OUTSIDE PERSPECTIVES

In The Interest Of Full Disclosure

SEVEN YEARS AFTER GOODYEAR, FEW COURTS have followed the Sixth Circuit's lead in recognizing a settlement privilege.

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Federal law reflects two distinct policies of (a) permitting liberal discovery, *see* FED. R. CIV. P. 26(b)(1); *Schlaugenhauf v. Holder*, 379 U.S. 104, 114-115 (1964), and (b) encouraging settlement, *see* FED. R. EVID. 408; *Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976). But what happens when these policies conflict? Consider the following scenario: A and B are adverse parties. B and C were adverse parties in a separate, though related, litigation that has settled. A seeks discovery of settlement negotiations between B and C. B asserts that the information is privileged. Rejecting A's request would impede liberal discovery, but granting it could have a chilling effect on settlement discussions by future litigants, given that their negotiations would be discoverable. To resolve the issue, one of the two policies must give way to the other.

In *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc*., 332 F.3d 976 (6th Cir. 2003), the Sixth Circuit confronted this very scenario. While *Goodyear* held that settlement communications are privileged and therefore not discoverable, courts have generally not found the Sixth Circuit's reasoning persuasive. Because most courts have rejected the existence of a federal settlement privilege, counsel and clients involved in settlement negotiations should proceed as if all settlement communications are subject to disclosure in subsequent litigation.

I. The *Goodyear* Decision

Goodyear involved a suit by a customer against both a manufacturer of heating and snowmelt systems and one of the manufacturer's parts suppliers. 332 F.3d at 977. The manufacturer and the parts supplier were adverse parties in another, related litigation that concluded before the customer's action concluded. *Id*. at 978. Following the settlement of the related litigation, the customer requested discovery of settlement communications between the manufacturer and parts supplier. *Id*. When the manufacturer and supplier objected to the discovery requests, the customer filed a motion to compel, which the federal district court denied. *Id*. at 978-979. In affirming this denial, the Sixth Circuit became the first and only federal appellate court to hold that "any communications made in furtherance of settlement are privileged" and not subject to production to third parties. *Id*. at 983.

The *Goodyear* court based its holding on "the public policy favoring secret negotiations." *Id*. at 981. The Court reasoned that, because (a) settlement is more efficient, in terms of cost, time, and judicial resources, than trial and (b) "[i]n order for settlement talks to be effective, parties must feel uninhibited in their communications," settlement communications must be protected from disclosure. *Id*. at 980. The *Goodyear* court also focused on "the inherent questionability of the truthfulness of any statements made" during settlement negotiations, concluding that because parties attempting to reach settlement "may assume disputed facts to be true," information gleaned from settlement discussions "would be highly misleading." *Id*. at 981 (quoting Cook v. Yellow Freight Sys., Inc., 132 F.R.D. 548, 554 (E.D. Cal. 1990)).

II. Reactions to *Goodyear* beyond the Sixth Circuit

Since *Goodyear*, a number of federal district courts have considered whether to adopt a federal settlement privilege in light of the Sixth Circuit's holding. Few have done so. *See, e.g*., *Pfizer Inc. v. Apotex Inc*., No. 08 C 7231, 2010 WL 3087458, at *7 (N.D. Ill. Aug. 4, 2010) (declining to apply *Goodyear*); *Polston v. Eli Lilly & Co*., No. 3:08-3639, 2010 WL 2926159, at *1 (D. S.C. July 23, 2010) (same); *Phoenix Solutions, Inc. v. Wells Fargo Bank, N.A*., 254 F.R.D. 568, 583-585 (N.D. Cal. 2008) (same); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc*., No. 05-2164-MLB-DWB, 2007 WL 1246216, at *4 (D. Kan. Apr. 27, 2007) (same); *Rates Tech. Inc. v. Cablevision Sys. Corp*., No. 05-CV-9583, 2006 WL 30508789, at *4 (E.D.N.Y. Oct. 20, 2006) (same); *In re Subpoena Issued to Commodity Futures Trading Comm'n,* 370 F. Supp. 2d 201, 212 (D.D.C. 2005) (same); *but see Software Tree, LLC v. Red Hat, Inc*., No. 6:09-CV-097, 2010 WL 2788202, at *3-4 (E.D. Tex. June 24, 2010) (applying *Goodyear*

and recognizing the existence of a federal settlement privilege).

Even in the Sixth Circuit, district courts have both criticized and sought to limit the impact of *Goodyear*. *See, e.g.*, *Grant, Konvalinka & Harrison v. United States*, No. 1:07-cv-88, 2008 WL 4865571, at *9 (E.D. Tenn. June 27, 2008) (holding that, while settlement communications are privileged under Goodyear, actual settlement agreements are not privileged); *Grupo Condumex, S.A. C.V. v. SPX Corp*., 331 F. Supp. 2d 623, 629 n.3 (N.D. Ohio 2004) (noting "latent misgivings" with *Goodyear*).

The primary argument that courts have invoked in rejecting *Goodyear* is that Congress's efforts to protect settlement communications are codified in Federal Rule of Evidence 408, and that rule definitively does not establish a settlement privilege. *See, e.g., United States v. Union Pac. R.R. Co*., No. 06-1740 FCD KJM, 2007 WL 1500551, at *5-6 (E.D. Cal. May 23, 2007). By its plain language, Rule 408 limits the *admissibility*, rather than *discoverability*, of settlement communications. *See* FED. R. EVID. 408; *see also, e.g*., *Union Pac*., 2007 WL 1500551, at *5-6; *Heartland Surgical*, 2007 WL 1246216, at *4. In fact, the language of Rule 408 actually permits evidence of settlement negotiations to be admitted for certain purposes, such as for proving the fact that settlement discussions took place. *See Matsushita Elec. Indus. Co., Ltd. v. Mediatek, Inc.*, No. C-05-3148 MMC, 2007 WL 963975, at *5 (N.D. Cal. March 30, 2007). Had Congress intended to prevent discovery of settlement discussions on privilege grounds, courts have reasoned, Rule 408 would expressly limit their discoverability, rather than admissibility. *See, e.g., Commodity Futures*, 370 F.Supp. 2d at 210-211.

A number of courts rejecting *Goodyear* have also found particularly persuasive the district court's reasoning in *In re Subpoena Issued to Commodity Futures Trading Commission*, 370 F. Supp. 2d 201, a case rejecting *Goodyear*. *See, e.g., Urethane Antitrust Litig.*, No. 04-MD-1616-JWL, 2009 WL 2058759, at *3 (D. Kan. July 15, 2009). After analyzing Supreme Court jurisprudence regarding privilege, the *Commodity Futures* court found that four factors, when considered together, warranted rejection of a settlement privilege. 370 F. Supp 2d at 208-209. First, there is no consensus among federal and state courts that settlement communications are privileged. *Id*. at 209-210. Second, as discussed above, Congress chose in Rule 408 to limit the admissibility, rather than discoverability, of settlement communications. *Id*. at 210-211. Third, the settlement privilege is not one of the privileges recognized by the Committee of the Judicial Conference in its proposed Federal Rules of Evidence. *Id*. at 211-212. Fourth, no "compelling empirical case" was presented to the *Commodity Futures* court that establishing a settlement privilege would advance a public good. *Id*. at 212. After a thorough analysis, the *Commodity Futures* court rejected *Goodyear* and determined that settlement communications should remain discoverable.

III. Approaching Settlement Discussions in Light of Courts' Reactions to *Goodyear*

Most courts have declined to rule that a "privilege" exists to protect settlement negotiations from discovery. Accordingly, counsel and clients engaging in settlement negotiations should approach those negotiations with the understanding that the negotiations themselves, and information exchanged during the negotiations, may be discoverable in subsequent litigation. However, by clearly delineating what constitutes a settlement communication, clients and counsel may be able to preserve objections to the admissibility of the settlement information.

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