Westlaw Today
powered by Reuters

As good as new? Rule 407 and subsequent policy modifications

By Syed Ahmad, Esq., and Casey Coffey, Esq., Hunton Andrews Kurth LLP

DECEMBER 28, 2021

As is often said, those who fail to learn from history are bound to repeat it. Based on that caution, companies that face litigation as a result of past practices and other actions often change their conduct going forward, in the hopes of avoiding the same kinds of risk again. Federal Rule of Evidence 407 was drafted to address that situation. Specifically, Rule 407 applies to subsequent remedial measures and provides that those measures generally cannot be introduced as proof of fault.

For instance, if a product with design failure injures consumers and the manufacturer remedies those errors, a party may seek to rely on the subsequent fix to demonstrate that the prior design was faulty. Under Rule 407, use of such evidence in that manner is generally prohibited.

This same issue can arise in the context of insurance coverage disputes. In that situation, courts have disagreed on whether Rule 407 applies to insurance policy modifications. Insurance companies often make changes in their policies in response to contractual disputes. Some insurers have cited Rule 407 and argue that changes to policy language should not be considered.

However, this improperly broadens the scope of Rule 407. Courts should consider policy modifications while evaluating the meaning of a disputed term. This evidence could shed light on the parties' intent and does not conflict with Rule 407's prohibition on subsequent remedial measures offered as proof of fault.

Background of Rule 407

Rule 407 is designed to encourage people to fix defects or, at least, not discourage them from making things safer. It states:

> 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.

In the first sentence, "measures" is undefined, but courts have held the term applies to various types of evidence.[1] The second sentence defines the limits of Rule 407. It states that this evidence may still be admissible if offered for another purpose. The rule lists examples of non-prohibited uses: impeachment, ownership, control, or feasibility. This list is not exhaustive, and the rule requires exclusion if "the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct."[2]

In some cases, Rule 407's application is simple. Similar to the example above, imagine a manufacturer adds a warning label after an accident occurs, and the plaintiff (an individual injured from the pre-label product) tries to use that evidence to prove negligence. Evidence of the new warning is generally not admissible. Other cases are not so straightforward.

Rule 407 in insurance coverage disputes

In disputes about insurance coverage, insurers may argue that Rule 407 should exclude evidence about changes to disputed policy language. In doing so, insurers may face many obstacles. To start, some courts have refused to apply Rule 407 in breach of contract cases, like most insurance disputes where an insurer is sued for breaching the policy.[3]

Other courts have interpreted Rule 407 more broadly.[4] In *Pastor*, the parties disputed the meaning of the word "day" in an insurance policy. The plaintiff relied on a subsequent version of the policy that defined "day" to mean 24 hours. State Farm described this as a clarification, while the insured argued it was "a confession that her interpretation of the original clause is correct." The court refused to consider the change because "to use at a trial a revision in a contract to argue the meaning of the original version would violate Rule 407 ... by discouraging efforts to clarify contractual obligations, thus perpetuating any confusion caused by unclarified language in the contract."

The court correctly recognized that Rule 407 is not strictly limited to "repairs." But it improperly broadened the scope to exclude evidence being used to prove the meaning of a disputed term. This is not the type of corrective active that Rule 407 was designed to prevent. It also conflicts with key principles of contract interpretation, one of which is to ascertain and give effect to the parties' intention. These problems with the *Pastor* court's ruling are illustrated in other decisions.

In *Williston Basin*, for example, the court disagreed with the insurer's position that Rule 407 precludes evidence of policy changes.[5] The parties disputed the meaning of "occurrence." The court recognized that, "[b]y its terms, Rule 407 is limited to evidence of subsequent remedial measures which are made following an event that causes injury or harm." It noted that while there may be other reasons to exclude the evidence, "there is nothing in the language of Rule 407 or its commentary that suggests the Supreme Court intended Rule 407 to apply to changes in contract language."

In addition, the court recognized that there are exceptions that allow admitting the evidence, including "when the evidence is offered to demonstrate there is another reasonable construction of the policy language when that is disputed." In any case, the court concluded that Rule 407 was a rule of admissibility and should not prevent discovery of the post-event policy language that may be admissible for another purpose.[6]

This issue recently came up in an insurance coverage dispute on whether the policy's computer transfer provision covered losses from a cybercrime.[7] The magistrate judge relied on Rule 407 to deny the discovery of documents related to subsequent policy modifications to the crime coverage provisions. The insured objected to that ruling. The district court did not address whether Rule 407 applied because it found that the policy unambiguously precluded coverage and found the objections moot. The Fifth Circuit affirmed the district court's ruling, leaving the question of whether Rule 407 applied unanswered.

The mix of case law serves as a reminder that parties should clearly explain the purpose of evidence that may be considered a subsequent remedial measure. In insurance disputes, for instance, the proponent of the evidence should emphasize that the policy modifications are being introduced to support a reasonable construction of the policy language. Otherwise, a court may incorrectly find that the evidence is being used as proof of fault that is precluded by Rule 407.

Notes

[1] *See* Fed. R. Evid. 407, Advisory Committee Notes to 1972 Proposed Rules ("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 rule is broad enough to encompass all of them.").

[2] *See* Fed. R. Evid. 407, Advisory Committee Notes to 1972 Proposed Rules.

[3] *See All the Chips, Inc. v. OKI America, Inc.*, 1990 WL 36860, *4 (N.D. Ill. March 16, 1990) (stating breach of contract "requires no showing of any sort of fault, thus apparently negating the operation of Rule 407"); *Smith v. United HealthCare Servs., Inc.*, 2003 WL 22047861, at *11 (D. Minn. Aug. 28, 2003) (finding Rule 407 inapplicable to cases with no allegations of culpability); *NAZ, LLC v. Philips Healthcare*, 2019 WL 77233, at *16 (E.D. La. Jan. 2, 2019) ("words and the rationale of Rule 407" did not apply because the evidence related to whether the product worked as warranted not to the issue of culpability).

[4] *See Pastor v. State Farm Mutual Automobile Insurance Co.*, 487 F.3d 1042 (7th Cir. 2007).

[5] *Williston Basin Interstate Pipeline Co. v. Factory Mut. Ins. Co.*, 270 F.R.D. 456, 463 (D.N.D. 2010).

[6] *See also Smith v. Miller Brewing Co. Health Benefits Program*, 860 F. Supp. 855, n.1 (M.D. Ga. 1994). ("Subsequent remedial measures are not generally admissible in evidence, Fed. R. Evid. 407; however, when the dispute concerns the terms of a contract, changes in the language that make the intent of the drafter clearer, the court should consider that change in evaluating the disputed term.")

[7] *Mississippi Silicon Holdings, LLC v. Axis Ins. Co.*, 843 Fed. Appx. 581 (5th Cir. 2021).

About the authors

Syed Ahmad (L) is a partner in **Hunton Andrews Kurth**'s insurance coverage group. Based in the firm's Washington, D.C. office, Ahmad represents clients in connection with insurance coverage, reinsurance matters and other business litigation. He can be reached at sahmad@HuntonAK.com. **Casey Coffey** (R) is an associate in the insurance coverage group. Based in in the firm's Miami office, Coffey focuses on complex insurance litigation and advising policyholders in insurance coverage matters. She can be reached at ccoffey@HuntonAK.com.

This article was first published on Westlaw Today on December 28, 2021.