Driver Discipline

Application of the Subsequent Remedial Measures Doctrine

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Trucking and transportation companies often have policies requiring drivers deemed to have been at fault or involved in a "preventable" accident to be discharged, disciplined or sent for further training or retraining. Such evidence, if presented to a jury, may be so prejudicial as to be dispositive on the issue of liability. Thankfully, the longstanding rule is that evidence of repairs, improvements, safety precautions and the like made after an accident is not admissible to prove negligence. *See* Thomas J. Fleming, *Admissibility of Evidence of Repairs, Change of Conditions, or Precautions Taken after Accident—Modern State Cases*, 15 A.L.R. 5th 119 (2005) at §§4 and 5; 29 Am. Jur. 2d, *Evidence* §§275 and 628. This article discusses the subsequent remedial measures doctrine as it applies to post accident employee discipline.

Relevance and Public Policy

The common law recognized two distinct grounds for excluding evidence of subsequent remedial measures: relevance and public policy. The relevance ground for exclusion proceeds from the proposition that a subsequent remedial measure is not an admission of fault because the conduct is equally consistent with other possibilities, such as a sincere desire to minimize the risk of future injury, and contributory negligence. This line of reasoning is derived from *Hart v. Lancashire & Yorkshire Railway Co.*, 21 L.T.R. 261, 263 (1869), in which the Court of Exchequer Chamber concluded that "people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident…" The common law thus rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Id. See Columbia & P.S. R.R. v. Hawthorne*, 144 U.S. 202, 207 (1892) ("[T]he taking of precautions against the future is not to be construed as an admission of responsibility for the past.").

The public policy ground for exclusion is intended to encourage people to take steps to promote safety—or, at least, not to discourage them from doing so. In *Morse v. Minneapolis & Saint Louis Railway*, 30 Minn. 465, 16 N.W. 358, 359 (1883), the Supreme Court of Minnesota explained: "The more careful a person is, the more regard he has for the lives of others, the more likely he would be to [make repairs], and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence." The court concluded that "such a rule [would put] an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." *Id. See Terre Haute and Indianapolis Railroad Company v. Clem*, 123 Ind. 15, 23 N.E. 965, 966 (1890) ("True policy and sound reason require that men should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been the wrong-doer.").

The common law rule regarding subsequent remedial measures was codified in 1975 when Congress approved the Federal Rules of Evidence. Rule 407 provides, in pertinent part:

> 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, or culpable conduct… 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.

The Advisory Committee Notes state that Rule 407 "incorporates conventional doctrine." The rule thus codifies the common law as to both grounds for excluding evidence of subsequent remedial measures. The Notes reflect that the drafters found the policy basis for the rule to be the "more impressive." Others disagree, reasoning that the limited probative value of such evidence is nearly always substantially outweighed by the prejudice created by introducing it. *See* Stephen A. Saltzburg, *et al.*, *Commentary on Rule 407*, United States Code Service—Lawyers Edition (1998) at 498, citing *In re Air Crash Disaster*, 86 F.3d 498, 529 (6th Cir. 1996). "What Rule 407 does is to keep the jury's attention on the defendant's information and conduct at the relevant time—*i.e.*, prior to the accident." *Id.*, citing *Cook vs. McDonough Power Equip. Inc.*, 720 F.2d 829 (5th Cir.

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1983). The majority view appears to favor the public policy approach.

The debate over the rationale for the rule is not a purely academic one. As discussed in the following section, a court's ruling may well depend on whether it views the rule as one grounded in relevance or in public policy.

Investigations and Remedial Actions

The threshold issue in a Rule 407 analysis is whether or not the evidence pertains to a remedial "measure" within the meaning of the rule. The fact that an employer discharged, disciplined or retrained a driver following an accident easily qualifies for exclusion as a remedial measure. *See*, *e.g.*, *Specht v. Jensen*, 863 F.2d 700, 701 (10th Cir. 1988), *cert. denied* 488 U.S. 1088 (1991); *Hull v. Chevron U.S.A.*, 812 F.2d 584, 586–87 (10th Cir. 1987); *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1417 (9th Cir. 1986); *Jumper v. Yellow Corp.*, 176 F.R.D. 282 (N.D. Ill. 1997); *Dukett v. Mausness*, 546 N.E.2d 1292 (Ind. App. 1989); *Rynar v. Lincoln Transit Co.*, 129 N.J.L. 525, 30 A.2d 406, 410 (E. & A. 1943); *Hewitt v. Taunton St. Ry. Co.*, 167 Mass. 483, 46 N.E.106, 107 (1897). The same cannot be said of accident investigation reports, internal memoranda, or employee files indicating the employer's reasons for taking such action. The distinction between actions and findings of fact, conclusions, opinions and recommendations has led many courts to hold that the former are protected, but the latter are not. *See*, *e.g.*, *Westmorland v. CBS, Inc.*, 601 F.Supp. 66, 67 (S.D.N.Y. 1984) (exclusion of subsequent remedial measures as admissions of fault "does not mean that competent evidence resulting from an internal investigation… must also be excluded"); *Fox v. Kramer*, 22 Cal. 4th 531, 547, 93 Cal. Rptr. 2d 497 (2000); *Ensign v. Marion County*, 140 Or. App. 114, 914 P.2d 5, 7 (App. Ct. 1996) ("To be excluded under the rule, the measure at issue must be one that could have been taken before the event that gave rise to the claim."); *In re Chicago Flood Litigation*, 1995 WL 437501 (N.D. Ill. 1995) ("Rule 407 does not bar evidence of a party's own analysis of events, even if those events result in the party taking remedial action.").

When addressing the admissibility of an in-house accident investigation, a distinction should be made between investigative conclusions and facts. They are discussed separately below. Preliminarily, defense counsel should consider whether an in house investigation falls within the scope of the work product doctrine. That doctrine is beyond the scope of this article because it is a rule of discovery whereas the subsequent remedial measures doctrine is a rule of admissibility.

Investigative Conclusions

In *City of Bethel v. Peters*, 97 P.3d 822 (Alaska 2004), the Supreme Court of Alaska held that evidence that the city installed safety bars after a fall down accident in the shower of a city-owned senior center was inadmissible pursuant to Alaska Rule of Evidence 407. However, the court also held that findings and conclusions as to the cause of the accident contained in the city's investigation report were properly admitted in evidence because: 1) the presumption codified in Rule 402 that all relevant evidence is admissible "strongly suggests… that such evidence should be admitted despite any possible disincentive to safety improvements"; 2) the rule speaks of remedial "measures," which the court took to mean concrete actions and not "investigations and recommendations pointing toward those actions"; and 3) the rule excludes only those measures that would have made the harm less likely to occur if they had been "taken previously," that is, before the accident. "One cannot investigate an accident before it occurs… so an investigation and report… cannot be a measure that is excluded." *Id.* at 826–27.

A distinction should be made between investigative conclusions and facts.

In *Martel v. Massachusetts Bay Trans. Authority*, 403 Mass. 1, 525 N.E.2d 662 (1988), the Supreme Court of Massachusetts held that public policy precluded admission of an accident report containing the bus company's opinion that its driver could have prevented the accident. It was undisputed that the purpose of the investigation was to prevent further accidents by identifying drivers who required additional safety training. The court recognized that an investigation is a necessary prerequisite to any remedial measure, and that if a defendant does not determine the cause of an accident, it can scarcely hope to prevent a recurrence.

> The investigation is inextricably bound up with the subsequent remedial measures to which it may lead, and questions of admissibility of evidence as to each should be analyzed in conjunction and answered consistently. If, as a result of the investigation, the defendant had discharged the bus driver, or required him to undergo additional safety training, evidence of these steps would fall squarely within the rule excluding evidence of subsequent remedial measures. The investigation cannot sensibly be treated differently. To do so would discourage potential defendants from conducting such investigations, and so preclude safety improvements, and frustrate the salutary public policy underlying the rule.

Martel, 525 N.E. 2d at 664.

Peters highlights the limits of a relevance-based approach to subsequent remedial measures. The argument that a defendant's conclusion about the cause of an accident is not relevant seems untenable given the broad modern definition of relevance. However, the court's reasoning is flawed to the extent that it treats relevance and public policy as factors to be balanced against each other rather than separate grounds for exclusion. The public policy ground for excluding evidence of subsequent remedial measures is not based on relevance, nor does the rule call for a balancing of one against the other. It is further noted that the public policy ground for exclusion is generally regarded as the "more impressive," which implies that if some sort of balancing test is used, the policy concerns should be given more weight—not less.

Martel is rooted in public policy, which solves the problem of what constitutes a "measure," and in the authors' view, provides a more powerful argument for excluding accident reports and related documents developed in the course of an in-house investigation. It stands for the common sense proposition that investigation is necessary to remediation. Protecting the latter but not the former frustrates "the salutary public policy underlying the rule." 525 N.E.2d

at 664. *But see Pearl v. Chicago Transit Authority*, 177 Ill.App.3d 499, 532 N.E.2d 439 (1988) (*automatic* dismissal of drivers involved in a pedestrian accident pursuant to fixed company policy does not implicate policy bases for exclusion of subsequent remedial measures). Defense counsel should make the case for exclusion on that basis.

Defense counsel should also consider Rule 403 as an alternative ground for exclusion. In *Villalba v. Consolidated Freightways*, 2000 WL 1154073 (N.D. Ill. 2000), the defendant truck driver had been disciplined based on his employer's finding that the accident was "preventable" because he had made an improper lane change. The accident review was conducted "for the sole purpose of increasing the driver's understanding of how to prevent accidents. *Id.* Defendants moved *in limine* to bar all evidence of the accident investigation and the discipline imposed on the driver. *Id.* at 5.

The defendant employer's remedial action was part of a fleet safety program based on National Safety Council guidelines. The National Safety Council publication titled "A Guide to Determine Motor Vehicle Accident Preventability" calls for comprehensive fleet safety programs consisting of field investigations, a review committee, driver discipline and an internal appeals process. The Guide defines a "preventable accident" as "one in which the driver failed to do everything that reasonably could have been done to avoid the accident. In other words, when a driver commits errors and/or fails to react reasonably to the errors of others, the… [NSC] considers an accident to be preventable." *Id.* at 6. The Guide further states that preventability "is not solely based on or determined by legal liability." *Id.*

The *Villalba* court acknowledged a split in authority regarding admissibility of investigative conclusions under the subsequent remedial measures rule. The court resolved the issue by holding that "even if [the employer's] conclusions… are not remedial measures… such evidence [is] inadmissible under Rule 403," which precludes evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. *Id.* Noting that preventability is a different standard than negligence, the court reasoned that "the two standards may confuse and mislead the jury and result in a mini-trial regarding… the significance of the preventability finding, diverting attention away from the real issues of negligence. Likewise… the [employer's] finding of preventability could lead the jury to decide the issue of negligence by improper reference to the preventability standard and [the employer's] finding of preventability." *Id.* The court recognized both the distinction between preventability and negligence, and the fact that the distinction might not be appreciated by a jury and thus presents danger of unfair prejudice. *Villalba* is an example of how the relevance and the public policy rationales sometimes conjoin to create a powerful argument for exclusion of post accident remedial measures in truck accident cases.

Investigative Facts

Even if the conclusions of an investigation are excluded, the facts discovered during the investigation may not be. In *Bulger v. Chicago Transit Authority*, 345 Ill.App.3d 103, 801 N.E.2d 1127 (2003), the plaintiff sued the Chicago Transit Authority (CTA) for injuries he received in a bus accident. The court held that it was error to admit evidence that the CTA had charged its driver with a violation of its rules and had sent him for retraining. The court reasoned that "the CTA's investigative opinions, conclusions, and follow-up actions are inadmissible as post-accident remedial measures." 345 Ill.App.3d at 116, 125, 801 N.E. 2d at 1138–39. But the court made it clear that its opinion "should not be interpreted as precluding the admission of factual 'time of the accident' evidence…. Factual evidence about an accident obtained as a result of investigating the accident can properly be admitted as evidence providing it constitutes 'time of the accident' evidence, not post-accident remedial measures." *Id.*

The distinction between "investigative opinions, conclusions and follow up actions" and factual "time of the accident" evidence is logical and fair to both sides at least insofar as Rule 407 is concerned. It recognizes the litigants' rights to access to relevant facts concerning the accident itself and it does not impair the public policy purpose for the rule.

That is not to say that "time of the accident" evidence may not be excluded for other reasons. Investigation reports are typically offered into evidence under the admissions and/or business records exceptions to the hearsay rule. Even if a report meets the criteria for one or both of those exceptions, it may contain multiple levels of hearsay subject to exclusion under Rule 805. *See Benson v. Tennessee Valley Elec. Co-op.*, 868 S.W.2d 630, 641 (Tenn. App. 1993); *Osterneck v. E.T. Barwick Industries, Inc.*, 106 F.R.D. 327, 333 (N.D. Ga. 1984), *citing* J. Weinstein and M. Berger, *Weinstein's Evidence*, ¶801(d)(2)(C)[01] at 801-157 and 801-158 (1984) ("hearsay within an agent's statement… is best excluded under Rule 805 or Rule 403…"). *See also Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272, 280 (5th Cir. 1991). The contents of an investigation report may also be excluded under Rule 403 if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or confusion of the issues. *See Advisory Committee Note to Rule 407* (1997 amendment).

Evidence Offered for "Another Purpose"

Rule 407 excludes evidence of subsequent remedial measures offered to prove negligence or culpable conduct. It does not exclude such evidence "when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." The list of other purposes is illustrative, not exhaustive, but it is submitted the rule should be construed to preserve the "important policy of encouraging subsequent remedial measures." *Werner v. Upjohn Co., Inc.*, 628 F.2d 848, 856–57 (4th Cir. 1980), *cert. denied* 449 U.S. 1080 (1981).

Plaintiffs offering evidence of subsequent remedial measures for any purpose other than to prove negligence should be required to establish three factors: 1) the issue upon which the evidence is offered is material; 2) the evidence is relevant to the issue; and; 3) the probative value of the evidence is not substantially outweighed by its prejudicial effect. *Holland v. First Nat'l Bank*, 519 So.2d 460, 462 (Ala. 1987). Professor McCormick cautions that "the court should be satisfied that the issue on which it is offered is of substantial importance and is actually, and not merely formally, in dispute, that the plaintiff cannot estab-

lish the fact to be inferred conveniently by other proof, and consequently that the need for the evidence outweighs the danger of its misuse." *Werner v. Upjohn Co., Inc.*, *supra* at 855, quoting *McCormick on Evidence*, §275, at 668–69 (2d ed. 1972); *Hallmark v. Allied Products, Corp.*, 132 Ariz. 434, 646 P.2d 319, 324 (App. Ct. 1982); *Welch v. Railroad Crossing, Inc.*, 488 N.E.2d 383, 392 (Ind. App. 1986); *Landrum v. DeBruycker*, 90 S.D. 304, 240 N.W.2d 119, 121 (1976).

In many cases the *bona fides* of the other purpose for which the evidence is offered will depend on whether the issue is genuinely in dispute. *See Werner v. Upjohn Co., Inc.*, *supra* at 855; *Fish v. Georgia-Pacific Corp.*, 779 F.2d 836, 840 (2d Cir. 1985); *Standridge v. Alabama Power Co.*, 418 So.2d 84, 88 (1982). In a case involving a driver employee who was disciplined or terminated as a result of the accident, ownership, control and feasibility of the remedial measure are typically not controverted. Defense counsel might wish to stipulate to issues that are not truly in dispute in order to thwart efforts to present subsequent remedial measures evidence under the guise of some "other purpose."

Causation

Perhaps it is no surprise that what is meant by "negligence" as the term is used in Rule 407 is unclear—and hence, there is no bright line between what is proscribed and what is permitted. In *Wright & Graham*, *23 Federal Practice & Procedure, Evidence §5285*, the authors assert that the meaning of "negligence" is implied in the Advisory Committee's Note, which states that the rule bars evidence offered as an "admission of fault." The authors conclude that evidence of subsequent remedial measures is barred only if it is offered to show the actor's belief that he breached a duty of care. The authors assert that the rule does not apply when the evidence is offered to prove some other element of the cause of action. *Id.*

This narrow interpretation of "negligence" has led some courts to hold that while evidence of subsequent remedial measures may not be used to prove a breach of duty, it may be used to prove causation. *See*, *e.g.*, *Bailey v. Kawasaki-Kisen, K.K.*, 455 F.2d 392, 396 (5th Cir. 1972); *Wetherill v. University of Chicago*, 565 F.Supp. 1553, 1558 (N.D. Ill. 1983); *Rieger v. Coldwell*, 254 Mont. 507, 839 P.2d 1257, 1259 (1992). This distinction appears to be made most often in product liability cases involving complex issues of causation that are separate and distinct from the issue of product defect. In *Wetherill v. University of Chicago*, for example, the plaintiffs alleged claims for strict liability, medical malpractice and battery arising from injuries due to *in utero* exposure to diethylstilbestrol (DES). The plaintiffs were allowed to use the drug manufacturer's literature, published after the fact, to prove that prenatal exposure to the drug causes the kind of injuries they suffered. The court reasoned that "[b]ecause causation is analytically distinct from fault ('negligence or culpable conduct'), it is plainly 'another purpose' for which evidence of subsequent remedial measures can be offered under Rule 407." 565 F.Supp. at 1558.

The public policy ground for excluding evidence of subsequent remedial measures is not based on relevance.

In the context of a truck accident case, the distinction is specious. This is so for two reasons: first, because truck accidents do not ordinarily involve esoteric issues of causation of the kind more commonly encountered in product liability cases; and second, because the discharge, discipline or retraining of a driver due to his or her involvement in an accident cannot be separated from the issue of negligence. *See* Graham, *1 Handbook of Fed. Evid. §407.1* (5th ed.), quoting 2 Weinstein, *Weinstein's Evidence* ¶407[02] at 407–17 (1992) ("Sometimes evidence of subsequent remedial measures involves issues that cannot be clearly separated from the fundamental issue of negligence."). Indeed, evidence of post accident employee discipline is almost always relevant for only one purpose—to prove negligence.

In *Freeman v. Funtown/Splashtown, USA*, 2003 Me. 101, 828 A.2d 752, 754 (2003), the Supreme Judicial Court of Maine held that "[e]vidence of causation is a necessary element of a negligence claim… and… therefore, any evidence used to prove causation is also used to prove negligence. Thus, evidence of subsequent remedial repairs intended to prove causation is evidence offered to prove negligence." *See McClain v. Otis Elevator Company, Inc.*, 106 N.C. App. 45, 415 S.E.2d 78, 80 (N.C. App. 1992) (replacement of worn leveling brush after an elevator accident not admissible to show causal link between accident and alleged improper maintenance); *Russell v. Dunn Equipment, Inc.*, 712 S.W.2d 542, 546–47 (Tx. App. 1986) (excluding evidence that the defendant made brake repairs after the accident "because establishing this fact was as essential part of… [the] proof that… [defendant] was negligent"). *Cf. Harris v. Florida Power & Light Co.*, 700 So.2d 1240, 1241 (Fla. App. 1997).

It follows that in the context of a truck accident case, a narrow construction of "negligence" to mean only "breach of duty" is problematic for several reasons. It is inconsistent with the commonly accepted meaning of the term, which includes duty, breach, causation and damages. It undermines the public policy basis for the rule. And it glosses over the fact that it is often impossible to separate causation from negligence.

Impeachment

Rule 407 lists impeachment as one of the purposes for which subsequent remedial measures may be admitted into evidence. Impeachment aids in the search for truth and prevents defendants from taking unfair advantage of the rule. Yet, the use of subsequent remedial measures for impeachment is dangerous because, if broadly construed, the exception can swallow the rule. Impeachment also can be used all too easily as a subterfuge to bring otherwise inadmissible evidence to the attention of the jury. *See generally*, Harris, *The Impeachment Exception to Rule 407: Limitations On the Introduction of Evidence of Subsequent Remedial Measures*, 42 U. Miami L. Rev. 901, 903, 925–34 (1988).

In *Hardy v. Chemetron Corp.*, 870 F.2d 1007, 1011 (5th Cir.1989), the court explained that "[t]his exception must be applied with care, since any evidence of subsequent remedial measures might be thought to contradict, and so in a sense impeach, a party's testimony that he was

using due care at the time of the accident…. If this counted as 'impeachment' the exception would swallow the rule. *Public Service Co. of Indiana v. Bath Iron Works Corp.*, 773 F.2d 783, 792 (7th Cir.1985), quoting *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 468 (7th Cir.1984). "Evidence of subsequent measures is no more admissible to rebut a claim of non-negligence than it is to prove negligence directly." *Studard v. Dept. of Transportation*, 219 Ga. App. 643, 466 S.E.2d 236 (Ga. App. 1995). *But see Bickerstaff v. South Central, etc. Co.*, 676 F.2d 163 (5th Cir.1982).

The problem, as *Hardy* recognized, is that almost anything a defense witness testifies to can be contradicted in some way by evidence of subsequent remedial measures. If, for example, a truck driver testifies that he operated his vehicle safely, or if he denies that he was negligent, he could arguably be contradicted with the fact that he was disciplined due to his involvement in the accident. *See* Saltzburg, *et al.*, *Commentary on Rule 407*, *supra* at 500; *Herzog v. Lexington Tp.*, 167 Ill.2d 288, 657 N.E.2d 926, 933(1995); *Bulger v. Chicago Transit Authority*, *supra* at 1134. The unfairness of this kind of impeachment has led most courts to hold that evidence of subsequent remedial measures is not admissible if it is offered solely for simple contradiction of a defense witness. Saltzburg, *et al.*, *Commentary on Rule 407*, *supra*, citing *Kelly v. Crown Equip. Co.*, 970 F.2d 1273 (3d Cir. 1992). *See Tuer v. McDonald*, 112 Md. App. 121, 684 A.2d 478, 484–85 (Md. App.1995).

Defense counsel should be on guard against the plaintiff who seeks to open his or her own door through questioning designed to set up a defense witness for impeachment. In *Phar-Mor Inc. v. Goff*, 594 So.2d 1213, 1219 (Ala. 1992), the court held that in order to impeach a witness with evidence of a subsequent remedial measure the testimony providing the ground for impeachment "must have been initiated by the witness."

> The impeachment exception to the exclusionary rule was created to prevent a defendant from gaining an unfair advantage from self-serving, false, or misleading statements that would go unchallenged under the exclusionary rule…. Because the exception arose in order to protect a plaintiff from an aggressive defendant attempting to manipulate the exclusionary nature of the rule for his own advantage, it follows that a plaintiff who is on the offensive should not be allowed to manipulate the impeachment exception in order to introduce evidence for purposes otherwise inadmissible. In such a situation, the defendant is in greater need of protection than the plaintiff who is seeking to prove the defendant's negligence under the guise of impeachment.

Id. citing *Blythe v. Sears, Roebuck & Co.*, 586 So.2d 861 (Ala. 1991).

However, defendants seeking to use the rule offensively open the door to impeachment. In *Werner v. Upjohn Co., Inc.*, the court explained that "offensive" use of the rule is when a defendant takes advantage of it in order to gain "a direct benefit over and above the fact of exclusion." *Id.* at 857, 858; *Wolf by Wolf v. Proctor & Gamble Co.*, 555 F.Supp. 613, 623 (D.N.J. 1982). A defendant who disputes the condition of an accident scene and tries to exclude evidence that it was subsequently altered or repaired may be guilty of using the rule as a sword rather than a shield. The same rationale may apply if a defendant denies that the accident could have happened in the manner plaintiff alleges it did, or claims that the accident was due to the negligence of third parties or to circumstances over which the defendant had no control. *See*, *e.g.*, *Pitasi v. Stratton Corp.*, 968 F.2d 1558, 1561–62 (2d. Cir. 1992) (evidence that warning signs and ropes were placed at entrances to closed trails permitted to rebut operator's contributory negligence defense and impeach assertions that hazard was apparent and thus no warnings or protective measures were required); *Kenney v. Southeastern Pennsylvania Transp. Auth.*, 581 F.2d 351, 356 (3d Cir. 1978), cert. denied 439 U.S. 1073 (1979) (evidence that new light fixture installed four days after rape on subway platform admitted to rebut inference that lighting was sufficient based on daily inspections); *Rieger v. Coldwell*, 254 Mont. 507, 839 P.2d 1257, 1259 (1992) (evidence that defendant's method of repairing fallen light fixture was inconsistent with its theory as to cause of accident permitted as to "feasibility").

The witness who testifies that his or her conduct was proper, or safe, should be let alone insofar as impeachment with remedial measures is concerned—but the defendant who offers false or misleading testimony and then tries to hide behind Rule 407 can expect to be impeached. In *Martin v. Cleveland*, 66 Ohio App.3d 634, 585 N.E.2d 922 (1991), the defendant employer's claim that that the accident was "unavoidable" opened the door to rebuttal evidence of disciplinary measures taken against the driver, including a letter of reprimand and a mandatory defensive driving course. *Martin* shows that particular care must be taken when preparing the defense in a case in which an in-house investigation resulted in a finding that the accident was "preventable," or resulted in discipline inconsistent with a claim that the accident was unavoidable.

Verbal extravagance must also be avoided. In *Muzyka v. Remington Arms Co.*, 774 F.2d 1309, 1313 (5th Cir. 1985), for example, the defendant's witnesses in a gun misfire case testified at length that the Remington Model 700 "embodied the ultimate in gun safety…. [it was] [t]he premier rifle, the best and the safest rifle of its kind on the market." The Fifth Circuit held that it was reversible error to refuse to allow plaintiff to impeach the witnesses with evidence that the defendant changed the design of the gun after the accident. *See also Anderson v. Malloy*, 700 F.2d 1208, 1212–14 (8th Cir. 1983) (impeachment of defendants' statements that they did "everything possible" to make area safe prior to accident); *Wood v. Morbark*, 70 F.3d 1201, 1208 (11th Cir. 1995) (designer's testimony that wood chipper chute was the "safest length chute you could possibly put on the machine" opened door to impeachment).

Conclusion

Rule 407 codifies the common law regarding exclusion of evidence of subsequent remedial measures to prove negligence. The rule is justified on two grounds: relevance and public policy. Strong arguments can be made on both grounds, but in most cases the policy argument that evidence of remedial measures should be excluded in order to encourage (or at least not discourage) people from taking steps in furtherance of added safety is more powerful. The argument that an employer's action in discharging, disciplining or retraining a

driver after an accident should be protected on public policy grounds is logical and well supported in the case law.

Excluding accident reports and like materials is another matter. The rule, read literally, protects only "measures," which some courts have held include only concrete actions (*i.e.*, driver discipline), but not the investigations that precede those actions. Here, too, the public policy argument is stronger because it enables the argument that investigation is a necessary step toward remedial action. To protect the latter but not the former is to undermine the policy served by the rule. That said, defense counsel should not overlook other bases for exclusion, such as hearsay, unfair prejudice, undue delay and confusion of the issues.

Defendants acting pursuant to a comprehensive safety program of the kind recommended by the National Safety Council are well positioned to exclude all evidence related to post accident employee discipline. Defense counsel should emphasize that a finding of "preventability" pursuant to NSC guidelines is not to be equated with a finding of negligence. Furthermore, the social value of programs designed specifically to enhance safety by improving driver skills is clear and compelling.

Defense counsel would be wise to keep that in mind that Rule 407 is defensive in nature. It is intended to be used as a shield—not a sword. Counsel should not try to use the rule as an offensive device to gain an advantage over and above the fact of exclusion. Doing so will invite admission of remedial measures evidence for impeachment purposes, with embarrassing and potentially devastating results. Witnesses should be instructed to be matter of fact and to avoid speaking in superlatives—*i.e.*, the accident was "unavoidable." That too can be an invitation to disaster.

On the other hand, defense counsel should be on guard against efforts by plaintiffs to bring inadmissible evidence to the jury's attention under the guise of offering it for "another purpose," such as proving ownership or control, or for impeachment. Defense counsel should utilize the *in limine* motion practice and consider appropriate stipulations so as to resolve as many of these issues as possible before trial. Plaintiffs should be required to meet the three part test for admission of subsequent remedial measures evidence discussed earlier in this article. Finally, defense counsel should be mindful of efforts to improperly set up defense witnesses for impeachment with subsequent remedial measures that would otherwise be inadmissible. FD