STRATEGIES
FOR
LOUISIANA RULE OF EVIDENCE 407

Presented by:

Frank E. Lamothe III

LAMOTHE LAW FIRM, L.L.C.
400 Poydras Street, Suite 1760
New Orleans, LA 70130
(504) 704-1414
www.lamothefirm.com

STRATEGIES FOR LOUISIANA RULE OF EVIDENCE 407

Louisiana Rule of Evidence 407 was enacted in 1988 and in part modeled on Federal Rule of Evidence 407 which was originally enacted in 1975 and later amended in 1997. The federal rule was specifically amended in 1997 in a few key respects.

The Federal Rule reads as follows:

> "When measures are taken that would have made an earlier 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 or its design; or
> - a need for a warning or instruction.
>
> 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."

The rule was amended in 1997 to clarify that the rule applies only to changes made after the occurrence that produced the harm incurred. Evidence of measures taken by the defendant prior to the "event" causing "injury or harm" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. This is some temporal clarification involving when measures were initiated.

Second, Federal Rule 407 was amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product or its design, or that a warning or instruction should have accompanied a product." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. Louisiana will differ in this regard as we will see.

Louisiana's version of Rule 407 does not include any such limiting or clarifying language. It reads as follows:

Universal Citation: LA Code Ev 407

> "Art. 407. Subsequent remedial measures
>
> In a civil case, 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 not admissible to prove negligence or culpable conduct in connection with the event. This Article does not require the exclusion of evidence of subsequent measures

when offered for another purpose, such as proving ownership, authority, knowledge, control, or feasibility of precautionary measures, or for attacking credibility."

Acts 1988, No. 515, §1, eff. Jan. 1, 1989.

The policy behind Rule 407 is to encourage parties to take corrective measures after an event for the public good. It also is an alleged safeguard since not all subsequent conduct will necessarily be evidence of negligence.

Subsequent is Not Always Subsequent

If an action is not taken subsequently then it is not remedial and doesn't fall under the rule. This seems simple enough but occasionally it is not.

We were involved in a high pressure gas release case where the accident occurred on October 29, 2007 due to an undisclosed VR (valve removal) plug in the casing valve of a well head.

In May of 2011, Larry Benson of Wood Group gave a slide show titled "Wellhead Safety for Non-wellhead Professionals" to an industry group showing a VR plug installed on a well head gate valve and the well head having a chain and tag on it. It was further acknowledged that Wood Group began to do this after accident.

WG attempted to claim this policy altered practice and was a subsequent remedial measure since it occurred well after our accident.

Unfortunately for Wood Group something was going on in East Texas.

At another job site in East Texas, Robert Dale Gayan was fatally injured on April 22, 2006 when he removed the VR plug from the off side of the tubing head on a well owned by XTO, another operator located in Fort Worth, Texas. He believed there was no pressure on the casing since the gauge inaccurately read zero. The VR plug had been installed by Wood Group to provide protection to the casing valve during fracture operations which generate very high pressures.

Prior to the *Gayan* incident, Billy Pate, a Wood Group area manager, sent out an email requiring that VR plugs installed in the XTO field be tagged. The purpose of the directive was "to eliminate the uncertainty of whether a VR plug has been installed on a well or not." Unfortunately, the Pate directive was not retroactive to prior installations. In deposition testimony, he indicated there had been a number of instances where VR plugs have been forgotten with no record showing they had been installed.

Although this directive was only directed to a particular geographical area, we were successful in establishing that it had companywide implications since upper management received a copy. It also had a key role to play in thwarting Wood Group’s attempt to use Louisiana Rule of Evidence 407, alleging subsequent remedial measures.

The Court correctly rejected Wood Group's argument because of the Pate directive which occurred prior to the accident. This was a substantial victory in establishing some responsibility on the part of Wood Group.

In *Thornton v. National R.R. Passenger Corp.* 802 So.2d 816, 816, La. App. 4 Cir., the defendant used wood blocking which caused the accident but other of their rail yards used metal blocking which was safer. There was no companywide practice for using metal blocking. The evidence was allowed since it was not a subsequent remedial measure. It was a practice which already existed. In support of this argument, Mr. Thornton cites *Fontenot v. Hollier & Sons,* 478 So.2d 1379 (La. App. 3 Cir.1985) and *Northern Assurance Company v. Louisiana Power & Light Co.,* 580 So.2d 351 (La.1991) which both confirmed a policy not need be companywide to establish a prior practice.

We were therefore able to show that the Benson slide show was not subsequent and this procedure was put in place in East Texas prior to our accident.

For good measure we got Benson to acknowledge the materials in his slide show were always his beliefs.

Practice Key - where practice or procedure - dig out prior actions to see if the practice already existed somewhere in the company and therefore is not a subsequent measure.

Don't Let it Become Subsequent

Another good practice is to make sure something does not become subsequent. Be aware of temporal slippage.

I had a recent case where a forklift's brakes failed and the forklift pinned a worker against a cleaning tank - killing him. There was a safety meeting after the event discussing the accident and safe work practices.

A supervisor who attended the meeting testified in deposition about the safe practices discussed at the meeting which were not memorialized. I made sure I slammed the door on subsequent by having him admit they were reemphasizingestablished practices in the safety meeting.

I did not want to give him the opportunity to say they discussed improved practices.

What If It's Subsequent and Remedial?

The most common outcome is that courts will exclude remedial measures where they are subsequent. They must be subsequent **and** remedial.

Tilden vs. Blanca LLC -- Court of Appeal of Louisiana, Fourth Circuit. June 26, 2013 119 So.3d 962 2013 WL 3214710 - Negligence. Restaurant's placement of additional rugs on the floor after patron slipped and fell was inadmissible as a subsequent remedial measure.

Daigle vs. Parish of Jefferson-- Court of Appeal of Louisiana, Fifth Circuit. December 08, 2009 30 So.3d 55 2009 WL 4639891 -- trimming foliage around stop sign after accident.

What Can be Remedial?

Repairs - Alterations

Williams v. Anthony Court of Appeal of Louisiana, First Circuit. August 17, 1988 534 So.2d 458 1988 WL 12250- skid tests after accident inadmissible .

Practice - Procedure Changes

Wilson v. National Union Fire Ins. Co. of Louisiana Court of Appeal of Louisiana, Second Circuit. December 06, 1995 665 So.2d 1252 1995 WL 71448 change in mopping technique.

Study

Reichart v State, department of Transportation Court of Appeal of Louisiana, Second Circuit. May 08, 1996 674 So.2d 1105 1996 WL 22986 - evidence of a study inadmissible after an accident safety rule.

Revised Packaging

Jurovich v. Catalanotto Court of Appeal of Louisiana, Fifth Circuit. April 13, 1987 506 So.2d 662 Prod.Liab.Rep. (CCH) P 11,54

Change in Accounting Practice to Protect Against Fraud

Peake Performance v Hibernia 992 So.2d 527 2008 WL 2330192

Act of Third Party

Jurovichv Catalanotto - CPSC enactment - -- Act of non party can be excluded.

Exceptions -- Evidence Admitted

Rule 407 lists exceptions where the subsequent remedial measure can be admitted. These are "such as ownership, authority, knowledge, control, or feasibility of precautionary measures, or for attacking credibility".

It’s an open question what else "such as" will allow. The factors listed are not exclusive.

Note the rule says "such as" so the list provided is not exclusive. If you can show there is another legitimate exception to the exclusionary rule, you can argue it should be admitted.

Control

Patterson vs City of New Orleans -- Court of Appeal of Louisiana, Fourth Circuit. December 18, 1996 686 So.2d 87 1996 WL 729627 - evidence admitted for limited purpose showing control over area. The issue was whether the City or Sewage and Water Board had jurisdiction over a given area.

Boudreaux v. Exxon Co., U.S.A Court of Appeal of Louisiana, Third Circuit. May 16, 1984 451 So.2d 85 - evidence of subsequent measures to show control over worker not allowed where would be confusing to jury.

To Attack Credibility

Thornton v. National R.R. Passenger Corp. Court of Appeal of Louisiana, Fourth Circuit. November 14, 2001 802 So.2d 816 - documents were admissible in FELA action when offered for other purposes than proving negligent or culpable conduct; where used to attack credibility of railroad employees who testified that blocking was adequate to safely perform job and to rebut claim the employee was contributory negligent.

Muzyka v. Remington Arms Co., Inc., 774 F.2d 1309 (5th Cir.1985)- evidence should have been allowed for impeachment - statements by attorney opened door.

Feasibility

Crisler v. Paige One, Inc. Court of Appeal of Louisiana, Second Circuit. January 9, 2008 974 So.2d 125 - evidence of guard rail addition admissible to show feasibility.

Burk v. Illinois Cent. Gulf R. Co. Court of Appeal of Louisiana, First Circuit. June 30, 1988 529 So.2d 515 - evidence not allowed where feasibility not controverted.

Knowledge

Conques v. Wal-Mart Stores, Inc. Court of Appeal of Louisiana, Third Circuit. February 14, 2001 779 So.2d 1094 2001 WL 12393 - evidence admitted to prove knowledge.

Additional Thoughts on Feasibility

Feasibility is a listed ground for admitting evidence of subsequent remedial measures but what does it mean? If your expert testifies a measure could have been taken which would have protected against the event occurring and it’s challenged, then you can show the implementation of the measure would demonstrate that it's feasible. In Crisler, there was no mention of defendant denying that a rail was feasible but the court allowed the evidence anyway for that limited purpose. It seems the court extended some generosity to the claimant in the determination.

There are cases in other jurisdictions that analyze what is necessary for a defendant to acknowledge to escape the feasibility exception. Feasibility determinations can involve different criteria.

The Broad Approach

The broad approach is as follows: If the defendant denies the remedial change would have increased safety, then the evidence will be admitted. Under this broad approach, the defendant arguably required to stipulate not only that the remedial measure was technologically and economically feasible, but also that the modification would have made the equipment safer and would not have affected its performance or marketability.

This is obviously problematic for defendants, where evidence that a safer alternative was both practicable and feasible is often permitted to show that the original condition was defective or inadequate and unsafe. In other words, requiring the defendant to admit that the change was capable of being implemented without impacting the utility or marketability of the equipment of device would come close to requiring the defendant to admit liability in certain cases.

The Narrow Approach

Under the narrow approach to the feasibility exception, a defendant still must concede that the change or alteration was technologically and economically feasible in order to exclude evidence of the subsequent remedial measures. But this is not as problematic as it may appear, because the defendant has already implicitly conceded these two issues by changing the device or condition.

However, the defendant does need not need to admit that the change was practicable, or that it could have been implemented without impacting the utility or marketability of the device or condition. Additionally, the defendant may still argue that the change would not have prevented the accident or materially impacted the safety of the device even though it made the changes after the event.

Obviously plaintiffs should seek a full acknowledgement of feasibility criteria and defendants should try to limit what they must acknowledge. A request for admissions can bring this to a head. It can also be a trap for unwary defendants.

Thoughts on Products Liability Cases

As you saw earlier, the Louisiana version of Rule 407 is different than the federal version. The federal version specifically includes products liability cases. The Louisiana rule does not mention products liability cases.

Toups v. Sears, Roebuck and Co., Inc., 507 So. 2d 809 - La: Supreme Court 1987 is the seminal case and supports the proposition that products cases are excluded from Rule 407.

"The policy considerations which exclude evidence of remedial measures in negligence cases are not applicable where strict liability is involved. See *Unterburger v. Snow Company, Inc.,* 630 F.2d 599 (8 Cir., 1980); *Farner v. Paccar, Inc.,* 562 F.2d 518 (8 Cir., 1977); *Robbins v.*

Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8 Cir., 1977); and *Ault v. International Harvester Company*, 13 Cal.3d 113, 117 Cal.Rptr. 812, 528 P.2d 1148 (1975). In a strict product liability case, evidence of such remedial measures should be allowed insofar as they are relevant in 817 establishing what the manufacturer knew or should have known at the time of the injury. See the discussion under Art. 407 of the Proposed Louisiana Code of Evidence, which is "in accord with the prior Louisiana law."

The Louisiana Products Liability Act, LSA-R.S. 9:2800.51, et seq was effective September 1, 1988-right after the *Toups* case was decided. This exception has been **criticized** by Commentators but remains intact. See Erin G. Lutkewitte, *A Problem in Need of Repair: Louisiana's Subsequent Remedial Measures Rule*, 67 La. L. Rev. (2006).

This could suggest - given the right case - to consider filing in state court as opposed to federal court where the admissibility of subsequent measures in a products case is at issue.

The Gate Keeping Function - Alive and Well

The Gate Keeping function still exists: Louisiana Code of Evidence articles 402 and 403 require that the evidence sought to be introduced be relevant, but relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. One would need to show the proposed evidence is not barred by 407 and is relevant and non-prejudicial under Rule 402, 403 standards.

Conclusion

Rule 407 presents the thoughtful claimants' attorney with opportunity to exploit exceptions to the exclusionary part of the rule or force stipulations which will effectively let plaintiffs' experts testify with limited opposition. Defendants should also try to avoid falling into admissibility traps.