

COMMERCIAL AND FEDERAL LITIGATION SECTION

October 8, 2013

REPORT REGARDING PROPOSAL TO AMEND CPLR § 4547

For the reasons stated below, the Commercial and Federal Litigation Section APPROVES, in part, the proposal put forward by the Association's Committee on Civil Practice Law and Rules (the "Standing Committee") to amend CPLR § 4547 to conform the language of that section to the current language of Rule 408 of the Federal Rules of Evidence (regarding the admissibility *vel non* of statements or conduct made in settlement negotiations), thereby embracing certain substantive amendments made to Rule 408 in 2006, as well as non-substantive amendments made in 2011 to simplify and clarify the language of the rule, but DISAPPROVES the proposal insofar as it recommends adoption of one of the changes to Rule 408 permitting the admission into evidence, in a subsequent criminal proceeding, of a party's conduct or statements made in negotiation of a settlement in a prior civil dispute between the defendant and a government agency.

CPLR § 4547 was enacted in 1998 at the recommendation of the Standing Committee; the goals of the amendment were both to broaden the protections available for settlement-related communications and to establish a rule that would be substantively identical to the corresponding federal rule, so that courts and litigants could benefit from the interpretation of the rule in multiple jurisdictions.

In 2006, Rule 408 was amended to clarify and resolve a number of issues that had arisen in the application of the rule in federal courts:

- the 2006 amendment prohibited the use of statements made in settlement discussions for purposes of impeachment, an issue not directly addressed by the original rule (or by CPLR § 4547); as the Advisory Committee noted, "[s]uch broad use of impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements." *Id.*;
- the 2006 amendment also clarified that the prohibition against introduction of settlement communications applies with equal force against a party's attempt to introduce his or her own statements. "If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiations disclosed to the jury." *Id.*; and
- finally, Rule 408 was amended to clarify that it "does not prohibit the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute" involving a claim by a "government regulatory, investigative, or enforcement agency." *Advisory Committee Comment to 2006 Amendment to Fed. R. Evid. 408*;

As a result of these changes, CPLR § 4547 – which was originally intended to read identically to Rule 408, now looks and feels quite different, and does not specifically incorporate any of the 2006 amendments to the federal rule. Nor does CPLR § 4547 benefit from the clarifying and simplifying amendments made to the federal rule in 2011.

The Standing Committee, in its supporting memorandum, states that, “[i]n order to fulfill the policy goal of keeping both rules identical, it is necessary to amend CPLR 4547 to conform to FRE 408. This will enable a common body of law and understanding with respect to settlement discussions, which remains as important now as it was in 1998. Indeed, often settlement discussions occur in the context of controversies that might be litigated in federal or state court, or both, and a common set of easily understood rules, applicable to both, remains important.”

This Section acknowledges that courts and parties may benefit from having a common understanding in New York and federal courts of the scope and limitations of the protections afforded to settlement communications; the Section further notes that the specific changes to the federal rule adopted in 2006 regarding the prohibition against (a) using settlement communications for purposes of impeachment and (b) a party’s introduction of its own settlement offers appear to be valuable extensions of the rule and appropriate for adoption in New York as well. Accordingly this Section APPROVES those portions of the Standing Committee’s proposed amendment to CPLR § 4547.

However, insofar as the proposed amendment calls for the adoption of that portion of FRE 408 addressing the use of otherwise protected communications or conduct in criminal proceedings (which appears as section (a)(2) of the proposed amendment), this Section believes that that proposal is unwise as a matter of policy and should not be adopted. As the Advisory Committee comments note, a defendant who is ably represented in settlement negotiations could readily avoid making any statements or engaging in any conduct that would later be admissible in a criminal matter, and thus the amendment would primarily serve as a trap for the unwary or unrepresented. Moreover, the Section is concerned that the amendment, if adopted, would have a potential chilling effect on efforts to settle civil matters brought by government agencies where the subject matter of the dispute might later become the subject of criminal proceedings. In the Section’s view, this would be a highly undesirable result.

The Section notes that the only New York State case of which we are aware that has addressed this issue is *People v. Forbes-Haas*, 926 N.Y.S.2d 872 (County Court, Onondaga County 2011), a case which ultimately held that CPLR § 4547 had *no* application to criminal proceedings, and as a result permitted the introduction into evidence in a criminal proceeding statements that the defendant had made in a prior settlement of a civil dispute – a result that would go beyond the uses that would be permitted by section (a)(2) of the proposed amendment. To avoid any confusion in this area, the Section recommends that the proposed amendment be changed as follows:

First, by deleting section (a)(2) as proposed and replacing it with the following (the effect of which is to delete the language permitting introduction of prior statements in a criminal case):

“conduct or a statement made during compromise negotiations about the claim;” and

Second, by adding new language after section (a)(2), applicable to both (a)(1) and (a)(2), stating as follows:

“regardless of whether such evidence is offered in a civil, criminal, administrative, or other adjudicative proceeding.”

Conclusion: For the reasons stated, the Commercial and Federal Litigation Section APPROVES, in part, and DISAPPROVES, in part, the amendment to CPLR § 4547 proposed by the Association’s Standing Committee on Civil Practice Law and Rules.