

The Fix Is Out

BY LAWRENCE SAVELL

For all the benefits of car collecting, there are some sacrifices that have to be made. Dedicated car collectors have to invest significant time, effort, and money into their hobby. In addition, by definition, they are capturing (and perpetuating) a moment along the technological spectrum, at a point before some innovations or improvements (for example, anti-lock brakes and air bags) were developed or widely used. This is a choice the collector makes when he or she commits himself or herself to total authenticity and accuracy.

The law sometimes makes a similar choice. The Federal Rules of Evidence (and evidence rules of many states that emulate the Federal Rules) provide that, in certain circumstances, the fact that improvements or other changes may have been made to a vehicle or other product after an event such as an accident generally may not be used at trial against the manufacturer. In the absence of such a rule, a plaintiff might attempt to claim that the manufacturer's making such a change constituted an admission or concession by it that the product prior to the change was somehow defective or negligently made. Evidence Rule 407 relates to such "subsequent remedial measures" and provides:

"When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

There are two primary rationales for excluding evidence of subsequent remedial measures. The first is that even though the measure, if taken previously, might have made the event less likely to occur, the taking of it may have been motivated by a desire to exercise the highest care possible and thus was not an admission that the manufacturer had acted negligently in the past. As an English jurist put it over a century ago, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before."

The second and more commonly cited rationale is one of social policy. The law wants to encourage people to take, or at least not discourage them from taking, steps in furtherance of added safety. Such corrective steps might be discouraged by allowing evidence of them to be used at trial against the party taking them.

Courts have applied this principle to exclude evidence of steps such as subsequent repairs, removal of

dangerous conditions, installation of safety devices, and attachment of warnings, notices, and instructions. There have been cases where the "subsequent remedial measures" rule has been applied where the product involved was an old car. A recent example was *Misener v. General Motors*, decided on April 30, 1996 by the United States District Court for the District of Utah.

According to the Court, on July 5, 1991, Lynn Misener was seriously injured in an accident while a passenger in a 1977 Chevrolet Blazer. The vehicle, while being driven on State Road 40 in Utah, left the road and rolled over.

Misener sued General Motors (and others) for negligence, products liability, and breach of warranty. General Motors made a motion to the court under Rule 407 (among other grounds) to prevent the plaintiffs from introducing or referring at trial to evidence of design changes Chevrolet had made to the model and its components following the manufacture of the particular Blazer involved. In 1977 (presumably after that manufacture), Chevrolet had made its roll bar optional. In 1978, it modified the model's windshield. In 1992, it added an all-metal roof.

The court acknowledged that "[u]nder Rule 407, F.R.E., evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct." It also acknowledged the rule's rationale: "The exclusions are important to foster the policy of encouraging a person to take steps in furtherance of added safety. Further, the probative value of such evidence as an admission is limited when it occurs after the fact and where the experience of the event provides insight that did not previously exist."

The court concluded that the "event" in this case was the 1991 accident. It therefore ordered that the 1977 roll bar and 1978 windshield changes would be admissible because they preceded the accident. It excluded evidence of the 1992 roof change as a "subsequent remedial measure" with regard to plaintiff's negligence claim (although it allowed such evidence relating to plaintiff's "products liability" claim, based on a prior Tenth Circuit appellate court ruling—with which many other courts disagree—that Rule 407 did not apply to so-called "strict liability" claims).

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