Evidence and Practice Tips
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Admissibility of Statements under Illinois Rule of Evidence 408: Control Solutions, LLC v. Elecsys

The evidentiary rule excluding offers of compromise and statements made within compromise negotiations was developed through the common law in Illinois for years. The rule was finally codified at Illinois Rule of Evidence 408. Ill. R. of Evid. 408 (eff. Jan. 1, 2011). Few Illinois cases have analyzed Illinois Rule of Evidence 408 in detail, although courts have relied on cases that analyze the Federal Rule of Evidence 408, which mirrors its Illinois counterpart.

Illinois Rule of Evidence 408 provides:

(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.

(b) Permitted Uses. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of settlement negotiations. This rule also does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness’ bias or prejudice; negating an assertion of undue delay; establishing bad faith; and proving an effort to obstruct a criminal investigation or prosecution.

Ill. R. of Evid. 408.

In Control Solutions, LLC v. Elecsys, 2014 IL App (2d) 120251, the Illinois Appellate Court Second District analyzed whether statements made in communications between parties to a breach of contract claim were admissible under Illinois Rule of Evidence 408. The focus of the Second District’s discussion ultimately became whether the dispute that was the subject of the litigation predated the statements.
Background/Statements at Issue

Control Solutions involved a breach of contract claim brought by the plaintiff, Control Solutions, LLC (Control Solutions), against the defendant, Elecsys. The underlying dispute involved a contract for the purchase of controllers used in military equipment to assist in opening doors of damaged vehicles. The defendant bid on and received a contract with the United States Army (Army) to provide these controllers. Control Solutions, 2014 IL App (2d) 120251, ¶ 4-6. Under the Army’s agreement, controllers were to be obtained from the plaintiff, the sole supplier. As a result, the defendant was required to enter into a contract with the plaintiff and ultimately placed an order with the plaintiff for 4,211 controllers. The Army later cancelled the contract with the defendant after the plaintiff shipped only 200 of the 4,211 controllers. Id. ¶16. Following the defendant’s cancellation, the parties exchanged numerous e-mails over the next year regarding the terms of the contract and the damages involved. Some of these e-mails became the subject of the appeal in this case. Id. .25-3

Given the facts of the case, it is important to set out the exact statements at issue:

• On June 5, 2008, a week after the Army cancelled its contract with the defendant, the defendant’s agent informed the plaintiff’s agent that the Army had cancelled its contract, the plaintiff should stop work, and advise as to the status of production and any cancellation costs. The plaintiff later responded that the contract was non-cancellable and that a balance of 4,011 controllers remained for a cancellation liability of $3,730,230. Id. ¶16,17.

• On August 26, 2008, the defendant’s agent contacted the plaintiff’s agent and asked for information regarding how many controllers were built and ready for shipment, what the component inventory was for the order, and requesting a cost break down. The plaintiff responded on September 5, 2008, stating that there was a commonality with other products and that only the finished product was unique, meaning that parts in the non-finished controllers could be reused. The plaintiff thus submitted that it had costs of 100 finished controllers for a total of $93,000 and 15% of lost profit on the remaining controllers for a total of $545,584.50. The plaintiff indicated in this e-mail that its “offer” was “predicated on the expectation that a speedy resolution of this matter will occur.” Id. ¶19,20.

• On December 29, 2008, the plaintiff generated an invoice that billed the defendant in the amount of $638,584.50, consisting of $93,000 for the 100 finished but unshipped controllers and $545,584.50 for a 15% lost profit charge on the balance of the unfinished controllers. Id. ¶21.

• On March 30, 2009, the plaintiff’s agent sent the defendant’s agent an email inquiring about the status of the overdue invoice. The next day, the defendant’s agent wrote the plaintiff’s agent, stating she had spoken with the plaintiff’s agent recently and had explained that the cost amount on the invoice for the 15% lost profit charge needed to be removed because it was a flow-down contract on which the government would not have allowed for lost profit to be reimbursed. The defendant’s agent further stated that if a letter stating the final settlement amount was $93,000.00 and was sent, payment could be processed in that amount the following day. Id. ¶23.

No payment was made following these discussions. The plaintiff ultimately filed suit in September 2009. Id. ¶25. Prior to trial, the plaintiff filed a motion in limine, asking the trial court to exclude the September 5, 2008 offer from the plaintiff to the defendant and related communications on the basis that the communications consisted of settlement negotiations and statements made in support of settlement
negotiations. The plaintiff claimed that it had engaged in settlement discussions by conveying a settlement offer and later sending an invoice to the defendant for that amount. The plaintiff also argued that the defendant recognized that this was an offer when it responded on March 31, 2009, with an offer to pay $93,000, a much lower amount. The trial court denied the motion, finding that the dispute over damages did not predate the communications. The dispute ultimately went to trial, with the jury returning a verdict in favor of the plaintiff in the amount of $106,950, much less than the $2.7 million the plaintiff had asked the jury to award. *Id.* ¶¶ 26-28.

The plaintiff also raised this issue in its post-trial motions, with the court again denying the motion. At the hearing, the trial court judge indicated that he wanted to clarify his prior ruling for any resulting appeal and stated that he felt the communications, based on his review, did not fall within the category of settlement documents that should be excluded from the jury for public policy reasons. *Id.* ¶ 31. He emphasized that his decision was not solely based upon the fact that the communications occurred before suit was filed. *Id.* The plaintiff then appealed. *Id.* ¶31.

**Second District Ruling**

On appeal, the plaintiff argued that the trial court erred in admitting the September 5, 2008 offer and related communications because doing so contravened well-established Illinois law that protected the disclosure of such offers of compromise to the jury. *Id.* ¶ 35. The defendants argued that the communications were not regarding settlement and that even if they should not have been admitted, the admission was harmless. *Id.* ¶83. The Second District explained that courts reviewing such communications are to consider the totality of the circumstances, and the party’s act of labeling something as a “settlement offer” is not dispositive. It further emphasized that the standard of review on such rulings was an abuse of discretion. *Id.*

The plaintiff first argued that the trial court had erred because it had drawn an arbitrary line between pre- and post-litigation offers of compromise, holding that only post-litigation communications were inadmissible under Rule 408. *Id.* 39 ¶. The Second District agreed that the application of Rule 408 does not depend on when the actual lawsuit is filed, but felt that the plaintiff had misunderstood the rationale for the trial court’s ruling. *Id.* The court noted that the trial court’s initial ruling on the motion in *limine* had provided that the communications were admissible because they predated the *dispute at issue* (not the litigation, as the plaintiff had argued). *Id.* Moreover, the court felt the trial court reinforced that point when ruling on the post-trial motion by specifically clarifying the prior ruling and stating that the communications at issue had not fallen within the category of settlement documents. *Id.* 40 ¶.

The plaintiff next argued that a *bona fide* dispute over damages had in fact existed when the plaintiff sent the September 5, 2008 email regarding its “offer.” *Id.* 4 ¶1. The plaintiff claimed that from the time it originally demanded $3,730,230, the remaining contract value, the defendant had refused to pay that amount and disputed owing anything other than the cost of completed controllers. *Id.* The plaintiff thus felt the parties had conflicting opinions concerning the amount owed and that an actual dispute existed.
for purposes of Rule 408. Id. The Second District reviewed the timeline of communications and determined that the trial court did not abuse its discretion in admitting the communications. Id. 43-42 ¶¶. The appellate court explained that the trial court could have reasonably concluded that the communications at issue constituted an effort by the defendant and the plaintiff to identify and submit cancellation costs to the Army for reimbursement as a result of the Army’s termination of its contract with the defendant. Id. 44 ¶. It also found it significant that the communications were not adversarial. Id.

The Second District next rejected the plaintiff’s argument that the invoice generated constituted an offer of compromise to be protected by Rule 408. Id. 45 ¶. The court explained that in advising the defendant of the invoice, the plaintiff indicated that it knew the defendant was still settling terms with the Army over the cancelled contract, but was generating the invoice to get its books in order. Id. Thus, the court found that the evidence suggested that the invoice was generated merely for bookkeeping purposes rather than as an offer of settlement. Id.

The court also rejected the plaintiff’s reliance on another case, Davis v. Rowe, No. 91C2254, 1993 WL 34867 (N.D. Ill. Feb. 10, 1993), finding the case distinguishable for several reasons, including that the parties in Davis had both retained outside counsel when the communications took place and had engaged in settlement discussions around the time of the communications. Control Solutions, 2014 IL App (2d) 120251, ¶ 46. The Second District explained that in this case, the parties had not retained counsel until 2009 and had not engaged in any meetings to discuss a potential settlement. Id. 48 ¶.

Finally, the Second District agreed with the defendant that even if the communications at issue should have been excluded under Rule 408, any error in admitting them was harmless. Id. 49 ¶. The court noted that the evidence the plaintiff claimed was harmful was found in other places within the record. Id. Moreover, certain evidence that was found only in those communications was actually found to have benefitted the plaintiff. Id.

Conclusion

It is easy for attorneys and unrepresented parties to consider any communication regarding a compromise inadmissible under evidentiary rules regarding offers of compromise and settlement negotiations. Control Solutions raises some concern regarding when such communications may be admissible at trial. It is important for an attorney to warn his clients, especially businesses, as to when Rule 408 and the rules regarding the admissibility of settlement discussions actually applies. It is crucial that the attorney and/or party be aware that such discussions are generally only excluded when there is an actual bona fide dispute about the validity or amount of a claim.

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