

Rule 408 - Admission Of Civil Compromise Evidence In A Criminal Case

Can civil settlement evidence, normally barred under Federal Rule of Evidence 408 in civil cases, be used in a criminal case? The circuits have split on this application of Rule 408. But the Tenth Circuit recently reviewed the positions taken by the circuits, and decided civil settlement evidence should not be admitted in a criminal case.



Investors filed separate civil suits concerning violations of a partnership agreement and seeking termination of the agreement, an accounting and other relief. The civil actions were consolidated and certified as class actions and were ultimately settled. The settlement agreement summarized a partial return to the partnership concerning unauthorized withdrawals. Subsequently, a criminal action was filed alleging wire fraud and money laundering counts.

At trial, after the defense rested, the government called one of the plaintiffs in the civil suit. Three questions were asked concerning unauthorized withdrawals: (1) whether the defendant admitted that he had made unauthorized withdrawals over partnership accounts; (2) whether partners had given permission to withdraw the funds; and (3) whether the amount of the unauthorized withdrawals exceeded \$1.3 million dollars.

Because the defense did not object to the questions at trial, the issue was reviewed for plain error. On appeal, the defense argued that the admission of matters within the civil settlement violated FRE 408, generally barring evidence of civil offers to compromise or admission of such compromises. The case presented the following open issue for the circuit:

“[W]hether Rule 408 applies to both criminal and civil proceedings, or whether it only applies to civil proceedings in which a party seeks to admit evidence regarding a settlement.”

After recognizing the split in the circuits and a division among commentators, the Tenth Circuit noted “the question is a very close one” and concluded that Federal

Rule of Evidence 408 bars settlement evidence in criminal and civil cases:

“We reach this conclusion for essentially the same reasons stated by those courts: the FRE apply generally to both civil and criminal proceedings; nothing in Rule 408 explicitly states that it is inapplicable to criminal proceedings; the final sentence is arguably unnecessary if the Rule does not apply to criminal proceed-

ings at all; and the potential prejudicial effect of the admission of evidence of a settlement can be more devastating to a criminal defendant than to a civil litigant.” [1146]

The circuit concluded that the error did not rise to the level of plain error, since the evidence did not affect the outcome of the proceeding in light of other admitted evidence.



Case Reference

Cross-Reference : *United States v. Bailey* is reviewed in *Circuit Splits* (p. 89).

Citation: *United States v. Bailey*, 327 F.3d 1131 (10th Cir. 2003) (No. 02-3187) (Lucero, McWilliams, Anderson (SCJ)).

Type of Action/Claim or Charge: Criminal; 18 U.S.C. § 1343 (wire fraud), § 1957(a) (money laundering).