DATE FILED: July 19, 2024 4:29 PM
FILING ID: FC142008972B4
CASE NUMBER: 2023SC333

SUPREME COURT OF COLORADO
Ralph Carr Judicial Center
2 East 14th Avenue
Denver, CO 80203

Appeal from the Colorado Court of Appeals, 2021CA2023
Opinion by Grove, J., Harris and Kuhn, JJ., concurring
Denver Dist. Ct. No. 2020CV32188
Honorable Marie Avery Moses, Judge

Petitioner: Marcus A. Fear

v.

Respondents: GEICO Casualty Company

▲ COURT USE ONLY ▲

Case Number: 2023SC333

Robert Reeves Anderson, No. 48057
Brian M. Williams, No. 55343
Jake W. Murphy, No. 60118
Arnold & Porter Kaye Scholer LLP
1144 Fifteenth Street
Denver, CO 80202-2848
Tel.: (303) 863-1000
Fax: (303) 863-2301
Email: reeves.anderson@arnoldporter.com
brian.williams@arnoldporter.com
jake.murphy@arnoldporter.com

Attorneys for Amicus Curiae

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28(a)(2) and (3), C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. The brief of *amicus curiae* complies with the applicable word limit set forth in C.A.R. 29(d). Specifically, the brief contains 4,647 words (excluding the caption page, this certificate page, the table of contents, the table of authorities, and the signature block).

I acknowledge that the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28(a)(2) and (3), C.A.R. 29, and C.A.R. 32.

/s/ R. Reeves Anderson
Robert Reeves Anderson

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

IDENTITY AND STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Internal Settlement Evaluations Are Not Relevant Evidence of Undisputed "Benefits Owed" Under *Fisher* 4

II. Allowing Admission of Internal Settlement Evaluations Would Erode CRE 408 and Undermine Its Purpose of Facilitating Settlement 8

A. Rule 408's Purpose and History Underscore the Need for Robust Enforcement of the Rule 8

B. Consistent with Rule 408's Purposes, Federal and State Courts Consistently Exclude Internal Settlement Materials 12

C. Admission of Internal Settlement Evaluations Would Extend Beyond Insurance Disputes and Create an End-Run Around Rule 408 15

CONCLUSION 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Page(s)

Cases

Accurso v. Infra-Red Servs., Inc.,
No. CV 13-7509, 2016 WL 1273878 (E.D. Pa. Apr. 1, 2016).........13, 14, 16, 17

Affiliated Mfrs., Inc. v. Aluminum Co. of Am.,
56 F.3d 521 (3d Cir. 1995) 12, 14, 16, 17

Axenics, Inc. v. Turner Const. Co.,
62 A.3d 754 (N.H. 2013) 15, 16

Berg v. Berg,
170 N.E.3d 224 (Ind. 2021) 15, 16

Blu–J, Inc. v. Kemper C.P.A. Grp.,
916 F.2d 637 (11th Cir. 1990) 13, 16, 17

Blue Circle Atl., Inc. v. Falcon Materials, Inc.,
760 F.Supp. 516 (D. Md. 1991)...14

Bradbury v. Phillips Petrol. Co.,
815 F.2d 1356 (10th Cir. 1987) 12

Buell v. People,
439 P.3d 857 (Colo. 2019)...8

Conroy v. Book Automation, Inc.,
398 N.W.2d 657 (Minn. App. 1987) 15

E.E.O.C. v. UMB Bank Fin. Corp.,
558 F.3d 784 (8th Cir. 2009) 12, 13, 16, 17

Hartman v. Cmty. Resp. Ctr., Inc.,
87 P.3d 202 (Colo. App. 2003)...9

Koninklijke Philips Elecs. N.V. v. Nat'l Film Lab'ys Inc.,
No. CV 12-4576, 2012 WL 12886833 (C.D. Cal. Dec. 4, 2012).........................4

Kritikos v. Palmer Johnson, Inc.,
821 F.2d 418 (7th Cir. 1987) 13

Larsen v. Archdiocese of Denver,
631 P.2d 1163 (Colo. App. 1981)...7

McGill Restoration, Inc. v. Lion Place Condo. Ass'n,
959 N.W.2d 251 (Neb. 2021) 15

People v. Butson,
410 P.3d 744 (Colo. App. 2017)...8

Ramada Dev. Co. v. Rauch,
644 F.2d 1097 (5th Cir. 1981) 13, 16

Rangel v. Gonzalez Mascorro,
274 F.R.D. 585 (S.D. Tex. 2011)..7

Roach v. State,
329 So.3d 974 (La. App. 2021) 15

Silva v. Basin W., Inc.,
47 P.3d 1184 (Colo. 2002)..2, 4, 5

State Farm Mut. Auto. Ins. Co. v. Fisher,
418 P.3d 501 (Colo. 2018)...2

Stewart v. Rice,
47 P.3d 316 (Colo. 2002)...9

Sunahara v. State Farm Mut. Auto. Ins. Co.,
280 P.3d 649 (Colo. 2012)..2, 4, 5, 6

Tolstyga v. Toll Bros., Inc.,
No. 02-23-00119-CV, 2024 WL 273547 (Tex. App. 2024)...............................15

Trujillo v. Am. Fam. Mut. Ins. Co.,
No. 1:08-CV-36 TS, 2009 WL 440638 (D. Utah Feb. 20, 2009).........................7

United States v. Wilford,
710 F.2d 439 (8th Cir. 1983) 4

Williams v. Dist. Ct.,
866 P.2d 908 (Colo. 1993) 7

Xcoal Energy & Res., LP v. Smith,
635 F. Supp. 2d 453 (W.D. Va. 2009) 13, 16

Rules

Colo. R. Evid. 105 7

Colo. R. Evid. 408 8

Fed. R. Evid. 408 .... 9, 10, 11

Other Authorities

2 Fed. Evid. § 4:57 (4th ed) 14

2 McCormick on Evid. § 266 (8th ed.) 11, 14

3 Handbook of Fed. Evid. § 408.1 (9th ed.) 14

Christian C. Onsager, *The Ins and Outs of FRE 408,*
Am. Bankr. Inst. J. 50 (May 2014) 12

Robert A. Weninger, *Amended Federal Rule of Evidence 408: Trapping the Unwary*, 26 Rev. Litig. 401 (2007) 9

S. Rep. No. 93-1277, *as reprinted in* 1974 U.S.C.C.A.N. 7051 11

Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955 (1988) 10, 18, 19

IDENTITY AND STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a substantial interest in the second question presented in this appeal. Every day and in every sector, national and local businesses in Colorado engage in good-faith efforts to settle claims outside of court. Adoption of Petitioner's rule, which would allow parties to admit internal settlement evaluations to prove *the amount* of their claims—in contravention of the spirit and letter of the Colorado Rules of Evidence—would significantly hinder attempts to resolve disputed claims. That new landscape would, in turn, compound the costs of litigation and further clog court dockets. The Chamber offers a broad, cross-industry perspective on the detrimental consequences that would follow if this Court were to reverse the Court of Appeals' well-reasoned decision.

SUMMARY OF THE ARGUMENT

In the second question presented, the Court must decide whether insurers' internal settlement evaluations are admissible as evidence of undisputed "benefits owed" under *State Farm Mutual Automobile Insurance Co. v. Fisher*, 418 P.3d 501 (Colo. 2018). They are not, for two reasons. First, internal settlement evaluations are not relevant to the specific issue for which Petitioner seeks to offer them: proving the amount of undisputed benefits owed. Second, these materials fall within the heartland of Colorado Rule of Evidence 408; allowing their admission would gut Rule 408 and thwart its primary purpose of encouraging settlement.

This Court has already concluded that internal valuation assessments and settlement authority are not relevant evidence to establish the amount of a disputed claim. In *Silva v. Basin Western, Inc.*, 47 P.3d 1184 (Colo. 2002), and *Sunahara v. State Farm Mutual Automobile Insurance Co.*, 280 P.3d 649 (Colo. 2012), this Court held that neither an insurer's settlement authority nor the information used to develop settlement authority is discoverable under Colorado's broad discovery rules. In both cases, this Court reasoned that such information was not relevant to any issue in the litigation, including the valuation of a disputed claim. The Court's reasoning as to why internal settlement evaluations are not even *discoverable* applies a fortiori to bar the admissibility of such evidence here.

Even if the Court concludes that internal settlement evaluations are relevant evidence to prove the amount of undisputed "benefits owed" under *Fisher*, CRE Rule 408 bars their admission all the same. The drafters of FRE 408—the model for CRE 408—expanded the common-law rule primarily to facilitate settlement: The more freely parties can communicate and exchange information without fear of later having those disclosures prejudice their position, the more likely they are to resolve disputes amicably. Petitioner's proposed rule does just the opposite, creating a kind of *Miranda* rule for settlement discussions: any internal memoranda, analyses, or evaluations you undertake can and will be used against you. For that reason, state and federal courts have overwhelmingly held in a variety of contexts that Rule 408 bars the admission of internal settlement materials to establish the value of a disputed claim.

The Court's decision here will reverberate far beyond the insurance industry. Disputes about the admissibility of underlying settlement materials arise regularly across numerous areas of law, ranging from contract and tort claims to family law and bankruptcy actions. Petitioner's rule would open the door to the discovery and admission of routine settlement materials in all of these contexts, further undermining the salutary purposes of CRE 408.

This Court should affirm the well-reasoned decision below on this issue.

ARGUMENT

Insurers' internal settlement evaluations fall squarely within the exclusionary reach of Rule 408. But Rule 408 does not even "come into play" unless the evidence is relevant. *Koninklijke Philips Elecs. N.V. v. Nat'l Film Lab'ys Inc.*, No. CV 12-4576, 2012 WL 12886833, at *4 (C.D. Cal. Dec. 4, 2012); *see also, e.g.*, *United States v. Wilford*, 710 F.2d 439, 450 (8th Cir. 1983) ("To determine whether the trial court properly admitted evidence of the settlement stipulation, we must decide first, whether the evidence was relevant to an issue in the lawsuit, and second, whether [R]ule 408 prohibited admission of the evidence."). This Court's precedents confirm that settlement offers and related materials are irrelevant for the specific purpose of determining the value of an insured's claim. But even if a litigant could overcome that hurdle, Rule 408 bars such evidence here, where its admission would violate the Rule's prohibition on admitting settlement offers and frustrate its purpose of promoting settlement.

I. Internal Settlement Evaluations Are Not Relevant Evidence of Undisputed "Benefits Owed" Under *Fisher*

On two occasions, this Court has concluded that materials related to an insurer's settlement authority and information used to establish that authority are not discoverable. *Silva*, 47 P.3d at 1191; *Sunahara*, 280 P.3d at 657. The same reasoning supplied by *Silva* and *Sunahara* to bar discovery of those materials on relevance

grounds likewise supports precluding parties from admitting those materials as evidence of the undisputed amount of an insured's claim.

In *Silva*, this Court considered whether an insured was entitled to discovery of redacted portions of an insurer's claim file that revealed the insurer's reserves and settlement authority. 47 P.3d at 1186–87. This Court held that reserves and settlement authority were "not relevant" to the dispute and therefore not discoverable. *Id.* at 1187. The Court held that those materials were irrelevant for three reasons: "(1) they do not accurately reflect the insurer's valuation of a particular claim; (2) they are not admissions of liability; and (3) insurance companies prepare them simply to satisfy statutory obligations and to establish bargaining tactics." *Sunahara*, 280 P.3d at 656. *Silva*, a third-party insurance dispute (where the defendant insurer is *not* the plaintiff's carrier), left open two issues—whether its holding applied to first-party insurance claims and whether it applied to internal assessments an insurer made for the purpose of determining reserves and settlement authority.

Sunahara, a first-party insurance dispute (where the defendant insurer *is* the plaintiff's carrier), answered both questions affirmatively. 280 P.3d at 655-58. There, the insured sought to discover redacted portions of the insurer's claim file, which, in addition to the insurer's settlement authority, also contained internal "fault

evaluations" and "undeveloped liability assessments" that the insurer "made for the purpose of determining reserves and settlement authority." *Id.* at 652. The Court rejected the insured's attempt to discover those internal materials, holding that the underlying assessments and evaluations the insurer prepared to establish its settlement authority were no more discoverable than the settlement authority itself: "[I]t would be absurd to protect the end result of the insurance company's initial evaluation process—the reserves and settlement authority—without also protecting the assessments that led to those numbers." *Id.* at 657. And, in any event, the internal settlement materials were irrelevant for the same reasons identified in *Silva*—the materials "did not contain a thorough evaluation of [the insured's] claim, did not reflect an admission of any party's liability for the accident, and did not constitute an admission by [the insurer] that [the insured's] claim was worth a particular amount of money." *Id.*

Sunahara's rationale for extending *Silva* to the underlying assessments used to establish an insurer's settlement authority applies equally here. It makes little sense to conclude that internal settlement materials are irrelevant for discovery purposes yet sufficiently relevant to admit as evidence of the undisputed amount of an insured's claim. Indeed, the relevancy bar for admitting evidence is *higher* than for discoverability: "the threshold for relevance at the discovery stage is lower than

at the trial stage." *Rangel v. Gonzalez Mascorro*, 274 F.R.D. 585, 590 (S.D. Tex. 2011) (collecting cases); *cf. Williams v. Dist. Ct.*, 866 P.2d 908, 911 (Colo. 1993) ("[T]he fact that evidence . . . may not be admissible at trial . . . does not preclude discovery of this information.").

Petitioner's argument (at 31-32) that *Sunahara* acknowledges that settlement authority and related materials could be relevant in "first-person insurance cases alleging bad faith" does not change this basic conclusion. An insurer's internal settlement evaluation can be admissible for one purpose (evincing an insurer's bad faith) while inadmissible for a different purpose (establishing the *undisputed amount* of a claim). *See* Colo. R. Evid. 105 ("When evidence which is admissible . . . for one purpose but not . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). Indeed, courts routinely referee disputes about how evidence may be used, ensuring that evidence admissible for one purpose is not improperly relied on for a different purpose. *See, e.g.*, *Larsen v. Archdiocese of Denver*, 631 P.2d 1163, 1164 (Colo. App. 1981) (barring evidence of subsequent remedial measures as evidence of negligence or culpable conduct but permitting admission for another purpose).[1]

[1] Alternatively, some courts, recognizing that evidence regarding settlement negotiations may be admissible for some purposes but not others, bifurcate the trial on the breach-of-contract claim from the bad-faith claim. *See, e.g.*, *Trujillo v. Am.*

As a result, a ruling that internal settlement evaluations are irrelevant to establish the undisputed *amount* of an insured's claim would not preclude an insured from introducing those same evaluations to establish whether an insurer acted in bad faith. At bottom, the second question presented concerns admissibility as to a particular purpose, and affirming the Court of Appeals' decision would not prevent parties from using this evidence to establish bad faith.

II. Allowing Admission of Internal Settlement Evaluations Would Erode CRE 408 and Undermine Its Purpose of Facilitating Settlement

A. Rule 408's Purpose and History Underscore the Need for Robust Enforcement of the Rule

Colorado Rule of Evidence 408—which was "amended in 2007 to mirror the federal rule," *People v. Butson*, 410 P.3d 744, 752 n.4 (Colo. App. 2017), *overruled on other grounds*, *Buell v. People*, 439 P.3d 857 (Colo. 2019)—precludes parties from introducing certain settlement-related evidence if offered to prove (1) the

---

Fam. Mut. Ins. Co., No. 1:08-CV-36 TS, 2009 WL 440638, at *4 (D. Utah Feb. 20, 2009) ("In the normal course of determining liability for a claim, evidence regarding the underlying settlement negotiations would be inadmissible under Rule 408 of the Federal Rules of Evidence. While it would be proper for the jury to hear evidence on settlement negotiation regarding a bad faith claim, such evidence could prejudice a jury in its determination of the express breach of contract claim. . . . To provide [the insurer] with a fair and just trial, the jury should not hear evidence regarding settlement negotiations before deciding the express breach of contract claim.").

validity of a disputed claim, (2) the amount of that claim, (3) or "to impeach through a prior inconsistent statement or contradiction." CRE 408(a).[2]

The drafters of Federal Rule of Evidence 408, on which CRE 408 is modeled, justified excluding compromise-related evidence under Rule 408 on two grounds. First, "[t]he evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position." Fed. R. Evid. 408 advisory committee's note to 1972 proposed rules. A defendant hotel may offer to settle a slip-and-fall plaintiff's claim for $10,000 not because it believes it is liable or that the plaintiff's injuries are worth $10,000 but because it wants to avoid bad publicity, resolve the dispute quickly, or avoid its own litigation costs.

Second, the more "impressive ground" the committee identified is "promotion of the public policy favoring the compromise and settlement of disputes." *Id.* With the promotion of settlement in mind, the drafters sought to craft a rule expansive enough to accomplish that public-policy purpose. Robert A. Weninger, *Amended*

---

[2] Even before CRE 408 was amended in 2007, Colorado's courts regularly consulted decisions interpreting Federal Rule of Evidence 408 to help decide cases involving CRE 408. *See, e.g.*, *Hartman v. Cmty. Resp. Ctr., Inc.*, 87 P.3d 202, 206 (Colo. App. 2003) (looking to "Fed.R.Evid. 408, the counterpart of CRE 408" in resolving dispute under CRE 408); *cf. Stewart v. Rice*, 47 P.3d 316, 321 (Colo. 2002) (noting that when a state rule of evidence "is similar to the federal rule, [the Court] may look to the federal authority for guidance in construing our rule").

Federal Rule of Evidence 408: Trapping the Unwary, 26 Rev. Litig. 401, 414 (2007) (noting that FRE 408 "broke from the common law by expanding the Rule's coverage"). One commentator has described that policy objective as "vital to the survival of our court system" because "if a large percentage of our cases did not settle, the backlog in our courts would become totally intolerable." Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955, 959 (1988).

The advisory committee thus crafted the modern rule to remedy what they viewed as a weak common-law rule that was too narrow to actually encourage settlement. *See, e.g.*, *id.* at 958. Under the common law, statements of fact made during settlement negotiations were not excluded "unless the author explicitly made the statement hypothetical, or incanted the prophylactic words 'without prejudice,' or unless the words constituting the admission were 'so connected with the offer as to be inseparable from it.'" *Id.* (quoting 1972 advisory committee notes). The "practical value" of the common-law rule was "greatly diminished" by its narrow scope, which "inhibit[ed] freedom of communication with respect to compromise, even among lawyers." Fed. R. Evid. 408 advisory committee's note to 1972 proposed rules. Those concerns "account[ed] for the expansion of [Rule 408] to

include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself." *Id.*

The House Committee initially rejected proposed changes to Rule 408 and sought to "revert[] to the traditional rule." Fed. R. Evid. 408 advisory committee's note to 1974 enactment. But the Senate Committee generally restored the rule as submitted by the Supreme Court. *Id.* The Senate Committee explained that

> The real impact of [the House's] amendment, however, is to deprive the rule of much of its salutary effect. The exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements—*the encouragement of which is the purpose of the rule.* Further, by protecting hypothetically phrased statements, it contributed a preference for the sophisticated, and a trap for the unwary.

S. Rep. No. 93-1277, *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7057 (emphasis added).

Over time, amendments to Rule 408 have broadened the rule's exclusion of settlement-related material. In 2006, the Rule was amended to prohibit the use of statements made in settlement negotiations when offered for impeachment. *See* Fed. R. Evid. 408 advisory committee's note to 2006 amendment. The reason was simple: such use would "swallow the exclusionary rule," thereby "impair[ing] the public policy of promoting settlements." *Id.*; *see also McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the

testimony of a party . . . is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). In short, given the "increased emphasis on promoting the policy of encouraging compromise," the "trend appears to be toward *expanding* the scope of FRE 408." Christian C. Onsager, *The Ins and Outs of FRE 408,* Am. Bankr. Inst. J. 50 (May 2014) (emphasis added); *see Bradbury v. Phillips Petrol. Co.*, 815 F.2d 1356, 1364 (10th Cir. 1987) ("[W]hen the issue is doubtful, the better practice is to exclude evidence of compromises or compromise offers.").

B. Consistent with Rule 408's Purposes, Federal and State Courts Consistently Exclude Internal Settlement Materials

When it comes to applying the exclusionary principle in Rule 408, federal and state courts agree: broader is better. Of the numerous federal and state courts that have considered whether Rule 408 extends beyond settlement offers to also protect underlying internal reports, memoranda, and evaluations, all but one have concluded that the policy goal of promoting settlement supports broadly applying Rule 408 to exclude these materials.

Every federal circuit court that has considered Rule 408's scope relative to underlying settlement-related materials has concluded that the Rule bars their admission. *See, e.g.*, *E.E.O.C. v. UMB Bank Fin. Corp.*, 558 F.3d 784, 791 (8th Cir. 2009); *Affiliated Mfrs., Inc. v. Aluminum Co. of Am.*, 56 F.3d 521, 529 (3d Cir.

1995); *Blu–J, Inc. v. Kemper C.P.A. Grp.*, 916 F.2d 637, 641–42 (11th Cir. 1990); *Kritikos v. Palmer Johnson, Inc.*, 821 F.2d 418, 421–23 (7th Cir. 1987); *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1106–07 (5th Cir. 1981). As the Eighth Circuit explained, "[t]he spirit of the Rule, as recognized by several circuits and as set forth in the commentary to the Rule, supports the exclusion of certain work product, *internal memos*, and other materials created specifically for the purpose of conciliation, even if not communicated to the other party." *UMB Bank*, 558 F.3d at 791 (emphasis added). That spirit encompasses "the purposes of the rule," including "to foster open discussions and out-of-court settlements and to guard against the admission of evidence that may not fairly represent the actual value or merits of a claim." *Id.* (citation omitted).

For the same reasons, federal district courts regularly bar parties' attempts to introduce evidence of internal materials that were prepared to facilitate settlement discussions. *See, e.g.*, *Accurso v. Infra-Red Servs., Inc.*, No. CV 13-7509, 2016 WL 1273878, at *5 (E.D. Pa. Apr. 1, 2016); *Xcoal Energy & Res., LP v. Smith*, 635 F. Supp. 2d 453, 455 (W.D. Va. 2009) (excluding evidence based on "the policy objectives of Rule 408, the broad language of the Rule, and the majority case law"). In *Accurso*, for example, the court excluded a witness's declaration that was

"prepared as a basis for compromise negotiations, in an effort to identify what an appropriate compromise damages figure might be." 2016 WL 1273878, at *5.

Only one district court has reached the opposite conclusion: *Blue Circle Atlantic, Inc. v. Falcon Materials, Inc.*, 760 F.Supp. 516 (D. Md. 1991). Devoting just three sentences of analysis to the question, the court held that "Rule 408 does not apply to internal memorandum unless communicated to the other side in an attempt at settlement." *Id.* at 522. The court never discusses the content of the memoranda at issue, and subsequent courts reviewing *Blue Circle* have "reject[ed]" its holding as poorly reasoned. *See Affiliated Mfrs., Inc.*, 56 F.3d at 529 (criticizing *Blue Circle* for "overstat[ing] the meaning" of the treatise the decision cites). Thus, under the near-uniform majority rule in federal courts, "[u]ndisclosed internal reports prepared as a basis for compromise negotiations fall within the protection of Rule 408(a)." 3 *Handbook of Fed. Evid.* § 408.1 (9th ed.); *see also* 2 *Fed. Evid.* § 4:57 (4th ed) ("Not only does Rule 408 apply to statements actually made and communicated to other parties in attempts to settle disputes, but it applies as well to internal statements and discussions, and to background memoranda prepared in attempts to settle disputes."); 2 *McCormick on Evid.* § 266 (8th ed.) (collecting cases applying Rule 408 to "[i]nternal documents prepared for settlement negotiations").

State courts agree. Interpreting their Rule 408 analogues, state courts have consistently "join[ed] the federal circuits in concluding that the policy objectives of Rule 408 weigh in favor of exclusion of internal" materials prepared for settlement purposes. *Axenics, Inc. v. Turner Const. Co.*, 62 A.3d 754, 768 (N.H. 2013); *see also Berg v. Berg*, 170 N.E.3d 224, 228 (Ind. 2021); *McGill Restoration, Inc. v. Lion Place Condo. Ass'n*, 959 N.W.2d 251, 273 (Neb. 2021); *Tolstyga v. Toll Bros., Inc.*, No. 02-23-00119-CV, 2024 WL 273547, at *4 (Tex. App. 2024); *Roach v. State*, 329 So.3d 974, 992 (La. App. 2021); *Conroy v. Book Automation, Inc.*, 398 N.W.2d 657, 660 (Minn. App. 1987). Like their federal counterparts, these state courts recognize that "Rule 408 is intended 'to promote candor.'" *Berg*, 170 N.E.3d at 228 (citation omitted). That objective is served when the Rule is extended to underlying settlement materials as well as the offers themselves.

C. Admission of Internal Settlement Evaluations Would Extend Beyond Insurance Disputes and Create an End-Run Around Rule 408

A decision that allows admission of settlement evaluations for the purposes of establishing the undisputed amount of a claim—effectively sidestepping Rule 408—could not be confined to the insurance context. While this case involves a disagreement over undisputed "benefits owed" under *Fisher*, the same rule will determine whether internal settlement evaluations are admissible in a host of other

contexts. Without sharp lines that protect the sanctity of settlement negotiations, litigants will be increasingly wary of engaging in settlement talks that invariably require internal evaluations because those assessments could (and likely would) be used against them.

Courts regularly confront disputes concerning whether documents prepared as a basis for settlement offers—but not offers themselves—are admissible under Rule 408. These disputes are not limited to any particular subject matter. Indeed, this issue has already reached each of the following areas of law:

- Contract disputes, *e.g., Affiliated Mfrs., Inc.*, 56 F.3d at 529; *Ramada Dev. Co.*, 644 F.2d at 1107;
- Tort claims, *e.g.*, *Blu–J, Inc.*, 916 F.2d at 641–42;
- ADA suits, *e.g.*, *UMB Bank*, 558 F.3d at 791;
- Family law, *e.g.*, *Berg*, 170 N.E.3d at 228;
- Wrongful-termination claims, *e.g.*, *Accurso*, 2016 WL 1273878, at *5;
- Bankruptcy actions, *e.g.*, *Xcoal Energy & Res.*, 635 F. Supp. 2d at 455;
- Damages issues, *e.g.*, *Axenics, Inc.*, 62 A.3d at 767–68.

In each case, a party sought to introduce evidence of an adversary's internal settlement materials that, while never communicated to the other side, were created specifically for the purpose of settlement. And in each case, the court ruled that the

evidence should be excluded, recognizing that Rule 408's purpose would be frustrated if the internal materials were admitted. *See UMB Bank*, 558 F.3d at 791 (finding Rule 408 covered handwritten note bearing on how plaintiff valued his claim); *Affiliated Mfrs., Inc.*, 56 F.3d at 530 (affirming district court's exclusion of "internal memoranda" that were "prepared as a basis for compromise negotiations, particularly because the memoranda appeared to be intended to assist in calculation of compromise figures discussed subsequently"); *Blu–J, Inc.*, 916 F.2d at 641–42 (affirming district court's exclusion of an accounting firm's "independent evaluation" that was "prepared by mutual agreement of [the parties] as part of their settlement negotiations"); *Accurso*, 2016 WL 1273878, at *5 (excluding declaration that was "prepared as a basis for compromise negotiations, in an effort to identify what an appropriate compromise damages figure might be").

In other words, Petitioner's proposed rule—which would permit parties to introduce internal documents that were prepared specifically for settlement purposes for the express purpose of establishing *the undisputed amount* of a claim—would apply beyond insurance-coverage disputes. If internal settlement documents can be used to establish the undisputed amount of an insurance claim under *Fisher*, enterprising lawyers will argue that those same internal materials should be

admissible in a tort claim, a bankruptcy action, and in every other dispute cataloged above.[3]

What the drafters of Rule 408 understood in 1972 is still true today: The stronger the rule excluding evidence of compromise negotiations, the more likely the rule is to encourage settlement. Yet Rule 408 "is a rule that the courts could easily eviscerate." *See* Brazil, *supra* at 959. If courts take a narrow view of Rule 408, parties will be increasingly less willing to engage in settlement talks and less forthcoming: "By resolving close cases in favor of admitting the evidence, *courts would strike fear into the hearts of negotiating lawyers and clients and could compel them to play their settlement cards closer to their chest*[,] . . . depriv[ing] parties of access to the reasoning that supports one another's positions." *Id.* (emphasis added). In contrast, giving Rule 408 a broad construction creates the necessary conditions for parties to feel comfortable engaging in settlement discussion:

> Broad construction of the rule would enhance the rationality of the negotiation process and improve the likelihood that litigants will understand the basis for the proposals that are put on the table; litigants would thus feel good about the terms they finally accept. Rationality promotes settlement and respect for the system, and openness of communication is essential to rationality. *Every blow the courts strike*

---

[3] If the Court rules that internal settlement evaluations are admissible to establish undisputed "benefits owed," the ruling should be explicit that its holding is limited to the unique insurance circumstances under *Fisher*.

> *against openness is a blow against the health of the system and against the fundamental values on which it is based.*

Id. at 959–60 (emphasis added).

Rule 408 cannot serve its purpose if the underlying facts and evaluations necessary to prepare settlement offers are admissible. In many instances, a party's ultimate settlement offer communicated to the other side mirrors its internal settlement evaluation. This is a case in point: GEICO initially offered Fear $2,500 to settle the claim. Everyone agrees that GEICO's settlement offer could not be admitted for the purpose of establishing the amount of Fear's damages. Yet GEICO's internal settlement evaluation—which Fear argues *is* admissible to prove the amount of undisputed benefits owed—provides the exact same information, as the evaluation set an internal negotiation range beginning at $2,500. Allowing parties to admit underlying settlement-related documents would render Rule 408 a dead letter—eliminating all the benefits and incentives that Rule 408 was specifically enacted to create.

At best, adoption of Petitioner's rule will distort settlement negotiations. If this Court holds that the undisputed "benefits owed" can be proven based on the low end of an insurer's internal settlement evaluation, then insurers could simply begin

every settlement range at zero.[4] They could do so in good faith. Settlement evaluations are generally initially created early in a claim, before insurers have a chance to obtain all medical and other records, learn of any pre-existing conditions or complaints, obtain opinions from medical providers based on reviews of medical records or independent medical examinations, and learn more about claimants' assertions through discussions with the individuals or their legal representatives (and long before any formal discovery). It would not be unreasonable for insurers to begin their settlement ranges at zero before they have conducted a sufficient investigation to determine the actual scope of a claimant's damages.

The effects on settlement outside the insurance industry—where parties have no statutory obligation to settle claims in good faith—will be even more pronounced. Knowing that their internal settlement evaluations could be admitted in evidence, defendants may artificially lower their internal estimates of plaintiffs' claims. Those lowered estimates would in turn make settlement less likely as parties will have a wider gap to close and a less accurate conception of their litigation exposure. Lower

[4] The evaluations at issue are not static, but are based on the information available to the insurer at a specific point in time. Because insurers continue to gather additional information as the claim proceeds, evaluations often change over time. Indeed, insurers regularly *lower* evaluations based on new facts, so the initial evaluation could not be evidence of undisputed amounts owed.

rates of settlement will in turn drive up businesses' litigation costs, further clog the already strained court system, and cause more delay.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Dated: July 19, 2024

Respectfully submitted,

ARNOLD & PORTER

<u>/s/ R. Reeves Anderson</u>
Robert Reeves Anderson (Bar No. 48057)
Brian M. Williams (Bar No. 55343)
Jake W. Murphy (Bar No. 60118)
1144 Fifteenth Street
Denver, CO 80202-2848
Tel.: (303) 863-1000
Fax: (202) 863-2301
Reeves.Anderson@arnoldporter.com
Brian.Williams@arnoldporter.com
Jake.Murphy@arnoldporter.com

CERTIFICATE OF SERVICE

This is to certify that I have duly served the above and foregoing BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT by e-service, this 19th day of July 2024, addressed to the following:

DezaRae D. LaCrue
Timothy L. Foster
Franklin D. Azar & Associates, P.C.
14426 East Evans Avenue
Aurora, CO 80014

Counsel for Petitioner Marcus A. Fear

Gregory K. Falls
Deisch, Marion & Klaus, P.C.
851 Clarkson Street
Denver, CO 80218

Counsel for Respondent GEICO Casualty Company

/s/ *Tanya Huffaker*
Tanya Huffaker