The Limits of Rule 408 After Hernandez

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In a three-to-two decision, the Arizona Supreme Court recently ruled that facts set out in an offer to compromise may be admitted to impeach a party testifying, notwithstanding Rule 408 of the Arizona Rules of Evidence, which prohibits the use of offers to compromise and statements made in settlement negotiations for the purposes of proving liability for, or invalidity of, a disputed claim or its amount. Nothing in the majority's opinion, however, limited the ruling's coverage to merely factual statements made in offers to compromise. The ruling, therefore, will apply to offers of compromise themselves, statements, and conduct in settlement negotiations. While an impeachment use does not appear contrary to Rule 408 on its
face, it substantially guts the protection of the rule and contradicts its purpose—encouraging more open and frequent communication to reach settlements by keeping offers to compromise and statements made during settlement negotiations inadmissible. Under the Hernandez ruling, the trier of fact undoubtedly will use this evidence substantively for the improper purpose of determining liability or the amount of the claim, and any resort to limiting instructions in this context will be inconsequential. The jury simply will be incapable of maintaining the flawed distinction between using the evidence—evidence that came straight from the party’s mouth and bears crucially on liability—for determining credibility (the proper purpose) and using the evidence for its substance (the improper purpose). Because the risk that a jury will use the evidence for an improper purpose is so certain, trial judges generally should exclude this kind of evidence under their Rule 403 discretionary powers, save certain possible exceptions.5

5. Rule 408 explicitly states that the rule does not preclude use of offers to compromise or statements and conduct in settlement negotiations when used “for another purpose,” other than proving liability for, or amount, of the claim. Id.

6. Id. advisory committee’s note; see also Report of Senate Committee on the Judiciary and the Conference Report accompanying the advisory committee’s note; Hernandez, 52 P.3d at 772 (Howard, J., dissenting) (quoting STEVEN A. SALTBURG & KENNETH R. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 286 (4th ed. 1986)) (“The philosophy of [Rule 408] is to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial.”).

7. Hernandez, 52 P.3d at 774 & n.10 (Howard, J., dissenting) (noting that a limiting instruction in this context is of “limited practical value” and “admission for th[is] limited purpose undermines the goal of Rule 408 of allowing free and open settlement negotiations”); see infra notes 77 & 79–80. It should be disclaimed that some of this note’s disgust with the impotence of Rule 408 is owing to the weak language of the rule and not the majority’s reading of it. The majority may be blamed, however, for not balancing the evidence under Rule 403 before ruling on its admissibility.

8. See infra subsection II.C. Using evidence for its substance is unfairly prejudicial in these circumstances. Rule 408 specifically bars this use of settlement evidence. FED. R. EVID. 408. Unfair prejudice to a party results from evidence evincing an “undue tendency to suggest decision on an improper basis”—here, the improper basis is the substance of the party’s settlement communications, which is barred by Rule 408. FED. R. EVID. 403 advisory committee’s note; JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 185, n.31 (2d ed. 1972). For more on the flawed distinctions on which the Hernandez case rests, see infra notes 77, 79–80 & 85.

9. See supra notes 5, 8.

10. Hernandez, 52 P.3d at 774 (“hop[ing] that trial courts will vigorously exercise their discretion to prevent admissibility of prior inconsistent statements by a party concerning the facts of the accident made in settlement negotiations”); see also id. (quoting Schlossman & Gunkelman, Inc. v. Tallman, 593 N.W.2d 374, 380 (N.D. 1999)): In conducting a Rule 403 analysis in this context, a trial court must “carefully balance the probative value of the evidence against the danger it will be used for an improper purpose within the context of the policies encouraging open and frank discussions during settlement negotiations and
Before the reader moves on, it is helpful to bring attention to a caveat and a distinction, both recurring throughout this article. First, while this note is indeed critical of the majority’s ruling, the criticism is based neither on the majority’s reading of Rule 408 nor its result with respect to the specific facts of the Hernandez case. Rule 408, under a literal interpretation, allows the use of offers to compromise or statements made in settlement negotiations for the purpose of impeachment, even against a party. And under the facts of Hernandez, the evidence in the (assumed) offer of compromise was not particularly prejudicial because it was “prior beneficial evidence.”

Second, this article advocates exclusion of offers to compromise and statements made in settlement negotiations under either Rule 403 or 408. Both routes to exclusion are closely interrelated; to exclude under Rule 408 (which the Hernandez court declined to do) excludes the evidence for basically the same reasons as a Rule 403 exclusion—i.e., because the jury will use the evidence for the improper purpose of ascertaining liability for a claim or its amount, it will discourage offers to compromise and hamper settlement negotiations. Since the Hernandez court refused to exclude such evidence under Rule 408 itself, Rule 403 is the judicial route of exclusion currently available in Arizona.

This note also disagrees with the majority’s failure to balance the evidence under Rule 403 before ruling on its admissibility, and its failure to address the high potential for unfair prejudice inherent in such evidence, despite the fact that the majority noted that Rule 403 is applicable in deciding whether offers to compromise or statements made in settlement negotiations are admissible.

SECTION AND SUBSECTION OVERVIEW:

This article begins by carefully briefing the background and treatment of the Hernandez case in both the Arizona Court of Appeals and the Arizona Supreme Court (at Sections I. A-C.). The article thereafter embarks on a fostering the truth-finding process through the evaluation of a witness’s credibility.”

11. See infra Section III.B.
12. But see infra note 48 (citing cases finding that allowing such evidence to be used for impeachment of a party is contrary to the Rule’s purpose, and thus it should be excluded by Rule 408).
13. See infra Section III.B.
14. Hernandez, 52 P.3d at 769 n.5. The court seemed to assume that, if the other side merely offers the evidence for impeachment and not liability for or invalidity of a claim or its amount, the evidence is admissible. Id. at 769.
critical analysis of the implications of the supreme court’s ruling, including
the majority’s (strained) assumption that a Notice of Claim could qualify,
unconditionally, as an offer to compromise under Rule 408 (at Sections II.
A-F.). The article then offers some selected solutions to the settlement
problems created by the majority’s ruling, with greatest resort to the judicial
solution of generally excluding the evidence under Rule 403 (at Section III.
A.). Finally, the article suggests certain possible exceptions under which
compromise offers or statements made in settlement negotiations could be
admitted to impeach a witness (at Section III. B.).

I. THE HERNANDEZ CASE

A. Facts & Procedural History

Michael Hernandez and his son were at Patagonia Lake State Park at
dusk on August 29, 1997. Hernandez went to the camp store, which was
located on a hill, to buy fishing bait but was told that he could only
purchase bait from the marina store. Instead of driving to the marina
store, Hernandez decided to walk down the hill to reach the store below.
Apparently there was no trail connecting the stores, and he and his son had
to step over a three-foot high cable fence on their journey to the marina
store. With the reduced visibility because of nightfall, Hernandez failed to
see a fourteen-foot drop off ahead. Hernandez fell and suffered injuries.

Hernandez filed the required Notice of Claim with the State of Arizona
on September 15, 1997, claiming negligence by the State. In the Notice,

15. Id. at 766–67. This Section borrows the majority’s characterization of the facts and
procedural posture of the Hernandez case. A few gaps, however, were filled in from the Court
Hernandez I].
17. Id.
18. Id.
19. Id.
20. ARIZ. REV. STAT. ANN. § 12-821.01(A) (West Supp. 2000). The statute requires:
Persons who have claims against a public entity . . . shall file claims with the
person or persons authorized to accept service for the public entity . . . . The
claim shall contain facts sufficient to permit the public entity . . . . to
understand the basis upon which liability is claimed. The claim shall also
contain a specific amount for which the claim can be settled and the facts
supporting that amount. Any claim which is not filed within one hundred
eighty days after the cause of action accrues is barred and no action may be
maintained thereon.
Hernandez (or his attorney) set out facts forming the basis of his claim, but those facts varied from his trial testimony. In particular, Hernandez stated in his Notice of Claim that there was a trail connecting the stores, the drop-off was twenty-five feet, and he fell off a cliff, not a retaining wall.

The trial court admitted the Notice of Claim for the purpose of impeaching Hernandez by his prior inconsistent statements, and the trial ultimately produced a verdict for the State.

The Arizona Court of Appeals held that the trial court did not abuse its discretion in admitting this evidence for impeachment. The Court of Appeals reasoned that when a plaintiff files the required Notice of Claim, (1) "there is not yet a disputed claim," and (2) the Notice of Claim lacks a "compromise" necessary to qualify as an offer of compromise, and thus it falls outside the protection of Rule 408. When a potential claimant files the Notice, the state could—in theory—agree to all parts of the claim, and therefore nothing would be disputed. Furthermore, the claimant does not "compromise" on any part of their claim when filing the Notice. Because Rule 408 did not block admission, the court held that the evidence was properly admitted for impeachment.

Judge Edward C. Voss dissented from the Court of Appeals' opinion. Reading the "dispute" and "compromise" requirements of Rule 408 quite broadly, Judge Voss concluded that Notice of Claims automatically

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21. At trial, Hernandez and his attorney insisted that Hernandez played no active role in making the Notice of Claim. With respect to the narration of facts in the claim, Hernandez testified that "he did not verify them, review them, or approve them." Hernandez I, 35 P.3d at 104 (Voss, J., dissenting).
22. Id. at 99.
23. The dissent in the Court of Appeals noted the limited relevance of these prior inconsistent statements given that Hernandez and the State stipulated to the facts before trial. Id. at 104.
24. Id. at 100.
25. Id. (citing cases in which the document qualifying as an offer to compromise varied from a Notice of Claim).
26. Id. at 101 ("[A Notice of Claim] simply does not constitute an offer to compromise [a] claim as envisioned by Rule 408.").
27. Id.
28. Id. (noting that in a demand letter, as opposed to a Notice of Claim, a party might make concessions). While this is true in practice, certainly it is possible to include concessions in a Notice of Claim.
29. Id. Of course, the evidence still had to pass other evidentiary hurdles, such as Rules 401, 402, and 403.
30. Id. at 103.
31. Judge Voss noted that a Notice of Claim "serves both notice and settlement purposes." Id. (citing, among others, Andress v. City of Chandler, 7 P.3d 121, 123 (Ariz. Ct. App. 2000)) (emphasis added); see Ariz. Rev. Stat. Ann. § 12-821.01(A) ("The claim shall also contain a
qualified as offers to compromise under Rule 408. Judge Voss then found that the trial court abused its discretion by allowing the evidence for impeachment because: (1) the Notice of Claim was written by Hernandez’s attorney and not Hernandez himself; (2) since the facts were stipulated by the parties, impeachment of a witness should not have been allowed on events that were not relevant to trial; (3) allowing these prior inconsistent statements of the party to come in for impeachment was contrary to Rule 408’s policy of encouraging open settlement negotiations; and (4) Hernandez was prejudiced because the jury “most likely” used this evidence for the improper purpose of proving liability.

Hernandez then petitioned the Arizona Supreme Court for review.

B. The Majority’s Reasoning and Result

The Arizona Supreme Court held that Rule 408 did not bar prior inconsistent statements made by a witness in an offer of compromise or settlement negotiations for the purpose of impeaching the witness’s trial testimony. For at least some in the legal community, the supreme court’s result was unexpected. The issue, as framed by Hernandez in his petition, was whether a Notice of Claim qualified as an offer to compromise under Rule 408. The Arizona Supreme Court instead assumed, for purposes of

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32. Hernandez I, 35 P.3d at 103.
33. Id. at 104.
34. Id.
35. Id.
36. Id.
38. See Hernandez, 52 P.3d at 769.
39. See, e.g., State Bar of Arizona, Supreme Court Petitions: Petitions for Review, 38 ARIZ. ATT’Y 34, 35 (June 2002) (declaring the issue for review, as framed in Hernandez’s brief, was “[w]hether a Notice of Claim . . . is an offer to settle a disputed claim prohibited from admission into evidence by Rule 408.”).
its opinion, that a Notice of Claim qualified as an offer to compromise. The court then held that Rule 408 did not bar a compromise offer or statement when used to impeach the witness who made the offer or statement. The court observed that Rule 408 only prohibited offers of compromise or statements made in settlement negotiations from being used as evidence for certain limited purposes—namely, to prove liability for or validity of a claim or its amount—and the rule itself stated that it did not bar evidence used for other purposes. Here, the state sought to use the factual statements in the Notice of Claim for another purpose—to impeach Hernandez’s trial testimony. The court noted that the rules of evidence were designed to reach the truth, and Rule 408 was designed to promote candid settlement negotiations. The court thought neither of these purposes would be furthered if parties were given a blank check to lie about the facts underlying their case just because they were engaged in settlement negotiations. The majority further noted that the bulk of federal and state courts have taken a similar position. This position, however, is not without some strong opposition from several courts around the country.

40. *Hernandez*, 52 P.3d at 767.
41. *Id.* at 769.
42. *Id.* at 767. This assertion is unquestionably valid as a sheer textual interpretation of the rule. Rule 408 states that it does not exclude admission when offered “for another purpose,” other than proving liability or amount of claim. *Ariz. R. Evid.* 408.
43. *Ariz. R. Evid.* 408.
44. The court cited Rule 102 of the Arizona Rules of Evidence, which states that one of the purposes of the Rules of Evidence is to develop evidence law in a manner that will further the ascertainment of truth. *Hernandez*, 52 P.3d at 768. The *Hernandez* case has already been cited by the Court of Appeals of Arizona for the proposition that litigants must be held accountable for setting forth one version of facts during settlement negotiations and then giving another version at trial. *Henry v. Healthpartners of S. Ariz.*, No. 2-CA-CV-2000-0136, 2002 Ariz. LEXIS 144, at *14 (Ct. App. Sept. 19, 2002). *But see infra* section II. F. (noting that the majority’s ruling does not necessarily promote truthfulness or candidness).
45. *Hernandez*, 52 P.3d at 768 (citing *Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure: Evidence* § 5314, at 286 (1980)).
46. *Id.* at 768–69. The *Hernandez* case has already been cited by the Arizona Court of Appeals for the proposition that litigants must be held accountable for setting forth one version of facts during settlement negotiations and then giving another version at trial. *Henry v. HealthPartners of S. Ariz.*, 55 P.3d 87, 91 (Ariz. Ct. App. 2002). *But see infra* section II. F. (noting that the majority’s ruling does not necessarily promote truthfulness or candidness).
47. *Hernandez*, 52 P.3d at 767–68 (citing federal and state cases). *But see id.* at 772–73 (Howard, J., dissenting) (noting, correctly, that some of the cases cited by the majority are not as persuasive as indicated in the majority’s opinion).
C. The Dissent

The dissenting opinion first concluded (rather than assumed) that a Notice of Claim did in fact qualify as an offer of compromise under Rule 408.\textsuperscript{49} The dissent then found that allowing factual statements in an offer to compromise to be admitted to impeach a party is contrary to the purpose behind Rule 408.\textsuperscript{50} The majority's ruling not only has a chilling effect on what is said during compromise negotiations, thereby substantially hindering Rule 408's goal of encouraging open and frequent settlement negotiations,\textsuperscript{51} but it also produces several other negative side effects, such as the return of the hypothetical statements\textsuperscript{52} that attended negotiation under common law.\textsuperscript{53}

II. CRITICAL ANALYSES OF THE MAJORITY’S RULING

A. The Majority’s Treatment of Notice of Claims

To put the majority’s ruling in context, it is necessary to address the peculiar "modus operandi" of the majority. Hernandez came up from the Court of Appeals seemingly for the purpose of deciding whether a Notice of Claim qualified as an offer to compromise under Rule 408.\textsuperscript{54} This question was left unattended (save by the dissent\textsuperscript{55}). The majority simply assumed, "for purposes of this opinion," that a Notice of Claim qualified as an offer

\textsuperscript{49} Hernandez, 52 P.3d at 771 (Howard, J., dissenting). Judge Howard noted that the Notice of Claim statute is designed to promote settlement before litigation is required, citing Crum v. Superior Court, 922 P.2d 316, 317 (Ariz. Ct. App. 1996). Moreover, a dispute for purposes of Rule 408 should include even "an apparent difference of opinion between the parties," citing and quoting Affiliated Manufacturers Inc. v. Aluminum Co. of America, 56 F.3d 521, 528 (3d Cir. 1995), among others. The advisory committee’s note to Federal Rule of Evidence 408 also mentioned the difficulty of the common law approach in discerning what exactly qualified as protected settlement negotiations. Thus it can be inferred that the drafters of the Rule 408 wished to define offers to compromise and settlement negotiations broadly. Hernandez, 52 P.3d at 770–71 (Howard, J., dissenting).
\textsuperscript{50} Id. at 771–72. Judge Howard also noted that impeaching a party for prior inconsistent statements concerning the facts of the case is inconsistent with the types of exceptions specifically listed in Rule 408. Id. at 771.
\textsuperscript{51} Id. at 771–73.
\textsuperscript{52} Id. at 773.
\textsuperscript{53} Id.
\textsuperscript{54} E.g., State Bar of Arizona, Supreme Court Petitions: Petitions for Review, 38 ARIZ. ATT'Y at 35 (June 2002).
\textsuperscript{55} Hernandez, 52 P.3d at 770–71 (Howard, J., dissenting).
to compromise. This assumption is somewhat counterintuitive, at least in terms of the criteria of Rule 408. Rule 408 requires an offer to compromise a disputed claim. In theory, the state could, upon receiving Hernandez’s Notice of Claim, agree to both the claim and damages filed in the Notice, and thus nothing would be disputed. Furthermore, the policy behind a Notice of Claim is predominately to apprise the state of a potential suit.

Arizona’s Notice of Claim statute does, however, contain language consistent with requiring an (involuntary) offer to compromise or settle. While a logical argument can be mounted from either side of the fence, the side more in accord with Rule 408’s dispute and compromise requirements seems to be the one that holds that a Notice of Claim, in most instances, falls outside of Rule 408’s protection. Even a liberal reading of the “dispute” requirement defines dispute as “an apparent difference among the parties.” If the state is not yet aware of the claim, how can it express an opinion one way or the other as to the claim’s resolution? In other words, it is impossible for the state to dispute a claim before it knows that the claim exists.

As for an actual “compromise,” few claimants are so benevolent (or foolish?) as to offer an actual compromise of their claim in their required Notice of Claim. The Notice of Claim is required in order to sue the state.

56. Id. at 767.
57. ARIZ. R. EVID. 408.
58. See, e.g., Hernandez I, 35 P.3d at 100.
59. See id. at 100 (noting that the purpose of a notice of claim is to alert the public entity of the potential claim, which of course helps the entity settle the claim); Andress v. City of Chandler, 7 P.3d 121, 123 (Ariz. Ct. App. 2000).
60. ARIZ. REV. STAT. § 12-821.01(A) (West 2003) (“The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount.”).
61. Of course, one can envision a situation falling outside this categorization: say, the state and claimant had been negotiating even before the Notice of Claim was filed, and it was understood that the Notice of Claim was a continuation of this process.
62. After all, if the state is not even aware of the claim, how can it possibly dispute it? It is difficult to reconcile this fact even under the most liberal of dispute interpretations—e.g., whether there is an apparent difference of opinion between the parties. See, e.g., Affiliated Mfrs., Inc., v. Aluminum Co. of Am., 56 F.3d 521, 528 (3d Cir. 1995). On the other hand, the legal community tends to view initial demand letters as protected by Rule 408. E.g., Hernandez v. State, 52 P.3d 765, 771 (Ariz. 2002) (Howard, J., dissenting). An initial demand letter, however, often is not apprising the other party of the dispute; rather, it typically represents that a party has just brought legal counsel into the dispute because the dispute could not be resolved otherwise. (If, however, equity were to be a consideration, it seems fair to exclude this evidence given that the claimant was forced to divulge facts and amounts at such an early stage, an advantage to which a non-state defendant would not be entitled.)
63. See, e.g., Affiliated Mfrs., 56 F.3d at 528; see also supra note 62.
64. But see supra note 59.
65. But see supra note 62.
There is no reason to make a concession in the Notice of Claim. Claimants must merely meet the basic statutory commands in order to preserve their claim for the future.\(^6\) Thus to compromise one’s claim in a Notice of Claim is, in most cases, irrational: claimants receive no benefit from a concession at this stage.\(^7\) If anything, claimants receive a detriment in that their position has been compromised. The fact that a Notice of Claim is statutorily required cuts further against viewing it as an offer to compromise in most instances. Claimants must file it regardless of whether it is excluded under Rule 408. Hence, holding that Notice of Claims typically fall outside of Rule 408 would not conflict with the purpose of Rule 408 (to encourage settlements) because the parties would not be discouraged from filing Notice of Claims; they must file them, whereas traditional offers to compromise and settlement negotiations are voluntary. Rule 408 provides incentives to engage in compromises in the pursuit of settlement. Notice of Claims, on the other hand, do not need evidentiary incentives to encourage such behavior because they are required by law.

Although the issue of whether a Notice of Claim qualifies for the protections of Rule 408 is collateral to the main purposes of this article, it bears reminding that the majority did not hold that a notice of claim qualified as an offer to compromise. The majority’s opinion rested, rather, on the (shaky) assumption that it so qualified.\(^8\) The opinion is barren of any analysis on the propriety of this assumption. The practitioner dealing with a Notice of Claim is left with uncertainty. The better practice would be, in accordance with the vacated Court of Appeals opinion,\(^9\) to treat the Notice of Claim as falling outside of Rule 408’s ambit and presume that which is said in the Notice will be used against the party wherever possible. Unfortunately for the State of Arizona, this rational behavior likely will result in claimants offering the least amount of information possible concerning their claim and inflating damages to the maximum extent of reason.

\(^{66}\) See supra note 20.

\(^{67}\) Perhaps if the state were to pay out claims that contained a compromise sooner than those that did not, or if some other incentive resulted from a voluntary compromise at such an early stage of litigation, but in the absence of such incentives, the claimant would be voluntarily compromising his or her claim when the state may very well accept an uncompromised claim.

\(^{68}\) Hernandez v. State, 52 P.3d 765, 767 (Ariz. 2002).

\(^{69}\) Id. at 769 (vacating the Court of Appeals opinion).
Moving back into focus, the following sections address the (im)propriety of the majority’s ruling allowing an offer to compromise or statements made in settlement negotiations to come in to impeach a party.\textsuperscript{70}

\textbf{B. The Holding Guts the Protections of Rule 408\textsuperscript{71}}

The court’s ruling effectively destroys most of Rule 408’s protection.\textsuperscript{72} In the vast majority of cases, parties will need to take the stand in their own support, so anything that the party-witnesses have said or done in settlement negotiations that is arguably inconsistent with their present testimony could be used to impeach them. On cross-examination, all opposing counsel has to do is ask a question that he or she knows will produce an answer sufficiently contrary to the evidence given in settlement negotiations. Presto, the evidence is then admitted for impeachment purposes. (See also Section II.C. infra for further illustration of the ease in which this evidence can be admitted.) Surely, the point of Rule 408 was not merely to delay the other side in using the evidence until the opposing party testifies.

Granted, the court’s reading of Rule 408 was a reasonable textual interpretation,\textsuperscript{73} but the ruling drastically ‘hinders open and candid communication in settlements by subjecting the communications to admissibility at trial, destroying the purpose behind Rule 408.\textsuperscript{74} Parties will now be willing to offer and concede less information than they could have under a more effective 408 doctrine. Most parties presumably will offer as little factual information as possible during negotiations, realizing full well that the \textit{Hernandez} holding offers them little protection, unless they know there is no chance that they will testify weeks, months, or even years later if the case reaches trial. Most parties likely will adopt a “listen-and-learn”

\textsuperscript{70} This note is particularly adverse to impeaching a party, as in the facts of \textit{Hernandez}, with settlement evidence, as opposed to impeaching a nonparty witness. For the reasons behind this bias, see section III.B. infra.

\textsuperscript{71} The following Sections (II.B–F.) show the negative effects of the majority’s ruling. Once again, the distinction between exclusion on the basis of Rule 408 or Rule 403 is rarely mentioned because the analysis is largely the same. There are of course subtle differences, but it is the purpose of not discouraging settlements (and the inability of jury instructions to cure the prejudicial effects) that lies at the base of each.

\textsuperscript{72} \textit{Hernandez}, 52 P.3d at 773 (Howard, J., dissenting) (“[T]he majority’s construction will ‘eviscerate Rule 408.’”) (quoting Jane Michaels, \textit{Rule 408: A Litigation Mine Field}, 19 No. 1 LITIG. 34, 37 (1992)).

\textsuperscript{73} Evidence may be admitted for “another purpose” other than proving liability for or validity of a claim or its amount. ARIZ. R. EVID. 408.

\textsuperscript{74} \textit{Hernandez}, 52 P.3d at 774 (Howard, J. dissenting). Perhaps the following criticism is based more on the impotency of Rule 408’s language, as drafted, than on the majority’s interpretation of it.
stance in settlements negotiations, rather than the more proactive and "compromising" posture that could be taken if what the parties said and did was actually protected under Rule 408.

To make matters worse, the ruling could stop the settlement process from even beginning. While the Hernandez case only involved impeaching a party-witness on the facts laid out in an offer to compromise, nothing in the majority’s opinion specifically limits the ruling to just these types of factual statements; the offer to compromise itself also could be used for impeachment purposes. The historical motivation for Rule 408, and its common law predecessor, was to encourage offers to compromise by protecting the parties from the adverse inferences that juries tend to draw from such offers—namely, that the party’s claim is weak, so the party wishes to compromise. Hence, parties risk weakening their claims by making offers of compromise.

C. Juries Will Use Evidence Proffered for Impeachment for Improper Purposes

By allowing prior inconsistent statements by a party to be admitted for the purpose of impeachment, but not for the purpose of proving liability or amount of the claim, the court relies on a fatally artificial distinction. Juries doubtlessly will use these statements made by the party in settlement negotiations, or the offers to compromise themselves, to ascertain the party’s liability or amount of the claim. Although Rule 105 of the Arizona Rules of Evidence allows the compromising party a limiting instruction, the instruction is completely impotent. Here, the jury has

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75. Of course, it is less likely that the opposing party will be able to find a valid purpose other than the forbidden ones of proving liability or amount of claim. An example would be to prove knowledge. In DeForest v. DeForest, 694 P.2d 1241 (Ariz. Ct. App. 1985), the court allowed a spousal maintenance award negotiated between the parties to be admitted in order to show that the husband indeed had knowledge of it. Id. at 1247. But by admitting an offer to compromise, courts risk seriously offending one of the main reasons that common law long ago began excluding offers to compromise: the jury may think that the party’s position is weak, and hence the party wished to settle. See Fed. R. Evid. 408 advisory committee’s note.

76. See Fed. R. Evid. 408 advisory committee’s note (noting the risk that the jury will perceive an offer to compromise as a weakness in the party’s claim, rather than merely a “desire for peace”); Ariz. R. Evid. 408. Of course, this argument is premised on the assumption that a jury will ignore, consciously or subconsciously, the limiting instruction and use the evidence to prove liability for or validity of the claim or its amount. See Section II. C.


78. Hernandez, 52 P.3d at 769 n.5 (quoting Ariz. R. Evid. 105 (“When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court,
the party herself stating a version of the facts that is contrary to her trial theory, and the prior version of the facts may limit or destroy liability or the amount of the claim. It is futile to ask a jury to maintain the distinction of using this evidence solely for credibility and not as substantive evidence, when the substance of the statement bears crucially on the basis for the claim or damages. In settlement negotiations, for example, the party states "the floor was not really slippery." At trial, however, the party on direct instead testifies that "the floor was slippery" or even just says upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

79. Hernandez, 52 P.3d at 774 & n.10 (Howard, J., dissenting) (noting that a limiting instruction in this context is of "limited practical value" and "admission for th[is] limited purpose undermines the goal of Rule 408 of allowing free and open settlement negotiations"); see Hernandez v. State, 35 P.3d 97, 104 (Ariz. Ct. App. 2001) (Voss, J., dissenting) (estimating that the jury "most likely drew the . . . improper[] inference" of going beyond the limiting instructions and using the evidence as substantive to liability); Davidson v. Beco Corp., 753 P.2d 1253, 1256 (Idaho 1987) ("The dangers are high that, even with a limiting instruction, the jury will substantially consider the impeachment evidence."). The court in Davidson nevertheless ruled that it was not a clear abuse of discretion to admit the evidence for impeachment. Id. at 1257. Even the Supreme Court of the United States, in another context, has questioned the efficacy of limiting instructions. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) quoted in United States v. Ince, 21 F.3d 576, 584 (4th Cir. 1994) ("The na've assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."). For an analogous empirical study as to how juries clearly ignored limiting instructions that told them they were only allowed to use evidence of prior convictions to assess the defendants' credibility, and not his or her guilt in the current trial, see Roselle L. Wisler & Michael J. Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 LAW & HUM. BEHAV. 37 (1985). See also Shari Seidman Diamond & Neil Vidmar, Jury Room Ruminations on Forbidden Topics, 87 VA. L. REV. 1857, 1864 (2001) (A limiting instruction on forbidden purposes of evidence gives the jury "the psychologically challenging, and probably impossible, task of using the [evidence only for the permissible purpose]. . . .") quoted in George Fisher, EVIDENCE 112 (2002); Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 HARV. L. REV. 177, 192–96 (1948) ("Practically, men will often believe that if a witness has earlier sworn to the opposite of what he now swears to, he was speaking the truth when he first testified.") (quoting United States v. Cursi, 65 F.2d 564, 565 (2d. Cir. 1933).

80. See Hernandez, 52 P.3d at 771–72; Schlossman & Gunkelman, 593 N.W.2d at 380 ("When the witness sought to be impeached is also a [party], the admissibility of statements made during settlement negotiations increases the risk a jury may use the evidence substantively as an admission of liability."); John W. Strong et al., MCCORMICK ON EVIDENCE § 266, at 411 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, 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."); Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S EVIDENCE § 408[05], at 408–34 (1991) ("The danger that the evidence will be used substantively as an admission is especially great when the witness sought to be impeached . . . is [a party] . . . .") quoted in Gear Petroleum, 948 F.2d at 1546.

81. See cases and commentary cited in supra notes 79–80.
"unsafe," or on cross the party is asked whether the floor was slippery. 82 The party has lost this battle—the party has but two detrimental choices: admit to it on the stand or have the evidence from the settlement negotiations admitted. 83

Now, in theory, the jury may only use this evidence to impeach the party's credibility, 84 but there are two glaring misconceptions in this theory: first, impeaching the party's credibility here impeaches the party's whole theory of the case; 85 second, no juror realistically has the capability or discipline of separating substance from credibility in this statement. 86

82. Similarly, Hernandez testified, consistent with the stipulation, that there was a trail and a retaining wall, whereas he stated in his Notice of Claim that there was no trail and a cliff, and thus the evidence was admitted for impeachment. Hernandez I, 35 P.3d at 99.

83. Since this is a specific self-contradiction impeachment on a non-collateral issue, proof is allowed by extrinsic evidence—i.e., the offer to compromise or evidence from settlement negotiations. If the contradiction, however, becomes substantial enough, and it is on a collateral issue, perhaps it could be said the party's character for truthfulness is being impeached, which places certain limits on the use of extrinsic evidence. See ARIZ. R. EVID. 608(b) (limiting inquiry into specific instances of conduct to cross-examination); GEORGE FISHER, EVIDENCE 284–85 (2002). This possible exception may keep the actual offer to compromise out, but it only would cover very rare situations. The better approach is for the trial judge to exercise his or her discretion and limit cross-examination solely to what is essential to impeach and not allow the jury to hear that the evidence came from a settlement negotiation. See Bankcard Am., Inc., v. Universal Bancard Sys., Inc., 203 F.3d 477, 483 (7th Cir. 2000) (describing how trial judge allowed evidence of settlement negotiation to be admitted but barring opposing counsel from going into the purported terms of the settlement or using the terms "negotiation' or 'settlement').

84. As for the worth of this theory, see supra notes 77 & 79-80 above.

85. Hernandez, 52 P.3d at 772 (Howard, J., dissenting) (noting the "only possible relevance" of impeaching a party's credibility "concerning the facts of an accident is to assist the jury in determining 'liability for or invalidity of the claim or its amount'") (quoting ARIZ. R. EVID. 408). Judge Howard went on to point out that "[e]vidence concerning credibility merely assists the jury in determining which set of facts it should adopt, which will determine liability," id. Consider the following typical jury instruction given where the only proper use of evidence is for impeachment of credibility: "If the witness is shown knowingly to have testified falsely concerning any material matter, you[, the jury,] have the right to distrust such witness; . . . and you may reject all the testimony of that witness or give it such credibility as you may think it deserves." United States v. Ince, 21 F.3d 574 n.10 (4th Cir. 1994) (emphasis added). Moreover, prior inconsistent statements can be "considered as substantive evidence of the facts contained in [the prior inconsistent statements]." Hernandez, 52 P.3d at 772 (Howard, J., dissenting) (citing ARIZ. R. EVID. 801(d); JOSEPH M. LIVERMORE ET AL., ARIZONA PRACTICE: LAW OF EVIDENCE § 608.3(F) (4th ed. 2000)). But on this last point, it seems that Rule 408's prohibition against considering the evidence for the substantive purpose of proving liability or amount of the claim would trump the more general evidentiary rule of prior inconsistent statements. The advisory committee's note to Rule 801 states that the rule is not meant to displace other evidentiary rules.

86. See supra notes 79–80. "[T]he probable effectiveness or lack of effectiveness of a limiting instruction" is one factor in weighing whether evidence should be excluded under Rule 403. FED. R. EVID. 403 advisory committee's note.
contrary and wholly relevant statement from settlement negotiations potentially crushing or limiting liability or damages has just come straight from the horse’s mouth. No instruction in the world (save one that involves hypnosis) could stop the jurors from considering the substance of the statement, at least in the back of their minds. 87

D. Inadequate Common Law Style Negotiation Will Return

As to statements and conduct made during settlement negotiations, the behavior of those in negotiations operating under the old common law rule probably will return. Under common law, the rule did not exclude statements and conduct made in settlement negotiations, just the offers to compromise and that which was virtually inseparable from the offer or acceptance. 88 Thus, to avoid admissibility, parties would phrase factual statements as hypotheticals, or make them “without prejudice.” 89 The federal rules, which Arizona adopted verbatim, rejected this result. 90 The advisory committee’s note to the federal rule states that the old common law method was merely a trap for the “unwary” or a benefit to the skilled. 91 The federal rule also promotes more open communication about the dispute and produces no arguments as to which statements or conduct were actually hypothetical or made without prejudice. 92

While Rule 408, as it stood before, seemed to offer a more promising solution to the problems posed by common law settlement negotiations, Rule 408 has been stripped of these protections by the Hernandez court. If parties are no longer guaranteed any meaningful protection of their statements during settlement negotiations, parties will not say anything or cast their statements as hypos or “without prejudice.” 93

E. The Holding May Force Attorneys to Testify at Trial for Their Client

The court’s ruling also may force attorneys to testify against their

87. See supra notes 79–80.
88. See ARIZ. R. EVID. 408 advisory committee’s note; Hernandez, 52 P.3d at 773 (Howard, J., dissenting); see also Michaels, Rule 408: A Litigation Mine Field, 19 No. 1 LITIG. 34, 37–38.
89. See supra note 88.
90. See id.
91. FED. R. EVID. 408 advisory committee’s note (noting also the other negative side effect of common law negotiation: “to inhibit freedom of communication with respect to compromise”).
92. Id.
93. See supra note 88.
For example, assume that an attorney writes a demand letter laying out certain facts leading to the client’s cause of action. Assume further that there are certain inconsistencies between this version of the facts and the testimony of the attorney’s client at trial. A common defense may be that the attorney, not the client, was mistaken about the facts, and misstated them in the demand letter. Thus, in an attempt to expose this defense as a sham, the other side may attempt to call the attorney to the stand and question him or her about whether she was actually mistaken as to the facts. This result would, at the least, add an additional inconvenience to the adversarial system.

F. The Holding Does Not Necessarily Promote Truthfulness

The majority’s claim that its ruling promotes truthfulness, or at least does not discourage it, is not in accord with reality. Parties will not ensure that their statements are truthful under the new ruling; rather, they will either not say anything or make sure that their falsehoods in settlement negotiations stay consistent through trial. The only “truths” that the new ruling will catch are in those few cases where an attorney is mistaken as to the extent of Rule 408 protection (which is no longer much) and thus proffers too much or too candid information during settlement negotiations. Or worse, it may catch attorneys who are honestly mistaken about certain facts at early stages of disputes. The rest of the world will just keep their mouths shut, hindering open negotiations.


96. Hernandez, 52 P.3d at 773 (Howard, J., dissenting).

97. Or, as seen in Section II.D. above, attorneys will resort to phrasing all assertions as hypotheticals. This is not to suggest that parties are not (or should not be) completely truthful, but the new ruling itself will not affect the client’s or attorney’s truthfulness.

98. As Judge Howard notes in his dissent, “if the majority opinion [could be] limited to ... clear perjury,” then perhaps the truth-finding process of the Rules of Evidence would trump Rule 408’s policies. Hernandez, 52 P.3d at 773.

99. Id.

100. See, e.g., Stephen A. Saltzburg & Kenneth R. Redden, Federal Rules of Evidence Manual 286 (4th ed. 1986) (“The philosophy of [Rule 408] is to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial.”). Once again, the text is not meant to condone less than honest and forthcoming behavior, it merely notes its existence and nature.
III. THE JUDICIAL SOLUTION: \textsuperscript{101} RULE 403

\textbf{A. The Typical Balance}

Given the crucial policy of encouraging settlements and the risk that the jury will use settlement negotiation evidence for improper purposes, courts should exclude this evidence under Rule 403\textsuperscript{102} balancing.\textsuperscript{103} The risk that the jury will use this evidence for improper purposes is all but certain,\textsuperscript{104} and the only reason an opposing party wishes to impeach a party’s credibility is to weaken the chance that the jury will believe the party on the issues of liability or the amount of the claim.\textsuperscript{105} Unfair prejudice is therefore a necessary corollary to admitting this evidence. Rule 408 stands for the proposition that evidence in settlement negotiations used to prove liability or amount of the claim is of questionable probative value and discouraging to settlements.\textsuperscript{106} In fact, by generally excluding such evidence under Rule 403, courts may be effecting the true intent of the drafters of Rule 408.\textsuperscript{107} Given the certainty that the evidence will be used by the jury for ascertaining substance as opposed to merely credibility,\textsuperscript{108} Rule 403 typically should exclude the evidence.\textsuperscript{109}

\textsuperscript{101} The Rule 403 solution is perhaps the last resort. Parties are not completely helpless to prevent admission of settlement negotiation evidence. As suggested by David G. Campbell, a former partner in the Phoenix law firm Osborn Maledon, the parties could, for example, engage in private agreements—i.e., contracts specifying that any evidence derived from the negotiations will not be used subsequently for any purpose. See Wayne D. Brazil, \textit{Protecting the Confidentiality of Settlement Negotiations}, 39 HASTINGS L.J. 955, 1026 (1988). Another option is for the parties to agree to mediation protected by statute. \textit{E.g.}, ARIZ. REV. STAT. § 12-2238(b) (West 2003) (making the mediation process confidential); Brazil, \textit{supra} note 101, at 1022–25. Other solutions include an amendment of Rule 408. See ALASKA R. EVID. 408 (“[E]xclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statements.”), \textit{cited in} Fred S. Hjelmeset, Comment, \textit{Impeachment of Party by Prior Inconsistent Statement in Compromise Negotiations: Admissibility Under Federal Rule of Evidence 408}, 43 CLEV. ST. L. REV. 75, 111 (1995). Yet another approach would be to tilt the 403 balance further to the exclusionary side. See Davidson v. Beco Corp., 753 P.2d 1253, 1256 (Idaho 1987) (describing, and then ultimately rejecting, how the Idaho Court of Appeals allowed prior inconsistent statements to be admitted only when such statements “strongly suggest that a witness is perjuring himself at trial or if any unfair prejudice is likely to be insubstantial.”) (quoting Davidson v. Beco Corp., 733 P.2d 781, 787 (Idaho Ct. App. 1986)).

\textsuperscript{102} ARIZ. R. EVID. 403 (permitting courts to exclude evidence where the risk of unfair prejudice substantially outweighs the probativeness of the evidence); \textit{see} Hernandez, 52 P.3d at 769 (noting that, although its ruling does not exclude impeachment evidence for settlement negotiations under Rule 408, admissibility is still subject to Rule 403).

\textsuperscript{103} \textit{See, e.g.}, Schlossman & Gunkelman, Inc. v. Tallman, 593 N.W.2d 374, 380 (N.D. 1999). The court noted that:

[A] trial court considering the admissibility of settlement evidence for impeachment purposes must carefully balance the probative value of the evidence against the danger it will be used for an improper purpose within the
B. Two Exceptions Where the Majority’s Rule May Be Tolerable Under Rule 408’s Policies: Nonparty Witnesses and Prior Beneficial Evidence

The two exceptions that follow are lesser evils. Both are often contrary to the proscriptions and underlying purposes of Rule 408, but neither possess the degree of unfair prejudice inherent in the typical use of compromise negotiations for impeachment. Hence, on a Rule 403 balance, evidence falling into either of these two categories is much more suitable for admission. The first exception is where the witness to be impeached with an offer to compromise or statement made in negotiations is not a party. The most common situation is where a witness was involved previously in the dispute, but he or she has already settled. The risk is still present that the jury will use this evidence for substance rather than credibility, but the effect of proving liability or amount of the claim in the context of the policies encouraging open and frank discussions during settlement negotiations and fostering the truth-finding process through the evaluation of a witness's credibility.

Id. (citation omitted).

104. See supra notes 79–80. “[T]he probable effectiveness or lack of effectiveness of a limiting instruction” is one factor in weighing whether evidence should be excluded under Rule 403. FED. R. EVID. 403 advisory committee’s note.

105. See supra note 85.

106. ARIZ. R. EVID. 408 advisory committee’s note.


108. See supra notes 79–80, 85.

109. See Gear Petroleum, 948 F.2d at 1546 (“[T]he risks of prejudice and confusion entailed in receiving settlement evidence are such that often . . . the underlying policy of Rule 408 requires exclusion even when a permissible purpose can be discerned.”) (alteration in original) (quoting DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 170, at 443 (rev. vol. 2 1985)).

110. The “prior beneficial evidence” rule is, at least as far as I can tell, a product of my own mind, while it doubtlessly is considered by judges in weighing prejudicial effects of evidence, at least in the back of their minds. My insight has two notable features: (1) showing the intellectual prowess of the author of this article (if the reader will buy that); and (2) risks leading readers astray if they should assume that the prior beneficial evidence rule is substantiated in the common law or the Rules of Evidence.

111. See supra notes 79–80. The authorities there cited note the increased risk of unfair prejudice when the witness is a party; by negative implication, then, a witness who is not a party should run a lesser risk of unfair prejudice.

112. Take, for example, an automobile accident where both the passenger and the driver sue the driver of the other car. The passenger engages in settlement negotiations and settles before trial. The driver of the car, however, does not settle and the case goes to trial.
current dispute is typically less harsh, or even nonexistent. After all, it is not the party that has made the damaging statements, and the prior inconsistent statements made by the nonparty witness could have little or no consequence to the current suit.

It even could be argued that nonparty witnesses who have settled their dispute almost always fall outside the protection of Rule 408 because admitting their compromise offers or statements will not discourage settlements. If the witnesses engaged in settlement negotiations and settled, they should not care whether their past statements are used in a subsequent proceeding with different parties, therefore they would not be discouraged from engaging in settlement negotiations in the first place.\textsuperscript{113} This nonparty witness exception is largely fact driven, however. The trial judge is in the best position to assess how much, if any, the risk of unfair prejudice or confusion of the issues is present in the witness’s prior inconsistent statement when making the 403 ruling.

The second exception is termed “prior beneficial evidence.”\textsuperscript{114} Here, it is still a party that is being impeached with his or her prior inconsistent statements in the offer to compromise or settlement negotiations. The difference, however, is that this evidence, if believed by the jury,\textsuperscript{115} would be beneficial to the party’s case, or at least not detrimental to it. All that is happening at trial is that the party is telling a story more beneficial to the other side, though perhaps inconsistent with their settlement statements. Thus the party is not exaggerating or lying to the jury; instead, the party is being perfectly candid with them in conceding a weaker position. By allowing these types of prior inconsistent statements, the jury can only use this evidence to assess the party’s credibility, not the liability for or validity of the party’s claim because the testimony given by the party at trial is less self-serving than the evidence admitted for impeachment.\textsuperscript{116} (Why would

\textsuperscript{113} This would not hold true where, for example, the nonparty witness is related to one of the parties in some way. Furthermore, this assumes that Rule 408 would effectively exclude such evidence if the witness is in fact a party. This, of course, is not the law as it stands. Thus nonparty witnesses will be discouraged the same as party witnesses to the extent that they are unsure of whether their statements will be used if the case goes to trial instead of settling.

\textsuperscript{114} See supra note 110.

\textsuperscript{115} See Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 HARV. L. REV. 177, 192–96 (1948) ("Practically, men will often believe that if a witness has earlier sworn to the opposite of what he now swears to, he was speaking the truth when he first testified."). Id. at 193 (quoting United States ex. rel. Ng Kee Wong v. Corsi, 65 F.2d 564, 565 (2d. Cir. 1933). Of course, impeachment in and of itself can be detrimental.

\textsuperscript{116} Thus Mr. Morgan’s assumption (see supra note 115) does not hold true where the party is now testifying to a weaker position—i.e., where the prior evidence was more beneficial to the party.
parties lie at trial to hurt, rather than help, themselves?) The facts of *Hernandez* are illustrative.

Hernandez’s Notice of Claim set out facts of the accident that, if true, would have been *beneficial* to his claim, just as initial demand letters often set out a strong version of the grounds for the claim. Hernandez stated in his Notice of Claim that there was a trail, a twenty-five-foot drop (not a 14-foot drop), and a cliff (not a retaining wall). These facts, if believed by the jury after learning them on impeachment, would be beneficial to Hernandez. Thus, there is less concern that the jury will use them substantively for determining liability, and thereby unfairly prejudice Hernandez by using the evidence for the improper purpose of discerning liability or damages, because Hernandez has just taken the stand and directly told the jurors a less favorable version of the facts. Perhaps, then, the majority may have been right to hold the evidence admissible, under the facts of *Hernandez*, because it was beneficial to Hernandez’s case, if believed.

As a very general classification, statements made in an initial offer to compromise, such as a Notice of Claim or initial demand letter, as opposed to statements or conduct made during settlement negotiations, are perhaps better suited for admissibility. These types of statements or admissions lend themselves better to determining credibility only, not liability for or the amount of a claim as well (at least to the extent that *any* statements or admissions made with the intention of settling a dispute are probative assessments of credibility). These documents tend to be constructed to

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117. Once again, parties should not lie for any reason, but to lie to hurt oneself in this context isrationally inconceivable, in addition to being legally and ethically wrong.


119. Thus the risk of unfair prejudice from the jury using the evidence for improper purposes is greatly diminished, if present at all. The jury would be left with no use of this evidence except to evaluate the party’s credibility. Of course, the concern that the jury will use knowledge of offers to compromise as a perceived weakness of position still remains. *ARIZ. R. EVID.* 408 advisory committee’s note. Moreover, see note 85 above, discussing the flimsy distinction between impeaching a party’s credibility and impeaching the party’s theory of liability or amount of damages in this type of case.

120. These classifications are indeed general. Under no circumstances should one assume without looking to the actual case that an initial offer to compromise is admissible for impeachment of a party. There are countless situations where settlement negotiations would instead be better suited for admissibility, and, of course, many more situations where neither would be suitable for admissibility.

121. See *ARIZ. R. EVID.* 408 advisory committee’s note (noting the reduced probativeness of settlement evidence). Offers to compromise and statements or conduct in settlement negotiations are often worded as to effect their purpose—settling the dispute. Inconsistencies in this evidence are only probative of credibility to the extent that the negotiation process is consistent with truth-finding and not merely dispute-settling.
the drafter’s advantage, at least initially. Concessions made in settlement negotiations, on the other hand, may be more likely to be damaging to the party’s case. In settlement debates, a party is much more likely to concede a point in order to further the negotiations. Thus there is greater risk that the jury will use this evidence for the improper purpose of assessing liability for or amount of a claim, instead of restricting the evidence’s use to merely the credibility of the party.\textsuperscript{122} Once the jury, in its ever-vigilant quest for the truth, hears that the party has once exposed a weaker side of the truth, they will likely use the evidence for liability or amount of claim.\textsuperscript{123}

Of course, the utility of the prior beneficial evidence rule varies with the facts of each case. Furthermore, the theory is based on the assumption that a trial is designed to bring out the closest version of the truth, and that a witness’s concession of a less favorable position while on the stand will be believed by the jury over the more favorable version given in an offer to compromise or settlement negotiations. More importantly, the prior beneficial evidence rule does not alleviate a huge problem in the majority’s ruling: if the party is impeached on his or her basis for their claim, the whole claim risks “impeachment,” not just the party’s credibility.\textsuperscript{124}

Thus, the more critical the party’s credibility is to the basis for his or her claim or its amount, the more the trial judge should consider excluding the evidence in the Rule 403 ruling,\textsuperscript{125} regardless of whether the prior inconsistent statements are beneficial or detrimental. Here, Hernandez\textsuperscript{126} is illustrative once again. Hernandez and his son were the only witnesses to the accident. If Hernandez is impeached on his story of the events leading to the accident, he only has his son to rehabilitate his version of the basis for the dispute. Now, to the extent his son is available to testify, and to the extent other evidence (such as photographs of the scene) is available to prove liability or the amount of his claim, the case is stronger for allowing the impeachment, and perhaps the majority’s result would not have been too unfairly prejudicial under such circumstances. But as a

\textsuperscript{122} Id.
\textsuperscript{123} See supra notes 79–80, 115.
\textsuperscript{124} See supra note 85. Of course, if the reader believes there is a viable distinction between impeaching credibility and impeaching the party’s entire cause of action in such circumstances, then the prior beneficial evidence rule should allow all such evidence in, provided the evidence is not excluded elsewhere in the Rules of Evidence.
\textsuperscript{125} Cf. United States v. Brewer, 451 F. Supp. 50, 53–54 (E.D. Tenn. 1978) (noting that a critical factor in determining whether a criminal defendant’s credibility can be impeached by a showing of prior convictions is the importance of defendant’s testimony to his or her case). Of course, a party’s credibility is always “critical” to some extent.
\textsuperscript{126} Hernandez v. State, 52 P.3d 765, 766 (Ariz. 2002).
party's need to testify becomes more critical, the prior beneficial evidence rule should be given less and less weight in a Rule 403 balance. The most critical, of course, would be where the party's testimony is solely dispositive—e.g., where the party is the only witness, save the defendant, in a civil assault case, and the defendant claims self-defense. Nevertheless, while clearly not designed for every case, a court could, by looking to the guidance of the prior beneficial evidence rule, alleviate some of the inherent unfair prejudice and confusion caused by the majority's ruling.

IV. IN SUM

Under Hernandez, Arizona courts today (may) allow offers to compromise and statements or conduct made during settlement negotiations to come into evidence for impeachment purposes against a party, notwithstanding the contrary policies of Rules 408 and 403. Though the extent remains to be seen, the ruling should negatively affect settlement negotiations, at least insofar as hindering open and candid communication negatively affects settlement negotiations. In a legal community dedicated to and dependent on settlements, the community must adapt if it wishes to maintain the benefits of Rule 408's policies. Some solutions have been suggested above, such as private agreements and mediation. In the meantime, it is strongly urged that trial judges use their Rule 403 discretion to bar this evidence, absent atypical situations like those involving nonparty witnesses and prior beneficial evidence.

128. Once again, it is worth reminding the reader that some of this note's disgust with the impotence of Rule 408 is owing to the weak language of the rule and not the majority's reading of it. The majority may be blamed, however, for not balancing the evidence under Rule 403 before ruling on its admissibility.
129. See supra note 101.