SUBSEQUENT REMEDIAL MEASURES

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Traditionally, evidence of subsequent remedial measures has been inadmissible to show negligence, culpable conduct or a defect in design. The policy rationale that forms the basis for Federal Rule of Evidence 407 (hereinafter "Rule 407") is essentially twofold. The primary policy concern is that if Plaintiffs could introduce evidence of subsequent remedial measures performed by a Defendant, then otherwise conscientious parties would be discouraged from making necessary safety precautions after an incident. See *Raymond v. The Raymond Corp.*, 938 F.2d 1518, 1523 (1st Circuit 1991); *Bauman v. Volkswagenwerk Aktiengesevschatt,* 621 F.2d 230 (6th Cir. 1980); Rimkus v. Northwest Colorado Ski Corp., 706 F.2d 1060, 1064 (10th Circ. 1983). Rule 407 rests on the strong public policy of encouraging manufacturers to "make improvements for greater safety." *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 415 (quoting Kelly *v. Crown Equip. Co.,* 970 F.2d 1273, 1276 (3d Cir. 1992). Thus, the primary concern for the exclusion of otherwise admissible evidence rests with the public social policy of not discouraging Defendants from taking steps in furtherance of added safety." See Fed. R. Evid. 407, advisory committee notes 1972 proposed Rules.[1]

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[1]See Notes of Advisory Committee on Rules, which states, "[t]he rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. N.S. 261, 263

The other, lesser-known policy behind the Rule is that the Rule seeks to avoid "unfairly prejudicing" the Defendant. See *Grenada Steel Industries, Inc., v. Alabama Oxygen Co.,* In., 695 F.2d 883 (5th Cir. 1983). The underlying theory governing this aspect of the Rule is that disclosure of such evidence will prejudice the Defendant in eyes of the jury by creating a bias against the condition at the time of incident, in favor of that subsequent to the incident. *Grenada Steel Industries, Inc.*, 695 F.2d at 888.

Rule 407, as amended in 1997, prescribes as follows:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This Rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. *Fed. R. Evid.* 407

The stated exceptions of Rule 407 are widely known and accepted, and the language indicates that the explicit exceptions are not exclusive. Therefore, many federal cases have considered the admissibility of evidence of subsequent remedial measures for purposes other than those specified by Rule 407. This publication will focus on the lesser-known

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(1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them. See *Falknor, Extrinsic Policies Affecting Admissibility*, 10 Rutgers L.Rev. 574, 590 (1956)." (Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1932.)

exceptions which the Federal Courts[2] have carved out through their own interpretation of Rule 407.[3]

1. **PRIOR REMEDIAL MEASURES MAY BE ADMISSIBLE.**

A number of courts have held that Federal Rule of Evidence 407 does not prohibit admission of evidence of measures taken by a manufacturer with respect to a product after its manufacture but before an accident involving the product. Although evidence concerning subsequent remedial measures generally is not admissible at trial, measures that are not "subsequent" in the strict sense (i.e. they take place before the accident at issue) do not fall within that prohibition. See *Myers v. Hearth Technologies, Inc.*, 621 N.W.2d 787 (Minn. Ct. App. 2001)[4], review denied, (Mar. 13, 2001)(holding in a products liability suit against manufacturer of a gas fire fireplace evidence of changes to the fireplace's instructions before explosion was not barred by subsequent remedial measure Rule).

2. **MANDATORY RECALL CAMPAIGNS OR REMEDIAL MEASURES COMPELLED BY HIGHER AUTHORITY MAY BE ADMISSIBLE.**

Some courts have found that Rule 407 does not bar evidence of subsequent remedial measures when such measure was involuntarily compelled by a superior authority. Generally, these courts have held that Rule 407 does not apply to evidence of mandatory remedial measures, including recall campaigns that are compelled by government agencies. *See O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1203 (8th Cir. 1990); *Rozier v. Ford Motor Co.*, 573 F.2d 1132, 1343 (5th Cir. 1978)(remedial measure did not fall within Rule 407 as it was not out of a sense of social

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[2] Or a state court under a comparable state evidentiary rule.
[3] Some cases and opinions cited or used as examples in this publication may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions.
[4]Decided under Minnesota Rules of Evidence 407(b).

responsibility but rather was required by the National Highway Safety Administration). It is clear that the rationale behind this exception is that in order to be shielded by the protection of Rule 407, Defendants must be compelled to voluntarily recall their defective products under a sense of civil obligation—as opposed to be forced to do so by a superior authority or government agency. (See *In Re Aircrash in Bali, Indo.*, 871 F.2d 812, 816-17 (9th Cir. 1989) (holding a Federal Aviation Administration report on airline's safety record and procedures, pursuant to investigation begun five days after air crash, was not excludable from evidence in litigation arising from the crash, as being a "subsequent remedial measure," where it was prepared by the FAA without the voluntary participation of Defendant airline)(*See also Koonce v. Quaker Safety Products & Mfg Co.*, 798 F.2d 700, 719-20 (5th Cir.1986). The courts have reasoned that policy behind Rule 407 is not offended where Defendants did not voluntarily participate in the remedial measures.

The Court in *In Re Aircrash in Bali, Indo* stated that "[w]here the Defendant has not voluntarily participated in the subsequent measure at issue, the admission of that measure into evidence does not "punish" the Defendant for his efforts to remedy his safety problems. *In Re Aircrash in Bali, Indo.*, 871 F.2d at 817. Thus, the policy behind the Rule is further effectuated as evidence against a conscientious and responsible Defendant would be barred, where the same evidence would be admissible against a less diligent Defendant.

3. SUBSEQUENT REMEDIAL MEASURES TAKEN BY A THIRD PARTY MAY BE ADMISSIBLE.

Although on its face Rule 407 does not differentiate between parties and non parties, courts generally hold that subsequent remedial measures carried out by a non-party is not in contravention of Rule 407

and therefore admissible. The majority view is that the social policy behind the Rule is not implicated where the evidence concerns remedial measures taken by an individual or entity that is not a party to the lawsuit. See generally *2 Weinstein's Federal Evidence* § 407.05[2] (Joseph M. McLaughlin ed., 2d ed.2003). Whereas, the admission of remedial measures by a non-party will not expose them to liability, there is no underlying social necessity to protect them. It is noteworthy that circuits which addressed this issue have concluded that Rule 407 does not apply to subsequent remedial measures taken by a non-party. *See, e.g, Raymond v. Raymond Corp.,* 938 F.2d 1518, 1523-24 (1st Cir.1991); *Diehl v. Blaw-Knox, 360 F.3d 426* (3rd Circuit 2004); *TLT-Babcock, Inc. v. Emerson Elec. Co.,* 33 F.3d 397, 400 (4th Cir.1994); *Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 583 (5th Cir.1985); *Lolie v. Ohio Brass Co.,* 502 F.2d 741, 744 (7th Cir.1974) (per curiam); O'Dell *v. Hercules, Inc.,* 904 F.2d 1194, 1204 (8th Cir.1990); *Pau v. Yosemite Park & Curry Co., 928 F.2d* 880, 888 (9th Cir.1991); *Mehojah v. Drummond*, 56 F.3d 1213, 1215 (10th Cir.1995).

Usually, this situation arises in the context of a lawsuit brought by a worker against a third party where his employer, who is barred from liability under a Worker's compensation law, has made a subsequent remedial measure to the defective product or condition. In *Diehl v. Blaw-Knox,* a road crewman was severely injured when a machine designed to widen the road suddenly reversed direction, pinning the Plaintiff's right ankle beneath the wheel eventually crushing his leg. *Diehl, 360* F.3d 426 at 428-429. Following the accident, the Plaintiff's employer made several modifications to the machine, including a bumper to shield the rear wheels and moving the "back-up" alarm from the front of the vehicle to its rear. In a design defect suit against the original manufacturer, both parties moved *in limine* with respect to introduction of these changes. The Court denied the evidence and the jury returned a verdict for the

Defendant, which Plaintiff's appealed. In remanding the case for a new trial, the Third Circuit relied upon rulings in other Circuit Courts that the policy concerns forming the basis for Rule 407 are not present when the subsequent remedial measure is undertaken by a third party. Specifically, the *Diehl* Court focused its analysis on that Rule 407 "incorporates conventional doctrine which excludes evidence of subsequent remedial measures *as proof of an admission of fault.*" [Emphasis Added]. See also Rimkus v. N.W. Colo. Ski Corp., 706 F.2d 1060, 1064 (10th Cir.1983). The Court also cited The Advisory Committee's reference to "an admission of fault" which reinforces this limitation: it hardly makes sense to speak of a party's fault being "admitted" by someone other than the party. See Fed. R. Evid. 407, advisory committee notes 1972 proposed Rules. Basic logic dictates that since evidence of a subsequent remedial measure conducted by a non-party cannot be used as proof of fault against the non-party, the ominous danger of creating a disincentive to make improvements is extinguished. In furtherance of the policy behind the rule, the measure cannot be viewed as an admission of fault against the Defendant. See, e.g. Huckaby v. A.G. Perry & Son, Inc., 20 S.W.3d 194 (Tex. App. Texarkana 2000)(holding evidence of subsequent efforts by the state to improve intersection following the accident was not offered to prove negligence or culpable conduct of the state, and thus was not inadmissible as evidence of a party's subsequent remedial measures, where state was not a Defendant to wrongful death and survival action brought by parents of passenger killed in car-truck collision at intersection).

This line of precedent presents a separate level of analysis for Plaintiffs contemplating multiple potential Defendants. In light of the likelihood that a potential third party's remedial evidence can be introduced when made by a non-party, Plaintiffs are urged to make strategic decisions with respect to naming the potential Defendant who

made a remedial measure, especially where liability or coverage is an issue, or full damages are barred by cap.

4. INVESTIGATIVE REPORTS AND STUDIES MAY NOT CONSTITUTE "MEASURES" UNDER RULE 407.

Evidence produced which resulted from an investigation of an underlying accident or occurrence is generally admissible. Many courts have held that this evidence was prepared for internal investigative purposes—not to cure the defect, and therefore, are not "measures" under the Rule. (See Rocky *Mountain Helicopters v. Bell Helicopters*, 805 F.2d 907, 918 (10th Cir. 1986)(finding that Rule 407 excludes evidence of subsequent remedial measures themselves, and not evidence of a party's analysis of its product). Thus, even if the subsequent remedial measure itself is not admissible, evidence mounted against a Defendant which leads to them implementing a remedial measure may be admissible. Under this logic, investigative reports which lead a company to voluntarily recall a product may be admissible. *See Prentiss & Carlisle Co., Inc. v. Koehring-Waterous*, 972 F.2d 6, 10 (5th Cir. 1992); *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 33 (1st Cir. 1988)(holding, a report commissioned by the manufacturer of pressure cookers was admissible despite claim that it was evidence of remedial measures in a products liability action against manufacturer and broker of defective pressure cookers).

RULE 403

Plaintiff's lawyers must be vigilant in their presentation of legitimate purposes with respect to evidence of remedial measures. It must be noted that evidence falling under an exception of Rule 407 must still satisfy the requirements of Federal Rule of Evidence 403. Thus, if the probative value of a subsequent remedial measure is substantially outweighed by the danger of unfair prejudice of confusion

of the issue, the evidence will not be admitted. Fed. R. Evid. 403. *See also Bizzle v. McKesson Corp.*, 961 F.2d 710, 721 (8th Ci. 1992)(holding otherwise admissible evidence of a product recall was excluded under Rule 403 where probative value is outweighed by prejudicial value because Plaintiff's failed to produce sufficient evidence to prove that the Plaintiff's cane model was the same model involved in the recall).

INVESTIGATION AND DISCOVERY

Thorough investigation will often reveal admissible subsequent remedial measures or modifications of a defect. Naturally, Plaintiff attorney's success will depend on effective investigation and discovery. Plaintiff attorneys, as soon as practicable, must thoroughly document the condition or product. How the Plaintiff's theory is developed during the course of litigation plays an important role with respect to the admissibility of any subsequent remedial measures. Plaintiff's discovery should therefore, focus on: (1) the chain of custody; (2) ownership history (in order to identify when modifications were performed and when safety concern arose); (3) third party investigative analysis by government agencies, parent corporations, insurers and/or other third parties; (4) repair and maintenance history (including identification of service contactors and third party contractors); (5) architects, engineer and consultants; and (6) internal audits, safety reports, studies and reviews.

CONCLUSION

Despite the strict language of Rule 407, the numerous pitfalls for Plaintiff and the proverbial trump card of Rule 403, creative, thorough discovery, investigation, and analysis can lead to the admission of evidence of subsequent remedial measures under common law exceptions to the Rule.