



2018

§4.23 Subsequent Remedial Measures Generally Excluded

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Recommended Citation

Mueller, Christopher B. and Kirkpatrick, Laird C. and Richter, Liesa, §4.23 Subsequent Remedial Measures Generally Excluded (2018). C. Mueller, L. Kirkpatrick, & L. Richter, *Evidence* §4.23 (6th ed. Wolters Kluwer 2018); GWU Law School Public Law Research Paper No. 2018-57; GWU Legal Studies Research Paper No. 2018-57. Available at SSRN: <https://ssrn.com/abstract=3275024>

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§4.23 Subsequent Remedial Measures Generally Excluded

FRE 407 bars evidence of subsequent remedial measures to prove negligence, culpable conduct, product or design defects, or the need for a warning or instruction. For example, evidence that defendant made repairs at a place where plaintiff had sustained injuries in an accident cannot be proved in a later lawsuit to prove that defendant was negligent in maintaining the place at the time of the accident.

Reasons to exclude

Such evidence is excluded for three reasons. First, the fact that a party made repairs after an accident may not indicate negligence or fault. Often premises or instrumentalities that are safe can be made safer, and a party undertaking repairs may be employing a higher standard of safety than due care requires. Second, even if subsequent repair tends to show negligence, there is a strong social policy to encourage people and companies to make such repairs to enhance the safety of others. Parties might be deterred from undertaking them if their efforts could be used against them in a later suit arising out of an accident.¹ Finally, regardless whether FRE 407 encourages parties to undertake subsequent remedial measures, it seems unfair to penalize them for socially responsible conduct.

What seems the most important rationale (encouraging subsequent repairs) is open to considerable doubt. Most ordinary citizens are unaware of FRE 407 and do not consult a lawyer in deciding whether to undertake repairs. And it is doubtful that large manufacturers, even if well-advised and familiar with litigation, need the incentive of FRE 407 to make their products safer. They are likely to do so regardless of evidentiary consequences in order to prevent further injuries and lawsuits and avoid the possibility that inaction in the face of repeated accidents or injuries will itself be taken as proof of negligence, or even as the basis for the award of punitive damages. Evidence of subsequent remedial measures satisfies the liberal relevancy standard of FRE 401 and at least sometimes does tend to prove negligence or culpable conduct, and therefore some state counterparts of FRE 407 take precisely the opposite approach.²

Remedial measures

The term “remedial measures” in FRE 407 and its state counterparts is interpreted broadly to

§4.23 1. *Werner v. Upjohn Co.*, 628 F.2d 848, 857 (4th Cir. 1980) (rationale behind FRE 407 is that “people in general would be less likely to take subsequent remedial measures if their repairs or improvements would be used against them in a lawsuit arising out of a prior accident”), *cert. denied*, 449 U.S. 1080. *See also* ACN, FRE 407 (most important ground for exclusion is “social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety”).

2. *See* Rhode Island Rule 407 (“When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is admissible.”).

include changes in design,³ installation of protective devices,⁴ new warnings,⁵ removal of dangerous conditions,⁶ revision of contracts,⁷ changes in policies⁸ or regulations⁹ or procedures or protocol,¹⁰ and discipline¹¹ or dismissal of employees.¹² It also includes instructions to take remedial measures,¹³ but post-event investigations, tests, or reports are not themselves subsequent

3. Hardy v. Chemetron Corp., 870 F.2d 1007, 1010 (5th Cir. 1989) (wiring change on bacon slicer); Cann v. Ford Motor Co., 658 F.2d 54, 59 (2d Cir. 1981) (modification of transmission), *cert. denied*, 456 U.S. 960.

4. Reddin v. Robinson Property Group Ltd. Partnership, 239 F.3d 756, 760 (5th Cir. 2001) (area of fall on gambling barge taped off afterwards).

5. Chlopek v. Federal Ins. Co., 499 F.3d 692, 700 (7th Cir. 2007) (modified warning label).

6. Rush v. Troutman Investment Co., 121 Or. App. 355, 854 P.2d 968 (1993) (manager ordered clothing rack removed that had injured plaintiff).

7. R. M. Perlman v. N.Y. Coat, Suit, Union Local 89-22-1, 33 F.3d 145, 156 (2d Cir. 1994) (letter from union suggesting changes in contract clause could not be used to prove clause was unlawful; recommendation in letter was subsequent remedial measure); Noble v. McClatchy Newspapers, 533 F.2d 1081, 1090 (9th Cir. 1975) (deletion of anticompetitive provision from distributor contracts after they were challenged), *cert. denied*, 433 U.S. 908.

8. Pastor v. State Farm Mutual Auto Insurance Co., 487 F.3d 1042, 1045 (7th Cir. 2007) (change in language of insurance policy stating that “day” meant 24 hours could not be used to prove that “day” in earlier version of contract meant “any part of a day”; such use would violate FRE 407 by “discouraging efforts to clarify contractual obligations” and “perpetuating any confusion caused by unclarified language”).

9. Ford v. Schmidt, 577 F.2d 408, 410-411 (7th Cir. 1978) (change in prison regulations after incident giving rise to suit), *cert. denied*, 439 U.S. 870; SEC v. Geon Indus., Inc., 531 F.2d 39, 52 (2d Cir. 1976) (new company regulation concerning brokerage practices).

10. Estate of Hamilton v. City of New York, 627 F.3d 50, 54 (2d Cir. 2010) (excluding proof that management involved more people in employment process to lessen feeling in unsuccessful candidates that they were unfairly passed over).

11. Specht v. Jensen, 863 F.2d 700, 701-702 (10th Cir. 1988) (in civil rights action, evidence excluded that city had stated that “appropriate disciplinary action would be taken” against officers); Maddox v. City of Los Angeles, 792 F.2d 1408, 1417-1418 (9th Cir. 1986) (excluding evidence of disciplinary proceeding against police officer because it was a remedial measure).

12. Nolan v. Memphis City Sch., 589 F.3d 257, 273-274 (6th Cir. 2009) (evidence that employer “subsequently discharged an employee accused of causing a plaintiff’s injury may be properly excluded as a subsequent remedial measure” under FRE 407).

13. Rush v. Troutman Inv. Co., 121 Or. App. 355, 854 P.2d 968 (1993) (“Instructions to take remedial measures are

remedial measures excluded by the Rule,¹⁴ even where they lead to later adoption of such measures.¹⁵

Third-party and mandated measures

Despite the broad language of FRE 407, the prevailing view is that third-party remedial measures or repairs are not covered by the exclusionary principle, which means (for example) that plaintiffs suing manufacturers may prove remedial measures undertaken by employers or owners of the equipment or processes that caused the injury, who are not themselves being sued.¹⁶ Some courts recognize an even broader exemption, holding that only “voluntary” remedial measures are covered by FRE 407,¹⁷ with the result that measures mandated by governmental or regulatory authority (such as many product recalls) are not covered because they do not represent self-motivated socially responsible behavior of the sort that FRE 407 seeks to encourage.¹⁸ Arguably, however, voluntary product recalls undertaken by manufacturers on their own are and should be covered by the principle, even though undertaken under the pressure of a legal regime that might impose liability if the defect goes uncorrected. In any event, proof of recalls is sometimes excluded

themselves remedial measures.”).

14. *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron, Div. of Textron, Inc.*, 805 F.2d 907, 918-919 (10th Cir. 1986) (it “would strain the spirit of the remedial measure prohibition in Rule 407 to extend its shield to evidence contained in post-event tests or reports” as distinguished from actual remedial measures). Mere tests or reports do not fit FRE 407 because they do not make the event giving rise to the claim “less likely to occur.”

15. *Prentiss & Carlisle v. Koehring-Waterous*, 972 F.2d 6, 10 (1st Cir. 1992) (FRE 407 does not bar evidence of a party’s post-accident analysis of its products, even though “the analysis may often result in remedial measures being taken”).

16. *Diehl v. Blaw-Knox*, 360 F.3d 426, 429-430 (3d Cir. 2004) (error to exclude evidence that owner of machine, who was not a party, made post-accident modifications to prevent similar accidents in future; FRE 407 does not apply to evidence of remedial measures taken by a nonparty); *Buchanna v. Diehl Machine, Inc.*, 98 F.3d 366, 369 (8th Cir. 1996) (in suit against maker of saw, proof that plaintiff’s employer installed T-guard after accident supported finding of liability and was not excludable under FRE 407).

17. *Millennium Partners, L.P. v. Colmar Storage, LLC*, 494 F.3d 1293 (11th Cir. 2007) (FRE 407 does not apply to remedial measures “taken without the voluntary participation of the defendant”).

18. *O’Dell v. Hercules, Inc.*, 904 F.2d 1194, 1204 (8th Cir. 1990) (recognizing exception “for evidence of remedial action mandated by superior government authority”); *In re Aircrash in Bali, Indonesia*, 871 F.2d 812, 817 (9th Cir. 1989) (purpose of FRE 407 “is not implicated in cases involving subsequent measures in which the defendant did not voluntarily participate”), *cert. denied*, 493 U.S. 1017. *See generally* Note, The “Superior Authority Exception” to Federal Rule of Evidence 407: The “Remedial Measure” Required to Clarify a Confused State of Evidence, 1991 U. Ill. L. Forum 843.

under FRE 403, and findings and communications mandating recalls raise hearsay issues.¹⁹

Subsequent measures

As originally enacted, FRE 407 left room to argue that a “subsequent” measure reaches steps taken after the date of the manufacture of the product that caused the injury, rather than after the accident.²⁰ This argument was eliminated by a 1997 amendment defining subsequent to mean “after an injury or harm allegedly caused by an event.” The restyled Rule restates the same limitation in different language by applying only to measures taken “that would have made an *earlier injury or harm* less likely to occur.” Hence a remedial measure taken after manufacture of a product but before plaintiff’s injury is not covered,²¹ although proof of such a measure is sometimes excludable under FRE 403.²² Some courts admit evidence of a modification planned before plaintiff’s accident even though implemented afterwards.²³

The policy of FRE 407 arguably applies only to remedial measures taken in response to an accident, and some authority holds that measures taken after plaintiff’s accident are not excludable if defendant was unaware of it and no claim had yet been made.²⁴

19. *Compare* Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 94 (2d Cir. 1980) (drug label changes made in response to FDA pressure excludable under FRE 403) *with* Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988) (recall of automobiles was covered by FRE 407). Official findings underlying government-required remedial measures are hearsay, but they may fit FRE 803(8)(C). *See* §8.50, *infra*.

20. *Compare* Huffman v. Caterpillar Tractor Co., 908 F.2d 1470, 1481 (10th Cir. 1990) (“wording and history of Rule 407” make it clear that “event” refers to “the time of the accident or injury to the plaintiff, not to the time of manufacture of the product or creation of the hazard”) *with* Petree v. Victor Fluid Power, Inc., 831 F.2d 1191, 1197-1198 (3d Cir. 1987) (no abuse of discretion to exclude warning decals that were added subsequent to manufacture but prior to accident because offered on issue of foreseeability, and danger “must be foreseeable at the time of sale”).

21. *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 686 (5th Cir. 1991) (error to exclude changes to warning placard and instruction manual made after sale but prior to accident); *Roberts v. Harnischfeger Corp.*, 901 F.2d 42, 44 n.1 (5th Cir. 1989) (proper to admit evidence of change implemented in January 1984 where accident did not occur until February 1984).

22. *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472, 481 (1st Cir. 1997) (trial judge may exclude evidence of post-manufacture, pre-accident design modifications if its probative value is substantially outweighed by its prejudicial effects).

23. *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1523 (1st Cir. 1991) (FRE 407 does not exclude evidence of design modifications used on later model when these “were on the drawing board” before machine involved in accident was made, but evidence properly excluded as more prejudicial than probative).

24. *See, e.g., Van Gordon v. Portland Gen. Elec. Co.*, 693 P.2d 1285, 1289-1290 (Or. 1985) (evidence of new signs posted after accident were not excludable “subsequent repairs” where defendant did not know of injury to plaintiff at time they were posted).

Measures after *similar* accident

FRE 407 does *not* bar evidence of remedial measures taken after an accident similar to the one giving rise to plaintiff's claim but before plaintiff's own accident (a point that is clear under the 1997 amendment, even if it was uncertain under the prior language).²⁵ Some pre-amendment decisions had extended the protection of FRE 407 to remedial measures taken in response to earlier accidents rather than the one giving rise to the claim in the instant case.²⁶ Sometimes, of course, accidents or repairs prior to the event in suit may themselves be proved to show that defendant had knowledge or notice of a dangerous situation, which may bear on negligence in design, manufacture, or maintenance or may be relevant to claims of failure to warn or even recall a product.

Strict liability claims

Originally FRE 407 barred evidence of subsequent remedial measures only when offered to prove "negligence or culpable conduct," inviting arguments that the Rule did not apply to strict liability claims. Most federal circuits, however, applied FRE 407 in strict liability actions,²⁷ and this approach was codified by a 1997 amendment to the Rule specifying that "evidence of subsequent remedial 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."

By way of contrast, many state courts interpreting their state counterpart of original FRE 407 have taken the opposing view that evidence of subsequent remedial measures is admissible in strict liability actions.²⁸ In some states, legislative commentary resolves the issue.²⁹

25. *Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 96 (1st Cir. 1999) ("measures that take place *before* the accident at issue do not fall within the prohibition") (but excluding under FRE 403).

26. *See Kelly v. Crown Equip. Co.*, 970 F.2d 1273, 1277 (3d Cir. 1992) (policy of FRE 407 supports "exclusion of evidence of safety measures taken before someone is injured by a newly manufactured product, even if those measures are taken in response to experience with an older product of the same or similar design").

27. Among pre-amendment federal cases taking the view that FRE 407 applies in strict liability cases, *see Raymond v. Raymond Corp.*, 938 F.2d 1518 (1st Cir. 1991); *Cann v. Ford Motor Co.*, 658 F.2d 54, 60 (2d Cir. 1981), *cert. denied*, 456 U.S. 960.

28. *See, e.g., Forma Scientific, Inc. v. Biosera, Inc.*, 960 P.2d 908 (Colo. 1998); *Dura Corp. v. Harned*, 703 P.2d 396, 411 (Alaska 1985); *Chart v. General Motors Corp.*, 258 N.W.2d 680, 684 (Wis. 1977). *But see Krause v. American Aerolights*, 762 P.2d 1011, 1015 n.6 (Or. 1988) (state counterpart of FRE 407 applies in products liability actions; listing split of federal and state authorities on question).

29. *Compare* Commentary, N.C. R. Evid. 407 ("It is the intent of the Committee that the rule should apply to all types of actions.") *with* Committee Comment, Colo. R. Evid. 407 ("The phrase 'culpable conduct' is not deemed to include proof of liability in a 'strict liability' case based on defect, where the subsequent measures are properly

The argument for applying FRE 407 to strict liability claims is that they raise many of the same issues as a negligence claim.³⁰ Plaintiffs often assert both, and instructions could not be effective in limiting juries to considering proof of subsequent remedial measures on the strict liability claim but not the negligence claim. Moreover, the policies of FRE 407 are said to apply with full force to strict liability claims in order to encourage manufacturers to make their products safer, or at least to avoid deterring them from doing so.³¹

Courts refusing to apply Rule 407 to strict liability claims take the view that manufacturers are likely to make their product safer without the incentive provided by Rule 407. Remedial measures are implemented regardless of whether they are later provable, simply to prevent future claims and the possibility of punitive damage awards for failure to correct a known defect.³² And in strict liability cases, subsequent remedial measures often have particularly high probative value on the question whether a product was designed defectively. Even if Rule 407 were applicable, evidence of subsequent remedial measures is often admissible on the issue of feasibility. Rather than confuse the jury with a limiting instruction directing them to distinguish between feasibility and liability, arguably it is preferable to make the evidence generally admissible.

***Erie* issue**

Since many states refuse to apply their own Rule 407 to strict liability claims, the issue arises whether federal courts must defer to state law in diversity cases. Most federal courts hold that FRE 407 controls in diversity cases, and the 1997 amendment at least *assumes* that this view is correct.³³ A significant minority of pre-1997 decisions reached the opposite conclusion, insisting that *state* counterparts should be honored.³⁴

admitted as evidence of the original defect.”).

30. *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 467 (7th Cir. 1984) (strict liability is “something of a misnomer in products cases” for liability exists only “if a product is defective or unreasonably dangerous,” which “bring[s] into play factors of cost and risk similar to those that determine negligence”).

31. *Grenada Steel Indus. v. Alabama Oxygen Co.*, 695 F.2d 883, 886-889 (5th Cir. 1983) (assumption that admitting design changes evidence would deter “is not demonstrably inapplicable to manufacturers”).

32. *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974) (“manifestly unrealistic” to suggest that a manufacturer “will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image” because evidence of such improvement may be admitted in suit).

33. *See, e.g., Flaminio v. Honda Motor Co.*, 733 F.2d 463, 470 (7th Cir. 1984) (excluding subsequent remedial measure under FRE 407 and rejecting claim that *Erie* requires application of identical state rule interpreted by state courts as being inapplicable in product cases); 1997 ACN to FRE 407 (speaking of a “uniform federal rule” applicable in product cases, most of which are brought under state law).

34. *See Wheeler v. John Deere Co.*, 862 F.2d 1404, 1410 (10th Cir. 1988) (whether to admit evidence of subsequent remedial measures is based on policy considerations, so “it is governed by state law in diversity actions”). *See also*

The best argument for applying state law is that the issue is substantive and there is no federal intent to legislate on substantive points relating to product liability, hence FRE 407 should not apply even though no express language points toward this result. (It is not possible to argue that this substantive area is beyond *federal power* to regulate, since Congress obviously could enter the field of product liability. There is only an argument that Congress did not intend, when the Rules were enacted and when FRE 407 was amended, to regulate this area.) The best argument *for* applying federal law on this point is that there is no *textual* basis for refusing to apply FRE 407, and the provision has a procedural component in preventing jury confusion and furthering the cause of efficient and accurate fact ascertainment.³⁵

Donahue v. Phillips Petroleum Co., 866 F.2d 1008, 1013 & n.10 (8th Cir. 1989) (“not clear whether federal or state law” applies). *See generally* Note, Design Defects in the Rules Enabling Act: The Misapplication of Federal Rule of Evidence 407 to Strict Liability, 65 N.Y.U. L. Rev. 736 (1990) (endorsing minority view).

35. Flaminio v. Honda Motor Co., 733 F.2d 463, 470 (7th Cir. 1984) (no deference to state law required in diversity case because “substantive judgment that underlies Rule 407 is entwined with procedural considerations” and so occupies “that borderland where procedure and substance are interwoven” that it passes muster under *Hanna v. Plumer*).