

**KENTUCKY BAR ASSOCIATION
KENTUCKY RULES OF EVIDENCE**

**ARTICLE IV
RELEVANCY AND RELATED SUBJECTS**

KRE 407 Subsequent remedial measures

When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Evidence Rules Review Commission Notes (2006)

The objective of the amendment is to modify the existing law to prohibit the introduction of evidence of subsequent remedial measures in products liability litigation (what some think of as strict liability litigation). The original federal rule was silent with respect to whether evidence of subsequent remedial measures was admissible or inadmissible in strict liability litigation and federal courts split over the issue, with a strong majority holding the prohibition applicable in such cases. In 1997, the federal counterpart to Rule 407 was amended too make this majority holding a part of the rule. The amendment of Kentucky's Rule 407 brings the Kentucky law into conformity with the federal law.

The following statement from a federal case decided before amendment of the federal provision describes well the rationale for the amendment:

"The rationale behind Rule 407 is that people in general would be less likely to take subsequent remedial measures if these repairs or improvements would be used against them in a lawsuit arising out of a prior accident. By excluding this evidence defendants are encouraged to make such improvements. It is difficult to understand why this policy should apply any differently where the complaint is based on strict liability as well as negligence. From a defendant's point of view it is the fact that the evidence may be used against him which will inhibit subsequent repairs or improvements. It makes no difference to the defendant on what theory the evidence is admitted: his inclination to make subsequent improvements will be similarly repressed. The reasoning behind the asserted distinction we believe to be hypertechnical, for the suit is against the manufacturer, not against the product." Werner v. Upjohn Co., Inc., 628 F.2d 848, 857 (4th Cir. 1980).

The argument against this position is that a mass producer of goods will not be deterred from taking subsequent remedial measures by the thought that its actions might be used against it in litigation, thereby leaving the prohibition without a rationale and having the effect of excluding relevant evidence. The difficulty of confirming or denying this claim and the very high probability of prejudice from the introduction of this kind of evidence tilts the scales in favor of exclusion of the evidence without regard to whether the case is based on a theory of negligence or a theory of strict liability.

HISTORY: Amended by Supreme Court Order 2006-06, eff. 7-1-06; 1992 c 324, § 6, 34, eff. 7-1-92; 1990 c 88, § 17