

Alabama Rules of Evidence

Article IV. Relevancy and Its Limits

Rule 407.

Subsequent remedial measures.

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, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. 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.

[Amended 8-15-2013, eff. 10-1-2013.]

Advisory Committee's Notes

This rule, in its adoption of the historic "subsequent remedial measures doctrine," calls for the general exclusion of evidence of remedial measures when it is offered to prove antecedent negligence or other culpable conduct. Based upon both a policy of encouraging safety measures and a consideration of irrelevancy, this general exclusionary rule is deeply rooted in the law of Alabama and the United States. See, e.g., *Columbia & Puget Sound R.R. v. Hawthorne*, 144 U.S. 202 (1892); *Frierson v. Frazier*, 142 Ala. 232, 37 So. 825 (1904); *Hyde v. Wages*, 454 So.2d 926 (Ala.1984); *Banner Welders, Inc. v. Knighton*, 425 So.2d 441 (Ala.1982). See also C. Gamble & G. Windle, *Remedial Measures Doctrine in Alabama: From Exclusion to Admissibility and the Death of Policy*, 37 Ala.L.Rev. 547 (1986); C. Gamble, *McElroy's Alabama Evidence* § 189.02 (4th ed. 1991).

As under the reasoning at work in such principles as those incorporated into Ala.R.Evid. 404(b) (excluding evidence of prior criminal misconduct by an accused), Ala.R.Evid. 408 (excluding evidence of offers of compromise), and Ala.R.Evid. 411 (excluding evidence of liability insurance), evidence of subsequent remedial measures is excluded only when it is offered for the impermissible purpose of proving either negligence or other culpable conduct. A party may circumvent the general rule of exclusion by offering the evidence for some permissible purpose, such as impeachment or to prove ownership, control, or feasibility of precautionary measures, if the thing to be proved is controverted. As indicated by the phrase "such as," these purposes stated are not a complete listing. Several of the purposes mentioned in this rule have been recognized under preexisting Alabama law. See *Holland v. First Nat'l Bank of Brewton*, 519 So.2d 460 (Ala.1987) (control); *Alabama Power Co. v. Marine Builders, Inc.*, 475 So.2d 168 (Ala.1985) (feasibility); *Stauffer Chem. Co. v. Buckalew*, 456 So.2d 778 (Ala.1984) (impeachment). Additionally, preexisting Alabama evidence law has acknowledged permissible purposes that are not expressly mentioned in Rule 407. See, e.g., *City of Montgomery v. Quinn*, 246 Ala. 154, 19 So.2d 529 (1944) (classic decision allowing evidence of remedial measures for the purpose of showing the condition of the place or object after an

accident as a basis for inferring its condition at the time of the accident); *Dixie Elec. Co. v. Maggio*, 294 Ala. 411, 318 So.2d 274 (1975) (admitting evidence of a post- accident safety measure as part of the *res gestae*).

Use of the word “controverted” is intended to continue the strong line of Alabama decisions precluding the use of a purpose, for admitting evidence of safety measures that otherwise would be excluded, when the asserted purpose does not relate to a genuine or material issue in the case. See, e.g., *Standridge v. Alabama Power Co.*, 418 So.2d 84 (Ala.1982) (evidence of remedial measures, offered to prove control, excluded because control was not a disputed issue in the case; defendant admitted control but claimed it owed no duty to the plaintiff, even assuming control); *Alabama Power Co. v. Marine Builders, Inc.*, 475 So.2d 168 (Ala.1985); *Hyde v. Wages*, 454 So.2d 926, 930 (Ala.1984) (evidence offered to prove ownership not admissible because there was no dispute over ownership or control); *Leeth v. Roberts*, 295 Ala. 27, 30, 322 So.2d 679, 681 (1975) (holding that the purpose of proving a condition at the time of an event can be relied upon only “when the existence of an object or condition at a given time is in issue or is the gravamen of the action or defense”). See also C. Gamble & F. James III, *Perspectives on the Evidence Law of Alabama: A Decade of Evolution, 1977-1987*, 40 Ala.L.Rev. 95, 105 (1988). Compare *Anonymous v. State*, 507 So.2d 972 (Ala.1987) (the purpose of proving intent, used as a basis for admitting evidence of an accused’s collateral criminal misconduct, is applicable only in cases requiring a specific criminal intent); *Ex parte Cofer*, 440 So.2d 1121, 1124 (Ala.1983) (applying the present concept as a basis for excluding the accused’s collateral crimes when offered to prove intent; held that the “intent” purpose is not applicable when the prosecution’s evidence itself, if believed, would indicate that there is “no real and open issue” about the accused’s intent).

Nothing in Rule 407 is intended to preclude the court’s application of Rule 403 to subsequent remedial measures evidence. Factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration.

Rule 407 is identical to Fed.R.Evid. 407.

Advisory Committee's Notes to Amendment to Rule 407 Effective October 1, 2013

Alabama's Rule 407 has been amended in the same manner and for the same purposes that Federal Rule 407 was amended in 1997. The advisory committee's notes accompanying the 1997 amendment of the federal rule summarize two changes made by the amendment as follows:

"The amendment to Rule 407 makes two changes in the rule. First, 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. See *Chase v. General Motors Corp.*, 856 F.2d 17, 21-22 (4th Cir. 1988).

"Second, 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."

In Alabama, these changes have application primarily in product-liability or Alabama Extended Manufacturer's Liability Doctrine (AEMLD) cases. Both changes find support in Alabama caselaw. See, e.g., *Phar-Mor, Inc. v. Goff*, 594 So. 2d 1213, 1216 (Ala. 1992) ("The general rule excluding evidence of subsequent remedial measures is that 'evidence of repairs or alterations made, or precautions taken, by the defendant after the injury to the plaintiff in an accident [are] not admissible as tending to show the defendant's antecedent negligence [or culpable conduct].'" (quoting C. Gamble, *McElroy's Alabama Evidence* § 189.02(1) (4th ed. 1991))); *Blythe v. Sears, Roebuck & Co.*, 586 So. 2d 861, 866 (Ala. 1991) (affirming trial court's exclusion of subsequent-remedial-measures evidence in case brought under the AEMLD).

The Committee recognizes that the overwhelming body of federal caselaw holds that Federal Rule 407 does not require exclusion of evidence of (1) subsequent remedial measures made by nonparties or (2) subsequent remedial measures that were involuntarily undertaken or performed, and that such caselaw constitutes persuasive authority for the interpretation of Alabama's Rule 407. See Ala. R. Evid. 102 (Advisory Committee's Notes ("These rules have been modeled ... after the Federal Rules of Evidence Cases interpreting the federal rules ...are persuasive ... authority before the Alabama courts."); *Ex parte Lawrence*, 776 So. 2d 50, 53 (Ala. 2000) (construing Rule 404(b)) ("The Advisory Committee Notes to the federal rules are persuasive authority in our interpretation of the Alabama rules."); and *Snyder v. State*, 893 So. 2d 488, 540 (Ala. Crim. App. 2003) (construing Rule 609(b)) ("Because Alabama has had little opportunity to address this issue we have looked to the federal courts for guidance."). However, the Committee has decided against incorporating language on these subjects into the text of Rule 407 primarily in order to maintain uniformity with the Federal Rule. For authority on the first point, see *Millennium Partners, L.P. v. Colmar Storage, LLC*, 494 F.3d 1293, 1302 (11th Cir. 2007) ("Rule 407 does not apply to a remedial measure that was taken without the voluntary participation of the defendant."); 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 189.02(13) (6th ed. 2009) ("The Rule 407 exclusionary principle applies only to subsequent remedial measures taken by the party to the present litigation. ... Such third party remedial measures may be excluded but, rather than under Rule 407, such would be for lack of relevancy or because any relevancy is substantially outweighed by prejudice." (footnotes omitted)). On the latter point, see *Herndon v. Seven Bar Flying Service, Inc.*, 716 F.2d 1322, 1331 (10th Cir. 1983) ("Where a superior authority requires a tortfeasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force -- a tortfeasor cannot be discouraged from voluntarily making repairs if he must make repairs in any case." (emphasis omitted)).

Note from reporter of decisions: The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective

October 1, 2013, is published in that volume of *Alabama Reporter* that contains Alabama cases from ____ So. 3d.