NEW MEXICO LAW REVIEW

Volume 36
Issue 2 *Spring*

Spring 2006

# Alone and Out of Excuses: The Tenth Circuit's Refusal to Apply Federal Rule of Evidence 407 to Product Liability Actions

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# ALONE AND OUT OF EXCUSES: THE TENTH CIRCUIT'S REFUSAL TO APPLY FEDERAL RULE OF EVIDENCE 407 TO PRODUCT LIABILITY ACTIONS

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## I. INTRODUCTION

In 1993, the Advisory Committee on the Federal Rules of Evidence (the Committee) decided to resolve a circuit split regarding the applicability of Federal Rule of Evidence 407[1] (Rule 407) to product liability actions.[2] Rule 407 governs the admissibility of evidence of subsequent remedial measures in federal court. Subsequent remedial measures are defined as "postaccident warnings, safety precautions, repairs, design changes, changes in procedure," or any other improvements that, if taken previously, would have made the event that caused the harm less likely to occur.[3]

By 1997, most circuits had applied Rule 407 to product liability actions to exclude evidence of subsequent remedial measures, but the U.S. Courts of Appeals for the Eighth and Tenth circuits had declined to do so.[4] To unify the federal courts in this matter and to supersede the anomalous decisions of these two circuits, the Committee voted to reject the highly unusual position of the Tenth Circuit on this issue and to amend the rule.[5] The Eighth Circuit's refusal to exclude evidence of subsequent remedial measures in strict liability actions under Rule 407, unlike one

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1. The current version of Federal Rule of Evidence 407 provides:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FED. R. EVID. 407.

2. *See Minutes of the Advisory Comm. on Federal Rules of Evidence* 3–4 (1993), *available at* 1993 WL 761151 [hereinafter *Minutes*].

3. *See* Randolph L. Burns, Note, *Subsequent Remedial Measures and Strict Products Liability: A New—Relevant—Answer to an Old Problem*, 81 VA. L. REV. 1141, 1147 (1995); FED. R. EVID. 407.

4. The Eighth Circuit, when applying Rule 407, affirmed a district court's judgment and approved of its ruling admitting evidence of subsequent remedial measures. *See* Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793–95 (8th Cir. 1977). The Tenth Circuit did the same in *Herndon v. Seven Bar Flying Service, Inc.*, 716 F.2d 1322, 1331 (10th Cir. 1983). After *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 933–34 (10th Cir. 1984), however, the Tenth Circuit subsequently began applying relevant state evidence rules on the issue of the admissibility of evidence of subsequent remedial measures. *See, e.g.*, Wilmer v. Bd. of County Comm'rs, No. 92-3389, 1993 U.S. App. LEXIS 19650, at *3–*5 (10th Cir. July 26, 1993) (applying Kansas evidence law and citing *Moe*); Wheeler v. John Deere Co., 862 F.2d 1404, 1410 (10th Cir. 1988) (applying Kansas law and citing *Moe*); Romine v. Parman, 831 F.2d 944, 945 (10th Cir. 1987) (citing *Moe* for the proposition that "[t]his court has indentified [sic] one instance in which an evidentiary question is so dependent on a state substantive policy that state law must be applied," and noting that state law is applied to determine the admissibility of evidence of subsequent remedial measures).

5. *See infra* Part IV.C.

of the grounds relied upon by the Tenth Circuit, derived purely from its reading of the pre-1997 rule's language.[6]

Federal courts hearing product liability actions always sit in diversity and apply state substantive law,[7] but, unlike any other circuit, the Tenth Circuit declined to apply Rule 407 to product liability actions by invoking *Erie Railroad v. Tompkins*.[8] *Erie* established that in diversity actions federal courts must apply state substantive law.[9] In *Moe v. Avions Marcel Dassault-Breguet Aviation*,[10] the Tenth Circuit held that under *Erie* the admissibility of evidence of subsequent remedial measures should be governed by substantive state policy and that, if contrary state policy existed, Rule 407 could not be applied by a federal court sitting in diversity.[11] As a result, the federal courts of the Tenth Circuit do not generally apply Rule 407 to product liability actions.[12] Instead of applying Rule 407 across the board, these courts have used relevant state evidence rules.[13]

During its 1993 meeting, the Committee voted on how to respond to this circuit split.[14] No Committee member voted to adopt the Tenth Circuit's position.[15] A majority, however, voted to amend Rule 407 to encompass product liability actions.[16] In 1997, the U.S. Supreme Court promulgated the Committee's amendment and Congress subsequently allowed it to take effect. But in subsequent product liability actions, the courts of the Tenth Circuit have not given effect to this amendment.[17] These courts should apply amended Rule 407 without reservation.

This Article argues that the 1997 amendment to Rule 407 has superseded the Tenth Circuit's holding in *Moe* by invalidating the Tenth Circuit's application of

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6. *See Robbins*, 552 F.2d at 793–95.

7. *See Moe*, 727 F.2d at 932 (observing that "there is no federal products liability law" and "products liability action[s] are governed by the law of the state...").

8. *See* David Wadsworth, Forma Scientific v. Biosera *and the Admissibility of Evidence of Subsequent Remedial Measures in Strict Liability Actions*, 71 U. COLO. L. REV. 757, 781 (2000) ("[O]nly the Tenth Circuit has held the exclusionary rule [of Rule 407] substantive."). *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

9. *Erie*, 304 U.S. at 78.

10. 727 F.2d 917 (10th Cir. 1984).

11. *Id.* at 931–33; *see* Wheeler v. John Deere Co., 862 F.2d 1404, 1410 (10th Cir. 1988) (following *Moe*); *see also Erie*, 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

12. *See infra* Part IV.A. Sometimes federal courts within the Tenth Circuit do apply Rule 407. For instance, it has been applied when there is no finding of a conflict between it and a state evidence rule or when a party has failed to object to its use. *See, e.g.*, Gray v. Hoffman-La Roche, Inc., 82 F. App'x 639, 646–47 (10th Cir. 2003); Enfield v. A.B. Chance Co., No. 97-3377, 1999 U.S. App. LEXIS 6318, *8–*9 (10th Cir. Apr. 7, 1999); Mehojah v. Drummond, 56 F.3d 1213, 1214–15 (10th Cir. 1995); Hull v. Chevron U.S.A., Inc., 812 F.2d 584, 587 (10th Cir. 1987). The Tenth Circuit later said of *Hull*:

> [T]his Court has on at least one occasion applied Fed. R. Evid. 407 in a diversity case involving a strict liability claim. *Hull*, however, also involved negligence claims, and it is unclear to which claim the court was referring when it held the evidence of remedial measures was inadmissible under Rule 407 to prove "culpable conduct."

Call v. State Indus., No. 99-8046, 2000 U.S. App. LEXIS 17732, *19 n.7 (10th Cir. July 24, 2000) (citation omitted).

13. *See infra* Part IV.A.

14. *See infra* Part IV.C.

15. *See infra* Part IV.C.

16. *See infra* Part IV.C. As discussed in Part IV.C, several options were proposed, one of which was the Tenth Circuit's *Erie* approach.

17. *See infra* Part IV.A.

*Erie* to Rule 407. In *Moe*, the Tenth Circuit assumed that Rule 407 did not directly address the issue before the court.[18] In all fairness, prior to 1997, Rule 407 did not clearly instruct courts to apply the rule in product liability actions.[19] As a result, the Tenth Circuit engaged in a vague and freewheeling choice-of-law analysis guided by nothing other than the general policy underlying *Erie*;[20] that is, federal courts apply state substantive law in diversity actions to discourage forum shopping and avoid the inequitable administration of the laws.[21] Since December 1, 1997, however, the language of Rule 407 has unmistakably and directly covered product liability actions. Federal courts may choose to apply a contradictory state evidence rule only if Rule 407 flunks the test of *Hanna v. Plumer*, meaning that amended Rule 407 is unconstitutional.[22] The Tenth Circuit is not alone in facing difficulties applying *Erie* or *Hanna* when state and federal evidence rules conflict. In 1995, the Fourth Circuit illustratively floundered when dealing with the *Erie-Hanna* set of doctrines.[23] Such difficulties offer an explanation for the Tenth Circuit's failure to acknowledge that *Moe* has been superseded by amended Rule 407, despite several opportunities where it could have done so.[24]

Although analyzing Rule 407's relationship to product liability litigation has been a popular sport for decades, commentators have usually focused on such topics as whether admitting evidence of subsequent remedial measures in product liability actions will influence tort law,[25] the merits of various proposed amendments to Rule 407 (before 1997),[26] and whether the pre-1997 version of Rule 407 should have applied to product liability actions in federal court.[27] One commentator has addressed the *Erie-Hanna* implications of applying amended Rule 407 to product liability actions in the context of California law and has urged the Ninth Circuit to adopt the Tenth Circuit's rationale.[28] Since the 1997 amendment, no academic

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18. *See infra* notes 155–160 and accompanying text.

19. *See* Andrea Lynne Flink, Note, *Admissibility of Subsequent Remedial Measures Evidence in Diversity Actions Based on Strict Products Liability*, 53 FORDHAM L. REV. 1485, 1490 (1985) (stating that, before the 1997 amendment, "Rule 407 [did] not conflict with contrary state products liability law"). Although it is somewhat awkward to say that Rule 407 did not "conflict" with something that was "contrary," Ms. Flink's wording adequately conveys the idea.

20. *See infra* Part III.B.4.

21. Hanna v. Plumer, 380 U.S. 460, 468 (1965) (noting that the "twin aims" of *Erie* are "the discouragement of forum-shopping and avoidance of inequitable administration of the laws").

22. *See infra* Parts III.B.1–2; *see also In re* Air Crash Disaster Near Chi., Ill. on May 25, 1979, 701 F.2d 1189, 1193 (7th Cir. 1983) ("In such a case the Rules of Decision Act, 28 U.S.C. § 1652 (1976), coupled with the supremacy clause of the United States Constitution, demands that the [federal evidence] rules apply in federal court, unless Congress exceeded its powers to regulate federal courts in enacting them.").

23. *See generally* Kenneth J. Lorge, Note, Hottle v. Beech Aircraft*: Confusion Surrounding the Choice of Law in Federal Diversity Actions Persists as the Fourth Circuit Applies State Evidentiary Law in the Face of a Conflicting Federal Rule of Evidence*, 26 SW. U. L. REV. 135 (1996). *See infra* Part III.B.3.

24. *See infra* Part IV.A.

25. *See* Burns, *supra* note 3.

26. *See generally* Marcie J. Freeman, Comment, *Spanning the Spectrum: Proposed Amendments to Federal Rule of Evidence 407*, 28 TEX. TECH L. REV. 1175 (1997); Eric L. Vinson, Note, *Applying Federal Rule of Evidence 407 in Strict Liability: A Discussion of Changes to the Rule*, 16 REV. LITIG. 773 (1997).

27. *See, e.g.*, Karen A. DiLisio, Note, *The Admissibility of Subsequent Remedial Measures in a Product Liability Case*, 3 PRODS. LIAB. L.J. 222 (1992); Marcia Lyn Finkelstein, Note, *Comity and Tragedy: The Case of Rule 407*, 38 VAND. L. REV. 585 (1985); Flink, *supra* note 19.

28. *See* Daniel Ogburn, Comment, *Subsequent Remedial Measures and the Application of California Law in a Diversity Action*, 39 SANTA CLARA L. REV. 615, 617, 646 (1999).

commentator has advocated against the Tenth Circuit's continued refusal to apply the rule in product liability actions.[29]

Part II of this Article examines the origin, derivation, and purposes of Rule 407. Part III explains the pre-1997 circuit split regarding the applicability of Rule 407 to product liability actions. Part IV demonstrates that the 1997 amendment rendered the Tenth Circuit's *Erie* analysis moot and sets forth further support for the proposition that the 1997 amendment has superseded *Moe*. For the reasons demonstrated, the Tenth Circuit should apply Federal Rule of Evidence 407 in product liability actions.

## II. BACKGROUND: FEDERAL RULE OF EVIDENCE 407

This Part briefly explains the origin of the Federal Rules of Evidence, emphasizing Rule 407. It further discusses the process by which the 1997 amendment to Rule 407 was adopted. Understanding the origin of the Federal Rules of Evidence, and the painstaking process by which the Supreme Court and Congress amend them, highlights the importance of the 1997 amendment of Rule 407 and emphasizes the seriousness of the Tenth Circuit's failure to follow this rule.

### *A. The Origin and Purposes of Federal Rule of Evidence 407*

Congress enacted the Federal Rules of Evidence in 1975.[30] The rules were the culmination of a decade-long process that began in 1965.[31] In that year, Chief Justice Earl Warren "appointed an advisory committee of judges, practitioners, and academics, who drafted the original slate of proposed rules."[32] Drawing on the common law of evidence and former attempts at codification, the Committee delivered a set of proposed rules to Congress in 1972.[33] "Congress proved to be a tough and discriminating audience" as it tinkered with and even deleted scores of proposed rules.[34] This process lasted years longer than intended; the rules had been scheduled to go into effect on July 1, 1973, but Congress passed a statute suspending their effective date until a future act of Congress.[35] Congress passed another statute enacting the rules in 1975.[36]

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29. One lawyer in the Tenth Circuit, however, has done so in two brief articles in practitioner-oriented periodicals that utilize roughly the same analysis as this Article. *See* Nathan Davis, *Admissibility of Subsequent Remedial Measures: Bad Law Lurking in the 10th Circuit*, 23 LJN'S PROD. LIAB. L. & STRATEGY No. 5, at 1 (2004), *available at* http://www.swlaw.com/publications/files/LJNarticleNov2004.pdf; Nathan Davis, *Applicability of C.R.E. 407 in Federal Court*, 34 COLO. LAW. 77 (2005), *available at* http://www.swlaw.com/publications/files/05JanEvidence.pdf [hereinafter Davis, *C.R.E. 407*]. The author provided research assistance for both articles cited in this footnote.

30. GEORGE FISHER, EVIDENCE 3 (2002); *see* COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, FEDERAL RULES OF EVIDENCE vii (2002) ("Public Law 93-595 (approved January 2, 1975, 88 Stat. 1926) enacted the Federal Rules of Evidence proposed by the Supreme Court, with amendments made by Congress, to be effective July 1, 1975.").

31. FISHER, *supra* note 30, at 3.

32. *Id.*

33. *Id.*

34. *Id.*

35. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

36. *See* FISHER, *supra* note 30, at 3.

Like many of the other Federal Rules of Evidence, Rule 407 codifies a common law rule of admissibility. Rule 407 excludes evidence of subsequent remedial measures as proof of an admission of fault. Although Rule 407 ultimately is derived from the common law,[37] two other evidence rule codifications preceded it. The older of these two codifications, Model Code of Evidence Rule 308, was promulgated in 1942 and read as follows:

> 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 the 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.[38]

Rule 308, therefore, did not contain eventual Rule 407's exclusion of evidence offered to prove "culpable" conduct.[39]

The other predecessor of Rule 407 was the 1953 Uniform Rule of Evidence 51.[40] The Uniform Rule of Evidence exclusionary rule closely paralleled the pre-1997 version of Rule 407 but differed from Rule 407 in that Rule 407 makes explicit that subsequent remedial measures may be admitted for any purpose other than to prove negligence or culpable conduct.[41]

The exclusion of evidence of subsequent remedial measures serves two purposes: first, it "prevent[s] the use of evidence that may not be relevant" to the issues of negligence or culpable conduct; second, it "promote[s] the policy of not deterring people from making safety improvements."[42] As to the first traditional purpose of Rule 407, evidence of subsequent remedial measures should be excluded because it lacks probative value in establishing negligence or culpable conduct.[43] This rationale shall be referred to as the "relevance rationale."[44] Making safety improvements does not admit fault or breach of a duty, "since the conduct is equally

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37. *See* Thais L. Richardson, *The Proposed Amendment to Federal Rule of Evidence 407: A Subsequent Remedial Measure That Does Not Fix the Problem*, 45 AM. U. L. REV. 1453, 1454 (1996).

38. MODEL CODE OF EVID. R. 308 (1948).

39. *Compare id. with* FED. R. EVID. 407.

40. The text of Uniform Rule of Evidence 51 read as follows:

> Subsequent Remedial Conduct. 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 not admissible to prove negligence or culpable conduct in connection with the event.

*Freeman*, *supra* note 26, at 1179 n.31 (quoting UNIF. R. EVID. 51).

41. Of course, the current version of Rule 407 also makes explicit its applicability to strict product liability actions, unlike Uniform Rule of Evidence 51. *Compare* FED. R. EVID. 407 *with* UNIF. R. EVID. 51.

42. Lev Dassin, Note, *Design Defects in the Rules Enabling Act: The Misapplication of Federal Rule of Evidence 407 to Strict Liability*, 65 N.Y.U. L. REV. 736, 736 (1990).

43. In a classic explanation of this rationale, the Supreme Court noted:

> But it is now 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 [of subsequent remedial measures] 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 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).

44. For an articulation of the relevance rationale, see *id.*

consistent with injury by mere accident or through contributory negligence."[45] In other words, it does not logically follow that "'because the world gets wiser as it gets older, therefore it was foolish before.'"[46] In the words of one commentator, "Because evidence of a subsequent remedial measure addresses neither the reasonableness of an actor's conduct nor the foreseeability of risk at the time the conduct occurs, courts should exclude the evidence on the issue of fault [or culpable conduct] because it is irrelevant."[47]

The Advisory Committee Note to Rule 407, however, expresses skepticism about the sufficiency of the relevance rationale: "Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one."[48] As Judge Weinstein notes elsewhere, "Under the liberal theory of relevancy embodied in Rule 401, circumstantial evidence of 'subsequent remedial measures' is relevant on the issue of negligence or culpability."[49] The Fifth Circuit has impliedly disagreed with the Advisory Committee Note and Judge Weinstein on this point. Long before the 1997 amendment, in *Grenada Steel Industries v. Alabama Oxygen Co.*,[50] the Fifth Circuit upheld the exclusion of evidence under Rule 407 in a product liability appeal relying solely on the relevance rationale.[51] Therefore, whether the relevance rationale justifies Rule 407 is debatable.

Regarding the second traditional purpose of Rule 407, it "rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety."[52] This rationale of not deterring safety measures is referred to in this Article as the "social policy rationale." Admitting evidence of post-injury safety improvements against defendants at trial would not encourage, and may discourage, some safety measures.[53]

> [A]ccidents are low-probability events. The probability of another accident may be much smaller than the probability that the victim of the accident that has already occurred will sue the injurer and, if permitted, will make devastating use at trial of any measures that the injurer may have taken since the accident to reduce the danger.[54]

The "social policy [rationale] consistently has been recognized as an important ground for exclusion by the courts."[55] The Advisory Committee Note agrees that the social policy rationale is more "impressive" than the relevance rationale.[56]

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45. FED. R. EVID. 407 advisory committee's note.
46. *Id.* (quoting Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869)).
47. Richardson, *supra* note 37, at 1459.
48. FED. R. EVID. 407 advisory committee's note.
49. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 407.03[2], at 407–12 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 2006).
50. 695 F.2d 883 (5th Cir. 1983).
51. *See id.* at 889.
52. FED. R. EVID. 407 advisory committee's note.
53. *See* Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984) ("In either [strict liability or negligence], if evidence of subsequent remedial measures is admissible to prove liability, the incentive to take such measures will be reduced.").
54. *Id.*
55. 2 WEINSTEIN & BERGER, *supra* note 49, § 407.03[1], at 407-10.1. *See generally* 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 166 (rev. vol. 1985).
56. *See* FED. R. EVID. 407 advisory committee's note.

The relevance rationale seeks to enhance the truth-seeking mechanism of litigation and may be seen as "procedural."[57] The social policy rationale, however, aims to benefit society by guiding litigants' behavior out of court and is "substantive."[58]

These traditional rationales and the common law exclusion of evidence of subsequent remedial measures addressed the needs of actions based on negligence, not strict liability.[59] As courts before 1997 attempted to apply the rule properly to strict product liability actions, they were forced to try to fit a square peg (Rule 407) into a round hole (strict product liability actions). The Supreme Court and Congress intervened and amended the rule in 1997.[60] The resulting amendment unambiguously extended Rule 407 to product liability actions but did not update the advisory committee notes with a new rationale, or an elaboration of an existing rationale, to justify the new extension.[61] The 1997 amendment should have settled the question of Rule 407's applicability to product liability actions once and for all. But a circuit split regarding the applicability of Rule 407 to product liability actions still exists due to the Tenth Circuit's continued failure to honor the amended rule.[62] It would benefit this discussion to examine the amendment process that produced the current version of Rule 407.

### *B. The Amendment Process for the Federal Rules of Evidence*

The seriousness of the Tenth Circuit's failure to apply amended Rule 407 can be fully appreciated only by understanding the lengthiness and rigor of the amendment process. This Part provides a brief overview of that process.

Proposed changes to the Federal Rules of Evidence undergo a lengthy and painstaking process. The 1997 amendment to Rule 407, for instance, passed through numerous procedural checkpoints—including Supreme Court and congressional

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57. Douglas McKeige, Note, *Federal Rule of Evidence 407: Can It Override Conflicting State Law?*, 59 TUL. L. REV. 1577, 1584 (1985) (noting that the Seventh Circuit recognizes that "rule 407 also serve[s] the procedural purpose of excluding irrelevant and prejudicial evidence").

58. *Id.* at 1583 (noting that the Tenth Circuit has held that "Rule 407 promotes a substantive policy [in that] it is designed to encourage manufacturers to subsequently repair their product by excluding evidence that they did so from the resulting law suit").

59. *See* Dassin, *supra* note 42, at 743 ("The Rule's exclusion of evidence of subsequent remedial measures to prove a person's 'negligence or culpable conduct' obviously applies to negligence actions. As such, it conforms to the historical exclusion of subsequent remedial measures in common law negligence actions." (footnote omitted)).

60. *See infra* Part. II.B.

61. *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5285.1 (Supp. 2005).

> In 1996, the newly revived Advisory Committee on Federal Rules of Evidence revealed its agenda when as one of its first items of business it amended Rule 407 to add to the list of impermissible objects of proof "a defect in a product, a defect in a product's design, or a need for a warning or instruction." The best the Advisory Committee could do by way of justifying the change was that it "adopts the view of a majority of the circuits." The Committee wisely decided not to claim that this would encourage drug and other manufacturers not to use consumers as guinea pigs to test their products; the evidence suggests that despite the encouragement supposedly provided by the Rule, corporations still refuse to make needed safety changes after accidents bring defects to their attention because it is cheaper to pay off injured persons in secret settlements.

*Id.* (citations omitted).

62. *See infra* Part III.B.4–IV.A.

review—before being implemented.[63] The difficulty and care inherent in amending Rule 407 underscores two lessons: (1) the Tenth Circuit should follow the 1997 amendment because it is the product of the best available legal thought and (2) the 1997 amendment represents (or is at least consistent with) the wishes of the highest legal authorities, the Supreme Court and Congress.[64] An appreciation of the laborious, careful, and time-consuming nature of the amendment process adds to the seriousness of the Tenth Circuit's refusal to follow amended Rule 407 in product liability cases because such refusal to follow the rules reduces the amendment process to a wasted exercise commensurate with the magnitude of the efforts expended and has the effect of undermining the authority of the bodies charged with amending the rules. What follows is an overview of the amendment process.

The Rules Enabling Act (the Act)[65] lays out the amendment process. The Act authorizes the Supreme Court to promulgate rules or changes in rules governing the admissibility of evidence in federal courts.[66] The rules may be changed for the purpose of "maintain[ing] consistency"[67] among the federal courts. The Supreme Court receives assistance from the federal Judicial Conference and the standing committee on evidence rules.[68] These bodies recommend changes to the Federal Rules of Evidence.[69] After being drafted, suggested changes must be published for public comment.[70] This process "involves a minimum of seven stages of formal comment and review."[71] Following the public comment and revision stages, an authorized body provides the changes to the Supreme Court with an explanatory note on the rule and a written report explaining the body's action, including any minority or other views.[72] After the Supreme Court receives and adopts a proposed change from the Judicial Conference or the standing evidence committee, the Court must transmit it to Congress within a prescribed time period.[73] Congress may nullify

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63. For a more detailed overview of the rulemaking process than is provided below, see generally Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323 (1991); Frank H. Easterbrook & Thomas E. Baker, *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679 (1996); Freeman, *supra* note 26, at 1203–07.

64. That the amended rules represent the will of Congress and the Supreme Court follows from the necessity of Supreme Court promulgation and congressional acquiescence before any amendment can take effect. *See infra* notes 65–75 and accompanying text (outlining the process for amending a Federal Rule of Evidence).

65. 28 U.S.C. § 2072 (2000).

66. The Rules Enabling Act, 28 U.S.C. § 2072, provides:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

67. 28 U.S.C. § 2073(b).

68. *See id.* §§ 2073, 2074 (2000 & Supp. 2005).

69. *See id.* § 2073(d).

70. *See Federal Rulemaking: The Rulemaking Process, A Summary for the Bench and Bar* (2006), *available at* http://www.uscourts.gov/rules/proceduresum.htm [hereinafter *Federal Rulemaking*].

71. *Id.*

72. *See* 28 U.S.C. § 2073(d).

73. *See id.* § 2074.

any proposed rule or change.[74] "From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule."[75]

Considering the difficulty and care taken in the adoption of the 1997 amendment to Rule 407, it would behoove the Tenth Circuit to follow the amendment as required by the Rules Enabling Act.[76] The failure on the part of the Tenth Circuit to do so up to this point has arguably called into question the authority of the bodies that amend the evidence rules, the Supreme Court and Congress (at least for those who may have noticed this refusal to follow amended Rule 407). If a federal circuit court ignores the legal effect of a duly-promulgated amendment, as this Article claims the Tenth Circuit has done, the true rulemaker cannot be said to be the Supreme Court or Congress; the true rulemaker is the Tenth Circuit.

## III. THE EMERGENCE OF THE CIRCUIT SPLIT OVER RULE 407 AND PRODUCT LIABILITY ACTIONS

Prior to 1997, Rule 407 left "open the question of whether Rule 407 was intended to include claims based on a theory of strict liability"[77] such as strict product liability. The rule forbade the admission of subsequent remedial measures evidence at trial only if offered to prove "'negligence or culpable conduct,'"[78] which arguably are not at issue in strict product liability suits. Nevertheless, the majority of federal circuits applied Rule 407 in such suits.[79] Only the Courts of Appeals for the Eighth and Tenth circuits declined to do so.[80] This Part analyzes the principal lines of reasoning in the debate over this issue.

### *A. The Eighth and Tenth Circuits Held That Rule 407, by Its Terms, Did Not Apply to Strict Product Liability Actions*

In *Robbins v. Farmers Union Grain Terminal Association*,[81] the Eighth Circuit declined to apply Rule 407 to strict product liability actions because, by its own terms, the rule confined its governance to cases involving "negligence or other

74. *Federal Rulemaking*, *supra* note 70.

75. *Id.*

76. *See* 28 U.S.C. § 2072 (2000).

77. *See* Dassin, *supra* note 42, at 737.

78. *Id.*

79. *See* Cameron v. Otto Bock Orthopedic Indus., Inc., 43 F.3d 14, 17–18 (1st Cir. 1994); Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991); McInnis v. A.M.F., Inc., 765 F.2d 240, 244–45 (1st Cir. 1985); Joint E. Dist. & S. Dist. Asbestos Litig. v. Armstrong World Indus., Inc., 995 F.2d 343, 345 (2d Cir. 1993); Cann v. Ford Motor Co., 658 F.2d 54, 59–60 (2d Cir. 1981); Kelly v. Crown Equip. Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Petree v. Victor Fluid Power, Inc., 831 F.2d 1191, 1198 (3d Cir. 1987); Josephs v. Harris Corp., 677 F.2d 985, 990–91 (3d Cir. 1982); Werner v. Upjohn Co., 628 F.2d 848, 857–58 (4th Cir. 1980); Grenada Steel Indus., Inc. v. Ala. Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983); Hall v. Am. S.S. Co., 688 F.2d 1062, 1066–67 (6th Cir. 1982); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636–37 (9th Cir. 1986); Wood v. Morbark Indus., Inc., 70 F.3d 1201, 1206–09 (11th Cir. 1995).

80. Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977).

81. *Robbins*, 552 F.2d at 793 ("Rule 407 is, by its terms, confined to cases involving negligence or other culpable conduct.").

culpable conduct."[82] The Tenth Circuit agreed in *Herndon v. Seven Bar Flying Service, Inc.*[83] "The reasoning behind [the theory relied upon by the Eighth and Tenth circuits was] that the language of [Rule 407] expressly limits its application to claims in which fault must be proven, and that because fault is irrelevant under a theory of strict liability, the rule cannot apply."[84] Both circuits followed the California Supreme Court's decision in *Ault v. International Harvester Co.*,[85] "which reasoned that because the focus in strict products liability cases is on the product itself and not on the manufacturer's conduct, the policy justification for excluding evidence of remedial measures does not exist."[86]

The majority of federal circuit courts rejected this line of argument. For example, the majority "reason[ed] that there is no practical difference between strict liability and negligence in defective design cases."[87] The majority also noted that the social policy argument in favor of not deterring safety improvements seemed as strong in strict liability cases as it is in negligence cases.[88]

The 1997 amendment to Rule 407 superseded the Eighth Circuit's position and aligned the Eighth Circuit with the majority of other federal circuit courts. The U.S. District Court for the District of Minnesota (within the Eighth Circuit) recognized that the Eighth Circuit's position permitting admission of evidence of subsequent remedial measures under Rule 407 has been superseded by the amended rule.[89] The district court noted recently that "the precedents on that issue, within this Circuit, have been superseded by the most recent amendment to Rule 407" of the Federal Rules of Evidence.[90] Likewise, the Pennsylvania, Colorado, and Washington state supreme courts observed that the Tenth Circuit's identical position has also been superseded.[91] The Colorado Supreme Court observed:

> Two circuits, the Eighth and the Tenth...did not adhere to the views of the majority of the federal circuits prior to the amendments to Rule 407. Instead, the Eighth and the Tenth Circuits followed the reasoning expressed in *Ault*. These decisions have now been superseded by the amendments to Rule 407.[92]

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82. *Id.*; *see also* Burke v. Deere & Co., 6 F.3d 497, 506 (8th Cir. 1993); Donahue v. Phillips Petroleum Co., 866 F.2d 1008, 1013 (8th Cir. 1989); Roth v. Black & Decker, U.S., Inc., 737 F.2d 779, 782 (8th Cir. 1984); Unterburger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980).

83. 716 F.2d 1322, 1331 (10th Cir. 1983) (noting that Rule 407 cannot apply when culpability is not at issue); *see also* Huffman v. Caterpillar Tractor Co., 908 F.2d 1470, 1480–81 (10th Cir. 1990); Meller v. Heil Co., 745 F.2d 1297, 1299–1300 (10th Cir. 1984).

84. Richardson, *supra* note 37, at 1467 (footnotes omitted).

85. 528 P.2d 1148 (Cal. 1974); *see* Forma Sci., Inc. v. BioSera, Inc., 960 P.2d 108, 115 (Colo. 1998) ("[T]he Eighth and the Tenth Circuits followed the reasoning expressed in *Ault*.").

86. Richardson, *supra* note 37, at 1467; *see also Ault*, 528 P.2d at 1150.

87. Richardson, *supra* note 37, at 1468; Dassin, *supra* note 42, at 753.

88. *See, e.g.*, Werner v. Upjohn Co., 628 F.2d 848, 856–57 (4th Cir. 1980); Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984); *see* Richardson, *supra* note 37, at 1468.

89. Berczyk v. Emerson Tool Co., 291 F. Supp. 2d 1004, 1016 n.14 (D. Minn. 2003).

90. *Id.*

91. Duchess v. Langston Corp., 769 A.2d 1131, 1138 n.8 (Pa. 2001); Forma Sci., Inc. v. BioSera, Inc., 960 P.2d 108, 115 (Colo. 1998); Hyjek v. Anthony Indus., 944 P.2d 1036, 1039 (Wash. 1997).

92. *Forma Sci.*, 960 P.2d at 115 (footnotes and citations omitted).

The Tenth Circuit, however, had another ace up its sleeve: a choice-of-law rationale that permits exclusion of subsequent remedial measures evidence under state law, despite the contrary command of amended Rule 407.

### *B. The Tenth Circuit's* Erie *Rationale*

In *Moe v. Avions Marcel Dassault-Breguet Aviation*, the Tenth Circuit held that the pre-1997 Rule 407 was inapplicable to product liability suits using a theory grounded in the *Erie* doctrine.[93] This section will first explain the *Erie* doctrine and the related principles set forth in *Hanna v. Plumer*[94] and then analyze the Tenth Circuit's attempt at applying these doctrines.

#### 1. *Erie Railroad v. Tompkins* and Subsequent Cases

*Erie*'s holding is an interpretation of the Rules of Decision Act, a federal statute that seeks to define those situations where state law applies in federal court.[95] According to *Erie*, the Rules of Decision Act requires federal courts sitting in diversity to apply the substantive law of the state.[96] The Rules of Decision Act, however, does not require federal courts to apply state procedural law. Federal courts in general must use federal procedure.[97]

The Supreme Court later refined the test for identifying which state laws must apply in federal court.[98] In *Guaranty Trust Co. of New York v. York*, the Court stated that the use of federal rules in diversity cases, as opposed to state rules, should not change cases' outcomes.[99] For a time, outcome determination became the touchstone for choosing between federal and state rules in federal diversity cases.[100] The *York* variation of *Erie* was itself refined in the later case of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[101] In *Byrd*, the Supreme Court used a balancing test to conclude that Seventh Amendment policy required federal courts sitting in diversity to allow juries to make certain factual findings, even when state law

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93. 727 F.2d 917, 931–33 (10th Cir. 1984).

94. 380 U.S. 460 (1965).

95. 28 U.S.C. § 1652 (2000) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

96. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State.").

97. For the notion that *Erie* requires federal courts sitting in diversity to apply state substantive law but federal procedural law, see *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 105–12 (1945), *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) ("The broad command of *Erie* was...that...federal courts are to apply state substantive law and federal procedural law."), and *Gasperini v. Center for the Humanities, Inc.*, 518 U.S. 415, 427 (1996). Although *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941), is a Rules Enabling Act case, not a Rules of Decision Act case, it is nevertheless helpful to take note of its definition of procedure. A rule is procedural "if it really regulates procedure," meaning "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering a remedy and redress for disregard or infraction of them." *Id.*

98. *See* Lorge, *supra* note 23, at 142 ("Subsequent Supreme Court decisions have altered and re-shaped the original holding of *Erie*.").

99. *See Guaranty Trust Co.*, 326 U.S. at 109–12.

100. *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 709 (1974) ("But although it held sway for quite a time, *York*'s outcome determination test seemed overbroad."); Finkelstein, *supra* note 27 at 591 (noting that "the *York* outcome determination test endured for some time").

101. 356 U.S. 525 (1958).

entrusted such findings to judges.[102] According to Professor Ely, "In 1958, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, the Court...announc[ed] that *Erie* really required that the state's interests be balanced against whatever interests the federal government might have in the application of its rule."[103]

The Supreme Court made a final, paradigmatic change in federal-state choice of law for federal courts in *Hanna v. Plumer*.[104] Since *Hanna*, federal-state choice of law for federal courts has largely stabilized.[105] Unlike *Erie*, *Hanna* primarily interpreted not the Rules of Decision Act, but the Rules Enabling Act.[106] Whereas the Rules of Decision Act defines situations where federal courts must apply substantive state law—thus making state law the focus of inquiry—the Rules Enabling Act seeks to accomplish the inverse: it tells federal courts when federal rules must be followed.[107] The Rules Enabling Act and *Hanna*, therefore, control the choice-of-law analysis when a federal court must determine whether a specific federal rule might control.[108]

*Hanna* consequently created a test specifically designed for federal rules that proceeds in two parts.[109] Each part employs a mutually exclusive avenue of analysis. First, the court "asks whether the federal rule directly covers the situation before it. If not, the court then evaluates the choice of law in light of the policies underlying the *Erie* doctrine."[110] This mode of choice-of-law analysis is a *standard*, not a rule, and will be referred to in this Article as the "*Erie* standard." This *Erie* standard, of course, is heavily dependent on the balancing test announced in *Byrd*.[111] As a

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102. *See Byrd*, 356 U.S. at 536–40; Lorge, *supra* note 23, at 143–44.

103. Ely, *supra* note 100, at 696.

104. Hanna v. Plumer, 380 U.S. 460, 470–71 (1965).

105. *See* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 966 (1998) (noting that "since the Court decided *Hanna* in 1965 it has provided and maintained a reasonably stable, workable, and sensible structure for analyzing issues in...the *Erie-Hanna* area of state-federal law choice for federal courts").

106. *See Hanna*, 380 U.S. at 463–64 ("We conclude that the adoption of [Federal] Rule [of Civil Procedure] 4(d)(1)...neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service.").

107. For the text of the Rules Enabling Act, see *supra* note 66.

108. *See Hanna*, 380 U.S. at 470–71.

109. *See* Fasanaro v. Mooney Aircraft Corp., 687 F. Supp. 482, 484–85 (N.D. Cal. 1988) (citing and discussing *Hanna*, 380 U.S. at 471).

110. *Id.* at 484 (citing *Hanna*, 380 U.S. at 471).

> *Erie Railroad Co. v. Tompkins* established that federal courts may apply federal procedural law but must apply state substantive law in diversity actions. *Hanna v. Plumer* dictates that when there is a direct conflict between state law and the express language of a federal rule, the federal rule controls. If there is no direct conflict, however, the court must look to the policies underlying *Erie* to determine whether state or federal law governs.

Flink, *supra* note 19, at 1488–89.

111. In a relatively recent major case involving the *Erie* doctrine, the Court relied heavily on a mode of analysis inspired by *Byrd*. *See* Gasperini v. Ctr. for the Humanities, Inc., 518 U.S. 415, 431–39 (1996) (citing and discussing *Byrd*); *see also* J. Benjamin King, Note, *Clarification and Disruption: The Effect of* Gasperini v. Center for Humanities, Inc. *on the* Erie *Doctrine*, 83 CORNELL L. REV. 161, 164 (1997) ("*Gasperini* affirms *Byrd*'s place in the *Erie* doctrine, assuring the legal community of *Byrd*'s continuing relevance."). One commentator expressed disappointment in this fact. C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 B.Y.U. L. REV. 267, 270 ("The *Gasperini* majority relied centrally on *Byrd*, which it apparently assumed should be read as a charter for federal courts to dispense with 'substantive' state rules whenever they conclude that 'essential' federal interests are paramount. However, this question has been subject to considerable debate in the years following *Byrd*.").

further illustration that the *Erie* standard is in fact a standard and not a rule, it is worth noting that in *Hanna* the Supreme Court said that the "typical" *Erie* analysis is "relatively unguided,"[112] which of course means that it is more standard-like than rule-like.

Second, moving to the other mutually exclusive avenue of analysis under *Hanna*, if a federal rule is "clearly applicable" to the issue at hand, "the test [is] whether the Rule was within the scope of the Rules Enabling Act, and if so, within a constitutional grant of power such as the Necessary and Proper Clause of Art. I."[113] As *Hanna* itself said,

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[114]

Clearly applicable federal rules that have been promulgated by the Supreme Court and Congress therefore must be presumed constitutionally valid "unless they cannot rationally be characterized as rules of procedure."[115] In terms of Justice Harlan's *Hanna* concurrence, a federal rule must be deemed procedural, and therefore constitutionally valid, if it is "arguably procedural."[116] This second choice-of-law test, the *Hanna* arguably procedural test, is much easier to apply than the *Erie* standard because it is a bright-line rule,[117] not a "relatively unguided"[118] standard, and shall be referred to as the "*Hanna* rule."

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112. *Hanna*, 380 U.S. at 471.

113. Walker v. Armco Steel Corp., 446 U.S. 740, 748 (1980) (citation omitted); *see Hanna*, 380 U.S. at 471; *Fasanaro*, 687 F. Supp. at 484–85; Ogburn, *supra* note 28, at 616–17, 636–67.

> Application of the *Hanna* analysis is premised on a "direct collision" between the Federal Rule and the state law. In *Hanna* itself the "clash" between Rule 4(d)(1) and the state in-hand service requirement was "unavoidable." The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court. It is only if that question is answered affirmatively that the *Hanna* analysis applies.

*Walker*, 446 U.S. at 749–50 (citations omitted).

> Since there is no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply. Instead, the policies behind *Erie* and *Ragan* control the issue whether, in the absence of a federal rule directly on point, state service requirements which are an integral part of the state statute of limitations should control in an action based on state law which is filed in federal court under diversity jurisdiction.

*Id.* at 752–53.

114. *Hanna*, 380 U.S. at 471.

115. McInnis v. A.M.F., Inc., 765 F.2d 240, 244 (1st Cir. 1985) (citing *Hanna*, 380 U.S. at 471).

116. *Hanna*, 380 U.S. at 476 (Harlan, J., concurring).

117. *The Supreme Court, 1995 Term—Leading Cases*, 110 HARV. L. REV. 256, 257 n.5 (1996) ("*Hanna* held that a Federal Rule of Civil Procedure trumps state law if the Rule is constitutional, within the Rules Enabling Act, and applicable to the situation at bar. Thus, *Hanna* created a bright-line rule in favor of the application of federal procedural rules.") (citations omitted).

118. *Hanna*, 380 U.S. at 471.

When the *Hanna* rule controls, federal rules are generally upheld.[119] Therefore, a federal rule that directly covers the issue before the court runs the risk of being held constitutionally invalid if it cannot rationally be characterized as procedural. A federal rule that only indirectly addresses the issue at hand, however, need not be declared constitutionally invalid. The court may use the *Erie* standard and apply the state rule in favor of the federal rule with a mere choice-of-law analysis conducted "in light of the policies underlying" *Erie*.[120]

As will be shown below, this distinction is crucial. Prior to the 1997 amendment, Rule 407 in a strict product liability action could have been tested with the *Erie* standard—meaning that it did not have to be declared constitutionally invalid to be set aside in favor of a state evidence rule.[121] But, in its amended form, Rule 407 must always be tested by the *Hanna* rule.[122] In other words, if it re-decided *Moe* today, the Tenth Circuit could reach the same result only by holding Rule 407 unconstitutional.[123] At the time of *Moe*, however, the Tenth Circuit did not have to hold Rule 407 invalid.

2. A Possible Source of Confusion: *Hanna*'s Meta-Rule

The *Hanna* two-step choice-of-law test can be misapplied quite easily if a court fails to realize that it implicitly contains a choice-of-law rule that chooses between the *Hanna* rule and the *Erie* standard.[124] The overall *Hanna* scheme, therefore, contains not only its own choice-of-law test for determining when to apply federal or state law in diversity actions, it also sets forth a choice-of-law test that selects either the *Hanna* arguably procedural rule or the *Erie* standard. This implicit choice-of-law rule in *Hanna* for choosing between the *Hanna* rule and the *Erie* standard shall be referred to in this Article as the "*Hanna* meta-rule." The *Hanna* meta-rule stands apart from both the *Hanna* rule (meaning the arguably procedural test itself) and the *Erie* standard as a means of choosing one or the other. Put another way, the *Hanna* meta-rule tells the court whether it should be deciding the choice-of-law issue based on the Rules Enabling Act (and therefore the *Hanna* rule) or the Rules of Decision Act (and therefore the *Erie* standard).

Such a meta-rule of some kind is necessary, owing to the inherent tension between the Rules of Decision Act (and the *Erie* standard) and the Rules Enabling

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119. No federal court has ever struck down a federal rule of evidence or procedure under *Hanna*. Rioux v. Daniel Int'l Corp., 582 F. Supp. 620, 624 (D. Me. 1984) ("It is significant to note that no federal rule of procedure or evidence has *ever* been struck down as exceeding Congress' constitutional power."). No federal case in the last twenty-two years has made this observation from *Rioux* any less true.

120. Fasanaro v. Mooney Aircraft Corp., 687 F. Supp. 482, 484. (N.D. Cal. 1988).

121. This statement contemplates testing the applicability of the pre-1997 version of Rule 407 in a strict liability case; of course, the pre-1997 rule would have been tested under the *Hanna* rule, not the *Erie* standard, in a negligence case in federal court.

122. Amended Rule 407 directly applies in all suits in federal court involving evidence of subsequent remedial measures.

123. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 748 (1980); *Hanna*, 380 U.S. at 470–72; *Fasanaro*, 687 F. Supp. at 484.

124. The subtleties of the *Erie-Hanna* system, one of which is discussed in this subsection, have thrown off lower federal courts. *See* Darrell N. Braman, Jr. & Mark D. Neumann, *The Still Unrepressed Myth of* Erie, 18 U. BALT. L. REV. 403, 405–06 (1989) ("[O]f the many cases since 1974 involving *Erie* disputes, only a handful have used an analysis that arguably tracks the Supreme Court's standard....").

Act (and the *Hanna* rule). This tension arises from the way that the two statutes cover highly similar subject matter with inconsistent tests. The Court in *Hanna* obliquely substantiated this point: "It is true that both the [Rules] Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions."[125]

The Rules of Decision Act directs courts to use state law where it applies,[126] and by implication denotes the issues governed by federal procedure as the exception to those situations where state law applies. The Rules Enabling Act is the inverse of the Rules of Decision Act. It tells federal courts when to obey federal procedural rules and by implication allows other substantive law to go where federal procedural rules cannot or do not tread. Of course, in diversity actions the substantive law will be the law of the state.[127]

There would be no need to choose between these two statutes if they relied on the same implementing tests. For instance, if the *Erie* standard applied to every determination under the Rules of Decision Act and the Rules Enabling Act, every case would come out the same way regardless of which statute the court cited as the basis for its choice-of-law decision. The same would hold true if both statutes relied on the *Hanna* rule. But they do not.[128] The Supreme Court has created two distinct tests to implement these two different statutes.[129]

The two statutes' potential to cover essentially the same subject matter, however, opens the door to considerable confusion. Imagine, for instance, a purportedly procedural federal rule promulgated by the Supreme Court or enacted by Congress that has strongly substantive aspects and directly contradicts substantive state law. As the importance of the social policy rationale for Rule 407 demonstrates, Rule 407 is just such a rule.[130] Should a federal court use the *Erie* standard or the *Hanna* rule? Arguably, the *Erie* standard should control because, to the extent that the federal rule is substantive, the Rules of Decision Act says that state law, not federal law, should apply. But just as arguably, the *Hanna* rule should apply because, after all, the rule in question is purportedly (and maybe arguably) procedural. Without a meta-rule, the existence of two inconsistent tests covering highly similar subject matter potentially renders the choice-of-law decision arbitrary.

*Hanna* solves this dilemma with a meta-rule that tells courts when to use the Rules Enabling Act's *Hanna* rule. As laid out in Part III.B.1 above, the *Hanna* meta-

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125. *Hanna*, 380 U.S. at 471.

126. It may seem circular to say that the Rules of Decision Act directs federal courts to apply state substantive law "where it applies," but that is what the Rules of Decision Act actually says. *See* 28 U.S.C. § 1652 (2000) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, *in cases where they apply*." (emphasis added)).

127. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state.").

128. *See Hanna*, 380 U.S. at 471.

129. *See* Megan Barbero, Note, *Interpreting Rule 68 to Conform with the Rules Enabling Act*, 57 STAN. L. REV. 2017, 2032 (2005) ("The Court in '*Hanna* Part II' distinguished the Rules Enabling Act test from the 'relatively unguided *Erie* choice.'").

130. *See supra* Part II.A (explaining the social policy rationale for excluding evidence of subsequent remedial measures).

rule selects for application the *Hanna* arguably procedural rule whenever a federal rule clearly controls the issue before the court. This meta-rule, however, selects for application the *Erie* standard whenever the federal rule in question does not clearly control the issue before the court.

Some commentators note that the Court's articulation of this overall scheme in *Hanna* has led to confusion and inconsistent decisions in the lower federal courts.[131] A federal court can easily become confused if it fails to acknowledge the existence of the *Hanna* meta-rule. A court unaware of the *Hanna* meta-rule, unless it invented or borrowed a different meta-rule, would have no definitive way to determine when to use the *Hanna* arguably procedural rule and when to rely on the *Erie* standard in cases involving a federal rule with strongly substantive aspects. Such a court might arbitrarily choose one test or the other. Or, as the Tenth Circuit has arguably done since *Moe*,[132] such a federal court might see no reason to revisit a past precedent based on the *Erie* standard that the *Hanna* meta-rule now requires to be analyzed under the *Hanna* arguably procedural rule. As will be seen below, the Fourth Circuit illustratively committed the former error, and the Tenth Circuit arguably committed the latter mistake by failing to acknowledge that the 1997 amendment to Rule 407 superseded *Moe*.

3. The Fourth Circuit Illustratively Overlooked the *Hanna* Meta-Rule in *Hottle v. Beech Aircraft Corp.*

The Fourth Circuit appears to have overlooked the *Hanna* meta-rule in *Hottle v. Beech Aircraft Corp.*[133] *Hottle* was a product liability case in which the Fourth Circuit assumed for purposes of the appeal that a Virginia evidence rule conflicted with Federal Rule of Evidence 402.[134] Recall that if the Fourth Circuit actually believed that Rule 402 directly covered the situation before it—and it assumed so for purposes of the appeal—the court was obligated to rely on the *Hanna* rule and either follow Rule 402 or hold it unconstitutional.[135] The Fourth Circuit did neither.[136] Instead, the court recited the *Erie* standard *and* the *Hanna* rule as part of its statement of the governing law.[137]

The *Hottle* court first noted that federal courts sitting in diversity must apply state substantive law and federal procedural rules.[138] Citing *Byrd*, the Fourth Circuit stated, "[T]he Supreme Court has also noted that where a state's procedural rule is

131. *See* Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 366 (1977) ("These varying interpretations of *Byrd*, together with the Court's ambiguous analysis of *Byrd* in *Hanna v. Plumer*, have been significant factors in creating the confusion and inconsistency lower federal court decisions after *Hanna* have exhibited in fashioning a standard for deciding Rules of Decision Act cases.").

132. *See infra* Part IV.A.

133. 47 F.3d 106 (4th Cir. 1995).

134. *Id.* at 109 & n.5.

135. *See supra* Part III.B.1.

136. Although, ironically, it mentioned in passing that the Federal Rules of Evidence were validly enacted. *See Hottle*, 47 F.3d at 109 ("Accordingly, we, along with other courts of appeals, have held that the Federal Rules of Evidence, as validly enacted procedural rules, govern in diversity cases.").

137. *Id.*

138. *Id.*

bound up with substantive policy, a federal court is to apply the state rule."[139] The court next reviewed *Hanna*: "Yet, in a more recent case involving a conflict between Federal Rule of Civil Procedure 4(d)(1) and a state service of process rule, the Court *rejected* the substantive-procedural test in that context and found the federal rule controlling under the authority of the Rules Enabling Act."[140] In other words, the Fourth Circuit acknowledged that, in *Hanna*, the Supreme Court "rejected" (on *Hanna*'s facts at least) the very *Erie* standard it had just reviewed. The court therefore understood that two different and inconsistent tests were in play. The Fourth Circuit then applied the *Erie* standard without explaining why it declined to use the *Hanna* rule.[141]

*Hottle* thus reveals how federal courts attempting to identify the applicable law can go astray. The court in *Hottle* showed no awareness that *Hanna* tells federal courts when the *Hanna* rule, and not the *Erie* standard, should apply (and vice versa). The example of *Hottle* supplies a possible explanation for why the Tenth Circuit has failed to revisit *Moe* in light of the 1997 amendment to Rule 407. If the Tenth Circuit has simply failed to take note of the *Hanna* meta-rule, as the Fourth Circuit arguably did in *Hottle*, that would explain why it sees no need to revisit an issue ostensibly settled in *Moe* by application of the *Erie* standard. Before this explanation for the Tenth Circuit's position can be demonstrated, the Tenth Circuit's opinion in *Moe* must be examined.

4. The Tenth Circuit's *Erie* Analysis of Rule 407

As noted above, when the Tenth Circuit decided *Moe* in 1984, the scope of Rule 407 was "ambiguous."[142] It left "open the question of whether Rule 407 was intended to include claims based on a theory of strict liability."[143] As a result of this ambiguity, the Tenth Circuit was not required to test Rule 407 in 1984 using the *Hanna* rule; that is, it was not required to determine whether or not Rule 407 was unconstitutional. Instead of using the *Hanna* rule, the ambiguity of Rule 407 in 1984 permitted the *Moe* court to use the *Erie* standard by holding that Rule 407 did not directly cover the issue before it, thereby avoiding any need to strike down Rule 407 to apply state evidence law.[144]

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139. *Id.*

140. *Id.* (emphasis added).

141. *See id.* at 109–10. As one commentator points out, the *Hottle* court may have reached the correct bottom-line result for reasons unrelated to its erroneous decision not to apply the *Hanna* rule.

> A closer look at the *Hottle* opinion and the state rule may not produce a conflict which would make the ultimate holding a correct one. Federal Rules of Evidence 401 and 402 are validly enacted procedural rules that govern even in diversity suits. The proper inquiry in the *Hottle* case then becomes whether the evidence is in fact relevant under Federal Rule of Evidence 401. Therefore, if Virginia's rule is substantive, then the introduction of the manual would be irrelevant under federal law, as well as state law. A closer look at the cases cited in the opinion may demonstrate that no real conflict exists.

Lorge, *supra* note 23, at 163.

142. Dassin, *supra* note 42, at 737; *see Rule 407: Subsequent Remedial Measures*, 12 TOURO L. REV. 425, 427 (1996).

143. Dassin, *supra* note 42, at 737.

144. *See supra* notes 121–123 and accompanying text.

In fact, the Tenth Circuit used the *Erie* standard because it had previously held that Rule 407 did not, by its own terms, "preclude the admissibility of subsequent remedial measures in product liability actions."[145] Thus, the Tenth Circuit analyzed the choice-of-law issue based on the policies underlying *Erie*.

A more detailed look at the Tenth Circuit's analysis in *Moe* also reveals that it applied the *Erie* standard and not the *Hanna* rule. *Moe* held that the Colorado state rule of evidence at issue in that case, and not Rule 407, should apply for several interlocking reasons. First, the court attributed importance to Colorado policy. The court stated, "It is our view that when state courts have interpreted Rule 407 or its equivalent state counterpart, the question whether subsequent remedial measures are excluded from evidence is a matter of state policy."[146] The state evidence rule was "so closely tied to the [state] substantive law to which it relate[d]" that it should control.[147] Later in the opinion, the court restated its view that it must "regard" the content of state law to decide the applicability of Rule 407 to the product liability action before it.[148] This first reason implies that the Tenth Circuit opted for the *Erie* standard. If the court had resolved the issue using the *Hanna* rule, it would not matter in the slightest what Colorado evidence policy was (except for purposes of establishing a conflict with the federal rule).[149] Once a conflict has been established, the *Hanna* arguably procedural rule examines only the federal rule, not the state rule.[150]

Next the court provided a list of factors supporting its decision, including its observation that

> (a) there is no federal products liability law, (b) the elements and proof of a products liability action are governed by the law of the state where the injury occurred and these may, and do, for policy reasons, vary from state to state, and (c) an announced state rule in variance with Rule 407 is so closely tied to the substantive law to which it relates (product liability) that it must be applied in a diversity action in order to effect uniformity and to prevent forum shopping.[151]

This list of factors also indicates that the Tenth Circuit relied on the *Erie* standard. Although the court considered whether Rule 407 is substantive or procedural, this inquiry is consistent with use of both the *Hanna* rule and the *Erie* standard and therefore does not reveal which one the *Moe* court applied.[152] The court was acutely concerned with forum shopping, uniformity of law, and the lack of any federal

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145. Davis, *C.R.E. 407*, *supra* note 29, at 78 (citing Herndon v. Piper Aircraft Corp., 716 F.2d 1322, 1328–29 (10th Cir. 1983)).

146. Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984).

147. *Id.*

148. *See id.* at 933 (restating the "view that the trial court erred in ruling that Fed. Rule of Evid. Rule 407 applies in diversity actions without regard to state law").

149. The *Hanna* rule asks only whether the challenged federal rule can be rationally characterized as procedural; this inquiry does not include an analysis of state policy. *See supra* Part III.B.1.

150. *See supra* notes 115–120 and accompanying text.

151. *Moe*, 727 F.2d at 932.

152. *See id.*; Hanna v. Plumer, 380 U.S. 460, 471 (1965) (observing that both *Hanna* and *Erie* require application of federal procedure and state substantive law in diversity actions, but observing that this fact does not mean that the tests enunciated in these cases are identical).

product liability law, none of which should be brought up when using the hard-and-fast *Hanna* rule.[153]

As another reason for concluding that the Tenth Circuit applied the *Erie* standard and not the *Hanna* rule, consider the following: although the court claimed that "[t]he purpose of Rule 407 is not to seek the truth or to expedite trial proceedings"[154] and therefore is purportedly not procedural, this observation was not entered into the *Hanna* arguably procedural algorithm, which would signal use of the *Hanna* rule. To the contrary, the court merely said that it was "not unmindful" of *Hanna*.[155]

The *Moe* court left no doubt at the end of its Rule 407 analysis that it was relying on the *Erie* standard. The court held that state law controls the application of Rule 407, and then cited *Erie* itself.[156] The court stated that the use of Rule 407 in product liability actions would represent "an unwarranted incursion into the *Erie* doctrine."[157] There can be no doubt, then, that *Moe* relied on the *Erie* standard and not the *Hanna* rule.

Because the Tenth Circuit did not rest *Moe*'s holding on the *Hanna* arguably procedural rule,[158] it most likely did not consider Rule 407 and the Colorado state evidence rule to be in "direct conflict"[159]—the court apparently believed that the federal rule did not directly cover the issue at hand. It seems clear from the decision's dicta, however, that at the time it would have also held Rule 407 invalid under the *Hanna* arguably procedural rule.[160] The court suggested that Congress lacked power to enact Rule 407.[161] In sum, the Tenth Circuit's actual holding in *Moe* relied on the *Erie* standard only.

## IV. THE 1997 AMENDMENT TO RULE 407 SUPERSEDED THE TENTH CIRCUIT'S POSITION

Although the 1997 amendment to Rule 407 expressly extends the rule to product liability actions, the circuit split described above has continued. The Tenth Circuit, all alone now, still does not apply Rule 407 to product liability cases (or any diversity cases) as a general matter. Perhaps because the Tenth Circuit has overlooked the *Hanna* meta-rule, it has shown no awareness of the 1997 amendment's *Erie-Hanna* ramifications for *Moe*. This Part demonstrates that the 1997 amendment to Rule 407 rendered *Moe*'s mode of analysis obsolete. Today,

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153. *See* Flink, *supra* note 19, at 1490–91 ("The *Hanna* conflict test establishes the presumptive validity of federal rules when a federal rule is on point and is within the scope of the Federal Rules Enabling Act, thereby rendering *Erie* analysis unnecessary.").

154. *Moe*, 727 F.2d at 932.

155. *Id.*

156. *Id.*

157. *Id.*

158. *See* French v. Fleet Carrier Corp., 101 F.R.D. 369, 372 n.3 (D. Me. 1984) (noting that "[t]he *Moe* court found that the analysis set forth in *Hanna*...is inapplicable").

159. *Moe*, 727 F.2d at 932.

160. *Id.* at 932–33.

161. "'[I]t does not necessarily follow that the Congress, in codifying the law of evidence, may constitutionally enact a narrow statute governing a single substantive issue in a lawsuit which is otherwise to be resolved by reference to state law....'" *Id.* at 933 (quoting 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 166, at 264 (1978)).

Rule 407's applicability in diversity cases may be judged only by the *Hanna* rule and not by the *Erie* standard.[162] *Hanna* requires the Tenth Circuit to acknowledge that *Moe* is no longer good law and to apply Rule 407 in product liability cases.[163] In addition, the minutes of the 1993 Committee meeting show that the 1997 amendment was intended to have the effect of superseding *Moe*'s holding.[164]

### *A. The Federal Courts of the Tenth Circuit Have Continued to Follow* Moe

The U.S. Court of Appeals for the Tenth Circuit and two federal district courts within the Tenth Circuit have followed *Moe* and its progeny rather than the 1997 amendment to Rule 407. In *Blanke v. Alexander*,[165] a 1998 diversity case in tort concerning a traffic collision (not product liability),[166] the Tenth Circuit stated in dicta that *Moe* is still good law:

> We have expressed the view that in a diversity action, when there is a conflict between Fed. R. Evid. 407 excluding evidence of subsequent remedial measures, except where offered for specified limited purposes, and a contrary state rule repudiating the rule of exclusion, the state rule controls; the question of exclusion of subsequent remedial measures is a matter of state policy.[167]

Two years after *Blanke*, in the unpublished product liability appeal of *Call v. State Industries*,[168] the Tenth Circuit held that it was still "bound" by *Moe*: "we are bound by the...rule announced in the earlier case of *Moe*."[169] "In diversity actions involving a strict products liability claim," the court held, "the question of whether to permit evidence of subsequent remedial measures is governed by state law."[170] In neither *Call* nor *Blanke* did the Tenth Circuit consider the *Erie-Hanna* ramifications of the 1997 amendment to Rule 407. As explained in detail below,[171] the 1997 amendment to Rule 407 renders *Moe* moot because now the rule directly applies to product liability cases and therefore may be set aside in favor of a conflicting state rule only if it flunks the *Hanna* rule—a rule that *Moe* never incorporated into its holding.[172]

In a 2003 unpublished product liability appeal, however, the Tenth Circuit took note of the 1997 amendment. In *Gray v. Hoffman-La Roche, Inc.*,[173] the plaintiff lost a lawsuit in which she alleged that the drug Accutane caused her depression. The plaintiff appealed to the Tenth Circuit and claimed that the trial court should have admitted "evidence [that the defendant had] changed Accutane's warnings after she

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162. *See supra* Part III.B.1.
163. *See supra* Part III.B.1.
164. *See Minutes*, *supra* note 2.
165. 152 F.3d 1224 (10th Cir. 1998).
166. *Id.* at 1227.
167. *Id.* at 1231 (citing Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984)).
168. No. 99-8046, 2000 U.S. App. LEXIS 17732 (10th Cir. July 24, 2000).
169. *Id.* at *18 n.7.
170. *Id.* at *18 (citing Wheeler v. John Deere Co., 862 F.2d 1404, 1410 (10th Cir. 1988); *Moe*, 727 F.2d at 932).
171. *See infra* Part IV.B.
172. *See supra* Part III.B.4 (demonstrating that *Moe* in its holding did not rely on the *Hanna* rule).
173. Gray v. Hoffman-La Roche, Inc., 82 F. App'x 639, 646–47 (10th Cir. 2003).

stopped taking the drug."[174] As it had done twice before in the post-1997 period, the Tenth Circuit adhered to its long-held position on Rule 407: "In diversity actions involving a products liability claim, the admissibility of subsequent remedial measures is a matter of state law."[175] In the final analysis, however, the court did not apply Oklahoma evidence law because it discovered that "no Oklahoma law indicat[es] whether this exclusion applies to products liability suits."[176] For lack of a conflict, the Tenth Circuit applied amended Rule 407.[177] In its analysis of the 1997 amendment, the court failed to mention any *Erie-Hanna* implications for its prior rulings.[178] It once again overlooked the *Hanna* meta-rule, in a manner consistent with the Fourth Circuit's similar error in *Hottle*.

In 2002, the U.S. District Court for the District of New Mexico (within the Tenth Circuit) heard a case involving a strict product liability claim and, despite taking special note of the 1997 amendment to Rule 407, followed *Moe*.[179] In *Garcia v. Fleetwood Enterprises*, the district court restated the Tenth Circuit's long-held position: "Pursuant to Tenth Circuit precedent...the admissibility of subsequent remedial measures is a matter of state, not federal, law."[180] The court then noted that in 1997 Rule 407 was amended to include product liability cases, but the court declined to apply the amended rule.[181] The court *did* exclude the evidence of subsequent remedial measures in that case, but only because it found that "New Mexico Rule of Evidence 11-407 [the State's equivalent of Rule 407] does apply to product liability cases."[182] Nowhere did the court question the continuing validity of the *Moe* line of decisions. Once again, a federal court overlooked the *Hanna* meta-rule and consequently failed to see that the 1997 amendment supersedes *Moe* under the *Hanna* rule.

Finally, the U.S. District Court for the District of Kansas (also within the Tenth Circuit) has stated in unreported opinions that *Moe* continues to require that Kansas evidence law control the admissibility of evidence of subsequent remedial measures in diversity cases.[183] The district court in Kansas showed no awareness of the *Hanna* meta-rule or the possible *Erie-Hanna* ramifications of the 1997 amendment to Rule 407.

To recapitulate, the Court of Appeals for the Tenth Circuit and the federal district courts for New Mexico and Kansas still consider themselves bound to set aside amended Rule 407 in product liability actions or, more generally, when the rule conflicts with "substantive" state evidence law. Of these courts, only the district

174. *Id.* at 646.
175. *Id.* (citing *Wheeler*, 862 F.2d at 1410).
176. *Id.*
177. *See id.*
178. *See id.* at 646–49.
179. *See* Garcia v. Fleetwood Enters., Inc., 200 F. Supp. 2d 1302, 1303–04 (D.N.M. 2002).
180. *Id.* at 1303 (citing Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (1984)).
181. *See id.* at 1303–05.
182. *Id.* at 1305.
183. Wildermuth v. Staton, No. 01-2418-CM, 2002 U.S. Dist. LEXIS 8034, at *5–*6 (D. Kan. Apr. 29, 2002); Davis v. Mgmt. & Training Corp. Ctrs., No. 98-4175-RDR, 2001 U.S. Dist. LEXIS 8361, at *5 (D. Kan. May 30, 2001); Strahley v. Mercy Health Ctr. of Manhattan, Inc., No. 99-2439-KHV, 2000 U.S. Dist. LEXIS 21247, at *2 (D. Kan. Nov. 8, 2000).

court in New Mexico took note of the 1997 amendment to Rule 407.[184] None, however, saw any *Erie-Hanna* ramifications of this amendment for the *Moe* line of decisions.

### *B. The Effect of the 1997 Amendment of Rule 407 on the Tenth Circuit's* Erie *Analysis*

As discussed above, the Tenth Circuit used the *Erie* standard when it conducted its *Erie* inquiry into the pre-1997 Rule 407.[185] Today, after the effective date of the 1997 amendment, *Moe* could not be decided the same way it was decided in 1984. Amended Rule 407 directly and explicitly covers product liability actions[186] and, therefore, as commanded by *Hanna*'s meta-rule, Rule 407's applicability in federal diversity actions must be determined by the *Hanna* rule. The Tenth Circuit's decision in *Moe*, because it never incorporated the arguably procedural test into its holding (as opposed to its *dicta*),[187] cannot be viewed as controlling.

Although Daniel Ogburn's research on this issue is generally well done,[188] he urges the Ninth Circuit to copy the Tenth Circuit's position based on an error: Ogburn states that the Tenth Circuit's rationale in *Moe* from 1984 for not applying the pre-1997 version of Rule 407 in product liability actions also precludes federal courts from applying amended Rule 407 to such actions.[189] Ogburn's contention that *Moe*'s rationale continues to have relevance after the 1997 amendment is false. Ogburn appears to overlook that the *Hanna* meta-rule steers courts down one of two mutually exclusive avenues: an avenue for federal rules that directly cover the issue before the court (the *Hanna* rule), and a different avenue for rules that do not (the *Erie* standard).[190] Although in some passages of his piece, Ogburn appears to appreciate that these two different decision systems are at work,[191] he does not appreciate that they are *mutually exclusive*.[192] Ogburn apparently conflates these avenues, and this leads him to conclude that the Tenth Circuit's use of the *Erie* standard is still valid for amended Rule 407.[193] Tellingly, Ogburn never applies the *Hanna* rule to Rule 407; he never states that amended Rule 407 is beyond the power of Congress to enact or call for it to be struck down as unconstitutional, as the

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184. *Garcia*, 200 F. Supp. 2d at 1303–05.

185. *See supra* Part III.B.4.

186. As the Committee noted:

> Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product or its design, or that a warning or instruction should have accompanied a product." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions.

FED. R. EVID. 407 advisory committee's note; *see also* Vinson, *supra* note 26, at 775–76 ("[T]he amended version of Rule 407 adopts the position of the majority of the circuits that subsequent remedial measures should be excluded in strict liability actions.").

187. *See supra* notes 158–161 and accompanying text.

188. *See generally* Ogburn, *supra* note 28.

189. *See id.* at 644 ("The rationale of *Moe* holds true, even after the recent change in Rule 407, since the changes to the Rule were made merely to adopt the majority rationale, as stated by the Seventh Circuit in *Flaminio v. Honda Motor Co.*").

190. *See supra* Part III.B.1–2.

191. *See* Ogburn, *supra* note 28, at 616–17, 636–37.

192. *See supra* Part III.B.1 (analyzing *Hanna*).

193. *See* Ogburn, *supra* note 28, at 644.

*Hanna* rule would require.[194] Instead, Ogburn urges the Ninth Circuit to follow the Tenth Circuit in more or less employing the *Erie* standard by essentially incorporating the *Erie* standard into the Rules Enabling Act's limitation that federal "rules shall not abridge, enlarge or modify any substantive right."[195] Ogburn's theory, flawed as it is, has some plausibility at first blush, although he fails to mention one rather strange consequence of it. He neglects to note that the original Rule 407 is not subject to the Act's substantive-rights limitation to begin with.[196] It is an act of Congress in its own right; it was not promulgated by the Supreme Court pursuant to the Act and, hence, is not governed by its substantive-rights limitation.[197]

The 1997 amendment to Rule 407, on the other hand, *was* promulgated by the Supreme Court pursuant to the Act and *is* subject to the substantive-rights limitation.[198] This difference between the original rule and the 1997 amendment could conceivably create a bizarre result: the original rule may abridge substantive rights, but the amendment extending Rule 407 to product liability actions cannot.

This strange possibility presents no great problem in practice. The Supreme Court long ago rejected the underpinnings of Ogburn's attempt at using the Act's substantive-rights limitation to, in effect, reconcile the *Erie* standard and the *Hanna* rule. Almost twenty years ago in *Burlington Northern Railroad Co. v. Woods*, the Supreme Court held that "reasonably necessary," arguably procedural federal rules may "incidentally affect" substantive rights.[199] Ogburn never discusses *Burlington*. Far from permitting the Act's substantive-rights limitation to encroach on the *Hanna* rule, the "Supreme Court...has put its finger on the scale in favor of

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194. This omission is particularly ironic because Ogburn states in the introduction to his piece that the *Hanna* rule controls the conflict between California Evidence Code section 1151 and Rule 407.

> The 1997 revision of Federal Rule of Evidence 407 now puts California Evidence Code § 1151 in direct conflict with the Federal Rule.
>
> When a direct conflict between a state and federal rules of evidence exists, the proper test to determine which rule applies is no longer the "typical, relatively unguided *Erie* choice." Under the test prescribed in *Hanna v. Plumer*, Rule 407 must be followed in a diversity case unless "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question [does not] transgress [either] the terms of the Enabling Act [or] constitutional restrictions."

Obgurn, *supra* note 28, at 616–17 (footnotes omitted). Nevertheless, Ogburn's introduction foreshadows an analysis that looks decidedly like the *Erie* standard and not at all like the *Hanna* rule:

> The purpose of this comment is to compare Federal Rule of Evidence 407 with California Evidence Code § 1151 to determine which rule should apply in an action based on California law and brought in federal court under diversity jurisdiction. It is the position of this comment that California's section 1151 should prevail. Allowing evidence of subsequent remedial measures is a matter of state concern which helps to define the substantive law of design defect in products liability cases. This policy decision should be effectuated in a case heard in federal court where the claim is based on California law.

*Id.* at 617 (footnotes omitted); *see also id.* at 648 ("As the *Moe* court indicated, to rely on the federal rule when California has announced a contrary position on this policy 'is an unwarranted incursion into the *Erie* doctrine.'").

195. *See id.* at 636–37, 647, 648, 649; 28 U.S.C. § 2072(b) (2000).

196. Flaminio v. Honda Motor Co., 733 F.2d 463, 470 (7th Cir. 1984) ("Having been enacted by Congress rather than promulgated by the Supreme Court pursuant to the Rules Enabling Act, the Federal Rules of Evidence are not subject to the Act's proviso that rules promulgated under it 'shall not abridge, enlarge or modify any substantive right....'" (citation omitted)).

197. *See id.*

198. *See id.*

199. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987).

upholding the validity of any rule enacted pursuant to the"[200] Rules Enabling Act by permitting federal rules to infringe on substantive rights.[201]

Contrary to the approach suggested by Ogburn, amended Rule 407 may be subjected only to the *Hanna* rule and not to the *Erie* standard via the Rules Enabling Act's substantive-rights limitation, because to do otherwise would disobey the Supreme Court's directives discussed in Part III.B.1 of this Article. Other courts have tested Rule 407 with the *Hanna* rule.[202] All such courts have found Rule 407 constitutional and followed it.[203] Commentators agree that "all of the [Federal] Evidence Rules can rationally be viewed as rules of procedure...."[204]

In other words, the Tenth Circuit was incorrect to begin with when it suggested in *Moe* that Rule 407 is not procedural.[205] Recall that the Tenth Circuit stated that "[t]he purpose of Rule 407 is not to seek the truth or to expedite trial proceedings...."[206] But Rule 407 does assist courts in seeking out the truth. The relevance rationale for Rule 407 enhances the truth-seeking mechanism of trials by excluding evidence of questionable relevance, and this aspect of the rule is therefore procedural.[207]

Rule 407 provides other procedural benefits. As the Supreme Court recognized over a century ago, excluding evidence of subsequent remedial measures also protects against trial-distorting undue prejudice.[208] The "substantive judgment that underlies Rule 407 is entwined with procedural considerations. It is only because juries are believed to overreact to evidence of subsequent remedial measures that the admissibility of such evidence could deter defendants from taking such measures."[209] Congress's judgment that juries will be overly swayed by evidence of subsequent remedial measures manifests concern for the accuracy and expense of adjudication—in other words, procedural concerns.[210] Further, the Eleventh Circuit has concluded that "Rule 407 is necessary in [product liability] cases to focus the jury's attention on the product's condition or design at the time of the accident."[211]

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200. Dassin, *supra* note 42, at 768.

201. *See Burlington N. R.R.*, 480 U.S. at 5.

202. *See, e.g., Flaminio*, 733 F.2d at 471–72.

203. Other cases testing Rule 407 with the *Hanna* rule include *Cameron v. Otto Bock Orthopedic Industries, Inc.*, 43 F.3d 14, 17–18 (1st Cir. 1994); *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 245 (1st Cir. 1985); *Kelly v. Crown Equipment Co.*, 970 F.2d 1273, 1277–78 (3d Cir. 1992); and *Wood v. Morbark Industries, Inc.*, 70 F.3d 1201, 1206–09 (11th Cir. 1995).

204. 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4512, at 414 (2d ed. 1996 & Supp. 2004).

205. *See supra* Part III.B.4.

206. Moe v. Avions Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984).

207. *See supra* Part II.A.

208. *See* Columbia & Puget Sound R.R. v. Hawthorne, 144 U.S. 202, 207 (1892) (observing that evidence of subsequent remedial measures "is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant"); *see also* Flaminio v. Honda Motor Co., 733 F.2d 463, 471 (7th Cir. 1984) (noting that Congress has "excluded [evidence of subsequent remedial measures] because its impact on those jurors is believed to be unduly prejudicial").

209. *Flamino*, 733 F.2d at 471.

210. *See id.*

211. Wood v. Morbark Indus., Inc., 70 F.3d 1201, 1207 (11th Cir. 1995).

As District Judge D. Lowell Jensen of the U.S. District Court for the Northern District of California has noted, Rule 407 also serves the procedural purpose of expediting trial proceedings.[212]

> [I]f courts are to allow evidence of subsequent remedial measures, they must also allow defendants the opportunity to rebut that evidence. This would slow down the trial process and lead to a mini-trial of issues tangential to the actual dispute. Thus, the Rule can also be justified as reflecting the procedural goal of judicial economy.[213]

A uniform approach to Rule 407 among the circuits would also reduce plaintiffs' incentives to engage in inter-circuit forum shopping in product liability cases. Today, plaintiffs may come to the Tenth Circuit to ensure that defendants who remove to federal court cannot benefit from Rule 407 in product liability cases, an outcome unavailable in every other circuit.[214] One commentator has warned that the Tenth Circuit's position on this issue could attract a large number of product liability forum shoppers: "[T]he fact that Colorado is in the Tenth Circuit [and allows evidence of subsequent remedial measures] may lead to the reputation of the state, in years to come, as a real plaintiff's jurisdiction for products liability actions."[215] At least one attendant at the 1993 Committee meeting "objected to the forum-shopping that exists in the 10th Circuit."[216]

Additionally, at the 1993 Committee meeting, Judge Fern Smith identified another procedural benefit to applying Rule 407 to product liability actions: "[W]ere the Committee to require deference to state law [as did *Moe*], it would become even more difficult to settle or try a products liability action with plaintiffs from a number of different states."[217] Many courts and commentators persuasively argue that Rule 407 can rationally be characterized as procedural and is constitutionally valid.[218]

In the future, when the Tenth Circuit is faced with a case presenting the issue of the applicability of Rule 407 in the context of product liability suits, the court will have no defensible alternative to holding that Rule 407 may rationally be characterized as procedural and is therefore constitutionally valid. In other words, the Tenth Circuit should recognize that *Moe* has been superseded by the 1997 amendment to Rule 407. If the Tenth Circuit were to hold otherwise, doubtless any U.S. Supreme Court review would result in reversal. It seems inherently unlikely that the Court would agree to strike down an amended rule that it had promulgated. Moreover, the Court likely understood the *Erie-Hanna* implications of the 1997 amendment, as the next section demonstrates.

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212. Fasanaro v. Mooney Aircraft Corp., 687 F. Supp. 482, 485–86 (N.D. Cal. 1988).
213. *Id.*
214. *See supra* notes 79, 89 and accompanying text.
215. Wadsworth, *supra* note 8, at 787.
216. *Minutes*, *supra* note 2, at 3.
217. *Id.*
218. *See supra* notes 207–217 and accompanying text.

### *C. The Advisory Committee, the Supreme Court, and the 1997 Amendment to Rule 407*

The U.S. Supreme Court likely intended to supersede the Tenth Circuit's *Erie* analysis with its promulgation of the 1997 amendment to Rule 407. The minutes of the previously mentioned 1993 meeting of the Advisory Committee on the Federal Rules of Evidence, which doubtless informed the Supreme Court's approval of the amendment, contains the following account and deserves quotation in full:

> The Committee then turned to Rule 407, the subsequent remedial measures rule on which the Reporter had prepared a memorandum that was distributed with the agenda for the meeting. It pointed out that there is a split in the circuits *since the 10th Circuit views the issue as raising Erie concerns that should be resolved in terms of the forum's substantive law.* The memorandum also pointed out that although the other federal circuits, to the extent that they have addressed the issue, bar subsequent remedial measures evidence in products liability cases regardless of the particular cause of action, *a majority of the states allow such evidence to be admitted* at least in certain types of products liability actions. This federal-state dichotomy obviously produces some *forum shopping* by plaintiffs and the removal of state instituted actions to federal court by defendants.[219]

This quote demonstrates that the Committee was fully aware not only that the majority of state evidence laws would contradict the extension of Rule 407 to product liability actions, but that (1) this difference produced forum shopping, (2) the Tenth Circuit had caused a circuit split, and (3) the Tenth Circuit's rationale relied on *Erie*.[220]

The Committee then voted on four possible resolutions, as follows:

1. To leave the circuit split - 3 votes
2. To adopt the 10th circuit rule - 0 votes
3. To adopt the majority state rule and allow the evidence - 0 votes
4. To amend Rule 407 so that the bar would apply in products liability cases, with perhaps some exceptions for recall letters - 5 votes.[221]

Interestingly, not one Committee member voted to adopt the Tenth Circuit's *Erie*-based position. But a majority (five out of eight) voted to amend the rule to eliminate the Tenth Circuit's position. The language proposed at the 1993 meeting for the amendment resembles the language later adopted: "The Reporter was directed to consider redrafting the rule to add 'culpable conduct, defectiveness of a product, or unreasonableness of a design.'"[222]

One year later, the Committee again discussed amending Rule 407. According to the minutes of its October 1994 meeting, the

> Committee discussed at length the advisability of amending Rule 407 so as to impose a *uniform rule* throughout the circuits with regard to the admissibility of evidence of subsequent remedial measures in products liability cases. Ultimately,

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219. *Minutes*, *supra* note 2, at 3 (emphasis added).
220. *Id.*
221. *Id.*
222. *Id.* The Committee did not vote on an amendment at that time. *Id.* at 4.

> the Committee agreed to forward to the Standing Committee an amendment that *extends Rules 407's ban to products liability cases.*[223]

The next year, the amendment made its way to the Committee on Rules of Practice and Procedure.[224] The minutes record the following: "Judge Winter stated that the advisory committee was proposing two amendments to Rule 407 (subsequent remedial measures). The first would apply the rule expressly to product liability actions, thereby reflecting the position of a majority of the federal circuit courts (although state law is generally to the contrary)."[225]

Finally, in June of 1996, the Committee on Rules of Practice and Procedure approved the proposed amendment without objection and sent it to the Judicial Conference.[226] The minutes of that meeting show that the membership understood that the new rule would explicitly cover product liability cases.[227]

Ultimately, the Supreme Court promulgated the amendment, Congress allowed it to take effect, and it became part of the Federal Rules of Evidence. It appears certain that the Tenth Circuit's ruling in *Moe*, more than any other decision, precipitated the 1997 amendment to Rule 407. Thus, the amendment appears to have been aimed at the Tenth Circuit.[228]

## V. CONCLUSION

The Tenth Circuit should acknowledge that *Moe* has been superseded by the 1997 amendment to Rule 407. Today, *Hanna* supplies the only valid test for evaluating the applicability of amended Rule 407 to product liability actions in federal court, as the new rule directly covers the issue of the admissibility of subsequent remedial measures evidence. Under *Hanna*'s test, Rule 407 must be held constitutional because it rationally can be characterized as procedural. The 1997 amendment therefore leaves the Tenth Circuit with no defensible alternative other than joining its sister circuits in adhering to the Federal Rules of Evidence without reservation.

Moreover, the minutes of the Advisory Committee meetings show that the amendment was designed to have this very effect—to leave the Tenth Circuit no other option than to abandon the holding of *Moe*. Further delay on the Tenth Circuit's part in acknowledging that *Moe* is no longer good law will inevitably call into question the authority of the bodies that promulgated the 1997 amendment as *Moe*'s invalidity becomes more widely recognized among practitioners and legal scholars. The Tenth Circuit should apply Rule 407 in product liability actions without delay.

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223. *Minutes of the Advisory Comm. on Evidence Rules* 3 (1994), *available at* 1994 WL 880347 (emphasis added).

224. *Minutes of the Comm. on Rules of Practice and Procedure* 9 (1995), *available at* 1995 WL 811896.

225. *Id.*

226. *Minutes of the Comm. on Rules of Practice and Procedure* 23 (1996), *available at* 1996 WL 936792.

227. *Id.*

228. *See supra* notes 219–222 and accompanying text.