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Can You Keep a Secret: Discoverability and Admissibility of Confidential Settlement Agreement Amounts in Ohio ?

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COMMENT

CAN YOU KEEP A SECRET?: DISCOVERABILITY AND ADMISSIBILITY OF CONFIDENTIAL SETTLEMENT AGREEMENT AMOUNTS IN OHIO

INTRODUCTION

Consider the following hypothetical.[1] ABC Corporation ("ABC Corp.") is sued by employee A for alleged discrimination under the Age Discrimination in Employment Act[2] ("the ADEA"). One year later it is sued by former employee B for alleged gender discrimination under Title VII of the Civil Rights Act[3] ("Title VII") in a separate claim. ABC Corp. settles the ADEA claim with employee A under a confidential settlement agreement that prohibits employee A from disclosing the agreement to anyone but his immediate family and accountant. The settlement agreement further provides that if employee A breaches the confidentiality provision, ABC Corp. is entitled to recoup the full settlement amount as well as attorney fees.

ABC Corp. has not settled employee B's Title VII claim and is in the discovery stages of the litigation. Employee B's attorney plans to call employee A as a witness at trial and seeks both discovery and admission of the settlement agreement to show employee A's bias. ABC Corp., however, is willing to stipulate to the existence of the settlement agreement and argues that the confidential settlement agreement between itself and a nonparty is therefore undiscoverable and inadmissible. Moreover, ABC Corp. argues that even if the compromise agreement is discoverable and admissible, the settlement amount must be redacted and excluded from trial.

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1 This hypothetical is drawn from the fact patterns of the cases discussed *infra* in Part II.

2 *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1990).

3 *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1995).

There is no mandatory Ohio law on point. But federal and other state jurisdictions have addressed the issue, with varying approaches and results. The purpose of this Comment, therefore, is to analyze both the discoverability and admissibility of a confidential settlement agreement amount from the perspective of a litigant seeking to preserve confidentiality. It examines Ohio discovery and evidence rules and their policies. Based on the Ohio rules and the analogous federal rules, this Comment also suggests the proper way in which Ohio appellate courts should approach the problem. Specifically, Ohio courts should not allow discovery of confidential settlement agreement amounts between a defendant and a nonparty unless the moving party meets a heightened relevancy standard. Moreover, even if the moving party satisfies this heightened burden and is able to discover the settlement amount, Ohio courts should seldom allow the jury to be told the settlement amount under Ohio Rule of Evidence 403 because of the substantial prejudice to the defendant in doing so.

This Comment addresses the legal issues in three sections. Part I briefly summarizes evidence and civil procedure rules that are involved in the discovery and admission of confidential settlement agreements in general. Part II analyzes possible legal arguments both for and against discovery and admission of confidential compromise agreements, including witness bias, trial preparation and strategy, and evidence rule policy arguments, as they relate to confidential settlement amounts. Part II also discusses the possible relevancy standards, normal and heightened, that Ohio courts can use to determine discoverability. Finally, Part III proposes that because of the privacy interests involved and the importance of fostering settlements, Ohio courts should use a heightened relevancy standard to determine if confidential settlement agreement amounts are discoverable. Further, Part III suggests that Ohio courts should defer to the policy of Ohio Rule of Evidence 408 and diligently use an Ohio Rule of Evidence 403 balancing approach for admissibility of such amounts. This approach would almost always prevent the jury from hearing the settlement amount. Part III concludes with an application of the discovery and admissibility standards to the ABC Corp. hypothetical.

I. BACKGROUND: RULES OF DISCOVERABILITY AND ADMISSIBILITY OF CONFIDENTIAL SETTLEMENT AGREEMENTS

Most Ohio common pleas courts, appellate courts, the Ohio Supreme Court, and the Court of Appeals for the Sixth Circuit have not yet addressed whether confidential settlement agreements are discoverable. At least one Ohio common pleas court, however, has held that

settlement agreements are discoverable if they are relevant.[4] This accords with the general Ohio discovery rules that permit discovery of any matter relevant to the subject matter that is not privileged. Specifically, Ohio Rule of Civil Procedure 26(B) provides that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence.[5]

Therefore, confidential settlement agreements, in general, appear to be discoverable in Ohio if they are relevant. As in Ohio, the discoverability of confidential compromise agreements in federal and most state jurisdictions also hinges upon the relevancy of the settlement agreement. A minority of jurisdictions, however, has implied that there is privilege under Federal Rule of Evidence 408 ("Federal Rule 408") that protects all settlement communications, including final agreements, from discovery. Federal Rule 408 limits the introduction at trial of settlement evidence, but does not directly govern discovery. Specifically, Federal Rule 408 provides:

> Evidence 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. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not 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.[6]

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[4] *See* Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co., 660 N.E. 2d 765 (Ohio Ct. Com. Pl. 1993) (holding that a settlement agreement in an asbestos action was discoverable because it was relevant to show that lower levels of insurance had been exhausted).

[5] OH. R. CIV. P. 26(B).

[6] FED. R. EVID. 408. Ohio Rule 408 is substantively identical to Federal Rule 408. *See* OH. R. EVID. 408.

Many courts have noted, however, that the policy underlying Federal Rule 408 to encourage settlement agreements may impact the discoverability of settlement agreements.[7] In addition to merely noting that Federal Rule 408 policy impacts discovery, some courts have partly relied on Federal Rule 408 policy in prohibiting discovery of settlement agreements. Specifically, these courts emphasize the strong Federal Rule 408 policy interest in encouraging settlements, opining that a settlement communication privilege is necessary to effectuate Federal Rule 408's purpose of encouraging settlements.[8] But many federal and state jurisdictions reject the view that Federal Rule 408 creates an absolute privilege for all settlement communications.[9] One argument given by these courts and others in rejecting the Federal Rule 408 privilege theory is that historically privileges such as those between lawyer and client and husband and wife were created to foster these important societal relationships. Parties to settlement, however, have an adversarial relationship that society arguably has no interest in fostering.[10] Additionally, Federal Rule 408, by its express terms, appears to only apply at trial and Federal Rule 408 only protects against admission of settlement evidence used to prove the validity of a claim.[11]

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[7] *See* Allen County v. Reilly Indus., 197 F.R.D. 352, 353 (N.D. Ohio 2000) (applying Federal Rule 408 policy to discovery); Young v. State Farm Mutual Auto. Ins. Co., 169 F.R.D. 72, 76-79 (S.D. W. Va. 1996) (noting that many federal courts require the requesting party to meet a heightened standard in deference to Federal Rule 408 when considering the discoverability of confidential settlement agreements); Vardon Golf Co., Inc. v. BBMG Golf Ltd., 156 F.R.D. 641, 650-51 (N.D. Ill. 1994) (extending Federal Rule 408 policy to discovery); Lesal Interiors, Inc. v. Resolution Trust Corp., 153 F.R.D. 552, 562 (D.N.J. 1994) (same); Fidelity Fed. Sav. & Loan Ass'n v. Felicetti, 148 F.R.D. 532, 534 (E.D. Pa. 1993) (applying the heightened standard in deference to Federal Rule 408); Morse/Diesel, Inc.v. Fidelity & Deposit Co. of Md., 122 F.R.D. 447, 451 (S.D.N.Y. 1988) (same).

[8] *See* Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1071 (5th Cir. 1986) (denying discovery partly on Federal Rule 408 policy grounds); McHann v. Firestone Tire & Rubber Co., 713 F.2d 161, 167 (5th Cir. 1983) (denying discovery and opining that "the incentive for parties to settle cases involving many plaintiffs would be undermined if their settlement with one victim could come back to haunt them in later suits."); Hasbrouck v. BankAmerica Housing Servs., 187 F.R.D. 453, 458-62 (N.D.N.Y. 1999) (prohibiting discovery of confidential settlement agreement because of strong public interest in encouraging settlements); Bottaro v. Hatton Assocs., 96 F.R.D. 158 (E.D.N.Y. 1982). See also Olin Corp. v. Ins. Co. of N. Am., 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985) (holding that a settlement privilege exists which prohibits discovery of settlement communications absent a clear showing that Federal Rule 408 would not prohibit admission of the settlement evidence at a subsequent trial); Dunlop v. Bd. of Governors, 16 F.E.P. Cases 1116, 1117 (N.D. Ill. 1975) (opining that settlement communications privilege is necessary to effectuate Federal Rule 408's purpose of encouraging settlements).

[9] *See* Bennett v. La Pere, 112 F.R.D. 136 (D.R.I. 1986); NAACP Legal Defense & Educ. Fund, Inc. v. Dept. Of Justice, 612 F. Supp. 1143 (D.D.C. 1985); Ctr. for Auto Safety v. Dept. of Justice, 576 F. Supp. 739 (D.D.C. 1983).

[10] *See* Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 990 (1988) for a detailed discussion of this argument.

[11] *See id.* for a detailed discussion of these arguments.

Federal circuit courts addressing the discoverability of confidential settlement agreements have followed Federal discovery rules[12] and held that confidential settlement agreements are only discoverable if they are relevant or reasonably calculated to lead to discovery of admissible evidence. These courts have found witness impeachment and damage issues to be permissible relevant purposes.[13] These same courts are split, however, as to the showing of relevance required to justify the disclosure of a settlement agreement. Some require a "particularized showing" that disclosure of settlement agreements will lead to admissible evidence; others reject the heightened standard and only require the normal relevancy standard.[14]

State courts[15] have also held that confidential settlement agreements are discoverable only if they are relevant.[16] The discoverability

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[12] See FED. R. CIV. P. 26(b) which provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence.

FED. R. CIV. P. 26 (b).

[13] *See* Young v. State Farm Mutual Auto. Ins. Co., 169 F.R.D. 72, 79 (S.D. W. Va. 1996) (holding compromise agreement between client and insurance company that resulted from an unlawful trade practices suit was discoverable in an action by the client's former attorney for fees because it was relevant to the nature of the agreement between client and attorney, and the results obtained in the action); Baby Doe v. Methacton Sch. Dist., 164 F.R.D. 175, 177 (E.D. Pa. 1995) (holding that confidential settlement agreements may be discoverable on a heightened showing that discoverability will lead to admissible evidence but finding no such showing in this case); Vardon Golf Co., Inc. v. BBMG Golf Ltd., 156 F.R.D. 641 (N.D. Ill. 1994); Lesal Interiors, Inc. v. Resolution Trust Corp., 153 F.R.D. 552, 562 (D.N.J. 1994) (recognizing discoverability of settlement agreements but declining to compel disclosure where party seeking it did not make a particularized showing that material sought was relevant or likely to lead to admissible evidence); Morse/Diesel, Inc. v. Fidelity & Deposit Co. of Md., 122 F.R.D. 447, 451 (S.D.N.Y. 1988) (holding that a settlement agreement was discoverable because it was relevant to the requesting party's increased remuneration claim and the requesting party had documented specific instances in which the settlement documents showed increases in construction costs); Olin Corp. v. Ins. Co. of N. Am., 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985) (holding that where there was no evidence that confidential compromise agreement was relevant to show witness bias, discovery of the terms of the agreement should be denied to safeguard policy favoring settlements); Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (holding that a confidential settlement agreement was not discoverable because "the terms of the settlement do not appear to be reasonably calculated to lead to discovery of admissible evidence.").

[14] *See infra* Part II.A.3 for a more detailed discussion of the different relevance standards used by the courts.

[15] Since the Ohio rules of evidence and civil procedure at issue here are substantively analogous to the Federal rule, state cases addressing the discoverability of confidential settlement agreements are instructive.

[16] *See* Hinshaw v. Superior Ct. of Santa Clara County, 51 Cal. App. 4th 233, 242 (Ct. App. 1996) (holding that because the settlement terms were irrelevant to the action, public policy favored settlements, and the parties to the settlement expressed a desire for confidentiality, the confidential settlement agreements were not discoverable); Porter-Hayden Co. v. Bullinger, 713 A.2d 962, 969 (Md. 1998) (holding that settlement agreement in joint-tortfeasor action was discoverable because the settlement amounts were relevant to damages); Hulse v. A.B. Dick Co., 162 Misc. 2d 263 (N.Y. Sup. Ct. 1994) (overruled on other grounds); Burlington Northern,

of settlement agreements in federal and state jurisdictions, therefore, turns on the relevancy of the settlement agreement. Both the Ohio and Federal Rules of Evidence define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[17]

Under Ohio law, evidence of settlements is inadmissible to prove liability, the invalidity of a claim, or the amount of a claim.[18] Similarly, Federal Rule 408 prohibits the admission of compromises or offers of compromise "to prove liability for or invalidity of the claim or its amount."[19] Under both Ohio and federal law, the rule also applies to evidence of a settlement between a party and a non-party.[20] While Ohio Rule of Evidence 408 ("Ohio Rule 408") bars admission of settlement evidence to prove liability or validity of a claim, it expressly allows such evidence to be admitted for other purposes.[21] Federal Rule 408 also permits settlement evidence to be admitted for

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Inc., v. Hyde, 799 S.W. 2d 477 (Tex. App. 1990) (holding that settlement agreement was discoverable for admissible evidence, but not the amount); Palo Duro Pipeline Co., Inc. v. Cochran, 785 S.W.2d 455, 457 (Tex. App. 1990) (holding that a compromise agreement is not discoverable where the parties' interest in the cash amount of the settlement is as a 'comparative bargaining tool for their settlement purpose' because this interest does not satisfy the relevance test for discovery).

[17] FED. R. EVID. 401; OH. R. EVID. 401.

[18] OH. R. EVID. 408. Specifically, Ohio Rule 408 states:

> Evidence 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. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not 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.

Id.

[19] FED. R. EVID. 408.

[20] *See* McInnis v. A.M.F., Inc., 765 F.2d 240, 247 (1st Cir. 1985); Lewis v. Alfa Laval Separation, Inc., 714 N.E.2d 426, 432 (Ohio Ct. App. 1998); Fireman's Fund Ins. Co. v. BPS Co., 491 N.E.2d 365 (Ohio Ct. App. 1985).

[21] *See* OH. R. EVID. 408; *see also Lewis*, 714 N.E.2d at 432 (holding that admission of settlement between the plaintiff and a nonparty was proper because the settlement was offered to explain why evidence was unavailable to the plaintiff's expert, why the nonparty was not a party to the case, and to explain the nonparty's lack of motivation to be forthright about the investigation it conducted); Shimola v. Cleveland, 625 N.E.2d 626, 630 (Ohio Ct. App. 1992) (holding that testimony regarding settlement properly admitted in property action where the settlement testimony was offered to outline the history of the disputed property's move to its new location); Owens Corning Fiberglas Corp. v. Am. Centennial Ins. Co., 660 N.E.2d 828, 831 (Ohio Ct. Com. Pl. 1995) (admitting settlement between plaintiff and settling defendants in an asbestos suit because it was offered so jurors would understand the scope of the plaintiff's insurance coverage and not to prove liability).

purposes other than proving liability or validity of a claim.[22] Therefore, under both Ohio and federal law, admissibility of settlement evidence hinges upon the purpose of admission. Part II analyzes possible admission arguments for confidential settlement agreement amounts under both Ohio and federal law.

II. LEGAL ARGUMENTS FOR POSSIBLE DISCOVERY AND ADMISSION OF CONFIDENTIAL SETTLEMENT AGREEMENT AMOUNTS

A. Discovery of Confidential Settlement Agreement Amounts

As discussed in Part I, there is no mandatory Ohio law about the discoverability of confidential settlement amounts between a party and a nonparty. Under persuasive Ohio law and analogous Federal Rules of Evidence and Civil Procedure, confidential settlement agreements in general are discoverable only where they are relevant. Therefore, the following sections analyze possible relevancy arguments for and against discovery of a confidential settlement agreement amount between a defendant and a nonparty.

1. Relevancy of Confidential Settlement Agreements to Show Witness Bias

Many courts have held that confidential settlement agreements are relevant for impeachment purposes.[23] Therefore, one of the strongest arguments for discovery of confidential settlement agreement amounts in Ohio is that the settlement is relevant to show witness bias. In a Sixth Circuit case, *Allen County v. Reilly Industries*,[24] the court addressed the discoverability of the content of settlement negotiations.[25] The court held that settlement negotiation letters were not discoverable because they were not relevant to the existence of witness bias since the plaintiff had already turned over the final settlement agreement to the defendants.[26] Significantly, the court stated, "[the settlement] agreement—and not the unaccepted proposals—

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[22] *See* United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949, 956 (5th Cir. 1990) (admitting settlement evidence where it was offered to show the change in witness's position since his deposition); *McInnis*, 765 F.2d at 248; Breuer Elec. Mfg. Co. v. Toronado Sys. of Am., 687 F.2d 182 (7th Cir. 1982).

[23] *See* John McShain, Inc.v. Cessna Aircraft Co., 563 F.2d 632 (3rd Cir. 1977) (holding that settlement evidence is relevant to witness's credibility); Hasbrouck v. BankAmerica Housing Servs., 187 F.R.D. 453, 461 (N.D.N.Y. 1999) (noting that fact of settlement is relevant to impeach plaintiff as a chronic litigator). *See also* Allen County v. Reilly Indus., 197 F.R.D. 352, 354 (N.D. Ohio 2000) (noting that settlement agreements are relevant to show witness bias).

[24] 197 F.R.D. 352 (N.D. Ohio 2000).

[25] *See id.*

[26] *See id.* at 353-54.

would best satisfy Reilly's needs to the extent it seeks to establish a bias.[27]

Because the *Allen County* court expressly noted that the settlement agreement would best show witness bias, a party seeking discovery of a confidential settlement amount in Ohio can argue that the *Allen County* decision supports the proposition that final settlement agreements are always discoverable to show witness bias. It should be noted, however, that since *Allen County* was a Sixth Circuit federal case that addressed the discoverability of settlement negotiation evidence and the discovery of the settlement agreement itself was not in dispute, it is unclear the effect that *Allen County* will have on Ohio state law. Further, Ohio litigants seeking to protect the confidentiality of the settlement amount may be able to distinguish *Allen County.* First, the *Allen County* court did not have to decide if the settlement *agreement* was discoverable because it appears that the plaintiff voluntarily disclosed it. Therefore, *Allen County* arguably did not advocate a blanket discoverability of settlement agreements. Next, there is no indication that the *Allen County* settlement agreement was confidential. Finally, the settling co-defendant in *Allen County* was testifying at trial. Therefore, a party arguably could distinguish *Allen County* if it successfully motioned to exclude the settling nonparty's testimony at trial.

Additionally, many courts, while allowing discovery of the *existence* of settlement agreements for impeachment purposes, have prohibited discovery of the *specific terms and amount* of the settlement because the existence of the settlement agreement alone, is all that is necessary to impeach witnesses.[28] Moreover, at least one court has disallowed discovery of the confidential settlement amount on the basis that "allowing discovery of the consideration being paid in confidential settlements of this kind would have a chilling effect on their encouragement."[29] Therefore, even if the settling nonparty was testifying at trial as a witness, a defendant might still be able to prevent discovery of the settlement amount based on the policy favoring settlements expressed in the above line of cases. Moreover, if the de-

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[27] *Id.*

[28] *See Hasbrouck*, 187 F.R.D. at 461 (holding that discovery of the details of the settlement agreement not necessary to impeach a witness because the fact of the settlement alone was sufficient to impeach); Kalinauskas v. Wong, 151 F.R.D. 363, 367 (D.C. Nev. 1993) (holding that although the factual information surrounding a settlement agreement was discoverable, the amount and conditions of the agreement were not discoverable absent a showing of compelling need); Hulse v. A.B. Dick Co., 162 Misc. 2d 263, 267 (N.Y. Sup. Ct. 1994) (holding that disclosure of the terms and amount of the settlement was unnecessary for impeachment because "it is the mere *fact* that there was a settlement . . . that may, in the eyes of the jury, taint a witness's credibility").

[29] Burlington Northern, Inc., v. Hyde, 799 S.W. 2d 477, 481 (Tex. App. 1990).

fendant were willing to stipulate to the existence of the settlement, it would arguably have a stronger argument that the settlement is not discoverable at all and that at the very least, the settlement amount is not discoverable.

2. *Use of Confidential Settlement Agreement Amounts as Trial Strategy*

Another argument that a party seeking discovery of a cash settlement amount may advance is that the settlement agreement and amount are relevant to trial strategy and preparation. At least two federal courts have allowed discovery of the terms and amounts of confidential settlement agreements, opining that they are relevant to trial strategy and preparation.[30] In *Bennett v. LaPere*,[31] a medical malpractice action, the court permitted discovery of a confidential settlement agreement that was relevant to proving damages under a state tort damages act.[32] The court, however, emphasized that the relevance of the settlement was not limited to proving damages.[33] Rather, it held that discovery of the settlement was also relevant to the defendant's determination of whether it could introduce the settlement at trial without violating Federal Rule 408.[34] The court further stated that the remaining defendant's "ability realistically to evaluate the plaintiff's case against it depends upon an awareness of the terms and conditions of the settlement with the codefendants . . . the remaining defendants should not be left to grope blindly in the dark."[35]

Many other courts, however, have rejected this argument, reasoning that it does not satisfy the discovery relevancy standard.[36] In *Baby Doe v. Methacton School District*,[37] for example, the defendant

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[30] *See* Bennett v. LaPere, 112 F.R.D. 136, 141 (D.R.I. 1986); EnergyNorth Natural Gas, Inc. v. Century Indemnity Co., No. 97-64-M, 2000 WL 33667085, at *1 (D.N.H. March, 8 2000) (unpublished order) (holding that a desire to keep prior settlement agreement amounts confidential is not a valid reason for opposing disclosure because full disclosure will facilitate the settlement process). It should be noted that it is unclear whether the *EnergyNorth Natural Gas, Inc.* settlement agreement contained a confidentiality provision or if the parties merely wished the agreement to remain secret. Therefore, the full impact of the *EnergyNorth Natural Gas, Inc.* decision in assessing the discoverability of a confidential settlement agreement amount is unknown.

[31] 112 F.R.D. 136 (D.R.I. 1986).

[32] *See id.* at 138.

[33] *See id.* at 139.

[34] *See id.*

[35] *See id.* at 141.

[36] *See* Baby Doe v. Methacton Sch. Dist., 164 F.R.D. 175, 176-77 (E.D. Pa. 1995) (rejecting the trial preparation relevancy argument); Hulse v. A.B. Dick Co., 162 Misc. 2d 263, 265 (N.Y. Sup. Ct. 1994) (same); Palo Duro Pipeline Co., Inc. v. Cochran, 785 S.W.2d 455, 457 (Tex. App. 1990) (holding that non-settling party's interest in cash amount of settlement agreement as a "comparative bargaining tool" does not satisfy the relevancy test for discovery); Burlington Northern, Inc., v. Hyde, 799 S.W. 2d 477, 481 (Tex. App. 1990) (same).

[37] 164 F.R.D. 175 (E.D. Pa. 1995).

sought discovery of the plaintiff's confidential settlement agreement with two co-defendants.[38] The defendant alleged that the agreement was relevant for three reasons: 1) it could lead to the discovery of admissible evidence; 2) it was relevant to the issue of damages; and 3) it was necessary for trial preparation.[39] The court denied the defendant's discovery request, holding that the defendant had not shown the relevance of the agreement, reasoning that "the broad assertion that the [agreement] could lead to admissible evidence and that it is 'clearly' relevant to . . . damages and is imperative for trial preparation . . . without any detail or analysis whatsoever, are insufficient to prove . . . relevance."[40]

In *Hulse v. A.B. Dick Co.*,[41] plaintiffs in a repetitive stress injury action sought a protective order against the non-settling defendants' discovery request for the plaintiff's compromise agreement with the settling defendants.[42] The applicable New York discovery rule provided that "discovery is limited to what is 'material and necessary in the prosecution or defense of an action' and entails liberal disclosure, upon request, 'of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'"[43] The non-settling defendants argued that the settlement was material and necessary to determine their maximum damage exposure at trial and to determine if they should settle the plaintiff's claim or continue to defend.[44] The court, however, rejected this trial strategy argument, reasoning that:

> [a]lthough trial strategy is important to any party in litigation, defendants' 'need' to obtain the settlement information arises not out of materiality or necessity but, rather, desirability. As much as defendants believe that obtaining this information now will better protect them at the time of trial, or assist them in assessing their risk of trial versus settlement, these are neither recognized nor accepted reasons for denying plaintiff's motion and disclosing the terms of the settlement agreements.[45]

In *Burlington Northern, Inc. v. Hyde*,[46] defendants in an oil and gas lease dispute sought a writ of mandamus ordering the trial court

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38 *See id.* at 175.
39 *See id.* at 176.
40 *Id.* at 176-77.
41 162 Misc. 2d 263 (N.Y. Sup. Ct. 1994).
42 *Id.* at 264.
43 *Id.* at 264-65 (citation omitted).
44 *See id.* at 265.
45 *Id.*
46 799 S.W.2d 477 (Tx. App. 1990).

to rescind its order requiring disclosure of the confidential settlement agreement amount between the defendants and a cross-claiming party.[47] Under Texas discovery rules, the existence and contents of compromise deals that are "relevant to the subject matter in the pending action" were discoverable.[48] The defendants argued that the settlement amount was irrelevant to any issues remaining in the lawsuit with the non-settling parties.[49] The non-settling party, however, asserted that the amount was both relevant and reasonably calculated to lead to discoverable evidence.[50] The court granted the writ of mandamus holding that the settlement amount was not relevant to the remaining cause of action.[51] The court reasoned that the litigant merely wanted the agreement for trial strategy purposes and noted that for a settlement amount to be discoverable, there must be "some relevance other than as a 'comparative bargaining tool.'"[52] Therefore, based on this line of cases, an Ohio party opposing discovery of a confidential settlement amount has a strong argument that the cash amount is irrelevant as anything other than an impermissible bargaining tool and is undiscoverable.

3. Different Relevancy Standards Used by the Courts

Ohio parties opposing discovery of confidential settlement agreements can argue that Ohio courts should use a heightened relevancy standard. As briefly discussed in Part I, federal circuit courts addressing the discoverability of confidential settlement agreements have split on the showing of relevance required to justify the disclosure of a settlement agreement. Some courts have emphasized the litigant's privacy interest over the broad discovery policy and have required a "particularized showing" that disclosure of settlement agreements will lead to admissible evidence.[53] In *Bottaro v. Hatton Associates*,[54] a securities action, the court rejected a defendant corporation's discovery request for a former co-defendant's settlement agreement with the plaintiffs because the settlement amount was not

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[47] *See id.* at 478-79.

[48] *Id.* at 479 (citations omitted).

[49] *See id.*

[50] *See id.*

[51] *See id.* at 481.

[52] *Id.* (quoting Palo Duro Pipeline Co., Inc. v. Cochran, 785 S.W.2d 455, 457 (Tex. App. 1990)).

[53] *See, e.g.*, Lesal Interiors, Inc. v. Resolution Trust Corp., 153 F.R.D. 552, 562 (D.N.J. 1994) (requiring a "greater, more 'particularized showing' that the [settlement] evidence sought is relevant and calculated to lead to the discovery of admissible evidence"); Morse/Diesel, Inc.v. Fidelity & Deposit Co., 122 F.R.D. 447, 450-51 (S.D.N.Y. 1988) (requiring more particularized showing of relevancy for discovery of confidential settlement agreements).

[54] 96 F.R.D. 158 (E.D.N.Y. 1982).

relevant.[55] The court applied a "particularized showing" heightened relevancy standard, reasoning that:

> The question in this case . . . is whether an inquisitor should get discovery into the terms of the [settlement] agreement itself based solely on the hope that it will somehow lead to admissible evidence on the question of damages. Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we think the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.[56]

The court in *Lesal Interiors, Inc. v. Resolution Trust Corp.*[57] echoed this emphasis on the settlement policy when it applied a heightened relevancy standard and rejected a discovery request for a confidential settlement amount.[58] The court elaborated on the conflict between the policy favoring settlements and the policy favoring broad discovery, noting that in regards to the appropriate standard to be used in the discovery of settlement negotiations:

> [A]s Judge Joyner noted, "the principles underlying Fed. R. Evid. 408 and Fed. R. Civ. P. 26 are in conflict." This court agrees, and observes that while Congress' intent in Civil Rule 26 . . . was an acknowledgment that the "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation," it was equally affirmative in its desire, reflected in Rule of Evidence 408, to observe "the strong public interest in encouraging settlement of private litigation." It is not reasonable to suggest that Congress intended to denigrate one rule through the application of the other rule, therefore the two must somehow find reconciliation. It is the belief of this court that the most reasonable means of doing this, and one which best effectuates the aims of both rules, is to require a greater, more "particularized showing" that the evidence sought is relevant and calculated to lead to the discovery of admissible evidence.[59]

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[55] *See id.* at 159-160.
[56] *Id.* at 160.
[57] 153 F.R.D. 552 (D.N.J. 1994).
[58] *See id.* at 561-62.
[59] *Id.*

Others courts, however, emphasize the policy favoring broad discovery and reject the heightened standard in favor of the normal relevancy standard.[60] The *Bennett* court, for example, expressly rejected the *Bottaro* court's reasoning, stating:

> With respect [to *Bottaro*] . . . the balance which *Bottaro* suggests seems out of kilter with the spirit and philosophy of the Federal Rules. . . . [T]he underpinnings of *Bottaro* simply will not support the weight of its reasoning. . . . Rule [408] addresses the *admissibility* of compromise negotiations . . . the Rule cannot be read so broadly as to bar discovery in the same sweeping fashion. . . . *Bottaro* [also] misconceives the public policy considerations which underlie Rule 408. . . . the fears which might inhibit the making of offers in the absence of Rule 408 do not apply [when a settlement is achieved].[61]

4. *Obtaining Relevant Information Through Means Other Than Discovery of Settlement Agreements*

Even where a confidential settlement agreement is relevant, a defendant may still be able to protect the secrecy of the amount if the relevant information in the settlement agreement is available through other means. Courts have denied settlement agreement discovery requests when the requesting party fails to show that he cannot obtain the relevant information through other means.[62] In *Butta-Brinkman v. FCA International, Inc.*,[63] a sexual harassment plaintiff sought discovery of documentation relating to other allegations of harassment against the defendant, including the defendant's confidential com-

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[60] *See, e.g.*, Young v. State Farm Mutual Auto. Ins. Co., 169 F.R.D. 72, 79 (S.D. W. Va. 1996) (noting that if the party requesting discovery of confidential settlement documentation shows that the "'information appears reasonably calculated to lead to the discovery of admissible evidence,' then it is probably discoverable"); Baby Doe v. Methacton Sch. Dist., 164 F.R.D. 175, 176-77 (E.D. Pa. 1995) (discussing the different relevancy standards used but appearing to use the normal relevancy standard when it denied disclosure of confidential settlement agreement because the requesting party had made no "showing that the Release is 'relevant to the subject matter involved in the pending action'"); Bennett v. LaPere, 112 F.R.D. 136, 139-40 (D. R.I. 1986) (rejecting the argument that the party requesting discovery of confidential settlement agreements has "the burden of making 'some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement." (quoting *Bottaro*, 96 F.R.D. at 160)).

[61] *Bennett*, 112 F.R.D. at 139-40.

[62] *See* Hasbrouck v. BankAmerica Housing Servs., 187 F.R.D. 453, 461 (N.D.N.Y. 1999) (denying discovery of settlement agreement where the evidence was available through other means); Butta-Brinkman v. FCA Intl., Inc., 164 F.R.D. 475 (N.D. Ill. 1995); Flynn v. Portland Gen. Elec. Corp., [1989] 50 Fair Empl. Prac. Cas. 1497 (D. Or. Sept. 21, 1989), 1989 WL 112802.

[63] 164 F.R.D. 475 (N.D. Ill. 1995).

promise deals in other cases.[64] The court denied discovery even though the agreements were relevant, because the plaintiff had not shown that she could not obtain the information through other means such as interrogatories.[65] The court reasoned that confidential settlement agreements should be protected where the relevant information can be obtained by other means because "strong congressional policy favoring settlement weighs in favor of keeping such documents protected, so long as the information is available through other means."[66]

Similarly, in *Flynn v. Portland General Electric Corp.*,[67] age discrimination plaintiffs requested discovery of the defendant company's settlement agreement with a different age discrimination plaintiff.[68] The defendant company motioned for a protective order against discovery of the agreement, arguing that the plaintiffs had not shown any need for the information "other than an impermissible desire to discover the terms of the . . . settlement."[69] The plaintiffs argued that the settlement agreement was relevant because both the settled case and the action at bar involved reduction-in-force age discrimination claims against the defendant.[70] The court granted the defendant's protective order, holding that the plaintiffs had not shown sufficient need for the information.[71] The court explained, "the strong public policy favoring settlement of disputed claims dictates that confidentiality agreements regarding such settlements not be lightly abrogated. [The plaintiffs] have not identified specific information, other than the settlement terms, which they seek from [the defendant] that could not be secured by other discovery methods."[72]

Based on the above line of cases, if an Ohio party seeking to preserve confidentiality of a settlement agreement can show that the information is available through other discovery means such as interrogatories, he can argue that the settlement amount is not discoverable.

5. Privacy Interest Versus Broad Discovery Interest

Some courts in determining if settlement agreements are discoverable, have noted that although both federal and Ohio procedural rules allow for broad discovery, these liberal policies must be bal-

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64 *See id.* at 476.

65 *See id.* at 477.

66 *Id. at* 476-77.

67 No. CIV.88-455-FR, 1989 WL 112802, at *1 (D. Or. Sept. 21, 1989).

68 *See id.* at 1497.

69 *Id.*

70 *See id.*

71 *See id.*

72 *Id.* The court did not, however, identify how the plaintiff could otherwise obtain the information.

anced against the producing party's confidentiality and equity interests.[73] While the privacy interest alone is insufficient to prevent discovery of settlement agreements, some courts have held that where the relevance of the settlement agreement is minimal, the privacy interest weighs against discovery disclosure.[74]

In *Hasbrouck v. BankAmerica Housing Services*,[75] the plaintiff sued her former employer, BankAmerica, alleging gender discrimination. She had previously settled another sex discrimination claim against a different former employer, Trustco Bank.[76] The plaintiff motioned for a protective order prohibiting the discovery of the terms of the confidential settlement agreement with Trustco Bank.[77] She argued that good cause[78] to protect the settlement terms from disclosure existed because the agreement manifested the parties' express intent to maintain confidentiality and provided penalties for breach.[79] Additionally, Trustco Bank, the former defendant, argued that good cause to prohibit disclosure existed because it bargained for confidentiality in the agreement.[80] BankAmerica argued the agreement was relevant to impeach the witness's credibility.[81] The court agreed with the plaintiff and Trustco Bank that good cause existed and rejected the credibility argument because "the fact of the settlement, without going into details regarding the Agreement, would be sufficient to impeach Hasbrouck's credibility."[82]

After it determined that good cause for the protective order existed, the court balanced the equities to determine the extent of

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[73] *See, e.g.*, Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co., 660 N.E.2d 765 (Ohio Ct. Com. Pl. 1993) (permitting discovery of settlement agreement after determining that the relevancy outweighed the discovery burdens and noting "[t]he discovery rules embody competing concerns. An effort to determine a discovery dispute must contain an assessment of the potential for developing relevant evidence in addition to an analysis of the relative burdens the discovery may entail.").

[74] *See* Hasbrouck v. BankAmerica Housing Servs., 187 F.R.D. 453, 454 (N.D.N.Y. 1999); Hinshaw v. Superior Ct. of Santa Clara County, 51 Cal. App. 4th 233, 241-42 (Ct. App. 1996) (holding that private settlement agreements are entitled to privacy protection such that privacy should not be invaded absent a showing of compelling need); Hulse v. A.B. Dick Co., 162 Misc. 2d 263, 269 (N.Y. Sup. Ct. 1994) (opining that "the strong public policy favoring settlement of disputes dictates that confidentiality agreements regarding such [confidential] settlements not be lightly abrogated.").

[75] 187 F.R.D. 453 (N.D.N.Y. 1999).

[76] *See id.* at 454.

[77] *See id.* at 453-54.

[78] The standard for granting a protective discovery order is as follows: "[F]or good cause shown, the court may make 'any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Id.* at 455 (quoting Fed. R. Civ. P. 26(c)).

[79] *See id.* at 456.

[80] *See id.* at 457.

[81] *See id.* at 461.

[82] *Id.*

protection needed.[83] First, the court noted that the plaintiff and Trustco Bank had a privacy interest in the settlement agreement.[84] The court elaborated that:

> [The plaintiff] has an interest in maintaining the confidentiality of the information as required by the Agreement, so that she will not be in breach and subject to further liability to Trustco Bank. Trustco Bank relies on the Agreement, and the benefit of its bargain, to maintain the secrecy of its confidential information . . . . Confidentiality is an important corollary without which many lawsuits would remain unsettled. While protecting the confidentiality of settlement agreements encourages settlements, which is in the public interest, permitting disclosure would discourage settlements, contrary to public interest. The public interest in maintaining confidentiality of settlements is therefore strong.[85]

Additionally, the court acknowledged that there was a public policy interest, as evidenced by Federal Rule 408, in protecting the confidentiality of settlement agreements because that protection encouraged settlements.[86] The court also noted, however, the countervailing public interest "in affording a litigant the opportunity to broadly discover information in support of its case."[87] But the court then noted that there was no constitutional right to access information necessary to try a lawsuit.[88] The court concluded:

> There is a strong public interest in encouraging settlements and in promoting the efficient resolution of conflicts. This strong public interest outweighs any general public interest in providing litigants broad discovery of facts to support their claims and defenses. Finally, the minimal relevance of the discovery sought illustrates the slight interest defendants have in disclosure, particularly when the availability of relevant evidence through other means is considered. The balance of equities weighs in favor of protecting the terms of the Agreement and the surrounding circumstances.[89]

Finally, the court ordered that the settlement agreement be "given the full amount of protection affordable under Rule 26(c)" because of the plaintiff's "strong showing of good cause. . . the substantial public

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[83] *See id.* at 458.
[84] *See id.*
[85] *Id.* at 458-59.
[86] *See id.* at 458-59.
[87] *Id.* at 459.
[88] *See id.*
[89] *Id.* at 461.

interest in maintaining confidentiality of settlements, and the slight, if any, relevance demonstrated by BankAmerica."[90]

In *Hulse*, plaintiffs sought a protective order against disclosure to non-settling defendants of the terms of confidential settlement agreements between plaintiffs and co-defendants.[91] The plaintiffs argued that the confidentiality provision of the settlement agreement should be upheld.[92] The defendants argued that disclosure of the terms of the settlement agreement was necessary for witness impeachment purposes.[93] The court rejected the impeachment argument in favor of the privacy interest and granted the plaintiffs' protective order, reasoning that:

> Here, the compelling need for privacy articulated by the plaintiffs outweighs the reasons stated by defendants for discovery of the settlement agreements . . . . The settlement of this case could not have been achieved without an agreement that the terms of the settlement, particularly the consideration paid, would not be revealed. Secrecy was deemed vital by all of the parties to the agreements . . . . For the court to decline to support the parties in their reliance upon the agreements they have reached would work an injustice on these litigants and would inhibit future settlements.[94]

Based on the above cases, therefore, an Ohio litigant seeking to protect a confidential settlement amount can argue that the confidentiality provision was vital to the settlement and it can argue that it bargained for the confidentiality provision. Finally, this party can emphasize that the moving party will still have full discovery because they can depose the settling party.

6. Policy Rationales

A litigant seeking to keep the settlement amount with a nonparty secret can bolster its argument against discovery by emphasizing the policy interests of Ohio Rule 408 and Federal Rule 408. As previously mentioned in Part I, although these rules do not directly govern discovery, some courts have partly relied on Federal Rule 408 policy in prohibiting discovery of settlement agreements.[95] In *Hasbrouck*, the court prohibited discovery of a confidential settlement agreement

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[90] *Id.* at 461-62.
[91] *See* Hulse v. A.B. Dick Co., 162 Misc. 2d 263, 264 (N.Y. Sup. Ct. 1994).
[92] *See id.*
[93] *See id.* at 266.
[94] *Id.* at 268-69.
[95] *See supra* Part I notes 7-8.

because the privacy and settlement policy interests outweighed the relevance.[96] Regarding the Federal Rule 408 policy, the court stated:

> Settlement of civil disputes is in the public interest because it avoids the significant costs of trial. In addition to conservation of judicial and private resources, settlement results in higher levels of satisfaction to the litigants, having determined their own solution to their dispute rather than being subject to a judicially-created solution. Most importantly, a settlement produces finality and repose upon which people can order their affairs.[97]

Similarly, the *Bottaro* court denied the defendant's motion to compel discovery of a settlement agreement, reasoning that a particularized showing of relevance was necessary for a settlement agreement to be discoverable because of the "strong public policy of favoring settlements and the congressional intent to further that policy [through Federal Rule 408]."[98]

At least one court, however, has rejected this argument, opining that the purpose of Federal Rule 408 applies only to settlement negotiations and not to final settlements or discovery.[99] In *Bennett*, the non-settling defendant hospital in a medical malpractice action motioned to compel discovery of a settlement agreement between the plaintiffs, parents of a brain-damaged infant, and defendant physicians.[100] The court granted this motion, holding that the agreement was relevant to damages and to determine the viability of the hospital rejoining the physicians as third-party defendants.[101] In doing so, the *Bennett* court rejected the argument that the purpose of Federal Rule 408 to protect settlement communications from unnecessary intrusions extended to discovery.[102] Instead, the court opined that the fears that would inhibit settlement offers in the absence of Federal Rule 408 did not apply to completed settlements because "[f]rom the point of view of the settling parties, the deal is done."[103] Moreover, the *Bennett* court opined that the Federal Rules' purpose to "secure the just, speedy, and inexpensive determination of every action" weighed

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[96] *See* Hasbrouck v. BankAmerica Housing Servs., 187 F.R.D. 453, 461-62 (N.D.N.Y. 1999).

[97] *Id.* at 458 (citations omitted).

[98] Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982).

[99] *See* Bennett v. LaPere, 112 F.R.D. 136, 139-40 (D.R.I. 1986).

[100] *See id.* at 138.

[101] *See id.* at 138-41.

[102] *See id.* at 139.

[103] *Id.* at 140.

in favor of extending discovery to encompass settlement agreements.[104]

B. Admissibility of Confidential Settlement Agreement Amounts

Even if confidential settlement amounts are discoverable in Ohio, are they admissible at trial? As discussed in Part I, under Ohio and federal law, settlement evidence is admissible for purposes other than to prove liability or validity of a claim. Therefore, under both Ohio and federal law, admissibility of settlement evidence hinges upon the purpose of admission. The following sections analyze possible admission arguments under both Ohio and federal law.

1. Ohio Rule 408 and Witness Bias

In Ohio, settlement evidence is admissible to show witness bias and such admission does not violate Ohio Rule 408.[105] Therefore, a party seeking admission of the settlement amount, who plans to call the settling party as a witness, may argue that the settlement amount is admissible to impeach the settling party's testimony. But at least one Ohio appellate court, in *Shoemaker v. Crawford*,[106] has held that settlement evidence offered for the permissible purpose of showing witness bias under Ohio Rule 408 is nonetheless excludable under the rule if the bias issue is not clear.[107]

In *Shoemaker*, a non-settling medical malpractice defendant appealed the trial court's exclusion of a settlement agreement between the plaintiff and two co-defendants.[108] The settlement agreement guaranteed the plaintiff a minimum payment in exchange for the plaintiff's agreement not to proceed against the two defendants personally if the verdict exceeded the limits of their malpractice insurance.[109] The defendant argued that the agreement should have been introduced to show the bias of the two settling co-defendants.[110] The appellate court, however, upheld the exclusion of the settlement because the bias issue was not clear.[111] The court reasoned "[t]he trial court explored several scenarios where the agreement could actually benefit appellant and harm the two settling doctors. Therefore, the

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[104] *See id.* at 141 (quoting FED. R. CIV. P. 1).

[105] *See* WEISSENBERGER'S OHIO EVIDENCE §408.5 (2002). *See also* Shoemaker v. Crawford, 603 N.E.2d 1114, 1118-19 (Ohio Ct. App. 1991) (noting that settlement evidence is generally admissible to show witness bias or prejudice).

[106] 603 N.E.2d 1114 (Ohio Ct. App. 1991).

[107] *See id.* at 1118-19.

[108] *See id.* at 1118.

[109] *See id.* at 1118-19.

[110] *See id.*

[111] *See id.* at 1119.

issue of bias was not clear . . . As such, the trial court was justified under either evidence rule 408 or 403 in excluding the evidence."[112] Based on this case, a party opposing admission of a confidential settlement amount in Ohio may argue that the amount should be excluded from trial because the bias issue is unclear. Specifically, the party could argue that disclosure of the agreement amount could harm it because the jury will think that it would not have settled for that cash amount unless it was liable. Or the opposing party could argue that disclosure of the settlement amount would harm the plaintiff because the jury would think that the defendant must not be liable because the settlement cash amount was insubstantial.

2. Federal Rule 408 and Witness Bias

Federal courts have also refused to admit settlement evidence offered for a permissible witness bias purpose under Federal Rule 408 where the admission would have the effect of proving liability.[113] In *Stacey v. Bangor Punta Corp.*,[114] the plaintiff motioned for a pretrial order to exclude reference at trial to his settlement with a third-party defendant.[115] The defendants argued that the settlement agreement was admissible to show the bias and prejudice of the third-party defendant.[116] Although the court held that a pretrial ruling on the admissibility of a settlement agreement would be premature, it noted that:

> [a]lthough Defendants claim to be offering the settlement for purposes of impeachment or credibility determination, sometimes those issues are inextricably bound up with issues of causation and liability and the offer runs afoul of Rule 408. Moreover, it is only in light of evidence actually presented at trial that the Court can determine relevance and balance that against any prejudice or confusion that might be generated by the factual aspects of the settlement.[117]

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[112] *Id.*

[113] *See* Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1069-70 (5th Cir. 1986) (finding that district court's disclosure of settlement agreement violated FRE 408 because it was used to prove liability question); McInnis v. A.M.F., Inc., 765 F.2d 240, 247-49 (1st Cir. 1985) (holding that settlement agreement improperly admitted because although the agreement was introduced to attack the plaintiff's credibility, the effect of the admission was that the "impeachment" evidence was camouflaged causation evidence); Stacey v. Bangor Punta Corp., 620 F. Supp. 636 (D. Me. 1985).

[114] 620 F. Supp. 636 (D. Me. 1985).

[115] *See id.* at 637.

[116] *See id.*

[117] *Id.* (citations omitted).

In *Kennon v. Slipstreamer, Inc.*,[118] parents brought a product liability action against multiple defendants, including a moped windshield manufacturer, after their son was injured on a moped.[119] Prior to trial, the parents settled, for ten dollars each, their claims against all of the co-defendants except the windshield manufacturer.[120] At trial, the district court on its own initiative, disclosed the settlement amount to the jury so that the jurors would not speculate as to the co-defendants absence and whether the parents had received a substantial payout.[121] The appellate court held that although the disclosure of the fact of the settlement was proper to explain the absence of the settling defendants, disclosure of the amount "violated Rule 408."[122] The court further noted that the disclosure of the amount prejudiced the defendant because the settlement of the case for a nominal amount suggested to the jury that the remaining non-settling defendant was the only one liable in the case.[123] Specifically, the court stated that it did "not attribute to the district court any intention that disclosure of the settlement amount should be used by the jury to determine [defendant's] liability or the amount of the claim. It is nonetheless clear that [defendant] was prejudiced by that disclosure."[124]

Arguably, *Kennon* extends beyond nominal settlement amounts and reaches all settlement amounts. This is because a party seeking protection against admission at trial will usually be able to argue that the jurors might view the settlement amount with the nonparty to be a substantial amount that indicates the party's liability to the settling nonparty and suggests that the party is also liable to the non-settling party. Further, this party can argue that disclosure of the existence of the settlement agreement and not the amount is sufficient to show witness bias.[125] Therefore, an Ohio litigant should be able to successfully argue that the settlement amount is inadmissible because its effect would be to show liability.

3. Rule 408 Policy Arguments

Similar to the discovery arguments, a party opposing disclosure of its confidential settlement amount at trial can bolster is inadmissibility arguments by making Rule 408 policy arguments. No Ohio

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118 794 F.2d 1067 (5th Cir. 1986).

119 *See id.* at 1068.

120 *See id.* at 1069.

121 *See id.*

122 *Id.* at 1070.

123 *See id.*

124 *Id.*

125 *See* Belton v. Fireboard Corp., 724 F.2d 500 (5th Cir. 1984) (holding that disclosure of fact of settlement at trial did not violate Federal Rule 408 but disclosure of the amount did).

court appears to have noted this policy yet. But some federal courts have noted that admitting settlement agreements would violate the congressional policy favoring settlement by insulating potential litigants from later being penalized in court for resolving their dispute out of court.[126] Courts have been particularly apt to embrace this policy argument when there are two suits against a defendant involving two different plaintiffs because of a concern of a chilling effect on settlements and damaging inferences against the defendant.[127]

In *Scaramuzzo v. Glenmore Distilleries Co.*,[128] an age discrimination plaintiff sought to introduce evidence of the defendant's settlement with other non-party employees in other age discrimination suits.[129] The defendant motioned the court to prevent the plaintiff from introducing evidence about any charges, settlements, or settlement terms about charges filed against the defendant by anyone other than the plaintiff.[130] The court granted this motion, reasoning that the fact that persons other than the plaintiff had filed age discrimination charges against the defendant was of minimal probative value in comparison to the "potentially damaging inferences against [defendant] that are not supported by the mere fact that a 'charge' had been filed."[131] Likewise, an Ohio party opposing admission of a settlement amount at trial can argue that the amount should be excluded because admission would lead to the damaging inference that the defendant would not have settled unless it was liable. This party can further emphasize the chilling effect on settlements if confidential settlement agreements are admissible.

4. *Ohio Rule 403 & Federal Rule 403 Arguments Against Admissibility*

Even if an Ohio court found a confidential settlement amount to be admissible under Ohio Rule 408, a party seeking to protect confi-

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126 *See* McInnis v. A.M.F., Inc., 765 F.2d 240, 247 (1st Cir. 1985) (noting that the admission of settlement evidence would discourage settlements and thereby violate congressional policy underlying Federal Rule 408); Scaramuzzo v. Glenmore Distilleries Co., 501 F. Supp. 727, 733 (N.D. Ill. 1980) (opining that "[i]t would be logically inconsistent to uphold the vitality of Federal Rule 408, while at the same time holding that a settlement offer could be used against the offeror in related cases").

127 *See* McHann v. Firestone Tire & Rubber Co., 713 F.2d 161, 167 (5th Cir. 1983) (opining that "the incentive for parties to settle cases involving many plaintiffs would be undermined if their settlement with one victim could come back to haunt them in later suits"); *Scaramuzzo*, 501 F. Supp. at 733; Reichenbach v. Smith, 528 F.2d 1072, 1074 (5th Cir. 1976) (noting that admission of settlement evidence "could work to discourage plaintiffs and defendants from settling with one or more of several [litigants].").

128 501 F. Supp. 727 (N.D. Ill. 1980).

129 *See id.* at 732.

130 *See id.*

131 *Id.* at 733.

dentiality can argue that the amount should be excluded under Ohio Rule of Evidence 403 ("Ohio Rule 403").[132] Ohio Rule 403 provides:

> (A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
>
> (B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.[133]

Further, the "trial court has broad discretion in the admission and exclusion of evidence under Evid. R. 403."[134]

In *Cannell v. Rhodes*,[135] the dispute centered on the admission of settlement negotiation letters.[136] The court, in holding that the letters were inadmissible under 408 because they were offered to prove liability, also noted that under Rule 403, "[t]heir prejudicial effect substantially outweighed any probative value, because the pernicious effect of settlement evidence commonly misleads jurors to believe that the offering party owed at least that amount."[137] Therefore, Ohio caselaw provides a party opposing admission of a confidential settlement amount with a Rule 403 argument for exclusion. Specifically, the amount should be excluded from the jury because of its substantial prejudicial effect in that the jurors will think that the defendant is liable and owed at least the amount of the settlement. This is especially true where the existence of the settlement alone can be used to show bias because the probative value of the settlement amount is very low.

Federal courts have also excluded settlement evidence under Federal Rule of Evidence 403 ("Federal Rule 403") that was otherwise admissible under Federal Rule 408.[138] Federal Rule 403 provides:

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132 *See* Shoemaker v. Crawford, 603 N.E.2d 1114, 1119 (Ohio Ct. App. 1991) (holding that although a settlement agreement was relevant to witness bias, its exclusion at trial was proper under either Ohio Rule 408 or 403 because admitting the agreement would have caused jury confusion); WEISSENBERGER'S OHIO EVIDENCE, *supra* note 105, at § 408.5 (noting that "pursuant to the balancing principle of Rule 403, the trial judge may restrict the inquiry on cross-examination in order to preserve the policy of Rule 408). *See also* Cannell v. Rhodes, 509 N.E.2d 963 (Ohio Ct. App. 1986).

133 OH. R. EVID. 403.

134 Shimola v. Cleveland, 625 N.E.2d 626, 629-30 (Ohio Ct. App 1992).

135 509 N.E.2d 963 (Ohio Ct. App. 1986).

136 *Id.* at 967.

137 *Id.*

138 *See, e.g.*, McHann v. Firestone Tire & Rubber Co., 713 F.2d 161, 163 (5th Cir. 1983).

"[a]lthough relevant, evidence may be excluded if its probative value is subsequently outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[139]

In *McHann v. Firestone Tire & Rubber Co.*,[140] the plaintiff sued multiple defendants, including a tire manufacturer and a service station, for injuries he received when a tire exploded during mounting activities at the service station.[141] The service station employee was also injured in the explosion.[142] The plaintiff settled with the service station and the trial court allowed the terms and amount of the settlement agreement to be admitted at trial.[143] The tire manufacturer defendant did not settle with the plaintiff but did settle with the service station employee.[144] This settlement was not admitted at trial.[145]

On appeal, the court held that the district court erred in admitting the settlement agreement between the plaintiff and service station.[146] The appellate court also affirmed the district court's exclusion of the defendant's settlement with the service station employee.[147] Regarding the agreement between the plaintiff and the service station, the court held that the admission prejudiced the plaintiff because disclosure of the amount could have led the jury to believe that the service station would not have paid $27,000 if it were not liable.[148] Consequently, the jury would not have believed that the remaining nonsettling defendant was liable.[149] The court further reasoned, "[e]xcluding evidence of the [settlement] will eliminate this possible source of prejudice."[150]

The court also reasoned that the exclusion of the settlement between the defendant and the service station employee was proper because "[i]t is reasonable to infer that jurors would view the settlement as an admission of guilt."[151] Likewise, an Ohio party opposing admission of a settlement amount, can argue that admission of the settlement amount will lead jurors to believe that the defendant would not have paid the settlement amount unless it were liable.

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139 FED. R. EVID. 403.
140 713 F.2d 161 (5th Cir. 1983).
141 *See id.* at 162-63.
142 *See id.*
143 *See id.* at 163.
144 *See id.*
145 *See id.*
146 *See id.* at 166.
147 *See id.* at 167.
148 *See id.* at 166.
149 *See id.*
150 *Id.*
151 *Id.* at 167.

III. AN APPROACH THAT PROTECTS CONFIDENTIALITY

When Ohio courts are faced with the issue of whether a confidential settlement agreement amount between a defendant and a nonparty is discoverable and admissible, they should follow the federal and state jurisdiction approaches that zealously safeguard the secrecy of such amounts. In particular, Ohio courts should only allow discovery of such agreements where the moving party meets a heightened relevancy standard and makes a "particularized showing" of relevance.[152] Further, Ohio courts should apply the Ohio Rule 403 balancing approach to admission of settlement amounts with a cognizance of the substantial prejudice that disclosure of such amounts may cause to the defendant.

Part III explains the application of these two approaches and why they are justified in the context of confidential settlement agreement amounts. Finally, this Part explores the implications of protecting privacy interests and fostering settlements versus broad discovery policies. Will this approach too narrowly limit the policy favoring broad discovery? Does it unfairly ignore a litigant's interest in the settlement amount as trial preparation and strategy?

A. Why the Heightened Relevancy Standard Should Be Used

This Comment suggests that Ohio courts should require a party seeking discovery of confidential settlement amounts to make a "particularized showing" of relevance. This is because this approach will best protect the litigant's privacy interest and foster settlements. Moreover, this Comment rejects the argument that the broad discovery policy, as evidenced in Federal Rule of Civil Procedure 26, calls for the normal, less stringent, relevancy policy to be used for several reasons. First, the litigant's privacy interest and the policy favoring settlements take priority. Arguably, defendants sued by multiple plaintiffs would be less willing to settle cases with one or more of the plaintiffs if there was a risk that that settlement agreement could harm their position in a different case.[153] Further, given the strained judicial system and its clogged dockets, the policy favoring settlements should be given priority because settlements help reduce the stress on the courts. Also, the settling parties bargained for the secrecy. This bargaining may have resulted in the defendant paying a higher settlement amount or the plaintiff accepting a lower amount in exchange

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[152] *See supra* Part II.A.3 and accompanying text for discussion of this argument.

[153] *See, e.g.*, McHann v. Firestone Tire & Rubber Co., 713 F.2d 161, 167 (5th Cir. 1983) (opining that "the incentive for parties to settle cases involving many plaintiffs would be undermined if their settlement with one victim could come back to haunt them in later suits").

for confidentiality. This bargain should be upheld by Ohio courts. Using a heightened relevancy standard will help ensure that the bargain is upheld by only allowing a party access to the confidential information if it has a compelling need and not allowing blanket access. In turn, this also furthers the broad discovery process by ensuring that a party with a compelling need for the settlement amount has discovery access. Moreover, protection of the settlement amount will rarely inhibit discovery. The moving party often will be able to obtain the same relevant information sought from the settlement agreement through deposition or interrogatories.[154] Finally, to the extent that a litigant seeks the settlement amount for impeachment purposes, the existence of the settlement agreement alone is sufficient to impeach witnesses.[155]

1. Policy Favoring Broad Discovery Interest Is Not Impermissibly Limited by an Approach Favoring Privacy Interests

In determining both the discoverability and admissibility of confidential settlement agreements, courts have struggled with the competing policies of Civil Procedure Rule 26's emphasis on broad discovery and Federal Rule 408's emphasis on fostering settlements.[156] Accordingly, the court's decision often hinges on which policy it favors. This Comment advocates that the policy favoring settlements should take priority. First, as the court in *Vardon Golf Co. v. BBMG Golf Ltd.*,[157] countered in discussing the divergent approaches of *Bennett* and *Bottaro*: "We believe that the *Bottaro* approach represents the proper course. The policies underlying exclusionary evidentiary rules have an equal if not stronger basis in our policy as the policies favoring sweeping discovery."[158] Moreover, protecting the confidentiality of the settlement amount often does not inhibit discovery. The moving party, as discussed in Part II, often has access to relevant information through other means such as deposition or interrogatories. But preserving confidentiality also ensures the integrity of the adversarial system, as well as the litigant's privacy interest. Further, this Comment's approach does not completely bar a party from discovery access. Instead, it only allows discovery for a party with a compelling need for the amount. This approach, therefore, strikes a middle ground between the competing privacy and discovery interests rather than giving one interest complete dominance. Given the co-existence

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154 *See supra* Part II.A.4 and accompanying text.

155 *See supra* Part II.A.1 and accompanying text.

156 *See supra* Part II notes 54-61 for a more detailed discussion.

157 156 F.R.D. 641 (E.D. Ill. 1994).

158 *Id.* at 650.

of the two rules, Evidence Rule 408 and Civil Procedure Rule 26, and their conflicting policies, this middle ground approach is appropriate.

2. This Approach Does Not Unfairly Ignore Litigant's Interest in Settlement Amount as Trial Preparation and Strategy

This Comment rejects the argument that disclosure of a confidential settlement amount is necessary to further a trial strategy and to facilitate settlement.[159] While current discovery rules do favor broad discovery, this policy should not be extended to force litigants to hand over their settlement amounts with nonparties to the plaintiff on a silver platter. The defendant bargained for this settlement amount and may have agreed to a higher cash amount on the basis that the amount would be kept secret. Arguably, if a defendant is forced to disclose this amount to a different plaintiff in a different suit, the defendant's bargaining was useless. This, in turn, could lead to a chilling effect on settlements.

Also, even though current discovery rules advocate broad discovery, ours is still an adversarial system. Allowing plaintiffs unfettered access to a defendant's confidential settlement amount with a nonparty risks the integrity of the adversarial system by eroding it away.

3. Applying the Approach

Consider again the ABC Corp. hypothetical. ABC Corp. seeks to prevent employee B from discovering and admitting ABC Corp.'s settlement amount with employee A in a different lawsuit. If Ohio courts use the heightened relevancy standard that this Comment proposes, then employee B should not be able to discover the confidential settlement amount. Although employee B may plan to call employee A as a witness at trial and seeks to use the confidential settlement amount to impeach employee A, the existence of the settlement, alone, will achieve this. Further, the Ohio courts should reject the trial strategy argument. Consequently, employee B is left to argue that the settlement amount might lead to discoverable information. Therefore, arguably, employee B cannot satisfy the particularized showing of relevance standard and its discovery request should be denied. It is important to note that by using this approach, Ohio courts would not be unduly frustrating the broad discovery policy. This approach still allows employee B the opportunity to obtain other relevant information relating to the settlement agreement through deposition or interrogatories. But this approach draws the line at allowing employee B to invade ABC Corp.'s bargained for privacy interest.

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159 *See supra* Part II.A.2 and accompanying text.

Even if employee B met the heightened relevancy standard and successfully discovered the confidential settlement amount, Ohio courts should exclude the amount at trial under the Rule 403 balancing approach because of the substantial prejudice that admission would cause ABC Corp. As discussed previously, the jury arguably would either think that ABC Corp. is liable or else it would not have paid the settlement amount. Or it might think that ABC Corp. is not liable to employee B because it paid such a nominal amount to employee A. Either way, substantial prejudice to ABC Corp. or jury confusion would result. Further, if employee B wants to use the settlement amount to impeach witnesses, this goal can be achieved by the mere fact of the settlement, without admitting the amount and terms of the settlement. Therefore, Ohio courts should exclude the confidential settlement amount. This would protect ABC Corp.'s privacy interest, foster settlement, and not unduly inhibit broad discovery.

CONCLUSION

Ohio has not yet addressed the discoverability and admissibility of a confidential settlement agreement amount. But other federal and state jurisdictions have. Some of these jurisdictions emphasize the litigant's privacy interest and the policy favoring settlements and therefore require a heightened showing of relevancy. This Comment suggests that Ohio courts should follow this approach because it strikes the best balance between settlement policy and broad discovery policy. In particular, this approach protects a litigant's privacy interest, fosters settlement, accords with Ohio Rule of Evidence 408 policy, while also not unduly inhibiting broad discovery policies.

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