

# Snell & Wilmer

LLP.

## OFFICE MEMORANDUM

**TO:** Ad Hoc Committee on Arizona Rules of Evidence

**FROM:** Subcommittee on Rules 407 and 408\*

**DATE:** May 11, 2010

**RE:** Rule 407 – Subsequent Remedial Measures\*\*

### I. INTRODUCTION

When enacted, Rule 407 of the Arizona Rules of Evidence (“ARE 407”) simply adopted verbatim Rule 407 of the Federal Rules of Evidence (“FRE 407”). The rules remained identical until 1997, when the United States Supreme Court adopted two amendments to FRE 407, and Arizona failed to follow suit. The first amendment was meant to clarify that FRE 407 only applies to remedial measures that occur “after an injury or harm allegedly caused by an event.” The second amendment explicitly adopted the view, already held by a majority of the circuits, that in addition to actions based on negligence, FRE 407 applies also to products liability actions.

ARE 407, which is identical to the former FRE 407, reads:

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 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.

In 1997, FRE 407 was amended, as follows:

When, after an injury or harm allegedly caused by an event, measures are taken that, which if taken previously, would have made the injury or harm event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction ~~in connection with the event~~. This

---

\* Memorandum prepared by Robert Schwimmer, Associate, Snell & Wilmer L.L.P.

\*\* Rule 407 is presently before the Arizona Supreme Court in *Johnson v. State ex rel. Dep’t of Transportation*, CV-09-0267-PR. The question presented therein is whether exclusion under Rule 407 requires a defendant to have known about the plaintiff’s “event” in enacting subsequent remedial measures, or whether it is sufficient that the measures, “if taken previously, would have made the event less likely to occur,” regardless of the defendant’s knowledge.

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.

## **II. THE 1997 AMENDMENTS TO RULE 407, FEDERAL RULES OF EVIDENCE**

The purpose of the 1997 amendments to FRE 407 were twofold. First, the Advisory Committee on Federal Rules of Evidence thought it prudent to clarify that FRE 407 only excluded evidence of remedial acts that are, in fact, subsequent to the plaintiff's injury. As the Committee Note explained, "the words 'an injury or harm allegedly caused by' were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. 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."<sup>1</sup> Fed. R. Evid. 407 advisory committee's note (1997 Amendments).

Second, the Committee Note further explained that "Rule 407 has been 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." *Id.*

## **III. INTERPRETATION OF RULE 407, ARIZONA RULES OF EVIDENCE**

Arizona courts have generally construed ARE 407 in much the same way as its federal counterpart. Despite the fact that ARE 407 does not refer explicitly to injury or harm, it is interpreted as if it does. *See Readenour v. Marion Power Shovel*, 149 Ariz. 442, 445, 719 P.2d 1058, 1061 (1986) ("Rule 407 forbids the admission and use of post-*injury* remedial measures 'as evidence of negligence or culpable conduct.'") (emphasis in original). Moreover, the rule has long been understood to apply equally to actions based on strict products liability and to those based on negligence.<sup>2</sup> *See Hallmark v. Allied Products Corp.*, 132 Ariz. 434, 441, 646 P.2d 319, 326 (1982) (reasoning that "[i]t makes no difference to the defendant on what theory the evidence is admitted (negligence or strict liability) because his inclination to make subsequent improvements will be similarly inhibited"). Therefore, the interpretation of ARE 407 by Arizona courts comports with the interpretation of FRE 407 demanded by the 1997 amendments.

---

<sup>1</sup> As explained in n.2, *infra*, while measures taken by defendant prior to the "event" causing "injury or harm" do not fall within the exclusionary scope of Rule 407, in a products liability action in Arizona, such measures are excluded by A.R.S. § 12-686(2) to the same extent as they would be by Rule 407 if the measures had been taken post-injury.

<sup>2</sup> In addition to Rule 407, in any product liability action, A.R.S. § 12-686(2) makes inadmissible as direct evidence of a defect, "[e]vidence of any change made in the warnings, design or methods of manufacturing or testing the product or any similar product subsequent to the time the product was first sold by the defendant." *See Readenour*, 149 Ariz. at 446, 719 P.2d at 1062 (concluding "that the extension of the prohibition to include post-sale changes . . . supplements the provisions of Rule 407").

#### **IV. POLICY UNDERLYING RULE 407**

Rule 407 stands for the proposition that, from a policy perspective, it is important to encourage, or at least not to discourage, defendants or potential defendants from taking subsequent remedial measures to protect public safety. *See, e.g., Seisinger v. Siebel*, 220 Ariz. 85, 89, 203 P.3d 483, 487 (2009) (recognizing that “the policy of . . . Rule [407] is to encourage remedial measures”). The rationale underlying the rule “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. By excluding this evidence, defendants are encouraged to make such improvements.” *Hallmark*, 132 Ariz. at 440, 646 P.2d at 325. “The rule plainly reflects a substantive policy decision—that it is more important to encourage remedy of defects than to allow plaintiffs to use arguably relevant evidence as proof of negligence.” *Seisinger*, 220 Ariz. at 93 n.5, 203 P.3d at 491.

#### **V. RECOMMENDATION**

Because adoption of the language of the federal rule would lead to greater clarity regarding the applicable scope of Rule 407, without affecting the manner in which it is presently interpreted and applied in Arizona, the Subcommittee on Rules 407 and 408 recommends adoption of FRE 407, as amended in 1997.