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The Impeachment Exception to Rule 407: Limitations on the Introduction of Evidence of Subsequent Measures

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The Impeachment Exception to Rule 407: Limitations on the Introduction of Evidence of Subsequent Measures

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I. INTRODUCTION

Rule 407 of the Federal Rules of Evidence provides in part: "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."¹ This principle first developed under the common law to encourage individuals to repair potentially hazardous conditions to further public safety.² The premise of the

1. FED. R. EVID. 407.

2. See, e.g., *Terre Haute & I. R.R. v. Clem*, 123 Ind. 15, 19, 23 N.E. 965, 966 (1890) ("A rule which so operates as to deter men from profiting by experience, and availing themselves of new information, has nothing to commend it."); *Morse v. Minneapolis & St. L. Ry.*, 30 Minn. 465, 468, 16 N.W. 358, 359 (1883) ("The more careful a person is, the more regard he has for the lives of others, the more likely he would be to [make repairs], and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior

Rule is that individuals would be discouraged from improving safety procedures if evidence of these subsequent measures could be used against them in suits arising from the prior conditions. When Congress enacted Federal Rule of Evidence 407, the Rules incorporated the common law standard on subsequent measures.³

The exclusion of evidence of subsequent measures under Rule 407 is not absolute. Rule 407 provides four exceptions under which evidence of subsequent measures may be admissible.⁴ One exception in particular—impeachment—has created significant controversy because it has the potential of swallowing up the Rule. The impeachment exception is potentially dangerous in two respects. First, when evidence of subsequent measures is introduced to impeach a defendant's testimony, the natural implication is an inference of negligence or culpable conduct by the defendant, which is the precise result that Rule 407 seeks to prevent. Therefore, when a defendant states that his place or product was safe and in no need of repair or improvement, evidence of subsequent measures may cause a jury to doubt the safety of the defendant's place or product and naturally lead the jury to assume that the defendant would not have made the repair or improvement unless the place or product was unsafe. The result is an inference of negligence against the defendant. Second, the impeachment exception can be manipulated by a plaintiff's counsel in order to introduce otherwise inadmissible evidence of subsequent measures under the guise of impeachment evidence.⁵ This would occur when a plaintiff's counsel called the defendant or his witness on direct examination, asked the witness if the defendant's place or product was safe, and then impeached the witness with evidence of subsequent

negligence."); see also 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 283, at 151 (3d ed. 1940) ("[A]dmissions of such acts . . . would discourage all owners, even those who had genuinely been careful, from improving the place or thing that had caused the injury, because they would fear the evidential use of such acts to their disadvantage.").

3. The advisory committee's note states in part: "The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." FED. R. EVID. 407 advisory committee's note, 56 F.R.D. 183, 226.

4. Rule 407 provides in part: "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." FED. R. EVID. 407. The four exceptions listed in the rule are illustrative and do not constitute an exhaustive list. 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5290, at 148 (1980) ("The list of permissible uses in Rule 407 is illustrative, not exclusive.") (footnote omitted).

5. See 10 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE § 407.04, at IV-159 (2d ed. 1981) ("[T]he trial judge should guard against the improper admission of [such] evidence . . . to prove prior negligence under the guise of impeachment.").

measures.⁶

Although the impeachment exception has the potential to vitiate the effectiveness of Rule 407 in a given case, it is not without merit. Without the impeachment exception to Rule 407, the defendant would be unduly favored because he would have the unlimited ability to exaggerate the safety of his place or product or to make inconsistent statements.⁷ Fairness in the administration of justice and the quest for truth demand that a defendant's self-serving assertions not go unchallenged.⁸ Because Rule 407 promotes the important social interests of encouraging repairs and improvements, while the impeachment exception to the Rule furthers the administration of justice, it is necessary to achieve a balance between the policies underlying the Rule and its impeachment exception. Such a balance would protect the policy concerns of the Rule, as well as the litigation interests of the parties promoted by the exception.

This Comment analyzes the historical development of the impeachment exception to the common law rule governing the admission of evidence of subsequent measures. Section IIA discusses the policies supporting the exclusion of evidence of subsequent measures. Section IIB analyzes cases interpreting the subsequent measures rule and focuses upon three scenarios: A defendant or his witness testifying falsely or in a misleading manner about a subsequent measure; a defendant or his witness testifying that the place or product was safe; and a plaintiff's counsel calling the defendant or his witness on direct examination and subsequently impeaching the witness with evidence of subsequent measures. Section III then analyzes the application of Rule 407 of the Federal Rules of Evidence, which codified the common law rule relating to evidence of subsequent measures, by the federal courts. In addition, Section IV compares the use of impeachment under Rules 407, 408 and 411 of the Federal Rules of Evidence. Finally, Section V suggests that limitations should be placed on the

6. See Note, *The Admissibility of Subsequent Remedial Measures in Strict Liability Actions*, 39 WASH. & LEE L. REV. 1415, 1429 (1982) ("If plaintiff's counsel can maneuver a defendant's witness into suggesting . . . that the defendant's place or product was as safe as possible, then a court would receive the subsequent repair evidence to impeach.") [hereinafter Note, *Admissibility of Remedial Measures*]; see also Rossi, *The Ban on Evidence of Subsequent Remedial Measures*, 7 CORNELL L.F. 6, 8 (1981) ("[I]f the plaintiff's counsel can push the defense witness into suggestions that the defendant's place or product was safe . . . courts everywhere would receive subsequent change evidence under the . . . impeachment exception.") (footnote omitted).

7. C. WRIGHT & K. GRAHAM, *supra* note 4, § 5289, at 147 ("The impeachment exception is "necessary to prevent defendants from taking advantage of the rule by making sweeping assertions of the safety of their prior actions.") (footnote omitted)).

8. FED. R. EVID. 102.

use of impeachment under Rule 407 in order to promote a necessary balance between the achievement of the social interests promoted by the subsequent measures rule, and the litigation interests promoted by the impeachment exception to the rule.

II. THE HISTORICAL BACKGROUND OF THE IMPEACHMENT EXCEPTION

A. *The Policies Underlying the Rule Excluding Evidence of Subsequent Measures*

The rule excluding evidence of subsequent measures is founded upon two premises: First, the policy promoting the proper administration of justice, and second, the policy promoting a social concern.⁹ The first premise is derived from *Hart v. Lancashire & Yorkshire Railway*,¹⁰ in which the English Court of Exchequer Chamber held that subsequent remedial conduct should not be viewed as an admission of negligence. In reaching its decision, the *Hart* court reasoned:

[P]eople do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. . . . [A] proposition to the contrary would be barbarous. . . . [The court would be holding] that, because the world gets wiser as it gets older, therefore it was foolish before.¹¹

Rather than viewing subsequent remedial conduct as an admission of negligence, the advisory committee's note to Rule 407 adopts the view that "the conduct is equally consistent with injury by mere accident or through contributory negligence."¹²

Other authorities have argued that evidence of subsequent measures is irrelevant, or at best only marginally relevant, to the issue of negligence.¹³ Three reasons are offered in support of this argument: First, they argue that subsequent measures are not necessarily proof of negligence because alternative explanations exist that are sufficient to explain the "repair" conduct. For example, the repair conduct may reflect advances in technology, or other economic factors.¹⁴

9. See FED. R. EVID. 407 advisory committee's note, 56 F.R.D. 183, 226.

10. 21 L.T.R. 261 (1869).

11. *Id.* at 263; see also *Columbia & P.S. R.R. v. Hawthorne*, 144 U.S. 202, 207 (1892) ("[T]he taking of precautions against the future is not to be construed as an admission of responsibility for the past.").

12. FED. R. EVID. 407 advisory committee's note, 56 F.R.D. 183, 226.

13. See Note, Chart v. General Motors Corp.: *Did It Chart the Way for Admission of Evidence of Subsequent Remedial Measures in Products Liability Actions?*, 41 OHIO ST. L.J. 211, 214 (1980).

14. See Note, *Admissibility of Remedial Measures*, *supra* note 6, at 1418.

Accordingly, the subsequent measures may be entirely irrelevant in a suit concerning an injury suffered under the prior conditions. Second, "a defendant's subsequent repair activities often stem from his discovery or realization that the object is capable of causing harm, rather than his negligence in failing to foresee the harm."¹⁵ And third, the potential for "misleading, confusing, or unduly prejudicing the jury" often outweighs the probative value of the evidence.¹⁶

These arguments have not gone unchallenged. Critics of the Rule contend that evidence of subsequent measures is indeed relevant proof of negligence. Because negligence is a "*possible* inference from the evidence,"¹⁷ the evidence is relevant, for relevance means "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹⁸

The second and "more impressive"¹⁹ premise of the Rule promotes the social policy interest of encouraging people to take precautionary measures or to repair potentially hazardous conditions existing under their control.²⁰ This policy was best explained in *Morse v. Minneapolis & Saint Louis Railway*,²¹ in which the Supreme Court of Minnesota upheld the exclusion of evidence of subsequent measures. The *Morse* court reasoned:

The more careful a person is, the more regard he has for the lives of others, the more likely he would be to [make repairs], and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence.²²

Throughout the years, the Rule's social policy of encouraging repairs has been criticized by those who believe that this premise is obsolete.²³ Critics argue that most manufacturers have an economic self-interest in repairing the allegedly hazardous condition, in order to

15. *Id.* at 1419 (footnote omitted).

16. See Note, *supra* note 13, at 214.

17. *Id.* at 215.

18. FED. R. EVID. 401.

19. FED. R. EVID. 407 advisory committee's note, 56 F.R.D. 183, 226.

20. See *supra* note 2.

21. 30 Minn. 465, 16 N.W. 358 (1883).

22. *Id.* at 470, 16 N.W. at 359.

23. See 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 164, at 381 (1985) (The "validity" of excluding evidence of subsequent measures in order to encourage repairs "is open to serious doubt."); see also C. WRIGHT & K. GRAHAM, *supra* note 4, § 5282, at 93 (The policy of excluding evidence of subsequent measures in order to encourage repairs has been heavily criticized and is no longer a sound justification for the Rule.).

avoid negative publicity.²⁴ Critics further maintain that most manufacturers do not know about the Rule, and that even those who do know are familiar with the Rule's many exceptions.²⁵ Finally, critics claim that insurance companies usually urge manufacturers to make repairs.²⁶

These critics of the Rule have overlooked the fact that the need to avoid unfavorable publicity may still be outweighed by the expense of altering a product that the manufacturer believes is safe.²⁷ Furthermore, once an injury has been suffered, the manufacturer may already have received negative publicity, and as such the motivation of avoiding further publicity may not be a significant inducement to undertake subsequent measures.

Despite this criticism, the principle of excluding evidence of subsequent measures was codified in Rule 407 of the Federal Rules of Evidence.²⁸ The advisory committee explained that the Rule was included because evidence of subsequent measures is not an admission of negligence, and also because exclusion of this evidence serves the important social policy of encouraging repairs.²⁹

B. *The Evolution of the Impeachment Exception*

1. THE PERIOD FROM 1885 TO 1950

The impeachment exception to the Rule excluding evidence of subsequent measures evolved through the common law from the latter part of the 19th century to the codification of the Federal Rules of Evidence in 1975. And, until about 1950, the use of evidence of subsequent measures to impeach was relatively uniform throughout the state courts.³⁰ The defendant or his witness would typically raise the issue by testifying to some aspect of the safety of the prior condition, which the plaintiff had alleged was hazardous.³¹ On cross-examination or in rebuttal testimony, the plaintiff would offer evidence of the defendant's subsequent measures in order to contradict or rebut the

24. See Note, *supra* note 13, at 216.

25. See D. LOUISELL & C. MUELLER, *supra* note 23, at 381 ("Many persons take subsequent remedial measures wholly unaware that there exists an evidential rule of exclusion, and those who are aware of such a rule are likely to know that the rule is easily circumvented."); Note, *supra* note 13, at 216.

26. Note, *supra* note 13, at 216.

27. See Note, 67 MARQ. L. REV. 188, 191 (1983).

28. See *supra* note 1 and accompanying text.

29. FED. R. EVID. 407 advisory committee's note, 56 F.R.D. 183, 226 (Evidence of subsequent measures is not an admission of negligence, and excluding such evidence encourages repairs and improvements.).

30. See *infra* notes 37-141 and accompanying text.

31. *Id.*

claim made by the defendant, thereby impeaching the credibility of the testimony of the defendant, or his witness.³²

The defendant's testimony, which raised the danger of impeachment by the plaintiff, took one of three forms. The defendant might make false or misleading assertions about the safety of the allegedly hazardous condition. The defendant also might assert that repairs were made before the accident, when, in fact, they had been made after the accident. Finally, the defendant might merely proclaim that the condition was safe, or in no need of repair.³³ In each of these scenarios, permitting the defendant to make self-serving assertions without subjecting him to impeachment was thought to give the defendant an unfair advantage.³⁴ In seeking to preserve fairness between the litigants, the courts admitted evidence of subsequent measures for the sole purpose of impeachment, and not for any inference of negligence.³⁵ To avoid the inference of negligence, courts instructed juries as to the limited purpose for which the evidence was admitted.³⁶

a. False or Misleading Claims by the Defendant as to the Taking of Subsequent Measures

During the period from approximately 1885 to 1950, the majority of cases concerning subsequent measures involved the first scenario.³⁷ When faced with this scenario, the courts allowed plaintiffs to

32. *Id.*

33. See *infra* notes 100-41 and accompanying text.

34. See, e.g., *Virginia & North Carolina Wheel Co. v. Chalkley*, 98 Va. 62, 65, 34 S.E. 976 (1900) (upholding the trial court's decision to permit the plaintiff to offer evidence of the subsequent repair because, otherwise, the defendant would be permitted to prove facts that the plaintiff was denied the right of disproving).

35. See, e.g., *Choctaw, O. & G. R.R. v. McDade*, 191 U.S. 64, 69 (1903) (Supreme Court of the United States upholding the trial court's instruction to the jury that the evidence was solely admitted to impeach and not to infer negligence); see also *Bedgood v. T.R. Miller Mill Co.*, 202 Ala. 299, 80 So. 364 (1918) (upholding the introduction of evidence of the subsequent measure to contradict or impeach, and not to show anterior negligence); *Lombardi v. Yulinsky*, 98 N.J.L. 332, 119 A. 873 (1923) (upholding a limiting instruction to the jury that the evidence was admitted to impeach the defendant, and not to prove the defendant was negligent); *Tise v. Thomasville*, 151 N.C. 281, 65 S.E. 1007 (1909) (upholding the right of the plaintiff to introduce evidence that a hole was filled by the defendant after an accident to show that repairs were made, not to prove negligence).

36. See C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 252, at 545 (1954).

37. See, e.g., *Taylorville v. Stafford*, 196 Ill. 288, 63 N.E. 624 (1902); *Garshon v. Aaron*, 330 Ill. App. 540, 71 N.E.2d 799 (1947); *Chicago & E. R.R. v. Barnes*, 10 Ind. App. 460, 38 N.E. 428 (1894); *Butkovitch v. Centerville Block Coal Co.*, 188 Iowa 1176, 177 N.W. 479 (1920); *Beck v. Beck Coal & Mining Co.*, 180 Iowa 1, 162 N.W. 861 (1917); *Parker v. City of Ottumwa*, 113 Iowa 649, 85 N.W. 805 (1901); *Rogers v. Kansas Co-Operative Refining Co.*, 91 Kan. 351, 137 P. 991 (1914); *Bell-Knox Coal Co. v. Gregory*, 152 Ky. 415, 153 S.W. 465 (1913); *Goodell v. Sviokla*, 262 Mass. 317, 159 N.E. 728 (1928); *Clemens v. Gem Fibre*

impeach defendants or their witnesses with evidence of subsequent measures to prevent the defendant from achieving an unfair advantage by manipulating the exclusionary nature of the rule of subsequent measures. The Court of Appeals of New York espoused this position in *Bush v. Delaware, Lackawanna & Western Railroad*.³⁸ In *Bush*, an employee was fatally injured after attempting to cross a wooden bridge over a railroad with his employer, in a traction engine and separator, used for threshing farm land.³⁹ Before crossing, the two men examined the bridge and inquired about its safety.⁴⁰ The pathmaster assured them that the bridge was safe, and the two attempted to cross.⁴¹ While they were midway across the bridge, two sleepers on the bridge gave way, and the two men fell to the railroad tracks below.⁴² After the accident, the railroad company placed four or five sleepers in place of the previous two.⁴³ At trial, the railroad's expert witness testified that the bridge was as strong as before the accident.⁴⁴ On appeal, the court upheld the right of the plaintiff, the employee's widow, to offer evidence of the subsequent repair on the express ground that it contradicted the testimony of the railroad's witness as to the strength of the bridge.⁴⁵ Evidence of subsequent measures in this case was relevant to establishing whether the strength of the bridge was the same before and after the accident.⁴⁶

The Supreme Court of Appeals of Virginia reached a similar holding in *Virginia & North Carolina Wheel Co. v. Chalkley*.⁴⁷ In *Chalkley*, an employee of the wheel company was injured while operating a circular saw.⁴⁸ An expert witness, called on behalf of the wheel company, testified that "the machinery was in the same condition when exhibited to the jury that it was when [Chalkley] was injured."⁴⁹ The court upheld the trial court's decision to permit the

Package Co., 153 Mich. 495, 117 N.W. 187 (1908); *McDonald v. City of Duluth*, 93 Minn. 206, 100 N.W. 1102 (1904); *Schloemer v. St. Louis Transit Co.*, 204 Mo. 99, 102 S.W. 565 (1907); *Tetherow v. St. Joseph & P.M. Ry.*, 98 Mo. 74, 11 S.W. 310 (1889); *Overby v. Mears Mining Co.*, 144 Mo. App. 363, 128 S.W. 813 (1910); *Missouri, K & T Ry. v. St. Clair*, 21 Tex. Civ. App. 345, 51 S.W. 666 (1899); *Duggan v. Heaphy*, 85 Vt. 515, 83 A. 726 (1912); *Weaver v. Wheeling Traction Co.*, 91 W. Va. 528, 114 S.E. 131 (1922).

38. 166 N.Y. 210, 59 N.E. 838 (1910).

39. *Id.* at 214-15, 59 N.E. at 839-40.

40. *Id.* at 214, 59 N.E. at 839.

41. *Id.* at 214, 59 N.E. at 839-40.

42. *Id.* at 214-15, 59 N.E. at 840.

43. *Id.* at 216, 59 N.E. at 840.

44. *Id.*

45. *Id.*

46. *Id.*

47. 98 Va. 62, 34 S.E. 976 (1900).

48. *Id.* at 63, 34 S.E. at 976.

49. *Id.* at 65, 34 S.E. at 977.

plaintiff to offer evidence of the subsequent repair to the circular saw, because "otherwise, the [wheel company] would be permitted to prove facts to establish its defen[s]e which the plaintiff was denied the right of disproving."⁵⁰

Subsequent to these two state court decisions, the Supreme Court of the United States, in *Choctaw, Oklahoma & Gulf Railroad v. McDade*,⁵¹ upheld the use of subsequent measures evidence to contradict a defendant's misleading testimony,⁵² in order to achieve fairness in litigation. The plaintiff, who had the unenviable job of riding on top of trains to give track signals to the conductor below, was fatally injured when his head struck a water spout that hung vertically from a water tank over the railroad tracks.⁵³ At trial, the railroad company's witness testified as to the height of the water spout, and claimed that it was not dangerously low.⁵⁴ Before the measurements were taken, but after the accident, the water spout had been reconstructed.⁵⁵ The Supreme Court upheld the trial court's ruling admitting evidence of the subsequent reconstruction solely for the proper determination of the measurements, with a limiting instruction to the jury.⁵⁶

Five years after *Choctaw*, the Supreme Court of Washington, in *Gustafson v. A.J. West Lumber Co.*,⁵⁷ upheld the use of evidence of subsequent measures to impeach a defendant who had denied the hazardous condition of a passageway.⁵⁸ The plaintiff, an employee of the lumber company, was injured while passing through a passageway located near an electric saw.⁵⁹ The plaintiff alleged that the passageway was too narrow, causing him to stumble and fall into the saw, which severed his arm.⁶⁰ At trial, the lumber company denied that a passageway had ever existed along the length of the saw.⁶¹ The court upheld the trial court's decision to permit the plaintiff's counsel to introduce evidence that the passageway had been subsequently widened to facilitate passage in order to dispute the company's denial of

50. *Id.*

51. 191 U.S. 64 (1903).

52. *Id.* at 69.

53. *Id.* at 65.

54. *Id.* at 69.

55. *Id.*

56. *Id.*

57. 51 Wash. 25, 97 P. 1094 (1908).

58. *Id.* at 28, 97 P. at 1096.

59. *Id.* at 27, 97 P. at 1095.

60. *Id.*

61. *Id.*

the passageway.⁶²

As courts began to perceive the need to contradict misleading and false statements made by defendants, the impeachment exception to subsequent measures evidence rapidly gained acceptance. The Supreme Court of Alabama adopted the use of subsequent measures evidence for this limited purpose in *Bedgood v. T.R. Miller Mill Co.*⁶³ In *Bedgood*, an employee of a mill company lost his arm and suffered lacerations and bruises after attempting to place a belt on the pulley of a ripper saw while the drive shaft was still revolving.⁶⁴ After the accident, the mill company boxed in the shaft between the pulley and the ripper saw post.⁶⁵ At trial, the company testified that it had not attempted to reduce the danger of the ripper saw after the plaintiff's injury.⁶⁶ Reversing the trial court, the Supreme Court of Alabama held that it was proper for the plaintiff's counsel to introduce evidence of the subsequent protective measure "not to show anterior negligence . . . but to contradict or impeach" the expert witness' testimony that no subsequent measures had been implemented.⁶⁷

Courts also have allowed the introduction of evidence of subsequent measures when defendants or their witnesses have unintentionally made incorrect statements. For example, in *Humphreys v. Chicago, Milwaukee, Saint Paul & Pacific Railroad*,⁶⁸ the plaintiff sued a railroad company after a train struck and killed ten mules and a horse that had broken through a gate separating the plaintiff's land from the railroad tracks.⁶⁹ The plaintiff alleged that the gate was insufficient for its purpose.⁷⁰ The railroad's expert testified as to the strength and good condition of a new gate installed after the accident, and not about the gate existing at the time of the accident.⁷¹ The appellate court upheld the trial court's decision to permit the plaintiff's counsel to introduce evidence about the new gate, reasoning that the subsequent measures evidence was competent to impeach the railroad's expert and to clarify whether the new gate or the old gate was sound.⁷²

62. *Id.* at 27-28, 97 P. at 1095-96.

63. 202 Ala. 299, 80 So. 364 (1918).

64. *Id.*

65. *Id.* at 301, 80 So. at 366.

66. *Id.*

67. *Id.*

68. 83 S.W.2d 586 (Mo. Ct. App. 1935).

69. *Id.*

70. *Id.* at 587.

71. *Id.* at 589.

72. *Id.*

b. False or Misleading Claims by the Defendant as to the Timing of Subsequent Measures

The second scenario also involves false and misleading testimony. It is, however, distinct from the first scenario in that a defendant or his witness testifies that a change to the allegedly hazardous condition was made before the accident, when it was actually made after the accident. When faced with this scenario, courts have considered that the defendant opened himself up to impeachment with his blatantly false testimony.

In the early stages of the period from approximately 1885 to about 1950, evidence of subsequent measures to impeach a defendant testifying in this manner was not automatically admissible. In the 1890 case of *Lang v. Sanger*,⁷³ the Supreme Court of Wisconsin refused to admit evidence of a subsequent repair to contradict a defendant who had testified falsely about the timing of a repair.⁷⁴ The plaintiff, a sawyer in the defendant's sawmill, lost his thumb and forefinger after his foot became caught on a knot in the floor of the gangway, causing his hand to strike the teeth of a nearby saw.⁷⁵ The defendant's witness testified that any defects in the gangway had been repaired before the accident.⁷⁶ The Supreme Court of Wisconsin held that the evidence that the gangway had been repaired after the accident was not admissible to rebut the testimony on the time of the repair.⁷⁷ The court feared that the jury might perceive the subsequent repair as an admission of negligence, even though it might not have affected the safety of the gangway at all. The court argued that even though the saw-guard may have been out of repair, the disrepair may have been minimal, and therefore may not have caused the injury. The court thus concluded that the defendant was entitled to this presumption.⁷⁸

Other state courts have admitted evidence of subsequent measures for impeachment purposes in this instance.⁷⁹ Three years after *Sanger*, a Kentucky court, in *Louisville & N.R.R. v. Woodward*,⁸⁰ held that the plaintiff could introduce evidence of the timing of corrective

73. 76 Wis. 71, 44 N.W. 1095 (1890).

74. *Id.* at 75, 44 N.W. at 1096.

75. *Id.* at 72, 44 N.W. at 1095.

76. *Id.* at 73, 44 N.W. at 1095.

77. *Id.* at 75, 44 N.W. at 1096.

78. *Id.*

79. The following cases support this proposition: *Holt v. Oval Oak Mfg. Co.*, 177 N.C. 170, 98 S.E. 369 (1919); *Anderson v. Conway Lumber Co.*, 99 S.C. 100, 82 S.E. 984 (1914); *Frankfort & Versailles Traction Co. v. Hulette*, 32 Ky. L. Rptr. 732, 106 S.W. 1193 (Ct. App. 1908); *Clonts v. Laclede Gaslight Co.*, 160 Mo. App. 456, 140 S.W. 970 (1911).

80. 15 Ky. L. Rptr. 445 (abstract) (1893).

measures to impeach a defendant's testimony on the issue.⁸¹ A railroad company witness testified that projecting railroad ties of unusual and dangerous length were sawed off before the accident.⁸² The court allowed the plaintiff to contradict the railroad's witness with evidence that the ties had been sawed off after the accident.⁸³

Similarly, in *Tise v. Thomasville*,⁸⁴ the Supreme Court of North Carolina upheld the admission of evidence of a subsequent repair to contradict testimony that the repair was made before the accident. In *Tise*, the plaintiff was injured when her horse stepped into a pothole in a street, causing her to fall.⁸⁵ Representatives for the city of Thomasville testified that the hole had already been filled before the accident.⁸⁶ The court allowed the plaintiff to introduce evidence that the hole was filled after the accident, in order "to show that the repairs were made afterwards—not that the repairs were evidence tending to prove negligence."⁸⁷

A case that raised truthfulness as an issue arising from the introduction of evidence of subsequent measures was *Koskoff v. Goldman*.⁸⁸ In *Koskoff*, the plaintiff brought a wrongful death action on behalf of his wife, who died after falling from a second-floor platform when the stairway railing collapsed.⁸⁹ The landlord of the premises testified at trial that the railing was replaced on the day before the accident.⁹⁰ The plaintiff's witness had already testified that when he inspected the railing after the accident, it was in disrepair, thereby implying that any repair must have been made after the accident.⁹¹ The Supreme Court of Errors of Connecticut upheld the admission of the testimony given by the plaintiff's witness, because a "question of veracity was thus presented, and it was one which had an important bearing upon the ultimate issue."⁹² The court emphasized that the trial court had given a limiting instruction to the jury and that the landlord had already testified about a replacement.⁹³

The Supreme Court of New Jersey, in *Lombardi v. Yulinsky*,⁹⁴

81. *Id.*

82. *Id.*

83. *Id.*

84. 151 N.C. 281, 65 S.E. 1007 (1909).

85. *Id.* at 282, 65 S.E. at 1007.

86. *Id.*

87. *Id.* at 282, 283, 65 S.E. at 1007.

88. 86 Conn. 415, 85 A. 588 (1912).

89. *Id.* at 418, 85 A. at 590.

90. *Id.* at 421, 85 A. at 591.

91. *Id.*

92. *Id.*

93. *Id.*

94. 98 N.J.L. 332, 119 A. 873 (1923).

echoed the perception of the *Koskoff* court that subsequent measures evidence may affect the credibility of a defendant's witness.⁹⁵ In *Lombardi*, the plaintiff was fatally injured when his automobile struck a pile of bricks left in the roadway by the defendant.⁹⁶ At trial, the defendant testified that, prior to the accident, he had installed danger lights on the pile of bricks.⁹⁷ On cross-examination, counsel for the plaintiff asked the defendant if, in fact, the danger lights were placed on the brick pile after the accident.⁹⁸ The court held this question was proper "for the purpose of affecting the credibility of the defendant as a witness," but added that the trial judge should have instructed the jury that evidence of the subsequent measures was admitted solely for its bearing upon the defendant's credibility, and not as evidence of negligence.⁹⁹

c. The Claim that the Place or Product Was Safe
Prior to the Accident

The courts have admitted evidence of subsequent measures to impeach the testimony of a defendant or his witness who has merely stated that the allegedly hazardous condition was safe, or that changes were not necessary or customary. This third scenario was perhaps the most threatening to the rule excluding evidence of subsequent measures. Impeaching a defendant or his witness who testifies in this manner threatens the rule because the defendant has merely stated an opinion, vital to his defense, about the safety of the allegedly hazardous condition. He has not made an obviously false or misleading statement as to the taking or the timing of subsequent measures in order to achieve an unfair advantage by manipulating the exclusionary nature of the subsequent measure rule. The fact that evidence of subsequent measures should not to be construed as an admission of negligence¹⁰⁰ means that it is possible for a defendant or his witness to believe that a particular condition in question is safe, and yet change that condition for other reasons. In such a situation, a subsequent measure would not be inconsistent with a defendant's belief that the condition in question was safe and not in need of repair. Evidence of subsequent measures should not be admissible for impeachment purposes in such a situation.

Notwithstanding such problems, in the period from approxi-

95. *Id.* at 334, 119 A. at 874.

96. *Id.* at 333, 119 A. at 874.

97. *Id.*

98. *Id.*

99. *Id.* at 334, 119 A. at 874.

100. See *supra* note 11 and accompanying text.

mately 1885 to about 1950, the majority of state courts permitted plaintiffs to impeach defendants with evidence of subsequent measures when confronted with this factual scenario.¹⁰¹ The Supreme Court of Rhode Island dealt with this particular issue in *Yeaw v. Williams*.¹⁰² In *Yeaw*, the plaintiff was injured when his horse struck a hitching post far out into the road.¹⁰³ At trial, the defendant called a surveyor who testified that, in his opinion, the position of the post did not render the highway unsafe.¹⁰⁴ On cross-examination, the plaintiff's counsel asked the surveyor whether the post had been removed after the accident.¹⁰⁵ The surveyor responded that it had been removed.¹⁰⁶ The court held that the subsequent removal of the post was admissible testimony because it was offered "to discredit the witness by showing that his conduct was inconsistent with his testimony."¹⁰⁷ The court reasoned: "[I]f that witness honestly thought the post was no defect, why should he remove it?"¹⁰⁸

Perhaps the most elaborate defense for the admissibility of subsequent measures evidence in a case of putative safety was stated by an Ohio court in *Bond Hill Village v. Atkinson*.¹⁰⁹ The plaintiff in *Atkinson* was fatally injured when she fell on a sidewalk.¹¹⁰ A witness for the village testified that he carefully examined the sidewalk in question immediately after the accident and found it in good condition.¹¹¹ On cross-examination, counsel for the plaintiff introduced evidence that the sidewalk was repaired within eight days of the accident.¹¹² Although the court held that this evidence was not admissible to prove negligence on behalf of the village, it viewed the evidence as proper for impeachment purposes:

[The evidence is] legitimate and proper cross-examination . . . to test [the witness'] credibility and throw light on the question whether his statement as to the safe condition of the sidewalk at the time of the accident was trustworthy and entitled to credit. If on such cross-examination the witness should state facts, which would limit or discredit his statement in chief, the plaintiff should

101. See *infra* notes 102-41 and accompanying text.

102. 15 R.I. 20, 23 A. 33 (1885).

103. *Id.*

104. *Id.* at 22, 23 A. at 34.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. 16 Ohio C.C. 470 (1898).

110. *Id.* at 471.

111. *Id.* at 473.

112. *Id.*

have the benefit of such statements.¹¹³

The court supported its holding by drawing an analogy between subsequent conduct and an inconsistent statement:

Suppose the witness had testified, as he did, that when he examined [the sidewalk] shortly after the accident he had found it in good condition, . . . should it not then be admissible on cross-examination to ask him if he had not soon after that told a number of persons that when he examined it, it was in very bad condition?¹¹⁴

The flaw in the court's reasoning is that it incorrectly interpreted the village's subsequent repair of the sidewalk to mean *only* that the village believed its sidewalk was in bad condition. The court neglected to consider the possibility that the village did in fact believe that the sidewalk was in good condition, but chose to exceed the standard of care required in the maintenance of the sidewalk and make subsequent repairs. The village may have been taking an extra precaution in excess of its duty of care, which the subsequent measure rule seeks to encourage. Furthermore, the court's interpretation that the sidewalk had been in bad condition was taken to imply that the village was negligent. The court did not permit evidence of subsequent measures for impeachment purposes, but rather to prove that the village believed that it had been negligent. This is precisely the result that the Rule seeks to prevent. Evidence of subsequent measures should not be construed to be an admission of negligence.¹¹⁵

The Supreme Court of Alabama followed the reasoning of *Bond Hill* in *Frierson v. Frazier*.¹¹⁶ In *Frierson*, the plaintiff suffered the loss of a team of mules that fell into a river because the defendant's ferry lacked a rear guard rail to hold in the animals.¹¹⁷ At trial, the defendant testified that a rear guard rail on ferries was neither necessary nor customary.¹¹⁸ On cross-examination, the plaintiff's counsel introduced evidence that a rear guard rail had subsequently been placed on the ferry.¹¹⁹ The Supreme Court of Alabama upheld the lower court's decision to allow the admission of this evidence because it affected the credibility of the testimony.¹²⁰

It is possible that the defendant may truly have believed that a rear guard rail was neither necessary nor customary, and his subse-

113. *Id.* at 473-74.

114. *Id.* at 474.

115. See *supra* note 11 and accompanying text.

116. 142 Ala. 232, 37 So. 825 (1904).

117. *Id.* at 234, 37 So. at 826.

118. *Id.* at 237, 37 So. at 827.

119. *Id.*

120. *Id.*

quent installation of the guard rail may have been simply an extra precaution. It is precisely this taking of added precautions that the rule seeks to encourage.¹²¹ It can be argued, therefore, that the defendant should have received the benefit of this assumption to further the social policy concerns of the Rule, at least until the assumption was shown to have been invalid in his case.

In cases with facts analogous to *Frierson*, not all state courts admitted evidence of subsequent measures to impeach the credibility of the defendant or his witness. For example, in *Mitchell v. J.S. Schofield's Sons Co.*,¹²² the plaintiff brought a wrongful death action against a company for her son, who died in a scaffolding accident.¹²³ An officer of Schofield's testified that the scaffolding was as strong as those in general use, and that it was reasonably safe.¹²⁴ On cross-examination, the plaintiff's counsel introduced evidence that the defendant added braces to the scaffolding after the accident for additional support.¹²⁵ Affirming the trial court, the Georgia appellate court held that this evidence was inadmissible.¹²⁶ The appellate court reasoned that when a defendant seeks to introduce evidence of subsequent measures, the same considerations of public policy that act to exclude evidence of subsequent measures in other circumstances apply with equal force. Thus, subsequent measures evidence is not an admission of negligence, and courts should encourage repairs by refusing to admit evidence of subsequent measures—"whether such evidence be offered in chief, or in rebuttal."¹²⁷

The Supreme Court of California reached a contrary result in *Inyo Chemical Co. v. City of Los Angeles*.¹²⁸ In *Inyo Chemical*, the court upheld the trial court's admission of evidence of subsequent measures to impeach the credibility of a Los Angeles city employee who had testified that a particular subsequent measure had not been necessary.¹²⁹ Inyo Chemical was in the business of refining and selling trona, a mineral that it acquired from the bed of a lake adjoining land leased from the city.¹³⁰ During a hard rainfall, the aqueduct operated by the city collapsed.¹³¹ The consequent flood waters

121. See *supra* note 2.

122. 19 Ga. App. 201, 91 S.E. 275 (1917).

123. *Id.* at 201, 91 S.E. at 276.

124. *Id.* at 202, 91 S.E. at 276.

125. *Id.*

126. *Id.*

127. *Id.*

128. 5 Cal. 2d 525, 55 P.2d 850 (1936).

129. *Id.* at 543, 55 P.2d at 858-59.

130. *Id.* at 530, 55 P.2d at 852.

131. *Id.*

washed out the company's trona beds and damaged its roads and pipelines.¹³² The city called an employee who was charged with overseeing the maintenance and operation of the aqueduct as an expert witness. The employee testified that he had inspected the area prior to the aqueduct collapse and had concluded that no overhead or underground drainage was necessary.¹³³ On cross-examination, counsel for Inyo Chemical introduced evidence that the city had authorized the construction of longer spillways after the accident.¹³⁴ The Supreme Court of California held that this evidence was admissible "for the purpose of weakening the testimony of [the city's] expert witness by showing that he had subsequently changed his opinion as to the necessity of drainage."¹³⁵

Five years later, the same court adhered to its holding in *Inyo Chemical* when faced with a similar factual situation in the case of *Hatfield v. Levy Bros.*¹³⁶ In *Hatfield*, a customer was injured when she slipped on the floor in a clothing store.¹³⁷ An employee of the store testified that he "looked at the floor (immediately after the accident) and—did not notice anything unusual about the floor."¹³⁸ Moreover, the defendant maintained at all times that nothing was wrong with the floor.¹³⁹ The plaintiff's counsel offered evidence that after the accident, the defendant discontinued its practice of waxing the store floor.¹⁴⁰ The Supreme Court of California held that this evidence was admissible because it "tended to impeach that [employee's] testimony by showing that he had changed his mind with reference to there being nothing wrong with the floor."¹⁴¹

2. THE PERIOD FROM 1950 TO THE CODIFICATION OF THE FEDERAL RULES OF EVIDENCE IN 1975

During the period from 1950 to the codification of the Federal Rules of Evidence in 1975, courts and commentators uniformly approved the use of subsequent measures evidence to impeach the credibility of a witness as an established exception to the rule excluding evidence of subsequent measures to prove negligence.¹⁴² This had

132. *Id.*

133. *Id.* at 543, 55 P.2d at 858.

134. *Id.*

135. *Id.* at 543, 55 P.2d at 859.

136. 18 Cal. 2d 798, 117 P.2d 841 (1941).

137. *Id.* at 803, 117 P.2d at 844.

138. *Id.* at 810, 117 P.2d at 847.

139. *Id.*

140. *Id.*

141. *Id.*

142. See *infra* notes 145-97 and accompanying text.

not always been the case, however, and before approximately 1950, legal commentators had virtually ignored the use of subsequent measures evidence for impeachment as a valid exception to the Rule.¹⁴³ Professor Wigmore did not recognize the use of subsequent measures evidence to impeach the credibility of a witness by presenting contradictory evidence until 1940; and then he relegated the recognition to a footnote.¹⁴⁴ By 1954, Professor McCormick had recognized what the courts had held for years.¹⁴⁵ His treatise, published in that year, acknowledged that evidence of subsequent measures could be admissible "as evidence contradicting facts testified to by the adversary's witness and thus impeaching [the witness'] credibility."¹⁴⁶

Once scholars had accepted the impeachment exception, its application became both more common and versatile. Plaintiff's lawyers sought to expand the impeachment exception, and correspondingly reduce the exclusionary effect of the rule against evidence of subsequent measures.¹⁴⁷ This expansion of the impeachment exception began in California, and decisions reached by California courts had a significant effect on the exception's application following the codification of Rule 407 of the Federal Rules of Evidence in 1975.¹⁴⁸

The versatility of the impeachment exception was first exemplified in *Daggett v. Atchison, Topeka & Santa Fe Railway*.¹⁴⁹ In *Daggett*, the plaintiff brought a wrongful death action against the railroad after his two minor children were killed when the railroad's passenger

143. See, e.g., 1 B. ELLIOTT & W. ELLIOTT, *THE LAW OF EVIDENCE*, § 150, at 205 (1904) (The only exception to the rule is showing notice or control.); 1 S. GREENLEAF, *THE LAW OF EVIDENCE*, § 195d, at 329 (J. Wigmore ed.) (16th ed. 1899) (Evidence of subsequent measures is admissible solely for the admission that a person has or claims control over the place or product.); 1 B. JONES, *THE LAW OF EVIDENCE*, § 288, at 540 (4th ed. 1938) (The exceptions to the rule against admission of evidence of subsequent measures are for proving that the condition existed at the time of the accident, and for identifying who had the duty of repair.); 3 B. JONES, *THE LAW OF EVIDENCE*, § 1043, at 1921-22 (2d ed. 1926) (Evidence of subsequent measures is admissible to show the control of defendant, the condition of the place before and after the accident, and in rebuttal when the defendant's evidence calls for such evidence.); 1 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW*, § 283, at 582-83 (2d ed. 1923) (The three exceptions to the rule are showing control of the premises, condition of the place before and after the accident, and failing to observe a precaution required by law.); 1 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW*, § 283, at 367 (1904) (same). But see 45 C.J. § 796, at 1236 (1928) (Evidence of subsequent measures is admissible to rebut contentions or evidence that no change had been made after the accident, and is admissible to show that no defect existed.).

144. See 2 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW*, *supra* note 2, § 283, at 159 n.3.

145. C. MCCORMICK, *supra* note 31, at 544-45.

146. *Id.* at 545.

147. See *infra* notes 149-70 and accompanying text.

148. See *infra* notes 149-97 and accompanying text.

149. 48 Cal. 2d 655, 313 P.2d 557 (1957).

train struck their automobile.¹⁵⁰ At trial, the plaintiff's counsel called two witnesses for the defendant as adverse witnesses on direct examination pursuant to section 2055 of the California Code of Civil Procedure.¹⁵¹ The first witness was the motorman who was driving the train at the time of the accident.¹⁵² The motorman testified that the train was travelling at a speed of eighty-five to ninety miles per hour, and that the speed limit in the district in which he was travelling "is 90 now."¹⁵³ The plaintiff's counsel countered with evidence that the speed limit in the district had been lowered after the accident to fifty miles per hour.¹⁵⁴ The second witness called by the plaintiff's counsel was a signal engineer for the railroad,¹⁵⁵ who testified that the crossing signal at the time of the accident was "the safest type of signal."¹⁵⁶ The plaintiff's counsel countered, once again, with evidence that the former single wigwag signal had been changed after the accident to a double flashing-light signal.¹⁵⁷

The Supreme Court of California addressed the issue of whether it was proper for the plaintiff's counsel to call the witnesses for the railroad on direct examination and then impeach them with evidence of subsequent measures.¹⁵⁸ The court held that, generally under section 2055 of the California Code of Civil Procedure, it was permissible for the plaintiff's counsel to call the witnesses for the railroad on direct examination and then impeach them.¹⁵⁹ Because the witnesses in such a situation were adverse, they could be subjected to impeachment.¹⁶⁰ Thus, the substantive interests of the rule excluding subsequent measures yielded to the procedural requisites of the interests of litigation.

150. *Id.* at 658, 313 P.2d at 559.

151. *Id.* at 659, 313 P.2d at 559. Section 2055 of the California Code of Civil Procedure provides in part:

A party to the record of any civil action or proceeding . . . may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence.

Id. at 659 n.2, 313 P.2d at 559 n.2. Section 2055 of the California Code of Civil Procedure was repealed in 1965 and subsequently restated in substance as Evidence Code Section 776. CAL. EVID. CODE § 776 (West 1966).

152. *Daggett*, 48 Cal. 2d at 659, 313 P.2d at 560.

153. *Id.*

154. *Id.*

155. *Id.* at 660, 313 P.2d at 560.

156. *Id.* (citing to the trial record).

157. *Id.*

158. *Id.* at 662, 313 P.2d at 561.

159. *Id.* at 664, 313 P.2d at 563.

160. *Id.*

In addition, the court adopted a narrower focus when it considered whether the testimony of each of the two witnesses was, in fact, subject to impeachment by evidence of subsequent measures.¹⁶¹ The court held that the motorman's testimony as to the speed limit in the district at the time of trial was subject to impeachment, because the speed limit was fifty miles per hour and not ninety miles per hour as the witness had testified.¹⁶² The court also held that the testimony of the signal engineer on the safety of the single-light wigwag signal was subject to impeachment "for the purpose of weakening the testimony of defendant's expert witness by showing that he had subsequently changed his opinion as to the . . . safety of the conditions prevailing at the time of the accident."¹⁶³

The *Daggett* court's decision to permit evidence of subsequent measures to impeach a defendant called as an adverse witness by the plaintiff's counsel raises some concern about the potential for an unbridled manipulation of the impeachment exception. The holding in *Daggett* does not appear to prevent the plaintiff's counsel from calling the defendant or his expert witness on direct examination, asking the witness if he believed that the allegedly hazardous condition in question was safe, and then impeaching the witness with evidence of the defendant's subsequent measures.¹⁶⁴ The plaintiff's counsel is thus able to instigate the inconsistency in testimonies and manipulate the impeachment exception to his own advantage. It is more commonly the defendant who opens the door to impeachment with inconsistent testimony.

A more subtle approach for the plaintiff's counsel would be to engage the defendant, or the defendant's expert witness, in tedious and confusing questioning, thereby increasing the likelihood that the witness will testify inconsistently. The dissent in *Daggett* complained of such a tactic.¹⁶⁵ After analyzing the questions and answers exchanged by the plaintiff's counsel and the motorman as to the speed limit in the district at the time of the trial, the dissent concluded that the motorman had *not* testified inconsistently.¹⁶⁶ Rather, the dissent-

161. *Id.*

162. *Id.* at 664, 313 P.2d at 563.

163. *Id.* (citing *Inyo Chem. Co. v. City of Los Angeles*, 5 Cal. 2d at 543, 55 P.2d at 859).

164. See Note, *Exceptions to the Subsequent Remedial Conduct Rule*, 18 HASTINGS L.J. 677, 679 (1967).

165. *Daggett*, 48 Cal. 2d. at 670, 313 P.2d at 567 (Schauer, Spence, and McComb, J.J., dissenting).

166. *Id.* The witness never testified that the speed limit for the street crossing remained at 90 miles per hour up to the time of trial. On the contrary, the witness testified that the overall restriction for the district was 90 miles per hour, and acknowledged that lower restrictions existed within the district. *Id.*

ing judges concluded that the plaintiff's counsel swung back and forth between the past and present tenses, without specifying which area of the district he was referring to, and that he succeeded in confusing both the motorman and the court.¹⁶⁷ Therefore, the dissent concluded:

[A]ny confusion as to speeds, times, and district or areas appears from the record to have been invited and brought about by the counsel for plaintiffs, who then seized upon such alleged confusion as an excuse to get before the jury otherwise inadmissible evidence of a change in the speed limit after the accident.¹⁶⁸

The potential that *Daggett* may be used by plaintiff's counsels to foster manipulation is disturbing because it was a major departure from the three original scenarios that gave rise to the admission of evidence of subsequent measures to impeach in the earlier common law cases. This departure threatens to compromise the integrity of the impeachment exception and the social interests sought to be promoted by the rule excluding evidence of subsequent measures.

In every case prior to *Daggett* that involved the use of subsequent measures evidence to impeach, the defendant was called on direct examination by his own counsel, and then proceeded to testify inconsistently or in a false and misleading manner.¹⁶⁹ The defendant was the initiator of the contradiction and was deemed the aggressor, while the plaintiff was the victim of the false testimony. In these instances, the courts felt the need to protect the plaintiff's position by admitting contradictory evidence of subsequent measures to impeach the credibility of the defendant, or his witness. The result was that the defendant was severely hindered in his attempt to gain an unfair advantage over the plaintiff in litigation by manipulating the exclusionary nature of the subsequent measures rule.

In *Daggett*, however, the plaintiff was viewed as the aggressor, and the defendant as the victim. Because the courts had formerly acted to protect the plaintiff from the defendant's unbridled manipulation of the evidence, the dissent found it difficult to justify protecting a plaintiff who had actively initiated the inconsistent testimony. If the plaintiff had refrained from asking the defendant whether he believed the allegedly hazardous condition was safe, he could have avoided the controversy altogether.

Sensing that the application of the impeachment exception had expanded beyond its proper limits, and that it now threatened to cir-

167. *Id.*

168. *Id.* at 667, 313 P.2d at 565.

169. See *supra* notes 37-141 and accompanying text.

cumvent the rule excluding evidence of subsequent measures, the California District Court of Appeal sought to restrict the application of the exception in *Pierce v. J.C. Penney Co.*¹⁷⁰ In *Pierce*, the plaintiff was injured after falling down the terrazo stairs in a department store.¹⁷¹ At trial, the department store called the section manager of the store as its witness.¹⁷² The manager had gone to the scene immediately after the accident and had inspected the steps, and testified that "there was no foreign substance on the steps and that they were not slippery."¹⁷³ On cross-examination, the plaintiff's counsel sought to impeach the witness with evidence that the defendant added abrasive strips to the stairs after the accident.¹⁷⁴

The *Pierce* court considered the admissibility of evidence of subsequent measures for impeachment according to the following two methods. The first method concerned "[i]mpeachment by evidence of previous conduct inconsistent with the fact or belief asserted by the witness on the stand."¹⁷⁵ The court recognized that prior California cases authorized the admission of subsequent measures evidence to impeach a witness who had authorized or directed changes to the allegedly hazardous condition after the accident, and had then testified at trial that he believed the condition to have been safe prior to the accident.¹⁷⁶ The court, however, distinguished these cases from the instant case by holding that subsequent measures evidence was not admissible to impeach a nonexpert witness who had not authorized, recommended, directed, approved, or supervised the subsequent changes.¹⁷⁷ The *Pierce* court reasoned that there had been no evidence of conduct inconsistent with the witness' testimony, because he had had no involvement with the subsequent repairs.¹⁷⁸

The second method analyzed by the court concerned "[i]mpeachment by contradictory evidence."¹⁷⁹ The plaintiff, by this method, would seek to introduce subsequent measures evidence on the ground that these acts, although not implemented or authorized by the witness, contradicted the witness' belief that the condition prior to the accident had been safe. The *Pierce* court stated that for it to view the subsequent placing of abrasive strips in the case at hand as

170. 167 Cal. App. 2d 3, 334 P.2d 117 (Dist. Ct. App. 1959).

171. *Id.* at 4, 334 P.2d at 118.

172. *Id.* at 5, 334 P.2d at 119.

173. *Id.* at 6, 334 P.2d at 119.

174. *Id.* at 5, 334 P.2d at 119.

175. *Id.* at 8, 334 P.2d at 120-21 (emphasis omitted).

176. *Id.* at 8, 334 P.2d at 121.

177. *Id.*

178. *Id.*

179. *Id.* at 9, 334 P.2d at 121 (emphasis omitted).

contradictory to the witness' testimony, it would have to "accept the premise that proof of this fact constitute[d] competent evidence tending to prove that before the abrasive strips were applied, the steps [had been] . . . unsafe."¹⁸⁰ It reasoned further that such a premise was not acceptable because "evidence of subsequent precautions is not competent to prove lack of safety in the antecedent condition."¹⁸¹

Moreover, the *Pierce* court, noting that admission of the evidence relating to the placing of abrasive strips on the steps could lead to a complete circumvention of the rule excluding evidence of subsequent measures, stated:

[T]o affirm the admissibility of the evidence of subsequent changes and precautions to impeach (contradict) testimony of the character given by the witness . . . would . . . completely . . . nullify the general rule and reduce it to nothing more than an empty shell. . . . [Thus] whenever a defendant in this type of case call[ed] any witness to testify to any observation tending to prove the safety of, or lack of danger or defectiveness in, his premises at the time of an accident, the door is automatically opened to plaintiff to prove (by way of impeachment) every subsequent repair made or precaution taken.¹⁸²

In addition, the court distinguished its holding from the *Daggett* decision.¹⁸³ In *Daggett*, the second witness impeached by the plaintiff's counsel had neither authorized, nor directed the placing of an improved wigwag signal subsequent to the occurrence of the accident. Rather, the witness testified that the improved wigwag signal was " 'the safest type of signal.' "¹⁸⁴ In analyzing the *Daggett* decision, the *Pierce* court stated that the witness in *Daggett* testified as an expert,¹⁸⁵ whereas the witness in *Pierce* testified as a layman.¹⁸⁶ Furthermore, the court concluded that because the witness in *Daggett* had voiced "a rather extravagant opinion" about the signal, he was subject to impeachment¹⁸⁷ under circumstances very different from those in the instant case.¹⁸⁸ Finally, although the *Pierce* court placed limitations on the application of the impeachment exception, it upheld the practice whereby a plaintiff calls a defendant or his expert witness to tes-

180. *Id.* at 10, 334 P.2d at 122.

181. *Id.*

182. *Id.* at 11, 334 P.2d at 122.

183. *Id.* at 12, 334 P.2d at 123.

184. *Daggett v. Atchison, Topeka & Santa Fe Ry.*, 48 Cal. 2d 655, 660, 313 P.2d 557, 560 (1957) (citing to the trial record).

185. *Pierce*, 167 Cal. App. 2d at 12, 334 P.2d at 123.

186. *Id.* at 6, 334 P.2d at 119.

187. *Id.* at 12, 334 P.2d at 123.

188. *Id.* at 13, 334 P.2d at 124.

tify on direct examination, and then impeaches the witness with evidence of subsequent measures.¹⁸⁹

Therefore, a witness who authorized, or directed a change to an allegedly hazardous condition after the occurrence of an accident and then testified that the condition before the accident had been safe, would be subject to impeachment through the introduction of evidence that subsequent measures had been implemented; evidence of the subsequent measures would show that his testimony was inconsistent with his conduct. On the other hand, a witness who had not authorized or directed the change to an allegedly hazardous condition after an accident, but who testified that the condition before the accident had been safe, would not be subject to impeachment because his testimony was not inconsistent with his conduct. The latter witness, however, would be subject to impeachment if he testified as an expert that the condition in question was the "best," or the "safest." Finally, a witness who testified in a false or misleading manner about the safety of the allegedly hazardous condition was subject to impeachment with evidence of subsequent measures.

The fifteen years prior to the enactment of the Federal Rules of Evidence witnessed no further qualification of the impeachment exception to the subsequent measures rule. Rather, the courts applied the impeachment exception within the parameters defined by one state court.¹⁹⁰ These boundaries, however, were tested in *Sanchez v. Bagues & Sons Mortuaries*.¹⁹¹ In *Sanchez*, the plaintiff, while walking through the defendant's mortuary, was injured when she slipped on a step that allegedly had a worn and slippery strip of abrasive tape.¹⁹² The plaintiff's counsel called the defendant as an adverse witness on direct examination and asked him: "You don't think these steps were slippery on [the date of the accident], do you?"¹⁹³ The plaintiff's counsel then sought to impeach the witness with evidence that the abrasive strip had been replaced after the accident.¹⁹⁴ Outside the hearing of the jury, the plaintiff's counsel explained to the court:

189. *Id.* at 11, 334 P.2d at 122.

190. *See, e.g., American Airlines v. United States*, 418 F.2d 180, 196 (5th Cir. 1969) (Evidence that the face of a drum-type altimeter was altered after a plane crash was admissible to impeach testimony by the airline's director of flight operations that the altimeter used before the accident was safe and that there was no reason to change it.); *Slow Development Co. v. Coulter*, 88 Ariz. 122, 353 P.2d 890 (1960) (Evidence that abrasive strips were placed on a cement walk after an accident was admissible to impeach testimony by a hotel expert that the cement was not slippery and that it was in the same condition after the accident as before.).

191. 271 Cal. App. 2d 188, 76 Cal. Rptr. 372 (1969).

192. *Id.* at 190, 76 Cal. Rptr. 372.

193. *Id.* at 191, 76 Cal. Rptr. 372.

194. *Id.*

"The only reason I asked the defendant whether or not in his opinion the condition was safe at the time of the accident is that now I can bring in the pictures to impeach his testimony."¹⁹⁵

The court held that the above question did not lay a sufficient foundation for the impeaching evidence and it criticized the attempt to introduce evidence of subsequent measures as a "deliberate and calculated attempt to circumvent the exclusionary rule and the policy which prompted its establishment."¹⁹⁶ Following the reasoning of *Pierce*, the court held that no evidence had been offered to show that the defendant had ordered the replacement of the strip, and that he was therefore not subject to impeachment with the subsequent replacement when he testified that the step was safe.¹⁹⁷

III. THE STATE OF THE IMPEACHMENT EXCEPTION SUBSEQUENT TO THE ENACTMENT OF RULE 407 OF THE FEDERAL RULES OF EVIDENCE

The common law rule excluding evidence of subsequent measures was codified in Rule 407 of the Federal Rules of Evidence.¹⁹⁸ Unlike the previous state evidentiary rules that adopted the common law rule excluding evidence of subsequent measures,¹⁹⁹ Rule 407 provides that evidence of subsequent measures is admissible for the purpose of impeachment.²⁰⁰ Thus, the common law rule of impeaching a witness with evidence of subsequent measures was now to be uniformly applied by the federal courts.

Since the enactment of the Federal Rules of Evidence, the impeachment exception has been developed further by the federal courts, which have interpreted Rule 407 in light of prior case law which considered the admissibility of evidence of subsequent remedial measures. Although some commentators have speculated that the development of the impeachment exception over the years may adversely affect the purpose of the subsequent measures rule, thereby thwarting the rule's purpose of encouraging remedial repairs or

195. *Id.*

196. *Id.*

197. *Id.* at 192, 76 Cal. Rptr. at 374.

198. See *supra* note 1, and accompanying text.

199. See CAL. EVID. CODE § 1151 (West 1966); KAN. STAT. ANN. § 60-451 (1983); N.J. STAT. ANN. § 2A:84A, Rule 51 (West 1976). These statutes provide: "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." *Id.* There are slight punctuation differences among the three statutes. See *id.*

200. See *supra* note 4.

improvements,²⁰¹ the methods for impeaching a witness with evidence of subsequent measures developed at common law continue to be practiced in the federal courts.

A. *Impeaching a Witness Who Makes False or Misleading
Assertions Regarding the Safety of the Allegedly
Hazardous Condition*

The use of evidence of subsequent measures to impeach a witness who makes false or misleading assertions is almost universally accepted by the federal courts. The use of the impeachment exception for this purpose is most important because it prevents witnesses for the defendant from testifying in a manner that would circumvent the interest of maintaining fairness and promoting truth among the parties to litigation.²⁰² Thus, a defendant might be tempted to achieve an unfair advantage over the plaintiff by introducing false testimony, expecting the exclusionary nature of the Rule to act as a shield.²⁰³

The United States Court of Appeals for the Sixth Circuit faced such a situation in *Patrick v. South Central Bell Telephone Co.*²⁰⁴ The plaintiff was a lineman for a power company who had been dispatched in an aerial lift truck during a storm to check damage to a power line.²⁰⁵ As the truck proceeded down a street, the aerial lift bucket on the truck struck a telephone cable, which was hanging four feet below its prestorm height.²⁰⁶ As a result, the truck acquired a charge of

201. See *Bickerstaff v. South Cent. Bell Tel. Co.*, 676 F.2d 163 (5th Cir. 1982). In *Bickerstaff*, the Fifth Circuit noted the negative attributes of the impeachment exception:

The leading authorities . . . have pointed out the difficulties with regard to the 'impeachment' exception. . . . [I]n connection with the other rules, the impeachment 'exception' may swallow up the 'rule' insofar as utilized on cross-examination of an adverse witness. . . . Professor Moore merely notes that the trial judge should guard against the improper admission of such evidence 'to prove prior negligence under the guise of impeachment.'

Id. at 168; see also 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* § 407[05], at 407-33 (1986) ("Care should be taken that needless inquiry and concern over credibility does not result in unnecessarily undercutting the policy objective of the basic exclusionary rule."); C. WRIGHT & K. GRAHAM, *supra* note 4, § 5289, at 145-47 ("It is possible that the Advisory Committee intended that the impeachment exception should be used to undermine Rule 407 If not, . . . the trial judge [has] very little power to prevent this result.").

202. Rule 102 of the Federal Rules of Evidence states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

203. D. LOUISELL & C. MUELLER, *supra* note 23, at 396 (The "impeachment exception is needed when defendant attempts unfairly to exploit the exclusionary doctrine by testimony which would mislead if subsequent measures are excluded.").

204. 641 F.2d 1192 (6th Cir. 1980).

205. *Id.* at 1194.

206. *Id.*

electricity, and the plaintiff was electrocuted when he attempted to leave the truck at a subsequent stop.²⁰⁷ At the time of the accident, Tennessee law required that all power lines be maintained at a minimum height of eighteen feet.²⁰⁸ At trial, an expert witness for the telephone company testified that after the accident the cable was raised to twenty-one feet seven inches, its prestorm height.²⁰⁹ Counsel for the plaintiff's estate introduced evidence that the cable was raised to twenty-one feet seven inches by raising the point at which it was attached to the preexisting poles and by adding a new pole between the two preexisting poles.²¹⁰ Thus, the impeaching evidence implied that without the subsequent measure, the true prestorm height of the power line was thirteen feet ten inches.²¹¹ The Sixth Circuit held that evidence of the subsequent repair was admissible for the purpose of impeaching the witness for the telephone company, who had implied that the cable's original height was above the statutory minimum height, when it had actually been well below the statutory minimum.²¹²

The *Patrick* case illustrates the necessity for permitting impeachment with evidence of subsequent measures. A contrary holding would have unduly disadvantaged the plaintiff by not allowing the false assertions made by the telephone company's witness to be impeached with contradictory evidence of the subsequent measure. Consequently, any false or misleading statements made by the defendant, or his witness, should be subject to impeachment with evidence of subsequent measures taken by the defendant.

B. *Impeaching a Witness Who Testifies That the Allegedly Hazardous Condition Was Safe*

In *Pierce*, the California District Court of Appeal limited the common law rule that allowed the use of subsequent measures evidence to impeach a defendant, or his witness, who testified that an allegedly hazardous condition had been safe prior to the accident.²¹³ The *Pierce* court restricted the availability of the impeachment exception to witnesses who had control over, or the authority to implement,

207. *Id.*

208. *Id.* at 1194 n.1.

209. *Id.* at 1195.

210. *Id.*

211. *Id.*

212. *Id.* at 1197.

213. See *supra* Section II(B)(1)(c).

the subsequent measure,²¹⁴ who were expert witnesses,²¹⁵ or who had made "extravagant" assertions about the safety of the condition in question.²¹⁶

In applying Rule 407, however, the federal courts have only partially applied the *Pierce* rule.²¹⁷ For example, a witness who merely testifies that an allegedly hazardous condition was safe prior to the accident is not subject to impeachment.²¹⁸ On the other hand, a witness who testifies that the condition before the accident was the "safest" possible, or the "best in the world," or that "all reasonable care was used," is subject to impeachment.²¹⁹ The federal courts, however, have failed to apply the other limitations on the admissibility of evidence of subsequent measures made by the *Pierce* court.²²⁰ The distinction between one who has control or authority to implement the subsequent measure and one who does not, and the distinction between an expert and a nonexpert have both not been recognized by the federal courts.²²¹

In *Kenny v. Southeastern Pennsylvania Transportation Authority*,²²² the United States Court of Appeals for the Third Circuit held that evidence of subsequent measures is admissible to impeach a witness who testified that all reasonable care had been used in making the condition safe.²²³ The plaintiff in *Kenny* was waiting on a metro train platform when she was beaten and raped by an assailant, who dragged her to a dark end of the platform.²²⁴ The victim sued the transportation authority for negligence in failing to properly illuminate the platform.²²⁵ At trial, a witness for the authority testified that all reasonable care had been used in checking the lighting fixtures²²⁶ and that some bulbs had been replaced.²²⁷ On cross-examination, the plaintiff's counsel introduced evidence that a new fluorescent fixture was installed four days after the attack.²²⁸

The Third Circuit explained that "when the defendant opens up

214. *Pierce*, 167 Cal. App. 2d at 8, 334 P.2d at 121.

215. *Id.*

216. *Id.*

217. See *infra* notes 222-59 and accompanying text.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. 581 F.2d 351 (3d Cir. 1978), cert. denied, 439 U.S. 1073 (1979).

223. *Id.* at 356.

224. *Id.* at 353.

225. *Id.*

226. *Id.* at 356.

227. *Id.* at 355.

228. *Id.*

the issue by claiming that all reasonable care was being exercised . . . the plaintiff may attack that contention by showing later repairs which are inconsistent with it.”²²⁹ The court reasoned that the “testimony bore directly on the inference that since the lighting was checked on a daily basis, it was adequate at the time the incident occurred.”²³⁰

The court’s emphasis on the testimony of the authority’s witness that all reasonable care was exercised suggests that a distinction may be made between testimony that all reasonable care was exercised and testimony that only reasonable care was exercised. A witness testifying to the latter contention is merely stating his belief that the defendant exercised due care, although it may have been possible to have exercised a higher degree of care. A subsequent measure taken by a defendant implementing a higher degree of care in such a situation would not be inconsistent with his belief that he had not acted negligently prior to the accident.

A witness testifying, on the other hand, that all reasonable care was exercised prior to the accident implies that no better care was possible and that the care exercised was the safest and highest possible. Evidence of subsequent measures would clearly be inconsistent with this contention. It is this extravagant description of the defendant’s exercise of care that is afforded no protection from impeachment by evidence of subsequent measures because the defendant testified beyond what is necessary for his defense.

The United States District Court for the District of New Jersey directly confronted this issue in *Wolf By Wolf v. Proctor & Gamble Co.*²³¹ The plaintiff brought an action on behalf of her daughter, who had allegedly contracted toxic shock syndrome from using Rely tampons.²³² Subsequent to the incident, Proctor & Gamble voluntarily withdrew Rely tampons from the market.²³³ At trial, the defendant maintained that Rely tampons were safe.²³⁴ Counsel for the plaintiff argued that the withdrawal of Rely tampons by the defendant should be admissible to impeach the defendant’s contention that the tampons were safe.²³⁵ The evidence of the subsequent withdrawal of Rely tampons was not admissible for impeachment purposes. The district court stated: “To allow evidence of defendant’s withdrawal

229. *Id.* at 356.

230. *Id.*

231. 555 F. Supp. 613 (D.N.J. 1982).

232. *Id.* at 616.

233. *Id.* at 623.

234. *Id.* at 624.

235. *Id.*

from the market of Rely in order to prove product defect or causation would certainly thwart the policy" of encouraging remedial measures.²³⁶ The court further reasoned that Rule 407 is designed to avoid giving rise to "inferences of product defect and of defendants' negligence."²³⁷

In *Probus v. K-Mart, Inc.*,²³⁸ the United States Court of Appeals for the Seventh Circuit similarly held that evidence of subsequent measures was not admissible to impeach a witness who testified on behalf of the defendant that the condition in question had been safe, rather than testifying that the condition in question was the safest. In *Probus*, the plaintiff sued for a back injury he had suffered allegedly from a fall from a ladder sold by K-Mart.²³⁹ At trial, an expert for K-Mart testified that the quality of the plastic used in the endcaps of the ladder was appropriate.²⁴⁰ To rebut this testimony, the plaintiff's counsel proffered evidence that K-Mart replaced the material used in the ladder endcaps, and strengthened the caps with glass fiber reinforcement after the accident.²⁴¹

In affirming the trial court's refusal to admit the evidence of the subsequent measure for impeachment purposes,²⁴² the Seventh Circuit stated that although evidence of subsequent measures can be introduced to contradict a witness who claims that he exercised due care or that the materials used were appropriate, "allowing that and no more to satisfy the impeachment exception would elevate it to the rule."²⁴³ The court noted that "the plaintiff [did] not contend that the defendants testified that the material used in the endcap was . . . the best material available."²⁴⁴ Thus, the court implied that the defendant's witness would had to have made an exaggerated claim about the appropriateness of the endcap material in order to permit the plaintiff's counsel to impeach the expert witness with evidence of the subsequent measures. Furthermore, the only plausible inference from the evidence of the subsequent measures in the instant case was that at the time of the accident, K-Mart believed that its ladder was unsafe—precisely the inference that Rule 407 seeks to preclude.

The distinction that the federal courts make between testimony

236. *Id.*

237. *Id.*

238. 794 F.2d 1207 (7th Cir. 1986).

239. *Id.* at 1208.

240. *Id.* at 1209.

241. *Id.*

242. *Id.* at 1210.

243. *Id.*

244. *Id.*

that claims the condition before the accident was "safe" and testimony that claims that the condition was the "safest"—extravagant testimony—was further demonstrated in *Muzyka v. Remington Arms*.²⁴⁵ In *Muzyka*, evidence of subsequent measures was admitted to impeach a witness who testified extravagantly about the safety of a product in question.²⁴⁶ The plaintiff was shot as her stepfather unloaded a magazine-fed, bolt-action rifle manufactured by the defendant.²⁴⁷ In order to unload the ammunition from the rifle, it was necessary to release the rifle's safety mechanism, and thereby place the rifle in the "fire" position.²⁴⁸ At trial, Remington called an expert witness who testified that the Remington rifle was rated a 9.8 or 9.9 on a safety scale of 10 and that no other model was superior to this rifle.²⁴⁹ Furthermore, in his opening and closing statements, Remington's counsel stated that the rifle "is the best rifle and the safety is the safest safety, it is the safest bolt-action rifle."²⁵⁰ The district court refused to admit evidence that Remington had changed the design of its safety mechanism after the accident.²⁵¹ After the jury returned a verdict in favor of the defendant,²⁵² the trial judge, in ruling on the plaintiff's motion for a new trial, indicated that he should have permitted the plaintiff's counsel to impeach the defendant's expert witness with evidence of the subsequent measure. The court, however, considered this error harmless.²⁵³

The United States Court of Appeals for the Fifth Circuit reversed, holding that the district court should have permitted the plaintiff's counsel to impeach the defendant's witness with evidence that the defendant had changed the model and safety mechanism after the accident and that, therefore, the error was not harmless.²⁵⁴ The appellate court based its decision upon the aggressive comments made by Remington's counsel and expert witness.²⁵⁵ By exaggerating the condition of its product, the defendant overstepped the boundaries of protection afforded by the exclusionary aspect of Rule 407. A defendant who testifies that his place or product was safe, merely states an opinion that is necessary and expected for his defense. A defendant,

245. 774 F.2d 1309 (5th Cir. 1985).

246. *Id.* at 1313.

247. *Id.* at 1310.

248. *Id.*

249. *Id.* at 1312.

250. *Id.*

251. *Id.*

252. *Id.* at 1313.

253. *Id.*

254. *Id.*

255. *Id.*

however, who calls his product the "safest" or the "best," goes beyond what is necessary and becomes an aggressor. The impeachment exception is designed to keep in check such aggressive attempts to manipulate the exclusionary nature of the Rule excluding evidence of subsequent measures. Otherwise, a defendant who testifies extravagantly about the safety of his place or product would certainly have an undue advantage at trial over the plaintiff.

As previously noted, the court in *Pierce* distinguished one who controlled or supervised the making of the subsequent repair from one who did not.²⁵⁶ The *Pierce* court also made a similar distinction between one who was an expert, and one who was not.²⁵⁷ The federal courts, however, have ignored these distinctions.²⁵⁸ It can be argued that the federal cases distinguishing between testimony that describes a condition as "safe" and testimony that terms a condition the "safest" are consistent with *Pierce* because all witnesses in the federal cases previously discussed were experts and had no control or supervision over the subsequent measure. It would, nevertheless, most likely be incorrect to say that a witness in federal court who had implemented or supervised the subsequent measure, or who was an expert, would be subject to impeachment for testifying that the condition in question was safe, as opposed to asserting an "extravagant" claim.

This view is supported by two considerations. First, because the federal cases make no mention of the distinctions raised by *Pierce*, they are not relevant in the federal courts. Second, control or supervision over the implementation of the subsequent measure, or whether the witness who testified was an expert, is irrelevant in distinguishing between "safe" and "safest." A witness who testifies that the allegedly hazardous condition was safe is still only testifying concerning what is necessary for the defendant's defense. Therefore, the witness should be protected by the Rule against the admission of subsequent measures evidence, whether he had control or supervision over the subsequent measure, or whether he was an expert. Furthermore, the inference that flows from evidence of subsequent measures—that the allegedly hazardous condition was unsafe—is highly prejudicial to the defendant. Moreover, a witness who testifies extravagantly is the aggressor and has gone beyond what is necessary to assert the defendant's defense. He is accordingly subject to impeachment regardless of these distinctions. Therefore, it is plausible to conclude that these

256. *Pierce*, 167 Cal. App. 2d at 5, 334 P.2d at 119.

257. *Id.* at 12, 334 P.2d at 123.

258. See *supra* notes 204-55 and accompanying text.

considerations that underlie *Pierce* were unduly emphasized by the court in order to distinguish a contrary and controlling higher court holding for the purpose of achieving a proper result.

One Fifth Circuit case, however, allowed a witness who testified that the condition in question had been safe to be impeached with evidence of a subsequent written warning. In *Dollar v. Long Manufacturing, N.C.*,²⁵⁹ the plaintiff's son was crushed to death between the control panel of the backhoe he had been operating and the rollbar canopy of the tractor.²⁶⁰ The plaintiff claimed that the backhoe had been negligently designed and manufactured because there was no adequate restraint to prevent the uplift of the backhoe from causing the operator to be crushed against the rollbar.²⁶¹ At trial, an expert for the manufacturer testified that it was his opinion that the backhoe was safe to operate while affixed to a rollbar-equipped tractor.²⁶² Counsel for the plaintiff sought to impeach the witness with a warning bulletin that the witness himself sent to all of the manufacturer's backhoe dealers after the accident.²⁶³ The warning stated: "It has been determined that a backhoe operator can be crushed to death against the rollbar or safety cab where the backhoe is not rigidly mounted."²⁶⁴ The trial court refused to allow impeachment by the admission of this evidence.²⁶⁵ The Fifth Circuit reversed and held that in the face of the witness' testimony "as to his present opinion of the safety of the backhoe when attached to a rollbar-equipped tractor, [the court did] not think *unfair* prejudice to the defendant would have resulted from his having been confronted by his own letter warning of exposure to death by such use."²⁶⁶

The *Dollar* decision can be distinguished from the previous cases in which the witness testified that the condition in question had been safe. In the other federal cases, the subsequent measure was conduct that concerned a particular condition. In *Dollar*, the subsequent measure was an inconsistent written statement made by the witness.²⁶⁷ The *Dollar* court focused on the inconsistency between the expert's testimony in court and the warning he issued after the accident, rather than on any subsequent conduct that was inconsistent.²⁶⁸

259. 561 F.2d 613 (5th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978).

260. *Id.* at 615.

261. *Id.*

262. *Id.* at 618.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. See *supra* notes 262-64 and accompanying text.

268. See *supra* notes 262-64 and accompanying text.

Because the issuing of a subsequent warning is subsequent conduct, it should be treated as any other subsequent measure. Evidence of subsequent measures, however, would be admissible to impeach extravagant testimony by the defendant or his witness. Thus, the Fifth Circuit should not have admitted evidence of the subsequent warning to impeach the defendant's witness, who testified only that the allegedly hazardous condition was, in fact, safe.

The distinction made by the federal courts between a defendant, or his witness, who testifies that an allegedly hazardous condition was "safe," and one who testifies that the allegedly hazardous condition was the "safest," the "best," or that "all reasonable care" had been exercised is proper because it prevents the introduction of evidence unfairly prejudicial to a defendant. Moreover, defendants who attempt to manipulate the subsequent measures Rule are denied an unfair advantage.

C. *Impeaching an Adverse Witness Called on Direct Examination by the Plaintiff's Counsel*

The practice of a plaintiff's counsel of calling, as an adverse witness, a defendant, or his witness, on direct examination, and then impeaching the witness with evidence of subsequent measures is recognized by the federal courts. Accordingly, there is a danger that the plaintiff will circumvent the purpose of the subsequent measures Rule by using manipulative tactics.

The Fifth Circuit confronted such a situation in *Bickerstaff v. South Central Bell Telephone Co.*²⁶⁹ The plaintiff had been injured while speaking on the telephone in her home during an electrical storm.²⁷⁰ She claimed that the telephone company had been negligent in failing to warn her of the possible dangers of electrical shock when using the telephone during a thunderstorm.²⁷¹ At trial, the plaintiff's counsel called a telephone company supervisor as an adverse witness.²⁷² The supervisor testified that a "'warning'" was a strong statement that implied an "impending danger, requiring a drastic change in behavior."²⁷³ Therefore, it was "not advisable or appropriate where the risks were minimal" to issue such a warning.²⁷⁴ The plaintiff's counsel then sought to impeach the supervisor with evidence of a subsequent warning given by the telephone company to its

269. 676 F.2d 163 (5th Cir. 1982).

270. *Id.* at 164.

271. *Id.*

272. *Id.* at 167.

273. *Id.*

274. *Id.*

subscribers stating that a slight risk of electrical shock existed if the telephone was used during an electrical storm.²⁷⁵ The district court refused to admit this evidence.²⁷⁶

The Fifth Circuit ruled that the district court's refusal to admit the evidence of the warning—a subsequent measure—was harmless error.²⁷⁷ Nonetheless, the Fifth Circuit thought that the district court should have allowed the telephone company supervisor to be impeached,²⁷⁸ even though it cited one commentator who had expressed reservations about plaintiffs calling a witness for the defendant as an adverse witness, and then impeaching that witness with evidence of subsequent measures.²⁷⁹

The *Bickerstaff* opinion notes that it is inevitable that plaintiffs will use such a tactic. Professors Wright and Graham agree:

[I]t is doubtful that the plaintiff, at common law, could have called the defendant to the stand, asked him if he thought he had been negligent, and impeached him with evidence of subsequent repairs if he answered 'no.' But after the Advisory Committee provided that a party can impeach his own witness, that a witness can express an opinion on the ultimate issue, and that prior inconsistent statements can be used as substantive evidence, it is difficult to see what is to prevent this.²⁸⁰

Professor Weinstein suggests that the trial judge should apply Rules 401²⁸¹ and 403²⁸² before admitting evidence for the purpose of impeaching an adverse witness.²⁸³ Professors Wright and Graham, however, argue that Rules 401 and 403 would not prevent the admission of such evidence:

Negligence or culpability is usually an ultimate issue in the case so that questions going to that issue are clearly relevant. If the defendant or his witnesses are competent to testify on that issue, it is difficult to see how the probative worth of their testimony could

275. *Id.*

276. *Id.*

277. *Id.* at 169.

278. *Id.*

279. *Id.* at 168.

280. C. WRIGHT & K. GRAHAM, *supra* note 4, § 5289, at 145 (footnotes omitted).

281. Rule 401 of the Federal Rules of Evidence states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

282. Rule 403 of the Federal Rules of Evidence states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

283. WEINSTEIN'S EVIDENCE, *supra* note 201, § 407[05], at 407-34.

be so low as to be excluded under Rule 403.²⁸⁴

Professors Wright and Graham have implicitly challenged commentators to provide advice on ways of preventing this potential manipulation.²⁸⁵ Two remedies are available to ameliorate this problem. First, evidence of subsequent measures should not be admissible to impeach a defendant, or his witness, who has been called as an adverse witness by the plaintiff.²⁸⁶ This approach would be an exception to Rule 607, which allows a party to impeach his own witness.²⁸⁷ In order to encourage the implementation of remedial measures, the ability of the plaintiff's counsel to manipulate Rule 407 should, therefore, be restricted. Although this remedy would appear to be drastic, it is consistent with the earlier common law application of the impeachment exception whereby the defendant would be called to the stand by his own counsel, and then would initiate the dispute by testifying in a false or misleading manner about the safety of an allegedly hazardous condition.²⁸⁸ Under common law prior to approximately 1950, impeachment through the admission of contradictory evidence was used defensively to protect a plaintiff from an aggressive defendant attempting to manipulate the exclusionary nature of the rule for his own advantage.²⁸⁹ It is not logical, however, to offer similar protection to a plaintiff who is on the offensive. In such a situation, the defendant is in greater need of protection than the plaintiff who is seeking to prove the defendant's negligence under the guise of impeachment.²⁹⁰

Second, evidence of subsequent measures should be admissible to impeach a defendant, or his witness, who is called as an adverse witness only when the defendant truly initiates the inconsistency. The trial judge should ensure strict compliance with this condition. To accomplish this objective, the defendant should not be subject to impeachment with evidence of subsequent measures when he answers either of two dangerously manipulative questions asked by the plain-

284. C. WRIGHT & K. GRAHAM, *supra* note 4, § 5289, at 146 (footnotes omitted); see M. GRAHAM, HANDBOOK OF FLORIDA EVIDENCE § 407.1, at 255 n.11 (1987) ("Rule [403] would permit exclusion However, given the critical nature of the inquiry it is not surprising that most decisions permit impeachment even though the exception swallows up the rule.").

285. C. WRIGHT & K. GRAHAM, *supra* note 4, § 5289, at 145.

286. See Note, *supra* note 164, at 683 ("The most effective way to eliminate the dangers inherent in the impeachment exception would be to disallow the admission of evidence of subsequent remedial conduct to impeach a witness called by the plaintiff.").

287. Rule 607 of the Federal Rules of Evidence states: "The credibility of a witness may be attacked by any party, including the party calling the witness." FED. R. EVID. 607.

288. See *supra* Section II(B)(1).

289. See *supra* Section II(B).

290. See J. MOORE, *supra* note 5, at IV-159.

tiff. The two questions are, "Do you think that the allegedly hazardous condition was safe?" and "Would it not be safer to perform the measures you subsequently undertook?" It is important to note that these questions are equally dangerous when asked on cross-examination by the plaintiff. It is, therefore, proposed that these questions not subject the defendant, or his witness, to impeachment with evidence of subsequent measures, regardless of whether they are asked on cross-examination or on direct examination of the defendant or his witness as an adverse witness.

An affirmative response to the first question—"Do you think that the allegedly hazardous condition was safe?"—should not subject the defendant or his witness to impeachment with evidence of subsequent measures for the same reason that a defendant who testifies that the allegedly hazardous condition was safe is not subject to impeachment. The inference received from the impeaching subsequent measures evidence is that defendant's conduct was not safe, and was thus negligent. This inference is precisely the inference the Rule seeks to exclude. A defendant or his witness, called as an adverse witness by the plaintiff, who asserts that the allegedly hazardous condition was safe in response to a plaintiff's question is no different from a defendant, or his witness, who asserts that the allegedly hazardous condition was safe on direct examination by his own counsel. In both of these situations, the defendant or his witness should be protected from the possibility of impeachment by evidence of subsequent measures.

A negative response to the second question—"Would it not be safer to perform the measures you subsequently undertook?"—appears to warrant impeachment because of the inconsistency between the witness' belief and his subsequent conduct. The focus, however, should be on the inference derived from the question and the purpose for asking the question. The inference derived from the subsequent measures evidence to impeach in this situation is that the defendant's care for the allegedly hazardous condition was not as safe as it should have been, and therefore the defendant was negligent. The fact that this inference may be drawn defeats the premise behind Rule 407—the fact a defendant makes an allegedly hazardous condition safer should not be taken as proof of prior negligence. In asking this question, the plaintiff acts as an aggressor who seeks to offer evidence of subsequent measures after setting the stage for the inconsistent evidence. Such conduct should not be tolerated because it would encourage plaintiffs' counsels to manipulate the examination process in order to create inconsistencies and bring in otherwise inadmissible evidence of subsequent measures.

Thus, in responding to either of these questions, whether on cross-examination or direct examination, an adverse witness should not be subject to impeachment with evidence of subsequent measures. The impeachment exception was created as a shield to protect a defenseless plaintiff from an aggressive defendant. It was not designed to be used as a sword by an aggressive plaintiff to coerce a defendant into giving seemingly inconsistent testimony in order to impeach him with evidence of subsequent measures.

IV. THE USE OF IMPEACHMENT UNDER OTHER RULES THAT EXCLUDE EVIDENCE AS A MATTER OF PUBLIC POLICY

Rule 408 of the Federal Rules of Evidence²⁹¹ excludes evidence of compromise or offers to compromise made during the course of settlement negotiations to prove liability for, or the invalidity of, a party's claim.²⁹² The public policy for excluding such evidence is to promote the compromise and settlement of disputes.²⁹³ Similarly, Rule 411 of the Federal Rules of Evidence²⁹⁴ excludes evidence that a person was or was not insured against liability to prove that the person acted negligently or otherwise wrongfully.²⁹⁵ The policy underlying the exclusion of such evidence is that proof of liability insurance is not relevant to the issue of fault, and that the introduction of evidence

291. Rule 408 of the Federal Rules of Evidence states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation of prosecution.

FED. R. EVID. 408.

292. *Id.*

293. FED. R. EVID. 408 advisory committee's note, 56 F.R.D. 183, 227 ("A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.").

294. Rule 411 of the Federal Rules of Evidence states:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

FED. R. EVID. 411.

295. *Id.*

that a party was insured would prejudice the jury.²⁹⁶ The policies underlying Rules 408 and 411 are therefore similar to the policies behind Rule 407²⁹⁷ because they are concerned with excluding highly prejudicial evidence that has minimal probative value.²⁹⁸ Finally, like Rule 407, Rules 408 and 411 provide exceptions from their operation.²⁹⁹

Because Rules 408 and 411 exclude evidence for policy concerns similar to those of Rule 407, one would expect all three rules to have parallel exceptions allowing the use of such evidence for impeachment purposes. But this is not the case. Rules 408 and 411 appear to provide for only a narrow use of evidence for impeachment purposes as an exception to their general rule of exclusion in contrast to Rule 407's broad impeachment exception. Rules 408 and 411 expressly allow the use of compromise evidence and evidence of insurance against liability to prove bias or prejudice of a witness.³⁰⁰ On the other hand, Rule 407 apparently provides for a broader use of subsequent measures evidence for impeachment because it lists impeachment as an illustrative exception to the Rule.³⁰¹

Commentators disagree as to whether Rule 408 limits the use of compromise evidence to impeach solely to show the bias or prejudice of a witness.³⁰² The disagreement is over whether compromise evidence may be used as a form of prior inconsistent statement to impeach a witness who testifies in a contradictory fashion. Commen-

296. FED. R. EVID. 411 advisory committee's note, 56 F.R.D. 183, 230 ("At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, . . . knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds.").

297. FED. R. EVID. 407 advisory committee's note, 56 F.R.D. 183, 225. The exclusion of evidence of subsequent measures is based upon the following two policy grounds:

The [subsequent measure] is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. . . .

[Another] ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.

Id. at 226.

298. *See supra* notes 291-96.

299. Rule 408 also provides: "This rule . . . does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." FED. R. EVID. 408. Rule 411 provides in part: "This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." FED. R. EVID. 411.

300. *See supra* notes 291 & 294.

301. Rule 407 of the Federal Rules of Evidence provides in relevant part: "This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as . . . impeachment." FED. R. EVID. 407.

302. *See infra* notes 303-18 and accompanying text.

tators who believe that evidence of compromises offered should not be used to impeach a witness who has testified in a contradictory fashion assert two principal arguments. First, they argue that the use of compromise evidence to contradict an inconsistent statement undercuts the policy behind Rule 408:

The philosophy of . . . Rule [408] is to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial. Opening the door to impeachment evidence on a regular basis may well result in more restricted negotiations.³⁰³

In addition, these commentators argue that the prejudicial impact on future negotiations as a result of admitting the evidence will outweigh any probative value the statements may have.³⁰⁴

The commentators' second argument relies upon the conference report drafted by the House of Representatives regarding Rule 408. The report states that "evidence of conduct or statements made in compromise negotiations is not admissible."³⁰⁵ Because the inconsistent statement in question was made during compromise negotiations, one commentator argues that it falls under the umbrella of the Rule's exclusion.³⁰⁶ A counterargument is that Rule 408 excludes only "evidence of conduct or statements made in compromise negotiations" when offered to prove liability for, or the invalidity of, the claim."³⁰⁷ Because the compromise evidence is being offered to impeach the witness and not prove liability for, or invalidity of, the claim, it should be admissible. One problem with this latter view is that it undermines the policy purpose of Rule 408.

It should be noted that the linguistic differences between Rules 407 and 408 do not support the view that evidence of compromise negotiations should not be admissible for broad impeachment purposes. One can argue that the text of Rule 407 lists only "impeachment" among its exceptions without any further qualification, and thereby suggests that impeachment be interpreted broadly. Moreover, the text of Rule 408 lists only one form of impeachment—to prove bias or prejudice of a witness—thereby indicating that evidence of compromise negotiations should only be admissible for this purpose.

303. S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL*, at 172 (2d ed. 1977).

304. *Id.*

305. H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 6, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7099.

306. *See* M. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 408.1, at 256 (1981) ("It is nevertheless suggested that conduct or statements made during compromise negotiations should not be admissible as inconsistent statements to impeach.").

307. *FED. R. EVID.* 408.

This argument is countered, however, by the advisory committee's note to Rule 408, which states that the exception provisions of that Rule are merely illustrative, and that only the most common use of compromise evidence is listed as an exception to the Rule.³⁰⁸

Commentators who believe that compromise evidence should be admissible to impeach witnesses who have testified inconsistently argue the proposition that "protecting the settlement process to the point of shielding apparently perjured testimony [is] excessive."³⁰⁹ Professors Louisell and Mueller find support for this position in a joint statement submitted by the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence, which they assert strongly hinted that the use of compromise statements for impeachment includes impeachment by contradiction.³¹⁰ Although Rule 408 was still in its gestation period at the time this statement was written, it was made by the standing committee and the advisory committee in response to a concern of some government agencies that Rule 408 would encourage misrepresentations during settlement negotiations. The advisory committee stated that the Rule would not encourage misrepresentations during settlement talks, because "the rule discloses that its protection applies only when the evidence is offered for the purpose of establishing liability for or invalidity of a claim."³¹¹ Professors Louisell and Mueller conclude that the evidence of compromise negotiations should be admissible because it is being offered to impeach, and not to prove liability for, or the invalidity of, a claim.³¹²

Professors Wright and Graham ultimately reach the same conclusion as Professors Louisell and Mueller. They, however, support their position by a different argument. Professors Wright and Graham consider the advisory committee intent argument "opaque,"³¹³ and term the supporting testimony as a "calculated effort to obscure the issue [rather] than an endorsement of [the] use of negotiation

308. FED. R. EVID. 408 advisory committee's note, 56 F.R.D. 183, 227 ("The illustrative situations mentioned in the rule are supported by the authorities.").

309. D. LOUISELL & C. MUELLER, *supra* note 23, at 470.

310. *Id.*

311. *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 53, 59 (1974) (joint statement of the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence of the Judicial Conference to the Senate Judiciary Committee).

312. See D. LOUISELL & C. MUELLER, *supra* note 23, at 447-48. Professors Louisell and Mueller responded to the quote by stating, "In other words, Rule 408 does not bar statements in settlement talks when offered to impeach at trial." *Id.* (footnote omitted). For the text of the quote, see note 304.

313. C. WRIGHT & K. GRAHAM, *supra* note 4, § 5314, at 285.

statements for impeachment purposes.”³¹⁴ Instead, they focus on Rule 102, which states in part that “[t]hese rules shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined.”³¹⁵ Given the express intent of the advisory committee to maintain fairness and truth, Professors Wright and Graham argue that “[i]t is difficult to see why the law would care to encourage falsehood The purpose of Rule 408 is to foster ‘complete candor’ between the parties, not to protect false representations.”³¹⁶ Consequently, they conclude:

[I]t would seem that the injunction in Rule 102 to interpret the rules so as [to] foster the values of ‘fairness’ and ‘truth’ should lead courts to conclude that prior inconsistent statements in the course of settlement negotiations should be admitted to impeach a party who testifies. If so, then only the fact the statement was made should be admitted, not that it was made during settlement negotiations.³¹⁷

In recognizing that there are valid arguments on both sides of this issue, Professors Wright and Graham realistically accept the fact that it will be up to the courts ultimately to decide whether evidence of compromise negotiations will be admitted for impeaching a witness who has given inconsistent testimony.³¹⁸

A resolution of this issue in the federal courts could be effected by accepting Professors Wright and Graham’s argument that fairness must be maintained. In addition, it is plausible that the enumerated exceptions to Rules 407 and 408 are only illustrative and that, therefore, the use of compromise evidence to impeach an inconsistent statement is not expressly forbidden. Nevertheless, it should be left to the trial judge to decide, in accordance with Rule 403,³¹⁹ whether admitting such evidence would unduly prejudice the jury, and therefore circumvent the policy behind the Rule.

A model for resolving these questions on the state level is shown by the example of Alaska.³²⁰ The Alaska Legislature added an addendum to its version of Rule 408 that states: “[E]xclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement.”³²¹ Any state legislature

314. *Id.* (footnote omitted).

315. FED. R. EVID. 102.

316. C. WRIGHT & K. GRAHAM, *supra* note 4, § 5314, at 286 (footnotes omitted).

317. *Id.* at 287 (footnotes omitted).

318. *Id.* at 286-87.

319. For the relevant text of Rule 403, see *supra* note 282.

320. ALASKA R. CT. Rule 408 (1979).

321. *Id.*

that wants to avoid the use of compromise evidence to impeach an inconsistent statement should take similar action and statutorily prohibit such impeachment.

Comparing the use of impeachment under Rules 411 and 407 is neither as complex, nor as debated as the comparison between Rules 408 and 407. One reason why impeachment under Rule 411 is principally used to prove bias or prejudice of a witness, rather than to challenge inconsistent statements, is that most defendants will not raise the issue of insurance fearing that it will adversely affect the jury. It is common, however, for a defendant to examine a witness who has had some connection with an insurance company—whether he is an employee or an agent, or merely a witness who gave a statement to an interested insurance carrier. In these situations, the plaintiff is permitted to offer proof of insurance to prove a bias or prejudice on behalf of the witness. Nevertheless, if the insurance issue were to arise to impeach in circumstances that did not indicate bias or prejudice of a witness—that is, to prove an inconsistent statement—the issue would raise the same concerns and considerations previously discussed in the comparison of Rules 407 and 408.³²²

This comparison of Rule 407 with Rules 408 and 411 should not lead to the conclusion that the impeachment exception in Rule 407 should be exercised without restraint. Trial judges and counsel must never lose sight of the policy underlying Rule 407. In applying the impeachment exception, a balance should be struck between the promotion of Rule 407's policy and the assurance that truth and fairness are achieved among the litigants.

V. CONCLUSION

This Comment argues that the impeachment exception to Rule 407, if properly applied, can serve as a useful tool to assure that fair-

322. The concerns and considerations previously discussed in the comparison of Rules 407 and 408, and which undoubtedly would be pertinent to the comparison of Rules 407 and 411, take two forms. First, permitting evidence of liability insurance to impeach an inconsistent statement may undercut the policy of Rule 411 which seeks to avoid any inference of fault which the possession of liability insurance may create. See FED. R. EVID. 411. Such a concern, however, must be weighed against the possibility that refusing to allow evidence of liability insurance to impeach an inconsistent statement may ultimately promote perjured testimony, and disparage truth and fairness among the litigants—the underlying purpose of the Federal Rules of Evidence. See FED. R. EVID. 102.

Second, it can be argued that the list of exceptions in Rule 411 are merely illustrative, and therefore, evidence of liability insurance is admissible to impeach an inconsistent statement. It is likewise feasible, however, to counterargue that the list of exceptions in Rule 411 is exhaustive, and therefore, evidence of liability insurance is not admissible to impeach an inconsistent statement.

ness and truth are not sacrificed in litigation. On the other hand, the impeachment exception, if used improperly, can have an adverse effect on the social policy concerns that Rule 407 seeks to promote. Given this tension, this Comment attempts to balance the social interests promoted by the subsequent measures Rule and the litigation interests promoted by the impeachment exception.

Overall, the courts have gone a considerable way in achieving this balance. First, courts hold that the use of subsequent measures evidence to impeach a witness who testifies either in a false or misleading manner, or incorrectly, about the safety of the allegedly hazardous condition is admissible. A contrary holding would unduly disadvantage the plaintiff by not allowing false assertions to be impeached with contradictory evidence of subsequent measures, and would thereby undercut the intentions of the drafters of the Federal Rules of Evidence, who sought that truth be ascertained and proceedings justly determined by the application of the Rules.³²³

Second, courts hold that a defendant or his witness who testifies only that the allegedly hazardous condition was safe is not subject to impeachment. If, however, the defendant or his witness testifies in a more extravagant manner—that the place or product is the “safest,” the “best,” or that “all reasonable care was being used”—then he is subject to impeachment by the introduction of evidence of subsequent measures. This distinction protects the defendant from a circumvention of the Rule and an unfair inference of negligence by the jury, while penalizing a defendant, or his witness, who attempts to manipulate the Rule to gain an unfair advantage. In the former situation, the defendant or his witness merely states a valid opinion that is necessary for the defense of the case. Evidence of a subsequent measure that is used to impeach would create the inference that the allegedly hazardous condition was unsafe, which is precisely the conclusion that the Rule seeks to avoid. Furthermore, if impeachment were allowed, the defendant would never be able to call a witness to testify about the safety of the allegedly hazardous condition.

Moreover, in the latter situation, the defendant, or his witness, goes beyond what is necessary for the defendant's defense, and states an aggressive opinion that deserves to be subject to impeachment with the evidence of subsequent measures taken by the defendant. The federal courts are silent as to whether this distinction between a witness who testifies that his place or product was safe, and one who testifies that his place or product was the safest, should be applied to witnesses or defendants who ordered or had control over the subsequent mea-

323. See FED. R. EVID. 102.

sure. This Comment argues that federal courts should apply this distinction to witnesses who ordered or had control over the subsequent measure, because the Rule excluding evidence of subsequent measures is just as susceptible to circumvention regardless of whether the witness ordered, or had control over, the subsequent measure.

The federal courts, however, have failed to achieve an optimal balance because they have condoned the use of subsequent measures evidence to impeach a defendant, or his witness, called on direct examination by the plaintiff's counsel. Although the Federal Rules permit a plaintiff's counsel to call an adverse witness on direct examination and subsequently to impeach the adverse witness with evidence of subsequent measures,³²⁴ such tactics are inconsistent with the historical use of the impeachment exception. Historically, the defendant, or his witness, was the aggressive and manipulative party, and the plaintiff was the victim. Therefore, prior to the enactment of Rule 407, courts sought to protect the litigation interests of the plaintiff, and to thwart any undue advantage the defendant sought to achieve. In its present use in the federal courts, however, the plaintiff has become the aggressor and manipulator, by converting the historically defensive shield of the impeachment exception into a sword.

To combat this abuse of the exception, this Comment suggests that evidence of subsequent measures not be admissible to impeach a defendant, or his witness, called on direct examination by the plaintiff.³²⁵ A less drastic means of curbing the abuse of the impeachment exception would be to permit the trial judge to ensure that the defendant was the true initiator of the inconsistency. Furthermore, the trial judge could ensure that the defendant or his witness would not be subject to impeachment with evidence of subsequent measures for merely answering affirmatively the question by the plaintiff's counsel, "Do you think that the allegedly hazardous condition was safe?" or answering negatively the question, "Would it not be safer to perform the measures you subsequently undertook?"

The impeachment exception should be respected by courts and litigants for its merits as well as its pitfalls. Applying the impeachment exception in the manner suggested promotes both the social concerns of the Rule as well as the litigation interests of the parties.

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324. FED. R. EVID. 607.

325. See Note, *supra* note 164, at 683 ("The most effective way to eliminate the dangers inherent in the impeachment exception would be to disallow the admission of evidence of subsequent remedial conduct to impeach a witness called by the plaintiff.").