New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
An ALM Publication
Litigation
WWW.NYLJ.COM
MONDAY, MAY 5, 2014

Practical Considerations for Dealing With Subsequent Remedial Measures

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BIGSTOCK

When David Bowie sang about "Changes" more than 40 years ago, he most certainly was not referring to measures by a defendant after an injury that "would have made an earlier injury or harm less likely to occur." See Fed. R. Evid. 407. It is, of course, black letter law under Federal Rule of Evidence 407 and New York's common law that evidence of remedial changes (or "ch-ch-ch-changes," to quote Mr. Bowie) after an injury are inadmissible to prove the defendant's negligence, culpable conduct, or other fault. However, evidence of subsequent remedial measures may be admissible if offered for another purpose, including "proving ownership, control, or the feasibility of precautionary measures," if disputed. See id.; *Stolowski v. 234 East 178th Street*, 89 A.D.3d 549 (1st Dept. 2011).

Though subsequent remedial measures are most commonly associated with product liability litigation, New York courts apply this doctrine in other types of litigation as well, often in creative ways. Thus, plaintiff and defense counsel must keep informed of developing case law in this area, and give advance thought as to how such potentially powerful evidence could get before the jury in a particular case.

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Basic Application

Courts consistently exclude evidence of subsequent remedial measures where offered as evidence of negligence, or other fault. The logic behind this rule, of course, is that a defendant's corrective action after the fact of an accident or other injury causing event does not establish that it was negligent for not making this change earlier, or that a product sold before a change was defective as sold. Furthermore, society does not want to deter actors from trying to make their products safer and from taking other remedial steps that might make injuries less likely to occur. Accordingly, New York courts will find such evidence inadmissible if offered to prove negligence, strict liability, or other fault. The scope of cases where this doctrine can arise is broad. For example, in *Flemmig v. Kwak*, 2013 N.Y. Misc. LEXIS 4812, 2013 NY Slip Op. 32592(U) (N.Y. Sup. Ct. Oct. 9, 2013), the plaintiff was bitten by a dog owned by the defendant, and sued both the dog's owner as well as the owner and manager of the residential building where the dog-bite occurred. On the defendants' motion for summary judgment, the plaintiff attempted to introduce evidence that the owner had the dog put to sleep after the incident as evidence of the dog's "vicious tendencies." The court excluded such evidence, however, holding that it did not raise a triable issue of fact, and that "whatever the reason for his decision to [put the dog to sleep], such evidence of subsequent remedial measures is not admissible to demonstrate liability." Id. at *14. The court granted defendants' motion for sum-

mary judgment, holding that plaintiff failed to produce sufficient admissible evidence to establish a triable issue of fact as to whether either defendant knew or should have known of the dog's vicious propensities. Id. at *15-16.

Likewise, in the federal case of *Robinson v. Troyan*, CV 07-4846 ETB, 2011 WL 5416324 (E.D.N.Y. Nov. 8, 2011), the district court creatively invoked Rule 407 in excluding evidence of disciplinary action taken against a policeman after he was accused of using excessive force against the plaintiff, a pretrial detainee. The defendant made a motion in limine to exclude testimony of the chief of police that the defendant had been suspended from police duty without pay for eight months following the incident, and, after being reinstated, was prohibited from carrying a weapon or resuming any courtroom duty. Though the court also excluded the evidence as being unduly prejudicial and inadmissible under the self-critical analysis privilege, the court stated that, "[a]s with a situation in which someone is injured due to a faulty condition and evidence of subsequent remedial measures taken by the defendant are not considered admissible to prove fault, [the chief's] testimony concerning the disciplinary action taken against defendant is not permitted to aid plaintiff in demonstrating that defendant engaged in excessive force." Id. at *5.

Recognized Exceptions

Though defendants should have a relatively straightforward path for excluding evidence of post-accident changes or repairs whose sole purpose is to suggest negligence or fault, there are a variety of exceptions to that general rule at the disposal of plaintiffs attempting to introduce such evidence. However, careful pleading and discovery on key issues will be necessary if a plaintiff wants to lay the groundwork to avail itself of one of the exceptions. Moreover, a defendant may need to decide early on in a case whether to concede certain issues, lest a dispute be created allowing the evidence in.

For example, evidence of subsequent repairs is admissible to establish the defendant's ownership or control over the instrumentality of the original accident. In the recent case of *Ginsburg v. City of Ithaca*, 5:11-CV-1374, 2014 WL 1152806 (N.D.N.Y. March 24, 2014), the parent of a Cornell student who committed suicide by jumping from a bridge brought a wrongful death action against both the city and Cornell University. Though the Thurston Avenue Bridge at issue was technically owned by the city, Cornell owned the property on either side of it and the bridge was traveled heavily by University students. Following a series of similar suicides, Cornell, with the permission of the city, installed chain-link fences (which were eventually replaced by permanent netting) at their own expense to prevent further suicide attempts. Cornell University moved for summary judgment on plaintiff's negligence claim, arguing that they "lacked ownership or control" of the bridge at issue and therefore could not be held liable. Id. at *3. However, the court held that the issue of whether the University exercised sufficient control over the bridge to impose premises liability was a question for the jury. Id. at *5. The court noted that, though evidence of the subsequent repairs and preventative measures taken after the suicides would be inadmissible to prove that Cornell was negligent, such evidence would be admissible to show that Cornell exercised control over the design, construction, and maintenance of the bridge. Id. at *5, n.13.

In addition to establishing ownership or control, evidence of subsequent remedial measures is similarly admissible to establish feasibility of precautionary measures—i.e., that such preventative measures *could* have been taken earlier. Notably, recent decisions involving the feasibility exception have turned on whether the exception is clearly at issue in the case, as required by the Rule. See Fed. R. Evid. 407 ("But the court may admit this evidence for another purpose, such as impeachment or—*if disputed*—proving ownership, control, or the feasibility of precautionary measures.") (emphasis added).

For example, in *Saltz v. Wal-Mart Stores*, 10-CV-4687 (NRB), 2012 WL 811500 (S.D.N.Y. March 7, 2012), the plaintiff brought a negligence claim against Wal-Mart for personal injuries sustained after tripping over a pipe in the parking lot. Immediately after the accident, an employee placed a yellow rope around the area where the accident occurred. Id. at *5. Plaintiff argued that evidence of this subsequent remedial measure was admissible to show feasibility—that Wal-Mart "could have just done what it did but before the accident rather than wait[ing] for the accident to occur." Id. at *6. Because Wal-Mart argued that the pipe was open and obvious and did not "dispute the self-evident feasibility of this precautionary measure at issue," the evidence was held "plainly inadmissible." Id. Emphasizing the point that feasibility must be at issue in order for evidence to be admitted under that exception, the court stated: "A defendant must first contest the feasibility of a warning before the subsequent warning would become admissible. … Feasibility is not an open sesame whose mere invocation parts Rule 407 and ushers in evidence of subsequent repairs and remedies." Id. (citing *In re Joint Eastern Dist. and Southern Dist. Asbestos Litig.*, 995 F.2d 343, 345 (2d Cir. 1993)). Finding no issue of fact as to whether the pipe was open and obvious and not inherently dangerous, the court granted the defendant's motion for summary judgment.

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As noted above, the evidentiary rule excluding proof of subsequent remedial measures is by no means limited to the products liability context. In *DeStefano v. MVN Assoc.*, 10-CV-05441 ALC, 2013 WL 395440 (S.D.N.Y. Feb. 1, 2013), the plaintiffs brought claims for negligence and violations of New York Labor Law for alleged work condition violations after a worker's foot got caught in a metal silt fence while working near a soil erosion control sys-

tem. The plaintiffs attempted to introduce an injury investigation report, which noted that "corrective action—moving the silt fence so that any employees … will not have to step over it—had been taken." Id. at *2. However, in granting defendant's motion for summary judgment on plaintiffs' Labor Law §200 claim, the court noted that "[u]nfortunately for plaintiffs, feasibility of alternative usable locations is not at issue here" and that defendants had likewise conceded their ownership and control over the location of the erosion system. Id.

Accordingly, before assuming that evidence of subsequent remedial measures is admissible under any of the recognized exceptions of ownership, control or feasibility, defense counsel would be well-advised to confirm that the issue is actually in dispute, as courts have consistently held that the "at issue" exception to Rule 407 must be clearly established for such evidence to be admitted.

Governmental Entities

An additional area of interest to both plaintiff and defense counsel is the admissibility of subsequent remedial actions taken by entities who are not parties to the action. Though not technically an exception to Rule 407, courts have generally held that evidence of remedial actions taken by non-parties such as the government are admissible—Rule 407 has generally been interpreted to bar only evidence of subsequent remedial measures taken by parties to the suit.

The case of *Schafer v. Board of Cooperative Educ. Servs. of Nassau Cty.*, 89 Fed. R. Evid. Serv. 1237 (E.D.N.Y. Nov. 15, 2012), addresses this issue most directly in the context of a school operated by defendant. In *Schafer*, plaintiffs brought federal §1983 claims, as well as state law claims for false imprisonment, negligence, intentional infliction of emotional distress and negligent infliction of emotional distress arising from the use of a "timeout room" for a developmentally disabled child. Following the incident, the New York State Department of Education (NYSDE) promulgated regulations concerning the use of "timeout rooms" in schools, and, in response to the NYSDE regulations, the defendant adopted new policies on the use of timeout rooms as well. The defendant brought a motion in limine seeking to exclude both policies as subsequent remedial measures under Rule 407. The court denied defendant's motion with respect to the NYSDE regulations, holding that Rule 407 did not bar evidence of the non-party's subsequent remedial measures, but granted the motion with respect to defendant's policies, holding that "evidence of a municipal entity's changes to its policies constitutes 'subsequent remedial measures' within the meaning of Rule 407." Id. at *2. This use of Rule 407 in the civil rights context further illustrates the potentially broad application of this Rule in a variety of litigation contexts. See id. ("[T]he text of Rule 407 does not contain any limitation on the types of cases to which it applies.").

Similarly, *Lidle v. Cirrus Design*, 505 Fed. Appx. 72 (2d Cir. 2012), involved the publication of two policy directives after an aircraft crash—one published by the government, a non-party, and the other by defendant, a private corporation. In *Lidle*, the decedent (a New York Yankee pitcher) and his flight instructor were flying in a Cirrus aircraft when they attempted a 180-degree turn and crashed into an apartment building in the Upper East Side. Plaintiffs sued Cirrus, asserting claims for wrongful death and survivorship, negligence, product liability and breach of warranty. On appeal, plaintiffs challenged the district court's exclusion of a Federal Aviation Administration Airworthiness Directive, issued after the accident, which mandated certain adjustments to the rudder of the aircraft at issue and incorporated by reference a 2007 Service Bulletin issued by Cirrus. Though the plaintiffs conceded on appeal that the 2007 company Service Bulletin was an inadmissible subsequent remedial measure taken by the defendant, they argued that Rule 407 should not apply to the FAA directive because it was a measure taken by the government, a non-party. Id. at *75. Though the Second Circuit did not decide whether the district court's exclusion of the FAA directive under Rule 407 was an abuse of discretion because plaintiffs failed to prove that they were prejudiced by the exclusion, the district court's analysis is instructive. Unlike *Schafer*'s treatment of the defendant's policy (issued in response to the NYSDE's policy), the lower court in *Lidle* indicated that "where the [FAA directive] was issued as a direct response to [Cirrus's Service] Bulletin, it is covered by Rule 407 … because to determine otherwise might discourage manufacturers from issuing service bulletins as part of voluntary compliance programs." Id. at *75. Arguably, *Schafer* is distinguishable because in that case, defendant issued its policies after the government issued theirs—in this case, the *government* issued its policies after—and in direct reliance on—the defendant's directive, making them less easily distinguishable from the subsequent remedial measures of a party.

Conclusion

Evidence of subsequent remedial measures can only be admitted for certain limited reasons, including ownership, control and feasibility, but not to establish negligence, fault or product defect. In a case where a plaintiff seeks to offer such evidence for other purposes, counsel must carefully assess early on what allegations will be necessary to set the groundwork for admitting the evidence at trial. When arguing against the admissibility of such evidence, defense counsel must be prepared to recognize and challenge the purpose for which plaintiffs may be attempting to use evidence of subsequent remedial measures, possibly conceding issues such as ownership or control over the instrumentality of the accident or feasibility. Of course, even if such evidence can fit within one of the recognized exceptions, a party may argue that it should be properly excluded on other grounds, such as Federal Rule of Evidence 403. Both parties must consider the relevance and circumstances surrounding any subsequent remedial measures early in litigation to address Federal Rule 407 and New York common law in this area. Change may be good, but in many cases it is not admissible at trial.