UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

	:	**MDL NO. 1355**
IN RE: PROPULSID	:	
PRODUCTS LIABILITY LITIGATION	:	**SECTION "L"**
	:	
	:	**JUDGE FALLON**
.. ..	:	

THIS DOCUMENT RELATES TO THE FOLLOWING CASES:
Civil Action No. 00-2577, and only on behalf of
Plaintiff Patricia L. Deiz, wife of and on behalf of
Richard Diez, Richard Diez, Jr., and Marc J. Diez;

ORDER & REASONS

Before the Court is the Defendants' Motion in Limine to Exclude Evidence of Subsequent Remedial Measures in the trial of the above-captioned cases. During oral arguments on this motion, the Court granted the motion insofar as it referred to warning labels issued for Propulsid after the death of the decedent, Richard Diez. The Court reserved ruling on the issue of the Propulsid Limited Access Program ("LAP"). The Court now writes to address this issue. For the following reasons, the defendants' motion is GRANTED.

BACKGROUND

Plaintiff Diez seeks damages for the wrongful death of her husband resulting from treatment with Propulsid. The plaintiff's case has been scheduled for trial before this Court, and the defendants have moved to exclude evidence relating to the LAP.

Defendants state that the LAP was created by the defendants in March, 2000 shortly before the defendants ceased commercial distribution of Propulsid in July, 2000. The LAP was created to permit some patients to continue using Propulsid because its "unique prokinetic mechanism makes it the only treatment for some patients with serious, potentially life-threatening diseases."[1] The LAP requires that patients meet certain health and safety criteria and be approved by the United States Food and Drug Administration before they can begin treating with Propulsid.

Diez was deceased at the time Propulsid was removed from the general market and placed on the restricted use program. Thus, defendants argue that any evidence relating to the LAP is an inadmissible subsequent remedial measure under Federal Rule of Evidence 407. Defendants further admit that such program was feasible at the time the plaintiffs were using Propulsid but that it was not necessary to create such program based on the then-existing knowledge in the defendants' possession. Plaintiffs contend that the LAP cannot be a subsequent remedial measure because Propulsid was not withdrawn from the market, and is still available, albeit on a restricted use basis.

ANALYSIS

Federal Rule of Evidence 407 provides:

> 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 remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

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[1]Defendants' Motion in Limine, at 3-4.

The rule is based on the theory of "encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." Advisory Committee Note, FED. R. EVID. 407.

There is no issue or dispute over ownership, control, or the feasibility of the precautionary measures. The only issue before the Court is whether the LAP adopted subsequent to Diez's death would have made his death less likely to occur. Under the LAP, a prospective user is screened by the physician and may be excluded from the program for any number of reasons, including the fact that he uses another drug for which interaction with Propulsid has been contraindicated.

This Court has previously noted that a "recall campaign is a measure 'taken which, if taken previously, would have made the event less likely to occur.' Consequently, product recalls are subsequent remedial measures for purposes of Rule 407." *Giglio v. Saab-Sania of America, Inc.*, 1992 WL 329557, at * 3 (E.D. La. Nov. 2, 1992), *aff'd*, 14 F.3d 55 (5th Cir. 1994) (mem.). The only difference between the LAP and a general recall is the extent to which the product is available. Rule 407 does not exclude the evidence only if the claimant would have had no access to the product at the time of his injury; rather, Rule 407 excludes subsequent measures which would have made the harm less likely to occur. Restricted use would have reduced the likelihood that Diez would have had access to Propulsid. Without access, the harm which plaintiff complains of would have been less likely.

Although Rule 407 does permit evidence of such measures to be admitted if it were feasible to adopt such measures, courts have recognized that where such feasibility is not contested, the evidence remains inadmissible. *See, e.g., Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 763-64 (5th Cir. 1989); *Werner v. Upjohn Co.*, 628 F.2d 848, 853 (4th Cir. 1980). Accordingly, Rule 407 applies, and evidence regarding the LAP is inadmissible.

CONCLUSION

For the foregoing reasons, evidence regarding Propulsid's Limited Access Program constitutes a subsequent remedial measure that is inadmissible in this particular case under Federal Rule of Evidence 407. IT IS ORDERED that the defendants' Motion in Limine be GRANTED.

New Orleans, Louisiana this 11th day of March, 2003

/s Eldon E. Fallon
UNITED STATES DISTRICT JUDGE