

No. 07-117

IN THE
SUPREME COURT OF THE UNITED STATES

STUART SLOPE, by and through his parents
and legal guardians,
Stacy and Serina Slope,
Petitioner,

-against-

UNDER THE SEA TOYS, Inc.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

- I. Under Federal Rules of Evidence 804(b)(3):
 - A) Does the interpretation of Federal Rule of Evidence 804(b)(3) in *Williamson v. United States*, 512 U.S. 594 (1994), preclude the admissibility in a civil case of a reliable collateral statement contained in the same narrative as statements that satisfy that rule's hearsay exception for declarations against interest?
 - B) Are statements acknowledging criminal conduct contained in a personal letter *per se* inadmissible in a civil case if, after sending it, the writer commits suicide?
- II. Under Federal Rule of Evidence 803(3), does a declarant's hearsay statement that she intends to meet and discuss a matter with a business associate constitute evidence in a civil case that the meeting took place and that the matter was discussed??
- III. Does the Federal Rule of Evidence 407 exclusion of "subsequent remedial measures:"
 - A) Apply to factual information in a post-injury report prepared by a distributor of a product, when the information supports a recommendation in that same report to recall the product?
 - B) Apply to measures undertaken at the direction of a government agency?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Boerum and the opinion of the United States Court of Appeals for the Fourteenth Circuit are reproduced in the record at pages 17-21 and 28-45, respectively.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in Appendix A and Appendix B.

STATEMENT OF THE CASE

Statement of Facts

Respondent Under the Sea Toys, Inc. (“Sea Toys”), collaborated with BFP Tattel, Inc. (Tattel), located in the country of Legolia, in or about March, 2005, to create the “Finn E. Shark”

stuffed plush toy. (R. 2.) The toy was released in connection with the movie “Shark Attack.” The toy was manufactured by Tattel, and was distributed in the United States by Sea Toys, beginning in May, 2005. (R. 2.)

Petitioner Slope was born on January 2, 2001, and in the summer of 2005, when he was four years old; he saw the movie Shark Attack three times. (R. 2.) Slope’s parents purchased the Finn E. Shark Toy as a holiday gift for the petitioner in December of 2005. (R. 2.) Slope carried the toy with him constantly, and was observed licking its eyes. (R. 2.) Slope’s parents noticed that the eyes had fallen off the toy approximately one week after he was given the toy in early December, 2005. (R. 2.)

By the end of December, 2005, Slope began to experience alarming physical changes. (R. 2) He suffered from slurred speech, brief periods of unconsciousness, headaches, confusion, dizziness, sensory problems, mood changes, memory problems, and an inability to concentrate. (R. 2-3.)

Slope sought medical treatment on January, 2, 2006. (R. 3.) After extensive testing, the petitioner was diagnosed with irreversible brain damage which was caused by exposure to “rH-12,” a rare toxin. (R. 3.)

In September, 2005, the Legolian government began to investigate to determine the source of an rH-12 outbreak among Legolian children. (R. 3.) It was determined that rH-12 was present in the glue of adhesive used to attach the eyes of the Finn E. Shark toy. (R. 3) The Respondent learned in or around October, 2005, that the Finn E. Shark toy contained rH-12. (R. 3.) On October 10, 2005, Mimi Jussel, CEO of Tattel, wrote a personal business journal entry

stating that everyone in Legolia and in America knew about the contamination of the Finn E. Shark toy. (R. 22) On October 11, 2005, Ms. Jussel wrote a personal letter to her daughter apologizing for her involvement and stating that she informed Sea Toys of the contamination. (R. 23.) On January 16, 2006, Under the Sea Toys issued a confidential memorandum stating that the Finn E. Shark toy contained rH-12 and should be recalled. (R. 25.) On June 1, 2006, Jaffe Peetz, Mimi Jussel's secretary, stated in deposition that Ms. Jussel told him that she was going to California to inform the Respondent of "what was going on." (R. 24.) On April 1, 2006, Sea Toys issued a recall of the Finn E. Shark toy that it distributed in the United States, and warned of the potential rH-12 exposure. (R. 3.) Tattel, the manufacturer of the Fin E. Shark toy, was dissolved in January, 2006. (R. 3.)

Procedural History

Slope filed an action under §204 of the Boerum Tort Reform Act seeking compensatory damages in the sum of \$25,000,000, plus costs and disbursements. (R. 4.) The District Court granted the Respondent's summary judgment motion because it found that Slope had no admissible evidence on the essential element of knowledge. (R. 18.) Slope appealed to the Fourteenth Circuit Court of Appeals, which affirmed the District Court's holding that Slope had no admissible evidence on the essential element of knowledge and the grant of the motion for summary judgment. (R. 39.)

SUMMARY OF THE ARGUMENT

Generally, statements made by an unavailable declarant are inadmissible hearsay. The statements are excluded because they are unreliable, and because there is no opportunity to

cross-examine the declarant. However, in some circumstances this evidence is allowed. Rule 804(b)(3) allows statements that are against the declarant's interest because there would be little incentive for the declarant to lie. In Williamson v. United States, 512 U.S. 594, 600 (1994), this Court declined to admit statements collateral to the declaration against interest. This ruling, however, was not extended to civil non-custodial cases.

A statement that would otherwise be admissible under Federal Rule of Evidence 803(b)(3) may be inadmissible if the declarant commits suicide directly after making the statement. However, the statement requires a fact-sensitive inquiry as to its trustworthiness before it is excluded.

Additionally, Fourteenth Circuit incorrectly held that Fed. R. Evid. 803(3) did not incorporate Hillmon by incorrectly relying on the House Committee Reports and not focusing on the plain meaning of the statute. The Fourteenth Circuit incorrectly relied on the House Committee's Report as the basis for rejecting the unambiguous language of the rule and the express language contained in the notes of the rules' drafters. The Fourteenth Circuit also erred in holding the factual findings of the Sea Toys report inadmissible as a subsequent remedial measure under Rule 407. The factual findings themselves are not subsequent remedial measures, and thus, Rule 407 is not implicated. Additionally, even if the factual findings are found inadmissible the entire report is admissible because it was an involuntary response to a government directive and so did not implicate the stated purpose of Rule 407.

ARGUMENT

IV. UNDER FEDERAL RULE OF EVIDENCE 804(b)(3):

A. A Reliable Collateral Statement in a Civil Case is Admissible When it is Contained in the Same Narrative as Statements That Satisfy that Rule's Hearsay Objection for Declarations Against Interest.

“A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination. Among the most prevalent of these exceptions is the one applicable to declarations against interest-- an exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made.” Chambers v. Miss., 410 US 284, 299 (1973). This exception is Federal Rule of Evidence 804(b)(3). The rationale behind this rule is that a person is less likely to fabricate a statement when that statement will only subject him or her to penalties. “In criminal trials, statements against penal interest are offered into evidence in three principal situations: (1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant.” Lilly v. VA, 527 U.S. 116, 129 (1999). In Williamson v. United States, 512 US 594, 600 (1994), this Court held that while statements against penal interest can be admitted under 84(b)(3), statement collateral to those against penal interest can not. However, “the presumption of unreliability that attaches to codefendants' confessions . . . may be rebutted.” Lee v. Illinois, 476 US 530, 543 (1986).

In Williamson, the defendant this Court considered collateral statements made by a defendant which implicated his co-conspirator. The defendant had been pulled over while driving, and cocaine was found in his vehicle. Id. at 597. Upon questioning, the defendant implicated his co-conspirator, who was tried based on that information. Id. When the prosecution sought to introduce the statement made by the original defendant, the defense argued that the statement was not reliable, because it was only collateral to the self-inculpatory statement. This Court found that, “ In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.” Id. at 600.

However, Williamson is not on point in this instance. Williamson dealt only with a declaration against penal interest. This case deals exclusively with a declaration against a pecuniary interest. According to Judge Julio in Slope v. Under the Sea Toys, Inc., “[g]iven the vast difference between declarations against penal interest and declarations against pecuniary interest, it is too great a stretch to extend Williamson to declarations against pecuniary interest.” Slope v. Under the Sea Toys, Inc. 40, (14th Cir. 2007) (Julio J., dissenting). Additionally, Williamson dealt only with custodial statements against penal interest. The rationale in Williamson was that criminal defendants would attempt to divert blame to their co-conspirators in collateral statements, and thus, those collateral statements were not as trustworthy as the statements against penal interest. Judge Julio went on to say that, “Unlike the reliability of a declaration against penal interest, the reliability which we attribute to a declaration against pecuniary interest itself cloaks the rest of the statement. Implicating others in the civil context does not ordinarily reduce the penalties that may be levied against the declarant, nor does it

reduce the likelihood that suit will be brought.” Id. at 40. Thus, there is was no motivation for Ms. Jussel to lie in this circumstance, and the reliability of the statement against pecuniary interest encompasses the collateral statements.

There is a longstanding common law tradition of admitting statements collateral to those that are against a pecuniary interest. “It is also important to note that the original common law exception to the hearsay rule for statements against interest did not include an exception for statements against penal interest.” Fed. R. Evid. 804(b)(3) Advisory committee’s note, exception 3. Regarding statements against pecuniary interest, “[f]rom the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement.” S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 57 (1994).

This Court reaffirmed the Williamson decision in Lilly v. VA, 527 US 116, (1999). In Lilly, the defendant’s brother made several statements while being interrogated that implicated both himself and the defendant in a murder and several burglaries. Id. at 121. The defendant’s brother’s statements were taken during police interrogation and were mostly responses to questions from the police. Id. at 120-121. The statements of the defendant’s brother were admitted and used against the defendant at his trial. The Supreme Court of Virginia upheld the use of those statements in part because the defendant’s brother was not offered a deal in return for implicating his brother the reliability of his statements was not affected. Id. at 135. This Court granted certiorari and evaluated the reliability of the statement of the defendant’s brother.

The Court said that, “the absence of an express promise of leniency to [the declarant] does not enhance his statements' reliability to the level necessary for their untested admission.” Id. at 139.

The present case is distinguished from Lilly in several ways. First, again, this case involves only a pecuniary instead of a penal interest. The statements in Lilly were analyzed in the same manner as those in Williamson. The Court again discussed the rationale that a criminal defendant may try to shift blame to his co-conspirators, and thus, those statements are unreliable. Id. When a pecuniary interest is implicated there is a lesser amount of motivation to shift blame or implicate others than there is in a penal setting.

However, the decision in Lilly did imply that the reliability was raised at least somewhat by the fact that the defendant's brother was not offered any compensation for his statements against his brother. Id. In this case the reliability of the Ms. Jussel's statement is also increased because she was not offered any compensation for the statement. “It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice -- that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.” Id. at 137. Additionally, the Court in Lilly said the reliability, though slightly raised because of the circumstances, was not sufficient because Lilly could have reasonably inferred at the time that statements implicating someone else in the same clam might help him. Ms. Jussel was not under the same pressure or in any kind of a similar situation. There

was no implied compensation for her statement. Thus, her statement has more reliability than the Lilly statement and should be allowed under 804(3)(b).

In Lee v. Illinois, 476 US 530 (1986), this Court emphasized that the reliability of the declarant's statement was based on the declarant's opportunity for gain. In Lee the prosecution sought to introduce statement's collateral to a declaration against interest from the defendant's boyfriend. Id. at 532. The statements were not allowed because they lacked the same reliability as the declarations against interest. This Court said that the holding of Lee, "was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation is presumptively suspect." Id. at 541.

In this case, Ms. Jussel had nothing to gain from implicating Under the Sea. She was fully aware that she was already going to jail and that she would be financially ruined. As stated above, implicating the "Americans" would not reduce the likelihood of a lawsuit, and thus, Ms. Jussel had nothing to gain. Because Ms. Jussel does not stand to gain, under the holding in Lee, the statement is not presumptively suspect. Additionally, the Lee court found that, "accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant but instead are likely to be attempts to minimize the declarant's culpability." Id. at 552-553. (Blackmun, J., dissenting). Here, Ms. Jussel's conduct was not likely to affect her culpability, and thus, the statements are more reliable.

The Second Circuit has allowed collateral statements in cases where the statements were not made in custodial settings. The second circuit has also found that these cases are not in

conflict with Williamson or Lilly. First, before Williamson was decided, the Second Circuit decided United States v. Mathews, 20 F.3d 538 (2d. Cir. 1994). In Mathews, the defendant's were convicted of bank robbery and conspiracy to commit bank robbery. Id. at 542. One of the co-defendant's had made a statement to his girlfriend which implicated them in the crimes. Id. The incriminating statement made to the girlfriend was later introduced against by the prosecution. Id. Even statements made which were collateral to the statements against interest were admitted. The Second Circuit said that, "the statements were not made to law enforcement authorities, were not made in response to questioning, and were not made in a coercive atmosphere. Rather, they were volunteered . . . to his girlfriend, an intimate and confidante, in the private recesses of their home. There were no coercive pressures, and there was no attempt to curry favor with authorities." Id. at 546. All of these factors were considered, and they increased the trustworthiness of the statements, such that they were allowed into evidence. The Second Circuit continued that, "when he made the statement to [his girlfriend], [the co-defendant] had no reason to expect that his admission would ever be disclosed to the authorities. Further, the statements do not reflect any attempt by [the co-defendant] to minimize his own culpability. . . . Nor was there any effort to make [the defendant] seem more culpable than [the co-defendant]." Id. at 546.

Similarly, in this case, Jussel's statements were not made to the police or in any context that could have reduced the pecuniary consequences that she faced. She was not coerced to make an entry in her journal, nor was she answering any questions. The action was completely voluntary. Jussel had no reason to suspect that the statement would ever help her avoid any of the consequences she was facing, and thus she had no reason to lie. The factors in this case that are

similar to those in Mathews made the testimony reliable enough that it was admissible. Thus, this testimony should be admitted.

After the Mathews decision, the Supreme Court decided Williamson. However, the Second Circuit still reaffirmed the Mathews decision in United States v. Sasso, 59 F.3d 341 (2d. Cir. 1995). In Sasso, the defendant's were convicted of gun charges. Id. at 345. One of the defendant's again made comments to his girlfriend which incriminated himself and a co-conspirator. Id. at 346. The Sasso court looked to the following factors: (a) the equal inculcation of the defendant and his co-defendant; (b) the fact that there was no effort to shift blame; (c) the context of when and where the statements were made and whom they were made to; and (d) the fact that there was no attempt to implicate or curry favor." Id. at 349.

The court in Sasso found that there was no conflict between the Mathews and the Williamson decision. Id. at 349. The Second Circuit still felt that a statement collateral to a declaration against interest could be admissible if certain conditions were met. One of those conditions was custodial interrogation. The rationale in Williamson is implicated in custodial interrogation. There it is likely that a defendant would implicate another for personal gain. However, when the statement is made to an outside source, such as Jussel's was, that statement is more reliable, just at the statement in Sasso was found to be.

This Court's decisions in Williamson and Lilly are not applicable in this case. Additionally, a factual inquiry indicates the reliability of the statements made by Jussel. Therefore, they should be admitted under Fed. R. Evid. 804(b)(3).

B. Statements Acknowledging Criminal Conduct Contained in a Personal Letter May Be Admissible, Even if, After Sending It, the Writer Commits Suicide.

Federal Rule of Evidence 804(b)(3) admits evidence that would otherwise be excluded under the hearsay rule. It allows admission of a statement, “which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.” Fed. R. Evid. R 804. According to *The Judicial Interpretation of Suicide*, “[s]o far as [third parties who write suicide notes] are concerned, the contents of the suicide note constitute hearsay evidence. Whether the evidence will nevertheless be admissible has been primarily a function of judicial treatment of those statements as possessing the same degree of reliability as legal precedent attributes to declarations which subject the declarant to criminal or pecuniary liability.” *Note, The Judicial Interpretation of Suicide*, 105 U. PA. L. Rev. 391, 402-403 (1957). Additionally, the Supreme Court may consider the factual issues of trustworthiness. “Nothing in our prior opinions, however, suggests that appellate courts should defer to lower courts' determinations regarding whether a hearsay statement has particularized guarantees of trustworthiness. To the contrary, those opinions indicate that we have assumed, as with other fact-intensive, mixed questions of constitutional law, that ‘independent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles’ governing the factual circumstances necessary to satisfy the protections of the Bill of Rights.” Lilly 527 US at 136, (Quoting Ornelas v. United States, 517 U.S. 690, 697, (1996)).

In United States v. Layton, 720 F.2d 548 (9th Cir. 1983), one of the declarant's made a statement to his attorney that other members of his social group were about to engage in violent acts. Later, the declarant committed suicide, and was not available at the time of the trial of one of his co-conspirators. Id. at 559. The prosecution attempted to admit the statements, but the district court disallowed them. The Ninth Circuit took part in a fact-sensitive inquiry as to whether the testimony was reliable. Id. at 559-561. It was not deemed unreliable based solely on the death of the declarant. In fact, the Ninth Circuit admitted the evidence after finding that it was trustworthy.

In this case, the evidence contained in a letter written from Jussel to her daughter should not be excluded without first completing a fact sensitive inquiry into whether the evidence is reliable. "The majority [in the Fourteenth Circuit] rightly notes that suicide may provide a declarant with the opportunity to rewrite history. Thus, where suicide is concerned, the circumstances surrounding both the suicide and the declaration should be carefully parsed to determine the declaration's reliability or lack of the same." Slope v. Under the Sea Toys, Inc. , 41, (14th Cir. 2007) (Julio J., dissenting). Here, Jussel's statement is reliable. The statement was made one week before the suicide, not directly before. The letter does not in any way suggest that Ms. Jussel will attempt or is thinking about suicide. Additionally, Jussel was diagnosed with a life threatening illness shortly after writing the letter, which may be the cause for her suicide.

In Atlas Metals Product Co. v. Lumberman's Mut. Casualty Co., 2003 Mass. Super. LEXIS 376, an employee of Atlas had been stealing money from one of its customers. The employee confessed to the police and shortly thereafter committed suicide. Id. at 2-3. Atlas

sought to strike the confession, but it was admitted by the Massachusetts Superior Court. Id. 5-6. The Superior Court did not exclude the testimony because of the declarant's suicide. It instead did an independent inquiry into whether the statements made by the declarant were trustworthy.

Just as the statements in Atlas were admitted despite the declarant's suicide, so should the statements in this case be admitted. The Court in Atlas performed an inquiry into the trustworthiness of the statements, despite the suicide. In this case, an independent inquiry is also warranted, and as stated above once a fact-sensitive inquiry is completed the statements will be found reliable.

In United States v. Angleton, 269 F.Supp.2d 878, 881 (S. D. Tex. 2003), the defendant was accused of murdering his wife. Id. at 881. In his defense, he sought to admit several letters that his brother had written while his brother was in jail. Id. His brother had admitted to committing the crime, and exculpated the defendant in the letters. Id. Some of the letters were written directly before the declarant's suicide, but some were written up to several weeks before. However, in all the letters the declarant spoke of his impending suicide. Id. The District Court excluded the evidence because it determined that when evidence is used to exculpate a defendant corroborating evidence is required. Importantly, the District Court did not exclude the evidence on the grounds that it was unreliable because of the suicide, and did a factual inquiry before the evidence was ultimately excluded. The Court stated that, "The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing

it to be true,' and this question can only be answered in light of all the surrounding circumstances.” Id. at 890. (Quoting United States v. Williamson, 512 US 594, 603-604 (1994).

In Angleton the defendant had clearly indicated in four of his five of his jail notes that he was contemplating suicide. He was aware of that eventuality at all times during writing, and claimed to have written the last letter after ingesting a deadly amount of pills. Id. at 881. In this case, Jussel didn’t indicate in her correspondence that she was contemplating suicide. In fact, there is no evidence that she was suicidal while writing the letter. The intervening cause, her illness, leads to the interference that she was not contemplating suicide, and thus, there could be pecuniary consequences following her statements. That makes them more trustworthy.

In Brennan v. State, 151 Md. 265, (1926), the Court of Appeals of Maryland dealt with a letter written to the declarant’s sister shortly before his suicide in a case where the defendant was accused of bastardy. Id. at 266. The Court of Appeals discussed that typically, third party statements are not allowed, especially when the declarant has committed suicide. However, they could be allowed, and were allowed in this case, because there were unusual circumstances that led to the increased trustworthiness of the statements. Id. at 271. The Court cites several reasons for supporting the truthfulness of the letter. The first was that it was written in the declarant’s own hand and sent to a relative of his. Id. Additionally, there was not friendship or relationship between the declarant and the defendant, and thus there was no reason for the declarant or his sister to exculpate the defendant. Id.

While the Brennan case was used to exculpate rather than inculcate a defendant in Brennan, the case is still applicable to this case. In this case, there was also handwritten note

implicating Jussel sent to a relative of hers. Additionally, Jussel had a relationship with the defendant, and there was no reason for her to implicate them, other than that her statements were the truth. As discussed above, there was no pecuniary advantage for Jussel to implicate Sea Toys, and thus, the evidence should be admitted.

In Truelsch v. Miller, 186 Wisc. 239, 202 N.W. 352 (1925), the Supreme Court of Wisconsin also admitted a note written by a declarant that had recently committed suicide. The declarant had embezzled \$4,400, from his place of business, and had admitted his action in a suicide letter left to his wife. Id. at 246. His former employer was seeking to place a trust on the money that the declarant's wife received from the insurance policy. Id. at 246. The Court allowed these documents into the record to show the extent of the declarant's actions. It said that, "The letters in this case are plainly within the class of declarations contemplated by the exception under discussion and should not have been disregarded." Id. at 249.

The statements made by Jussel in this case are similar to the ones made by Truelsch. Truelsch made a written declaration to his family member detailing his wrongdoings. He also made collateral statements which explained the amounts that were taken. The court allowed not only statements directly against Truelsch's pecuniary interest, but also statements detailing exactly the amount that he had taken. The declarations were allowed to enter into the pecuniary disagreement between his wife and his former employer after his demise. The fact that he committed suicide did not make his statements inherently untrustworthy.

V. UNDER FEDERAL RULES OF EVIDENCE 803(3), A DECLARANT'S HEARSAY STATEMENT THAT SHE INTENDS TO MEET AND DISCUSS A MATTER WITH A BUSINESS ASSOCIATE CONSTITUTES EVIDENCE IN A CIVIL CASE THAT THE MEETING TOOK PLACE AND THAT THE MATTER WAS DISCUSSED.

An out of court statement offered in evidence to prove the truth of the matter asserted is hearsay. Fed. R. Evid. 801(c). Hearsay statements are generally inadmissible at trial. Fed. R. Evid. 802. Hearsay exceptions are justified if the hearsay statement possesses sufficient circumstantial guarantees of trustworthiness. Fed. R. of Evid. 803, Advisory Committee Notes. An exception to hearsay inadmissibility is contained in Fed. R. Evid. 803(3) for statements of the declarant's then existing mental, emotional, or physical condition, including intent and motive. This exception does not encompass statements of memory or belief to prove the fact remembered or believed unless the statements are in regard to the "execution, revocation, identification or terms of the declarant's will. Fed. R. Evid. 803(3).

A. The Fourteenth Circuit Erred In Holding Jussel's Statement of Intent Inadmissible As a Matter of Law Because Federal Rule of Evidence 803(3) Incorporated the Holding of Mutual Life Insurance. Co. v. Hillmon.

The Fourteenth Circuit should have relied on the text of Rule 803(3) and not the contradictory legislative history because the Rule's language is unambiguous. The House Committee Report is an insufficient basis to ignore the plain meaning of the Rule and reject this Court's precedent especially considering the Senate's silence on this issue. Additionally, the Advisory Committee Notes of the Rules' drafters expressly state that "[t]he common law rule of allowing evidence of intention to prove the doing of the act intended, as held in Mutual Life Ins.

of New York v. Hillmon, is “left undisturbed.” Advisory Committee Notes, Note to Paragraph (3), at 585.

This Court has criticized statutory interpretation based on committee reports and has consistently referred to the text of the Rules and the accompanying notes of the Rules’ framers.

1. The Fourteenth Circuit incorrectly relied on the House Committee’s Report as the basis for rejecting the unambiguous language of the Rule and the express language contained in the notes of the Rules’ drafters.

A party claiming that legislative action has changed settled law has the burden of showing that the legislature intended the change. Green v. Bock Laundry Machine, 490 U.S. 504, 521 (1989). The traditional tools of statutory construction guide interpretation of the Federal Rules of Evidence. INS v. Cardoza-Fonseco, 480 U.S. 421, 446 (1987). If a Rule’s terms are unambiguous, the text of the Rule is authoritative. Exxon v. Allapattah, 545 U.S. 546, 568 (2005). Legislative materials and other extrinsic materials aid in statutory interpretation “only to the extent they shed a reliable light on the enacting Legislature understanding of otherwise ambiguous terms.” Id.

For instance, this Court has criticized judicial reliance on contradictory legislative materials when the plain meaning of the text is unambiguous. Id. In Exxon, gasoline dealers brought suit against a gasoline supplier for a breached sales agreement and the issue before the Court was whether the supplemental jurisdiction statute was applicable to plaintiffs who did not satisfy the amount in controversy requirement. Id. at 546. The defendants refuted jurisdiction, relying primarily on the House Committee Report on the supplemental jurisdiction statute. Id.

The Court based its holding on the text of the statute itself but stated that if the Court were to refer to the legislative history, they would not give “significant weight to the House Report” which was a “deliberate effort to amend a statute through a committee report.” Id. at 571.

In this case, as in Exxon, Rule 803(3) is not ambiguous. The Fourteenth Circuit should not have given the House Committee Report such significant weight when interpreting the scope of Rule 803(3). The plain language of the Rule 803(3) permits admission of statements of intent and the advisory committee notes clearly state that 803(3) did not disturb the holding in Hillmon. The House Committee Report on 803(3), much like the report in Exxon, was an improper effort to amend 803(3) through committee report.

Additionally, legislative history should be referenced only when it can clarify a statute’s ambiguous terms. Legislative history that is itself contradictory and ambiguous can not aid in statutory interpretation. When faced with conflicting House Committee and Senate Committee Reports on other Federal Rules of Evidence, this Court has relied on the statute’s text and advisory notes. For instance, in Beech Aircraft Corp. v. Rainey, the issue before the Court was whether Federal Rule of Evidence Rule 803(8) recognized any distinction between statements of fact and opinion. 488 U.S. 153, 170 (1988). The House Committee Report on Rule 803(8) stated that the “factual findings be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.” Id. at 165. However, the Senate Committee responded that it took “strong exception to this limiting understanding of the application of the rule.” Id. This Court concluded “neither the language of the Rule, nor the intent of its framers calls for a distinction between fact and opinion.” Id. at 168.

Similarly, this Court referred to the statutory text and Advisory Committee Notes when holding that the common law rule regarding prior inconsistent statements was embodied in Rule 801(d)(1)(B). Tome v. US, 531 U.S. 150, 161 (1995). The Court stated that the government’s reliance on academic criticisms of such embodiment was misplaced, Id. at 164, and that the Advisory Committee Notes “disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary.” Id. at 160.

Similar to the statute in question in Beech Aircraft, neither the language of Rule 803(3) nor the intent of its framers as expressed in the Advisory Notes, limit Hillmon’s application under 803(3). Rule 803(3) by its terms permits statements of intent be admitted as hearsay exceptions and the Advisory Notes clearly express the drafter’s intent to include the common law rule of Hillmon. The Fourteenth Circuit’s reliance on the House Committee Report was misplaced because it could not, by itself, shed light on the enacting Congress’ intent. Like the common law rule in Tome, the common law doctrine of Hillmon should be adhered to absent express provisions to the contrary. The House Committee Report does not constitute Congress’ express intention to exclude the reach of the Hillmon doctrine under Rule 803(3).

2. Courts have correctly interpreted Rule 803(3) to include the holding in Hillmon based on the Rule’s text and the Advisory Committee Notes.

The Ninth Circuit held that Rule 803(3) did incorporate Hillmon’s holding in its entirety. U.S. v. Pheaster, 544 F.2d 353 (1976). The court admitted the victim-declarant’s statements of intent to meet with the defendant on the night of the victim’s kidnapping. Id. at 377.

Recognizing the contradictory legislative history between the Advisory Notes and the Notes of

the House Committee Report, the court reasoned from the Rule's text, which does not itself prohibit the use of a declarant's statement to prove third party conduct. Id. at 379.

Similar reasoning has been used by other federal courts that have squarely addressed this issue. See, e.g., U.S. v. Houlihan, 871 F. Supp. 1495 (1994) (holding that Rule 803(3) incorporated Hillmon and admitting a declarant-victim's out of court statement to prove the actions of the defendant); Coy v. Renico, 414 F.Supp.2d 744, 771 (E.D. Mich., 2006) (holding that Supreme Court precedent as held in Hillmon would "not be trumped by this single committee report). In Houlihan, the court concluded that if Congress had wanted to limit the Hillmon doctrine, it would have done so in the language of the rule itself, as Congress had explicitly done in other Federal Rules of Evidence. Id. at 1500. The court noted that "only one chamber of Congress (indeed, only one committee of that chamber) approved the limitation of the Hillmon doctrine urged by the defense." Id. at 1499, Footnote 2.

The courts in Pheaster, Houlihan and Coy appropriately found the House Committee Report insufficient to reject Hillmon's inclusion in Rule 803(3) and correctly looked to the Rule's language and Advisory Committee Notes to determine that Hillmon was incorporated in Rule 803(3). Rule 803(3) permits statements of intent with no limiting language. Furthermore, the Advisory Committee Notes expressly include Hillmon in Rule 803(3). As noted by the court in Houlihan, Congress has put explicit limitations in the language of other Rules of Evidence. Thus, had Congress intended to limit 803(3) to reject the reach of Hillmon, it would have done so initially, or by amendment, in the language of the Rule itself.

B. Under Mutual Life Ins. Co. of New York v. Hillmon, a Declarant's Relevant, Necessary and Trustworthy Out of Court Statement of Intent is Admissible for the Inference of a NonDeclarant's Future Conduct, the Reliability of Which is an Inquiry for the Jury.

A declarant's out of court statement of intent may be admissible evidence when it is necessary, the intent is a material fact, and the statement was made "under circumstances precluding a suspicion of misrepresentation." Mutual Life Ins. Co. of New York v. Hillmon, 145 U.S. 285, 12 S.Ct. 909 (1892). The truth of the statement is "an inquiry for the jury." Id. (quoting Insurance Co. v. Mosley, 8 Wall. 397, 404). The trier of fact may infer from the declarant's intention that the declarant did perform the intended action. US v. Pheaster, 544 F.2d 353 (9th Cir. 1976). When a declarant's statement of intent necessarily implicates action by a third party to be carried out, the statement may be offered for the inference that the third party did so act. See Pheaster. The reliability of the inference to be drawn goes to the weight of the evidence, "which can be argued to the trier of fact." Id.

In Mutual Life Ins. Co. v. Hillmon, Sallie Hillmon filed an action for the life insurance funds of her purportedly deceased husband, John Hillmon. 145 U.S. at 285. The insurance company refused to pay on the policy alleging that John Hillmon was in hiding and that the corpse produced was actually that of a Mr. Walters. Id. This Court admitted the letters for the inference that Walters had carried out his intention and did leave with Hillmon. Id. at 296. The identity of the corpse was material to the resolution of the case and the Court reasoned that Walters' statements were the "the natural, if not the only attainable, evidence of his intention." Id. at 294. The Court referenced the reasoning in the New Jersey criminal case of Hunter v. State. Id. at 296-97. In Hunter, the court admitted statements by the deceased that he intended to

travel on business with the defendant because, the court reasoned, “a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it.” 40 N.J.L. 495 (1878). Id. at 29.

In this case, as in Hillmon, Jussel’s statement of intent is necessary. Both Jussel and Mr. Ledbetter, like Walters and Hillmon, are unavailable. Jussel’s secretary’s testimony is the best, if not the only, way to ascertain Jussel’s intent. Jussel’s intent bears on Sea Toys’ knowledge, which is the issue in controversy in this case. Like Walters’ statements in Hillmon, Jussel’s statement implicates action by a third party in order to be carried out.

Furthermore, the circumstances under which Jussel made her statements of intent to her secretary negate any suggestion of misrepresentation. Jussel had just read the paper about the sick Legolian children and reacted immediately with her statement of intent. As in Hillmon and Hunter, Jussel’s statements bear the indicia of trustworthiness. As it was natural in Hillmon for Walters to tell his family where he was traveling and whom he was traveling with, it was likewise natural for Jussel, when asking her secretary to book her an immediate flight, to inform her secretary of whom she was going to see and why.

Additionally, lower federal courts have followed Hillmon and admitted victim-declarants’ out of court statements of intent for the inference of a nondeclarant’s conduct. See, e.g., U.S. v. Pheaster, 544 F.2d at 377 (explaining that the unreliability of the inference drawn from the declarant’s statement of intent goes “to the weight of the evidence . . . but should not be a ground for completely excluding the admittedly relevant evidence”); Coy v. Renico, 414 F. Supp.2d 744 (E.D. Mich. 2006). In Coy v. Renico, the court refused to reverse the lower court’s

admission of the victim's statement of intent to prove the defendant's actions stating that the decision was not "contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court." *Id.* at 771. Here, as in *Coy*, applying *Hillmon* to Jussel's statement of intent would be consistent with clearly established Supreme Court precedent.

Furthermore, several state courts have also adopted *Hillmon*'s full reach when applying Rule 803(3). *See, e.g., State v. Santangelo*, 534 A.2d 1175 (Conn. 1987); *People v. Alcalde*, 148 P.2d 627, 632 (Cal., 1944). In *Santangelo*, the Connecticut Supreme Court admitted the victim's statements to her husband and daughter that she had planned to meet the defendant, "Don", on the night she was murdered with the court's express recognition of the "logical inference to be drawn there from, namely, that she was with the defendant that night." The court, citing *Hillmon*, held that a person's statement of intent to "meet with another person in the immediate future are admissible and allow the trier of fact reasonably to infer that the declaration's expressed intention was carried out. *Id.* at 592.

Contrary to the Fourteenth Circuit's ruling, it is not illogical to infer from Jussel's statement of intent to Peetz that she carried out her intent, met with Mr. Ledbetter and informed him about the presence of rH-12 in the Shark E. Finn toy. Jussel's sole stated purpose for the trip to California was to meet with Ledbetter and inform him of the rH-12 problem. Jussel's flight was booked for October 2nd, two days after she stated her intent. Jussel returned on October third with receipts for cabfare and hotel. These circumstances only enhance the inference that Russell did indeed meet with Ledbetter. Given the facts of the case at bar, the

reliability of Jussel’s statement should be weighed by the jury and is not an appropriate ground for exclusion.

III.A. THE FEDERAL RULE OF EVIDENCE 407 EXCLUSION OF “SUBSEQUENT REMEDIAL MEASURES DOES NOT APPLY TO FACTUAL INFORMATION IN A POST INJURY REPORT PREPARED BY A DISTRIBUTOR OF A PRODUCT WHEN THE INFORMATION SUPPORTS A RECOMMENDATION IN THAT SAME REPORT TO RECALL THE PRODUCT.

A. Sea Toys’ Factual Findings are Admissible Because Factual Findings Do Not Constitute Subsequent Remedial Measures Under Rule 407.

Post event tests are not subsequent remedial measures. Subsequent remedial measures are measures that, if taken prior to the injury, would have made the injury less likely to occur. Fed. R. Evid. 407. Evidence of 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.” *Id.* However, evidence of subsequent remedial measures may be admissible if offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. *Id.* One rationale behind Rule 407’s exclusion is to prevent the impermissible inference of admission of fault. Fed. R. Evid. 407, Advisory Committee Notes. The more significant ground for exclusion of subsequent remedial measures “rests on a social policy of encouraging people to take, or at least not discourage them from taking, steps in furtherance of added safety. *Id.*

The factual findings in Sea Toys’ report are admissible because the findings are not subsequent measures under Rule 407. In applying Rule 407, courts have limited the exclusion to actual subsequent remedial measures and not evidence of post injury tests or reports. See, e.g.,

Rocky Mountain Helicopters v. Bell Helicopter, 805 F.2d 907 (10th Cir. 1986); Fasanaro v. Mooney Aircraft Corp., 687 F. Supp. 482 (N.D. Cal. 1988); Brazos River Authority v. GE Ionics, Inc. 469 F.3d416 (5th Cir. 2006). For example, the Tenth Circuit distinguished post event studies from remedial measures in a suit for damages resulting from a fatal helicopter crash. Rocky Mtn. Helicopter, 805 F.2d at 907. The buyer sought to admit a photoelastic study conducted by the seller that omitted the references to the redesign of a helicopter. Id. The seller claimed the study was a remedial measure under Rule 407 because if conducted earlier, the study would have made the accident less likely. Id. at 918. The court rejected this argument and stated that “[r]emedial measures are those actions taken to remedy any flaws or failures indicated by the test.” Id. The court concluded that extending Rule 407 to post event tests would “strain the spirit of the remedial measure prohibition.” Id. Like the photoelastic study in Rocky Mountain Helicopters, in this case Sea Toys’ factual information was not a remedy for any problem.

Under similar reasoning, the Fifth Circuit reversed a trial court’s exclusion of post accident reports in a breach of warranty suit stating that “only the actual implemented changes” and not the post accident investigations would make the event “less likely to occur.” Brazos River Authority v. GE Ionics, Inc., 469 F.3d 416, 430 (5th Cir. 2006). The court admitted the post accident report with references to remedial measures actually implemented redacted. Id. In support of its holding, the court stressed the “social value of making available for trial what is often the best source of information.” Brazos, 469 F.3d at 430. (See also Westmoreland v. CBS, Inc. 601 F.Supp. 66 (S.D.N.Y. 1984). Likewise, in Fasanaro, the court reasoned from Rule 407’s safety rationale and found post injury tests outside the scope of Rule 407 because post event tests did not themselves result in added safety. The court held that 407 “includes only the actual

remedial measures themselves and not the initial steps toward ascertaining whether any remedial measures are called for.” Fasanaro, 687 F.Supp. at 487.

Here, Sea Toys’ informational findings alone, if taken earlier, would not have prevented Stuart Slope’s injury. Rather, like the post event test in Fasanaro, Sea Toys’ investigation was an initial step in ascertaining if there was a problem to remedy. Factual information in a post event report is outside the scope of Rule 407. Similar to the Plaintiff in Brazos, Slope is seeking admission of the factual findings in Sea Toys’ internal memorandum and not the actual remedial measures in the recommendations section. Furthermore, Slope is not offering the evidence as an admission of culpability but to prove Sea Toys’ knowledge. Rule 407 specifically does not require exclusion of measures when offered for another purpose if a genuine issue.

Sea Toys’ knowledge of the presence of rH-12 is a genuine issue in the case at bar. Applying Rule 407’s exclusion to the factual findings in Sea Toys’ report would expand 407’s reach beyond its intended scope. In this case, there is great social value in allowing Slope to use the factual findings within Sea Toys’ report in court. This report is the best, and possibly the only, way to show that Sea Toys had knowledge of the presence of rH-12 in the Shark E. Finn toy. To allow Rule 407 to encompass post event tests and reports like that of Sea Toys’ would unfairly disadvantage injured parties.

In fact, allowing Rule 407 to encompass information beyond subsequent remedial measures may completely undermine the purpose of the Rule. For example, such a broad interpretation of the term may encourage a manufacturer to hide otherwise admissible evidence in a report that also includes “subsequent remedial measures.”

III. B. THE FEDERAL RULE OF EVIDENCE 407 EXCLUSION OF “SUBSEQUENT REMEDIAL MEASURES” DOES NOT APPLY TO MEASURES UNDERTAKEN AT THE DIRECTION OF A GOVERNMENT AGENCY.

A. Sea Toys’ Report Should Be Admitted Because It Was An Involuntary Response To a Government Directive, Which Courts Have Created an Exception for Under Rule 407.

Federal Rule of Evidence 407’s express rationale is to encourage people to take added safety measures without the fear of those measures being used against them in litigation. Fed. Rule of Evid. 407, Advisory Notes. Given this rationale behind the exclusion, courts have held that Rule 407 does not apply to involuntary, mandated government directives because measures taken involuntarily do not implicate the policies underlying Rule 407. See e.g., In Re: Aircrash in Bali, Indonesia, 871 F.2d 812, (9th Cir. 1989); Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978). For example, representatives of passengers killed in an airplane crash sued the airline and sought to admit a post event FAA report of Pan Am Airline’s safety record and procedures. In Re: Aircrash in Bali, 871 F.2d at 816. The court concluded the FAA report was not a remedial measure because it was prepared by the FAA without Pan Am’s voluntary participation and thus did not implicate the policy behind Rule 407. Id. at 816.

Similarly, the Rozier court reasoned from the policy underlying Rule 407 when admitting a post event report. The court would not prohibit admission of the post event report under Rule 407 because the report was not completed “out of a sense of social responsibility but because the remedial measure was to be required in any event by a superior authority, the National Highway Traffic Safety Administration.” Rozier, 573 F.2d at 1343.

The courts' reasoning in In Aircrash in Bali and Rozier equally applies to the case at bar. Here, like the post event report in Rozier, Sea Toys' investigation was completed after receiving the directive from the Consumer Product Safety Commission, a superior government authority. Presuming Sea Toys' investigation was completed out of a sense of social responsibility is erroneous.

In contrast, courts have excluded evidence under 407 when there was no direction by a superior authority that required action. For example, in O'Dell v. Hercules Incorporation, the court held that evidence of remedial action is prohibited by Rule 407 if it was not "commenced pursuant to the direction of a superior authority." 904 F.2d 1194, 1206 (6th Eighth Cir. 1990) In O'Dell the plaintiffs sought introduction of evidence that the EPA had listed the defendant on the National Priority List (NPL) for Superfund Cleanup, a list completed annually by the EPA, to determine the risks of a dump site. Id. The court held the evidence inadmissible because inclusion on the list didn't require action or establish liability. Id. Unlike the list inclusion in O'Dell, the CPSC's directive to Sea Toys' in this case did require action.

Additionally, the Sixth Circuit excluded a manufacturer's service bulletin because the bulletin was voluntarily issued without the direction of a superior government authority. HDM Flugservice GMBH v. Parker Hannifin Corp., 332 F.3d 1025, 1034 (2003). The manufacturer had created the service bulletin and sought the FAA's prior approval of the bulletin. Id. In fact, the bulletin was initiated by HDM, who then contacted the FAA for approval of the bulletin. Id. Thus the policy considerations underlying Rule 407 were clearly implicated. Id.

The case at bar differs from O'Dell and HDM because Sea Toys' report was done at the behest of a superior authority. Unlike the list inclusion in O'Dell, the CPSC's directive did require Sea Toys to act. The CPSC directed Sea Toys to investigate and remedy any rH-12 issues. Also, unlike the bulletin in HDM, Sea Toys' report was issued after receipt of a government directive. Unlike the clearly voluntary action of the manufacturer HDM, there is no evidence in this case that Sea Toys issued the report on their own initiative out of social responsibility. On the contrary, CPSC's directive was dated October 20, 2005, and the Sea Toys report was issued on January 16, 2006 in response thereto. In HDM, the manufacturer took the initiative to not only issue the bulletin, but also to seek approval from a superior government agency. On the contrary, in this case, the CPSC directive spurred the involuntary response by Sea Toys.

Sea Toys' report was an involuntary response to a government mandate and should not be excluded under 407. The stated purpose of Rule 407 to encourage added safety will not be served by excluding Sea Toys' memorandum. Sea Toys' did not investigate and create the report on its own accord but responded to a government mandate by the CPSC. Therefore, allowing the memorandum into evidence can in no way be punishing or discouraging Sea Toys from taking measures that enhance safety. In fact, broadening the scope of Rule 407 to include post event reports and tests such as Sea Toys' will undermine the purpose of Rule 407 and provide companies such as Sea Toys too much protection at the expense of the injured.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court REVERSE the decision of the Fourteenth Circuit Court of Appeals.

February 29, 2008

Respectfully submitted,

APPENDIX A

Federal Rule of Evidence 804

Rule 804. Hearsay Exceptions; Declarant Unavailable

a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
- (2) Statement against interest. A statement which was at the time of its making so far contrary to

- (3) the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
- (4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
- (5) [Transferred to Rule 807]
- (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Federal Rule of Evidence 803

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Federal Rule of Evidence 407

Rule 407. Subsequent Remedial Measures

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.

APPENDIX B

Boerum Tort Reform Act §204

Limitation on the liability of the distributor or seller of a toy for harm caused by the failure to warn or recall.

- A) Exclusive Remedy. Except as provided herein no product liability action including negligence strict liability breach of an implied warranty or merchantability, or any other claim based exclusively upon a manufacturing or design defect may be brought against a distributor or commercial seller of a toy.
- B) Failure to Warn. One engaged in the business of selling or otherwise distributing toys is subject to liability for harm to persons or property caused by the sellers or distributors failure to provide a warning after the time of sale of distribution of the toy if a reasonable person in the sellers position including one having the knowledge possessed by the distributor or seller would provide such a warning.
- C) Failure to Recall. One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the sellers or distributors failure to recall a toy after the time of sale or distribution if;
 - 1) A reasonable person in the situation including one having the knowledge possessed by the distributor or seller would recall the product; or
 - 2) The seller or distributor undertakes to recall the toy but fails to act as a reasonable person in recalling the product.
- D) No Putative Damages. In any action based upon this section putative damages may neither be sought nor awarded.

