The Uncertain Fate of Remedial Evidence: Victim of an Illogical Imposition of Federal Rule of Evidence 407

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I. INTRODUCTION

When a defective product has caused injury, the manufacturer will often take remedial measures to prevent additional accidents. Remedial measures include any subsequent "change, repair, or precaution"\(^1\) that would prevent similar accidents in the future. Evidence of post-accident safety measures can effectively persuade a jury of the manufacturer's liability.\(^2\) Yet this evidence is frequently barred from trial.

Rule 407 of the Federal Rules of Evidence prohibits the admission of subsequent remedial evidence to prove negligence or culpable con-


duct.\textsuperscript{3} Strict liability focuses on the product’s fitness rather than the manufacturer’s negligent or culpable conduct.\textsuperscript{4} Despite the acknowl-

3. Fed. R. Evid. 407. Subsequent Remedial Measures [also referred to as the “exclusionary doctrine” for remedial measures] 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.

Advisory Committee’s Note

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that “because the world gets wiser as it gets older, therefore it was foolish before.” Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And Powers v. J.B. Michael & Co., 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant’s control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.

For comparable rules, see Uniform Rule 51; California Evidence Code § 1151; Kansas Code of Civil Procedure § 60-451; New Jersey Evidence Rule 51.

\textit{Id.} advisory committee’s note.

4. ALVIN S. WEINSTEIN ET AL., PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT: A GUIDE FOR MANAGEMENT, DESIGN, AND MARKETING § 1.4.1 (1978). Theories of liability in a products liability action include negligence, strict liability (implied warranty), and express warranty. \textit{Id.} § 1.4.2. While negligence tests the conduct of the defendant, strict liability (implied warranty) tests the quality of the product. \textit{Id.} On the
edged contrasts between negligence and strict liability, remedial evidence is often routinely excluded from products liability trials where either strict liability or negligence is at issue. The majority of Federal Circuits have applied Rule 407 to strict liability claims. However, the Eighth and Tenth Circuits have refused to limit the application of Rule 407 to claims based in negligence. Despite years of criticism and debate, the federal circuits continue to adhere to their respective philosophies concerning the admissibility of remedial evidence in strict liability actions.

Proponents of excluding remedial evidence under Rule 407 argue that admitting such evidence would discourage post-accident safety measures. They further contend that the relevance and probative value of remedial evidence is outweighed by problems of undue prejudice, misleading the jury, and confusing the issues. The Eighth and

other hand, express warranty and misrepresentation test the product against explicit representations made by the manufacturer or seller. *Id.* § 1.4.3.

5. See cases cited *infra* notes 6-8.

6. See, e.g., Gauthier v. AMF, Inc., 788 F.2d 634, 637 (9th Cir. 1986); Flaminio v. Honda Motor Co., 733 F.2d 463, 468-70 (7th Cir. 1984); Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 886-88 (5th Cir. 1983); Cann v. Ford Motor Co., 658 F.2d 54, 59-60 (2nd Cir. 1981); Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Knight v. Otis Elevator Co., 596 F.2d 84, 91 (3d Cir. 1979); *see also* Roy v. Star Chopper Co., 584 F.2d 1124, 1134 (1st Cir. 1978) (excluding remedial evidence with no discussion of Rule 407).

State courts are similarly split, with a nearly equal number of states excluding remedial evidence as those that admit the evidence. *See infra* notes 97-103 and accompanying text.

7. See, e.g., Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1331 (10th Cir. 1983); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977).

8. See, e.g., Burke v. Deere & Co., 6 F.3d 497, 506 (8th Cir. 1993) ("It is the law of this circuit that Rule 407 . . . does not preclude the introduction of such evidence in strict liability cases.") (emphasis added); *In re* Joint E. Dist. & S. Dist. Asbestos Litig. v. Armstrong World Indus., 995 F.2d 343, 345 (2d Cir. 1993) (stating that Rule 407 applies in all products liability cases, whether brought under a theory of negligence or strict liability); Kelly v. Crown Equip. Co., 970 F.2d 1273, 1275 (5th Cir. 1992) (holding that Rule 407 applies in strict liability cases even though the language in the rule refers to negligent or culpable conduct); Prentiss v. Carlisle Co. v. Koehring-Waterous Div. of Timberjack, Inc., 972 F.2d 6, 10 (1st Cir. 1992) (reaffirming the use of Rule 407 in strict product liability actions); Wheeler v. John Deere Co., 935 F.2d 1090, 1098 (10th Cir. 1991) (admitting remedial evidence in strict liability action, but holding that state law applies in diversity actions); Probus v. K-Mart, Inc., 794 F.2d 1207, 1210 n.3 (7th Cir. 1986) (excluding remedial evidence in product liability case).

9. *Fed. R. Evid.* 407 advisory committee's note, *supra* note 3. *See also* Flaminio, 733 F.2d at 469 (7th Cir. 1984) (stating that if evidence of remedial safety measures were admissible to prove liability, the incentive to take such measures would be reduced).

10. See, e.g., Flaminio, 733 F.2d at 471-72 (stating that "distrust of juries' ability to draw correct inferences from evidence of subsequent remedial measures" and the resulting undue prejudice demonstrates the need for Rule 407).
Tenth Circuits reject these arguments; they hold that blanket exclusion of remedial evidence is unwarranted, preferring a case-by-case analysis of admissibility.\textsuperscript{11}

This Comment proposes that excluding remedial evidence in strict liability actions contravenes public policy. Part II explores the development of perspectives on admissibility of remedial evidence in cases of strict products liability. Arguments favoring exclusion under Rule 407 are criticized in Part III. Rule 407 is better adapted to limit the use of remedial evidence in cases advanced on a negligence theory rather than in strict liability claims. Specifically, this section dispels the notion that admitting remedial evidence will discourage correction of defective products and illustrates how frequent circumvention of Rule 407 renders the rule virtually ineffective. Moreover, Part III examines problems of relevancy, unfair prejudice, confusion of the issues, and misleading the jury in both negligence and strict liability actions and concludes that, when they arise in the latter, these problems are better addressed through other evidentiary rules specifically designed for these purposes. This Comment concludes by advocating greater consistency in assessing the admissibility of remedial evidence in strict liability actions and suggests that this can be achieved by limiting Rule 407 to its original purview: negligence claims.

\section*{II. Background}

\textbf{A. Development of Strict Liability}

The law of products liability entered a period of rapid expansion in the late nineteenth century\textsuperscript{12} and emerged as a hybrid of tort and contract law.\textsuperscript{13} Initially, plaintiffs seeking to recover for injuries caused by a defective product had to prove both negligence and privity of con-

\begin{flushright}
\textsuperscript{11} See, e.g., \textit{Herndon}, 716 F.2d at 1327 (arguing that the exclusion of remedial evidence under Rule 407 contravenes the rationale of strict liability which is to place responsibility on the manufacturer, regardless of the reasonableness of design decisions); \textit{Robbins}, 552 F.2d at 793-94 (holding that the doctrine of strict liability "by its very nature," does not include the elements of negligence or culpable conduct, thus remedial evidence is relevant). \\
In the wake of \textit{Herndon}, the Tenth Circuit determined that questions of admissibility of subsequent remedial measures are a matter of state law. Moe v. Avins Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984). The Tenth Circuit continues to defer to applicable state law where appropriate state law exists and is on point. \textit{Wheeler}, 955 F.2d at 1098.

\textsuperscript{12} See \textsc{Paul Sherman}, \textsc{Products Liability for the General Practitioner} \S 7.02 (1981).

\textsuperscript{13} \textit{Id}. The contract element required proof of breach of contract, while the tort element required proof of negligence. \textit{Id}. \\
\end{flushright}
Negligence required that the defendant's conduct created an unreasonable risk that caused harm to the plaintiff. Privity of contract limited recovery to situations in which the plaintiff had a direct contractual relationship with the seller.

The early twentieth century heralded rampant industrialization that gave rise to popular demand for stronger protection from the growing numbers of dangerous products entering the market. In response, state courts began to abolish the privity of contract requirement; opening a door of remedy for plaintiffs who were harmed by products that they themselves did not actually purchase.

In 1913, the Washington Supreme Court abolished the privity of contract requirement in Mazetti v. Armour & Co., involving a restaurant patron who became ill after eating tainted meat. Recognizing the dramatic change in social conditions, the court held that a manufacturer may be directly liable to third persons, despite lack of privity, where "the existing rule does not square with justice." This rejection of privity of contract requirements in food products cases gave rise to an "implied warranty" of safety that subsequently was extended to many other dangerous products.

The next major advance in the development of strict liability did not occur until 1960 when the New Jersey Supreme Court decided Hen-
ningsen v. Bloomfield Motors Inc. In Henningsen, an action for breach of implied warranty, an automobile driver was injured when the steering in her ten-day old car malfunctioned. The New Jersey Supreme Court ruled that privity of contract should no longer be a requirement for liability where a dangerous product causes harm. Effectively, the Henningsen court held the manufacturer liable for selling a defective dangerous product despite lack of privity and despite lack of fault. Thereby, the general form of strict liability was born; its recognition as a distinct claim, however, was still developing.

The legal community quickly embraced the doctrine of implied warranty. Several jurisdictions adopted the rationale supporting Henningsen and applied the doctrine to a variety of products. Shortly thereafter, the implied warranty doctrine was codified in the Uniform Sales Act, which was later rewritten as Section 2-314 of the Uniform Commercial Code.


25. Henningsen, 161 A.2d at 75.

26. Id. at 84. The court held that:

[U]nder modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.

27. See, e.g., Weinstein et al., supra note 4, § 1.6, at 14.

28. Strict liability has been referred to as "liability without fault." Keeton et al., supra note 22, § 99, at 695.

In strict liability, the plaintiff is not required to impugn the conduct of the maker or other seller but he is required to impugn the product. Under [the Restatement (Second) of Torts] Section 402A it is said that the product must be in "a defective condition unreasonably dangerous." This simply means that the product must be defective in the kind of way that subjects persons or tangible property to an unreasonable risk of harm.

29. See id. § 97 at 690. "What followed was the most rapid and altogether spectacular overturn of an established rule in the entire history in the law of torts." Id.


32. U.C.C. § 2-314 (1992) provides:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is
As the contractual basis of product liability law eroded, so too did the requirements based in tort. Where dangerous products were involved, courts began to abandon the theory of implied warranty, recognizing instead a theory of strict liability in tort. For the first time, courts were willing to impose liability without evidence of breach of implied warranty or negligence.

The courts first recognized strict liability as a distinct claim in Greenman v. Yuba Power Products, Inc., in which the plaintiff was seriously injured by a piece of wood thrown from a lathe. The California Supreme Court adopted strict liability for defective products that cause harm. Although the Greenman decision reflected a controversial approach, it was supported by strong social policy of protecting consumers from dangerous products. Other jurisdictions adopted strict
liability in rapid succession. Shortly thereafter, the doctrine was incorporated into the *Restatement of Torts*.\(^{40}\)

Modern strict liability applies to actions involving dangerous defective products that result from defective design, production flaws, or failure to warn. Claimants injured by a dangerous defective product may seek damages under any one or a combination of three theories: (a) negligence in tort; (b) strict liability for breach of express or implied warranty; or (c) strict liability in tort.\(^{42}\) Rule 407’s exclusion of subsequent remedial evidence generally is applied to theories of negligence and strict liability in torts.\(^{43}\)

**B. Development of Rule 407\(^{44}\)**

In 1892, nearly seventy years before the development of strict liability, the United States Supreme Court ruled that evidence of post-accident remedial measures cannot be used to prove negligence.\(^{45}\) In *Columbia & Puget Sound R.R. v. Hawthorne*, in which a worker was in-

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40. After Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) was decided, and shortly before the Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1962) decision, the American Law Institute was in the process of drafting the *Restatement (Second) of Torts*. Sherman, *supra* note 12, at 194-95. A tentative draft of the 1965 Restatement was published in 1961. Id. at 195. The final version of the *Restatement (Second) of Torts* § 402A (1965) provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

**Id.**

41. Keeton et al., *supra* note 22, § 98, at 694-98.
42. *Id.* at 694.

jured by a pulley when it unscrewed from a machine and fell on him, the Supreme Court held that evidence of subsequently added safety features was inadmissible to show fault. The Court reasoned that such evidence is irrelevant since "taking . . . precautions against the future is not to be construed as an admission of responsibility for the past." In addition to being irrelevant, the Court noted that this type of evidence would confuse the issues and be prejudicial to the defendant.

In the wake of Hawthorne, the common law systematically began to exclude evidence of subsequent remedial measures in negligence actions. The Federal Rules of Evidence were enacted in 1975 and were drafted as a codification of common law tradition. Thus, Rule 407 embodies the traditional doctrine of excluding remedial measures to show fault. Neither the language of the rule nor the advisory committee's report, however, provide any guidance about its applicability to strict liability actions.

C. Modern Application of Rule 407

Despite the clear language of Rule 407, which provides that remedial measures are not admissible to prove "negligence or culpable con-

46. Id. at 202.
47. Id. at 207.
48. Id.
49. Id. at 208. In reaching its decision, the court relied on Morse v. Minneapolis & St. Louis Ry., 30 Minn. 465 (1883). In Morse, the Minnesota Supreme Court held that remedial evidence is irrelevant for demonstrating negligence and that allowing such evidence would "hold out an inducement for continued negligence." Id. at 468-69.

Confusion of the issues is addressed by Fed. R. Evid. 403. See infra note 196. Arguably, remedial evidence can be confusing when a jury may be uncertain whether to focus its attention solely on circumstances of the accident, or if subsequent occurrences also play a part in the determination of liability. Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1327 (10th Cir. 1983).

50. See, e.g., Chicago & E. R. Co. v. Ponn, 191 F.2d 682, 692 (6th Cir. 1911) (refusing to admit post-accident evidence that defendant installed a new turntable sufficiently long enough to accommodate engines); Southern Pac. Co. v. Hall, 100 F.2d 760, 767-68 (9th Cir. 1900) (refusing to admit evidence of a post-accident repair on the basis that such evidence could be improperly perceived as an admission of past negligence); Barber Asphalt Paving Co. v. Odasz, 60 F.2d 71, 73-74 (2d Cir. 1894) (excluding testimony of post-accident improvements in negligence claim).

51. See Barbara S. Goss, Note, Subsequent Remedial Measures in Strict Liability: Later Opinions as Evidence of Defects in Earlier Reasoning, 32 Cath. U. L. Rev. 895, 899 (1983). Rule 407 was adopted without challenge because it was essentially a codification of the common law rule of excluding remedial evidence to show negligence or fault. Id. at 896.


53. The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. See id.
duct," the exclusionary doctrine has been applied in cases based on strict liability as well as in cases of negligence. Some jurisdictions, however, have declined to apply the Rule 407 exclusion where strict liability is at issue.

The leading and most frequently cited case allowing evidence of remedial measures is *Ault v. International Harvester Co.*, decided several months prior to the enactment of Rule 407. In *Ault*, the passenger in a motor vehicle sustained injuries when the vehicle, traveling fifteen miles per hour, went off the road and plunged to the bottom of a canyon. The plaintiff, asserting that a defectively designed gearbox had caused the accident, attempted to introduce evidence of a subsequent design change to demonstrate a strict liability design defect. The California Supreme Court held that the remedial evidence exclusion was not applicable in actions against manufacturers based on strict liability.

The *Ault* court was unwilling to expand the definition of "culpable conduct" to encompass strict liability, reasoning that if the legislature had intended to include non-blameworthy conduct, it would have used an expression less related to affirmative fault. Moreover, the court stated that the rule supporting the exclusion was intended to codify well-settled common law; the rationale being that evidence of post-accident remedial measures was irrelevant to theories of negli-

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54. FED. R. EVID. 407.
55. See, e.g., Roy v. Star Chopper Co., 584 F.2d 1124, 1134 (1st Cir. 1978) (holding that subsequent remedial measures are inadmissible in strict liability, but failing to discuss Rule 407).
56. E.g., *Ault v. International Harvester Co.*, 528 P.2d 1148, 1150-51 (Cal. 1975) (distinguishing between use of evidence of remedial measures to prove negligence and use of the evidence to establish defect, which would be admissible in strict liability cases).
57. 528 P.2d 1148 (Cal. 1975).
58. Id. at 1150.
59. Id.
60. Id. The plaintiff claimed that the accident resulted from metal fatigue in the gearbox. Id. To support this claim, he sought to introduce evidence that the manufacturer, three years after the accident, changed the composition of the faulty gearbox from aluminum to iron. Id.
61. *Ault v. International Harvester Co.*, 528 P.2d 1148, 1150 (Cal. 1975). The *Ault* court analyzed the application of section 1151 of the California Evidence Code. Section 1151 provides: "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." CAL. EVID. CODE § 1151 (West 1966). The provision is identical to Federal Rule of Evidence 407, and thus, the same policy analysis applies. See supra note 3.
63. Id. at 1151.
The court further reasoned that, although the policy to encourage post-accident safety measures is necessary in negligence actions, the policy has no comparable role within the scope of strict products liability. Specifically, mass producers of products would not likely fail to implement safety features, thereby risking additional lawsuits and a tarnished public image, solely out of fear that such evidence would be used against them in the initial lawsuit.

Robbins v. Farmers Union Grain Terminal Ass'n was the first strict liability case to specifically test Rule 407. In that 1977 case, a farmer sued the manufacturer of a cattle protein supplement when his calves died after ingesting the product. After the accident, the manufacturer sent consumers a notice warning that the feed supplement may be dangerous if used within one month of transporting and vaccinating cattle.

The farmer claimed strict liability and sought to introduce the letter to demonstrate that the product was unreasonably dangerous and defective. On appeal, the Eighth Circuit admitted the evidence on the ground that strict liability, by its nature, does not contain the elements of negligence required for exclusion under Rule 407. The court, relying upon Ault, ruled that a post-accident remedial warning was admissible in a strict liability claim.

Despite the apparent lack of ambiguity in the Robbins decision, federal circuit courts have inconsistently applied Rule 407 to subsequent product liability actions. The first occasion of inconsistency occurred in 1979, when the Third Circuit decided that Rule 407 does apply to strict liability claims. In Knight v. Otis Elevator Co., an employee was injured when a malfunctioning elevator door struck her. The premise of that strict liability claim was that the elevator controls protruded from the wall unguarded, causing accidental activation of the doors. The employee sought to introduce evidence that the elevator company installed guards on its elevator systems after the accident to prevent future accidents. On review, the Third Circuit found no abuse of

64. Id.
66. Id. at 1152.
67. 552 F.2d 788 (8th Cir. 1977).
68. Id. at 790.
69. Id. at 792.
70. Id.
71. Id. at 793-94.
72. Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793-94 (8th Cir. 1977).
73. See cases cited supra notes 6-8.
74. 596 F.2d 84 (3d Cir. 1979).
75. Id. at 86.
76. Id.
77. Id.
discretion for excluding evidence of a subsequently installed safety device. The court relied on the trial court’s finding that the evidence was prejudicial and did not fall under any exception to Rule 407. The court excluded the evidence without distinguishing strict liability actions from actions claiming negligence, nor did it address the issue of fault or culpable conduct. Regardless of these notable omissions, the majority of federal courts have followed the Third Circuit’s interpretation of Rule 407.

In 1984, the Seventh Circuit attempted to expound a rationale for its application of the Rule 407 exclusion to strict liability claims. In Flaminio v. Honda Motor Co., a motorcyclist was rendered paraplegic after losing control of a wobbling motorcycle. The plaintiff claimed that his injuries resulted from both a defective design and the failure of the manufacturer to warn of the motorcycle’s propensity to wobble. The cyclist sought to introduce blueprints showing that the motorcycle manufacturer, in an effort to reduce the dangerous wobble, subsequently modified the front wheel forks making them two millimeters thicker.

In its analysis, the Flaminio court asserted the underlying purpose of Rule 407: the promotion of safety. If remedial measures were admissible as evidence of liability, the court noted, there would be no incentive for a manufacturer to make repairs after an accident or to take steps to remedy the danger. However immoral it might seem, a manufacturer may avoid taking remedial measures that would prevent further accidents; the likelihood that another accident will occur is actually smaller than the likelihood that the victim will sue the manufacturer and use evidence of remedial measures with devastating results. Relying upon this policy rationale, the court held that Rule 407 is applicable in strict liability claims.

78. Id. at 91-92.
79. Knight v. Otis Elevator Co., 596 F.2d 84, 91-92 (3d Cir. 1979). Specifically, the court held that unless feasibility of the safety measure was controverted, the evidence was prejudicial and properly excluded under Rule 407. Id.
80. Id.
81. See cases cited supra note 6.
82. 733 F.2d 463 (7th Cir. 1984).
83. Id. at 465.
84. Id. at 466. Failure to warn in a strict liability claim results from a duty to warn where the manufacturer has, or should have, knowledge of a dangerous use of its product. Id. at 466-68. In this case, there was evidence that the manufacturer knew of the motorcycle’s propensity to wobble. Id. at 468.
85. Id.
86. Id. at 469.
88. Id.
89. Id. at 469-70.
The Tenth Circuit has disagreed with the Seventh Circuit's interpretation of Rule 407, adhering instead to the position of the Eighth Circuit and the rationale supporting the *Ault* decision.90 In *Herndon v. Seven Bar Flying Service*,91 a student pilot was killed, allegedly as a result of a faulty flight control switch.92 After the accident, the switch manufacturer issued a service bulletin advising that the switch had a tendency to stick.93 The owners of the aircraft then modified the switch. The pilot's widow brought a strict liability action and sought to introduce evidence of the manufacturer's advisory bulletin. The court held that the evidence had been properly admitted,94 reasoning that, as a matter of policy, application of Rule 407 "is inappropriate in actions against defendants who are pursuing activities for which society has decided to assess strict liability."95 The court also noted that "there is no evidence which shows that manufacturers even know about the evidentiary rule [Rule 407] or change their behavior because of it."96

Several states have adopted the position of the Eighth and Tenth Circuits, relying upon the *Ault* rationale, admitting evidence of subsequent remedial measures in products liability cases based on strict liability.97 Maine, for example, freely admits remedial evidence not only

91. 716 F.2d 1322, 1327 (10th Cir. 1983).
92. Id. at 1324.
93. Id. at 1326-27.
94. Id.
95. *Herndon v. Seven Bar Flying Serv.*, 716 F.2d 1322, 1327 (10th Cir. 1983). The *Herndon* court noted that, in strict liability jurisdictions, society has decided to place "responsibility for the potential losses from producing an unsafe airplane with the manufacturer, regardless of the reasonableness of the manufacturer's design decisions." Id.
96. *Herndon*, 716 F.2d at 1328.
97. See, e.g., *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119, 126 (Ky. 1991) (holding that proof of post-accident design change is probative evidence of the quality of the earlier design); *Figgie Int'l Inc. v. Tognocchi*, 624 A.2d 1285, 1292 (Md. Ct. Spec. App. 1993) (admitting post-accident safety bulletin to show that standard of care had not been met at the time of accident); *Tune v. Synergy Gas Corp.*, No. 18273, 1993 WL 309055, at *8 (Mo. Ct. App. Aug. 17, 1993) (providing that evidence of subsequent remedial measures is admissible in showing the propane involved in the accident was...
in strict liability cases, but in negligence cases as well.98 At the other end of the evidentiary spectrum are the states that exclude remedial evidence in strict liability actions.99 Arizona and Nebraska are bound by express statute to exclude evidence of subsequent remedial measures in all product liability actions.100

Most cases involving the application of the exclusionary rule to subsequent remedial evidence are diversity actions, and thus, arise in federal court.101 In such cases, Federal Evidence Rule 407, rather than state law, generally applies since it can be rationally classified as proce-

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unreasonably dangerous); Robinson v. G.G.C., Inc., 808 P.2d 522, 526 (Nev. 1991) (holding that evidence of post-manufacturer design changes are admissible in strict liability claims); See also Tex. R. Civ. Evid. 407(a) (providing that evidence of subsequent remedial measures is admissible in products liability cases based on strict liability).

98. Me. R. Evid. 407(a). This statute has been construed to allow the admission of subsequent remedial evidence “for any purpose including to prove negligence.” Marcia L. Finkelstein, Comity and Tragedy: The Case of Rule 407, 38 Vand. L. Rev. 585, 611 (1985).


100. The Arizona statute provides:

In any product liability action, the following shall not be admissible as direct evidence of a defect:

1) Evidence of advancement or changes in the state of the art subsequent to the time the product was first sold by the defendant.

2) Evidence of any change made in the design or methods of manufacturing or testing the product or any similar product subsequent to the time the product was first sold by the defendant.

Ariz. Rev. Stat. § 12-686(2) (1956) (emphasis added). Similarly, the Nebraska statute 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. Negligence or culpable conduct, as used in this rule, shall include, but not be limited to, the manufacturer or sale of a defective product.


Diversity of jurisdiction is defined as follows:

A phrase used with reference to the jurisdiction of the federal courts, which, under U.S. Const. Art. III, § 2, extends to cases between citizens of different states, designating the condition existing when the party on one side of a lawsuit is a citizen of one state, and the party on the other side is a citizen of another state, or between a citizen of a state and an alien.

dural by nature. However, where state legislation contains specific exclusionary provisions for subsequent repairs, the state statutes may apply due to their substantive nature.

III. DISCUSSION: THE CASE FOR EXEMPTING STRICT LIABILITY CLAIMS

Evidence of remedial measures should not be excluded under Rule 407 in strict product liability actions. The policy argument on which exclusion is based—that admitting remedial evidence would provide a disincentive for manufacturers to repair defective products—is largely unsupported. Manufacturers that place defective and dangerous products in the stream of commerce have such substantial incentives to correct their products that the Federal Rules of Evidence, without more, are unlikely to deter remedial measures. In the rare event that manufacturers do consider Rule 407 in their decisions whether to repair unsafe products, the practical ease of avoiding exclusion under exceptions to the rule undermines certainty and reliance on its applicability.

The policies and purposes behind Rule 407 best serve actions that involve negligence. Negligence differs from strict liability in substantial ways. Defendants in negligence actions need to be pro-

102. Kelly v. Crown Equip. Co., 970 F.2d 1273, 1277 (3d Cir. 1992). The Kelly court held that Rule 407, and not state law, must be applied as long as the rule "can rationally be viewed as procedural." Id. (citing Salas v. Wang, 846 F.2d 897, 906 (3d Cir. 1988)). Under the United States Constitution, federal courts must apply the substantive rules prescribed by state law. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). The United States Supreme Court has ruled that in diversity cases, the Federal Rules of Evidence will apply in the "uncertain area between substance and procedure" where the applicable rule is capable of being classified as either. Hanna v. Plumer, 380 U.S. 460, 472 (1965).

Some courts also have determined that substantive judgment is entwined in Rule 407 application. See, e.g., Fasanaro v. Mooney Aircraft Corp., 687 F. Supp. 482, 485 (N.D. Cal. 1988) (reasoning that if courts allow evidence of subsequent remedial measures, defendants will be allowed to rebut the evidence, slowing the trial process considerably). The Fasanaro court also stated that Rule 407 reflects the procedural goal of judicial economy. Id. at 463. But see Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988) (applying state law in diversity action). In Wheeler, the court ruled that permitting evidence of subsequent remedial measures is based on policy considerations of encouraging manufacturers to take remedial measures without fear that these measures will be used against them at trial, not on the relevancy of the remedial measures. Id. at 1410.

103. 2 Weinstein & Berger, supra note 1, ¶ 407[03], at 407-25 to 407-26.

104. See Ault v. International Harvester Co., 528 P.2d 1148, 1152 (Cal. 1975) (reasoning that product manufacturers would not fail to implement safety features if doing so would risk additional lawsuits or a tarnished public image).

105. See Fed. R. Evid. 407 advisory committee's note, supra note 3. The note states that the rule incorporates the conventional doctrine of excluding remedial evidence to show "fault." Id. However, fault need not be demonstrated in a strict liability claim. See Keeton et al., supra note 22, § 75, at 534.

106. See discussion infra part III.C.
ected from irrelevant and prejudicial evidence. Although defendants in strict liability claims deserve the similar protection, the probative value of remedial evidence generally outweighs any prejudicial effect or concern of relevancy.

Moreover, the express language of Rule 407 unambiguously limits its application to negligence actions. Finally, social policies that have supported strict liability since the theory's inception mandate admission of remedial evidence in such claims.

A. Admitting Remedial Evidence Will Not Deter Safety Measures

Those who advocate excluding remedial evidence argue that admission of the evidence would discourage otherwise reasonable people from taking steps to increase safety. This argument, based on early common law decisions involving negligence, is speculative at best. There is no evidence that admitting remedial evidence deters manufacturers from correcting products that are known to be defective or dangerous.

Lack of evidentiary support is but one of several flaws in the deterrence theory. The notion that admitting remedial evidence will discourage post-accident repairs assumes that manufacturers know and understand the effect and applicability of Rule 407. This assumption is both unsupported and unrealistic. Decisions affecting the manufacturing process are made by management and engineering spe-

107. See supra note 3. The rule states that "evidence of the subsequent measures is not admissible to prove negligence . . . ." Fed. R. Evid. 407.

108. Fed. R. Evid. 407 advisory committee's note, supra note 3. The advisory committee's note states that "[t]he other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." Id.

109. E.g., Morse v. Minneapolis & St. Louis Ry., 30 Minn. 465, 468-69 (1883) (reasoning that allowing remedial evidence in an action based in negligence "holds out an inducement for continued negligence").

110. See Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 887 (5th Cir. 1983) (noting that a disincentive for manufacturers to correct defective products is "based on little direct evidence," but holding that Rule 407 nevertheless applies to strict liability).

111. See Friederichs v. Huebner, 329 N.W.2d 890, 902 (Wis. 1983) (expressing skepticism that defendants even know about the rule excluding subsequent remedial measures). At least one court has merely assumed that large manufacturers defending against products liability suits, "must know all about [Rule 407]." Flaminio v. Honda Motor Co., 733 F.2d 463, 470 (7th Cir. 1984).

112. Kobayashi, supra note 2.

The exclusionary rule may well be at least only marginally justifiable on the basis of the "social policy of nondeterrence." The presumptively controlling basic historical assumption that a person will refuse to take remedial measures because his subsequent corrective actions might be used in a future lawsuit does not nowadays seem to bear much of a relationship to reality. Even where that person might know of an earlier defect or accident related to a defect, it is highly unlikely that such a person or manufacturer would deliberately fail to
cialists. It is unlikely that a concept so foreign to the production process as a federal evidentiary rule would have any impact on the methods and specifications by which a product is manufactured. Even assuming that the manufacturer contemplates Rule 407, the effect of the rule, with its many exceptions and inconsistencies, is incapable of being predicted with any certainty.

Assuming further that a manufacturer has accurate knowledge of the effect and applicability of Rule 407, a responsible manufacturer is unlikely to forego implementing necessary safety measures that would decrease the risk of additional injuries to the consumer. Manufacturers intentionally rejecting reasonable remedial measures would be faced with evidence of previous accidents to demonstrate their knowledge of a product's dangerous condition. Evidence that a manufacturer knew that a product was prone to cause injury and nonetheless neglected to implement remedial safety measures generally will tip the judicial scales in favor of the plaintiff. Therefore, admitting remedial evidence in strict liability claims will likely encourage, rather than discourage, the repair of defective products; otherwise the manufacturer may be faced with additional future plaintiffs and a more difficult burden of persuasion.

taking some corrective action merely to come within the scope of an exclusionary evidentiary rule. . . .

Id. at 545; see also Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1327 (10th Cir. 1983) ("[i]t is unrealistic to think a tort feasor would risk innumerable additional lawsuits by foregoing necessary design changes simply to avoid the possible use of those modifications as evidence by persons who have already been injured.").

113. See 2 Weinstein & Berger, supra note 1, ¶ 407[2], at 407-15; see also Traylor v. Husqvarna Motor, 988 F.2d 729, 733 (7th Cir. 1993) (expressing "doubt that a producer will often be deflected from making improvements by fear about the consequences to his litigating position in hypothetical future cases—cases especially hypothetical because no accident has yet occurred.").

114. When determining the applicability and effect of Rule 407 on a decision to remedy a dangerous or defective product, the manufacturer must consider the differing applications of the rule in every federal and state jurisdiction to which the product may be subjected. The several exceptions to the exclusionary doctrine would need to be considered as well.

115. See Ault v. International Harvester Co., 528 P.2d 1148, 1152 (Cal. 1975) (stating that the policy of encouraging repairs by excluding remedial evidence in a strict liability claim is of "doubtful validity" because "it is in the economic self interest of a manufacturer to improve and repair defective products").

116. Id. See also Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) (holding that a remedial measure is admissible as proof of knowledge of a dangerous condition or feasibility of precautionary measures).

117. "If, nevertheless, manufacturers must pay for all harm proximately caused by their dangerously defective products, they are likely to be more deeply and continuously concerned with safety, and, as a result, allocate resources to research and testing that will improve safety quality control and reduce dangerous design defects." Clarence Morris & C. Robert Morris, Jr., Morris on Torts 240 (2d ed. 1980) (footnote omitted).
The possibility of extensive punitive damages is an additional deterrent to the manufacturer that fails to implement remedial measures. Juries are apt to impose guilt of willful and callous disregard for human life on any manufacturer that continued to foist a dangerous product with a known defect on the marketplace.

Practical implications beyond the judgments of unsympathetic juries dispel the myth that admitting remedial evidence will discourage repair of dangerous products. For example, insurers would not likely tolerate the insured manufacturer's failure to correct defects in a dangerous product. Such neglect would needlessly expose the manufacturer's insurer to additional injury claims that would continue unabated until the product was eventually remedied. Moreover, governmental agencies are also likely to condemn inaction after a product causes harm and may mandate that necessary remedial steps be taken.

The specter of severe economic implications is perhaps the most important and realistic deterrent to manufacturers that might fail to correct a dangerous or defective product. Repairing the product is often less costly than litigating later claims involving the defective product. Furthermore, consumers are not likely to purchase products known to be unsafe. The manufacturer's tarnished image may also extend to its other products, having a devastating effect on its overall economic viability.

118. See Kobayashi, supra note 2, at 545. "[I]t is highly unlikely that such a person or manufacturer would deliberately fail to take some corrective action merely to come within the scope of an exclusionary evidentiary rule, particularly in the light of the liberalized scope of punitive damage awards." Id.

119. See, e.g., Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993). In Burke, an employee cut his hand while reaching through the clean-out door of his employer's vertical auger. Id. at 501. The trial judge admitted remedial evidence during the trial and the jury awarded Burke $50,000,000 in punitive damages. Id. On appeal, however, the Eighth Circuit reversed the punitive damages award. Id. at 514. Evidence relied on by the district court was that the manufacturer knew of several accidents caused by the product, but intentionally delayed repairing the product to save money. Id. at 511-12.

120. Morris & Morris, supra note 117. "[I]nsurance companies that sell products liability policies also have become more interested in safety; many employ safety engineers whose inspections of factories affect underwriting and retention of risks. These insurance activities, in turn, induce manufacturers to turn out safer products." Id.; see also Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1328 (10th Cir. 1983).

121. Repairs to defective or dangerous products may be mandated by governmental agencies. Richard O. Lempert & Stephen A. Saltzburg, A Modern Approach to Evidence 194 n.15 (2d ed. 1982).

122. Id. "[T]he prospect of repeated products liability claims will make immediate repairs the less costly alternative whatever the current litigation costs." Id.

123. See Lempert & Saltzburg, supra note 121, at 194 n.15. "[P]erhaps most importantly, the danger [created by a defective product is] that unfavorable publicity will interfere with sales of non-defective products." Id.
Rule 407 offers tenuous protection. Manufacturers that reject the economic arguments favoring remedial measures run the risk of falling prey to any of the exceptions to Rule 407\(^{124}\) which increases the likelihood that evidence of remedial measures will be admissible on other grounds.\(^{125}\) Thus, the argument that a manufacturer will consciously neglect to repair a dangerous product out of fear that Rule 407 may later apply is both unrealistic and unsupported by empirical evidence.\(^{126}\)

B. The Exemptions Swallow the Rule

The clear language of Rule 407 permits the admissibility of evidence of subsequent remedial measures if offered for a purpose other than to demonstrate negligence.\(^{127}\) Despite the rule's unambiguous intent, some courts argue that the exceptions to Rule 407 apply only to negligence claims; these courts refuse to extend the exceptions to strict liability situations.\(^{128}\)

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124. *FED. R. EVID.* 407, *supra* note 3. Rule 407 does not prohibit evidence of remedial measures "when offered for another purpose." *Id.; see also* 2 *WEINSTEIN & BERGER, supra* note 1, ¶ 407[02], at 407-15. "Even if the defendant is as cold-blooded as the rule suggests, his awareness of the many exceptions to the general exclusionary rule would make it risky to refrain from making the needed repairs." *Id.*

125. Even in jurisdictions where remedial evidence is excluded in strict liability, such evidence often is admitted for other reasons. *E.g.*, Ross v. Black & Decker, Inc., 977 F.2d 1178, 1185 (7th Cir. 1992) (admitting evidence of post-accident safety standard to show that power saw had a dangerous defect because manufacturer failed to properly admit to the feasibility of the remedial measures); Pitasi v. Stratton Corp., 968 F.2d 1558, 1560-61 (2d Cir. 1992) (admitting remedial evidence to rebut a defense based on the nature or condition of the accident scene); Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 888 (9th Cir. 1991) (admitting remedial evidence against manufacturer when remedial steps were conducted by a third party).

126. As one commentator notes:

> Whether this rule of exclusion actually affects one's willingness to undertake remedial steps is problematic and the assumption that it does has been seriously questioned. Arguably, even if the evidence of remedial measures were admissible, the actor would still make the necessary repairs or take other corrective action. Failure to do so poses for him the risk that another person would injure himself; furthermore, the second claimant's case would be strengthened by the fact that the defendant had notice of a possibly dangerous condition by reason of the first accident.


127. *FED. R. EVID.* 407. "This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose . . . ." *Id.* Therefore, the exceptions to Rule 407 apply whether the claim is based in negligence or strict liability.

128. *See, e.g.*, Ault v. International Harvester Co., 528 P.2d 1148, 1150 (Cal. 1975) (arguing that the exceptions carved out of Rule 407 are additional evidence that Rule 407 was intended to apply only to cases of negligence).
1. Feasibility

The feasibility exception allows the use of remedial evidence to determine whether appropriate design alternatives or safeguards were possible at the time of the accident.\textsuperscript{129} If feasibility is at issue or is controverted by the defendant, remedial evidence is admissible to prove that an alternative design was possible.\textsuperscript{130} However, courts are inconsistent when determining whether feasibility is controverted.\textsuperscript{131}

Some courts hold that if a manufacturer does not expressly stipulate that an alternative design is feasible, such feasibility is at issue and the injured plaintiff may introduce remedial evidence.\textsuperscript{132} For example, in \textit{Ross v. Black & Decker, Inc.},\textsuperscript{133} a bricklayer's arm was severed while operating an electrical saw.\textsuperscript{134} The district court admitted evidence that the manufacturer added a blade-guard to later models of the saw in order to meet required safety standards.\textsuperscript{135} On appeal, the Seventh Circuit allowed the remedial evidence because the manufacturer committed a tactical error by failing to stipulate to feasibility of the safety guards during the pretrial memorandum or motions.\textsuperscript{136} The \textit{Ross} court required that feasibility be an explicitly controverted issue at trial before remedial evidence can be admitted. Consequently, plaintiffs that successfully invoke the feasibility exception effectively circumvent

\textsuperscript{129} See Boeing Airplane Co. v. Brown, 291 F.2d 310, 315 (9th Cir. 1961). The \textit{Brown} court admitted evidence of features added to an alternator device after the accident to show the feasibility of manufacturing the features at the time the questionable alternator was built. \textit{Id.}

\textsuperscript{130} \textit{Fed. R. Evid. 407. Rule 407 “does not require the exclusion of evidence of subsequent measures when . . . proving . . . feasibility of precautionary measures, if controverted . . . .” Id. Thus, where it is unclear whether an alternative design was possible or practical, remedial evidence is admissible. \textit{E.g.}, Whitehead v. St. Joe Lead Co., 729 F.2d 238, 247 n.6 (3d Cir. 1984) (holding admission proper since feasibility was at issue during trial). But cf. Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991) (excluding remedial evidence because feasibility was not controverted); Mills v. Beech Aircraft Corp., 886 F.2d 758, 763-64 (5th Cir. 1989) (holding that feasibility exception does not apply if feasibility is not controverted).

\textsuperscript{131} \textit{E.g.}, Donahue v. Phillips Petroleum Co., 866 F.2d 1008, 1013 (8th Cir. 1989) (admitting remedial evidence under feasibility exception despite manufacturer's contention that it was not feasible to provide warnings). But cf. Wheeler v. John Deere Co., 935 F.2d 1090, 1098-99 (10th Cir. 1991) (refusing to withdraw an alleged erroneous stipulation to feasibility made in an earlier trial because the manufacturer's admissions did not result in manifest injustice).

\textsuperscript{132} Meller v. Heil Co., 745 F.2d 1297, 1300 (10th Cir. 1984).

\textsuperscript{133} 977 F.2d 1178 (7th Cir. 1992).

\textsuperscript{134} \textit{Id. at} 1181.

\textsuperscript{135} \textit{Id. at} 1182-83.

\textsuperscript{136} \textit{Id. at} 1185. The court held that, although the manufacturer stipulated to feasibility during cross-examination, the admission was too late and the remedial evidence was properly admitted. \textit{Ross v. Black & Decker, Inc.}, 977 F.2d 1178, 1185 (7th Cir. 1992).
Rule 407 to admit remedial evidence. Other courts hold that if feasibility is conceded, evidence of subsequent modifications should be excluded under Rule 407.

2. Impeachment

Like the feasibility exception, admissibility for impeachment is also expressly provided under Rule 407. This exception is triggered when a manufacturer testifies, during its case-in-chief, that its actions were proper and that the product was not dangerous or defective at the time that injury occurred. The injured plaintiff may then introduce evidence of post-accident safety measures to impeach or contradict the manufacturer's testimony during cross-examination.

A recent Fifth Circuit case effectively demonstrates the significance of the impeachment exception. In a preemptory declaratory judgment action, the manufacturer testified that its floating dock system was "one of the strongest in the world." Remedial evidence was admitted to impeach this testimony since the evidence provided an alternative explanation for the dock's failure. Impeachment is such an effective and easy method of circumventing Rule 407 that one commentator has noted that, "given the critical nature of the inquiry, it is not surprising that most decisions permit impeachment even though the exception swallows up the rule."
3. Other Exceptions

Rule 407 also expressly permits the use of remedial evidence to determine ownership or control. In addition to exceptions specifically enumerated by Rule 407, plaintiffs frequently take advantage of less blatant strategic and procedural loopholes. For example, evidence of remedial measures will be admitted if such measures occurred after the product was manufactured, but before an accident occurred. A recent Seventh Circuit case, Traylor v. Husqvarna Motor demonstrates the effectiveness of this exception.

In Traylor, a metal chip from a defective maul struck a worker resulting in the loss of his eye. The manufacturer conducted tests after the product was sold, but before any injuries had resulted. The tests proving that the product was defective and dangerous led to improvements in the design of the maul. The court admitted evidence of these remedial measures because it believed that the probative value outweighed the desirability of encouraging safety measures.

Some courts that generally exclude subsequent remedial measures are willing to admit evidence that encourages and eventually leads to the remedial measure. Investigative safety reports, for example, may be admitted if they are not deemed to be an actual remedial mea-

145. Rule 407, "does not require the exclusion of evidence of subsequent measure when offered for another purpose, such as proving ownership, [or] control." Fed. R. Evid. 407.

146. Traylor v. Husqvarna Motor, 988 F.2d 729, 733 (7th Cir. 1993) (reversing trial court's exclusion of remedial evidence taken after product was sold, but before the accident); Arceneaux v. Texaco, Inc., 623 F.2d 924, 928 (5th Cir. 1980) (holding that trial court erred by excluding remedial evidence that occurred in 1971 since accident occurred in 1974); see also Raymond v. Raymond Corp., 938 F.2d 1518, 1524 (1st Cir. 1991) (holding that Rule 407 cannot be applied to modifications that took place prior to an accident).

147. 988 F.2d 729 (7th Cir. 1993).

148. Id. at 731.

149. Id. at 733.

150. Id.

151. Traylor v. Husqvarna Motor, 988 F.2d 729, 733 (7th Cir. 1993). When admitting this evidence, the court stated:

[1]n deciding how far back to push "event" one must keep in mind the desirability not only of encouraging safety improvements but also of permitting the finder of fact, here a jury, to consider probative evidence, as the evidence in question undoubtedly was. The latter consideration weighs more heavily when the improvements are made before an accident occurs.

sure.\textsuperscript{153} In \textit{Benitez-Allende v. Alcan Aluminio do Brasil},\textsuperscript{154} an injured plaintiff was allowed to introduce a report of the manufacturer's investigation that documented a product defect and urged a recall of the defective product.\textsuperscript{155} The jury was allowed to consider those sections of the report recommending the product recall; it was not allowed to view evidence of the recall itself.\textsuperscript{156} To a jury, this type of quasi-remedial measure likely will have the same effect as admission of the actual post-accident remedial evidence.

In another First Circuit case similar to \textit{Benitez-Allende}, an injured plaintiff was allowed to introduce a post-accident investigation report which supported his claim that the product was defective at the time of the accident.\textsuperscript{157} The report's findings prompted the defendant to send its customers an advisory warning of the problems.\textsuperscript{158} The court held that the contents of the investigation report were admissible because, on its face, the report was not a remedial measure.\textsuperscript{159} The court excluded, however, evidence of the actual remedial steps taken.\textsuperscript{160}

Although arguably remedial by nature, post-accident tests and reports are generally not excluded if not deemed "actions taken to remedy any flaws or failures."\textsuperscript{161} In practical effect, however, the evidence admitted in these situations often is indistinguishable—at least to the jury—from evidence of the remedial measure itself. Thus, reports demonstrating that a product is unsafe, although falling short of remediating the defect, may be as incriminating as the actual remedial measures.\textsuperscript{162} Where investigative reports are introduced, exclusion under Rule 407 serves no practical purpose.

\textsuperscript{153} See \textit{Chase v. General Motors Corp.}, 856 F.2d 17, 22 (4th Cir. 1988) (allowing the admission of design changes occurring prior to the manufacture and sale of the product).
\textsuperscript{154} 857 F.2d 26 (1st Cir. 1988).
\textsuperscript{155} \textit{Id.} at 33.
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} Prentiss & Carlisle Co. v. Koehring-Waterous Div. of Timberjack, Inc., 972 F.2d 6, 10 (1st Cir. 1992).
\textsuperscript{158} \textit{Id.} at 9.
\textsuperscript{159} \textit{Id.} at 9-10.
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} See \textit{Dow Chem. Corp. v. Weevil-Cide Co.}, 897 F.2d 481, 487 (10th Cir. 1990) (citing Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron, 805 F.2d 907, 918 (10th Cir. 1986)). The \textit{Weevil} court stated, "[A]cts which do nothing to make the harm less likely to occur should not be excluded under Rule 407." \textit{Id.} Rule 407 does not exclude the admission of pre-accident acts that do not reduce the probability of harm.
\textsuperscript{162} See \textit{Kaczmarek v. Allied Chem. Corp.}, 836 F.2d 1055 (7th Cir. 1987). The \textit{Kaczmarek} court allowed admission of pre-accident decisions to implement a safer design, but did not allow evidence that the decisions were carried out. \textit{Id.} at 1060. Since the decision to remedy the product was admissible, "the incremental evidentiary impact of the fact that the decision was carried out is unlikely to be great." \textit{Id.}
Courts also will admit evidence of post-accident remedial measures taken by parties other than the manufacturer. In *Grenada Steel Industries v. Alabama Oxygen Co.*, the court upheld admission of an alternative design implemented by one of the manufacturer's competitors after the defendant's product caused an accident. The court reasoned that since the party making the repair was not penalized by admitting the evidence, the policy underlying exclusion under Rule 407 was not violated.

Admitting subsequent repairs by parties other than the defendant is as potent as if the remedy had been conducted by the defendant itself. For example, Company X, one of two companies that produce the same product is sued for injuries resulting from a previously undisclosed defect that results in an injury. In response, both Company X, and its competitor Company Y, implement remedial measures to cure the defect. In a jurisdiction that would otherwise exclude remedial evidence, Company Y's remedial measures may be admitted and used to prove Company X's liability. Again, exclusion under Rule 407 would serve no practical purpose since the same remedial evidence will nevertheless be admitted on other grounds.

Evidence of mandatory remedial repairs will be admitted under yet another exception to the general rule of exclusion. In *Rozier v. Ford Motor Co.*, the Fifth Circuit held that where a superior authority such as the government forces a manufacturer to make post-accident repairs, the remedial evidence is admissible. The policy underlying Rule 407 does not apply in these situations because a manufacturer cannot be discouraged from making repairs if the repairs are man-

163. Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 888 (9th Cir. 1991) (admitting otherwise inadmissible remedial evidence in a breach of warranty claim since a non-defendant will not be inhibited from taking remedial steps if its actions are allowed into evidence against the defendant); Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 889 (5th Cir. 1983) (allowing otherwise inadmissible evidence conducted by third party but excluding the evidence on other grounds); see also Lolie v. Ohio Brass Co., 502 F.2d 741, 744-45 (7th Cir. 1974) (holding otherwise inadmissible evidence of post-accident repairs admissible since repairs were made by third party).

164. *Grenada Steel Indus.*, 695 F.2d at 889.

165. *Id.*

166. *Id.* For example, in Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991), the court reasoned that "[a] nondefendant will not be inhibited from taking remedial measures if such actions are allowed into evidence against a defendant." *Id.* at 1524 (citing Causey v. Zinke (*In re Aircrash in Bali, Indonesia*), 871 F.2d 812, 816-817 (9th Cir. 1989)).

167. See, e.g., Kociemba v. Searle & Co., 683 F. Supp. 1579, 1581 (D. Minn. 1988) (stating that the policy of discouraging a tortfeasor from performing remedial measures is not advanced when the government requires the changes); see also O'Dell v. Hercules, Inc., 904 F.2d 1194, 1204 (8th Cir. 1990) (holding that an exception to Rule 407 exists if remedial measures are mandated by a superior government authority).

168. 573 F.2d 1332 (5th Cir. 1978).

169. *Id.* at 1343.
dated.\textsuperscript{170} Thus, evidence that the manufacturer was required to remedy a defective product provides plaintiffs with yet another opportunity to circumvent Rule 407 exclusion.

A less prevalent exception, available in the Second Circuit, allows remedial evidence to be introduced into trial for purposes of acquainting the jury with the accident scene.\textsuperscript{171} In \textit{Lebrecht v. Bethlehem Steel Corp.},\textsuperscript{172} the plaintiff introduced photographs taken after the accident which indicated that subsequent repairs were made.\textsuperscript{173} The judge admitted the evidence, but instructed the jury to ignore the subsequent remedial measures.\textsuperscript{174} The practical effect of this ruling is admission of the remedial evidence itself.

In light of the ease and effectiveness by which plaintiffs can sidestep exclusion under Rule 407, product manufacturers can never be certain whether exclusion will apply and what effect it will have at trial. Although the law is somewhat more predictable in negligence actions, the exceptions to Rule 407 provide little guidance for the manufacturer considering whether to repair a defective product. The absence of fault-finding in strict liability actions renders the rule virtually ineffective to product manufacturers.\textsuperscript{175} Rule 407 should be uniformly inapplicable in these actions to provide manufacturers some greater measure of certainty.

\section*{C. The Phantom Problems of Relevancy and Danger of Unfair Prejudice}

Proponents of Rule 407's exclusionary effect argue that evidence of remedial measures is irrelevant. The legal elements supporting a claim of negligence differ markedly from those supporting a cause of action for strict liability.\textsuperscript{176} As a result, determining whether the same piece of evidence would be relevant to either claim requires a separate analysis for each. Where negligence arises from unreasonable conduct that breaches a duty of care, strict liability is imposed even where the

\begin{itemize}
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} \textit{Pitasi v. Stratton Corp.}, 968 F.2d 1558, 1560-61 (2d Cir. 1992) (holding that subsequent remedial measures are "admissible to rebut a defense based upon the nature or condition of the accident scene").
  \item \textsuperscript{172} 402 F.2d 585 (2d Cir. 1968).
  \item \textsuperscript{173} \textit{Id.} at 592.
  \item \textsuperscript{174} \textit{Id.}
  \item \textsuperscript{175} \textit{Id.} at 592.
  \item \textsuperscript{176} See Matthew L. Kimball, \textit{The Admissibility of Subsequent Remedial Measures in Strict Liability Actions: Some Suggestions Regarding Federal Rule of Evidence 407}, 39 WASH. & LEE L. REv. 1415, 1416 (1982). The author states that, "most commentators agree that the general exclusion of subsequent repair evidence in negligence actions is sound." \textit{Id.} at 1416 (citation omitted). However, strict tort liability does not require a showing of fault, "and stands on proof and policy considerations significantly different from those supporting a negligence theory." \textit{Id.} (citations omitted).
\end{itemize}
seller has exercised "all possible care" in the preparation and sales of its product. Remedial evidence, therefore, is more relevant in strict liability actions than in negligence actions.

Before it is admitted into trial, evidence must be demonstrated to be relevant. Evidence is relevant if it has any tendency to make a consequential fact more or less probable. Therefore, conduct that occurs after an alleged incident of negligence is irrelevant because negligence rests on affirmative conduct that either creates danger or fails to take reasonable steps to avoid danger. Once the culpable conduct is complete, it necessarily follows that the negligent incident has terminated.

In effect, the fact finder in a negligence action works from a position of hindsight. Thus, in a negligence action, exclusion under Rule 407 is proper since a determination of liability focuses on the reasonableness of the defendant's conduct at the time of the event. Steps taken after the event are appropriately excluded since they are only marginally relevant to show that a product was unsafe at the time of the manufacturer's conduct.

Unlike its role in negligence actions, evidence of remedial measures is relevant to strict liability actions because conduct at the time of the incident is not controlling; liability attaches if a product is defective when sold and reaches the consumer in an unchanged condition.

The fact-finder is not required to consider whether a duty is breached but rather must determine whether the manufacturer placed a defec-

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177. Restatement (Second) of Torts § 402A(2)(a) (1965).
178. Fed. R. Evid. 407. As the advisory committee's note states, conduct that may be classified as a remedial measure is not necessarily an admission of fault, however "[u]nder a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one." Id. advisory committee's note supra note 3. See infra notes 197-198.
179. Fed. R. Evid. 402. The rule provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Id.
180. Fed. R. Evid. 401. Rule 401 provides: "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Id.
182. Caprara, 417 N.E.2d at 549.
183. Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1327 (10th Cir. 1983).
184. Id.
185. In strict liability, courts focus on the time when the product was sold and when the product reaches the consumer. See Restatement (Second) of Torts § 402A (1965).
186. Strict liability requires that the product be in a defective condition when sold and that it reaches the consumer in a substantially unchanged condition. Id.
tive product in the stream of commerce.187 In the case of dangerous products, liability attaches irrespective of the defendant’s conduct.188 Since the defendant’s fault is not at issue, problems of relevance are circumvented and evidence of remedial conduct after the product enters the marketplace may be relevant to show a defect. Thus, remedial evidence is relevant in strict liability actions because it tends to show that it was more probable than not that the product in question was defective at the time it was purchased.189

The second argument offered in support of excluding remedial evidence is that it may create undue prejudice to the defendant.190 But, even relevant evidence may be excluded under Rule 403 if the probative value of evidence is “substantially outweighed by the danger of unfair prejudice.”191 Prejudice can result in negligence actions if a jury relies too heavily on post-accident conduct when assessing liability.192 When faced with persuasive evidence of post-accident measures, the fact-finder may neglect its duty to focus solely on conduct at the time of the alleged negligence.193 Instead, the jury might wrongly infer that a defendant’s subsequent remedial conduct is an admission of liability.194

This concern is clearly addressed in the advisory committee’s note to Rule 407: “Exclusion is called for only when the evidence of subse-

187. The traditional elements required to prove negligence are the defendant’s duty of due care, breach of that duty, damages suffered as a result of the breach, and that the damages were proximately caused by the breach. Morris & Morris, supra note 117, at 44. In a strict liability claim, the product must be proven to be defective at the time the manufacturer sent it to the market. Id. at 240. Unlike in a negligence claim, a manufacturer may be strictly liable for a product that causes injury even though the product conforms to accepted standards of safety. Id. at 241.

188. Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1327 (10th Cir. 1983). The court determined that Rule 407’s exclusion is inappropriate because society has decided that defendants who pursue certain activities should be strictly liable for damages. Id.

189. See Fed. R. Evid. 402.

190. See Fed. R. Evid. 407 advisory committee’s note, supra note 3.

191. Fed. R. Evid. 403. Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Id.

192. The trier of fact must rely on conduct at the time of the alleged negligence when assessing liability. Columbia & Puget Sound R.R. v. Hawthorne, 144 U.S. 202, 207 (1892). Prejudice may arise, for example, where liability is assessed primarily on actions taken after the alleged negligence rather than at the time of the incident. Rule 403 excludes relevant evidence if its “probative value is substantially outweighed by the danger of unfair prejudice.” Fed. R. Evid. 403.

193. Unfair prejudice may result where the jury draws inferences such as, “if it wasn’t broken or bad, why did the defendant(s) fix it?” Kobayashi, supra note 2, at 509.

194. See Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991). In the case of dangerous products, “[i]t was thought that jurors would too readily equate subsequent design modifications with admissions of a prior defective design.” Id. at 1523.
quent remedial measures is offered as proof of negligence or culpable conduct . . . [the rule] rejects the suggested inference that fault is admitted."195 This language suggests that Rule 407 excludes remedial evidence in negligence actions because fault might be inferred from a defendant's post-accident conduct. Imposing liability by inference, without a direct showing of fault, is unfairly prejudicial to a defendant attempting to disprove negligence.

Concerns of unfair prejudice also arise in strict liability claims, but to a lesser degree. In strict liability actions, fault, by definition, is imposed upon a defendant who places a dangerous product on the market.196 Thus, prejudicial harm that may befall the defendant evaporates because conduct is no longer the basis for finding liability.197 On the other hand, the probative value of remedial evidence is stronger than it would be in negligence claims because fixing a dangerous product suggests that the product was previously defective.198 The probative value of remedial evidence in product liability claims is further enhanced by the demands of public policy; society has chosen to place responsibility for harm caused by dangerous products on the shoulders of the manufacturers.199

Rule 407 unambiguously limits its exclusionary effect. The probative value of remedial evidence may be substantially outweighed by unfair prejudice when the defendant's conduct at the time of the accident is at issue. Thus, the rule supports exclusion in negligence claims. But, when a sequence of events unrelated to the defendant's conduct is at issue, as it is in product liability claims, probative value rarely if ever is outweighed by unfair prejudice.200

For the above-stated reasons, dangers of unfair prejudice do not weigh as heavily in strict liability claims as they do in negligence ac-

196. Restatement (Second) of Torts § 402A (1965). Liability for physical harm is imposed despite the fact that a manufacturer has "exercised all possible care in the preparation and sale of his product." Id.
197. The determination of liability focuses on whether the product was dangerous. Id.
198. Some commentators argue that the probative value of post-accident remedial measures is questionable since "the conduct and reason for the subsequent remedial measure may be equally consistent with mere invention, serendipity, or even extraordinary care or overabundance of caution." Kobayashi, supra note 2, at 509.
199. See Restatement (Second) of Torts § 402A cmt. c (1965); see also Caprara v. Chrysler Corp., 417 N.E.2d 545, 549 (N.Y. 1981).
200. The critical sequence of events in strict liability includes the time when the product is sold until it reaches the consumer in a substantially unchanged condition. Restatement (Second) of Torts § 402A (1965).
tions. Problems of unfair prejudice may also arise in strict liability actions, but in these instances, rules other than 407 more appropriately resolve them. 201

D. More Appropriate Rules Exist for Resolving Problems of Admissibility

Rules 401, 402, and 403 of the Federal Rules of Evidence assess the admissibility of remedial evidence in strict products liability claims more effectively and consistently than Rule 407. Under Rule 402, evidence that is not relevant is inadmissible. 202 Rule 401 defines relevance as the tendency to make any consequential fact more or less probable. 203 Evidence of a subsequent change in the manufacturing process is relevant and has substantial "probative value because a business is not likely to change a product unless the change promotes safety and is feasible." 204 Therefore, in strict liability actions, evidence of subsequent remedial measures is relevant because it allows the jury to infer from the measures that the product was originally defective. 205 Nevertheless, proponents of exclusion argue that remedial evidence is irrelevant not only to claims of negligence, but in strict liability as well. 206

Arguably, the relevance of remedial evidence may be called into question where the reasons why a manufacturer changed a product are uncertain. 207 In these instances, courts should apply the same analysis that would be triggered by any other question of relevance. The relevance standards set forth in Rules 401 and 402 specifically determine the admissibility of relevant evidence. Excluding evidence as irrelevant under Rule 407—in effect sidestepping the rigors of Rules 401 and 402—is improper and unduly excludes evidence that otherwise would be admissible under these rules. 208

201. Fed. R. Evid. 407 advisory committee's note supra note 3. Rule 403 specifically permits the exclusion of otherwise relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. See supra note 191 for text of the rule.


205. "Under the liberal theory of relevancy embodied in Rule 401, the circumstantial evidence of repair would have force sufficient to support admission." 2 Weinstein & Berger, supra note 1, ¶ 407[02], at 407-14.

206. Grenada Steel Indus. 695 F.2d. at 886.

207. See Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1327 (10th Cir. 1983). For example, "[a] person may have exercised all the care which the law required, and yet, in light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards." Morse v. Minneapolis & St. Louis Ry., 30 Minn. 465, 468 (1883) (deciding action was based in negligence, not strict liability).

208. See supra notes 178-179.
Not all relevant evidence will be admitted. The "probative value" balancing test required by Federal Rule of Evidence 403 works to exclude evidence if it poses danger of unfair prejudice to the defendant, confusion of issues, or misleading of the jury.\(^{209}\) Remedial evidence is rarely prejudicial in strict liability claims, but conceivably could confuse or mislead the jury where the sole issue in controversy arises from events that occurred at the time of the accident.\(^{210}\) Thus, the evidence of subsequent occurrences may prejudice the defendant by focusing jurors' attention on an irrelevant time-frame.\(^{211}\) When dangers of prejudice, confusion, or being misleading arise in strict liability actions, the exclusion of remedial evidence should be determined under Rule 403. Blind application of Rule 407, which was designed to address problems of prejudice in negligence actions, unnecessarily excludes nonprejudicial evidence.

Commentators support this solution and propose that all questions of prejudicial remedial evidence in strict liability claims be addressed under Rule 403 rather than Rule 407.\(^{212}\) This approach would allow the judge to consider the specific circumstances of each case and balance probative value of questionable evidence against potential prejudice to the defendant.\(^{213}\) Further support for applying Rule 403 in these situations is unambiguously expressed in the advisory committee's note, which provides that "the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403."\(^{214}\)

The Eighth Circuit, which generally admits remedial evidence in strict liability actions, will exclude such evidence where Rule 401, 402, or 403 issues arise.\(^{215}\) In *Burke v. Deere & Co.*, the court found evidence of remedial measures to be relevant to prove strict liability; nonetheless, the evidence was excluded because it was irrelevant to the manufacturer's "bad conduct" for which punitive damages were being sought.\(^{216}\)

In another Eighth Circuit decision, a worker recovering from surgery was injured when his walking cane broke, causing him to fall down a staircase.\(^{217}\) The cane was subsequently misplaced, so the

\(^{209}\) FED. R. EVID. 403.
\(^{210}\) Hendon, 716 F.2d at 1327.
\(^{211}\) See id.
\(^{212}\) 2 WEINSTEIN & BERGER, supra note 1, ¶ 407[02], at 407-23; see also Cook v. Navistar Int'l Transp. Corp., 940 F.2d 207, 214 (7th Cir. 1991) (excluding evidence under Rule 403 rather than 407 where unfair prejudice was at issue).
\(^{213}\) See id.
\(^{214}\) FED. R. EVID. 407 advisory committee's note, supra note 3.
\(^{215}\) See Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993); Bizzle v. McKesson Corp., 961 F.2d 719 (8th Cir. 1992).
\(^{216}\) Burke, 6 F.3d at 507.
\(^{217}\) Bizzle v. McKesson Corp., 961 F.2d 719, 720 (8th Cir. 1992).
plaintiff introduced pictures of it during trial and attempted to introduce evidence that the manufacturer had recalled a particular model of the cane after learning of the lawsuit.\footnote{18} The court noted the absence of convincing evidence that the cane which caused the injury was the same model as the cane subsequently recalled. Thus, the remedial evidence was properly excluded under Rule 403 because its probative value was outweighed by its prejudicial effect.\footnote{19}

The evidentiary approach adopted by the Eighth Circuit allows the trial judge to consider the peculiarities of each case; it is a workable and effective method for addressing problems of admissibility if such problems arise.\footnote{20} Blanket exclusion under Rule 407 is unwarranted where rules that specifically address the admission of problematic remedial evidence are available and effective.\footnote{21}

Concerns regarding prejudice may also be circumvented under Rule 105\footnote{22} which allows admission of subsequent remedial evidence, subject to a limited purpose instruction.\footnote{23} Although such an instruction may still threaten prejudice, the drafters of Rule 407 must have believed that juries are capable of understanding limited uses of remedial evidence; otherwise the Rule 407 exceptions would not exist or Rule 105 would not have been adopted.\footnote{24} In sum, better rules than Rule 407 exist for addressing procedural problems that may occasionally arise where remedial evidence is used in a strict liability trial.

\section*{E. The Ambiguous Limits of Rule 407}

The history and clear language of Rule 407 indicate that it was designed to apply to negligence claims rather than strict liability actions. The advisory committee's note explains the rule's scope: exclusion under the rule is appropriate only when the remedial evidence "is offered as proof of negligence or culpable conduct."\footnote{25} This limited scope of applicability is further supported by the rule's origin: the Federal Rules of Evidence were drafted as a codification of common law

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\begin{itemize}
  \item \footnote{18} Id. at 721.
  \item \footnote{19} Id.
  \item \footnote{21} Id.
  \item \footnote{22} \textit{FED. R. EVID.} 105. Rule 105 provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." \textit{Id.} This rule works well "where the risk of prejudice is less serious." \textit{FED. R. EVID.} 105 advisory committee's note.
  \item \footnote{23} See \textit{Rimkus v. Northwest Colorado Ski Corp.}, 706 F.2d 1060, 1066 (10th Cir. 1983).
  \item \footnote{24} See \textit{Flaminio v. Honda Motor Co.}, 733 F.2d 463, 469 (7th Cir. 1984).
  \item \footnote{25} \textit{FED. R. EVID.} 407 advisory committee's note, \textit{supra} note 3.
\end{itemize}
}
principles. Specifically, Rule 407 emerged from the "conventional doctrine which excludes subsequent remedial measures as proof of an admission of fault." Nowhere does Rule 407 or the advisory committee's note state or imply that the common law exclusionary doctrine encompassed activities beyond fault or culpability. Negligence, not strict liability, formed the basis for Rule 407 application. Thus, the rule stands only for the proposition that conduct cannot be an admission of fault when that conduct may be equally consistent with injury by mere accident or through contributory negligence.

Early interpretations of Rule 407 neglected to differentiate between negligence and strict liability when excluding remedial evidence. The unfortunate result of this lack of analytical foresight was unwarranted expansion of Rule 407 to strict liability claims. Negligence and strict liability, however, are very different causes of action; distinguishing between them is essential when determining whether to exclude remedial evidence under an express, plain meaning interpretation of Rule 407.

One possible explanation for such unchallenged expansion of Rule 407 to strict liability lies in judicial confusion over the appropriate analysis to be applied in strict liability actions. Strict liability requires that a product be unreasonably dangerous and reach the consumer in a substantially unchanged condition. Some authorities contend that the analysis for determining "unreasonably dangerous" is similar whether the cause of action lies in negligence, strict liability, or breach

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226. See supra note 49. In fact, the advisory committee's note refers practitioners to the California Evidence Code § 1151 as a comparable rule. FED. R. EVID. 407 advisory committee's note, supra note 3. According to its drafters, § 1151 was "intended to merely codify 'well-settled law.'" Ault v. International Harvester Co., 528 P.2d 1148, 1151 (Cal. 1974) (citing the Law Revision committee's comment to § 1151 of the California Evidence Code).

227. FED. R. EVID. 407 advisory committee's note, supra note 3.

228. See id.

229. See Columbia & Puget Sound R.R. v. Hawthorne, 144 U.S. 202 (1892); see also supra note 49. The advisory committee's note states that Rule 407 is based on the conventional doctrine that proof of conduct is not an admission of fault. FED. R. EVID. 407 advisory committee's note, supra note 3 (citing Hart v. Lancashire & Yorkshire Ry., 21 L.T.R. N.S. 261, 263 (1869), an action based in negligence).

230. FED. R. EVID. 407. The advisory committee's note quotes Baron Bramwell to demonstrate Rule 407's rejection of the notion that "because the world gets wiser as it gets older, therefore it was foolish before." Id. advisory committee's note, supra note 3.


of warranty. One court, for example, justified applying the exclusionary rule to strict liability actions on the ground that "the test for an unreasonably dangerous condition is equivalent to a negligence standard" of unreasonable conduct. Such over-generalization fails to appreciate important distinctions between negligence and strict liability, distinctions that underscore the inappropriateness of excluding remedial evidence from strict liability actions.

A manufacturer that could not have reasonably been expected to discover a product defect through testing or inspection will not be liable under a negligence theory. That same manufacturer, however, would be subject to strict liability. This occurs because a cause of action in negligence arises only where a defendant breaches a required duty of care. Strict liability, in contrast, will result despite the defendant's exercise of all possible due care. Because of the distinction between strict liability and negligence—specifically the critical role of culpability in the latter—application of the same analysis for both causes of action is an unwarranted expansion of Rule 407 in light of the rule's express language.

F. The Social Policies Supporting a Strict Liability Claim Require the Admission of Post-Accident Evidence

The law of strict liability emerged and evolved to guarantee that liability for injuries resulting from defective products vests with manufacturers rather than with vulnerable consumers. In order to achieve the law's social purpose, therefore, strict liability must not be burdened by procedural barriers. In fact, such barriers actively contravene the history of the strict liability doctrine; since its inception, the law of strict liability has operated to alleviate problems of proof formerly faced by injured consumers.

234. William L. Prosser, Handbook of the Law of Torts 671 (4th ed. 1971). The proof required in actions resulting from unsafe products is largely the same whether the cause of action is negligence, strict liability, or breach of warranty. Id.


236. See Flaminio, 733 F.2d at 467.

237. Id. For purposes of differentiating between negligence and strict liability, the same analysis applies for failure to warn. Id. Likewise, in a claim based on failure to warn, a manufacturer with no reason to know of a product danger would not be negligent for failing to warn of the danger, but may nevertheless be strictly liable with tort. Id.

238. Id. at 468.

239. Id.


Strict liability specifically eases the plaintiff's evidentiary burdens regarding scienter and defectiveness. Scienter,\textsuperscript{242} although indispensable in negligence actions, is not required in strict liability claims.\textsuperscript{243} Instead, the law presumes that the manufacturer knew about the dangerous condition of the product.\textsuperscript{244} Thus, absent knowledge of a product defect, a manufacturer will not be liable under a negligence theory, but would be held strictly liable.\textsuperscript{245} Furthermore, if a plaintiff is unable to prove by direct evidence that a product is defective, a strict liability defect may be inferred if other probable causes are ruled out.\textsuperscript{246} Excluding proof of remedial measures, therefore, is inconsistent with the trends and underlying policies of strict liability law that ease, rather than impede the plaintiff's burden of proof.\textsuperscript{247}

Although this theory supports admissibility in practice, most courts exclude remedial evidence, invoking the traditional policy arguments even though such policies are clearly not advanced by exclusion. For

\textsuperscript{242} Scienter refers to the actor's state of mind. BLACK'S LAW DICTIONARY 1345 (6th ed. 1990).

\textsuperscript{243} Caprara, 417 N.E.2d at 549-50.

\textsuperscript{244} See John W. Wade, On Product "Design Defects" and Their Actionability, 33 VAND. L. REV. 551, 567 (1980). The author suggests that an important distinguishing feature of strict liability is that "whether a reasonable prudent manufacturer would put the product or the market must be made with the assumption that the manufacturer knew of the dangerous condition of the product." \textit{Id.} at 567.

\textsuperscript{245} In Flaminio, Judge Posner recognized,

[When the defect is in a component and the manufacturer of the final product could not reasonably have been expected to discover the defect by inspecting or testing the component, the manufacturer would not be liable under a negligence regime for the defect, but under strict liability he would be.]

\textit{733 F.2d at 467.}

\textsuperscript{246} See Halloran v. Virginia Chems. Inc., 393 N.Y.S.2d 341, 343 (1977). In this case, a mechanic was injured when a can of refrigerant exploded. \textit{Id.} at 343. The manufacturer argued that a prima facie showing of defect was lacking since no particular defect in the refrigerant was ever established. \textit{Id.} The court found that the issue "merits little discussion," since in a product liability case, if a plaintiff excludes all causes other than those attributable to the manufacturer, even if the defect has not been proven, the fact-finder may infer that the accident was caused by a defect in the product or in its packing. \textit{Id.} (citations omitted).

\textsuperscript{247} See \textit{Caprara}, 417 N.E.2d at 550. In \textit{Caprara}, Judge Fuchsberg highlighted the argument:

This contrast between negligence and strict products liability law is dramatic . . . the logic behind the exclusionary rule . . . affords little, if any, support for the slavish application of the rule to cases brought on a legal theory so antithetical to the strictures of negligence law . . . .

\textit{Id.}
example, in *Raymond v. Raymond Corp.*,248 the operator of a tractor was killed when a steel beam pierced the operator's compartment and struck him.249 Prior to the fatal accident, the manufacturer planned to add steel backplates and more secure welding to prevent the known propensity for such accidents.250 In fact, after the accident, the manufacturer incorporated the safer design into later models of the tractor.251 On review, the court asserted Rule 407's goal to "further the social policy of encouraging manufacturers to create safer products."252 The evidence was thus excluded from trial. The court upheld the jury verdict that the product was not unreasonably dangerous,253 despite the fact that the manufacturer knew that the tractor was dangerous, planned on fixing the tractor prior to its sale, and actually remedied the tractor after the accident.254

Exclusion contravenes every policy underpinning the law of strict liability: manufacturers of dangerous products must be strictly accountable for any resulting injuries.255 Exclusion cannot rest on a court's purported desire to encourage manufacturers to create safer products. A safer design was admittedly necessary in *Raymond* and was, in fact, already being implemented at the time of the accident. The court's decision, therefore, would likely have had no effect on Raymond Corporation's decision to remedy the defect. *Raymond* exemplifies the unjust effect of relying on unsupported policy assumptions when excluding evidence under Rule 407. The effect, in that case, was to deny recovery where an admittedly dangerous product caused the death of an unsuspecting consumer.

IV. Conclusion

Federal Rule of Evidence 407 originated as a codification of decisions involving negligence and culpable conduct.256 Exclusion under Rule 407 is therefore justified in negligence actions because measures taken after the conduct in question are not relevant to conduct at the time of the accident. Strict liability actions, on the other hand, do not require that the defendant's conduct be directly related to the accident. Instead, society has determined that a manufacturer who places a dangerous product into the marketplace must bear the loss from in-

248. 938 F.2d 1518 (1st Cir. 1991).
249. *Id.* at 1520.
250. *Id.* at 1523. Before the tractor was manufactured, design modifications were on the "drawing board." *Id.*
251. *Id.*
252. *Id.*
254. *Id.* at 1523.
255. See *Restatement (Second) of Torts* § 402A, *supra* note 40.
256. *Supra*, note 49.

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juries caused by that product. Thus, excluding remedial evidence is contrary to public policy in strict liability claims.

Federal courts are inconsistent in their application of Rule 407 to strict liability claims. Inconsistent laws result in uncertainty and uneven application of evidentiary rules that were designed to achieve consistency.\textsuperscript{257} Arguments supporting exclusion bear little relation to the reality of product manufacturing. There is no evidence that admitting remedial evidence would discourage manufacturers from implementing safety measures. Furthermore, competent attorneys can and generally do qualify the evidence under one of the many strategic and procedural exemptions to the rule. Rule 407 was never intended to apply in strict liability. Applying the rule in strict liability actions more often than not produces unfair results that are contrary to public policy. Expansion of Rule 407 to exclude remedial evidence in strict liability is therefore unwarranted.

\textit{Brent R. Johnson}

\textsuperscript{257}. \textit{See} Kimball, \textit{supra} note 176, at 1416-17.

Without uniform court treatment of repair evidence in strict liability actions, producers and manufacturers defending strict liability claims find their products assessed differently from jurisdiction to jurisdiction. The disparate treatment of subsequent repair evidence is anomalous when a stated purpose of the Federal Rules of Evidence is fairness in the administration of evidence law, and the legislative intent is uniformity of evidence rules used in the federal circuits.

\textit{Id.} (footnotes omitted). As one commentator notes, "There is nothing to be gained by leaving this question open for further judicial resolution, other than an incentive for forum shopping . . . and a consequent expenditure of judicial resources." Margaret A. Berger, \textit{The Federal Rules of Evidence: Defining and Refining the Goals of Codification}, 12 Hofstra L. Rev. 255, 266 (1984).