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Federal Rule of Evidence 407: New Controversy Besets the Admissibility of Subsequent Remedial Measures

Wendy Bugher Greenley

NOTE

FEDERAL RULE OF EVIDENCE 407: NEW CONTROVERSY BESETS THE ADMISSIBILITY OF SUBSEQUENT REMEDIAL MEASURES

I. INTRODUCTION

Before the enactment of the Federal Rules of Evidence in 1975, the admissibility of evidence in civil cases in the federal courts was governed by Federal Rule of Civil Procedure 43(a).[1] That rule provided that evidence was admissible if it was admissible under either a federal rule or an evidentiary rule of the state in which the federal court sat.[2] Because the determination of rule 43(a) admissibility required an analysis of applicable state and federal statutes on a case-by-case basis, the application of the rule was both tedious and complex.[3] The adoption of the Federal Rules of Evidence was intended to clarify and simplify evidence law in the federal courts.[4]

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1. Fed. R. Civ. P. 43(a), 28 U.S.C. (1970).

2. Rule 43(a) formerly provided, in pertinent part:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, *the statute or rule which favors the reception of the evidence governs* and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.

Id. (emphasis added). *See also* 1 S. GARD, JONES ON EVIDENCE § 1.14, at 24 (6th ed. 1972) ("For all practical purposes evidence which [was] admissible in the state where the federal court sits [was] also admissible in the federal courts, and where there [was] a federal rule on the subject evidence which [was] inadmissible in the state court [was] nevertheless admissible in the federal.") (footnote omitted). *Cf.* New York Life Ins. Co. v. Schlatter, 203 F.2d 184 (5th Cir. 1953) (most favorable rule for reception of evidence governs admissibility of testimony regarding decedent's intent).

3. *See* Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275 (1962) (rule 43(a) provided guidelines for admissibility but application led to non-uniform results); Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223 (1966) (evidentiary reform is needed to advance dual goals of accurate fact-finding and uniform procedures); Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 372-73 (1977) (new rules were proposed to reduce "eclectic complexity" of evidence law that existed before enactment of Federal Rules of Evidence).

4. *See* FED. R. EVID. 102. This rule provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to

Rule 407 of the Federal Rules of Evidence[5] provides that evidence of subsequent remedial measures is inadmissible to prove negligence or culpable conduct.[6] The evidence is excluded both because it has little probative value with respect to the issues of negligence or culpable conduct, and because exclusion furthers the social policy of encouraging people to make remedial repairs that improve safety.[7]

In the ten years since Congress enacted the Federal Rules of Evidence, two issues have arisen concerning the admissibility of evidence of subsequent remedial measures in actions based on strict products liability theories. The first issue centers on whether rule 407 is applicable to strict liability actions.[8] The issue has arisen because although rule 407 explicitly excludes evidence of subsequent remedial measures to prove negligence or culpable conduct, it does not specify whether such evidence should be admissible in cases based on strict liability theories. The second issue involves the question whether rule 407 or state law governs the admissibility of evidence of subsequent remedial measures in strict liability actions tried in federal courts on the basis of diversity

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the end that the truth may be ascertained and proceedings justly determined." *Id.*

5. FED. R. EVID. 407.

6. *Id.* Rule 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id. See also id. advisory committee note (stating that rule 407 "incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault").

7. *See* FED. R. EVID. 407 advisory committee note. The Advisory Committee set forth two grounds on which rule 407 was based. *Id.* The first of these grounds was that evidence of subsequent measures was both inconclusive and inconsistent with an admission of guilt with respect to the issue of prior conduct. *Id.* The second ground was that admissibility of such evidence would discourage people from taking remedial safety measures. *Id.* The committee conceded that the relevancy concerns alone might not have been sufficient to support exclusion of such evidence, and denoted increased safety as the crucial policy basis for the rule. *Id.* Some commentators, however, have disagreed with the committee's policy analysis. *See* Note, *Torts—Products Liability—Subsequent Remedial Measures Admissible Under Allegations of Negligence and Strict Liability*, 67 MARQ. L. REV. 188, 191-92 (1983) ("most potential defendants do not even know of the existence of the exclusionary rule, and if they are aware of the rule, they are probably also aware of the various exceptions to the rule"). *See also* Schwartz, *The Exclusionary Rule on Subsequent Repairs—A Rule in Need of Repair*, 7 FORUM 1 (1971). For a further discussion of the advancement of policy as support for the exclusion of evidence of subsequent remedial measures, see *infra* notes 55 & 71-72 and accompanying text.

8. For a discussion of whether rule 407 is applicable to strict liability actions, see *infra* notes 12-87 and accompanying text.

jurisdiction.[9] The Tenth Circuit has taken the position that state law governs the admissibility of such evidence,[10] while the Seventh Circuit recently reached the opposite conclusion, holding that rule 407 applies in such actions.[11]

This note addresses the two issues raised by rule 407. The note first reviews the split among the federal circuits concerning the applicability of rule 407 to strict liability actions. The note then focuses on the developing controversy involving the application of rule 407 in cases brought in federal courts with jurisdiction based on diversity of citizenship. With regard to the first issue, this note suggests that rule 407 is applicable to strict liability actions, and that evidence of subsequent remedial measures should be excluded. With regard to the second issue, the note suggests that the federal courts should apply rule 407 when determining the admissibility of evidence of subsequent remedial measures. Finally, this note concludes with the suggestion that there is a need for the United States Supreme Court to address the two issues in order to resolve the conflicts that each issue has created among the federal courts.

II. THE APPLICABILITY OF RULE 407 TO STRICT LIABILITY CLAIMS—THE CIRCUIT COURT DICHOTOMY

A. *The Majority Position*

The courts that have held that rule 407 excludes evidence of subsequent remedial measures in strict liability cases have advanced several rationales in support of their position. The Second and Fourth Circuits have excluded evidence of subsequent remedial measures in strict liability actions reasoning that Congress intended rule 407 to incorporate common law precedent, and that the paramount policies behind the common law approach to encourage remedial action would be subverted if such evidence were admissible.[12] Taking a somewhat different

9. For a discussion of this choice of law issue, see *infra* notes 88-198 and accompanying text.

10. *See* Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932-33 (10th Cir.), *cert. denied*, 105 S. Ct. 176 (1984). For further discussion of *Moe*, see *infra* notes 95-107 and accompanying text.

11. *See* Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984). For a further discussion of *Flaminio*, see *infra* notes 30-32 & 115-122 and accompanying text.

12. *See* Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). Under the rationale of *Cann* and *Werner*, the application of rule 407 to issues upon which the rule is silent should be interpreted by reference to common law precedent. *Cann*, 658 F.2d at 60; *Werner*, 628 F.2d at 856. As rule 407 is silent as to strict liability actions, the rationale of *Cann* and *Werner* applies to such actions. For a further discussion of *Cann* and *Werner*, see *infra* notes 16-29 and accompanying text. *See also* Note, *Subsequent Remedial Measures in Strict Liability: Later Opinions as Evidence of Earlier Defects in Reasoning*, 32 CATH. U.L. REV. 895 (1983) (urging reliance upon common law precedent to promote

approach to the issue, the Seventh Circuit has emphasized that the exclusion of evidence of subsequent remedial measures tends to avoid the undesirable result of discouraging manufacturers from making improvements in unsafe products.[13] Still another rationale has been forwarded by the Fifth Circuit, which justified the exclusion of evidence of subsequent remedial measures on the ground that such evidence carries little probative value with respect to the issues properly before the court in a strict liability action.[14] In addition, the Third and Sixth Circuits have concluded that rule 407 applies in strict liability actions without asserting any rationale in support of their conclusion.[15]

The Fourth Circuit set forth its common law rationale in *Werner v. Upjohn Co.*[16] *Werner* involved an appeal from a jury verdict imposing liability on a defendant drug manufacturer for injuries allegedly caused by side-effects of the defendant's product.[17] The focus of the appeal was the propriety of the district court's decision to allow the plaintiff to introduce evidence that the manufacturer had sent physicians a revised warning after the plaintiff suffered his injury.[18] In light of the probability of prejudice to the defendant that would result from the jury's improper use of evidence of the revised warning, the Fourth Cir-

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uniform application of rule 407 as method to advance improvements in product safety). *Cf.* FED. R. EVID. 407 advisory committee note (noting that "[t]he rule incorporates conventional doctrine").

13. *See* Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984) (admission of evidence of subsequent remedial measures will reduce incentive to take such measures). For a further discussion of *Flaminio*, see *infra* notes 30-32 and accompanying text. *See also* Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980) ("It makes no difference to the defendant on what theory the evidence is admitted, his inclination to make subsequent improvements will be similarly repressed."), *cert. denied*, 449 U.S. 1080 (1981); Low, *Federal Rule of Evidence 407 and Strict Products Liability—The Rule Against Subsequent Repairs Lives On*, 48 J. AIR L. & COM. 887 (1983) (policy to encourage safety measures is one relied upon most frequently by courts to support exclusion of evidence of post-indictment repairs).

14. *See* Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983). For a further discussion of *Grenada Steel*, see *infra* notes 33-39 and accompanying text.

15. *See* Josephs v. Harris Corp., 677 F.2d 985, 991 (3d Cir. 1982) (noting that Third Circuit applies rule 407 to strict liability actions on basis of RESTATEMENT (SECOND) OF TORTS § 402A (1965)); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230 (6th Cir. 1980).

16. 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

17. 628 F.2d at 851. The plaintiff, Werner, sued the Upjohn Company alleging that Upjohn was both negligent and strictly liable for its failure to warn of the potential side-effects of one of its drugs. *Id.* Specifically, the plaintiff alleged that Upjohn's failure to provide his physician with an adequate warning of the potential side-effects of one of its products resulted in injuries which required corrective surgery. *Id.* at 851-52.

18. *See id.* at 853. The trial court admitted the subsequent warning under rule 407's feasibility exception but held that the revised warning was inadmissible as evidence that the prior warning was defective. *Id.*

cuit vacated the district court's decision and remanded for a new trial.[19]

The *Werner* court reasoned that, in enacting rule 407, Congress had not intended to "wipe out the years of common law development in the field of evidence."[20] Noting that both the common law and the express command of rule 407 exclude evidence of subsequent remedial measures in claims based on the defendant's negligent or culpable conduct, the court concluded that rule 407 precludes the admission of evidence of subsequent remedial measures in a strict liability action.[21] The court found no basis to distinguish between strict products liability and negligence actions.[22] In fact, the court reasoned that there was an even stronger basis to apply rule 407 and exclude evidence of subsequent remedial measures in a strict liability suit where the plaintiff does not need to prove blameworthy conduct.[23]

In *Cann v. Ford Motor Co.*,[24] the Second Circuit reiterated the reasoning of the Fourth Circuit's decision in *Werner*.[25] The plaintiffs in *Cann* brought an action under negligence, strict liability, and breach of warranty theories to recover for injuries they suffered when their Mercury Marquis allegedly shifted into reverse after having been left in the park position.[26] After the jury returned a verdict for defendant Ford Motor Co., the plaintiffs appealed the decision, claiming that the district court erred in refusing to permit the plaintiffs to present evidence of subsequent remedial measures taken by Ford after the plaintiff's accident.[27] Reiterating the policy arguments advanced in *Werner*, the court of appeals affirmed the district court's decision to exclude this evi-

19. *Id.* at 851. The court noted that the "obvious inference" from the evidence was that Upjohn was negligent for failing to use the warning sooner. *Id.*

20. *Id.* at 856.

21. *Id.* at 857-58.

22. *Id.* The court did concede that "in a negligence action the focus is on the defendant while in strict liability the focus is on the product." *Id.* at 857. The court found, however, that this difference in focus was not sufficient to make evidence of subsequent remedial measures admissible in strict liability actions. *Id.* The court concluded that under either theory of recovery, the use of such evidence would tend to discourage defendants from making otherwise desirable subsequent improvements. *Id.*

23. *See id.* at 857-58. The court reasoned that the policy underlying rule 407—to exclude evidence in order to encourage subsequent remedial measures—was more easily justified in strict liability actions because strict liability involved conduct by the defendant that was "technically less blameworthy than simple negligence." *Id.* It is suggested that the court implied that evidence of subsequent remedial measures is less relevant in a strict liability action than it is in an action for negligence. *See id.* at 857.

24. 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982).

25. 658 F.2d at 60 (citing *Werner*, 628 F.2d at 856; K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 411-13 (1975)).

26. *Id.* at 56. The car began to move when Mr. Cann slammed the car door to close it. *Id.* Mrs. Cann fell and was struck by the car as she attempted to get out of the moving vehicle. *Id.*

27. *Id.* The court refused to allow the plaintiffs to introduce evidence that, subsequent to plaintiffs' accident, Ford modified the design of the car's trans-

dence.[28] The court also noted that the admission of evidence of subsequent remedial measures in products liability cases would present difficult line-drawing questions because plaintiffs frequently bring actions sounding in both negligence and strict liability.[29]

In *Flaminio v. Honda Motor Co.*,[30] the Seventh Circuit affirmed a district court's exclusion of evidence of subsequent remedial measures in an action against a motorcycle manufacturer for injuries allegedly sustained either as a result of design defect in a product manufactured by the defendant or as a result of the defendant's failure to warn buyers of the defect.[31] The *Flaminio* court applied rule 407 to affirm the district court's exclusion of the evidence, asserting that the admission of evidence of the defendant's subsequent remedial measures would deter other manufacturers from undertaking such repairs.[32]

The Fifth Circuit addressed the applicability of rule 407 in strict liability actions in *Grenada Steel Industries v. Alabama Oxygen Co.*[33] That decision involved an appeal by an insurance company from a district court's refusal to permit the introduction of evidence of design changes in gas tank valves that were effectuated after an explosion at one of Grenada Steel's plants.[34] In affirming the district court, the court of appeals reasoned that, in strict liability actions, the relatively low probative value of evidence of subsequent remedial measures warranted application of

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mission and modified the owner's manual to warn drivers to turn off the ignition before leaving the car. *Id.* at 59.

28. *Id.* at 59-60. The court noted that Congress expected courts to apply common law principles to fill in any gaps in the Federal Rules of Evidence. *Id.* at 60.

29. *Id.*

30. 733 F.2d 463 (7th Cir. 1984).

31. *Id.* at 456, 470. Flaminio offered blueprints showing that after his accident Honda had increased by two millimeters the thickness of the struts that hold the handlebars to the front wheel to decrease wobble in the motorcycle's front wheel. *Id.* at 468.

32. *Id.* at 468-69. Although Honda did make subsequent repairs to correct the defect, it is unclear what motivated the manufacturer to do so. *See id.* For a further discussion of the encouragement of safety improvements as a policy basis for rule 407, see *infra* notes 55 & 71-72 and accompanying text. *See also* Note, *supra* note 12, at 912-14.

33. 695 F.2d 883 (5th Cir. 1983).

34. *Id.* at 885. The lawsuit in *Grenada Steel* arose when Grenada Steel's insurance company brought a products liability suit against Alabama Oxygen Company to recover the sum it paid to Grenada Steel for losses suffered when one of Grenada Steel's plants was destroyed by an explosion and the resulting fire. *Id.* Grenada Steel joined the suit to recover for damages not covered by its insurer. *Id.* The plaintiffs contended that the defendant supplied Grenada Steel with a defective valve that allowed leakage of a flammable gas, causing the accident. *Id.* The court held that evidence of post-accident design changes in the gas tank valves were inadmissible absent "an issue on which that evidence would have had sufficient probative value to outweigh its unfair prejudicial effect." *Id.* at 889.

rule 407 to exclude such evidence.[35] The court explained that the post-remedial measure condition of a product is of probative value in strict liability actions only insofar as the changed product represents industry's response to safety concerns existing at the time of the accident.[36] The altered condition of a product is irrelevant, however, when the change reflects safety improvements developed subsequent to the time of the accident, or as a response to business factors independent of safety concerns.[37] Fearing that evidence of a product's later condition would serve only to confuse the fact-finder,[38] the *Grenada Steel* court reasoned that exclusion of evidence of subsequent remedial measures in strict liability actions would bring rule 407 into conformity with the policies expressed in rule 403.[39]

B. *The Minority Position*

A minority of the federal circuits have rejected the rationales underlying the exclusion of evidence of subsequent remedial measures in suits involving strict liability claims.[40] In *Meller v. Heil Co.*,[41] the Tenth Cir-

35. *See id.* at 888. The court explained that evidence of subsequent changes tends to confuse the jury as to the point in time relevant to whether a product is defective. *Id.*

36. *Id.*

37. *Id.* The court explained that the relevant point in time in determining whether there is a product defect is the time of the product's manufacture and sale. *Id.*

38. *Id.* The court observed that a jury might use the evidence to infer foresight and repair of a defect where, in fact, there may only have been a change because of excessive caution or a response to a newly available supply of components. *Id. See also* Note, *Subsequently Remedying Strict Products Liability:* Cann v. Ford, 14 CONN. L. REV. 759, 769 (1982) (citing several factors that encourage manufacturers to make improvements).

39. 695 F.2d at 888. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. The *Grenada Steel* court noted, however, that the evidence of subsequent remedial measures would be probative and properly admissible under the express language of rule 407 when feasibility of the subsequent remedial measures was at issue. 695 F.2d at 888-89. Although feasibility was not at issue in *Grenada Steel*, the court further noted that the feasibility of alternative designs "may 'almost always' be in question in design defect cases." *Id.* at 888 (citing K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 180 (3d ed. 1982)). *See also* Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985). The plaintiff in *Dixon* brought a products liability action against the defendant for injuries sustained while driving a tractor manufactured by the defendant. *Id.* at 578. On appeal from the district court's judgment for the defendant notwithstanding the jury verdict for plaintiff, the Fifth Circuit cited *Grenada Steel* for the proposition that feasibility is likely at issue in a design defect case, and admitted evidence of the designs of tractor cabs that were used on tractors manufactured by the defendant after the plaintiff's injury. *Id.* at 578, 583. The evidence of alternative designs of protective structures on a tractor cab was admissible to prove the feasibility of the alternate designs. *Id.* at 583.

40. *See, e.g.*, Herndon v. Seven Bar Flying Serv., 716 F.2d 1322 (10th Cir.

cuit relied on a literal reading of rule 407 to conclude that some evidence of subsequent remedial measures should be admissible under rule 407 to prove controverted issues other than the existence of negligent or culpable conduct.[42] *Meller* involved an appeal by an equipment manufacturer from a jury verdict which found the defendant strictly liable in tort for defective design of a dump truck dump bed assembly.[43] Affirming the district court's admission of evidence of the defendant's subsequent remedial design changes in the truck assembly, the court of appeals viewed rule 407 as embodying a balancing test that "implicitly recognizes that there are interests that override the policy of encouraging subsequent remedial measures."[44] Relying on the literal language of the rule as the expression of this balancing test, the court reasoned that unless the evidence is offered to prove the specific issues of negligence or culpable conduct, rule 407 does not prohibit its admission.[45] The *Meller* court concluded that proof of the elements of a strict liability suit involves factual issues for which use of evidence of subsequent re-

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1983) (exclusion of evidence of subsequent remedial measures is inappropriate in strict liability action), *cert. denied*, 466 U.S. 958 (1984); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977) (evidence of remedial measures is admissible on strict liability cause of action in suit containing both negligence and strict liability theories). *But cf.* DeLuryea v. Winthrop Laboratories, 697 F.2d 222 (8th Cir. 1983) (narrowing Eighth Circuit's position on admissibility of evidence of subsequent remedial measures in strict liability claims).

41. 745 F.2d 1297 (10th Cir. 1984).

42. *Id.* at 1299-1300. The court stated that rule 407 recognizes that "social policy must be balanced against competing interests." *Id.* at 1299 (footnote omitted).

43. *Id.* at 1298. Plaintiff's husband was killed when he inadvertently touched an unshrouded cable while greasing the chassis of his truck and the bed of his dump truck fell on him. *Id.* at 1299. In the district court the plaintiff recovered damages for her husband's wrongful death on the theory of strict liability for defective product design. *Id.* at 1298. On appeal, the defendant company, Heil, argued that the district court erred in admitting evidence of its post-accident manufacture changes. *Id.* The court of appeals held that the evidence was properly admitted to show feasibility of alternative designs. *Id.* at 1302-03.

44. *Id.* at 1299 n.3. The court elaborated:

> Rule 407 balances a social policy of encouraging repairs against a competing interest in the admission of relevant, probative evidence. In striking the balance, it announces a clear rule: repair evidence is not admissible to prove negligence or culpable conduct, but may be admissible for other purposes. Under this rule, admissibility is not determined by categorizing a party's legal theory as negligence or strict liability, but instead, by examining the contention that the evidence is offered to prove.

Id. at 1300 n.8.

45. *Id.* at 1300. The court noted that subsequent repair evidence must still meet the additional requirements for admissibility under the federal rules addressing relevancy and sufficient probative value. *Id.* at 1300. In *Meller*, the court concluded that the evidence was offered to prove feasibility of alternative designs, and was therefore expressly admissible under rule 407 notwithstanding the court's general discussion of the use of evidence in strict liability actions. *Id.*

medial measures is appropriate.[46]

In addition to the *Meller* court's offer of affirmative support for the admissibility of evidence of subsequent remedial measures in strict liability actions, the court disputed the validity of the arguments proffered by courts that have found rule 407 to apply to such actions.[47] The *Meller* court argued for a literal interpretation of the rule, reasoning that its plain language limits its application to negligence actions.[48] The court also noted that the limited relevance of subsequent remedial measures in a strict liability action is not a basis to support exclusion under rule 407 because rule 407 is "an exception to the general rule that relevant evidence is admissible."[49]

A second argument favoring the admissibility of evidence of subsequent remedial measures in strict liability cases is that exclusion does not serve rule 407's twin goals of avoiding evidence that raises minimally probative inferences, and encouraging modifications that increase safety.[50] The Eighth Circuit in *Robbins v. Farmers Union Grain Terminal Association*[51] echoed this argument. In *Robbins*, the plaintiff sued under negligence and strict liability theories to recover damages suffered by his cattle herd after the cattle consumed feed produced by the defendant.[52]

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46. *Id.* For example, the court noted that "[p]roduct modifications may be relevant . . . to factual issues that underlie the ultimate contention of dangerousness." *Id.* The court further noted, however, that it did not construe rule 407 to impose a relevancy test, as that purpose is already served by rule 402. It suggested that if evidence is "relevant" as that standard is measured under rule 401, then the evidence should be admissible as long as it is not probative on either of the two issues specifically prohibited by rule 407 (negligence or culpable conduct). *Id.* at 1300-01 n.8.

47. *Id.* at 1301 n.8. The *Meller* court refuted the arguments relied on by the courts in *Grenada*, *Cann*, and *Werner*. *Id.*

48. *Id.* The court cited Lewis Carroll's description of Alice's meeting with Humpty Dumpty to support its argument that the language of the rules should be interpreted literally, and not to mean what the courts choose them to mean. *Id.* (citing L. CARROLL, THROUGH THE LOOKING GLASS 198 (Messner ed. 1982)). The court pointed out that interpreting "negligence or culpable conduct" to include strict liability went beyond the plain meaning of the words. *Id.*

49. *Id.* The court asserted that relevancy concerns are best relegated to rule 402. *Id.*

50. *See* Note, *supra* note 38, at 769-70. One commentator has noted that "to the extent that admission of such evidence of subsequent repairs results in recovery by injured plaintiffs, it can be argued that evidence of subsequent repairs *encourages* future remedial actions." Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837 (1972). The commentator argues that the product distributor's economic self-interest in avoiding adverse publicity and future litigation encourages repairs to the product to avoid greater total liability than that which would result from a judgment of liability in one case in which evidence of subsequent measures was introduced. *Id.* at 849-50. *But see* Note, *supra* note 12, at 930, 936 (concluding that threat of introduction of evidence of subsequent measures provides same deterrence to taking remedial actions in strict liability suits as in claims predicated on negligence).

51. 552 F.2d 788 (8th Cir. 1977).

52. *Id.* at 789. The plaintiff offered into evidence a letter that the defendant

On appeal from a jury verdict for the defendant, the Eighth Circuit affirmed the district court's determination that evidence of a subsequent remedial warning was admissible under rule 407, reasoning that the rule was inapplicable to plaintiff's strict liability cause of action.[53] The court of appeals rejected the *Flaminio* court's rationale that manufacturers might forego undertaking remedial efforts if evidence thereof is admissible, stating:

> In an age of mass production it is not reasonable to assume that manufacturers would forego improvements in a product and subject themselves to mass liability for a defect just because evidence of an improvement is admissible in a pre-improvement liability case. The pure economics of the situation dictate otherwise.[54]

Thus, the Eighth Circuit recognized that the defendant's conduct will be influenced more by the possibility of future suits resulting from continued existence of the defect than by the prospect of liability for actions in the past.[55]

In *Farner v. Paccar, Inc.*,[56] the Eighth Circuit rejected the *Werner* court's rationale that the low probative value of subsequent remedial measures fails to justify its admission under rule 407 in products cases.[57] The *Farner* court applied rule 403 and concluded that a subsequent recall letter was probative both of the existence of a design defect in the vehicle in question and of the failure to warn of a known danger.[58]

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mailed to its sales personnel, after the plaintiff's use of the feed, in which the defendant warned against using the feed in certain circumstances. *Id.* at 792. The court held that this letter was properly admissible with respect to the strict liability claim as evidence tending to show causation and to show that failure to include the warning made the product defective. *Id.*

53. *Id.* at 793.

54. *Id.* (quoting Shaffer v. Honeywell, Inc., 249 N.W.2d 251, 257 n.7 (S.D. 1976)).

55. *Id.* at 793 n.10 (citing Ault v. International Harvester Co., 13 Cal. 3d 113, 121-22, 528 P.2d 1148, 1151-52, 117 Cal. Rptr. 812, 815-16 (1974)). According to the *Robbins* court, a manufacturer would be more concerned with bad publicity or similar future legal actions than with liability in a single case. *Id.* Under this rationale, the policy of promoting modifications to increase safety should be a secondary consideration at best on the question of admissibility of evidence of remedial measures. *Id.* Several commentators have made this argument in challenging the soundness of rule 407's policy basis as applied to strict product liability claims. *See, e.g.*, Davis, *Evidence of Post-Accident Failures, Modifications and Design Changes in Products Liability Litigation*, 6 ST. MARY'S L.J. 792 (1975); Note, *supra* note 38, at 769.

56. 562 F.2d 518 (8th Cir. 1977).

57. *Id.* at 527-28. In *Farner*, the plaintiff's husband was killed while driving a tractor trailer manufactured by the defendant. *Id.* at 521. The plaintiff's suit alleged that the defendant was liable because it had negligently designed the truck's suspension and had failed to warn the decedent of the unsafe system. *Id.* at 522.

58. *Id.* at 527. The court distinguished the case before it from one in which

The court did not examine the probative value of the evidence with a narrow view towards its use in strict liability actions, but employed a general inquiry into the probative value of the evidence with respect to its possible prejudice to the defendant.[59] The *Farner* court reaffirmed its decision in *Robbins*, holding rule 407 inapplicable to actions based on strict liability theories.[60]

In *DeLuryea v. Winthrop Laboratories*,[61] the Eighth Circuit narrowed its position on the admissibility of evidence of subsequent remedial measures in strict liability cases based on a manufacturer's duty to warn.[62] More recently, however, in *R.W. Murray Co. v. Shatterproof Glass Corp.*,[63] the court reiterated its broad endorsement favoring the admissibility of subsequent repair evidence in strict liability actions.[64]

Several state courts also have adopted the position favoring admissibility of evidence of subsequent remedial measures in strict liability cases.[65]

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the defect that was the subject of a recall letter was not found in all the vehicles recalled. *Id.* at 527 n.18. In such a case, the court explained, the recall letter has less probative value if there is no other evidence that the condition described in the recall letter was in fact present in the item that is the subject of the dispute. *Id.*

59. *Id.* at 527-28.

60. *Id.* at 528.

61. 697 F.2d 222 (8th Cir. 1983).

62. *Id.* at 228-29. The court distinguished claims based on a manufacturer's duty to warn from other strict liability theories. *Id.* at 228. The court reasoned that the similarity of issues in failure-to-warn cases brought under negligence or strict liability theories (essentially whether an adequate warning was given by the manufacturer to avert injury) justified the decision to treat evidence similarly in these types of claims. *Id.* at 229. Accordingly, the court held that the revised wording on a drug insert sent to physicians subsequent to plaintiff's injury was inadmissible as evidence that the prior warning was inadequate. *Id.*

63. 758 F.2d 266 (8th Cir. 1985). *Shatterproof Glass* involved a contract action in which the defendant was held liable for breach of an express warranty in connection with the sale of reflective glass panels that the defendant had sold to the plaintiff to construct a building. *Id.* at 268-69. The plaintiff was allowed to introduce evidence that the defendant had changed the materials and method by which the panels were manufactured. *Id.* at 274.

64. *Id.* at 274. The court stated, "We have previously determined that Rule 407 does not bar the admission of subsequent remedial measures evidence in actions based on strict liability 'since Rule 407 is, by its terms, confined to cases involving negligence or other culpable conduct.'" *Id.* (quoting *Robbins*, 552 F.2d at 793).

65. *See, e.g.*, Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974) (exclusion of evidence of subsequent remedial measures is based on policy considerations absent when such evidence is not used to prove negligence or culpable conduct); Herrick v. Theberge, 474 A.2d 870, 874 (Me. 1984) (evidence of remedial measures is admissible to show both negligence and strict liability); Matsko v. Harley Davidson Motor Co., 325 Pa. Super. 452, 473 A.2d 155 (1984) (rationales for excluding evidence of subsequent remedial measures are inapplicable in products liability case involving allegedly defective motorcycle).

C. *Suggested Resolution of the Conflict*

It is submitted that the majority of the federal circuits that have addressed the issue have correctly applied rule 407 to exclude evidence of subsequent remedial measures in strict liability actions. This suggestion is grounded primarily upon the observation that, in enacting rule 407, Congress emphasized its intention to further the common law policy of prohibiting the admission of evidence tending to discourage a defendant from undertaking desirable remedial measures that would lessen the chance of future incidents similar to that which gave rise to the immediate litigation.[66] In addition, the suggestion is supported by the observation that no principled basis exists to distinguish negligence and strict liability actions with respect to the admissibility of evidence of subsequent remedial measures.[67]

As noted in the previous sections of this note, the courts holding that rule 407 does not exclude evidence of subsequent remedial measures in strict liability actions have focused on two arguments to support the evidence's admissibility: (1) the admission of such evidence will not discourage defendant-manufacturers from making repairs or modifications, as the threat of future liability will provide sufficient incentive to repair defective products,[68] and (2) the probative value of evidence of subsequent remedial measures justifies its admission in strict liability actions.[69] It is suggested, however, that both of these arguments are without merit. Moreover, as the Fourth Circuit noted in *Werner*, both of the arguments favoring the admissibility of evidence of subsequent remedial measures in strict liability actions are equally applicable to actions based on negligence theories, yet those arguments never have been accepted to support the admission of such evidence in negligence actions.[70]

1. *Application of Rule 407 to Strict Liability Actions Furthers Congressional Policy to Exclude Evidence Tending to Discourage Subsequent Remedial Measures*

While there exists no empirical proof that the admissibility of evidence of subsequent remedial measures actually has an influence upon a defendant's decision to take or forego such measures,[71] nonetheless it is

66. For a discussion of the impetus for manufacturers to make subsequent remedial measures, see *infra* notes 71-72 and accompanying text.

67. For a discussion of the unimportance of distinctions between negligence and strict liability actions in this context, see *infra* notes 74-87 and accompanying text.

68. For a discussion of this argument, see *supra* notes 54-55 and accompanying text. *See also* Note, *supra* note 12, at 939 (discussing manufacturers' incentive to repair defective products).

69. For a discussion of this argument, see *supra* notes 57-59 and accompanying text.

70. *See Werner*, 628 F.2d at 856-58.

71. *See, e.g.*, Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974); Herndon v. Seven Bar Flying Serv., Inc., 716

suggested that in enacting rule 407 Congress determined that the exclusion of evidence of subsequent remedial measures *would* avoid discouraging manufacturers from making repairs.[72] Based on this determination, Congress mandated that evidence of subsequent remedial measures be inadmissible to prove negligence or culpable conduct. As there is no principled basis upon which to distinguish between cases in which manufacturers are sued under strict liability or negligence theories,[73] it is submitted that the policy of excluding evidence in negligence actions should apply equally to exclude the introduction of such evidence in strict liability actions.

2. *Negligence Versus Strict Liability: A Distinction Without a Difference With Respect to Rule 407*

Rule 407 expressly prohibits the admission of evidence of subsequent remedial measures to prove negligence or culpable conduct, without regard to the probative value of such evidence with respect to those issues.[74] The rule does direct the courts to consider the probative value of such evidence, however, when two criteria are met: (1) when negligence or culpable conduct is not in issue, and (2) in a case where negligence or culpable conduct is in issue, when the evidence is offered for "another purpose."[75]

F.2d 1322, 1328 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984) ("there is no evidence which shows that manufacturers even know about the evidentiary rule or change their behavior because of it"); Note, *The Case for the Renovated Repair Rule: Admission of Evidence of Subsequent Repairs Against the Mass Producer in Strict Products Liability*, 29 AM. U. L. REV. 135 (1979) (suggesting that impetus provided by exclusion of subsequent remedial measures evidence is unnecessary to encourage repairs by manufacturers sued in strict products liability actions). Note, *supra* note 38, at 785 ("The market forces that will encourage the manufacturer to take subsequent remedial measures are not dependent on the theory of product liability litigation."). *See also* ME. R. EVID. 407(a) advisor's note (rule 407 is not necessary to encourage repairs).

72. *See* FED. R. EVID. 407 advisory committee note (primary purpose behind rule 407 is to encourage subsequent remedial measures). *See also Flaminio*, 733 F.2d at 469 ("A major purpose of Rule 407 is to promote safety by removing the disincentive to make repairs. . . ."). Congress enacted the rule without alteration. FED. R. EVID. 407 federal judicial center note. Although adoption of the language of a rule does not necessarily mean that Congress adopted the Advisory Committee note that accompanied the rule, the note is illustrative of the reasoning underlying the rule. This is especially true where, as here, Congress enacted the rule as written by the Committee without making any revisions.

73. For a discussion of the lack of a principled basis to distinguish between these two actions with respect to rule 407, see *infra* notes 74-87 and accompanying text.

74. *See* FED. R. EVID. 407.

75. *See id.* The rule lists several exceptions to the general rule of inadmissibility. *Id.* Authorities are divided on the question whether the enumerated exceptions in rule 407 are an exclusive or an exemplary list. *See, e.g.*, 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 41, at 297-98 (1977) (reading rule 407 to expressly provide that evidence of subsequent repairs is admissible for any purpose other than proving negligence or culpable conduct). *But see* Comment, *Fed-*

It is submitted that the probative value of evidence of subsequent remedial measures is no stronger in strict liability actions than it is in negligence actions,[76] and that a court's determination whether to admit such evidence in strict liability actions should focus not on the probative value of the evidence, but rather on whether the offering party's intended use of the evidence is more like proof of negligence or culpable conduct than it is the "other" purposes. If it is more like proof of negligence or culpable conduct, it should be inadmissible without regard to its probative value.[77] On the other hand, if the evidence is introduced for other purposes, then while its probative value is sufficiently high to make it relevant, the evidence still might be inadmissible under rule 403.

In *Cann* and *Werner*, the Second and Fourth Circuits noted the overlap and similarities between actions based on strict liability and negligence theories.[78] The Seventh Circuit also noted this similarity in

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eral Rule of Evidence 407 and Its State Variations: The Courts Perform Some "Subsequent Remedial Measures" of their Own in Products Liability Cases, 49 UMKC L. REV. 338, 341 (1981) (sufficient alternative sources of evidence exist by which plaintiffs in strict liability cases can prove their claims, therefore rule 407 should be strictly interpreted to avoid prejudice to defendant). It is suggested that the language of the rule implies that exceptions to the exclusion of evidence of subsequent measures are not limited to those stated in the text. The "such as" language in the second sentence indicates that the list of specified exemptions was not intended to be exhaustive but merely to serve as examples. *Id.* The Advisory Committee's note also uses words of inclusion rather than words of exclusion to describe the rule's exceptions. *See* FED. R. EVID. 407 advisory committee note ("Other purposes are, however, allowable, including. . . .").

76. *Cf.* FED. R. EVID. 407 advisory committee note. Under a "liberal" theory of relevancy, subsequent actions might be relevant to raise the inference of an admission of prior fault from the later remedial measure. *Id.*

77. Note, *supra* note 12, at 939 ("Although low probative value may be a sufficient basis for exclusion [of otherwise admissible evidence], consideration of probative value is an insufficient basis for admission."). *See also id.* at 938 (arguing that rule 407 reflects Congress' desire to exclude any use of subsequent repair evidence that would cause defendant threatened with liability to defer remedial action).

78. *See supra* notes 20-23 & 29 and accompanying text. This distinction was first raised in 1974 in *Ault v. International Harvester Co.*, where the Supreme Court of California held that evidence of subsequent remedial measures is admissible in a strict products liability suit. 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974). The state's exclusionary rule, like rule 407, denied the admission of this evidence to prove negligence. In *Ault*, however, the court found that the rule was not applicable because negligence was not at issue in a strict liability suit. *Id.* at 118, 528 P.2d at 1151, 117 Cal. Rptr. at 814. The reasoning of the *Ault* court also was adopted by the Eighth Circuit in *Robbins*, 552 F.2d 778 (evidence of subsequent remedial measures admissible in strict liability case).

The doctrine of strict liability imposes liability on the seller of a defective product for harm caused because of a defect in that product. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Liability is imposed regardless of the seller's care with respect to the product's manufacture or sale. *Id.* As one court noted, the doctrine of strict liability provides:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes injury. . . .

Flaminio.[79]

The similarities between strict liability and negligence actions are especially striking where the theory of recovery in the strict liability action is the defendant's failure to warn of a defective condition.[80] To hold a manufacturer strictly liable for his failure to warn of a risk concerning a product, the plaintiff must prove that the manufacturer knew or should have known of the risk about which it failed to warn.[81] Thus, the plaintiff must effectively prove the manufacturer's negligence in failing to warn of the risk.[82] Other strict liability theories bear similar resemblance to negligence theories.[83]

Given the similarity between strict liability and negligence actions, it is suggested that the use of evidence of subsequent remedial measures

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> The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons. . . ."

Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62-63, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1962). The rationale for imposing liability is that manufacturers are in the best position to bear the cost of liability and to correct any defects. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

79. *Flaminio*, 733 F.2d at 467 ("in a defective design case, there is no practical difference between strict liability and negligence") (quoting Birchfield v. International Harvester Co., 726 F.2d 1131, 1139 (6th Cir. 1984)).

80. *See Werner*, 628 F.2d at 858.

81. W. PROSSER & W. KEETON, THE LAW OF TORTS 697 (5th ed. 1984). The defendant is not liable unless the plaintiff shows that the defendant knew, or should have known by exercising reasonable care, of the risk about which he failed to warn and that an ordinary reasonable person would have taken precautions that the defendant failed to take. *Id.* at 697.

82. The difference between a strict liability action and an action for negligent failure to warn is that in the strict liability action a reseller is liable for reselling a product that lacked adequate warnings despite the reseller's lack of negligence with respect to the provision of the warning. *Id.*

83. For example, the plaintiff may want to recover damages from a defendant car dealer if the defendant sells the plaintiff a used car that loses its brakes as the plaintiff is driving the car home from the lot. To establish the defendant's conduct was negligent the plaintiff must prove that: 1) the defendant had a legal duty to conform to a particular standard of conduct; 2) the defendant breached that duty; 3) the breach was the legal cause of resulting injury; and 4) actual injury resulted to the plaintiff. *Id.* at 164-65. To hold the defendant strictly liable the plaintiff must prove that: 1) a defective condition existed at the time the defendant surrendered possession to the plaintiff; 2) the defective condition was the legal cause of a damaging event; and 3) the plaintiff's injury resulted from a dangerous condition of the product that was supplied or manufactured by the defendant. *Id.* at 712. Therefore, under either theory the plaintiff will have to prove that a flaw in the manufacture or maintenance of the automobile resulted in injury to the plaintiff. The sole difference is that in the negligence action, the plaintiff must also prove that the defendant had a duty that was breached by creating or failing to discover the flaw. Much of the same evidence would be needed under either theory to prove the existence of the flaw, the cause of the damage, and the extent of the resulting injury to the plaintiff. It is submitted that these similarities outweigh the contrasting factor with respect to the relevance of the defendant's conduct.

in a strict liability action is more like use to prove negligent or culpable conduct than it is like use for the other purposes permitted under rule 407. Therefore, it is submitted that the probative value of the evidence is not relevant to determining its admissibility.

If, as the Fifth Circuit asserted in *Grenada Steel*, feasibility of an alternative design at the time the product was introduced into the market almost always is at issue in design defect strict liability cases,[84] then upon a showing that feasibility actually is controverted, the evidence of subsequent remedial measures should be admitted just as it would be admitted in a negligence action where the same showing is made. Assuming *arguendo* that the Fifth Circuit is correct, evidence of subsequent remedial measures will tend to be admitted more often in strict liability actions than it is in negligence actions. This results not from a different *standard* for admissibility, but because the *use* is proper more often in the former case than it is in the latter. Thus, it is submitted that the same inquiries with respect to the evidence's *use* must be made in a strict liability action as would be made in a negligence action.

It should be recognized that a distinction between negligence and strict liability actions does exist insofar as strict liability actions were developed to reduce the plaintiff's burden of proof in order to promote the plaintiff's recovery for injuries sustained as a result of product defects.[85] It is submitted, however, that rule 407 does not increase the plaintiff's burden of proof. It is further suggested that it is not the role of the Federal Rules of Evidence to reduce the plaintiff's burden of proof in strict liability actions.

The plaintiff's burden of proof is lessened in a strict liability action because of the definition of the elements a plaintiff must prove to establish a prima facie case.[86] Rule 407 does not alter the elements that the plaintiff must prove. In fact, the elements of a strict liability action are determined by state law.[87] Therefore, it is submitted that while rule 407

84. *Grenada Steel*, 695 F.2d at 888.

85. *See generally*, Note, *supra* note 38, 771-82 (reviewing development of strict liability theories). For a brief synopsis of the doctrine of strict liability, see *supra* note 78.

86. *See generally* Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855 (1963) (describing plaintiff's burden of proof in strict liability actions). In a negligence action the plaintiff has to prove that defendant did not conform to what an ordinary reasonable prudent person would have done under similar circumstances. *Id.* To establish a strict liability action the plaintiff does not have to prove that the defendant's actions violated a standard of reasonable conduct. *Id.* This removes the principal problem in negligence cases: "the inability or impossibility in most instances of discovering direct or even circumstantial evidence of a specific act or omission on the part of anyone related to those processes that could be evaluated and found to be negligence." W. PROSSER & W. KEETON, *supra* not 81, at 695.

87. Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir.), *cert. denied*, 105 S. Ct. 176 (1984). For a discussion of *Moe*, see *infra* notes 95-105 and accompanying text.

does not further reduce the plaintiff's burden of proof, or otherwise aid the plaintiff's recovery in strict liability actions, rule 407 properly preserves the plaintiff's burden of proof in such actions.

III. THE APPLICABILITY OF STATE LAW: IS RULE 407 SUBSTANTIVE OR PROCEDURAL?

The question of whether rule 407 or state rules of evidence should be applied in diversity cases in the federal courts was first addressed by the Seventh Circuit in 1980, in a dissenting opinion in the case of *Oberst v. International Harvester Co.*[88] The issue remained largely overlooked after *Oberst*, until 1984,[89] when the Tenth[90] and Seventh[91] Circuits and a district court in Maine[92] confronted the issue. Unfortunately, the two circuits reached differing conclusions, creating a split of authority among the federal circuits, with the district court siding with the Seventh Circuit.

A. *The Tenth Circuit Approach: State Evidentiary Law Governs the Admissibility of Evidence of Subsequent Remedial Measures in Diversity Actions in Federal Court*

In *Meller v. Heil Co.*,[93] the Tenth Circuit acknowledged the existence of the potential conflict between application of rule 407 and state evi-

88. 640 F.2d 863, 867 & n.2 (7th Cir. 1980).

89. In the interim, several opinions discussed the general applicability of the Federal Rules of Evidence in diversity actions, but none focused on rule 407. *See In re* Air Crash Disaster near Chicago, Ill., 701 F.2d 1189, 1193 (7th Cir.) (reviewing cases in which courts held that Federal Rules of Evidence governed admissibility of evidence in diversity actions), *cert. denied*, 464 U.S. 866 (1983). *Air Crash* concerned the applicability of federal law to a determination of whether evidence of income tax liability is admissible when damages are computed for earnings lost because of a decedent's premature death. *Id.* at 1192. Although the court's opinion seemed to favor application of federal law over that of the state, the court did not resolve the issue of which rule should apply because the state law was identical to the federal law in *Air Crash*. *Id.* at 1195.

90. *See* Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir.), *cert. denied*, 105 S. Ct. 176 (1984). *See also* Meller v. Heil Co., 745 F.2d 1297 (10th Cir. 1984) (acknowledging the issue, but reserving judgment as no conflict existed between rule 407 and state evidentiary law).

91. *See* Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984). *Cf.* Public Serv. Co. v. Bath Iron Works Corp., 773 F.2d 783 (7th Cir. 1985) (applying rule 407 without discussing this issue).

92. *See* Rioux v. Daniel Int'l Corp., 582 F. Supp. 620 (D. Me. 1984); French v. Fleet Carrier Corp., 101 F.R.D. 369 (D. Me. 1984).

93. 745 F.2d 1297 (10th Cir. 1984). *Meller* involved a product liability action by a widow against the defendant-manufacturer of a dump truck. *Id.* at 1298. The action arose from a fatal incident in which the bed assembly from a truck manufactured by the defendant fell and crushed the plaintiff's husband. *Id.* The plaintiff sought to prove that the design of the truck was defective and at trial the court permitted the plaintiff to introduce evidence of the defendant's subsequent design changes in the dump bed assembly. *Id.* at 1299. The court also issued a limiting instruction, cautioning the jury that the evidence was to be

dentiary law, but the court reserved judgment on the issue, noting that rule 407 and the state statute in question were not in conflict in the case at bar.[94]

Two weeks after deciding *Meller*, the Tenth Circuit again was confronted with the issue of the admissibility of evidence of subsequent remedial measures in a diversity action in *Moe v. Avions Marcel Dassault-Breguet Aviation*.[95] *Moe* involved an appeal from a jury verdict for the defendant in a wrongful death action arising from the crash of an airplane manufactured by the defendant.[96] At trial, the plaintiff had sought to introduce evidence that subsequent to the crash the defendants published a strong warning concerning problems with its autopilot system.[97] The trial court excluded the evidence, however, on the basis of rules 407 and 403.[98]

On appeal, the Tenth Circuit concluded that the district court erred in applying the federal rule, stating, "If the law of the state supplies the rule of decision, there is no justification for reliance on Rule 407."[99] In support of its conclusion, the court noted that "[t]he purpose of Rule

considered only with regard to the question of whether a feasible design alternative existed at the time the truck was placed into the market. *Id.*

94. *Id.* at 1301. The court stated, "We need not reach the difficult and important issue concerning the reach of the Federal Rules of Evidence raised by Heil's claim because we do not believe the court violated [the state statute] in admitting the disputed evidence. . . ." *Id.* (citations omitted). The state statute in question prohibited the admission of evidence of scientific advancements arising subsequent to the time that a product in issue was sold by the manufacturer. *Id.* (citing COLO. REV. STAT. § 13-21-404 (Supp. 1982)).

95. 727 F.2d 917 (10th Cir.), *cert. denied*, 105 S. Ct. 176 (1984).

96. 727 F.2d at 920. The plane, a French-manufactured "Falcon 10" twin engine turbofan-powered aircraft, crashed near Denver, Colorado, killing its two pilots and two passengers. *Id.* The plaintiff brought suit against the airplane's manufacturer, asserting multiple theories of negligence and strict liability. *Id.*

97. *Id.* at 930. The warning was published on March 1, 1978, nearly a year after the fatal crash that killed the plaintiff's decedent. *See id.*

98. *See id.* at 930-31. The Tenth Circuit summarized the district court's action as follows:

> Prior to trial the court expressed its views that [the evidence] would not likely be admitted inasmuch as Plaintiffs alleged causes of action based both on negligence and strict liability and the policy underlying Fed. R. Evid. 407, was not to discourage persons from taking remedial measures. The trial court recognized, however, that its ruling would be guided by the balancing required under Fed. R. Evid. 403.

Id. at 931.

From the Tenth Circuit's summary of the district court's action, it appears that the district court properly recognized the force of prior decisions in the Tenth Circuit which held that rule 407 was inapplicable in strict liability actions, but that rule 403 could be utilized to exclude evidence of subsequent remedial measures in such actions. For a discussion of the Tenth Circuit's position on the applicability of rule 407 in strict liability actions, see *supra* notes 41-49 and accompanying text.

99. 727 F.2d at 932. Because the applicable state law, at the time of the crash, did not conflict with federal rule 407, the evidence was nevertheless found inadmissible in this suit. *Id.* at 933. However, the state law had been altered

407 is *not* to seek truth or to expedite trial proceedings; rather, in our view, it is one designed to promote state policy in a substantive law area."[100] The court added:

> We hold that when [a conflict exists between rule 407 and state law], because Rule 407 is based primarily on policy considerations rather than relevancy or truth seeking, the state rule controls because (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.[101]

Rejecting the notion that the Supreme Court's decision in *Hanna v. Plumer*[102] mandated the application of rule 407,[103] the *Moe* court observed that "while the sufficiency of the evidence is tested against the federal standard in a diversity case, the underlying cause of action, with its attendant elements and requirement of proof in a diversity case, is governed by state law."[104] The court ultimately focused its attention

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since the time of the crash, and the court suggested that similar evidence might be found to be admissible under the new state law. *Id.*

100. *Id.* at 932 (emphasis added) (citation omitted). The court also noted 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." *Id.* (citing Rexrode v. American Laundry Press Co., 674 F.2d 826 (10th Cir.) (holding that absent state law that provides otherwise, state evidentiary law will be applied to determine admissibility of subsequently promulgated national industry standards in diversity-based products liability case), *cert. denied*, 459 U.S. 862 (1982)).

101. *Id.* (citing Rexrode v. American Laundry Press Co., 674 F.2d 826 (10th Cir.), *cert. denied*, 459 U.S. 862 (1982)).

102. 380 U.S. 460 (1965).

103. *See* 727 F.2d at 932. According to the *Moe* court, *Hanna* stands for the proposition that "where the federal and state rules both govern the issue in dispute, and are in direct conflict, the federal rule applies in a diversity based case if the federal rule is *arguably procedural* in nature." *Id.* (emphasis added). For a further discussion of *Hanna*, see *infra* notes 125-38 and accompanying text.

104. 727 F.2d at 932 (citations omitted). *See also* McInnis v. A.M.F. Inc., 765 F.2d 240 (1st Cir. 1985). The First Circuit distinguished the *Moe* analysis, involving the application of rule 407, from *McInnis*, which involved the application of Federal Rule of Evidence 403 in a diversity action. *Id.* at 246 n.8. The court reasoned that rule 403 was strictly an evidentiary rule without underlying policy considerations. *Id.* at 246 & n.8. In its analysis of the choice of law question, the *McInnis* court concluded that the *Hanna* test was the proper test of the constitutionality of the Federal Rules of Evidence. *Id.* at 245 n.5. In support of its conclusion the court cited the Seventh Circuit's decision in *Flaminio* as well as several cases from other circuits that had indicated, without discussion of the issue, that a federal rule of evidence was applicable in diversity actions. *Id.* at 245 (*citing* Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 885 (5th

upon the Supreme Court's landmark decision in *Erie Railroad Co. v. Tompkins*,[105] which established, for the first time, that situations exist where it would be unconstitutional for a federal court to disregard state law in a diversity action.[106] Relying upon a respected evidence treatise, the *Moe* court concluded that reliance upon rule 407 in a diversity action would "result in an unwarranted incursion into the *Erie* doctrine."[107]

B. *The Seventh Circuit Approach: Rule 407 Governs the Admissibility of Evidence of Subsequent Remedial Measures in Diversity Actions in Federal Courts*

In *Oberst v. International Harvester Co.*,[108] Judge Swygert addressed the issue of the potential conflict between application of rule 407 and state evidentiary law in a lengthy footnote to his dissenting opinion.[109] Judge Swygert observed that the Supreme Court's decisions in *Hanna v. Plumer*[110] and *Walker v. Armco Steel Corp.*[111] established the principle that "where . . . a federal and state rule both govern the issue in dispute and

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Cir. 1983) (Federal Rules of Evidence apply in diversity cases); Ballou v. Henri Studios, Inc., 656 F.2d 1147, 1153 (5th Cir. 1981) (rule 403 is procedural and, therefore applies in diversity cases); Gibbs v. State Farm Mut. Ins. Co., 544 F.2d 423, 428 n.2 (9th Cir. 1976) ("In diversity cases, we apply the Federal Rules of Evidence when, as here, they cover the points in dispute.")).

105. 304 U.S. 64 (1938).

106. *See generally id.* For a further discussion of *Erie*, see *infra* notes 139-51 and accompanying text.

107. 727 F.2d at 932 (citing 2 D. LOUISELL & C. MUELLER, *supra* note 75, § 166, at 258). The court quoted extensively from a portion of the Louisell & Mueller text in which the authors argue that "there may well be valid constitutional reasons why Rule 407 cannot be applied in cases where state law supplies the rule of decision." *Id.* at 932-33 (quoting 2 D. LOUISELL & C. MUELLER, *supra* note 75, § 166, at 263). For the full text of the argument advanced by Professors Louisell and Mueller, see 2 D. LOUISELL & C. MUELLER, *supra* note 75, § 166, at 261-64 (1978).

It should be noted that the *Moe* court's entire discussion of the choice of law issue can be considered dicta because the state and federal rules in that case were not in conflict. 727 F.2d at 933. The court noted that the choice of law considerations did not affect the outcome of the case. *Id.* at 931. In his concurring opinion, Judge McKay stated that he could not join the majority opinion because it chose to resolve the choice of law question. *Id.* at 936 (McKay, J., concurring).

108. 640 F.2d 863 (7th Cir. 1980).

109. *See id.* at 867-68 n.2 (Swygert, J., concurring in part and dissenting in part). The *Oberst* majority did not find it necessary to address this issue.

110. 380 U.S. 460 (1965). For a further discussion of *Hanna*, see *infra* notes 125-38 and accompanying text.

111. 446 U.S. 740 (1980) (noting that *Hanna* analysis does not apply where scope of a Federal rule of Civil Procedure is sufficiently narrow that it does not control an issue; in such cases *Erie* analysis applies). The *Walker* court stated that, in determining the scope of a federal rule, the court did not mean to suggest that the rules should be "narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning." *Id.* at 750 n.9.

are in conflict, the federal rule is applied in a diversity case if it is *arguably procedural*."[112] Finding rule 407 to satisfy the "arguably procedural" standard,[113] Judge Swygert concluded that where such a conflict arises in an action tried in federal court, "[rule 407], and not a conflicting state rule, probably applies."[114]

In *Flaminio v. Honda Motor Co.*,[115] the Seventh Circuit's analysis of this issue resembled an expanded version of Judge Swygert's analysis in *Oberst*.[116] *Flaminio* involved an appeal from a jury verdict for the defendant in a strict liability action in which the district court excluded the plaintiff's proferred evidence of subsequent remedial measures undertaken by the defendant.[117] The appellant-plaintiff argued that the Seventh Circuit should adopt the Tenth Circuit's position in *Moe*[118] and reverse the district court on the ground that the evidence was admissible under the applicable state law.[119] Like Judge Swygert in *Oberst*, the *Flaminio* court concluded that rule 407 was sufficiently procedural to satisfy the *Hanna* test of constitutionality.[120] The court stated:

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112. 640 F.2d at 867 n.2 (Swygert, J., concurring in part and dissenting in part).

113. *Id.* at 868 n.2 (Swygert, J., concurring in part and dissenting in part). Judge Swygert stated, "Although Rule 407 is based primarily upon policy grounds, it is arguably evidentiary (i.e. procedural)." *Id.*

114. *Id.* Judge Swygert declined to decide which rule would govern because there was no conflict between rule 407 and the state rule in that case. *Id.* Nonetheless, he opined that rule 407 would probably be applied. *Id.*

115. 733 F.2d 463 (7th Cir. 1984).

116. While the *Flaminio* court applied an analysis similar to that employed by Judge Swygert in *Oberst*, the court did not mention *Oberst* in any portion of its discussion of the issue. *See generally id.*

117. *See id.* at 468. For a further discussion of the facts of *Flaminio*, see *supra* notes 30-32 and accompanying text.

118. 733 F.2d at 470. The court noted that the plaintiff was arguing with support from the "considered dictum" in *Moe*. *Id.*

119. *Id.* (citing WIS. STAT. § 904.07 (1975)). The court noted that although the state statute "is worded identically to Rule 407, . . . the [state] Supreme Court has held that it does not apply in the case of a mass-produced product." *Id.* (citing Chart v. General Motors Corp., 80 Wis. 2d 91, 102, 258 N.W.2d 680, 684 (1977)). The court further noted that a more recent decision by the Wisconsin Supreme Court "broadened this holding to all product liability cases in which at least one of the plaintiff's liability theories is strict liability." *Id.* (citing D.L. by Friederichs v. Hueber, 110 Wis. 2d 581, 610-14, 329 N.W.2d 890, 903-05 (1983)).

120. *Id.* For a further discussion of *Hanna*, see *infra* notes 125-38 and accompanying text.

Recognizing the potential inconsistency between *Hanna* and *Erie*, the *Flaminio* court stated:

> We are reluctant to cast a cloud over the whole federal rulemaking enterprise and open a new chapter in constitutional jurisprudence by holding that a procedural rule is beyond even the power of Congress to enact for application to diversity cases, because the rule affects substantive questions that the *Erie* doctrine reserves to the states.

733 F.2d at 472.

> An important though not the primary reason for the rule was distrust of juries' ability to draw correct inferences from evidence of subsequent remedial measures. Although it was a mild distrust, as shown by the exceptions built into the rule, it is enough to establish the rule's constitutionality in diversity cases.[121]

The court reasoned that, under *Hanna*, Congress has the authority to prescribe rules so long as the rules are arguably procedural; it is not fatal to a rule if it also has some substantive effects.[122]

Nineteen months after deciding *Flaminio*, the Seventh Circuit reaffirmed its determination that rule 407, and not state law, governs the admissibility of evidence of subsequent remedial measures in strict liability actions tried in federal court on the basis of diversity jurisdic-

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121. 733 F.2d at 472. In an earlier portion of its opinion, the court noted that the advisory committee notes to rule 407 indicate that the rule *primarily* is based "on a social policy of encouraging people to take . . . steps in furtherance of added safety." *Id.* at 471 (quoting FED. R. EVID. 407 advisory committee note) (citing C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE 666 (Cleary 2d ed. 1972)). The court added, however:

> [T]he 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. As the Advisory Committee and others have argued, . . . to infer negligence from such measures is to commit the fallacy, to which juries have long been thought prone, of believing that "because the world gets wiser as it gets older, therefore it was foolish before." Congress's judgment that juries are apt to give too much weight to such evidence is a procedural judgment, that is, a judgment concerning procedures designed to enhance accuracy or reduce expense in the adjudicative process.

Id. (quoting Hart v. Lancashire & Yorkshire Ry., 21 L.T.R. (n.s.) 261, 263 (Ex. 1869)) (citations omitted).

The court further noted, "Although Rule 407 has substantive consequences by virtue of affecting incentives to take safety measures after an accident occurs, this just puts the rule in that borderland where procedure and substance are interwoven." *Id.* For a discussion of the significance of a finding that a rule lies in the "borderland," see *infra* note 134 and accompanying text.

122. 733 F.2d at 471. The court noted that under article III of the Constitution, Congress' power to regulate the existence of the lower federal courts implied a broad power to regulate procedure in these courts. *Id.* In support of its reasoning, the court cited other federal rules that had been upheld as primarily procedural despite their substantive effects. *Id.* at 472. In particular, the *Flaminio* court pointed to rule 35 of the Federal Rules of Civil Procedure, the rule governing compulsory physical examinations during discovery, which had been held to be validly applied in federal diversity cases. *Id.* (citing Sibbach v. Wilson & Co., 312 U.S. 1 (1941)). The court observed that even though application of rule 35 could force a plaintiff to submit to a physical examination, a clear interference with the party's substantive right to privacy, the rule was sufficiently procedural in nature to pass constitutional muster. *Id.* (citing *Sibbach*, 312 U.S. at 14).

tion.[123] In addition to the Seventh Circuit, the district court in Maine also has relied upon *Hanna* to conclude that federal courts should apply rule 407 to exclude evidence of subsequent remedial measures in a diversity action despite the existence of a state law permitting the admission of such evidence.[124]

C. *Resolution of the Conflict*

It is submitted that both the Seventh and Tenth Circuits properly

123. *See* Public Serv. Co. v. Bath Iron Works Corp., 773 F.2d 783 (7th Cir. 1985). The court reaffirmed *Flaminio* without discussing the issue. *Id.* at 791 n.3. *Bath Iron Works* is somewhat unusual because defendants were the party arguing to admit evidence of subsequent remedial measures under rule 407's express exception allowing the use of evidence for impeachment purposes. *Id.* at 785. The court applied rule 407 instead of state law. *Id.* at 793.

124. *See* Rioux v. Daniel Int'l Corp., 582 F. Supp. 620 (D. Me. 1984); French v. Fleet Carrier Corp., 101 F.R.D. 369 (D. Me. 1984).

Rioux involved the court's ruling on a motion *in limine* to determine the admissibility of evidence showing a change in the defendant's method of securing concrete pipe risers on the defendant's construction site. 582 F. Supp. at 621. The plaintiff in *Rioux* argued that Maine's rule of evidence was a substantive policy-based rule that must be applied to determine the admissibility of evidence of subsequent remedial measures in a diversity action. *Id.* at 622-23. Maine's rule of evidence would admit this evidence in the plaintiff's negligence action. *Id. See* ME. R. EVID. 407.

In response to the plaintiff's argument, the *Rioux* court emphasized that although Congress explicitly preserved state law in some areas of evidentiary practice, no such preservation was incorporated in rule 407. *Id.* at 624-25. The court further asserted that although the *Hanna* test was devised to measure the constitutionality of the Federal Rules of Civil Procedure, it applied as well to the Federal Rules of Evidence. *Id.* at 624. "Because the Rules of Evidence were enacted directly by Congress, their validity vis-à-vis state law and the principles of the *Erie* doctrine stands on even firmer ground than that of the Rules of Civil Procedure." *Id.* at 625 (quoting 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4512, at 192-93 (1982)). The district court concluded that Federal Rule 407 governed the admissibility of evidence in diversity cases. *Id.* Although *Rioux* was decided after *Moe*, the opinion in *Rioux* did not address the *Moe* decision. The court based its decision on its application of the "rationally procedural" language of the *Hanna* test. *Id.*

In *French*, Maine's district court was presented with a conflict between Federal Rule of Civil Procedure 81(c) and Maine's rule 16(a)(3)(E), the federal and state rules governing the procedure for demanding a jury trial in cases removed to federal court. 101 F.R.D. at 370. Although the cases did not involve a conflict between evidentiary rules, the court cited *Rioux* and applied the *Hanna* analysis to determine which rule should apply. *Id.* at 371. The court also took the opportunity to refute the analysis in the *Moe* decision. *Id.* at 371 n.3. The *French* court interpreted *Moe* to have held that state law was utilized because considerations of substantive policy underlay both the state and federal rule. *Id.* The *French* court pointed out that all rules of evidence are based on some underlying policy considerations. *Id.* The court interpreted the rationally procedural standard to "be a determination by Congress and the Supreme Court that the ability of federal courts to govern their own proceedings takes precedence over state policy considerations when two rules, rationally classified as procedural, are in conflict." *Id.* The court concluded that the federal rule was properly applied. *Id.* at 471.

identified *Erie* and *Hanna* as the sources that provide the applicable framework of analysis for resolving the choice of law issue. Moreover, it is submitted that both circuits reached the appropriate conclusion in light of their respective views on rule 407's applicability to strict liability actions.

1. *The "Arguably Procedural" Standard of* Hanna v. Plumer

In *Hanna v. Plumer*,[125] the Supreme Court was confronted with the issue of whether rule 4(d)(1) of the Federal Rules of Civil Procedure[126] or state law governs the sufficiency of process in a proceeding tried in federal court where jurisdiction is based upon diversity of citizenship.[127] After reviewing its progression of decisions on similar questions, from *Swift v. Tyson*[128] to *Erie Railroad v. Tompkins*[129] to *Guaranty Trust Co. v. York*[130] and *Byrd v. Blue Ridge Rural Electric Cooperative*,[131] the Supreme Court announced the following standard for determining the proper choice of law where a federal rule is in conflict with a state law:

> When a situation is covered by one of the Federal Rules, . . . 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.[132]

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125. 380 U.S. 460 (1965).

126. FED. R. CIV. P. 4(d)(1). The federal rule allows service to a person's residence so long as the materials are served to someone of "suitable age and discretion then residing therein." *Id.*

127. 380 U.S. at 462. The plaintiff in *Hanna* filed suit in the United States District Court for the District of Massachusetts claiming damages for personal injuries. *Id.* at 461. Process was served in compliance with the applicable federal rule by leaving copies of the summons and complaint with the defendant's wife at the defendant's residence. *Id.* at 462. That method of service did not comply with state law. *Id.*

128. 41 U.S. (16 Pet.) 1 (1842). *Swift* held that federal courts exercising jurisdiction on the basis of diversity of citizenship may apply federal common law instead of state common law. *Id.* at 18.

129. 304 U.S. 64 (1938). For a discussion of *Erie*, see *infra* notes 139-51 and accompanying text.

130. 326 U.S. 99 (1945). The Court in *Guaranty Trust* construed the *Erie* limitation on federal courts' ability to apply substantive federal law in diversity actions. The court interpreted the focus of this limitation to be that when "a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the *outcome of the litigation* in the federal court should be substantially the same, as if it were tried in a State court." *Id.* at 109 (emphasis added).

131. 356 U.S. 525 (1958). The *Byrd* Court construed the choice of law under *Erie* to require a balancing of federal and state interests. *Id.* at 538. Even if a federal rule is outcome determinative, the federal rule can be applied under *Byrd* if affirmative countervailing considerations support application of the federal rule. *Id.*

132. *Hanna*, 380 U.S. at 471 (footnote omitted).

In addition, the Court noted that the propriety of applying a federal rule *enacted by Congress* is determined solely by reference to the Constitution.[133]

Delineating the breadth of power which Congress may exercise without transgressing its "constitutional restrictions," the Court observed:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to *make rules governing the practice* and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are *rationally capable of classification as either*.[134]

The Court concluded that the district court properly applied rule 4(d)(1) in the diversity action because the rule transgressed neither the Rules Enabling Act nor the Constitution.[135]

At this point, the *Hanna* Court could have ended its analysis, having resolved the limited statutory and constitutional issues presented. The Court went on in dicta, however, to distinguish between situations where a federal rule is in direct conflict with state law and where there is no federal rule on point.[136] In the former case, the court explained, the federal rule can govern the action without breaching constitutional standards unless the rule is not arguably procedural.[137] In the latter case, however, the proper choice of law is governed by what the *Hanna* court described as an "unguided" *Erie* choice.[138]

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133. *Id.* at 470-73.

134. *Id.* at 472 (emphasis added) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

135. *Id.* at 464.

136. *Id.* at 465-73.

137. *Id.* at 471-73. The "arguably procedural" language is not that of the *Hanna* Court. As quoted in the text (*see supra* text accompanying note 134), the precise language employed by the *Hanna* Court is that the federal rule governs the action provided it is "rationally capable of classification" as procedural. *Id.* at 472.

138. *Id.* at 470-72. The Court stated:

> It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.

Id. at 470. *See also* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 712-16 (1974) (discussing effect of *Hanna* upon the constitutional doctrine developed in *Erie*).

2. *The "Unguided" Choice of Law under* Erie

Erie Railroad v. Tompkins[139] involved an appeal by the Erie Railroad Company from a jury verdict for a plaintiff who was injured when struck by an object protruding from a passing freight train as he walked along the railroad's right of way.[140] The plaintiff in *Erie* was a citizen of Pennsylvania, the state in which the injury occurred, and the railroad was incorporated in New York.[141]

At trial, the railroad moved to dismiss the action on the dual grounds that (1) under Pennsylvania law, the plaintiff failed to prove actionable negligence, and (2) the railroad succeeded in proving the plaintiff's contributory negligence.[142] The district court refused to dismiss the action and the jury returned a verdict for the plaintiff.[143] On appeal, the Second Circuit affirmed the jury verdict.[144] The Second Circuit rejected the railroad's contention that it was not liable to the plaintiff under Pennsylvania law, stating:

> [W]e need not go into this matter since the defendant concedes that the great weight of authority in other states is to the contrary. This concession is fatal to its contention, for upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is.[145]

The Supreme Court unanimously reversed the Second Circuit.[146] Specifically addressing the lower court's refusal to apply Pennsylvania law, the Court stated:

> 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. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.[147]

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139. 304 U.S. 64 (1938).

140. *Id.* at 69.

141. *Id.*

142. *Id.*

143. *Id.* at 70.

144. Tompkins v. Erie R.R., 90 F.2d 603, 606 (2d Cir. 1937), *rev'd*, 304 U.S. 64 (1938).

145. 90 F.2d at 604.

146. 304 U.S. at 80. While every Justice who took part in the decision agreed that the Second Circuit should be reversed, the justices did not all agree upon the rationale supporting reversal. In addition, Justice Cardozo took no part in the consideration or decision of the case.

147. *Id.* at 78. The Court added, "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts." *Id.*

The *Erie* court reasoned that the state law must be applied in federal courts in order to avoid inequitable application of the law and to prevent forum shopping.[148]

Later Supreme Court decisions have construed the *Erie* balancing approach to be applicable only when there is no federal rule in direct conflict with a state law that addresses the issue in question.[149] When *Erie* is applicable, the choice between federal and state law focuses on the following factors: whether application of federal law as opposed to state law is outcome determinative; whether the choice of law will affect the parties' choice of forum; and whether there are countervailing circumstances to support application of state or federal law.[150] Unfortunately, the decisions expanding upon *Erie* have offered little guidance on how these factors are to be determined, and what weight they should be given.[151]

3. *Is Rule 407 Substantive or Procedural Under* Erie *and* Hanna: *The Apparent Split Between the Seventh and Tenth Circuits is Justified in Light of Their Differing Conclusions with Respect to Rule 407's Application to Strict Liability Actions*

It is submitted that if the majority of the federal circuits are correct in their determination that rule 407 applies to strict liability actions, then the *Hanna* analysis leads to the inescapable conclusion that rule 407, and not state evidentiary law, governs the admissibility of evidence of subsequent remedial measures in federal courts where jurisdiction is based on diversity of citizenship. Although rule 407 certainly echoes substantive policy concerns with respect to the tendency to discourage remedial measures, the rule just as certainly regulates matters that are "rationally capable of classification" as procedural.[152] Thus, application of rule 407 in diversity actions does not transgress the constitutional limitations delineated in *Hanna*. Moreover, it is submitted that it is unnecessary to determine whether rule 407 transgresses the limitations of

148. *Id.* at 73-80.

149. *Hanna*, 380 U.S. at 471-72. *See also* Ely, *supra* note 138, at 712-16 (discussing effect of *Hanna* decision on constitutional doctrine developed in *Erie*).

150. Lumberman's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963), *cited in Hanna*, 380 U.S. at 471. *See also Byrd*, 356 U.S. 525 (adding consideration of countervailing factors to *Erie* analysis); *Guaranty Trust*, 326 U.S. 99 (adding outcome determinative gloss to *Erie*). The balance leans heavily in favor of applying the state law if there is no federal rule on point. Oberst v. International Harvester Co., 640 F.2d 863, 867 n.2 (1980) (Swygert, J., concurring in part and dissenting in part) ("where there is no pertinent federal rule, usually a specific state rule will be applied").

151. *See, e.g.*, *Byrd*, 356 U.S. 525; *Guaranty Trust*, 326 U.S. 99 (giving no definite guidelines to determine if considerations are sufficiently "outcome determinative" or "countervailing" to provide predictability to choice of federal or state law). *See generally* Ely, *supra* note 138 (discussing intricacies of *Erie* analysis).

152. For a discussion of the "rationally" procedural analysis from *Hanna*, see *supra* notes 133-38 and accompanying text.

the Rules Enabling Act because, unlike the Federal Rules of Civil Procedure, the Federal Rules of Evidence were enacted by Congress.[153]

On the other hand, it is submitted that if the minority of the federal circuits are correct in their determination that rule 407 does *not* apply to strict liability actions, the *Hanna/Erie* analysis supports the conclusion that those federal courts must apply state evidentiary law in determining the admissibility of evidence of subsequent remedial measures in strict liability actions where jurisdiction is based on diversity of citizenship. If the minority rule is correct, the "arguably procedural" standard from *Hanna* is inapplicable since the federal rule is not on point and not directly in conflict with the state rule.[154] Consequently, it is not unreasonable to conclude that the highly substantive nature of a rule governing the admissibility of evidence of subsequent remedial measures in strict liability actions suggests that the federal courts must apply state law on

153. The Rules Enabling Act limits the United States Supreme court's authority to prescribe rules, not Congress' authority. *But see* Wellborn, *supra* note 3, at 401. Because Congress revised the Court's version of the rules out of concern to preserve state substantive law, the Rules Enabling Act's admonition to protect substantive rights remains a guidepost for construing the Federal Rules of Evidence, even though the Rules Enabling Act is not applicable to the statutorily enacted rules. *Id.* The text of the Rules Enabling Act is contained in 28 U.S.C. § 2072 (1982).

Procedural rules enacted pursuant to the Rules Enabling Act may not "abridge, enlarge, or modify any substantive right" of any litigant. 28 U.S.C. § 2072 (1982). So long as the newly enacted rule is within the Court's authority to prescribe, state laws are expressly superceded. *Id.* "[A]ll laws in conflict . . . shall be of no further force or effect . . . ." *Id.*

While *Erie*'s interpretation of the Rules of Decision Act's test looks to the lawsuit's ultimate outcome, the Rules Enabling Act's command to avoid modification of "substantive rights" does not. Ely, *supra* note 138, at 721-23. The proper approach under the Rules Enabling Act is to look to the purpose underlying the state provision that will be supplanted by the federal rule to see if the state provision is designed to promote fair and efficient litigation or designed to further a substantive policy. *Id.* If the rule governs the efficiency of the litigation it does not matter if it also affects the outcome of the litigation. *Id.* When the Federal Rules of Evidence were enacted, Congress also set forth a new Evidence Rules Enabling Act which specifically prescribes the rulemaking authority and procedure for amending rules of evidence. 28 U.S.C. § 2076 (1982). For a discussion of the Court's authority to prescribe amendments to the Federal Rules of Evidence under this statute, see Schmertz, *The First Decade Under Article VI of the Federal Rules of Evidence: Some Suggested Amendments to Fill Gaps and Cure Confusion*, 30 VILL. L. REV. 1367, 1391-95 (1985).

Although the scope and applicability of the original rules are not determined under the 1975 Evidence Rules Enabling Act, the validity and application of any amendments to the rules are measured by the Act. Section 2076 only applies to the procedure for amending the existing rules of evidence. 28 U.S.C. § 2076 (1982). Furthermore, it was not in force before the enactment of the original rules. Because rule 407 has not been amended since it was enacted in 1975, the Evidence Rules Enabling Act is not applicable to determine its scope or applicability.

154. For a discussion of the *Erie* choice of law when no federal rule is "on point", see *supra* notes 147-51 and accompanying text.

point pursuant to the "unguided" *Erie* analysis.[155] It is suggested that such a result is justifiable on the ground that it is necessary both to prevent forum shopping and to avoid any unnecessary incursion by the federal courts into the substantive rights of parties to a diversity action.

In light of their respective positions on the applicability of rule 407 to strict liability actions, it is suggested that both the Seventh and Tenth Circuits reached the appropriate conclusions as to the choice of law in a diversity action. It is further suggested, however, that the Tenth Circuit applied an erroneous analysis in reaching its conclusion.

Recall that the Seventh Circuit subscribed to the view that rule 407 is applicable in strict liability actions.[156] In light of that holding, it is suggested that the *Flaminio* court properly applied the *Hanna* analysis to conclude that rule 407, and not state law, governed the admissibility of the evidence in question. The court properly recognized that the Rules Enabling Act was irrelevant to the proper determination of the issue before the court because rule 407 was *enacted by Congress*, and not simply promulgated by the Supreme Court.[157] In addition, the court properly concluded that the application of the rule in diversity actions would not be unconstitutional because it is rationally capable of being classified as procedural.[158]

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155. One commentator has observed that "one purpose of Congress' action in revising the [Federal] Rules [of Evidence as proposed by the Supreme Court] was to police the limitation specified in the second sentence of the 1934 Rules Enabling Act against abridging substantive rights." Wellborn, *supra* note 3, at 401. The author has further noted that the majority of the federal rules are harmonious with *Erie* principles, thus supporting the interpretation that the rules were intended to avoid conflict with the application of state substantive rights. *Id. But see* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 105-08 (1962). The Committee noted that the area of lawmaking with respect to evidentiary rules, on the whole, "is not within the *Erie* doctrine." *Id.* at 114. The Committee reasoned that the *Erie* principles had been modified by the United States Supreme Court's decisions in Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525 (1958), and Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960). 30 F.R.D. at 114. The Committee concluded that the constitutional and congressional policy of having independent federal courts, and the desirability of uniformity among them in procedural matters, outweighed the policy of conformity to state law even if the outcome of the litigation is affected. *Id.* at 112-14. The Committee's analysis referred to the power of the Supreme Court, however, and was written when the Committee believed that the Rules of Evidence would be promulgated by the Supreme Court and not enacted by Congress as eventually occurred. *Id.* at 100. It is unclear if the enactment of the rules by Congress would affect the Committee's conclusion in any way.

156. For a discussion of the Seventh Circuit's position, see *supra* notes 30-32 and accompanying text.

157. 733 F.2d at 470. For a discussion of the Rules Enabling Act, see *supra* note 153 and accompanying text.

158. 733 F.2d at 471-72. For a discussion of the "rationally procedural" standard, see *supra* notes 133-38 and accompanying text.

In contrast to the *Flaminio* court, the Tenth Circuit in *Moe* misconstrued the *Hanna* analysis.[159] In its decision to apply state law, the *Moe* court failed to establish either that rule 407 and the state law were not in conflict, or that rule 407 was not rationally capable of classification as procedural. To the contrary, the *Moe* court reasoned that because state law supplied the rule of decision in the case,[160] state law governs the

159. The *Moe* court reasoned that because rule 407 determines what proof is available to the plaintiff to establish the elements of a products liability claim, rule 407 was so closely tied to the substantive state products liability law that it must be deemed substantive in nature. 727 F.2d at 932. Admittedly, questions concerning the admissibility of evidence have a procedural impact as well as a substantive effect. It is necessary to look, however, to the context in which the rule is applied, and the purpose it is intended to serve, to determine its classification as substantive or procedural. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 355-56 (1969). From a prudential standpoint, "state policy ought not to be frustrated by the accident of diversity; the allowance or denial of a privilege is so likely to affect the outcome of litigation as to encourage forum selection on that basis, not a proper function of diversity jurisdiction." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates*, 46 F.R.D. 161, 247 (1969) [hereinafter cited as *Preliminary Draft*]. One commentator similarly suggested that a law is substantive "(a) if it has a nonprocedural purpose, or (b) even if its purposes are entirely procedural, if it is calculated to affect behavior at the planning as distinguished from the disputative stage of activity." Wellborn, *supra* note 3, at 404. If the Rules Enabling Act can be viewed as a "guidepost" for application of substantive state law, then rule 407 fits the definition of a substantive law under section (a) of Wellborn's scheme. Although the rule has a procedural effect it clearly has the nonprocedural policy purpose of promoting safety as articulated by the Advisory Committee's notes on the rule. *See* FED. R. EVID. 407 advisory committee note. By the "planning stage of activity," the author refers to conduct that is not related to the litigation. Wellborn, *supra* note 3, at 404. One example cited by the author as a procedural rule that affects nonlitigation-related conduct is the parol evidence rule. *Id.* at 403. Rule 407 likewise affects non-litigation-related conduct in that the admissibility of evidence of subsequent measures is directed to whether a party is encouraged to make such repairs, and not to a litigation-related policy.

It is submitted that these interpretations fail to recognize the breadth of the Supreme Court's language in defining the *Hanna* standard of review. *See* French v. Fleet Carrier Corp., 101 F.R.D. 369, 371 n.3 (D. Me. 1984). The *Hanna* analysis gives federal courts a preferential right to govern their own practice and procedure at the expense of conflicting state law. *Id.* The *Moe* court's analysis failed "to consider the fact that the method of promulgation of the Federal Rules of Evidence, i.e., direct enactment by Congress, places the utilization of all federal rules of evidence in the federal courts, even in diversity cases, "on even firmer ground than that of the Rules of Civil Procedure." *Id.* (citing 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 124, § 4512, at 192-93 (1982) (footnotes omitted)). *But see Oberst*, 640 F.2d at 867 n.2 (Swygert, J., concurring in part and dissenting in part) ("rule of evidence . . . so intimately related to state substantive law that it should be applied in a diversity action to prevent forum shopping") (citing Conway v. Chemical Leamon Tank Lines, Inc., 540 F.2d 837 (5th Cir. 1976)).

160. 727 F.2d at 932. The Federal Tort Claims Act is one body of federal statutory law governing tort claims. The Federal Tort Claims Act, however, has no applicability unless the United States is a defendant to the action. 28 U.S.C.

admissibility of evidence of subsequent remedial measures.[161]

It is submitted that the *Moe* court's decision to apply state law would have been better justified if the court had based its decision on the Tenth Circuit's position that rule 407 is inapplicable to strict liability actions. In light of that position, there would be no conflict between rule 407 and state law, and the *Moe* court could reasonably have concluded that the "unguided" *Erie* analysis supported its decision to apply state law.[162]

It is submitted that if the *Moe* court had applied an *Erie* analysis, the court could have balanced the federal interests in maintaining a uniform set of evidentiary rules[163] and in excluding evidence to encourage manufacturer's repairs[164] against state interests such as the interest in defining the "elements and requirements of proof" for state law strict products liability claims.[165] The *Moe* court then could have articulated an acceptable basis for its choice to apply state law. Although the *Moe* court focused on the importance of maintaining the "*Erie* doctrine,"[166] it did not apply the balancing test that would be applicable under this doctrine. Thus it is submitted that although the *Moe* court reached a conclusion that could properly be justified in light of its decision that rule 407 was inapplicable to strict liability actions, the court failed to apply the analysis necessary to support that conclusion.

It is further suggested that the Tenth Circuit's failure to assert that the *Hanna* analysis was inapplicable to the situation before the court left open the implication that the decision was rendered despite *Hanna*'s application.[167] The *Moe* court's statement that applicable state law supplants federal law in diversity cases is equally applicable to negligence or strict liability actions. Such an interpretation would result in clearly undesirable practical consequences. Because almost all products liability and negligence cases brought in federal court are diversity cases,[168] ap-

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§§ 2671-2680 (1982). The Federal Tort Claims Act has been construed as not authorizing suits against the Government based on strict product liabilities theories. Stewart v. United States, 486 F. Supp. 178, 181 (C.D. Ill. 1980). Another federal statute concerning product liability risk retention expressly specifies that it does not affect the tort law of any state. 15 U.S.C. § 3901(b) (1982).

161. 727 F.2d at 932. The *Moe* court stated, "If the law of the state supplies the rule of decision, there is no justification for reliance on Rule 407." *Id.* The issue is a matter of state policy. *Id.*

162. For a discussion of the *Erie* analysis, see *supra* notes 139-50 and accompanying text.

163. For a discussion of the desire for uniformity, see *supra* notes 3-4.

164. For a discussion of the rule's presumed effect on manufacturers' incentive to repair defective products, see *supra* notes 71-72 and accompanying text.

165. 727 F.2d at 932.

166. *Id.* at 933.

167. *See id.* at 932 ("We are not unmindful of the rule laid down in *Hanna v. Plummer*.").

168. *See supra* note 160.

plying state law to determine the admissibility of evidence of subsequent remedial measures, instead of rule 407, would effectively repeal the federal rule.[169] If rules governing the admissibility of evidence of subsequent remedial measures are not "arguably procedural," then state rules also should apply in cases involving negligence claims. Such a result is directly contrary to the concept of a scheme of federal rules.[170] This interpretation would render unconstitutional virtually all of the Rules of Evidence as well as the Federal Rules of Civil Procedure as applied in diversity cases, leaving them in force only in federal question cases.[171] In view of the legislative purpose to enact a scheme of rules that would bring uniformity and simplicity to evidentiary law, it is submitted that the *Moe* court's interpretation lacks principled support.

4. *Additional Support for the Seventh Circuit's Position: An Examination of the Legislative History of the Federal Rules*

The ontogeny of the Federal Rules of Evidence supports the position of the Seventh Circuit that the procedural nature of rule 407 satisfies the constitutional standard enunciated in *Hanna*. When Congress enacted the Federal Rules into law in 1975, it had been apprised of the problems of federalism inherent in enactment of a national scheme of evidence rules.[172]

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169. Under the *Moe* court's analysis, rule 407 would never be applicable except, possibly, in a tort claim brought against the Government under the Federal Tort Claims Act. *See supra* note 160 and accompanying text. The question of the admissibility of evidence of subsequent remedial measures would be relevant only with respect to the interpretation of the applicable state law.

170. *See supra* notes 3-4 and accompanying text. Three arguments have been advanced against a need for uniformity in diversity actions brought in different states at the expense of intrastate uniformity. *See* Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives*, 122 U. PA. L. REV. 599, 603 (1974). First, because most products liability claims are brought in state court, by lawyers in a local practice, these lawyers would be best served by a single rule of evidence for both their local state and federal claims. *Id.* It is unusual for trial lawyers to practice concurrently in several states, therefore, lawyers have little need for interstate conformity of these evidentiary rules. *Id.* Second, the federal trial judges are drawn from the state bar and would be familiar with state practice. *Id.* at 604. Finally, state courts have concurrent jurisdiction with the federal courts over other questions. *Id.* The area of product liability claims should be no different. *Id.*

Moreover, inconsistent admissibility of evidence in products liability suits, between suits brought in state court and those brought in or removed to federal court, defeats the rationale for both the state and federal rule. The very policy served by a law controlling the admissibility of evidence is frustrated by this inconsistency. *Cf.* Berger, *Privileges, Presumptions and Competency of Witnesses in Federal Court: A Federal Choice-of-Laws Rule*, 42 BROOKLYN L. REV. 417, 420-32 (1976).

171. *Flaminio*, 733 F.2d at 471. *See, e.g.*, Rioux v. Daniel Int'l Corp., 582 F. Supp. 620, 624 (D. Me. 1984) (analysis of constitutionality of Federal Rules of Civil Procedure is analogous to that of Federal Rules of Evidence).

172. *See, e.g.*, Green, *Drafting Uniform Federal Rules of Evidence*, 52 CORNELL L.Q. 177, 200-09 (1967); Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 571-73 (1967).

The rules drafted by the Supreme Court gave rise to certain controversies over the determination of applicable law in diversity actions, prompting Congress to redraft the rules.[173] Criticism of the Supreme Court's draft focused on its failure to recognize the continued vitality of state substantive rules.[174] Former Supreme Court Justice Arthur Goldberg looked to the "constitutional implications of Erie,"[175] and the Rules Enabling Act,[176] and concluded that the substantive nature of the proposed Federal Rules required that state substantive law be applied in the area of privilege.[177] Testimony by several other witnesses before the congressional committee that reviewed the proposed rules echoed Justice Goldberg's concerns.[178] Consequently, Congress redrafted por-

173. *See* Wellborn, *supra* note 3, at 373-74, 406 (testimony before Congress concerning proposed Rules of Evidence often centered on rules' substantive nature and on possible unconstitutional violation of limits on congressional power to enact laws contrary to state law).

174. *See generally Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Criminal Laws of the House Judiciary Comm.*, 93d Cong., 1st Sess., ser. 2 (Supp.) [hereinafter cited as *Hearings*] (letter of Professor Victor Schwartz to Rep. William Hungate, July 31, 1973, *cited in* 2 D. LOUISELL & C. MUELLER, *supra* note 75, § 163, at 376 n.6 (1978)); H.R. REP. No. 650, 93d Cong., 1st Sess. 1-4 (1973); S. REP. No. 1277, 93d Cong., 2d Sess. 6-7 (1974).

175. *Hearings*, *supra* note 174, at 156 (testimony of Justice Goldberg). Justice Goldberg cited the *Erie* doctrine in support of the constitutional principle that "federal courts in diversity cases have no power to create and apply substantive federal law in conflict with the laws of the states where the courts preside." *Id.*

176. Justice Goldberg made reference to one of the Supreme Court's decisions which construed the Rules Enabling Act. *Hearings*, *supra* note 174, at 156 (testimony of Justice Goldberg) (citing Sibbach v. Wilson, 312 U.S. 1 (1941)). In support of his theory that rules of privilege are beyond the Supreme Court's power to regulate as procedure, Justice Goldberg explained that the standard derived from the Rules Enabling Act is used to distinguish between procedure and substance. *Id.* According to the Justice, that standard requires that rules of privilege be viewed as substantive for purposes of choice of law in diversity actions. *Id.*

177. *Id.* at 157 (testimony of Justice Goldberg) ("Most rules of evidence . . . are designed to facilitate the fact-finding process. Rules of privilege, on the other hand, are designed to protect independent substantive interests . . . .") Rule 407, like rules of privilege, excludes evidence of subsequent measures because of substantive policy considerations, not because of a lack of relevance to the issues before the court. *See supra* notes 71-73 and accompanying text. Admissibility of evidence on grounds of relevancy is governed by a separate rule of evidence. *See* FED. R. EVID. 401.

Justice Goldberg expressed great concern that the question of whether state or federal law regarding privileges should be applicable was not adequately considered in the Court's drafting of the rules. *Hearings*, *supra* note 174, at 143, 147. He also postulated that interference with state substantive rights would violate the doctrine of federalism. *Id.*

178. *Hearings*, *supra* note 174, at 169-72 (statement of Charles Halpern and George Frampton on behalf of Washington Counsel of Lawyers). Halpern and Frampton argued that the proposed Federal Rules "clearly affect substantive rights" and "abrogate important state policies". *Id.* at 169. *See also id.* at 331 (statement of Mr. Repasky during testimony of Robert Warren, Attorney General of Wisconsin) (if the rules are enacted "we may be litigating cases that I

tions of the Supreme Court's version of the rules to refer expressly to the application of state law.[179]

The extent to which congressional concern for the preservation of state substantive law occupied those charged with drafting the Federal Rules has led some commentators to argue that this legislative concern should be considered when construing rule 407.[180] Some commentators view rule 407 as a kind of rule of privilege.[181] They emphasize that Congress determined that state substantive law should be applied to determine if evidence is privileged,[182] and argue that the reasoning cited in support of the application of state rules of evidence in matters of privilege is equally applicable to rule 407.[183] It is submitted that this posi-

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have only heard about in law school, such as the *Erie* case, all over again, as to the question of State and Federal sovereignty"); S. REP. No. 1277, 93d Cong., 2d Sess. 6 (1974) (reason for delay in enacting Federal Rules was to allow resolution of dissatisfaction with their interference with the application of state substantive law).

179. Congress made several changes in the rules as drafted by the Court to preserve state substantive law. *See generally* 2 D. LOUISELL & C. MUELLER, *supra* note 75, § 166, at 258-66; Wellborn, *supra* note 3, at 401-02. Two such changes were congressional amendments to rules 501 and 601 to expressly require application of state law in questions of privileges and the competency of a witness with respect to claims or defenses based on state law. *See* FED. R. EVID. 501 (privileges), FED. R. EVID. 601 (competency). *See also* FED. R. EVID. 302 (presumptions concerning facts which are elements of claim or defense as to which state law is rule of decision are determined in accordance with state law).

180. By the time the Rules of Evidence were enacted by Congress, *Erie*'s constitutional principles were generally accepted legal doctrine. It is unlikely that Congress intended rule 407 to implicitly challenge these principles, since the other rules were carefully redrafted in support of the *Erie* doctrine, to thereby preserve state substantive law in diversity actions. It is more likely that Congress intended all of the rules to be interpreted as consistent with established *Erie* principles. *See generally* 2 D. LOUISELL & C. MUELLER, *supra* note 75, § 166, at 258-66; Wellborn, *supra* note 3, at 401.

181. Schwartz, *supra* note 7, at 5 n.26 ("The Advisory Committee's decision to federalize the repair rule should stand or fall on its argument to federalize privileges.") (citations omitted). *See generally Preliminary Draft*, *supra* note 159; Schwartz, *Privileges Under the Federal Rules of Evidence—A Step Forward?*, 38 U. PITT. L. REV. 79 (1976) (discussing reasons for applying state rules of privilege).

182. Federal Rule of Evidence 501 states that state law controls the determination of a privilege "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision . . . ." FED. R. EVID. 501.

183. Rules of privilege, like rule 407, are designed to promote specific policy considerations:

> [Privileges] do not in any wise aid the ascertainment of truth, but rather they shut out the light. Their sole warrant is the protection of interests and relationships which, rightly or wrongfully, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.

C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 72, at 152 (1954) (footnote omitted). For a discussion of the policy rationale behind rule 407, see *supra* notes 71-73 and accompanying text. *See also* 2 D. LOUISELL & C. MUELLER, *supra* note 75, § 163, at 237; Schwartz, *supra* note 7, at 5. The Senate Judiciary Com-

tion is not supported by the language of the rule. The rules of privilege expressly incorporate Congress' mandate to look to state law.[184] Rule 407, however, is silent on this issue.[185]

Some commentators believe that rule 407's silence on the issue of the application of state law was an oversight, and that Congress' intent was to apply established principles defining the limits of federal and state power to all the rules—leading to the conclusion that state law governs the admissibility of evidence of subsequent remedial measures in a diversity case.[186] Rule 407's silence on this issue, however, has led other commentators to conclude that Congress intended state law to be inapplicable with respect to the admissibility of evidence of subsequent remedial measures.[187] As of the drafting of the Federal Rules of Evidence by the Supreme Court, there was a disparity between state and federal evidence laws in the area of privilege. Most other state evidence laws, however, were consistent with the new federal provisions.[188] It is

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mittee expressed the view that other privileges that are not provided for in rule 501 should "be determined on a case-by-case basis." S. REP. No. 1277, 93d Cong., 2d Sess. 13 (1974).

184. *See, e.g.*, FED. R. EVID. 501.

185. For the text of rule 407, see *supra* note 6.

186. *See* 2 D. LOUISELL & C. MUELLER, *supra* note 75, § 166, at 265-66. Other legislative history includes discussions of the subject of applicable law with respect to the federal rules of evidence in general. *See* S. REP. No. 1277, 93d Cong., 2d Sess. 6-14 (1974); H.R. REP. No. 650, 93d Cong., 1st Sess. 1-4 (1973); Second Circuit Judicial Conference, *A Discussion of the Proposed Federal Rules of Evidence*, 48 F.R.D. 39, 72-75 (1969) (construing Weinstein, *supra* note 159, at 361-73).

187. *See, e.g.*, Schwartz, *supra* note 181, at 81. *See also* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (Congress' enactments preempt state laws where command is "explicitly stated in the statute's language or implicitly contained in its structure and purpose"); Johnson v. Ellis & Sons Iron Works, 609 F.2d 820 (5th Cir. 1980) (unless rule expressly directs court to apply state law, federal rules should be applied in diversity cases as well).

188. 2 D. LOUISELL & C. MUELLER, *supra* note 75, § 163, at 235 ("the exclusionary rule . . . of evidence of subsequent remedial measures [was] almost universally recognized"). Maine was one of the first states to enact an evidentiary rule expressly contrary to federal rule 407. *See* ME. R. EVID. 407. Maine's rules of evidence were not effective, however, until February 2, 1976, after the congressional debates concerning the proposed federal rules. *Id. See* MAINE RULES OF COURT at 631 (West 1985). Congress may not, therefore, have anticipated the existence of state laws that would be displaced by a strict uniform application of rule 407 in diversity cases. Where such conflicts were anticipated, and Congress intended state law to remain applicable, Congress explicitly provided for the application of state law. *See* FED. R. EVID. 601 advisory committee note (providing for existence of state dead man's statutes under rule 601 dealing with competency of witnesses).

Prior to the enactment of the Federal Rules of Evidence, federal courts were not rigidly bound to apply either the federal or state rule. *See* Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975) (scrutinizing admissibility of evidence in negligence action); Bailey v. Kawasaki-Kisen, K.K., 455 F.2d 392 (5th Cir. 1972) (determining that admissibility of evidence in negligence action is entitled to benefit of most favorable rule); New York Life Ins. Co.

suggested that because state evidence laws generally were consistent with the federal rules, it is likely that Congress may not have forseen the need to expressly provide for preemption of state laws concerning subsequent remedial measures. In summary, therefore, it is submitted that although rule 407's silence probably does not reflect a considered decision that state law be inapplicable, neither does it reflect complete oversight of the issue. In light of the congressional concern with state substantive law, it is submitted that it is especially unlikely that Congress would have remained silent on the issue had it intended to declare state law applicable to the question of admissibility of evidence of subsequent repairs.

IV. CONCLUSION

It is submitted that under the current state of the law rule 407 lacks the vitality to act as an effective policy measure. As is evidenced by the recent cases of *Meller v. Heil Co.*[189] and *Flaminio v. Honda Motor Co.*,[190] the split of authority remains among the federal circuits concerning the application of rule 407 to strict liability claims. The admissibility of evidence under the exceptions to the rule,[191] and the conclusion by a minority of the federal circuits that the rule is not applicable to strict products liability claims,[192] has eroded what little effect the rule may have had on the policy which the rule was designed to promote.[193]

In addition, the Tenth Circuit's position that rule 407 is "substantive" and, therefore, inapplicable in diversity cases[194] has added further confusion to the area. It is submitted that the rule cannot effectively encourage manufacturers to repair defective products unless it is clear that rule 407 will be applicable to a claim brought against the manufacturer. *Moe* introduced the possibility that state law may supplant the federal rule. Unless the issue of rule 407's application is settled in each of the fifty states, the manufacturers within the states cannot conform their conduct in reliance on rule 407. This is especially important because although most state rules are in agreement with the federal rules

v. Schlatter, 203 F.2d 184, 188 (5th Cir. 1953) ("In a federal court the rule, whether federal or state, which favors the reception of evidence governs.") (citation omitted).

189. For a discussion of *Meller*, see *supra* notes 41-49 & 93-94 and accompanying text.

190. For a discussion of *Flaminio*, see *supra* notes 30-32 & 115-22 and accompanying text.

191. For a discussion of the exceptions to rule 407, see *supra* note 75.

192. For a discussion of the minority position, see *supra* notes 40-65 and accompanying text.

193. For a discussion of the efficacy of the rule in the promotion of the policy rationales articulated by the Advisory Committee, see *supra* notes 55 & 71-72 and accompanying text.

194. For a discussion of the Tenth Circuit's position, see *supra* notes 93-107 and accompanying text.

with respect to the inadmissibility of such evidence in actions based on negligence theories,[195] a growing number of states find such evidence admissible in strict liability cases.[196] In cases that arise in those states, but which are then brought in a federal court based on diversity jurisdiction, rule 407 generally has been applied to exclude evidence of subsequent remedial measures. The application of state law in these cases, however, would admit this evidence. The magnitude of the issue's importance is not lessened by the fact that most products liability claims are brought in state courts. It is submitted that uncertainty accompanying the inability to predict whether state or federal law will be applied exacerbates the ineffectiveness of rule 407 as a policy measure.

It is suggested that the controversy concerning whether rule 407 is applicable to diversity cases should be resolved to allow the federal rules to govern the admissibility of evidence of subsequent remedial measures. While it is clear that substantive policies underlie rule 407, and that congressional revision of the rules was motivated by concern to preserve state substantive law, it also is clear that rule 407 meets the "arguably procedural" constitutional standard enunciated in *Hanna v. Plumer*,[197] by which the authority of Congress to enact federal rules is measured.

In light of the continuing erosion of the vitality of rule 407 it is submitted that there is a need for the Supreme Court to rule on both issues addressed in this note. Until these disputes are resolved, rule 407 is a rule that lacks the ability to promote the policy measures for which it was enacted.

Wendy Bugher Greenley

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195. *See, e.g.*, ARIZ. REV. STAT. ANN., Rule 407 (Supp. 1985); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 407 (1985); OR. REV. STAT. § 40.185 (1985); WIS. STAT. ANN. § 904.07 (West 1975). These state rules are worded and construed similarly to federal rule 407. *But see* ME. R. EVID. 407 (written to allow admission of evidence of subsequent remedial measures for any purpose, even to prove negligence). For a breakdown of state court variations of rule 407, see Wroth, *The Federal Rules of Evidence in the States: A Ten Year Perspective*, 30 VILL. L. REV. 1315, 1332-33 (1985).

196. *See, e.g.*, ALASKA R. EVID. 407; HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 407 (special Pamphlet 1980); IOWA R. EVID. 407; ME. R. EVID. 407(a); TEX. R. EVID. 407; WYO. R. EVID. 407. For example, the Texas rule states that "[n]othing in this rule shall preclude admissibility in products liability cases based on strict liability." TEX. R. EVID. 407. Several states courts have recently construed their state statutes, even statutes worded similarly to federal rule 407, to allow admission of evidence of subsequent remedial measures in strict liability actions. *See, e.g.* Matsko v. Harley Davidson Motor Co., 325 Pa. Super. 452, 453, 473 A.2d 155, 156 (1984).

197. For a discussion of *Hanna, see supra* notes 125-28 & 152-88 and accompanying text.