existing documents unreachable.”<sup>28</sup>

Finally, Rule 408 provides that evidence of compromise or offers to compromise may be admissible if used for purposes other than proving “liability for or invalidity of the claim or its amount.”<sup>29</sup> In addition to “proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution[,]”<sup>30</sup> evidence may be offered to explain “prior statements, or failure to seek employment to mitigate damages or to show the extent of legal services rendered in conducting them.”<sup>31</sup> In such

25. S. REP. NO. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7057. The Report stated:

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.

*Id.*

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

27. *Id.*

28. *Id.* *But see* *Cates v. Morgan Portable Bldg. Corp.*, 780 F.2d 683, 691 (7th Cir. 1985) (stating that “[o]bviously [the] settlement agreement [itself] is admissible to prove the parties’ undertakings in the agreement, should it be argued that a party broke the agreement”) (citing *Central Soya Co., v. Epstein Fisheries, Inc.*, 676 F.2d 939, 944 (7th Cir. 1982)).

29. FED R. EVID. 408.

30. *Id.*

31. MCCORMICK, *supra* note 2, § 266 at 196. *See* *Brocklesby v. United States*, 767 F.2d 1288, 1292-93 (9th Cir. 1985) (stating that it was not an abuse of discretion for the lower court to admit evidence of an indemnity agreement pursuant to Rule 408 in order to show “the relationship of the

circumstances, the probative value of the evidence sought to be admitted must be balanced against the danger of unfair prejudice pursuant to Rule 403.<sup>32</sup>

Thus, under Rule 408, evidence of an offer to settle a disputed claim or acceptance of such an offer is inadmissible for the purposes of proving liability, invalidity of the amount of a claim, or invalidity of the claim itself.<sup>33</sup> On the other hand, the rule allows the same evidence to be admitted to prove other issues, as long as its probative value is not substantially outweighed by its prejudicial effect.<sup>34</sup>

The New York rule concerning admissibility of evidence resulting from offer and compromise was established in *White v. Old Dominion S.S. Co.*<sup>35</sup> In *White*, the plaintiff sought damages for the defendant's negligence in "the performance of a contract to tow the hull of a steamboat."<sup>36</sup> The issue concerned the admissibility of a statement made during settlement negotiations between the plaintiff and the defendant which could have proven the negligence of the defendant.<sup>37</sup> The court held that "the admission of a distinct fact which in itself tends to establish a cause of action or defense is not rendered inadmissible from the circumstance that it was made during discussion relating to a compromise, unless it is expressly stated to be made without

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parties" and to prove that they "were not adverse," as well as "to attack the credibility of the witnesses"), *cert. denied*, 474 U.S. 1101 (1986); *Olin Corp. v. Insurance Co. of N. Am.*, 603 F. Supp. 445, 450 (S.D.N.Y. 1985) (stating that "Rule 408 may not exclude evidence that shows the bad faith failure of an insurance carrier to settle"); *Iberian Tankers Co. v. Gates Constr. Corp.*, 388 F. Supp. 1190, 1192 (S.D.N.Y. 1975) (holding that evidence of settlement negotiations is admissible if it is used by the court to determine whether or not to grant prejudgment interest and not to determine liability).

32. MCCORMICK, *supra* note 143, § 266 at 196-97. See FED R. EVID. 403. Additionally, an instruction to the jury of the evidence's limited purpose may be required pursuant to Rule 105. MCCORMICK, *supra* note 143, § 266 at 197.

33. FED R. EVID. 408.

34. MCCORMICK, *supra* note 2, § 266 at 196-97.

35. 102 N.Y. 660, 6 N.E. 289 (1886).

36. *Id.* at 660, 6 N.E. at 289.

37. *Id.* at 661-62, 6 N.E. at 290.



prejudice . . . .”<sup>38</sup> However, if the statement was made in the course of negotiations, “would not have been made except for the purpose of producing the objects of the negotiation, and . . . was not to be used afterwards to [the party’s] prejudice, it is not error for the court to exclude the evidence.”<sup>39</sup> As a result of this holding, the court in *White* encouraged settlements by compromise, and therefore, discouraged unnecessary litigation.

Although this case was decided in 1886, the rule of law in New York remains the same today. In *Crow-Crimmins-Wolff & Munier v. County of Westchester*,<sup>40</sup> the plaintiff sought information from the defendant’s manager of engineering for settlement purposes, and both parties agreed that any information obtained pursuant to that agreement would not be used for litigation purposes.<sup>41</sup> Subsequently, the plaintiff sought discovery of the information.<sup>42</sup> The issue was whether the information requested by the plaintiff was privileged under Civil Practice Law and Rules [hereinafter C.P.L.R.] 3101(b),<sup>43</sup> and therefore, protected from discovery.<sup>44</sup> The Appellate Division, in determining that the information was not discoverable, stated that “[a]dmissions of fact explicitly or implicitly made ‘without prejudice’ during settlement negotiations are protected from discovery pursuant to the public policy of encouraging and facilitating settlement.”<sup>45</sup> In addition, the court held that

[a]ctions taken and observations made for the stated purpose of arriving at a settlement agreement, and expressly not for litigation, which actions would not have been accomplished except in a mutual attempt to reach a settlement, should likewise

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38. *Id.* at 662, 6 N.E. at 291.

39. *Id.*

40. 126 A.D.2d 696, 511 N.Y.S.2d 117 (2d Dep’t 1987).

41. *Id.* at 697, 511 N.Y.S.2d at 118.

42. *Id.*

43. N.Y. CIV. PRAC. L. & R. 3101(b) (McKinney Supp. 1996). This section provides in pertinent part: “(b) Privileged matter. Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable.” *Id.*

44. *Crow-Crimmins-Wolff & Munier*, 126 A.D.2d at 697, 511 N.Y.S.2d at 118.

45. *Id.* at 697, 511 N.Y.S.2d at 119.

generally be protected by the same public policy of encouraging attempts at settlement.<sup>46</sup>

The New York rule holds that evidence of an offer to settle or compromise a claim is not admissible for the purposes of proving liability.<sup>47</sup> Moreover, the evidence is not permitted to establish a factual admission.<sup>48</sup> In addition, evidence of settlement offers is not allowed to establish the amount of an undisputed claim.<sup>49</sup>

46. *Id.*

47. *Firedoor Corp. of Am. v. Reliance Elec. Co.*, 56 A.D.2d 523, 524, 391 N.Y.S.2d 414, 416 (1st Dep't 1977) (stating that "an offer to compromise . . . cannot be used as an admission of liability"); *Williams v. John Hancock Mut. Life Ins. Co.*, 246 A.D. 891, 892, 285 N.Y.S. 840, 841 (4th Dep't 1936) (stating that "we did not consider the statements made by the insurer in the course of such negotiations[] as competent admissions of liability"); *Williamson v. Schwartz*, 33 Misc. 2d 557, 558-59, 225 N.Y.S.2d 563, 564-65 (N.Y. Sup. Ct. 1962) (asserting that "the general rule is that evidence of an offer to compromise or settle a question or claim in dispute is not competent . . . [because] the offer to compromise implies merely a desire for peace and not a concession of liability") (citations omitted). See EDITH L. FISCH, *FISCH ON NEW YORK EVIDENCE* § 796, at 466 (2d ed. 1977) (declaring that "[i]t is the general rule that unaccepted offers to compromise or settle a claim either by partial or complete payment, are not admissible to establish liability").

48. *Smith v. Saterlee*, 130 N.Y. 677, 679, 29 N.E. 225, 226 (1891) (holding that an offer of payment contained in a letter was a settlement offer and did not constitute "an admission of a fact"); *Universal Carloading & Distrib. Co. v. Penn Cent. Transp. Co.*, 101 A.D.2d 61, 63, 474 N.Y.S.2d 502, 503 (1st Dep't 1984) (stating that "[s]uch an offer of compromise, made for the purpose of procuring a settlement of a pending controversy, is not an admission of fact").

49. *Cook v. State of N.Y.*, 105 Misc. 2d 1040, 1045, 430 N.Y.S.2d 507, 509 (N.Y. Ct. Cl. 1980) (holding that "[o]ffers made in the course of settlement negotiations are not competent evidence as to the value of a claim"); *Quillen v. Board of Educ.*, 203 Misc. 320, 323, 115 N.Y.S.2d 122, 126 (N.Y. Sup. Ct. 1952) (maintaining that "[c]ompromise offers are not accepted in evidence as admissions of liability or to measure the value of an admitted liability"). See FISCH, *supra* note 47, § 796 at 466 (asserting that settlement offers are inadmissible in an attempt to "measure the value of an admitted liability"); see also *In re Brooklyn Bridge Southwest Urban Renewal Project*, 50 Misc. 2d 478, 481, 270 N.Y.S.2d 703, 708 (N.Y. Sup. Ct. 1966) (stating

However, it has been held that this type of evidence may be admissible for an other purposes, such as “showing an alleged malicious intent to prosecute the plaintiff.”<sup>50</sup>

In addition, New York courts have held that documents prepared for the purpose of settlement negotiations are not the valid object of discovery.<sup>51</sup> In *Randall Electric, Inc. v. State of New York*,<sup>52</sup> documents were prepared during settlement negotiations and a tentative agreement was reached.<sup>53</sup> After the tentative agreement was rejected, plaintiff instituted a breach of contract claim and sought discovery of the documents.<sup>54</sup> The appellate division, in affirming the decision of the lower court that the documents were made for the purpose of negotiations and thus were not discoverable, stated that

the subject documents were created specifically and directly as a result of the informal, off-the-record negotiations designed to settle claimant’s claim and not in the normal course of the administration of the contract. . . . [They] were put together solely to effect a negotiated settlement of the claim . . . [and are subject to] [t]he immunity afforded materials prepared in connection with settlement of a claim.<sup>55</sup>

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that “the general rule [is] that an offer of settlement . . . is inadmissible to show market value”).

50. *Williamson v. Schwartz*, 33 Misc. 2d 557, 558-59, 225 N.Y.S.2d 563, 564-65 (N.Y. Sup. Ct. 1962).

51. *Randall Elec., Inc. v. State of N.Y.*, 150 A.D.2d 875, 876, 540 N.Y.S.2d 901, 902 (3d Dep’t 1989).

52. *Id.*

53. *Id.* at 875, 540 N.Y.S.2d at 902.

54. *Id.* at 876, 540 N.Y.S.2d at 902. The court of claims, in refusing to compel discovery of the documents, determined that “the requested materials were ‘calculations of experts, prepared in evaluating the case for settlement negotiations’ and not merely ‘back-up materials to a proposed change order that was part of the contract work.’” *Id.*

55. *Id.* at 876-77, 540 N.Y.S.2d at 902-03. The court distinguished the agreement from work product and stated that “the fact that the material was not prepared solely for litigation . . . is irrelevant. The immunity afforded materials prepared in connection with settlement of a claim is not derived from [the rule concerning work product].” *Id.* at 877, 540 N.Y.S.2d at 903 (citations omitted). See N.Y. CIV. PRAC. L. & R. 3101(d)(2) (McKinney 1991).

Likewise, the fact that actions are taken to tender payment, make an offer to liquidate damages, or submit a written offer to compromise pursuant to C.P.L.R. sections 3219,<sup>56</sup> 3220<sup>57</sup> and 3221,<sup>58</sup> shall not be presented to the jury in a subsequent trial if the offer is rejected by the offeree. However, “admissions of fact made in connection with settlement negotiations” are admissible if made without a qualifying statement.<sup>59</sup> On the other hand, it

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56. N.Y. CIV. PRAC. L. & R. 3219 (McKinney 1992). Section 3219 provides in pertinent part:

At any time not later than ten days before trial, any party against whom a cause of action based upon contract . . . is asserted, and against whom a separate judgment may be taken, may, without court order, deposit with the clerk of the court for safekeeping, an amount deemed by him to be sufficient to satisfy the claim asserted against him . . . . A tender shall not be made known to the jury.

*Id.*

57. N.Y. CIV. PRAC. L. & R. 3220 (McKinney 1992). Section 3220 provides in pertinent part:

Offer to liquidate damages conditionally.

At any time not later than ten days before trial, any party against whom a cause of action based upon contract . . . is asserted may serve upon the claimant a written offer to allow judgment to be taken against him for a sum therein specified . . . . An offer under this rule shall not be made known to the jury.

*Id.*

58. N.Y. CIV. PRAC. L. & R. 3221 (McKinney 1992). Section 3221 provides in pertinent part:

[A]t any time not later than ten days before trial, any party against whom a claim is asserted, and against whom a separate judgment may be taken, may serve upon the claimant a written offer to allow judgment to be taken against him for a sum or property or to the effect therein specified . . . . An offer of judgment shall not be made known to the jury.

*Id.*

59. *Central Petroleum Corp. v. Kyriakoudes*, 121 A.D.2d 165, 165, 502 N.Y.S.2d 1017, 1018 (1st Dep’t 1986). The defendants’ admission, contained in a tentative settlement agreement, “that they were personally served with the summons and verified complaint and that they [had] no defenses to the complaint” was an admission of fact, and therefore, admissible. *Id.* The court determined that the fact “[t]hat the statement is contained in a settlement document is immaterial . . . .” *Id.* *Bellino v. Bellino Constr. Co.*, 75 A.D.2d 630, 631, 427 N.Y.S.2d 303, 304 (2d Dep’t 1980) (stating that “while an offer

has been asserted that “[h]ypothetical or tentative admissions made in the course of settlement negotiations are inadmissible in an action arising out of that dispute.”<sup>60</sup>

Federal Rule of Evidence 408 and New York common law have some similarities with regard to the types of evidence that are considered inadmissible in connection with compromise or settlement negotiations. Both the federal rule and the New York rule provide that conduct and actions taken during settlement negotiations, offers to compromise, and documents created for the purpose of negotiations are all inadmissible at trial. Federal Rule of Evidence 408 further provides for the exclusion of all statements made during settlement negotiations, including admissions, as well as evidence of completed settlements. The New York rule also allows the exclusion of admissions made by a party during settlement negotiations. However, exclusion of admissions in New York is limited to instances where the party expressly states that they are “without prejudice,” or if they are tentative or hypothetical. Otherwise, introduction of the admissions would be allowed at trial.

This type of evidence is inadmissible under the federal rule if it is being used to prove liability, invalidity of the amount of a claim or invalidity of the claim itself.<sup>61</sup> The evidence is inadmissible under the New York rule if it is being used to prove liability, a factual admission or the amount of an undisputed claim. Both Rule 408 and the New York rule state that this type of evidence may, however, be admissible for other relevant

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of settlement would be inadmissible, admissions made in the course of such negotiations are not”).

60. *Pennzoil Co. v. Carlson*, 178 A.D.2d 1005, 1006, 579 N.Y.S.2d 784, 785 (4th Dep’t 1991).

61. FED. R. EVID. 408.

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purposes.<sup>62</sup> Thus, both Federal Rule of Evidence 408 and New York common law refuse to allow evidence of settlement and compromise offers to prove liability, but may allow its admission for other purposes.

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62. FED. R. EVID. 408. *See supra* notes 29-31. 50 and accompanying text.