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Federal Rule of Evidence 407 as Applied to Products Liability: A Rule in Need of Remedial Measures

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I. INTRODUCTION

Under common law, repairs made by a defendant after an accident were excluded from evidence when offered by the plaintiff to prove negligence or culpable conduct.[1] By the late nineteenth century, the doctrine was firmly adopted in the American system.[2] The common law rule is based on the reasoning that (1) subsequent repairs by the defendant are not necessarily an admission of negligence[3] and should not be

1. *See* Hart v. Lancashire & Yorkshire Ry., 21 L.T.R.N.S. 261 (1869).

2. *See, e.g.*, Morse v. Minneapolis & St. L. Ry., 16 N.W. 358 (Minn. 1883) (holding that evidence that the defendant had repaired or changed a defective switch one year after a railroad accident is not admissible as evidence of previous negligence). *See also* 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5282 (1980). The Supreme Court decided the issue in Columbia & Puget Sound R.R. v. Hawthorne, 144 U.S. 202 (1892), by excluding evidence of an altered conveyor belt. "[I]t is now well settled, upon much consideration, by the decisions of the highest courts of most of the States in which the question has arisen, that the evidence is incompetent . . . ." *Id.* at 207.

3. At common law, evidence of a subsequent remedial measure was deemed irrelevant. Since the enactment of the Federal Rules of Evidence, such evidence, not withstanding Rule 407 of the Federal Rules of Evidence, would be admitted as relevant under the broad definition of relevancy in Rule 401 of the Federal Rules. Rule 401 states: " 'Relevant evidence' means

construed as such by the jury;[4] and (2) subsequent repairs should be encouraged to mitigate the possibility of further injury.[5]

The common law rule of the inadmissibility of evidence of subsequent repairs was codified in 1969 in Rule 407 of the Preliminary Draft Federal Rules of Evidence.[6] Rule 407 was revised in 1971[7] and promulgated by the Supreme Court in 1973 without change.[8] During Congressional consideration, Rule 407 was thought to be "noncontroversial";[9] it was neither the subject of floor debate, nor discussed during committee hearings in the House of Representatives.[10] Congress adopted Rule 407 when it enacted the Federal Rules of Evidence on January 2, 1975.[11] Rule 407 of the Federal Rules of Evidence states:

> 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

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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." FED. R. EVID. 401.

4. *Hawthorne*, 144 U.S. at 202. "[T]he taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant." *Id.* at 204. *See* 2 C. MCCORMICK, MCCORMICK ON EVIDENCE § 267 (4th ed. 1992); 2 J. WIGMORE, WIGMORE ON EVIDENCE § 283 (Chadbourne rev. 1979).

5. A person may have exercised all the care which the law required, and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence.

Morse, 16 N.W. at 359 (citations omitted).

6. FED. R. EVID. 407 (Preliminary Draft 1969); WRIGHT & GRAHAM, *supra* note 2, § 5282 n.1. The first statutory provision dealing with the common law rule was Rule 308 of the Model Code of Evidence, which states:

> Evidence of the taking of a precaution by a person to prevent the repetition of a previous harm or the occurrence of a similar harm or evidence of the adoption of a plan requiring that such a precaution be taken is inadmissible as tending to prove that his failure to take such a precaution to prevent the previous harm was negligent.

7. PROP. FED. R. EVID. 407, 1971, 51 F.R.D. 315, 352; WRIGHT & GRAHAM, *supra* note 2, § 5281 n.2.

8. PROP. FED. R. EVID. 407, 1973, 56 F.R.D. 183, 225; WRIGHT & GRAHAM, *supra* note 2, § 5281 n.4.

9. WRIGHT & GRAHAM, *supra* note 2, § 5281.

10. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, ¶ 407-1 (1992).

11. FEDERAL RULES OF EVIDENCE, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

precautionary measures, if controverted, or impeachment.[12]

The common law exclusionary rule for subsequent remedial measures was uniformly applied only to negligence actions.[13] By the mid-twentieth century, the application of the exclusionary rule was narrowed primarily to negligence actions dealing with personal injury and property damage.[14] However, the development of the "products liability" theory of tort law has caused considerable controversy over the proper applicability of Rule 407 to products liability cases. Absent congressional guidance on the issue,[15] courts have looked to Rule 407's terms and its underlying rationale to determine its applicability to products liability actions. This has resulted in inconsistent and conflicting application of Rule 407 by the federal circuit courts of appeal. The lack of any clear ground on which the courts may base a determination of the many issues concerning Rule 407 and products liability actions suggests a confusion and tension among the courts as to how the rule should be applied, creating even greater confusion among litigants. Therefore, the question is whether Rule 407 should be applied at all in the area of products liability? This Comment addresses this issue and finds that if Federal Rule of Evidence 407 maintains its present form in both statutory and case law, the rule should not be applied in products liability cases.

This Comment surveys the current judicial treatment of Rule 407 in the federal courts of appeals in products liability cases. Section II discusses the rationale underlying Rule 407 and focuses on the rule's social policy concerns. Section III examines the conflict among the circuits on the issue of whether Rule 407 should apply at all in strict products liability claims. Section IV addresses the courts' application of Rule 407 to products liability cases in terms of the rule's scope and its exceptions. Section V analyzes the general application of Rule 407. Finally, Section VI proposes a possible solution for the present confusion regarding Rule 407.

II. THE RATIONALE BEHIND RULE 407

The rationale for Rule 407's exclusion of subsequent remedial

12. FED. R. EVID. 407. Hereinafter, all references in the text to "Rule 407" refer to Rule 407 of the FED. R. EVID.

13. John M. Kobayashi, *Subsequent Remedial Measures and Recall Letters and Notices, in* PRODUCT LIABILITY 1989: WARNINGS, INSTRUCTIONS AND RECALLS 503, 512 (Practicing Law Institute 1989).

14. Roger C. Henderson, *Product Liability and Admissibility of Subsequent Remedial Measures: Resolving the Conflict by Recognizing the Difference Between Negligence and Strict Tort Liability*, 64 NEB. L. REV. 1, 2 (1985).

15. *See* FED. R. EVID. 407 advisory committee's note.

measures is based on two separate grounds, similar in reasoning to the common law doctrine. First, a subsequent remedial measure may not in fact be an admission of negligence or culpable conduct.[16] Second, people will not repair dangerous situations if their actions will be later used as evidence against them.[17]

Under Federal Rule of Evidence 401, evidence of subsequent remedial measures is sufficiently relevant to allow admission into evidence.[18] However, Rule 407 retains the common law concern that a subsequent remedial measure should not be considered an admission of negligence or culpable conduct because the plaintiff's injury might have resulted from a mere accident or contributory negligence. Accordingly, the rule considers repairs as merely additional safeguards or the exercise of a degree of caution beyond "reasonable care."[19] Legislators and the courts are also concerned that, if admitted, evidence of subsequent repairs or improvements would be overvalued by a jury as an admission of negligence or culpable conduct, thereby unfairly prejudicing the defendant.[20]

These policy concerns constitute the primary force behind Rule

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16. *Id.*

17. *Id.*

18. WEINSTEIN & BERGER, *supra* note 10, ¶ 407[02] at 407-14 ("Under the liberal theory of relevancy embodied in Rule 401, the circumstantial evidence of repair would have force sufficient to support admission."). *See supra* note 3.

19. *See* WIGMORE, *supra* note 4, § 283.

> If machines, bridges, sidewalks, and other objects, never caused corporal injury except through the negligence of their owner, then his act of improving their condition, after the happening of an injury thereat, would indicate a belief on his part that the injury was caused by his negligence. But the assumption is plainly false; injuries may be, and constantly are, caused by reason of inevitable accident, and also by reason of contributory negligence of the injured person. To improve the condition of the injury-causing object is therefore to indicate a belief merely that it has been *capable of causing such an injury*, but indicates nothing more, and is equally consistent with a belief in injury by mere accident, or by contributory negligence, as well as by the owner's negligence. Mere capacity of a place or thing to cause injury is not the fact that constitutes a liability for the owner; it must be a capacity which could have been known to an owner using reasonable diligence and foresight, and a capacity to injure persons taking reasonable care in its use.
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> On this ground, then, namely, that the supposed inference from the act is not the plain and most probable one, such acts of repair or improvement should be excluded.

Id. at 174-75.

20. "The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. . . . Under a liberal theory of relevancy [incorporated in Rule 401] this ground alone would not support exclusion as the inference is still a possible one." FED. R. EVID. 407 advisory committee's note.

Courts, inlcuding the Supreme Court, expressed concern about the prejudicial effect of such evidence.

> [I]t is now well settled . . . that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant

407. "Unlike most of the other Federal Rules of Evidence, . . . Rule 407 is based primarily upon policy considerations, and not upon relevancy or concern for truth finding."[21] Rule 407's underlying premise is that people will not take any post-accident measures to remedy a safety hazard if evidence of such measures is susceptible to overemphasis by a jury.[22] "[T]hus not only would careful owners refrain from improvements, but even careless ones, who might have deserved to have the evidence adduced against them, would by refraining from improvements subject innocent persons to the risk of the recurrence of the injury."[23]

III. Is Rule 407 Applied to Products Liability Cases?

The exact language of Rule 407 refers to the exclusion of evidence to prove "negligence or culpable conduct,"[24] but the rule, the advisory committee's note, and the legislative history of the rule do not specifically address the issue of whether Rule 407 bars the admission of evidence of subsequent remedial measures in products liability cases.[25] This lack of authority has caused confusion over the applicability of Rule 407 to products liability cases and has led to a split of authority

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had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant.

Columbia & Puget Sound R.R. v. Hawthorne, 144 U.S. 202, 207 (1892); *see also* Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991) ("It was thought that jurors would too readily equate subsequent design modifications with admissions of a prior defective design.").

21. Oberst v. International Harvester Co., 640 F.2d 863, 867 n.2 (7th Cir. 1980) (Swygert, J., dissenting). The Advisory Committee suggests that the policy of encouraging safety is the principle underlying rationale of the rule. "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." Fed. R. Evid. 407, advisory committee's note. *See* McCormick, *supra* note 4, § 267, at 200.

22. Wigmore, *supra* note 4, § 283. *See* Hull v. Chevron U.S.A., Inc., 812 F.2d 584, 587 (10th Cir. 1987).

23. Wigmore, *supra* note 4, § 283.

24. Fed. R. Evid. 407.

25. *See* Meller v. Heil Co., 745 F.2d 1297 (10th Cir.), *cert. denied*, 467 U.S. 1206 (1984). The *Meller* court concluded from the lack of statutory authority on this issue that "[t]he choice of this particular standard [of negligence or culpable conduct] presumably reflects a conclusion by the drafters that such evidence, on balance, is markedly less probative on these particular issues than on others." *Id.* at 1300 n.5. There is some evidence in the rules that the drafters do make a distinction between "negligence and culpable conduct" and other types of liability. Federal Rule of Evidence 408 (in the relevancy section as well) states that evidence of a compromise or offer to compromise "is not admissible to prove *liability*." Fed. R. Evid. 408 (emphasis added). The drafters chose the broader term of "liability" over "negligence and culpable conduct." Therefore, the drafters did make a distinction in their terminology.

among state[26] and federal courts[27] regarding the plain language of the rule and its underlying policy rationale. The majority of the states that have addressed this issue hold that Rule 407 does not apply in strict products liability actions,[28] whereas most of the federal circuit courts hold that the exclusionary rule does apply.[29]

A. *State Courts:* Ault v. International Harvester Co.

The Supreme Court of California was the first court to distinguish between the admissibility of subsequent remedial measures in actions brought under a theory of negligence and those brought under a theory of strict products liability.[30] In *Ault v. International Harvester*[31], the plaintiff brought an action for damages under the theories of strict liability, breach of warranty, and negligence after sustaining injuries from a motor vehicle accident.[32] The plaintiff alleged that the accident resulted from a failure of the vehicle's aluminum gear box, which was made of defective materials. The trial court admitted evidence that three years after the accident the defendant began manufacturing the gear box out of malleable iron rather than the less durable aluminum. On appeal, the

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26. *See* WRIGHT & GRAHAM, *supra* note 2, § 5285 n.34 (Supp. 1992). For a further discussion of the split among state courts, see Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1333-34 (10th Cir. 1983), *cert. denied sub nom.* Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc., 466 U.S. 958 (1984); Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 886-87 nn.2-3 (5th Cir. 1983).

27. The United States Supreme Court has not yet addressed this issue. For cases where the Supreme Court has denied certiorari, see *Herndon*, 716 F.2d at 1322; Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

28. Krause v. American Aerolights, 762 P.2d 1011, 1015 (Or. 1988); Thomas S. Stewart & Stacy M. Andreas, *Subsequent Remedial Measures: An Analytical Model for Product Liability Cases*, 26 TORT & INS. L.J. 74, 79-80; Kobayashi, *supra* note 13, at 548-49.

29. For an examination of the split among the circuits on the application of Rule 407 to strict products liability actions, compare Prentiss & Carlisle v. Koehring-Waterous, 972 F.2d 6 (1st Cir. 1992) (holding Rule 407 excludes evidence of subsequent remedial measures in strict liability case); *Cann*, 658 F.2d at 54 (same); Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992) (same); *Werner*, 628 F.2d at 848 (same); Mills v. Beech Aircraft Corp., 886 F.2d 758 (5th Cir. 1989) (same); Hall v. American S.S. Co., 688 F.2d 1062 (6th Cir. 1982) (same); Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463 (7th Cir. 1984) (same); Gauthier v. AMF, Inc., 788 F.2d 634 (9th Cir.) (same), *amended* 805 F.2d 337 (9th Cir. 1986) with Bizzle v. McKesson Corp., 961 F.2d 719 (8th Cir. 1992) (holding that Rule 407 does not apply to strict liability actions); Huffman v. Caterpillar Tractor Co., 908 F.2d 1470 (10th Cir. 1990) (same).

It should be noted that the Eighth Circuit is the only circuit to consistently refuse to apply Rule 407 to strict products liability cases. W.E. Brumby II et al., *Evidence of Subsequent Remedial Measures in Products Liability Actions: Recent Conflict in the Courts*, 35 MERCER L. REV. 1389, 1409 (1984).

30. Brumby, *supra* note 29, at 1395.

31. 528 P.2d 1148 (Cal. 1974).

32. *Ault*, 528 P.2d at 1149-50.

Supreme Court of California held that evidence of subsequent repairs is admissible in products liability cases brought under a theory of strict liability.[33] The significance of the *Ault* decision is that it was based upon section 1151 of California's Evidence Code[34] from which Rule 407 was derived.[35]

In making its decision the *Ault* court relied on the true strict liability theory of section 402A of the *Restatement (Second) of Torts*.[36] The court distinguished between negligence and strict liability theories by stating that in order to recover under the latter, a plaintiff need only prove that the *product* was defective and not that the *defendant* breached his duty of care.[37] The court took a strict interpretation of section 1151

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33. *Ault* was being decided while the Federal Rules of Evidence were still pending in Congress. While the *Ault* case was pending there were futile efforts made to get the Evidence Code amended to include strict liability suits.

> It is unlikely that the Congressional draftsmen were unaware of the possibility that the phrase 'culpable conduct' would be held not applicable to strict liability since the *Ault* case was much discussed at several continuing legal education programs dealing with the Evidence Rules that were held in California during this period, programs that featured the Chairman and the Reporter of the Advisory Committee and several Congressional staff members.

WRIGHT & GRAHAM, note 2, § 5285 n.26 and accompanying text.

In addition, some lawyers urged members of Congress to have Rule 407 amended to make it clear whether the rule did or did not apply to strict liability cases. *Id.* § 5285 n.30. *See* Brumby, *supra* note 29, at 1395.

34. California's Evidence Code § 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).

35. *See* FED. R. EVID. 407 advisory committee's note. California Evidence Code § 1151 and Rule 407 are virtually identical. *See supra* text accompanying notes 12 & 35. Section 1151 is California's codification of the subsequent repair rule.

36. *Ault*, 528 P.2d at 1150. The *Restatement* states:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
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> (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.

RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

37. *Ault*, 528 P.2d at 1150. For a more detailed discussion of the distinction between negligence and strict liability theories in the field of products liability theories, see generally Henderson, *supra* note 14.

and concluded that "if the Legislature had intended to encompass cases involving strict liability within the ambit of section 1151, it would have used an expression less related to and consistent with affirmative fault than 'culpable conduct'—a term which, under defendant's theory [that it encompasses strict liability], would embrace a moral rather than a legal duty."[38]

The court found that the policy rationale behind section 1151 of encouraging subsequent repairs applies to negligence cases but that section 1151 does not serve the same "anti-deterrent function" in strict products liability cases.[39] The court reasoned that the rule excluding evidence of subsequent repairs has no place in the field of products liability where the "contemporary corporate mass producer of goods" is unlikely to risk additional liability by refraining from improving his product because such actions may be used as evidence against him for a previous injury.[40] The court held that the only purpose section 1151 has in the field of products liability is to "serve[ ] merely as a shield [for the defendant] against potential liability."[41]

B. *Federal Circuit Courts That Do Not Apply Rule 407 to Products Liability Cases*

The circuit courts primarily address two issues in their determinations of whether Rule 407 applies to strict products liability cases. First, the courts consider whether the plain language of the rule mandates its application to strict liability actions. Second, they examine whether the policy rationale of the rule is served by applying it to these types of actions.[42] Both the Eighth and Tenth Circuits have followed the *Ault* decision in holding that Rule 407 does not apply to strict products liability actions.[43] These courts have addressed the two issues by confining

38. *Ault*, 528 P.2d at 1151.

39. *Id.* "Neither the Legislature nor the Law Revision Commission which drafted the section could have been oblivious to the likely evidentiary use of subsequent design changes in strict liability cases. Thus, the limitation of the section to essentially negligence causes of action must be deemed deliberate and significant." *Id.* at 1153 (footnote omitted). Moreover, by 1970, the *Restatement (Second) of Torts* was the majority rule, but until *Ault* no court made distinction between cases brought under theories of negligence and those brought under strict liability. Brumby, *supra* note 29, at 1395.

40. *Ault*, 528 P.2d at 1152.

41. *Id.*

42. Joyce M. Cartun, Note, *Admissibility of Remedial Measures Evidence in Products Liability Actions: Towards a Balancing Test*, 39 HASTINGS L.J. 1171, 1181 (1988).

43. *See* Bizzle v. McKesson Corp., 961 F.2d 719 (8th Cir. 1992); Huffman v. Caterpillar Tractor Co., 908 F.2d 1470 (10th Cir. 1990); Donahue v. Phillips Petroleum Co., 866 F.2d 1008 (8th Cir. 1989); R.W. Murray, Co. v. Shatterproof Glass Corp., 758 F.2d 266 (8th Cir. 1985); Roth v. Black & Decker, U.S., Inc., 737 F.2d 779 (8th Cir. 1984); DeLuryea v. Winthrop Lab., 697 F.2d 222 (8th Cir. 1983); Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322 (10th Cir.

Rule 407 to its terms, limiting its use to negligence and culpable conduct, and questioning the effectiveness of the social policy of encouraging repairs.[44]

1. THE EIGHTH CIRCUIT

In *Robbins v. Farmers Union Grain Terminal Ass'n*,[45] the Eighth Circuit Court of Appeals held that evidence of a subsequent warning of the danger of a cattle feed supplement was admissible based on the *Ault* rationale.[46] The *Robbins* court, like the *Ault* court, drew a sharp distinction between the theories of negligence and strict liability. Construing Rule 407 literally, the court confined it to cases involving negligence and culpable conduct do not encompass strict liability.[47] The court also decided that applying the rule to strict products liability cases provides no encouragement of remedial measures.[48] In the case of mass producers, the court found that Rule 407 does not serve as an anti-deterrent because manufacturers are not likely risk mass liability by foregoing repairs, even though evidence of the repairs might be used against them in an individual lawsuit.[49]

Shortly after *Robbins*, the Eighth Circuit in *Farner v. Paccar, Inc.*[50] reaffirmed its decision to exclude products liability actions from Rule 407. The *Farner* court admitted testimony of a recall letter for a truck sent by the defendant-manufacturer to the plaintiff post-accident. The court held that "the exclusionary rule governing subsequent remedial measures is inapplicable in a strict liability case because it serves no deterrent function."[51] The *Farner* decision applies the reasoning that manufacturers will not subject themselves to mass liability because evidence of a subsequent measure might be used against them in a pre-repair liability case.[52]

1983), *cert. denied sub nom.* Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc. 466 U.S. 958 (1984); Unterburger v. Snow Co., 630 F.2d 599 (8th Cir. 1980); Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977).

The *Ault* decision has been followed by a number of other state courts as well. *See* Henderson, *supra* note 14, at 16 n.59 and accompanying text.

44. Cartun, *supra* note 42, at 1186-87.

45. 552 F.2d 788 (8th Cir. 1977).

46. *Id.*

47. *Id.* at 793.

48. *Id.*

49. *Id.*

50. 562 F.2d 518 (8th Cir. 1977).

51. *Id.* at 527.

52. *Id. See* Unterburger v. Snow Co., 630 F.2d 599 (8th Cir. 1980) (holding instruction and parts illustrating modification admissible on strict liability claim); Roth v. Black & Decker, U.S., Inc., 737 F.2d 779 (8th Cir. 1984) (allowing admission of subsequent design modifications).

In *R.W. Murray, Co. v. Shatterproof Glass Corp.*,[53] the Eighth Circuit extended its position by holding that the exclusionary rule of Rule 407 should not apply to breach of warranty actions. The *Murray* court based its decision on the similarities between breach of warranty actions and strict liability actions. The court found that a breach of warranty action is similar to a strict liability action in that the focus is on the *product* and not on the defendant's negligence or culpable conduct.[54] Therefore, by confining Rule 407 to negligence and culpable conduct, the court held that the rule is inapplicable in a breach of warranty action.[55] Most recently, in *Bizzle v. McKesson Corp.*,[56] the Eighth Circuit held that Rule 407 does not prohibit evidence of a recall in strict liability cases.[57]

2. THE TENTH CIRCUIT

In 1983, the Tenth Circuit Court of Appeals first considered the issue of whether Rule 407 is applicable to strict liability cases in *Herndon v. Seven Bar Flying Service, Inc.*[58] In *Herndon*, the widows of persons killed in an airplane crash allegedly caused by a defective switch brought a strict liability action against the manufacturer of the airplane. The court admitted into evidence a service bulletin published a year after the accident notifying owners of a needed modification to the switch.[59]

In making its determination, the court reviewed Rule 407's policy of encouraging defendants to make repairs.[60] The court held that the exclusion of evidence of subsequent conduct cannot be applied to strict liability cases even though it is appropriate for negligence cases.[61] Applying the rule "would thwart the policies that underlie strict liability

53. 758 F.2d 266 (8th Cir. 1985) (plaintiff sought to admit evidence that the manufacturer changed the manufacturing materials and methods after the plaintiff had purchased glass that accumulated moisture between the panes).

54. *See Unterburger*, 630 F.2d at 603; Farner v. Paccar, Inc., 562 F.2d 518, 528 (8th Cir. 1977); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977).

55. *Murray*, 758 F.2d at 274.

56. 961 F.2d 719 (8th Cir. 1992).

57. *Id.* at 721. The evidence of a recall for a different model than plaintiff's walking cane was excluded on Rule 403 grounds.

58. 716 F.2d 1322 (10th Cir. 1983), *cert. denied sub nom.* Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc., 466 U.S. 958 (1984).

59. *Id.* at 1324.

60. *Id.* at 1327-29.

61. Exclusion of evidence of subsequent conduct under Rule 407 is appropriate because it assesses liability based on the reasonableness of a defendant's conduct at the time of the accident. Rule 407's exclusion of evidence, however, is inappropriate in actions against defendants who are pursuing activities for which society has decided to apply strict liability. *Id.* at 1327.

by an illogical imposition of a negligence-based rule of evidence."[62] The policy rationale of Rule 407 is not applicable to strict liability actions because (1) defendants will not risk additional lawsuits by refusing to repair or make modifications because of fear that it may be used against them by someone who has already been injured; (2) insurers would not let insured manufacturers refuse to take remedial measures; (3) governmental agencies and juries deliberating punitive damages would disapprove of such behavior; and (4) there is no evidence which shows that manufacturers are even aware of the rule.[63] The court closely reviewed the Fifth Circuit's decision in *Grenada Steel Industries v. Alabama Oxygen Co.*, which applied Rule 407 to a strict liability case.[64] The Fifth Circuit relied on both the deterrence of voluntary remedial measures and jury confusion rationales to exclude evidence of subsequent remedial measures. The primary basis of its decision was that evidence of subsequent repairs has little relevance to the issue of whether a product was previously defective.[65] The *Herndon* court was unpersuaded by the Fifth Circuit's policy reasoning in *Grenada Steel*.[66] The court found that the underlying social policy rationale of Rule 407 "cannot logically be extended to strict liability defendants"[67] because the reasonableness of a defendant's conduct is not at issue and therefore, there is no justification for excluding evidence of its conduct.[68]

In *Meller v. Heil Co.*,[69] the Tenth Circuit determined that Rule 407 requires a balancing test between the social policy of encouraging repairs and the interest in the admission of relevant, probative evidence.[70] "In striking the balance, it announces a clear rule: repair evidence is not admissible to prove negligence or culpable conduct, but may be admissible for other purposes."[71] Therefore, the court did not look at the legal theory behind the action, but examined what the party offering the evidence was trying to prove.[72] The opinion states that evidence of subsequent product changes is usually irrelevant to prove that a product is unreasonably dangerous because products are modified for many reasons unrelated to safety. Therefore, the modification is not

62. *Id.*

63. *Id.* at 1327-29.

64. 695 F.2d 883 (5th Cir. 1983). *See infra* notes 144-55 and accompanying text.

65. *Herndon*, 716 F.2d at 1328.

66. "[T]he Fifth Circuit felt that it could not know with any certainty whether manufacturers relied on Rule 407 in making post-accident decisions." *Id.*

67. *Id.*

68. *Id.*

69. 745 F.2d 1297 (10th Cir. 1984).

70. *Id.*

71. *Id.*

72. *Id.*

admissible due to the relevancy concerns of Rule 401.[73]

The Tenth Circuit was asked to overrule *Herndon* in *Huffman v. Caterpillar Tractor Co.*[74] Although the court acknowledged that its decision in *Herndon* is in conflict with the majority of the other circuits,[75] it refused to overrule *Herndon* without further discussion of the issue.[76]

3. THE EIGHTH CIRCUIT'S EXCEPTION FOR FAILURE TO WARN CASES

In *DeLuryea v. Winthrop Laboratories*,[77] plaintiff brought an action for damages against the defendant-drug manufacturer for failure to warn of certain side effects caused by its product. The trial court admitted into evidence a subsequent change in the wording of a package insert.[78] The issue of application of Rule 407 to a products liability case involving a prescription drug was one of first impression before the Eighth Circuit court's.[79] The *DeLuryea* opinion provides an exception to its position that Rule 407 is inapplicable in products liability actions by holding that the rule applies in a strict liability action alleging inadequate warning for a prescription drug.[80]

Basing its decision on the Fourth Circuit opinion in *Werner v. Upjohn Co.*,[81] the court recognized the similarity between the duty to warn in failure to warn cases and the duty of reasonable care in negligence cases. Both theories focus on the *actions of the defendant.* The former focuses on the defendant's failure to warn the plaintiff of the danger, the latter focuses on the defendant's failure to take precautionary measures to prevent injury.[82] Both theories are unlike strict liability, where the plaintiff must show that the *product* is unreasonably dangerous.[83] The court held that excluding evidence of subsequent measures in

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73. *Id.* "[T]he modification itself typically does not have any tendency to make more probable the past dangerousness of the product." *Id. See supra* note 3.

74. 908 F.2d 1470 (10th Cir. 1990).

75. *Id.* at 1481 n.24.

76. *Id.* at 1481. The evidence submitted did not come within the scope of the Rule 407 because the redesign of the tractor occurred before the accident. *See infra* notes 179-217 and accompanying text.

77. 697 F.2d 222 (8th Cir. 1983).

78. *Id.* at 227.

79. *Id.* at 228.

80. *Id.* at 228-29.

81. 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). *See infra* notes 90-95 and accompanying text.

82. *Werner*, 628 F.2d at 858.

83. *DeLuryea*, 697 F.2d at 228-29. "Defendant's conduct in giving the warning is in issue. Consequently, the reasoning in *Robbins*, that strict liability does not include negligence or culpable conduct, does not apply to the circumstances of this case. Rule 407 requires exclusion of evidence of subsequent remedial changes in Sterling's warning literature." *Id.* at 229.

failure to warn cases involving unavoidably dangerous drugs is consistent with the meaning of "negligence," and, as a result, Rule 407 is applicable.[84] The court did not overrule its earlier holdings that Rule 407 does not apply to strict products liability cases but carved an exception when the circumstances of the case indicate that negligence and strict liability contain similar elements.[85]

C. *Federal Circuit Courts That Apply Rule 407 to Products Liability Cases*

Despite the position taken by the Eighth and Tenth Circuits, most of the circuits hold that evidence of subsequent remedial measures is excludable in strict products liability actions under Rule 407.[86] The majority of the circuits assumes that the application of the rule affects behavior by encouraging repairs.[87] Thus, these courts focus on the social policy rationale behind the rule in making their decisions and find the lack of any express mention by Congress to the contrary to mean that Congress intended to encompass strict products liability actions within the terms negligence and culpable conduct.[88] These circuits are also concerned that admitting evidence of subsequent remedial measures

84. *Id.*

85. Brumby, *supra* note 29, at 1410. The Eighth Circuit affirmed the applicability of Rule 407 in failure to warn cases in Kehm v. Procter & Gamble, Mfg. Co., Kehm, 724 F.2d 613, 621 (8th Cir. 1983) (holding evidence of withdrawal of product from market inadmissible under Rule 407, because "duty-to-warn cases raise issues of reasonableness and foreseeability closely akin to those present in negligence cases") and Donahue v. Phillips Petroleum Co., 866 F.2d 1008, 1013 (8th Cir. 1989) (affirming the decision in *DeLuryea* that Rule 407 should apply in special strict liability failure to warn cases; evidence admitted on other grounds). In both *Kehm* and *Donahue*, the Eighth Circuit indicates that its previous holdings that Rule 407 does not include strict liability are still good law, and these cases are only the exception. *Kehm*, 724 F.2d at 621 ("But Rule 407 allows the admission of evidence of subsequent remedial measures when offered for any purpose other than to show negligence or culpable conduct," construing culpable conduct narrowly); *Donahue*, 866 F.2d at 1013 ("It has long been the law of this Circuit that Rule 407 does not preclude the introduction of evidence of subsequent remedial measures in a strict liability case.").

86. *See, e.g.*, Prentiss & Carlisle Co. v. Koehring-Waterous, 972 F.2d 6 (1st Cir. 1992); Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992); Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991); Petree v. Victor Fluid Power, Inc. II, 887 F.2d 34 (3d Cir. 1989); Mills v. Beech Aircraft Corp., 886 F.2d 758 (5th Cir. 1989); Hardy v. Chemetron Corp., 870 F.2d 1007 (5th Cir. 1989); Petree v. Victor Fluid Power, Inc. I, 831 F.2d 1191 (3d Cir. 1987); Gauthier v. AMF, Inc., 788 F.2d 634 (9th Cir.), *amended*, 805 F.2d 337 (9th Cir. 1986); Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463 (7th Cir. 1984); Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983); Josephs v. Harris Corp., 677 F.2d 985 (3d Cir. 1982); Hall v. American S.S. Co., 688 F.2d 1062 (6th Cir. 1982); Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); Longenecker v. General Motors Corp., 594 F.2d 1283 (9th Cir. 1979); Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

87. Cartun, *supra* note 42, at 1186-87.

88. *Id.*

under Rule 407 will confuse juries.[89]

The Fourth Circuit in *Werner v. Upjohn Co.*[90] addressed the issue of whether Rule 407 excluded evidence that the defendant, a drug manufacturer, had revised its warning that one of its products had dangerous side effects.[91] The court held that although Rule 407 does not explicitly mention strict liability, its omission does not mean that strict liability does not come within the scope of the rule.[92] The court focused on the underlying policy rationales behind the common law rule and Rule 407 to determine how to treat the evidence associated with a strict liability action.[93]

The court conceded that under a negligence theory the focus is on the defendant, while under a strict liability theory the focus is on the product.[94] But the court emphasized that regardless of the theory used to admit the evidence, the policy of encouraging remedial measures remains the same for both and should not produce a different result.[95] Under either theory, Rule 407 will encourage a manufacturer to take subsequent safety measures because he knows that such measures will not be used as evidence against him in a lawsuit. The court concluded on policy grounds that Rule 407 should not be applied differently in strict liability actions than in negligence actions and excluded evidence of the revised warning.[96] The court supported its conclusion by noting that the distinction between strict liability and negligence diminishes in failure to warn cases.[97] The issue under either theory is essentially the

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89. *See infra* notes 100, 103, 119 & 152 and accompanying text. This is one of the common law concerns underlying the rule. *See supra* note 4 and accompanying text.

90. 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

91. *Id.* at 851.

92. *Id.* at 856. The *Werner* court found the rule to be merely enacting the common law rule. *Id.*

93. *Id.*

> The rule simply does not speak to the question of whether the evidence should come in to prove strict liability. To resolve this question we must examine the policy behind Rule 407 and the common law basis for the rule, and then determine if admitting the evidence as evidence of strict liability is more akin to the use of the rule to prove negligence, or if it is closer to one of the recognized exceptions to the rule. *That is to say, would the policy behind the common law rule be served or subverted if the evidence of subsequent precautionary measures was admitted to prove strict liability.*

Id. (emphasis added).

94. *Id.* at 857. However, the court further noted that "[t]he reasoning behind this asserted distinction we believe to be hypertechnical, for the suit is against the manufacturer, not against the product." *Id.*

95. *Id.*

96. *Id.* Furthermore, the *Werner* court feared that admittance of subsequent remedial measures in strict liability cases might undermine Rule 407's application in negligence cases. *Id.* at 857-58.

97. *Id.* at 858.

same: was the warning adequate?

In *Cann v. Ford Motor Co.*,[98] the Second Circuit closely followed the reasoning used by the Fourth Circuit in *Werner*. *Cann*, however, is not a failure to warn case.[99] In *Cann*, the plaintiff tried to introduce proof that subsequent to his accident the defendant/manufacturer modified the design of its transmission and modified its owner's manual to specifically instruct drivers to turn off the ignition before leaving the car.[100] The court held that Rule 407 excludes evidence of subsequent remedial measures in products liability actions.[101]

The Second Circuit maintained its position of applying Rule 407 to strict products liability actions in *Fish v. Georgia-Pacific Corp.*[102] The court found error in the trial court's decision to permit the plaintiffs to read to the jury subsequent warnings issued by the defendant to its customers about formaldehyde emissions from particleboard.[103] The *Fish* opinion strongly suggest that jury confusion resulting from the inclusion into evidence of the warning was a major factor in its decision.[104] Recently, the Second Circuit in *McPadden v. Armstrong World Industries, Inc.*[105] reaffirmed the *Cann* and *Fish* holdings that Rule 407 applies in all products liability actions, whether brought under a negligence or strict liability theory.

In *Hall v. American Steamship Co.*,[106] the Sixth Circuit acknowledged the split among the circuits over the issue of whether Rule 407 applies to strict liability actions[107] but accepted the social policy reasoning of the Fourth Circuit.[108] The court held that proof of a change in

98. 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982).

99. Appellants point out that a negligence action places in issue whether the defendant's conduct was reasonable while a strict liability action involves whether the product was defective; they note that the jury focuses on the *defendant* in a negligence action, but solely upon the *product* in a strict liability action. However, the defendant must pay the judgment in both situations, regardless of where the jury's attention focused when they found against him. Since the policy underlying Rule 407 not to discourage persons from taking remedial measures is relevant to *defendants* sued under either theory, we do not see the significance of the distinction.

Id. at 60. *See supra* notes 90-95 and accompanying text.

100. *Cann*, 658 F.2d at 59. In this case, unlike *Werner*, the court expressed its concern with plaintiffs who bring actions in both negligence and strict liability. *Id.* at 60. The court appears to fear that juries will confuse the two theories, undermining Rule 407 in negligence cases. *Id.*

101. *Id.*

102. 779 F.2d 836, 839 (2d Cir. 1985).

103. *Id.*

104. *Id.* at 840.

105. 995 F.2d 343 (2nd Cir. 1993).

106. 688 F.2d 1062 (6th Cir. 1982).

107. *Id.* at 1066.

108. *Id.* at 1067. *See supra* notes 90-100 and accompanying text.

policy by the defendant/shipowners to no longer wash down decks in stormy weather was not admissible to show that the plaintiff was working under unseaworthy conditions at the time of his injury.[109] The Sixth Circuit arrived at this decision by equating strict liability with culpable conduct. The court stated that the unseaworthy condition, "although a species of strict liability, would be 'culpable conduct' within the meaning of the Rule for it is such conduct that would impose liability upon American Steamship under general maritime law."[110] The court was then able to apply Rule 407 under the *Werner* rationale that the policy of encouraging subsequent repairs applies regardless of the theory under which the action is brought.[111]

In a strict products liability action by a plaintiff/truck driver against a truck manufacturer to recover for injuries allegedly caused by a design defect in the cab of the truck, the Seventh Circuit affirmed the lower court's exclusion of evidence of a subsequent design change under Rule 407.[112] In *Oberst v. International Harvester Co.*,[113] the court held that Rule 407 applies to strict liability cases and that evidence of subsequent repairs may only be admitted if one of the exceptions stated in Rule 407 is met.[114] It is unclear whether the Seventh Circuit based its decision on Rule 407 or comparable Illinois law.[115] Although the *Oberst* court did not explicitly adopt the policy rationale relied upon by the courts in *Werner*, *Cann*, and *Hall*, one could infer that the court implicitly relied upon this policy rationale because of the dissent's attack on the policy of not discouraging subsequent repairs.[116]

Four years later, the Seventh Circuit affirmed the *Oberst* holding in *Flaminio v. Honda Motor Co., Ltd.*[117] In *Flaminio*, the plaintiffs attempted to offer into evidence two blueprints of subsequent design changes which were allegedly made to repair a "wobble" in the defend-

109. *Hall*, 688 F.2d at 1066. The court defined "culpable conduct" as including any conduct "that would impose liability" upon the defendant. *Id.* *See* Cartun, *supra* note 42, at 1183.

110. *Hall*, 688 F.2d at 1066. *See* Brumby, *supra* note 29, at 1403.

111. *See supra* text accompanying notes 95-96.

112. Oberst v. International Harvester Co., 640 F.2d 863 (7th Cir. 1980).

113. *Id.*

114. *Id.* at 866. *See generally infra* notes 212-50 and accompanying text.

115. The court makes substantial reference to Illinois case law in its opinion. *Oberst*, 640 F.2d at 866 n.5. It should be noted that in an extensive dissent, Judge Swygert makes a comprehensive survey of Rule 407 and Illinois law which leads to confusion as to which law was applied. *Id.* at 869-71 (Swygert, J., dissenting).

116. Brumby, *supra* note 29, at 1403. *See Oberst*, 640 F.2d at 869-71 (Swygert, J., dissenting). Judge Swygert in his dissent accepts the policy rationale of *Ault*, finding Rule 407 inapplicable to strict liability cases. *Id.* at 870. For a discussion of the *Ault* rationale see *supra* notes 30-41 and accompanying text.

117. 733 F.2d 463 (7th Cir. 1984).

ant's motorcycle.[118] Acknowledging that the *Oberst* court avoided the Rule 407 issue, the *Flaminio* court examined the conflict among the circuits and held that Rule 407 does apply in strict liability cases.[119] *Flaminio* echoed the concern expressed in *Cann* regarding jury confusion over a case submitted on both negligence and strict liability grounds and found that Rule 407 is applicable to strict liability cases.[120] The court based its decision on the social policy reasoning underlying Rule 407 that society should encourage repairs by manufacturers.[121] The Seventh Circuit found no merit in the argument that the distinction between negligence and strict liability justifies a refusal to apply the rule.[122] The court held that the policy behind Rule 407 was applicable and found no error in the trial court's decision to exclude the evidence.[123]

Although the First and Third Circuits have consistently held that Rule 407 is applicable to strict products liability cases,[124] there has been little discussion of the issue by these courts. The First Circuit initially accepted the application of Rule 407 to strict liability cases by implication in *Roy v. Star Chopper Co.*,[125] where it applied the rule without discussion.[126] It was not until *Raymond v. Raymond Corp.*[127] and *Prentiss & Carlisle v. Koehring-Waterous Division of Timberjack, Inc.*[128] that the First Circuit explicitly applied Rule 407 and held itself in accord with the majority of the other circuits.[129]

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118. *Id.* at 465-66.

119. *Id.* at 468-69.

120. *Id.* at 469. *See supra* note 100.

121. *Flaminio*, 733 F.2d at 469. The court reasons that one must assume that a manufacturer will weigh the possible use of the subsequent repairs evidence if Rule 407 is inapplicable against the lesser probability of another accident without the repairs. *Id.* at 469. This rationale is extremely weak. *See infra* part V.

122. *Id.* at 469-70. *See supra* note 94.

123. *Flaminio*, 733 F.2d at 470. Almost a decade after the *Flaminio* decision, the Seventh Circuit has maintained its position that "culpable conduct" includes the creation of a product defect and therefore, Rule 407 is applicable to products liability actions. Traylor v. Husqvarna Motor, 988 F.2d 729, 733 (7th Cir. 1993).

124. *See* Prentiss & Carlisle Co. v. Koehring-Waterous, 972 F.2d 6 (1st Cir. 1992); Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992); *see also* Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991); Petree v. Victor Fluid Power, Inc. II, 887 F.2d 34 (3d Cir. 1989); Petree v. Victor Fluid Power, Inc. I, 831 F.2d 1191 (3d Cir. 1987); Josephs v. Harris Corp., 677 F.2d 985 (3d Cir. 1982); Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

125. 584 F.2d 1124 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

126. *Id.* at 1134.

127. 938 F.2d 1518 (1st Cir. 1991).

128. 972 F.2d 6 (1st Cir. 1992).

129. *Id.* at 10; *Raymond*, 938 F.2d at 1522. It is unclear whether that the First Circuit even impliedly accepts the social policy reasoning used in other circuits because it makes no mention of any of the reasoning used behind *any* of the majority or minority decisions in coming to its

In *Josephs v. Harris Corp.*,[130] the Third Circuit held without further explanation that Rule 407 is applicable to products liability actions based on section 402A of the Restatement of Torts.[131] The *Josephs* holding was reaffirmed in the failure to warn case of *Petree v. Victor Fluid Power, Inc. I.*[132] It was not until the recent case of *Kelly v. Crown Equipment Co.*[133] that the Third Circuit gave some explanation for its application of Rule 407 to products liability actions. In *Kelly*, the plaintiffs contended that Rule 407 does not apply to design defect cases because, unlike warning cases such as *Petree I*, negligence theories play no part in the determination of a manufacturer's liability for a product that was defective at the time it was sold.[134] In rejecting this argument, the court considered whether the policies and goals of Rule 407 are furthered by applying the rule to design defect cases as well as to failure to warn cases.[135] The court held that "[e]xclusion of subsequent remedial evidence, regardless of the theory of the case, advances the policy behind Rule 407 of promoting safety" and cite to *Cann* and *Werner* for support.[136] Thus, the court extended its reasoning for not differentiating between negligence and strict liability actions to failure to warn and design defect actions.[137]

The Ninth Circuit in *Gauthier v. AMF, Inc.*[138] addressed the issue of whether Rule 407 is applicable to strict products liability actions. *Gauthier* was a defective design case in which the plaintiff attempted to offer into evidence subsequent design changes made by the defendant/manufacturer of a snow thrower.[139] The court accepted the reasoning of *Flaminio* and found "no practical difference between strict liability and negligence in defective design cases and the public policy rationale to encourage remedial measures."[140] The court noted that large manufacturers, who are usually the defendants in products liability actions, will

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conclusion. In discussions of exceptions and the scope of the rule, the opinions follow a literal interpretation of the rule or case law without any mention of policy. In *Raymond*, the court does mention the twofold purpose of Rule 407 but does not discuss its application to the case. *See Raymond*, 972 F.2d at 10.

130. 677 F.2d 985 (3d Cir. 1982).

131. *Id.* at 991.

132. 831 F.2d 1191, 1198 (3d Cir. 1987).

133. 970 F.2d 1273 (3d Cir. 1992).

134. *Id.* at 1276. For a discussion of the *DeLuryea* rationale, see *supra* text accompanying notes 81-84.

135. *Kelly*, 970 F.2d at 1276.

136. *Id.*

137. *Id.*

138. 788 F.2d 634 (9th Cir.), *amended* 805 F.2d 337 (9th Cir. 1986). The Ninth Circuit had reserved the issue of Rule 407's applicability to strict liability cases in Longenecker v. General Motors Corp., 594 F.2d 1283, 1286 (9th Cir. 1979).

139. *Gauthier*, 788 F.2d at 636.

140. *Id.* at 637.

most likely be aware of Rule 407.[141] Therefore, the application of the rule would affect their decisions regarding the manufacturing of a product.[142] Thus, the Ninth Circuit found the policy rationale of encouraging repairs persuasive and adopted the majority position.[143]

Finally, the Fifth Circuit took a different approach from the other seven circuits which exclude evidence of subsequent remedial measures in strict products liability actions under Rule 407.[144] The issue was initially addressed in *Grenada Steel Industries v. Alabama Oxygen Co.*,[145] where the plaintiff brought a strict liability action against the manufacturer of a tank valve that caused a fire and explosion at the plaintiff's plant.[146] Grenada Steel wanted to introduce into evidence subsequent design changes of the valve.[147] In affirming the trial court's decision to exclude the evidence under Rule 407,[148] the Fifth Circuit based its decision on relevancy concerns, not on policy concerns of encouraging subsequent repairs as the other circuits had.[149] In doing so, the Fifth Circuit underscored the lack of empirical evidence to support the traditional policy rationale of the other circuits.[150] The court dismissed academic hypotheses as to why manufacturers take subsequent remedial measures and reasoned from a legal standpoint that such changes are made for a number of reasons.[151] The Fifth Circuit held that a court should consider the probative value of the evidence and question whether the product or its design was defective at the time the product was sold.[152]

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141. This assertion is questionable, and there is no empirical data supporting it.

142. *Gauthier*, 788 F.2d at 637.

143. *Id.*

144. *See supra* notes 90-143 and accompanying text.

145. 695 F.2d 883 (5th Cir. 1983).

146. *Id.* at 885.

147. *Id.*

148. *Id.* at 888-89.

149. *Id.* at 887.

150. The court states:

> Voluntary change to improve a product and reduce the possible hazard to a user should be encouraged. While there is no evidence concerning whether admission of evidence of change would deter such action by manufacturers, the assumption in the rule that it might have a deterrent effect is not demonstrably inapplicable to manufacturers upon whom strict liability is imposed. But our decision does not rest only on theses about the influence of possible tort liability on human conduct. It rests more firmly on the proposition that evidence of the subsequent repair or change has little relevance to whether the product in question was defective at some previous time.

Id. *See* Brumby, *supra* note 29, at 1412.

151. *Grenada*, 695 F.2d at 877-88.

152. *Id.* at 888. In Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322 (10th Cir. 1983), *cert. denied sub nom.* Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc., 466 U.S. 958 (1984), the Tenth Circuit rejected this reasoning and came to an opposite conclusion. *See supra* notes 65-67 and accompanying text.

"Thus, instead of basing its decision on policy rationale, the court based its decision on the confusion which could result if the jury were given evidence of events taking place after the product was alleged defective."[153] The court further suggested that due to the focus on the time when the product was sold, Rule 407 should be interpreted as a balancing test between the probative value of the evidence and the possibility of jury confusion under Rule 403.[154] Although uncertain of the traditional policy reasoning, the Fifth Circuit decided to take a conservative approach and apply Rule 407 in strict liability actions.[155]

IV. How Is Rule 407 Applied to Products Liability Actions?

Once a court has addressed the issue of whether Rule 407 applies to strict products liability actions, it must then examine the scope of the rule and the application of exceptions. This often results in inconsistent conclusions among the circuits. Regardless of a court's decision on the applicability of the rule to strict products liability actions, the actual application of the rule is still dependent on its scope and exceptions, which are also susceptible to language interpretation and policy considerations.

A. *Third Parties and Superior Authorities*

Although there is little conflict over "whose" remedial measures are excluded under Rule 407, courts have narrowly construed the scope of parties that come within the ambit of the rule. Subsequent remedial measures taken by non-party persons/businesses are consistently held not to fall within the scope of Rule 407; this is in accord with the policy of encouraging subsequent remedial measures emphasized by the drafters of the rule and the courts.[156] The underlying reason is that the third party taking the remedial measures is not influenced in its actions by

153. Cartun, *supra* note 42, at 1185 (footnote omitted).

154. *Id. See* Brumby, *supra* note 29, at 1400. Federal Rule of Evidence 403 states: "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." Fed. R. Evid. 403.

155. Brumby, *supra* note 29, at 1412. The decision in *Grenada Steel* was later reaffirmed in Hardy v. Chemetron Corp., 870 F.2d 1007 (5th Cir. 1989) and Mills v. Beech Aircraft Corp., Inc., 866 F.2d 758 (5th Cir. 1989).

156. *See* Raymond v. Raymond Corp., 938 F.2d 1518, 1524 (1st Cir. 1991) (holding that evidence of subsequent repairs made by an employer to a sideloader are not excludable under Rule 407 in an action against the manufacturer); Koonce v. Quaker Safety Prods. & Mfg., 798 F.2d 700, 719-20 (5th Cir. 1986) (holding memo made by employer describing subsequent remedial measures after fatal injury to employee should not have been excluded where the employer is not a party to the suit); Dixon v. International Harvester Co., 754 F.2d 573, 583 (5th Cir. 1985) (holding evidence of subsequent repairs taken by non-defendant employer was not barred from admission under Rule 407); Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 889 (5th

having evidence admitted at trial. As a result, "the social policy which forms the basis of Rule 407 is not furthered."[157] Because it is outside the scope of Rule 407, the admissibility of evidence of subsequent remedial measures taken by third parties is governed by the general relevancy requirements of Rules 401, 402, and 403 and not Rule 407.[158]

Although some conflict exists among the circuits, admission of evidence of a subsequent repair required by an authority superior to the defendant (usually a regulatory authority) is held to lie outside the purpose of Rule 407.[159] "Where a superior authority requires a tortfeasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force — a tortfeasor cannot be discouraged from voluntarily making repairs if he must make the repairs in any

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Cir. 1983) (holding that evidence of subsequent design changes made by another manufacturer who was not a party did not fall within the realm of Rule 407).

157. *Raymond*, 938 F.2d at 1524 (footnote omitted). *See* Farner v. Paccar, Inc., 562 F.2d 518, 528 n.20 (8th Cir. 1977). In *Grenada Steel*, the Fifth Circuit recognized that "neither the text of Rule 407 nor the policy underlying it excludes evidence of subsequent repairs made by someone other than the defendant." 695 F.2d at 889.

Arguably, if the third party is sufficiently interested in the outcome of the litigation, admission of evidence of measures taken by the third party may deter him from taking such actions. Thus, the social policy rationale is being served by excluding evidence of measures taken by third parties. WRIGHT & GRAHAM, *supra* note 2, § 5284.

158. WEINSTEIN & BERGER, *supra* note 10, ¶ 407[01] at 407-12. *See Raymond*, 938 F.2d at 1524-25; *Koonce*, 798 F.2d at 720; *Dixon*, 754 F.2d at 584; *Grenada Steel*, 695 F.2d at 889; *see also supra* notes 3 & 154.

159. *See, e.g.*, O'Dell v. Hercules, Inc., 904 F.2d 1194, 1204 (8th Cir. 1990); Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1331 (10th Cir. 1983), *cert. denied sub nom.*, Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc., 466 U.S. 958 (1984); Rozier v. Ford Motor Co., 573 F.2d 1332, 1343 (5th Cir. 1978). *But cf.* Werner v. Upjohn Co., 628 F.2d 848, 859 (4th 1980), *cert. denied*, 449 U.S. 1080 (1981)(rejecting plaintiff's argument to admit evidence of a subsequent change in a warning for a prescription drug on the basis that such change was required by the FDA).

The *Werner* court's reasoning appears faulty because of its refusal to accept the superior authority argument as a bar to Rule 407. The court makes two arguments. First, the court wrongly equates a superior authority with a third party. The court finds that any change by or required by a third party removes the relevance of the evidence further from the central issue, which is the adequacy of the warning at the time the product was marketed. *Werner*, 628 F.2d at 859. The court essentially decides the issue on grounds closer to Rule 403 than to Rule 407 and does not rebut the social policy reasoning behind the superior authority argument. The second argument addresses more directly the contention that the policy of encouraging repairs is not furthered by remedial measures required by a superior authority. The court finds that there is a dual responsibility for preparing warnings for prescription drugs. *Id.* The FDA can require that a warning be changed, but it must also rely on voluntary compliance by the manufacturer in preparing the warning. *Id.* This argument assumes that not only are manufacturers cold-blooded in not making repairs, but they also need to be encouraged *not* to violate government statutes and regulations. But the purpose of government regulations is to make manufacturers comply.

For a more detailed discussion of this issue see E. Lee Reichert, Note, *The "Superior Authority Exception" to Federal Rule of Evidence 407: The "Remedial Measure" Required to Clarify a Confused State of Evidence*, 3 U. ILL. L. REV. 843 (1991).

case."[160] A distinction is then drawn between voluntary and involuntary repairs.[161] This makes sense in the context of products liability litigation. Government regulations and regulatory authorities are established to protect individuals from manufacturers, which are usually more powerful than individuals and have the potential to abuse that power. The purpose of protecting the individual would be defeated if Rule 407 barred admission at trial of evidence of subsequent remedial measures that a superior authority required the manufacturer/defendant to take, because then only the manufacturer and not the individual benefits from the regulation.

B. *Timing: What is a Subsequent "Event"?*

Rule 407 uses the term "event," but fails to specify whether "event" is the accident or injury at issue or whether another event may be used to determine the applicability of the rule.[162] In products liability cases confusion exists over what the "relevant" time is in determining whether evidence of remedial measures comes within the terms of Rule 407. Is it: (1) the date of the *manufacture* of the product;[163] (2) the date of the *sale* of the product;[164] or (3) the date of the *accident or injury* in question?[165] A close examination of this issue discloses a conflict between the language of the rule and the social policy underlying it,

160. *Herndon*, 716 F.2d at 1331; *see also Rozier*, 573 F.2d at 1343 (trend cost estimate is admissible under Rule 407 because it was not prepared out of a sense of social responsibility but because a superior authority required it). Arguably, under these circumstances manufacturers might be tempted to breach their statutory duty. *See* WRIGHT & GRAHAM, *supra* note 2, § 5284 n.62. But it seems unlikely manufacturers would risk government sanctions.

161. *O'Dell*, 904 F.2d at 1204. This same distinction also supports barring third party actions from the exclusionary protection of Rule 407. *Id.*

162. WRIGHT & GRAHAM, *supra* note 2, § 5283.

163. *See* Fish v. Georgia-Pacific, 779 F.2d 836, 838-40 (2d Cir. 1985); *see infra* note 170.

164. *See* Kelly v. Crown Equip. Co., 970 F.2d 1273, 1277 (3d Cir. 1992); Clarksville-Montgomery County Sch. Sys. v. U.S. Gypsum Co., 925 F.2d 993, 1001 n.17 (6th Cir. 1991) (stating in dicta that *post-sale* documents addressing attempts to reformulate products were properly excluded under Rule 407); Petree v. Victor Fluid Power, Inc. I, 831 F.2d 1191, 1197 (3d Cir. 1987) *infra* notes 172-74 and accompanying text.

165. *See* Traylor v. Husqvarna Motor, 988 F.2d 729, 733 (7th Cir. 1993) (holding "event" in an accident case to be the accident); Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991) (holding design modifications of a later model sideloader which were made pre-manufacture and pre-accident, did not constitute "subsequent remedial measures" because "event" refers to the accident); Roberts v. Harnischfeger Corp., 901 F.2d 42, 44 n.1 (5th Cir. 1989) (stating in dicta that "event" is the date of the accident and, therefore, testimony of a decision and implementation of a remedial measure which was pre-accident is not excludable under Rule 407); Roth v. Black & Decker, U.S., Inc., 737 F.2d 779, 782 n.2 (8th Cir. 1984) (holding evidence of subsequent design changes inadmissible where an electric saw was manufactured in 1975, the accident occurred in 1980, and the modification was designed in 1974 but not incorporated until 1976); Arceneaux v. Texaco, Inc., 623 F.2d 924, 928 (5th Cir. 1980), *cert. denied*, 450 U.S. 928 (1981) (holding evidence of pre-accident design changes were not subsequent to the "event" and were improperly excluded under 407); Rozier v. Ford Motor Co., 573 F.2d 1332, 1343 (5th Cir.

which suggests the inapplicability of the rule to products liability cases. The rule provides that evidence of subsequent measures is not admissible, "[w]hen, after an event, measures are taken which, if taken previously, *would have made the event less likely to occur.*"[166] The plain language of the rule suggests that "event" should be interpreted as the accident or injury.[167] It does not make sense in the context of "sale" or "manufacture" that subsequent remedial measures would make those events "less likely to occur."

If the primary purpose of the rule is to encourage safety measures by manufacturers, then the rule should be drafted to encourage this policy before injury occurs. Thus, "event" should be interpreted as either the manufacture or sale of the product because these are the moments at which the product usually leaves the control of the manufacturer. As the rule is written, manufacturers theoretically should be discouraged from taking any added safety measures prior to injury ("event") because these measures can be used as evidence against them at trial under Rule 407.

According to this definition of "event," the rule serves no purpose in products liability actions. In such cases, the injury or harm often does not occur until the plaintiff has used the product for a long period of time. There may be a cumulative effect to the injury (as with radiation or prescription drugs), and by the time the injury manifests itself the defects in the product already have been remedied. In these situations, the language of the rule would admit evidence of product repairs if "event" is the time of the injury. But, the social policy rationale of encouraging repairs is not served in the case of manufacturers of products causing injury or harm that may not surface for years.[168] A change in the product can be made years after the accident, in which case the changes are made for reasons completely unrelated to the plaintiff's injury. In this instance, the evidence would still be excluded notwithstanding the fact that the rule had no impact upon the defendant's behavior.[169] If an injury does have a cumulative effect, when during the period of continuous use of the product will the courts find the "event" to have occurred?[170] The exclusionary rule should not apply when a

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1978) (finding that the "event" was a 1973 automobile accident and therefore, a 1971 trend cost estimate was not within the scope of Rule 407).

166. FED. R. EVID. 407 (emphasis added).

167. Huffman v. Caterpillar Tractor Co., 908 F.2d 1470, 1482 (10th Cir. 1990). Furthermore, the advisory committee's note to Rule 407 uses the term "accident." FED. R. EVID. 407 advisory committee's note.

168. *See* WRIGHT & GRAHAM, *supra* note 2, § 5283.

169. Brumby, *supra* note 29, at 1416.

170. *See* Fish v. Georgia-Pacific, 779 F.2d 836, 838-40 (2d Cir. 1985). *Fish* is a failure to warn case in which the plaintiffs used the defendant's particleboard in the construction of their home. The particleboard was manufactured in 1977 and purchased in 1977 and 1978. The

defectively-designed product was manufactured either before or after the design was modified, but the unmodified product was delivered after the change in design.[171] In this instance, the product is still under the ultimate control of the manufacturer, and he should still be encouraged to take safety measures.

The case law recognizes the difficulties in the terminology and social policy of Rule 407 separately, but has yet to reconcile the two in a products liability action. In *Petree v. Victor Fluid Power, Inc. I*,[172] the Third Circuit held that evidence of warning labels affixed to hydraulic presses post-sale but pre-accident was a subsequent remedial measure under Rule 407.[173] The Third Circuit did not address the plain language of the rule. Instead, the court focused on the rule's policies. The court found "event" in a products liability action to be the time of sale. Therefore, the policy of encouraging repairs was consistent with the exclusion of evidence of safety measures made both *before* someone is injured and after someone is injured.[174]

In *Traylor v. Husqvarna Motor*,[175] the Seventh Circuit held that evidence that the defendant had conducted post-sale rather than pre-accident tests on the model of maul at issue should not be excluded under Rule 407.[176] The court justified this decision on policy grounds. The court found that subsequent remedial measures, when used as evidence of culpable conduct, undermine the underlying social policy rationale of encouraging repairs.[177] But courts must consider the policy of permitting the finder of fact to review probative evidence. This latter consideration weighs more heavily when the manufacturer takes remedial measures *prior to* the accident. A prudent manufacturer can then limit his liability by recalling the defective product. This made the *Traylor*

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plaintiffs lived in the home from September 1978 until March 1980, and during that time they developed medical problems. Defendant issued warnings of formaldehyde emissions from the particleboard in 1983. Although the warning was still subsequent to the period during which the plaintiffs' medical problems developed, the court referred to the relevant "event" as the time of *manufacture* in 1977. *Id.*

171. WEINSTEIN & BERGER, *supra* note 10, ¶ 407[01] at 407-10. *Contra* Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991) (holding pre-manufacture, pre-sale, and pre-accident design modifications for a sideloader did not constitute "subsequent" remedial measures); Roth v. Black & Decker, U.S., Inc., 737 F.2d 779, 782 n.2 (8th Cir. 1984) (holding evidence of subsequent design changes inadmissible where an electric saw was manufactured in 1975, the accident occurred in 1980, and the modification was designed in 1974, but not incorporated until 1976).

172. 831 F.2d 1191 (3d Cir. 1987).

173. *Id.* at 1198.

174. *Id.* For a further discussion of the *Petree I* decision, see Kelly v. Crown Equip. Co., 970 F.2d 1273, 1276-77 (3d Cir. 1992).

175. 988 F.2d 729 (7th Cir. 1993).

176. *Id.* at 733. The "event" is the time of the accident.

177. *Id.*

court doubt that a manufacturer is deterred from taking remedial measures *before an accident occurs* by the fear that such measures can be admitted into evidence against him if such an accident does occur. The court makes the erroneous assumption that the sole reason a manufacturer takes remedial measures is to limit future liability. However, the entire basis of Rule 407 and its policy of encouraging repairs is that manufacturers will not initiate repairs on their own.

On the timing issue, most products liability cases focus on the plain language of Rule 407. Many decisions accept the exact language of the rule with respect to timing without discussing the rule's social policy rationale.[178] In interpreting the language and history of the rule, the Tenth Circuit in *Huffman v. Caterpillar Tractor Co.*[179] maintained that the term "event" refers to the time of the accident or injury to the plaintiff.[180] Following a chronological analysis of the facts, the court held that the pre-accident design change to the defendant's tractor was not a "subsequent measure" under the terms of Rule 407 and was therefore properly admitted into evidence.[181] In *Chase v. General Motors Corp.*,[182] the Fourth Circuit defined "event" as the date of the automobile accident at issue. Therefore, evidence that the automobile manufacturer had recalled its product one year *after the accident* was excluded.[183] The court excluded evidence of a design modification made subsequent to the manufacture and purchase of the car and *prior to the accident* but later implemented by the recall.[184]

In *Cates v. Sears, Roebuck & Co.*,[185] the Fifth Circuit recognized the conflict between the relevant time in products liability cases and the language of Rule 407 but made no attempt to reconcile the two different events.[186] The court stated that the focus of a products liability case is on whether the product or its design was defective at the time of sale;[187] the court nevertheless contradicted itself by finding the relevant time

178. *See* Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991); Roberts v. Harnischfeger Corp., 901 F.2d 42, 44 n.1 (5th Cir. 1989); Roth v. Black & Decker, U.S., Inc., 737 F.2d 779, 782 n.2 (8th Cir. 1984); Arceneaux v. Texaco, Inc., 623 F.2d 924, 928 (5th Cir. 1980), *cert. denied*, 450 U.S. 928 (1981); Rozier v. Ford Motor Co., 573 F.2d 1332, 1343 (5th Cir. 1978).

179. 908 F.2d 1470 (10th Cir. 1990).

180. *Id.* at 1481.

181. *Id.* at 1482-83.

182. 856 F.2d 17 (4th Cir. 1988).

183. *Id.* at 21.

184. *Id.* at 22.

185. 928 F.2d 679 (5th Cir. 1991).

186. *Id.* at 686.

187. *Id.* The court bases its reasoning primarily on the *Grenada* opinion. *See supra* text accompanying note 154. It is noteworthy that the *Grenada* court's reasoning was founded on relevancy, rather than social policy grounds. *See supra* text accompanying notes 149-54.

under Rule 407 to be the date of the accident.[188] Pursuant to Rule 407, the court held that a manufacturer's post-sale, pre-accident warning placard and revised manual were admissible.[189] In *Kelly v. Crown Equipment Co.*,[190] the Third Circuit affirmed its *Petree I* holding by approving the exclusion of pre-accident remedial measures.[191] The *Kelly* court noted that the *Petree I* opinion did not confront the plain language of Rule 407 in its opinion, but only the rule's social policy rationale. But the *Kelly* court also did not directly address the language of the rule.[192]

C. *Tests and Reports and Recall Letters*

1. TESTS AND REPORTS

Courts have held that post-event tests and reports fall outside the scope of Rule 407 and thus are admissible as evidence.[193] The basis for the admission of tests and reports is that they are prepared only for analysis of the situation and therefore do not constitute "remedial" measures under the rule.[194] According to the rule's plain language, an action is a remedial measure if it would have made the accident or injury less likely to occur had it been taken previously.[195] A post-event test or report will not make an event less likely to occur, and therefore it is neither a remedial measure nor excludable under Rule 407.[196] "Remedial measures are those actions taken to remedy any flaws or failures . . . ."[197] Thus, changes may be implemented as a result of tests or reports, but the tests or reports themselves are excludable as remedial measures.[198]

The plain language of Rule 407 conflicts with its underlying policy

188. *Cates*, 928 F.2d at 686.

189. *Id.*

190. 970 F.2d 1273 (3d Cir. 1992).

191. *Id.* at 1277. *See supra* text accompanying note 173.

192. *Kelly*, 970 F.2d at 1277.

193. *Cf.* Rozier v. Ford Motor Co., 573 F.2d 1332, 1343 (5th Cir. 1978) (holding that a pre-accident report was not, in itself, a remedial measure; the document was held admissible under Rule 407 on timing grounds).

194. McFarlane v. Caterpillar, Inc., 974 F.2d 176, 181-82 (D.C. Cir. 1992); Prentiss & Carlisle v. Koehring-Waterous, 972 F.2d 6, 10 (1st Cir. 1992); Dow Chemical Corp. v. Weevil-Cide Co., 897 F.2d 481, 487 (10th Cir. 1990); Benitez-Allende v. Alcan Aluminio do Brasil, S.A., 857 F.2d 26, 33 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989); Rocky Mountain Helicopters v. Bell Helicopters, 805 F.2d 907 (10th Cir. 1986); WEINSTEIN & BERGER, *supra* note 10, ¶ 407[01] at 407-12 to 407-13.

195. FED. R. EVID. 407.

196. *Prentiss*, 972 F.2d at 10; *Dow Chemical*, 897 F.2d at 487; *Benitez-Allende*, 857 F.2d at 33; *Rocky Mountain*, 805 F.2d at 918. "The fact that the analysis may often result in remedial measures being taken . . . does not mean that evidence of the analysis may not be admitted." *Prentiss*, 972 F.2d at 10.

197. *Rocky Mountain*, 805 F.2d at 918.

198. *Id.*; WEINSTEIN & BERGER, *supra* note 10, ¶ 407[01] at 407-13.

rationale in products liability cases. The language of the rule excludes from its scope tests and reports by manufacturers because they are not remedial in nature.[199] But on many occasions tests and reports are often a preliminary (and a necessary) step toward making changes to a product that will eventually enhance the product's safety.[200] The policy rationale of encouraging subsequent repairs should extend to tests and reports, so that manufacturers are encouraged to engage in test-taking and report-writing as part of the process of enhancing product safety. If the social policy rationale underlying Rule 407 is to apply in products liability cases, evidence of tests and reports must be excluded.[201] Courts that hold that manufacturer tests and reports are not "remedial" measures according to the plain language of Rule 407 are also rejecting the rule's underlying social policy of encouraging repairs in products liability cases. One alternative remedy is to admit the results of tests or reports at trial without referring to them as post-event. If, however, the plaintiff characterizes the test or report as a remedial measure before the jury, Rule 407 will apply.[202]

2. RECALL LETTERS

In products liability actions, defendant/manufacturers argue that recall letters are inadmissible under Rule 407 because the letters are "subsequent remedial measures."[203] Although courts have been inconsistent on this issue, the circuit courts appear reluctant to apply Rule 407 to recall letters and similar evidence.[204]

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199. *See supra* notes 193-98 and accompanying text.

200. *Rocky Mountain*, 805 F.2d at 918 ("such tests are conducted for the purpose of investigating the occurrence to discover what might have gone wrong or right.").

201. *Contra Rocky Mountain*, 805 F.2d at 918. "We believe that the policy considerations that underlie Rule 407, such as encouraging remedial measures, are not as vigorously implicated where investigative tests and reports are concerned." *Id.* In the products liability context, however, enforcing the social policy rationale could put plaintiffs at risk of not being able to admit this highly relevant evidence.

202. *Id.* at 919.

203. *See* FED. R. EVID. 407.

204. *Compare* Bizzle v. McKesson Corp., 961 F.2d 719, 721 (8th Cir. 1992) (holding Rule 407 does not prohibit the admission of evidence of a recall in strict liability actions) *and* Kehm v. Procter & Gamble Mfg., 724 F.2d 613, 621-22 (8th Cir. 1983) (admitting evidence of withdrawal of product from market) *and* Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1331 (10th Cir. 1983), *cert. denied sub nom.* Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc., 466 U.S. 958 (1984) (admitting evidence of aircraft manufacturer's service bulletin under Rule 407) *and* Farner v. Paccar, Inc. 562 F.2d 518, 527 (8th Cir. 1977) (admitting evidence of recall of truck) *with* Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988) (excluding evidence of an automobile manufacturer recall letter) *and* Werner v. Upjohn Co., 628 F.2d 848, 852-59 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (excluding evidence of a prescription drug warning). Note that the Ninth Circuit in Longenecker v. General Motors Corp., 594 F.2d 1283 (9th Cir. 1979), failed to address the issue of whether a recall letter is the "sort of 'subsequent remedial measure' covered by Rule 407." *Id.* at 1286.

Like test reports, recall letters are frequently the first remedial action of a manufacturer. However, unlike test reports, recall letters are inadmissible evidence not because they do not fit within the rule's definition of "measure",[205] but because the arguments against applying the exclusionary rule of Rule 407 to strict products liability actions in general also apply with regard to recall letters.[206] First, Rule 407 does not apply because "the issue in controversy is defect rather than conduct."[207] Second, application of the rule will not further the social policy rationale of encouraging repairs because the recall action was taken involuntarily as the result of a regulatory authority.[208] The Eighth Circuit, in *Farner v. Paccar, Inc.*,[209] stated,

> Just as it is not reasonable to assume that manufacturers will forego improvements in products in order to avoid admission of the evidence of the improvements against them, it is not reasonable to assume that the manufacturers will risk wholesale violation of the [regulatory authority] and liability for subsequent injuries caused by defects known by them to exist in order to avoid the possible use of recall evidence as an admission against them.[210]

In an effort to resolve this issue, some states include a recall letter provision in the exclusionary rule.[211]

D. *Exceptions to Rule 407*

Rule 407's exceptions are based upon relevancy considerations that recognize that the rule is "not applicable to the proof of a consequential, material fact in issue other than negligence."[212] The use of evidence of subsequent remedial measures for other purposes such as, but not lim-

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205. *See supra* notes 193-98 and accompanying text.

206. WEINSTEIN & BERGER, *supra* note 10, ¶ 407[03] at 407-26.

207. *Id.* Weinstein finds this argument to be much stronger when applied to the issue of admitting recall letters. "When the plaintiff seeks recovery because of the very defect which is the subject of the letter, the probative value of the evidence in proving the defect is usually far greater than when the evidence of subsequent repairs is offered to show that the product must have been defective." *Id.*

208. *See* MCCORMICK, *supra* note 4, § 267 at 204. This is based on the superior authority argument. *See supra* notes 159-61 and accompanying text.

209. 562 F.2d 518, 527 (8th Cir. 1977).

210. *Id.* (footnote omitted). *See also* Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1331 (10th Cir. 1983), *cert. denied sub nom.* Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc., 466 U.S. 958 (1984) (holding that an aircraft manufacturer's service bulletin to owners, which the court likened to "an automobile manufacturer's recall letter," is admissible where taken in response to FAA directives).

211. *See* ME. R. EVID. 407 (1976) ("A written notification by a manufacturer of any defect in a product produced by such a manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant."); TEX. R. EVID. 407(b) (1982) (same); WEINSTEIN & BERGER, *supra* note 10, ¶ 407[03] at 407-26.

212. WEINSTEIN & BERGER, *supra* note 10, ¶ 407[01] at 407-8.

ited to, proving ownership, control, feasibility of precautionary measures, if controverted, and impeachment, is an exception to Rule 407.[213] The rule requires that evidence of a remedial measure sought to be admitted for other purposes must be controverted because of the common law concern that liberal admission of the evidence for other purposes would undermine the social policy behind the rule.[214] The Advisory Committee failed to justify the "other purposes" in terms of the policy of encouraging repairs.[215] Both commentators and courts have expressed concern that the exceptions could "come close to swallowing up the rule," particularly in terms of products liability litigation.[216]

In products liability actions, the ownership and control exceptions have limited applicability because the product in question is usually owned and/or controlled not by the defendant/manufacturer but instead by the plaintiff or a third party. For this reason this Comment focuses on the feasibility of precautionary measures and impeachment exceptions.

1. FEASIBILITY

Feasibility "relates not only to actual possibility of operation, and its cost and convenience, but also to its ultimate utility and success in its intended performance."[217] There are two reasons for excluding evidence offered to prove an uncontroverted issue of feasibility. First, feasibility

213. FED. R. EVID. 407. *See* Werner v. Upjohn Co., 628 F.2d 848, 855-56 (4th Cir. 1980), *cert. denied.*, 449 U.S. 1080 (1981)("the exceptions listed in Rule 407 . . . are illustrative and not exhaustive").

214. *See* MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE (3d ed. 1991) § 407.1 n.9; MCCORMICK, *supra* note 4, § 267; WEINSTEIN & BERGER, *supra* note 10, ¶ 407[01] at 407-9. If an issue is not controverted, no evidence is needed to prove it.

215. WRIGHT & GRAHAM, *supra* note 2, § 5286. The best explanation may be that the second sentence of the rule leaves the common law intact. *Id.* "It would seem that a person contemplating remedial measures would be no less deterred by knowledge that his action might be used to show feasibility of precautionary measures than he would by the fear that it might be offered to show negligence." *Id.*

216. *See* GRAHAM, *supra* note 214, § 407.1 n.9; MCCORMICK, *supra* note 4, § 267 at 203; *see also Werner*, 628 F.2d at 855-56 (finding that the use of exceptions should be limited to promote the social policy rationale of encouraging repairs).

> Rule 407 is designed to protect the important policy of encouraging defendants to repair and improve their products and premises without the fear that such actions will be used later against them in a lawsuit. Several exceptions to the rule have developed, but it is clear that they must be narrowly construed if the central policy behind the rule is to be effectuated. . . . If this policy is to be effectuated we should not be too quick to read new exceptions into the rule because by doing so there is a danger of subverting the policy underlying the rule.

Id. Note that admissibility of subsequent remedial measures for "another purpose" is still subject to the relevancy requirements of Rules 401 through 403. WEINSTEIN & BERGER, *supra* note 10, ¶ 407[01] at 807-9 & ¶ 407[04] at 407-28. *See* GRAHAM, *supra* note 214, § 407.1.

217. Anderson v. Malloy, 700 F.2d 1208, 1213 (8th Cir. 1983).

is an issue that almost always exists in products liability cases.[218] Second, the jury is unlikely to be able to distinguish feasibility from fault.[219] Feasibility does not bar the exclusion of evidence of subsequent remedial measures under Rule 407 unless it is "controverted" by the defendant.[220] If the defendant raises the issue of feasibility, Rule 407's protection is waived based on the theory that it is unfair to prohibit the plaintiff from rebutting the defendant's feasibility claim.[221]

Rule 407's feasibility exception is inapplicable when the defendant fully concedes to the feasibility of a design change or precautionary measure because feasibility is not controverted.[222] On the other hand, the defendant waives Rule 407's application when he expressly raises the issue of feasibility.[223] Confusion exists as to how the feasibility exception should be applied to the meaning of the phrase "if controverted."

When the defendant is silent on the issue of feasibility, there are two interpretations of "if controverted." First, feasibility is *presumed controverted* unless the defendant expressly admits to feasibility. According to this interpretation, the defendant's silence is controverting

218. *See* Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983); Henderson, *supra* note 14, at 13-15 ("Feasibility is part of the plaintiff's burden of proof and a change in design may be some of the best evidence on that point.").

219. WRIGHT & GRAHAM, *supra* note 2, § 5286 (footnote omitted).

220. FED. R. EVID. 407.

221. Kobayashi, *supra* note 13, at 535; WEINSTEIN & BERGER, *supra* note 10, ¶ 407[04] at 407-30 to 407-31.

222. Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991) ("In refusing to admit evidence regarding the modifications . . ., the district court correctly determined that the feasibility exception to Rule 407 did not apply because feasibility had been stipulated to by the parties."); Hardy v. Chemetron Corp., 870 F.2d 1007, 1011 (5th Cir. 1989) (holding that evidence of a subsequent design change of a bacon-slicing machine was properly excluded on the issue of feasibility because the defendant "conceded the feasibility of the design change they had adopted" after the plaintiff's accident); Fish v. Georgia-Pacific Corp., 779 F.2d 836, 840 (2d Cir. 1985) (holding evidence of a subsequent warning was not admissible on the issue of feasibility because the defendant "stated that it was willing to admit the feasibility of providing a warning in 1977; it simply contended that it did not have a legal duty to do so"); Knight v. Otis Elevator Co., 596 F.2d 84, 91 (3d Cir. 1979) ("At the point in the trial at which this evidence [of subsequent remedial measure] was offered, . . . there was already testimony that such repairs could be made simply, easily and inexpensively.").

223. Donahue v. Phillips Petroleum Co., 866 F.2d 1008, 1013 (8th Cir. 1989) (holding that a brochure prepared by the defendant/manufacturer after the accident was admissible under Rule 407 even though the defendant claimed it was not feasible to provide warnings); Reese v. Mercury Marine Div. of Brunswick Corp., 793 F.2d 1146, 1428-29 (5th Cir. 1986) (holding that district court did not abuse its discretion in admitting an operation manual for a boat engine to establish feasibility of direct manufacturer warnings to customers where the defendant suggested at trial that only the retailer could properly instruct the ultimate consumer regarding a kill switch on the engine); Dixon v. International Harvester Co., 754 F.2d 573, 583-84 (5th Cir. 1985) (admitting evidence of alternatively designed tractors to prove feasibility where there was substantial testimony by the defendant that the addition of protective structures to the tractor was not feasible because the operator's visibility would be impaired).

feasibility. This appears to be the minority position taken by the Tenth Circuit in *Meller v. Heil Co.*,[224] in which the feasibility of alternative designs of a dump truck was held a controverted issue.[225] In *Meller*, the plaintiff had to show the feasibility of alternative designs to prove that the product was "unreasonably dangerous." This decision was based on the court's interpretation of the Advisory Committee's Note that exclusion is only automatic when feasibility is admitted.[226] The Tenth Circuit concluded that "under these circumstances, the feasibility of an alternative design is deemed controverted unless the defendant makes an unequivocal admission of feasibility."[227]

The Seventh Circuit apparently followed the position of the *Meller* court in *Ross v. Black & Decker, Inc.*[228] In *Ross*, the defendant/manufacturer claimed that it admitted the feasibility of its subsequent remedial measures.[229] The court held that feasibility was not conceded by the defense because the "alleged" admission took place on cross-examination of the defendant's witness after the plaintiff introduced evidence of the subsequent remedial measure.[230] The court noted that the defendant had several opportunities to admit to feasibility prior to that point in the trial.[231] The *Ross* court upheld the district court's ruling admitting the evidence of a subsequent design change to a power saw, although the court failed to mention whether feasibility was explicitly disputed or

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224. 745 F.2d 1297 (10th Cir. 1984).

225. *Id.* at 1300.

226. *Id.* at 1300 n.7.

227. *Id.* *See* WRIGHT & GRAHAM, *supra* note 2, § 5288.

> The administration of Rule 407 would be greatly simplified if the appellate courts were to hold that . . . feasibility of precautionary measures will be deemed "controverted" unless the defendant is prepared to make an unequivocal admission of feasibility. This would narrow the scope of the clause insofar as requiring "automatic exclusion" of the evidence of subsequent remedial measures while still leaving it open to trial courts to exclude the evidence under Rule 403 in those cases in which the plaintiff is seen as abusing the rule for some tactical advantage.

Id. (footnotes omitted).

This position is further supported in Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1329 (10th Cir. 1983), *cert. denied sub nom.* Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc., 466 U.S. 958 (1984). In *Herndon*, even though feasibility was apparent to the jury, the defendant refused to admit to the feasibility of a design modification. Although the court based its decision to admit the evidence on other grounds, the court found this test to be "sensible." *Id.*

228. 977 F.2d 1178 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993).

229. *Id.* at 1185.

230. *Id.*

231. *Id.*

> The defendant could have stipulated to the feasibility, or included the admission as an uncontested fact in the pretrial memorandum submitted by the parties, or in a pretrial motion accompanying the submission of the memorandum. It did not, nor did it make any objection when the district court ruled that the post-remedial measures would be admitted because the defendant contested feasibility.

Id.

presumed disputed.[232]

Under the second interpretation, feasibility is *presumed admitted* unless the defendant explicitly controverts it. According to this interpretation of the phrase "if controverted," the defendant's silence on the issue has the same effect as admitting feasibility. When the defendant/manufacturer does not raise the issue of feasibility, the "mere assertion that the manufacturer did not make a change does not controvert the feasibility of change."[233] The feasibility exception is problematic because the feasibility of a precautionary measure and the issue of the manufacturer's knowledge of the product defect are often not distinct issues.[234] Courts have narrowly construed "feasibility" to protect the rule's underlying social policy from liberal use.[235] Therefore, when feasibility is not explicitly admitted or denied, the issue is left to the court's discretion.[236]

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232. *Id.* at 1184-85.

233. Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983). *Accord* Werner v. Upjohn Co., 628 F.2d 848, 855 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) ("it is clear from the face of the rule that an affirmative concession is not required. Rather, feasibility is not in issue unless controverted by the defendant.").

234. *See* WEINSTEIN & BERGER, *supra* note 10, ¶ 407[04] at 407-29 to 407-30.

235. "Several exceptions to [Rule 407] have developed, but it is clear that they must be narrowly construed if the central policy behind the rule is to be effectuated." *Werner*, 628 F.2d at 855. *But cf.* Reese v. Mercury Marine Div. of Brunswick Corp., 793 F.2d 1416, 1428 (5th Cir. 1986) (defining feasibility broadly).

236. *See, e.g.*, McPadden v. Armstrong World Indus., Inc., 995 F.2d 343 (2d Cir. 1993) (holding that feasibility was not controverted where defendant did not argue that it was unable to issue a warning, but instead denied that its product required a warning or was defective without a warning); Mills v. Beech Aircraft Corp., 886 F.2d 758, 763-64 (5th Cir. 1989) (defendants did not contest the feasibility of a better installation instruction, but maintained that instructions in the manual were acceptable); Probus v. K-Mart, Inc., 794 F.2d 1207, 1210 (7th Cir. 1986) (holding that feasibility of alternative materials to end cap of ladder was not in genuine dispute because plaintiff did not contend that defendants testified that the material used was the best available or that another use would have been feasible); Gauthier v. AMF, Inc., 788 F.2d 634, 638 (9th Cir.), *amended* 805 F.2d 337 (9th Cir. 1986) (holding that feasibility was not at issue when the defendant argued that the safety devices were technologically and economically feasible, but the safety problem was not great enough to warrant the trade-offs to the consumer frustration and greater complexity of the product); Flaminio v. Honda Motor Co., 733 F.2d 463, 468 (7th Cir. 1984) (defendants did not deny the technical feasibility of precautionary measures, but argued that by making the motorcycle safer for ordinary users, they would make it more dangerous to speeders, who were the intended purchasers of the motorcycle); *Grenada*, 695 F.2d at 888-89 (where defendant-manufacturer "does not suggest that another design was impractical but only that it adopted an acceptable one," feasibility was not contested); Oberst v. International Harvester Co., 640 F.2d 863, 866 (7th Cir. 1980) (holding that feasibility was not controverted where testimony indicated that alternative restraint bunks were feasible to install but would be a problem in other types of accidents and other systems were unacceptable to the drivers); *Werner*, 628 F.2d at 853-56 (holding that the warning defendant gave was adequate given the knowledge it had at the time, which did not raise an issue of feasibility); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 233 (6th Cir. 1980) (holding that trial court's admission of the evidence of subsequent design change to car door latch under the feasibility exception was erroneous where the defendants did not controvert feasibility but contested only the reasons for

Despite a narrow construction of "if controverted," plaintiffs can arguably introduce evidence of subsequent remedial measures via the feasibility exception and clever trial tactics.[237] This argument suggests the futility of Rule 407's exclusionary purpose. In addition, the "feasibility exception" is mainly used in products liability actions, perhaps because the courts believe that Rule 407 is inappropriate in strict liability cases.[238] In these circumstances, the issue should be decided under Rule 403 to determine whether the evidence was offered to allow the jury to improperly infer a product defect.[239]

2. IMPEACHMENT

Commentators are concerned that the impeachment exception will "swallow up the rule" by providing a means of circumventing Rule 407 to admit evidence of subsequent remedial measures to prove a defendant's negligence or culpability.[240] In products liability actions, the issue

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subsequent design changes); Robbins v. Farmers Union Terminal Ass'n, 552 F.2d 788, 792 n.8 (8th Cir. 1977) ("plaintiffs' request that the defendant admit feasibility, as interpreted by the court, placed the defendant between the rock and the hard place: [defendant] was either forced to openly admit the fact of feasibility to the jury or to allow the plaintiffs to prove the same. This offered the defendant little choice and it remains questionable that the issue can thus be 'controverted' within the intent of Rule 407.").

237. *See Oberst*, 640 F.2d at 870 (Swygert, J., dissenting) ("Ultimately, admissibility depends upon the effectiveness of the plaintiff's trial tactics in getting the defendant to 'controvert' feasibility or opening itself to impeachment."); Matthew L. Kimball, Note, *The Admissibility of Subsequent Remedial Measures in Strict Liability Actions: Some Suggestions Regarding Federal Rule of Evidence 407*, 39 WASH. & LEE L. REV. 1415, 1429 (1982) ("If plaintiff's counsel can maneuver a defendant's witness into suggesting that alternative designs were impractical, or that the defendant's place or product was as safe as possible, then a court would receive the subsequent repair evidence to impeach or show feasibility.").

238. WRIGHT & GRAHAM, *supra* note 2, § 5288 (footnotes omitted).

239. WEINSTEIN & BERGER, *supra* note 10, ¶ 407[04] at 407-31.

240. *See* MICHAEL H. GRAHAM, MODERN STATE AND FEDERAL EVIDENCE: A COMPREHENSIVE REFERENCE TEXT 479 (1989); MCCORMICK, *supra* note 4, § 267; WEINSTEIN & BERGER, *supra* note 10, ¶ 407[05] at 407-37 to 407-38; WRIGHT & GRAHAM, *supra* note 2, § 5289. *See also* Harrison v. Sears Roebuck & Co., 981 F.2d 25, 31 (1st Cir. 1992) ("Rule 407's impeachment exception must not be used as a subterfuge to prove negligence or culpability."); Petree v. Victor Fluid Power, Inc. II, 887 F.2d 34, 39 (3d Cir. 1989) ("Rule 407's impeachment exception must not be used as a subterfuge to prove negligence or culpability of the defendant."); Hardy v. Chemetron Corp., 870 F.2d 1007, 1011 (5th Cir. 1989) ("This circuit has . . . held that the trial judge should guard against the improper admission of evidence to prove prior negligence under the guise of impeachment."); *Flaminio*, 733 F.2d at 468 ("Although any evidence of subsequent remedial measures might be thought to contradict and so in a sense impeach a defendant's testimony that he was using due care at the time of the accident, if this counted as 'impeachment' the exception would swallow the rule.").

> It is undoubtedly true that evidence of subsequent remedial measures can be said to contradict, and hence, in a sense "impeach" a defendant's contention that he was exercising due care or that materials used in the manufacture of a product were appropriate for their intended application. Yet, allowing that and no more to satisfy the impeachment exception would elevate it to the rule.

of admissibility of subsequent remedial measures for purposes of impeachment is often unavoidable.[241] In its case-in-chief, the manufacturer/defendant will normally introduce evidence that its actions were proper, i.e., safe, not defective.[242] On cross-examination of the defendant, "impeachment by reference to subsequent remedial measure[s] as inconsistent conduct seems appropriate,"[243] and the court would exclude evidence of subsequent remedial measures under Rule 403 if the prejudicial nature of the evidence on the issue of negligence or culpable conduct outweighs its probative value for impeachment purposes.[244]

As a result of this potential danger, courts have struggled to preserve the integrity of the rule while maintaining the utility of its impeachment exception. Accordingly, the circuit courts limit the impeachment exception to "true" impeachment—"direct and significant contradiction of the earlier testimony or proof."[245] It is difficult to find a clear distinction between impeachment of credibility and impeachment to enter other forms of proof. The courts consistently try to maintain the integrity of Rule 407 by narrowly construing the "impeachment" exception to include only instances when the "witness goes beyond what is necessary and states on direct that [the] conduct [in issue] was, [for example], the 'safest', 'most reasonable', or 'best designed product possible'."[246] Furthermore, the rule excludes the use of the impeachment

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Probus v. K-Mart, Inc., 794 F.2d 1207, 1210 (7th Cir. 1986).

241. GRAHAM, *supra* note 214, § 407.1 n.11.

242. *Id.*

243. *Id.*

244. *Id.*

245. Kobayashi, *supra* note 13, at 533.

246. GRAHAM, *supra* note 214, § 407.1 n.11. *See* Kelly v. Crown Equip. Co., 970 F.2d 1273, 1278 (3d Cir. 1992) (holding impeachment exception does not apply where defendant did not make a statement that his product's design was the best or the only possible one, but only stated that it was an excellent and proper design); Petree v. Victor Fluid Power, Inc. II, 887 F.2d 34, 42 (3d Cir. 1989) (holding that a warning decal was admissible when the defendant's expert testified that any possibility of danger had been engineered out of the product, there was no need to modify the product's design, and a warning would serve no purpose); Hardy v. Chemetron Corp., 870 F.2d 1007, 1011 (5th Cir. 1989) (holding that evidence of rewiring of a bacon-slicer is inadmissible to rebut defendant's position that negligent wiring had not caused plaintiff's injury because defendant did not testify that the product was "the best" or "the safest" but had conceded the feasibility of the design change); Public Serv. Co. v. Bath Iron Works Corp., 773 F.2d 783, 792 (7th Cir. 1985) (holding that evidence of subsequent changes in plans are admissible to impeach plaintiff's witnesses' claim that the defendant should have been able to fabricate adequate parts from existing plans); Flaminio v. Honda Motor Co., 733 F.2d 463, 468 (7th Cir. 1984) (evidence of a subsequent design change does not impeach the defendant's testimony that he used due care; but the defendant's testimony that it would have never made the design change qualified for impeachment purposes); Dollar v. Long Mfg., N.C., 561 F.2d 613, 618 (5th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978) (evidence of a warning bulletin is admissible for impeachment purposes where defendant testified to the safety of a backhoe when attached to a rollbar-equipped tractor).

exception to infer negligence or culpable conduct.[247] A strong nexus must exist between the statement one seeks to impeach and the subsequent remedial measure at issue.[248]

By limiting the use of the impeachment exception to credibility, defendants can avoid the use of remedial measures by admitting in hindsight that alternative measures could make a safer product.[249] Before a court will admit evidence of a subsequent remedial measure for impeachment purposes, the evidence must comply with the general relevancy requirements of Rules 401 and 403.[250]

V. ANALYSIS

The split among the circuits on the issue of the applicability of Rule 407 to strict products liability actions indicates an absence of acceptable policy grounds for the exclusionary rule in these cases.[251] Many commentators criticize the social policy rationale behind Rule 407.[252] The underlying assumption that manufacturers will not take remedial measures because these actions may be used as evidence against them is absurd.[253] The trend away from the application of Rule 407 in products liability cases is partly due to a rejection of this assumption.[254] No empirical evidence exists to prove that manufacturers behave the way the rule presupposes.

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247. *See Hardy*, 870 F.2d at 1011 ("Evidence of subsequent measures is no more admissible to rebut a claim of non-negligence than it is to prove negligence directly."); Probus v. K-Mart, Inc., 794 F.2d 1207, 1210 (7th Cir. 1986) (holding that if plaintiff admits evidence of subsequent remedial measures to impeach defendant by contradicting his testimony that he used due care, then "allowing that and no more to satisfy the impeachment exception would elevate it to the rule"); *Public Serv. Co.*, 773 F.2d at 792 (court reluctant to admit evidence of subsequent changes in design plans for the purpose of showing that earlier plans were inadequate or to show that the manufacturer was aware of the inadequacy of the earlier plans).

248. Harrison v. Sears Roebuck & Co., 981 F.2d 25, 31 (1st Cir. 1992) (finding that a more direct form of impeachment by use of subsequent remedial measures would have existed if the defendant's witness had stated that he did not change the product after the alleged accident, rather than stating that the product, as it was, was not hazardous).

249. WRIGHT & GRAHAM, *supra* note 2, § 5289.

250. WEINSTEIN & BERGER, *supra* note 10, ¶ 407[05] at 407-41. *See Dollar*, 561 F.2d at 618 (holding admission of subsequent warning bulletin for impeachment did not cause unfair prejudice to the defendant under Rule 403).

251. Brumby, *supra* note 29, at 1414.

252. *See, e.g.*, WRIGHT & GRAHAM, *supra* note 2, § 5282; WEINSTEIN & BERGER, *supra* note 10, ¶ 407[02] at 407-15. "[I]n view of the devastating criticisms that have been made of this rationale, it is difficult to see how anyone favoring the preservation of the rule could regard it as a sound justification." WRIGHT & GRAHAM, *supra* note 2, § 5282.

253. WEINSTEIN & BERGER, *supra* note 10, ¶ 407[02] at 407-12. Some critics argue that no empirical evidence exists to support the claim that Rule 407 substantially affects manufacturing decisions on design modifications. Stewart & Andreas, *supra* note 28, at 78 n.26 and accompanying text; Brumby, *supra* note 29, at 1417.

254. MCCORMICK, *supra* note 4, § 267.

Commentators suggest that defendants will make repairs regardless of the rule out of fear of further tort liability.[255] "[I]t is highly unlikely that a manufacturer would deliberately [refuse to take remedial measures] merely to come within the scope of an exclusionary evidentiary rule, particularly in light of the liberalized scope of punitive damage awards."[256] The admission of evidence of subsequent repairs will encourage remedial action because a manufacturer of mass-produced goods risks increased tort liability if he allows defective goods to remain on the market unremedied.[257] A manufacturer's failure to take safety measures also can result in a violation of a government regulation[258] and the loss of customer goodwill. In addition, a manufacturer is already motivated to improve the safety of its goods by the pressures of consumer organizations, government agencies, and the media.[259]

Many defendants are not aware of Rule 407 or of the fact that subsequent repairs will not constitute an admission. Those who are "would surely regard it as a leaky shield in view of the many exceptions that would admit the evidence."[260] How can a manufacturer be encouraged to take remedial measures if there is a large probability that his actions will be admitted under one of the rule's exceptions? Even if a particular circuit excludes evidence of subsequent remedial measures, the evidence can be admitted either by way of the narrow scope of the rule[261] or one of its exceptions.[262] The inconsistency among the circuit courts on these issues, whether because of the rule's language and/or social policy rationale, produces a high degree of uncertainty as to the admissibility of the evidence.

Much of the social policy rationale of Rule 407 is already incorporated into the strict products liability theory. Under the Restatement of Torts,[263] a plaintiff does not need to show negligent conduct on the part

255. *See* WRIGHT & GRAHAM, *supra* note 2, § 5282; WEINSTEIN & BERGER, *supra* note 10, ¶ 407[02]; Reichert, *supra* note 159, at 851-52.

256. Kobayashi, *supra* note 13, at 545.

257. Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837, 848-49.

258. WEINSTEIN & BERGER, *supra* note 10, ¶ 407[02] at 407-15.

259. Note, *supra* note 257, at 849. *See* Reichert, *supra* note 159, at 853.

260. WRIGHT & GRAHAM, *supra* note 2, § 5282 (footnote omitted). *See* WEINSTEIN & BERGER, *supra* note 10, ¶ 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. See also* Kimball, *supra* note 237, at 1429 ("Rule 407 . . . is unlikely to achieve its ostensible objective because it is subject to so many exceptions."); Reichert, *supra* note 159, at 851 ("[t]he defendant that knows enough law to realize that a court will not admit evidence of subsequent remedial measures on the issue of negligence also will realize that a court can admit the evidence for other purposes.").

261. *See generally supra* notes 156-211 and accompanying text.

262. *See generally supra* notes 212-50 and accompanying text.

263. *See supra* note 36.

of the defendant but does need to prove the defective nature of the product.[264] Thus, courts can impose liability on manufacturers for their defective products regardless of their failure to breach any standard of due care.[265] But, in order to prove a claim of strict liability, "all relevant information concerning the product" must be made available to the trier of fact in order to make a determination of whether the product was unreasonably dangerous.[266] This use of the strict liability theory encourages manufacturers to produce safer products to avoid greater liability.[267] Thus, "to the extent that admission of such evidence results in recovery by injured plaintiffs, it can be argued that evidence of subsequent repairs *encourages* future remedial action."[268]

The application of Rule 407 to strict liability actions can have the effect of preventing the plaintiff from using relevant evidence, thereby increasing the probability of the plaintiff losing the suit and bearing the financial burden from the loss.[269] But manufacturers and corporations are better able to incur this liability because they can spread the losses by increasing prices.[270] Plaintiffs often have no access to direct evidence, such as records and memoranda concerning the production process, and must rely on circumstantial evidence, including subsequent remedial measures, to prove that a defect existed.[271] "Relevant evidence should not be excluded from a products liability case by an obsolete evidentiary rule when modern legal theories, accompanied by economic and political pressures, will achieve the desired policy goals."[272] If evidence of a subsequent remedial measure is relevant under Rule 401 and probative under Rule 403, then its exclusion undermines not only the policies underlying strict liability, but also those Rules of Evidence.[273]

As the Advisory Committee's Note to Rule 407 suggests, the social policy rationale must still be balanced against the interest of admitting relevant evidence.[274] The underlying social policy rationale, however, does not adequately function or serve its purpose due to the exclusions

264. Carol Proctor, Casenote, *Evidence of Subsequent Remedial Measures and Products Liability:* Herndon v. Seven Bar Flying Service, Inc., 33 DEPAUL L. REV. 857, 859 n.12 (1984).

265. Brumby, *supra* note 29, at 1395; Note, *supra* note 257, at 848.

266. Henderson, *supra* note 14, at 13.

267. Note, *supra* note 257, at 848; Proctor, *supra* note 264, at 869.

268. Note, *supra* note 257, at 848.

269. Brumby, *supra* note 29, at 1413; Note, *supra* note 257, at 848; Proctor, *supra* note 264, at 869.

270. Brumby, *supra* note 29, at 1395. MCCORMICK, *supra* note 4, § 267, at 204.

271. Proctor, *supra* note 264, at 873-74 n.115.

272. Note, *supra* note 257, at 850.

273. *See* Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1327 (10th Cir. 1983), *cert. denied sub nom.* Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc. 466 U.S. 958 (1984).

274. *See* Meller v. Heil Co., 745 F.2d 1297, 1299 n.4 & accompanying text (10th Cir. 1984).

and exceptions of Rule 407.[275] Rule 407 is an inappropriate means of determining the admission of evidence in products liability cases because the social policy underlying the rule is not served. Instead of emphasizing the social policy, relevancy concerns should be the focus of the exclusionary rule for products liability cases.

Several commentators suggest the use of Rule 403,[276] or a similar balancing test, to determine the admissibility of evidence of subsequent remedial measures. Rules 401 through 403 are still concerns because Rule 407 does not require exclusion, and the exceptions are not necessarily mandatory.[277] The courts have often determined the ultimate issue of admissibility of the evidence of subsequent remedial measures in terms of Rule 403 either (1) explicitly;[278] (2) implicitly by using the language of Rule 403 in a Rule 407 analysis;[279] or (3) a Rule 407 "balancing approach" which weighs the need for the evidence.[280] Thus, Rule 403 has become a viable alternative to Rule 407.

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275. *See supra* part IV.

276. *See* WEINSTEIN & BERGER, *supra* note 10, ¶ 407[03] at 407-23 ("[T]he most desirable approach is to treat products liability cases as governed by Rule 403 rather than Rule 407, thereby giving the judge discretion to admit the evidence of subsequent repairs when relevance exceeds prejudice to the defendant."); Kimball, *supra* note 237, at 1433 ("In conjunction, Rules 402 and 403 can render Rule 407 superfluous by excluding subsequent repair evidence without ever reaching Rule 407."); Proctor, *supra* note 264, at 870 ("[I]n products liability cases, a judge should be allowed to exclude evidence of subsequent repair at his discretion under Rule 403, rather than be compelled to exclude such evidence under the mandate of an arbitrary rule such as Rule 407."); Reichert, *supra* note 159, at 878 ("Rule 403 should continue to provide an alternative basis for defendants to argue for exclusion of remedial measures."); Kobayashi, *supra* note 13, at 576-77 ("The basic concern is not strictly theoretical purity but the integrity of the 'truth' and 'fact-finding' process in trials," but "provision of adequate safeguards against undue and unfairly prejudicial effects and inferences" is still needed); Cartun, *supra* note 42, at 1192 ("The most appropriate vehicle for dealing with remedial measures evidence in strict products liability actions is a rule 403-type standard."). For the text of Rule 403, see *supra* note 154.

277. Kobayashi, *supra* note 13, at 511.

278. *See, e.g.*, Dixon v. International Harvester Co., 754 F.2d 573, 584 (5th Cir. 1985) ("Any evidence not excluded by Rule 407, of course, must still be relevant and its probative value must, under Rule 403, outweigh any dangers associated with its admission."); Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1328-29 (10th Cir. 1983), *cert. denied sub nom.* Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc., 466 U.S. 958 (1984) (holding that evidence of subsequent remedial measures should not be automatically admissible under Rule 407; but the evidence's potential for prejudice against the defendant must be weighed against its probative value under Rule 403); Oberst v. International Harvester Co., 640 F.2d 863, 570 (7th Cir. 1980) (Swygert, J., dissenting) (suggesting that Rule 403 be used instead of Rule 407).

279. *See, e.g.*, Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983) (resting its decision to exclude the evidence on "relevancy" grounds, rather than on policy concerns); Knight v. Otis Elevator Co., 596 F.2d 84, 91 (3d Cir. 1979) (where there was already testimony as to the feasibility of repairs, the introduction into evidence of subsequent repairs would "have been cumulative at best and prejudicial at worst").

280. Reichert, *supra* note 159, at 878. *See, e.g.*, Meller v. Heil Co., 745 F.2d 1297, 1300-01 n.8 (10th Cir. 1984) (Rule 407 balances the social policy of encouraging repairs against the competing interest of admitting relevant, probative evidence).

VI. CONCLUSION

The purpose of the Federal Rules of Evidence is to promote fairness[281] and uniformity of treatment.[282] The absence of any clear standard in the application of Rule 407 by the circuit courts has led only to uncertainty for products liability litigants.[283] This uncertainty is costly for both plaintiffs and defendants. In the interest of fairness and uniformity, there are some possible solutions. First, the Supreme Court should finally address the issue and provide a guidepost for litigants. Second, in light of the inapplicability of the rule's underlying policy rationale of encouraging repairs, Rule 407 should be amended so that it would not apply to products liability actions. Third, admissibility should be decided based on the general relevancy requirements of Rules 401 through 403.[284]

Finally, empirical studies should be undertaken to determine the effect of the rule's social policy rationale on manufacturers. Mass producers may in fact actually be motivated by the exclusionary rule. If this is the case, then Rule 407 should be amended to harmonize the plain language of the rule with its social policy rationale for products liability. The rule should explicitly include products liability actions, and the meaning of "event" should be clarified. Omitting Rule 407's exceptions and replacing them with a form of Rule 403's balancing test would allow plaintiffs to introduce highly relevant evidence and prevent defendants from being "unfairly" prejudiced. Consequently, this may result in greater predictability and fairness in the application of the exclusionary rule.

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281. *See* FED. R. EVID. 102.

282. Proctor, *supra* note 264, at 874; Kimball, *supra* note 237, at 1416-17; Reichert, *supra* note 159, at 880.

283. Cartun, *supra* note 42, at 1187.

284. Although this may not lead to the uniformity, it may be the fairest alternative in the interest of admitting all relevant evidence at the trial proceeding.