Lee Burgess: Welcome back to the Law School Toolbox podcast! Today, we're doing another in our "Listen and Learn" series – this one is on the public policy exceptions in the Federal Rules of Evidence. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series. Today we are going to be talking about evidence that is excluded for various public policy reasons under the Federal Rules of Evidence. We're only going to focus on the federal rules today, but as a reminder, make sure to study any jurisdiction-specific rules that will be tested on your exam.

Lee Burgess: Now, we'll be covering five types of evidence excluded for policy reasons. The first is evidence of subsequent remedial measures. A subsequent remedial measure is a corrective action taken after an incident. For example, if Jon injures himself falling into a sinkhole in Sarah's backyard, and then Sarah fills the sinkhole, that is a subsequent remedial measure. And subsequent remedial measures are not admissible to prove negligence, culpable conduct, a defect in a product or design, or a need for a warning or instruction. The policy reason for this rule is so that people are not discouraged from making conditions safer. If improving a dangerous condition can be used to prove liability, then people would be discouraged from making that improvement, and then we're all worse off.

Lee Burgess: I'm going to use a brief example to illustrate an important part of this rule that sometimes trips up test-takers. If Sarah starts filling the sink hole and gets about halfway done, and then Jon falls in, is Sarah's act of starting to fill the sinkhole excluded under this rule? No. The remedial measure has to be subsequent to the incident. In other words, the action has to happen after the accident at issue to be excluded as a subsequent remedial measure.

Lee Burgess: Now, although evidence of subsequent remedial measures cannot be admitted for the purposes mentioned, it can be admitted for other purposes, such as impeachment, control, ownership, or feasibility. One note here: In order for a subsequent remedial measure to be admitted for one of these purposes, that purpose must actually be at issue. So, Jon can admit evidence of Sarah filling the

sinkhole to prove that Sarah owns the yard, or that it was feasible to fill the sinkhole, but that must be disputed in the case. If Sarah admits that she owns the yard, then Jon cannot admit evidence of her subsequent remedial measure, claiming that it's for the purpose of proving ownership.

Lee Burgess: The next type is evidence of compromise, settlement offer, or negotiation. Statements and offers made during settlement negotiations are not admissible to prove the validity or amount of a disputed claim, or to impeach a prior inconsistent statement. This is to promote compromising and the settlement of disputes. But again, these statements can be admitted for other purposes, such as proving a witness's bias or prejudice. So let's say Jon and Ben injure themselves in Sarah's yard. Sarah tries to settle both claims, but is only able to settle with Ben. Ben then testifies on Sarah's behalf in Jon's trial against Sarah. Statements made during the settlement negotiations can be admitted to prove any possible bias on Ben's part.

Lee Burgess: The third type of evidence excluded for policy reasons is pleas and plea negotiations. Statements made during plea negotiations, a nolo contendere plea, and guilty pleas that are later withdrawn are all inadmissible in subsequent civil or criminal cases. The rationale is similar to evidence of compromises and settlements – free communication is necessary for productive plea negotiations. And this rule promotes just that, thus encouraging plea deals. Also, if a withdrawn guilty plea could be used against a defendant, then why allow them to withdraw the plea at all? So this rule also prevents parties from undermining the ability to withdraw a guilty plea.

Lee Burgess: On our next rule, under the Federal Rules of Evidence, proof of paying or offering to pay medical expenses is inadmissible to prove liability. But an important note here: Anything said in conjunction with the offer to pay medical expenses is not excluded by this rule. The classic example is as follows: Car A runs a red light and hits car B. The person driving Car A gets out and says, "I'm sorry I ran the red light, but I can pay your medical bills." "I can pay your medical bills" is inadmissible to prove liability, but "I'm sorry I ran the red light" will not be excluded by this rule. Now, the policy reasoning behind this rule is to encourage assisting people who have been injured. Also, we make offers like these usually out of human compassion, and not necessarily because we were liable for the injury. So, this rule prevents parties from using that human compassion against people in a trial.

Lee Burgess: And now to the final policy exclusion we'll cover – liability insurance is not admissible to prove negligence, but it is admissible for other purposes, such as ownership, control, or agency. As a brief example, the City of Los Angeles takes out an insurance policy on a new Ferris wheel it just installed. A patron injured

on the Ferris wheel cannot use the liability insurance to argue that the City is culpable for the injury. But if the City denies that it owns the Ferris wheel, that insurance policy the city took out can be used to prove that the city does actually own the Ferris wheel. There are a couple of reasons for this exclusion. First, insurance and fault are just too loosely related to use insurance as proof of fault, and no insurance as proof of a lack of fault. Second, juries can determine a case on improper grounds based on evidence of liability insurance. Let's say the plaintiff has a weak case, but the jury knows that the defendant won't be paying; some billionaire insurance company will be. We don't want juries returning plaintiff verdicts for that reason alone.

Lee Burgess: Okay, let's briefly recap before we start the first hypo. We discussed five federal rules of evidence that exclude certain types of evidence for public policy reasons – including subsequent remedial measures, settlements and offers made during settlement negotiations, pleas and plea negotiations, offers to pay medical expenses, and liability insurance.

Lee Burgess: Alright, now let's jump to our first hypo. This problem is adapted from question 1 on the February 2021 California bar exam, and has been altered for brevity and focus:

Lee Burgess: "On January 15, Paul fell down the stairwell of Dell's Department Store. Paul sued Dell for personal injuries, alleging he fell because one of the steps was broken. The following occurred at a jury trial in a Federal District Court while Dell's manager, Mark, was being cross-examined by Paul's attorney as follows:

Lee Burgess: Question 1: The stairs were repaired the day after Paul fell, weren't they?

Lee Burgess: Answer: Yes.

Lee Burgess: Question 2: Is this the report that Dell's insurance company prepared following an investigation of the accident?

Lee Burgess: Answer: Yes, that is the report the insurance company gave me. They always prepare a report in case we get sued.

Lee Burgess: Paul's attorney then moved to enter into evidence the insurance company's report. The report states: 'Although maintenance is contracted out, the store has control over all stairs.'

Lee Burgess: What objections could Dell's attorney reasonably make to the motion to enter the insurance company's report into evidence, and how should the court rule?"

Lee Burgess: Okay, starting with question 1, which of our five policy exceptions, if any, would apply here? Well, we've got Paul's attorney asking about whether the stairs that Paul fell on were repaired the day after he fell. That sounds like a subsequent remedial measure, right? Right, and subsequent remedial measures are generally inadmissible. But now we'll need to look to the facts to see if Paul's attorney is asking this question for a permissible reason. And although the insurance report mentions control, the facts don't say anything about control, ownership, or feasibility being in dispute. And there's nothing that leads us to believe that Paul's attorney is trying to impeach this witness. So, we must assume that there is no permissible purpose for which this evidence is being admitted – meaning Dell's attorney should object to this question based on the subsequent remedial measure exclusion, and the court should sustain the objection.

Lee Burgess: Now, the second question asks about the motion made by Paul's attorney to enter the insurance company's report into evidence. There are a couple of objections that Dell's attorney could make here, but focusing on the policy exclusions we discussed earlier, we know that liability insurance is not admissible to prove negligence. So, Dell's attorney could reasonably argue that the report is inadmissible evidence of liability insurance. And, at first, we may think that this evidence is inadmissible under that rule, but remember, evidence of liability insurance, like this report, can be admissible for other purposes. The report states that the store has control over the stairs, and proving control is one of our exceptions to the insurance policy exclusion. But not so fast! Remember that in order to admit evidence typically excluded under one of our public policy exceptions, the reason for admission must actually be at issue. And like we said while answering the first part of our question, while control is mentioned in the report, there is nothing in the facts that suggests that Dell is denying control over the stairs. So, now we can be sure that the court will likely sustain this objection.

Lee Burgess: Let's jump right into another hypo. This problem is adapted from question 3 on the February 2017 California bar exam, and has been edited for brevity and focus. You might recognize this as a variation of a classic example we've already discussed:

Lee Burgess: "Pete sued Donna's Pizza in federal court. At trial, in his case-in-chief, Pete testified that, as he was driving his car one day, he entered an intersection with the green light in his favor. He further testified that when he entered the intersection, Erin, an employee of Donna's Pizza, was driving a company van, ran a red light, and collided with his car. He sustained serious injuries as a result and was taken to the hospital.

Lee Burgess: Erin testified that she had the green light and that it was Pete who ran the red light. To refute Erin's testimony, Pete testified that, at the accident scene as Pete was being loaded into the ambulance, Erin told him, 'I was in a hurry to make a pizza delivery and that's why I ran the red light. But Donna's Pizza will cover the cost of your hospital stay.' Pete also testified that Donna's Pizza, however, never paid for his hospital visit.

Lee Burgess: Pete also called the State's Attorney as a witness. The State's Attorney testified that he prosecuted the case against Erin for criminal negligence relating to the accident. Although a jury ultimately found Erin not guilty, the State's Attorney testified that 'Erin admitted guilt by initially entering a guilty plea before withdrawing it and going to trial.'

Lee Burgess: Did the court properly admit the testimony from the State's Attorney about Erin withdrawing the plea?"

Lee Burgess: Okay, first let's address Pete's testimony. Erin's offer to have Donna's Pizza pay Pete's medical expenses gives it away that we're evaluating whether this testimony falls under the policy exclusion and offers to pay medical expenses. But because this rule pertains to the offer only, and nothing said before or after the offer, it is helpful to break up statements and evaluate them one at a time when dealing with this exclusion.

Lee Burgess: So the first statement was, "I was in a hurry to make a pizza delivery and this is why I ran the red light." Is there any offer to pay medical expenses in that statement? No, so this statement should not be excluded under this rule. I'll note here that this testimony should also have you thinking about hearsay, but we have already covered hearsay in another episode. So, for purposes of this episode, we'll assume that this statement is admissible. The next statement was, "But Donna's Pizza will cover the cost of your hospital stay." Is there an offer to pay medical expenses there? Yes, a hospital stay is a medical expense, so Erin saying that Donna's Pizza will cover the hospital stay is an offer to pay medical expenses.

Lee Burgess: But does it matter that Pete testified that Donna's Pizza never made good on its promise to pay Pete's medical expenses? No. Offers to pay medical expenses are inadmissible whether the expenses are actually paid or not – meaning, this second statement was improperly admitted. So, to answer the question in full: The court properly admitted the first sentence of Pete's testimony, but improperly admitted the second sentence of Pete's testimony, as it should have been excluded as an offer to pay medical expenses.

Lee Burgess: Now, let's work through the prosecutor's testimony. The State's Attorney testified that "Erin admitted guilt by initially entering a guilty plea before withdrawing it and going to trial." If you remember from earlier, there is a federal rule that excludes plea negotiations, nolo pleas, and withdrawn guilty pleas from being admitted into evidence. And do we have one of those in this testimony? We do – the prosecutor is testifying to Erin's withdrawn guilty plea.

Lee Burgess: But does it matter that this subsequent trial is a civil case instead of a criminal case? No. Withdrawn guilty pleas, plea discussions, and nolo pleas are inadmissible in subsequent criminal or civil trials. So, that testimony from the State's Attorney was improperly admitted by the court, and should have been excluded as a withdrawn guilty plea.

Lee Burgess: And with that, we're out of time! Hopefully you now have a grasp on these public policy rules and why they exist. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to Lee or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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