SUBSEQUENT REMEDIAL MEASURES IN STRICT PRODUCTS LIABILITY CASES WITH SPOLIATION CONSIDERATIONS

Commonly, in defending products liability cases on behalf of manufacturers, we find that, following an accident, the manufacturer has made changes to the product, often in an effort to avoid a similar accident. The manufacturer frequently does not consult with counsel before making the changes, especially in situations involving industrial production machinery, which the manufacturer needs to use in order to continue production. Often, these changes are made long before a plaintiff has an opportunity to retain counsel who can conduct an investigation of the case, including an examination of the machine.

These changes raise two important issues for a strict products liability case: subsequent remedial measures and spoliation. The plaintiff may seek to introduce the fact that the defendant made changes to the machine following the accident, arguing that it is a tacit agreement with the claim that the machine was defective. The plaintiff may also claim that the changes to the machine precluded him/her from being able to conduct a thorough and meaningful examination and assessment of the machine, because it was no longer in the same condition it was in at the time of the accident. Thus, evidence was lost.

It is imperative that the defense be prepared to meet these issues and deal with them appropriately to avoid any negative impact on the client at trial. It is often possible, through a thorough understanding of the jurisdiction's relevant case law, artful pleading, and careful pretrial and trial strategy, to exclude evidence of subsequent remedial

measures, and spoliation issues can be mitigated, if not entirely avoided, in certain circumstances.

I. Subsequent Remedial Measures

A. Fed. R. Evid. 407 and Its Underlying Policy

The most common reason for a plaintiff to want to introduce evidence of subsequent remedial measures in a products liability case is to prove that the defendant agrees that the product was defective because it required a change in order to make it safe. This is a compelling argument to a jury, and the danger it presents is that a jury may be swayed by such evidence regardless of the accuracy of the assumption that is invited. The fact that a product can be made safer does not mean it was not reasonably safe before. Likewise, an accident with a product does not necessarily mean the product was defective, but evidence of subsequent remedial measures may easily be misinterpreted as suggesting that the manufacturer agrees that it was. This impression can be monumentally difficult to overcome, so the best course is not to allow it to grow.

Federal Rule of Evidence 407 was amended in 1997 to specifically provide that evidence of subsequent remedial measures may not be introduced to prove a defect in a product or its design, or that a warning or instruction should have accompanied a product. Rule 407 states:

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

FED. R. EVID. 407.

The rationale given by the advisory committee for amending Rule 407 to apply to products liability cases is that the "amendment adopt[ed] the view of a majority of the circuits that ha[d] interpreted Rule 407 to apply to products liability actions." FED. R. EVID. 407 advisory committee's note (1997). The 1972 advisory committee's note provides more insight to the policy considerations. According to it, as a general matter, Rule 407 is based upon two policy theories:

> 1) Changes made to a machine following an accident are not, in fact, admissions, since the conduct is equally consistent with an injury that is caused by mere accident or through contributory negligence; and
>
> 2) Social policy demands that manufacturers be encouraged to correct dangerous conditions to ensure future safety. Something they may not do if they know it will be held against them later.

See FED. R. EVID. 407 advisory committee's note (1972).

Both of these rationales have been criticized. The first has been criticized on the basis that, under Federal Rule of Evidence 401's broad definition of relevance, evidence of subsequent remedial measures is relevant because an admission that the product was defective is a *possible* inference from the evidence. *See D.L. v. Huebner*, 329 N.W.2d 890, 901 (Wis. 1983) (interpreting an analogous state rule). The second has been criticized on the basis that one, in good conscience, cannot refuse to undertake necessary remedial measures solely out of concern of evidentiary implications. *See id.* at 902 ("There is no empirical evidence that persons are aware of this evidentiary rule or that their actions are in any way affected by its existence. A person would probably prefer to correct a defect (even if evidence of this remedial action is admitted to prove negligence [or the existence of a defect]) rather than expose many other members of the public to

similar injuries and thus face numerous lawsuits arising out of each of these injuries.")[1] Further, even if one is aware the rule exists, the scope of evidence excluded is arguably so narrow that the rule provides limited protection, which calls into question whether the rule does in fact provide an incentive to undertake subsequent remedial measures.

Therefore, courts have identified other rationales supporting exclusion of evidence of subsequent remedial measures in products liability cases. One such explanation invokes the balancing test found in Federal Rule of Evidence 403:

> The real question is whether the product or its design was defective at the time the product was sold. The jury's attention should be directed to whether the product was reasonably safe at the time it was manufactured. . . . The introduction of evidence about subsequent changes in the product or its design threatens to confuse the jury by diverting its attention from whether the product was defective at the relevant time to what was done later. Interpreted to require the evidence to focus on the time when the product was sold, Rule 407 would conform to the policy expressed in Rule 403, the exclusion of relevant information if its probative value is substantially outweighed by the danger of confusion.

Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983) (citations omitted).

Fairness is another justification for Rule 407. For instance, it has been stated:

> A place may be left for a hundred years unfenced, when at last some one falls down it; the owner, like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shows that he thought the fence was necessary because he put it up. This is both unfair and unjust. It is making the good feeling and right principle of a man evidence against him.

DAVID P. LEONARD, THE NEW WIGMORE: SELECTED RULES OF LIMITED ADMISSIBLITY § 2.3.3 at 143 (2002) (citing *Beever v. Hasnon, Dale & Co.*, 25 Law J. Notes of Cases 132, 133 (Q.B. 1980) (Coleridge, L.C.J.)).

[1] In fact, it is arguable that one could face punitive damages in the subsequent suits if remedial measures were not taken despite awareness of the dangerous condition.

B. The Relevant "Event"

Rule 407 precludes only evidence of subsequent remedial measures taken by the manufacturer after the accident at issue in the case. It is important to note that it does not preclude presentation of remedial measures taken after the original manufacture of the product but before the accident occurred. A manufacturer may design and sell a product for some time and, subsequently, change the design to render it safer. The original product, however, sold prior to the changes, may still be in use and could injure someone. The changes made by the manufacturer prior to the injury would not be precluded based upon Rule 407. FED. R. EVID. 407 advisory committee's note (1997); *see also Moulton v. Rival Co.*, 116 F.3d 22, 26 n.4 (1st Cir. 1997); *Chase v. Gen. Motors Corp.*, 856 F.2d 17, 21-22 (4th Cir. 1988).

C. What is Not Excluded by Rule 407

Rule 407 also only precludes the use of evidence of subsequent remedial measures for the purpose of proving "negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." FED. R. EVID. 407. The evidence may be admitted for any other purpose, including "proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." *Id.* Therefore, if a plaintiff can show that the evidence will be admitted for purposes other than proving a product defect, negligence, culpable conduct or a need for a warning, the evidence may well come in. The list of other purposes cited in the rule is not exhaustive, so be wary of other issues that may be developed by the plaintiff to which evidence of subsequent remedial measures may apply.

1. Feasibility

The most frequently cited alternative reason for seeking admission of subsequent remedial measures in a products liability case is to establish the feasibility of an alternative design. This raises two important issues that defense counsel must keep in mind: the definitions of "feasibility" and "controverted."

The definition of "feasibility" varies from jurisdiction to jurisdiction. For instance, the Eighth Circuit has defined "feasibility" broadly as follows:

> Whether something is feasible relates not only to actual possibility of operation, and its cost and convenience, but also to its ultimate utility and success in its intended performance. That is to say, 'feasible' means not only 'possible,' but also means 'capable of being . . . utilized, or dealt with successfully.'

Anderson v. Malloy, 700 F.2d 1208, 1213 (8th Cir. 1983) (quoting *Webster's Third New International Dictionary* 831 (unabridged ed. 1967) and citing *Black's Law Dictionary* 549 (5th ed. 1979) ("reasonable assurance of success.")). Under that definition, a defendant's claim that an alternative design would have been more dangerous or would have been prohibitively expensive may be construed as falling under the definition of feasibility, and thus a defendant advancing such claims would risk being deemed to have controverted feasibility.

In contrast, the Seventh Circuit has arguably adopted a narrower definition of feasibility that focuses on the possibility of implementing a particular remedial measure. That is, a defendant controverts feasibility only if it contests whether adopting any given measure would have been possible, but an argument addressing the effectiveness of a particular measure does not speak to feasibility. *See Flaminio v. Honda Motor Co.*, 733 F.2d 463, 468 (7th Cir. 1984) (noting that the defendant did not deny the feasibility of

precautionary measures (i.e., that an alternative design was possible), but rather argued that there was a "tradeoff" between the two designs and that it had chosen what it perceived to be the safer of the two).

Similarly, jurisdictions differ over what constitutes placing feasibility in issue. Some courts have held that feasibility is controverted unless the defendant stipulates to feasibility. *See, e.g., Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1185 (7th Cir. 1992) (noting that the defendant made what evolved into a tactical trial error by not stipulating to feasibility and upholding the trial court's admission of evidence of subsequent remedial measures); *Meller v. Heil Co.*, 745 F.2d 1297, 1300 n.7 (10th Cir. 1984) (stating that the feasibility of an alternative design is deemed controverted unless the defendant makes an unequivocal admission of feasibility).

In contrast, the Second Circuit has suggested that unless a defendant affirmatively contests feasibility, the issue is not controverted. In an asbestos products liability case, the trial court admitted evidence that the asbestos manufacturer had recently started placing warning labels on its packaging. *In re Joint E. Dist. & S. Dist. Asbestos Litig.*, 995 F.2d 343 (2nd Cir. 1993). Admission of such evidence was held to be reversible error. With respect to the Plaintiff's argument that such evidence was relevant to feasibility, the court reasoned:

> The record is clear that Crane at no point argued that it was unable to issue a warning. Instead, it vigorously denied that its product required a warning or was defective without a warning. Because our review of the record convinces us that feasibility was not a contested issue, it was error to permit McPadden to read into evidence Vorhees's deposition testimony concerning post-exposure warnings that were placed on the product more than 12 years after McPadden was last exposed to Crane's asbestos products.

Id. at 346.

See also Werner v. Upjohn Co., 628 F.2d 848, (4th Cir. 1980) ("[I]t is clear from the face of the rule that an affirmative concession is not required. Rather, feasibility is not in issue unless controverted by the defendant.").

Thus, by carefully analyzing the applicable definitions of "feasibility" and "controverted," defense counsel may be able to avoid evidence of subsequent remedial measures either be artfully pleading arguments that advance its client's position without being deemed to place feasibility at issue, or, by stipulating to feasibility in advance.

2. Impeachment

Impeachment is another often cited reason for introduction of subsequent remedial measures. This exception is dangerous and must be aggressively opposed, as it can be so broadly interpreted that it would nullify the rule excluding subsequent remedial measures. A plaintiff could simply argue, for example, that where a defendant has claimed that a product was not defective but has taken subsequent remedial measures, introduction of those measures impeaches the claim that the product was safe and not defective. If that were the rule, defendants would be left in a position of having to forego a defense in order to avoid introduction of evidence of subsequent remedial measures. *See* DAVID P. LEONARD, THE NEW WIGMORE: SELECTED RULES OF LIMITED ADMISSIBLITY § 2.8.4 at 259.

Courts and commentators alike have cautioned against such a result:

> Professor Wright voices a strong concern that the 'exception' has the capacity to engulf the 'rule.' As an illustrative example, Wright explains that 'it 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.'' 23 Wright & Graham, *Federal Practice and Procedure* § 5289, at 145 (1980) (footnote omitted). Similarly, Professor Moore warns that 'the trial judge should guard against the improper admission of evidence of subsequent remedial measures to prove prior negligence

> under the guise of impeachment.' 10 Moore, *Moore's Federal Practice* § 407.04, at IV-159 (2d ed. 1988). Judge Weinstein also admonishes that '[c]are should be taken that needless inquiry and concern over credibility does not result in unnecessarily undercutting the policy objective of the basic exclusionary rule.' 2 Weinstein & Berger, *Weinstein's Evidence* ¶ 407[05], at 407-33 (1988).

Petree v. Victor Fluid Power, Inc., 887 F.2d 34, 39 (3d Cir. 1989).

Therefore, some courts have limited application of the impeachment exception to instances in which it is necessary to prevent the jury from being misled. *See Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1213 (10th Cir. 2006). This is admittedly a fuzzy standard, but case law helps give it some definition.

In *Wood v. Morbark Indus., Inc.*, 70 F.3d 1201 (11th Cir. 1995), the plaintiff sought recovery for the death of her husband who was killed using the defendant's wood chipper. *Id.* at 1203. The plaintiff claimed the chipper was defective because the infeed chute was only seventeen inches long and should have been longer. *Id.* The defendant prevailed on a motion *in limine* seeking to exclude evidence of post-accident changes that lengthened the chute, but at trial also sought to imply that the original length was the safest available and was still in use. *Id.* at 1203-04. The defendant's attempt to have it both ways proved costly. The court reasoned as follows:

> In his opening statement, Morbark's counsel suggested that the wood chipper used by Ginger Wood was not defective because, after the accident, the government 'ordered 30 machines just like the one that is involved in this case.' R4-141-22. Morbark's counsel later elicited testimony from Infinger that left the jury with the impression that DeFuniak Springs had made no modifications to the wood chipper. The district court correctly determined that Morbark's counsel's opening statement, particularly when combined with Morbark's counsel's cross-examination of Infinger, took unfair advantage of the court's in limine ruling and opened the door for rebuttal testimony regarding the subsequent modifications to the chute.

Id. at 1208; *see also Petree,* 887 F.2d at 40-41 (after defendant testified that there was no need for a warning label, the trial court impermissibly excluded evidence that the defendant in fact began using warning labels).

Conversely, the impeachment exception was not triggered in *Minter*, a case in which a professional painter was severely injured after falling from a lift. 451 F.3d at 1197. In that case, the plaintiff sought to admit evidence of the defendant's post-accident decision to install a solid guardrail on the lift on the grounds that it served to impeach the defendant's expert's testimony that a chainlink entry to the platform was "basically equivalent to a solid guardrail." *Id.* at 1213. The court parsed the testimony carefully and declined to apply the impeachment exception:

> The witness testified that a chainlink entry is 'basically equivalent' to a solid guardrail 'as long as [it is] in place,' and that the chainlink entry was not unreasonably dangerous because 'if [it] would have been properly latched, [Mr. Minter] would not have fallen out of the scissor lift and been injured.' This testimony is consistent with the evidence at trial that the ANSI safety standards were changed in 1991 to require solid guardrails in response to reports of workers operating the lift without latching the chainlink entry. Moreover, Prime Equipment did not dispute that a solid guardrail reduces the danger of falls for lift operators who might otherwise forget to latch the chainlink entry or fail to do so properly. Consequently, the evidence of Prime Equipment's subsequent repair work on the guardrail does not fall within the impeachment exception to Rule 407.

Id. at 1213; *see also Probus v. K-Mart, Inc.,* 794 F.2d 1207 (7th Cir. 1986) (another case carefully scrutinizing testimony for impeachment lest the exception swallow the rule).

Defense counsel should also heed the following lesson: permitting a client to defend its product in terms of superlatives can open the door to impeachment. In *Muzyka v. Remington Arms Co.*, 774 F.2d 1309, 1313 (5th Cir. 1985), an allegedly defective rifle was described as "the premier rifle, *the* best and *the* safest of its kind on the market." (emphasis in original). The court found that the jury had been denied evidence that the

design was changed within weeks of the subject accident "in impeachment of the experts who spoke in those superlatives." *Id.*

In sum, if the plaintiff raises the impeachment exception, it is important to carefully scrutinize the testimony to ensure that there has, in fact, been a contradiction.

3. Ownership or Control

In cases where the defendant claims that the product did not belong to it or was not under its control, the plaintiff will be permitted to present evidence of subsequent remedial measures taken by the defendant to show otherwise. FED. R. EVID. 407. Just as with the feasibility exception, the issue of ownership or control must be contested. *Id.* The evidence should be carefully evaluated, as well, to be sure it actually is probative of ownership or control.

D. Miscellaneous

Several other considerations related to subsequent remedial measures:

- Rule 407 may not apply to subsequent remedial measures taken by third parties. *Compare Diehl v. Blaw-Knox*, 360 F.3d 426 (3d Cir. 2004); *Raymond v. Raymond Corp.*, 938 F.2d 1518 (1st Cir. 1991); *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880 (9th Cir. 1991) (holding that rule does not apply), *with In re Air Crash Disaster*, 86 F.3d 498 (6th Cir. 1996) (noting that rule seems to exclude evidence of remedial measures regardless of who took them).

- In at least the Tenth Circuit, the admissibility of subsequent remedial measures is a matter of state law. *Wheeler v. John Deere Co.*, 862 F.2d 1404 (10th Cir. 1988); *see also Gray v. Hoffman-LaRoche, Inc.*, 82 Fed. Appx. 639 (10th Cir. 2003).

- Evidence of subsequent remedial measures may be admissible to demonstrate that the plaintiff was not contributorily/comparatively negligent. *See Rimkus v. Northwest Colorado Ski Corp.*, 706 F.2d 1060 (10th Cir. 1983).

- Evidence of subsequent remedial measures may also be used as evidence of a manufacturer's awareness of defects to support a post-sale duty to warn claim. *See, e.g., Dixon v. Jacobsen Mfg. Co.*, 637 A.2d 915 (N.J. Super. Ct. App. Div. 1994).

- A defendant's post-analysis tests or reports may not constitute a "remedial measure." *Compare Prentiss & Carlisle Co. v. Koehring-Waterous Div. of Timberjack, Inc.*, 972 F.2d 6 (1st Cir. 1992) *with Maddox v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986).

- Some courts have held that Rule 407 does not apply when subsequent remedial measures were not voluntarily taken. *See, e.g., Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322 (10th Cir. 1983)

- If all else fails and evidence of subsequent remedial measures is admitted, consider requesting a limiting instruction. FED. R. EVID. 105

II. Spoliation

If subsequent remedial measures are taken prior to giving the plaintiff an opportunity to examine or test the product at issue, the plaintiff may raise a claim of spoliation. Plaintiff would argue that she was deprived of the opportunity to see the product in the condition it was in at the time of the accident, and, therefore, evidence was lost. This can lead to sanctions from the court, or, in some jurisdictions, may be the basis for an entirely separate cause of action.

Spoliation has been defined as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Policy reasons for sanctioning spoliation of evidence include enhancing truth determination, assuring fairness, and promoting the integrity of the judicial system. *See* DAVID P. LEONARD, THE NEW WIGMORE A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBLITY § 2.7 at 233.

There is tension, however, between the public policy favoring remedial measures and the doctrine of spoliation. On the one hand, Rule 407 ostensibly exists to promote public safety by encouraging subsequent remedial measures that will make a product

safer. On the other, spoliation claims suggest that sanctions may be levied against a manufacturer that makes subsequent remedial measures. A vexatious litigant in California, for example, has repeatedly threatened that the taking of remedial measures would be met with a spoliation claim. *See, e.g., Molski v. Kahn Winery*, 405 F. Supp. 2d 1160, 1167 (C.D. Cal. 2005); *Molski v. Sport Chalet, Inc.*, 2005 WL 3280516 at *1 (C.D. Cal. 2005); *Molski v. Mandarin Touch Restaurant*, 385 F. Supp. 2d 1042, 1047 (C.D. Cal. 2005) (Molski's attorney sent letters to counsel for the defendants in each case threatening, "If any modifications are made, you will be subject to an action for spoliation of evidence…."). Similarly, in Louisiana, in a case in which the plaintiffs alleged that a defective road caused an accident that resulted in their injuries, the plaintiffs argued on appeal that evidence regarding subsequent remedial measures should have been admitted to prove the road was defective at the time of the accident, or alternatively, that the Department's repair of the road constituted spoliation.[2] *Yates v. Louisiana, Dep't of Transp. & Dev.*, 862 So.2d 1261, 1265-67 (La. App. 2003). As noted by the New Jersey Supreme Court in *Szalontai v. Yazbo's Sports Café*, 874 A.2d 507, 518 (N.J. 2005), threats that remedial measures constitute spoliation undermine the public policy favoring such measures:

> "When asked whether plaintiff sought an adverse inference based on a claim of spoliation of evidence[,] plaintiff declined to make that claim, perhaps because of the tension between a spoliation claim under the circumstances present here and our State's clear and long-standing public policy favoring subsequent remedial measures.

[2] The court of appeals held that the Department had not waived its right to object to the use of evidence of subsequent remedial measures as evidence of culpability, and declined to address the spoliation argument because the plaintiff had not argued spoliation before the trial court and there was a lack of evidence in the record regarding when repairs were made and regarding the Department's intent. *Id.*

(citations omitted); *see also* Stefan Rubin, Note, *Tort Reform: A Call for Florida To Scale Back Its Independent Tort for the Spoliation of Evidence*, 51 FLA. L. REV. 345, 368 (1999):

> Competing court interests can be seen in a situation where a party remedies a known problem or condition by discarding or dismantling it. According to evidentiary rules, the subsequent remedial act may not be used to prove that the condition was originally negligent. However, the subsequent remedial act may render the party liable for the spoliation of evidence. This result would be contrary to the intentions of the evidentiary rules.

In defending against spoliation claims, it can be argued that the duty to preserve evidence is not boundless, but rather is limited by what is reasonable under the circumstances. *See, e.g., Hirsch v. Gen. Motors Corp.*, 628 A.2d 1108, 1122 (N.J. Super. Ct. Law Div. 1993) ("The scope of the duty to preserve evidence is not boundless. A potential spoliator need do only what is reasonable under the circumstances.") (quotation marks and citation omitted); *In re Wechsler*, 121 F. Supp. 2d 404, 420 (D. Del. 2000). In *Conderman v. Rochester Gas & Elec. Corp.*, for example, the plaintiffs were hit by falling utility poles while driving during an ice storm. 693 N.Y.S.2d 787, 788 (N.Y. App. Div. 1999). Fourteen poles had broken off and fallen into the road, rendering the road impassable and leaving many without power. *Id.* The defendant utility companies "rushed emergency crews to the scene," who cut the poles into four-foot lengths so that they could be moved to the side of the road. *Id.* "Within 24 hours[,] the pieces were then loaded into trucks and removed to a landfill." *Id.* Affirming the trial court's refusal to impose spoliation sanctions, the appellate court noted, "In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices." *Id.* at 789.

The court added, the defendants "were responding to an emergency situation that affected the public safety, and it would be unreasonable to have imposed upon them at the time the duty to preserve evidence, anticipating the possibility of future litigation." In *Allen v. Blanchard*, 763 So.2d 704, 706 (La. Ct. App. 2000), the plaintiff, who was a spectator at a rodeo, was injured after falling from a set of bleachers when the railing he was leaning against gave way because of a failed weld. The court held that (1) the presumption of spoliation is not applicable when the failure to produce the evidence has a reasonable explanation, and (2) the defendant's explanation that he repaired the weld the next day to get his arena back in working condition as quickly as possible, in conjunction with the fact that there was no evidence to suggest that he knew suit would be filed, was reasonable. *Id.* at 709. Thus, in cases in which subsequent remedial measures are undertaken in order to promote safety and to prevent further accidents, it can be argued that a spoliation sanction is not warranted, at least in those cases in which suit has not yet been filed or the defendant has not been put on notice of a specific claim.

Some jurisdictions require a showing of subjective bad faith before imposing spoliation sanctions. "A spoliation inference or presumption may arise where it is shown that the destruction of evidence was: (a) intentional, (b) fraudulent, or (c) done with a desire to conceal and, thus, frustrate the search for the truth." *Scout v. City of Gordon*, 849 F. Supp. 687, 691 (D. Neb. 1994). In such jurisdictions, absent any evidence of bad faith, a spoliation sanction should not be warranted for subsequent remedial measures.

In order for a spoliation sanction to be warranted, any destruction of evidence must prejudice the plaintiff. Therefore, if a plaintiff can still mount a case against the defendant, the defendant may be able to argue that there is no prejudice. In design defect

cases in particular, a manufacturer may argue that the plaintiff has not been prejudiced because the viability of a design defect claim does not necessarily turn on the condition of any particular unit. *See, e.g., Rodriguez v. Pelham Plumbing & Heating Corp.*, 799 N.Y.S.2d 27, 29 (N.Y. App. Div. 2005). The availability of exemplars may serve the same purpose just as well.

Finally, in those jurisdictions in which subjective bad faith is not required, Rule 403 may serve as an important bulwark. In *United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir. 1986), the court said, "spoliation evidence should not be admitted if its probative value 'is substantially outweighed by the danger of unfair prejudice.'" (quoting FED. R. EVID. 403). A decision to remedy a defective product after an accident will always be intentional. If that is all that is required in order for a plaintiff to claim that evidence of the remedial measures is thereby admissible to prove spoliation, Rule 407 would be eviscerated in strict products liability actions. Hence, under the ambit of Rule 403, the policies underlying spoliation and subsequent remedial measures should arguably be balanced. If the spoliation was done with a subjective intent to destroy evidence, the policies underlying the spoliation doctrine should arguably prevail. If the spoliation was done for a justifiable reason, the inference of fault is much weaker and the policies underlying Rule 407 should arguably prevail. *Cf.* DAVID P. LEONARD, THE NEW WIGMORE A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBLITY § 2.7 at 234.

If the court does find that there has been spoliation of evidence, possible sanctions include adverse inference instructions, exclusion of evidence or expert testimony, and dismissal. *See, e.g., Samsung Elecs. Co. v. Rambus Inc.*, 439 F. Supp. 2d 524, 540 (E.D.

Va. 2006). An adverse inference instruction is the most common. *See, e.g., Oxford Presbyterian Church v. Weil-McLain Co.*, 815 A.2d 1094, 1105 (Pa. Super. 2003) ("[A]n adverse inference instruction is a common penalty for spoliation, whereas other sanctions, such as striking the plaintiff's expert's testimony, are much more extreme."). Adverse inference instructions usually take the form of a jury instruction that indicates the evidence is missing, and the jury should assume that, if the evidence had been available to the plaintiff, it would have been helpful to her case. *See, e.g., Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004) ("The spoliation inference is an adverse inference that permits a jury to infer that destroyed evidence might or would have been unfavorable to the position of the offending party.) (quotation marks and citation omitted). Sometimes, the court will be more specific, depending on the evidence at issue.

Some jurisdictions, however, also have a separate tort cause of action for spoliation. *See, e.g., Hannah v. Heeter*, 584 S.E.2d 560 (W. Va. 2003); *Oliver v. Stimson Lumber Co.*, 993 P.2d 11 (Mont. 1999); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993). In those jurisdictions, the plaintiff may be entitled to separate damages for this tort. The elements of the tort may vary from jurisdiction to jurisdiction, and should be carefully examined in developing the strategy for defending against it.

Subsequent remedial measures raise important issues in products liability cases that can have a substantial impact on the outcome of a case at trial. Properly recognized, these issues can be favorably resolved by precluding evidence of subsequent remedial measures from the trial, and preventing spoliation claims and the negative inferences that can come from them.