PROTECTING YOUR FLANK: RESOLVING PARALLEL PROCEEDING WHEN YOUR CLIENT FACES AN ENVIRONMENTAL CRIMES INVESTIGATION

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I. INTRODUCTION

One of the most difficult and intractable issues that arises in an environmental criminal investigation is how to resolve the parallel regulatory enforcement proceeding without jeopardizing your client's position in the criminal investigation. While ideally parallel proceedings are wrapped into the resolution of the criminal investigation in a global settlement, very often the civil and criminal enforcement proceedings have totally different timelines. The focus of the civil proceeding very often is on forcing future compliance, extracting a civil penalty payment, and remediating past environmental impact. In the criminal proceeding, in contrast, the focus is on the investigation and punishment of historical conduct. Moreover, the civil enforcement authorities may be willing to resolve the matter based on a more limited factual understanding, while a U.S. Attorney's Office or the Environmental Crimes Section is more likely to insist on a relatively complete investigation before agreeing to a settlement of the criminal investigation. As a result, especially in the case of corporate clients, clients are often willing to decouple a global settlement and resolve the civil proceeding first in hopes that the criminal investigation will then lose steam. When it does not, counsel must be ready to deal with the consequences.

This article discusses some of the issues presented when your client seeks to resolve the parallel proceeding in the midst of — or before the advent — of a criminal investigation. Specifically, it focuses on the interplay between Federal Rule of Evidence 408, the rule barring the admission of civil settlement proceedings, and Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e), the rules barring the admission of criminal settlement discussions. Because many circuits have held that Rule 408 does not apply in a criminal proceeding, civil negotiations and settlement may create havoc for your client in a follow-on criminal investigation.

II. DISCUSSION

A. Federal Rule of Evidence 408

Rule 408 provides that "[e]vidence 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."[1] Even more important, Rule 408 excludes "[e]vidence of

conduct or statements made in compromise negotiations" offered for the same purposes.[2]

The policy rationales behind Rule 408 are obvious. As the advisory committee's notes reflect, there are two very important purposes behind Rule 408: First, "[f he evidence [of compromise] is irrelevant, since the offer may be motivated by desire for peace rather than from any concession of weakness of position." Second, "[a] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes."[3] Permitting an adverse party to introduce statements, offers, and compromises made in settlement negotiations to prove liability or lack of liability would have a chilling effect on negotiations. The Rule seeks to facilitate the resolution of disputes by permitting the parties to engage in negotiations without the fear of undermining their respective litigation positions.

B. Cases Discussing the Application of Rule 408 to Criminal Proceedings

Despite tile uniformity of the policy goals behind Rule 408, Rule 410, and Rule 11, several courts of appeal have held that Rule 408 does not apply to criminal proceedings. In decisions spanning the last decade, the Second, Sixth, and Seventh Circuits have all held that Rule 408 does not prohibit the use of evidence from settlement negotiations in a criminal case. As is its custom, the Ninth Circuit has marched to its own drummer, indicating that the parallel goals of these Rules should preclude settlement negotiations from being introduced into evidence in any proceeding, whether civil or criminal.

1. The Second Circuit

In *United States v. Baker*, 926 F.2d 179 (2d Cir. 1991), the Second Circuit looked to the plain language of Rule 408, holding that it was "fairly evident" that the Rule applies only to civil litigation.[4] In reviewing the plain language of the Rule, the court of appeals held that words such as "validity" and "claim" establish that the drafters of the Rule intended for it to apply solely in a civil context. Despite the Rule's obvious application in parallel proceedings, the Second Circuit held that the primary policy consideration that underlies Rule 408, encouraging the settlement of civil cases, does not apply to criminal cases.[5]

2. The Seventh Circuit

The Seventh Circuit also looked to the plain language of Rule 408 in deciding this issue. In *United States v. Prewitt*, 34 F.3d 436 (7th Cir. 1994), the defendant marketed trust instruments to investors. During an investigation being conducted by the Securities Division of the Indiana Secretary of State's Office, the defendant entered into settlement discussions and, during an interview with the state, admitted to his personal use of' some of the investors' funds.[6] This evidence was

subsequently introduced against him in his trial for mail fraud and subscribing to a false tax return.

The court of appeals held that "[n]othing 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.[7] The court continued by noting that the language of the Rule reflects that it applies only to civil cases, "specifically the language concerning the validity and amount of a claim."[8] In addition, the Seventh Circuit reasoned that nothing in Rule 408 particularly circumscribes the use of evidence of settlement negotiations with a private party in the context of a criminal case.[9] Finally, the Seventh Circuit opined that the public interest in the prosecution of crime is greater than the public interest in the settlement of civil disputes.[10] Because of these considerations, the Seventh Circuit field that Rule 408 should not be applied to bar the admission of evidence of settlement negotiations in criminal proceedings.[11]

3. The Sixth Circuit

The Sixth Circuit followed *Baker* and *Prewitt* in a recent case addressing the applicability of Rule 408 in criminal proceedings. In *United States v. Logan*, 250 F.3d 350 (6th Cir. 2001), the defendants sold mortgage-backed securities that were guaranteed by the U.S. Department of Housing and Urban Development. In order to meet the conditions for participation in the program, the defendants submitted false documents to support the creditworthiness of the borrowers. Over their objections at trial, the district court admitted evidence of a review by HUD's monitoring division, a resulting action by HUD's mortgage review board, the defendants' response to the mortgage review board, and the settlement agreement and letter of reprimand disposing of the administrative action.[12]

In rejecting the defendants' claims on appeal, the Sixth Circuit also looked to the plain language of Rule 408. The court of appeals found the Rule inapplicable in the criminal context. The Sixth Circuit acknowledged that "this conclusion arguably may have a chilling effect on administrative or civil settlement negotiations in cases where parallel civil and criminal proceedings are possible."[13] However, without further analysis, the court of appeals discounted this consideration because "this risk is heavily outweighed by the public interest in prosecuting criminal matters."[14]

4. The Ninth Circuit

Although the Ninth Circuit has yet to address the application of Rule 408 to criminal proceedings in a published decision, it has provided a clear rationale for excluding of civil compromise negotiations in an analogous context. In *Hudspeth v. Commissioner of Internal Revenue Service*, 914 F.2d 1207 (9th Cir. 1990), the Ninth Circuit held that evidence of valuation data in a prior tax deficiency compromise

could not be introduced against the government in a subsequent tax deficiency proceeding involving a different taxpayer.[15] The Ninth Circuit rejected the taxpayers' contention that Rule 408 does not apply to third-party compromises, holding that "Rule 408 does apply to situations where the party seeking to introduce the evidence of a compromise was not involved in the original compromise."[16]

In an unpublished memorandum disposition, the Ninth Circuit went even further in articulating why Rule 408 should apply in criminal cases, not solely civil proceedings. In *United States v. Walls*, 949 F.2d 400 (9th Cir. 1991) (table), 1991 WL 261632, while ultimately finding that the introduction of statements made in civil settlement negotiations was harmless, the Ninth Circuit provided a convincing argument for why Rule 408 should apply in the criminal context:

> Admission of statements made during settlement negotiations, whether in a civil or a criminal trial, discourages settlement negotiations. If an individual believes that any statements might be used in a future criminal trial, that individual will not be willing to discuss the possibility of a compromise at a settlement conference. Since such statements would not be admissible in a civil trial to prove ***liability*** it would be inconsistent to and illogical to permit them to be admitted to prove ***guilt*** in a criminal trial as liability and guilt are truly synonymous. In addition, admission of statements made during settlement conferences conflicts with the rule prohibiting statements made during plea bargaining. *See* Fed. R. Evid. 410. Allowing such statements in would create an end run around the plea bargain rule in cases where the defendant's conduct exposes him to civil as well as criminal liability. [Emphasis added.][17]

Unfortunately, given the trend in the cases, attempting to raise such arguments when the government attempts to introduce evidence of civil or administrative compromise negotiations may simply be tilting at windmills.

C. Keeping Civil Settlement Discussions Out of Criminal Proceedings

The most effective solution to this dilemma is to never settle a civil enforcement proceeding without settling the criminal investigation at the same time. A global resolution provides the government, as well as the client, with the distinct advantage of ending all proceedings at the same time, avoiding duplication of resources, and permitting the coordination of remedies in each proceeding.

Unfortunately, the various government interests involved in each proceeding the state's delegated authority, the U.S. EPA, the U.S. Attorney's Office, and the Environmental Crimes Section may not coalesce. For example, the criminal investigation may not even be extant or known when the civil or administrative proceeding runs its course. Moreover, even when you are aware of the existence of the criminal investigation, especially when a state is involved in a civil or

administrative enforcement proceeding, the civil or administrative authority may be unwilling to wait until the criminal investigation runs its course. Finally, you and your client may wish to settle the parallel proceeding first for strategic reasons, such as to avoid considerably more damaging evidence developed in the grand jury proceeding from becoming a part of the civil or administrative record.

As a result, there are unavoidable circumstances in which resolving the parallel proceeding makes sense without disposing of the criminal investigation at the same time. The challenge in that instance is to do so without crippling your client's chances to work out a favorable resolution of the criminal investigation or to defend a prosecution successfully. Here are some suggestions for doing so.

— ***Keep the possibility of criminal enforcement in mind:*** Given the strict liability nature of environmental crimes, virtually any civil or administrative enforcement proceeding involving a permit violation or an unpermitted release can provide a theoretical basis for criminal prosecution.

— ***No admission of liability:*** Most parallel proceedings can be resolved without an admission of liability in the consent decree or negotiated order. Some state enforcement authorities, however, require some admission as a basis for settling a notice of violation. In such a case, the admission should be as narrow as possible.

— ***Limit factual representations:*** Statements made during the course of settlement negotiations must be carefully tailored to avoid making damaging admissions that can then be introduced in a criminal prosecution. If the existence of the criminal investigation is known, the defense of the parallel proceeded should be closely coordinated with the defense of the criminal investigation.

— ***Use care when making written submissions:*** To facilitate discussions in the parallel proceeding, counsel may wish to make a written submission, outlining factual and legal positions. The use of these submissions must be carefully evaluated for their effects on the criminal investigation, including the effect on potential defenses in the criminal case.

III. CONCLUSION

Resolving parallel proceedings can create traps for the unwary counsel in a criminal investigation. Because Rule 408 is unlikely to bar the admission of civil settlement negotiations in the criminal investigation, your job in settling the parallel proceeding is made that much more difficult. Above all else, anticipating the government's use of civil settlement negotiations and settlements in the

criminal proceeding may help you avoid undermining your position in the criminal investigation.

ENDNOTES

[1] Fed. R. Evid. 408.

[2] Id. The Rule does not, however, "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.

[3] Fed. R. Evid. 408, advisory committee note.

[4] 926 F.2d at 180.

[5] *See also Manko v. United States*, 87 F.3d 50, 54 (2d Cir. 1996); *United States v. Gonzalez*, 748 F.2d 1984 (2d Cir. 1984); *United States v. Peed*, 714 F.2d 7, 10 (4th Cir. 1983) (holding that Rule 408 was inapplicable in the context of a criminal case because the negotiations at issue "were not negotiations aimed at settling a civil claim, negotiations that the policy behind Rule 408 seeks to encourage").

[6] 34 F.3d at 438.

[7] *Id.* at 439.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] 250 F.3d at 356, 366.

[13] *Id.* at 367.

[14] *Id.*.

[15] 914 F.2d at 1213.

[16] *Id.*

[17] 1991 WL 261632, *3.