THE PROPOSED AMENDMENT TO FEDERAL RULE OF EVIDENCE 407: A SUBSEQUENT REMEDIAL MEASURE THAT DOES NOT FIX THE PROBLEM

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INTRODUCTION

Federal Rule of Evidence 407[1] is the codification of the common-law rule that excludes evidence of subsequent remedial measures[2] as proof of an admission of fault.[3] The rule departs from the liberal policy of admissibility embodied in the Federal Rules of Evidence[4] by advancing the social policy of encouraging people to take steps in furtherance of added safety by freeing them from the fear that such steps will be used against them in a future lawsuit.[5] When negli-

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1. Federal Rule of Evidence 407 states:

Rule 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial 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.

FED. R. EVID. 407.

2. The phrase "remedial measures" has been interpreted broadly to cover virtually any change, repair, or precautionary measure. *See, e.g.*, Petree v. Victor Fluid Power, Inc., 831 F.2d 1191, 1197-98 (3d Cir. 1987) (excluding evidence of warning decal placed on defective hydraulic press that ejected scrap metal during operation); Maddox v. City of Los Angeles, 792 F.2d 1408, 1417 (9th Cir. 1986) (excluding evidence of investigation and disciplinary measures taken after police officer's violation of city policy on use of choke hold); Gauthier v. AMF, Inc., 788 F.2d 634, 636-38 (holding that admission of post-accident design changes to snow thrower was reversible error), *amended*, 805 F.2d 337 (9th Cir. 1986); Knight v. Otis Elevator Co., 596 F.2d 84, 91-92 (3d Cir. 1979) (excluding evidence that guards had been placed around elevator buttons to prevent accidental pushing after accident in which freight elevator doors prematurely closed, striking plaintiff); Ford v. Schmidt, 577 F.2d 408, 410-11 (7th Cir.) (excluding evidence of new prison regulations that would have avoided event in litigation if they had existed at time in question), *cert. denied*, 439 U.S. 870 (1978); Arcement v. Southern Pac. Transp. Co., 517 F.2d 729, 734 (5th Cir. 1975) (excluding evidence of construction changes after railroad trestle collapse); Spurr v. LaSalle Constr. Co., 385 F.2d 322, 327 (7th Cir. 1967) (finding evidence that guardrail was erected around pit at construction site after employee lost his balance and fell into pit inadmissible to prove negligence); Armour & Co. v. Skene, 153 F. 241, 244-45 (1st Cir. 1907) (holding that evidence of discharge of employee responsible for accident in which runaway horse team collided with plaintiff's buggy was inadmissible because employee was discharged one year after accident). *But see* Kociemba v. G.D. Searle & Co., 683 F. Supp. 1579, 1580-81 (D. Minn. 1988) (holding that evidence of intrauterine device (IUD) warning issued pursuant to federal regulation mandating remedial measure is admissible where regulation was promulgated prior to plaintiff's injury, even though effective date of warning was four months after IUD was implanted).

3. FED. R. EVID. 407 advisory committee's note (pointing out that such conduct is equally consistent with injury by mere accident or through contributory negligence); Rimkus v. Northwest Colo. Ski Corp., 706 F.2d 1060, 1064 (10th Cir. 1983).

4. *See* United States v. Carranco, 551 F.2d 1197, 1200 (10th Cir. 1977) (stating that Federal Rules of Evidence favor admission of evidence over exclusion).

5. FED. R. EVID. 407 advisory committee's note; *Rimkus*, 706 F.2d at 1064; Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980) (noting that defendants would be discouraged from making repairs if such repairs could be used against them at trial), *cert. denied*, 449 U.S. 1080 (1981); *see also* Don Phillips, *Crash Sharpens Focus on Train Control, Safety*, WASH. POST, Feb. 20, 1996, at A1 (discussing Transportation Secretary Federico Peña's announcement that federal government was considering new rail-safety regulations in response to recent Amtrack accident).

gence[6] is at issue, federal courts universally have applied the exclusionary rule,[7] which originated at a time when negligence was the basis for most personal injury and property damage litigation.[8]

When a plaintiff's theory of recovery is not negligence, however, the courts have disagreed on the applicability of Rule 407.[9] In actions based on products liability,[10] a theory under which fault is arguably irrelevant,[11] the courts remain divided.[12]

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6. Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. RESTATEMENT (SECOND) OF TORTS § 283 (1965) [hereinafter RESTATEMENT]; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 173 (5th ed. 1984) (analyzing reasonable person standard and providing relevant case law).

7. *See, e.g.*, Columbia & Puget Sound R.R. v. Hawthorne, 144 U.S. 202, 207-08 (1892) (finding that evidence of subsequent repair to machine that was alleged to be constructed negligently is inadmissible to prove negligence); Heilig v. Studebaker Corp., 347 F.2d 686, 689 (10th Cir. 1965) (holding that evidence of repairs made after injury sustained when brakes failed during test drive is not admissible to prove negligence); Chicago, B. & Q.R. Co. v. Kelley, 74 F.2d 80, 85-86 (8th Cir. 1934) (holding evidence that railroad removed vegetation from tracks after accident in which locomotive slid into railway cars inadmissible to prove negligence). For a survey of courts adopting the exclusionary rule, see 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 283, at 175-84 n.1 (1979 & Supp. 1991).

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

9. *Compare* Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991) (holding that Rule 407 applies to strict liability cases) *and* Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984) (barring evidence of subsequent remedial measures in strict liability cases) *with* Burke v. Deere & Co., 6 F.3d 497, 506 (8th Cir. 1993) (holding that Rule 407 does not preclude introduction of evidence of subsequent remedial measures in strict liability cases), *cert. denied*, 114 S. Ct. 1063 (1994). The debate surrounding the issue of whether Rule 407 should apply to strict liability cases has been around as long as the rule itself. *See* Ault v. International Harvester Co., 528 P.2d 1148, 1151-52 (Cal. 1974) (raising issue with respect to state evidence rule enacted one year before Congress enacted Federal Rules of Evidence). The debate has generated a substantial amount of commentary. *See, e.g.*, Henderson, *supra* note 8, at 11-16 (arguing that rule should not be applicable because of theoretical differences between negligence and strict liability); Joyce M. Cartun, Note, *Admissibility of Remedial Measures Evidence in Products Liability Actions: Towards a Balancing Test*, 39 HASTINGS L.J. 1171, 1192-94 (1988) (emphasizing that Rule 403-type balancing test is appropriate standard for determining admissibility of subsequent repairs); Michele B. Colodney, Note, *Federal Rule of Evidence 407 as Applied to Products Liability: A Rule in Need of Remedial Measures*, 48 U. MIAMI L. REV. 283, 284-305 (1993) (asserting that rule should apply explicitly to strict products liability actions).

10. This Comment refers to "products liability" as an umbrella term that encompasses all causes of action involving product defects. "Strict products liability" refers to a theory of products liability that determines a manufacturer's liability based solely on a determination of whether the product was legally defective. While the debate surrounding the applicability of Rule 407 concerns only strict products liability, the proposed amendment of the Advisory Committee, as explained in the Committee Note, uses the general term "products liability." The analysis, however, is the same.

11. *See* RESTATEMENT, *supra* note 6, § 402A(2)(a) (explaining that theory of products liability holds product manufacturer strictly liable for physical injury caused to user even when manufacturer exercised all possible care). *But see infra* note 67 and accompanying text (explaining that strict liability standard actually applies reasonableness test).

12. Two federal circuits admit evidence of subsequent remedial measures in strict liability cases. *See Burke*, 6 F.3d at 506 (admitting evidence of post-accident decal and modification programs); Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1331 (10th Cir. 1983) (admitting evidence of post-accident service bulletin warnings by airplane manufacturer), *cert.*

Recognizing the split in the federal circuits with regard to the application of Rule 407,[13] the Advisory Committee on Evidence Rules has proposed an amendment to the rule.[14] The proposed amendment explicitly expands the scope of the exclusionary rule to cover products liability actions.[15] In addition, the Advisory Committee clarifies that the rule applies only to changes made after the event giving rise to the litigation.[16]

This Comment argues that while the rule's expansion to cover products liability actions is appropriate, limiting the scope of the exclusionary rule to remedial measures taken after personal injury or property damage in products liability actions is inconsistent with both

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denied, 466 U.S. 958 (1984). But the majority of the circuits hold that such evidence is inadmissible. *See, e.g., In re* Joint E. Dist. & S. Dist. Asbestos Litig., 995 F.2d 343, 345 (2d Cir. 1993) (excluding evidence of warnings on asbestos packaging); Kelly v. Crown Equip. Co., 970 F.2d 1273, 1275 (3d Cir. 1992) (excluding evidence of forklift design changes); *Raymond*, 938 F.2d at 1522 (excluding evidence of post-accident modifications to sideloader); Chase v. General Motors Corp., 856 F.2d 17, 22 (4th Cir. 1988) (excluding evidence of brake design changes); Gauthier v. AMF, Inc, 788 F.2d 634, 637 (excluding evidence of design changes to snow thrower), *amended*, 805 F.2d 337 (9th Cir. 1986); *Flaminio*, 733 F.2d at 469 (excluding evidence of design changes to motorcycle); Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983) (excluding evidence of design changes to gas tank valve); Hall v. American S.S. Co., 688 F.2d 1062, 1066-67 (6th Cir. 1982) (excluding evidence of policy change regarding washing ship deck during storm); Dollar v. Long Mfg., 561 F.2d 613, 618 (11th Cir. 1977) (admitting evidence of post-accident warning about backhoe for limited purpose of impeachment), *cert. denied*, 435 U.S. 996 (1978). While the District of Columbia Circuit has never ruled on the issue, dictum in one unofficially reported district court case indicates that the court would exclude evidence of subsequent remedial measures in a strict products liability case. *See* Dine v. Western Exterminating Co., No. 86-1857-OG, 1988 WL 28241, at *2 (D.D.C. 1988) (stating that "[t]he majority of circuits perceive no distinction between strict liability and negligence cases that renders inapplicable the policy underlying Rule 407 [and] . . . [t]his court is persuaded by the majority").

13. Memorandum from Professor Margaret A. Berger, Reporter for the Advisory Committee on the Federal Rules of Evidence, to the Advisory Committee on the Federal Rules of Evidence 2 (Sept. 19, 1994) (on file with *The American University Law Review*).

14. Report of the Advisory Committee on Evidence to the Standing Committee on Rules of Practice and Procedure (May 15, 1996) [hereinafter *Advisory Committee Report*] (on file with *The American University Law Review*). The text of the proposed rule states:

> Rule 407. Subsequent Remedial Measures
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> When, after an injury or harm allegedly caused by an event, measures are taken ~~which~~ that, if taken previously, would have made the ~~event~~ injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event. This rule does not require the exclusion of.~~ Evidence of subsequent measures may be ~~when~~ offered for another purpose, such as impeachment or ~~if controverted or proving~~ proof of ownership, control, or feasibility of precautionary measures~~, if controverted, or impeachment~~.

Id.

15. *Id.* (stating that evidence of remedial measure cannot be used to prove "a defect in a product, a defect in a product's design, or a need for a warning or instruction").

16. *See id.* (explaining that "rule applies only to changes made after the occurrence that produced the damages giving rise to the action").

the public policy behind the rule[17] and substantive products liability law.[18] This Comment urges the Advisory Committee to reconsider its proposed amendment.

Part I of this Comment provides background on both Rule 407 and products liability law and discusses the conflicting approaches taken by the federal circuit courts when applying the rule to actions based on a theory of products liability. Part II analyzes the proposed amendments to Rule 407. Subpart A considers the rationale for applying the rule to products liability actions and concludes that this approach is consistent with the social policy behind the rule. Subpart B analyzes the Advisory Committee's decision to limit the scope of the exclusionary rule to measures taken after the event giving rise to the lawsuit. This section concludes that such a limitation is inconsistent with both public policy and substantive products liability law. Finally, Part III offers an alternative amendment to the exclusionary rule. This alternative amendment expands the scope of the exclusionary rule in products liability actions to cover remedial measures taken after a manufacturer releases its product into the stream of commerce.

I. BACKGROUND

A. Federal Rule of Evidence 407

Federal Rule of Evidence 407 states:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not preclude 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.[19]

Most jurisdictions have long recognized the rule that evidence of remedial measures made after an accident is not admissible to prove negligence or culpable conduct.[20] The rule is based on the common-law reasoning that a defendant's subsequent repairs are not

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17. For a discussion of the public policy grounds that support Rule 407, see *infra* notes 37-38.

18. For a discussion of products liability law, see *infra* Part I.B.

19. FED. R. EVID. 407.

20. *See* Berger, *supra* note 13, at 3 (stating that "majority rule" excludes evidence of subsequent remedial measures in products liability cases); *see also supra* note 7 (citing cases in which evidence of subsequent remedial measures was held inadmissible to prove negligence).

necessarily an admission of negligence[21] and that repairs should be encouraged to reduce the possibility of further injuries.[22]

In 1892, the U.S. Supreme Court stated the common-law formulation of the exclusionary rule in *Columbia & Puget Sound R.R. v. Hawthorne*.[23] In this seminal case in which a worker was injured by a pulley that unscrewed from a machine and fell on him, the Court held that evidence of subsequently-added safety features was not admissible to show fault.[24] The Court reasoned that evidence of subsequent remedial measures could not be used to prove negligence because such evidence is irrelevant, confusing for the jury, and prejudicial to the defendant.[25] The Court explained that "taking . . . precautions against the future is not to be construed as an admission of responsibility for the past,"[26] and that admitting evidence of subsequent repairs is "an inducement for continued negligence."[27]

Federal Rule of Evidence 407 adopts both the common-law formulation of the exclusionary rule and the two grounds traditionally used to justify it, relevance and public policy.[28] The Advisory Committee Note explains that because remedial measures are "equally consistent with injury by mere accident or through contributory negligence,"[29] the rule rejects the suggested inference that remedial measures taken after an accident are an admission of fault.[30] For example, a product manufacturer may change a product's design

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21. *See* Columbia & Puget Sound R.R. v. Hawthorne, 144 U.S. 202, 208 (1892). In *Columbia & Puget Sound R.R.*, the Supreme Court noted that:

> "[S]uch acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in light of his new experience, after an unexpected accident has occurred, as a measure of extreme caution, he may adopt additional safeguards."

Id. (quoting Morse v. Minneapolis & St. Louis Ry., 16 N.W. 358, 359 (Minn. 1890)).

22. *See id.* (stating that admitting evidence of subsequent repairs to prove negligence "'virtually holds out an inducement for continued negligence'" (quoting *Morse*, 16 N.W. at 359)).

23. 144 U.S. 202 (1892).

24. *Columbia & Puget Sound*, 144 U.S. at 207-08.

25. *Id.* at 207.

26. *Id.*

27. *Id.* at 208.

28. FED. R. EVID. 407 advisory committee's note.

29. FED. R. EVID. 407 advisory committee's note; *see also* Rimkus v. Northwest Colo. Ski Corp., 706 F.2d 1060, 1064 (10th Cir. 1983) (recognizing that taking of subsequent remedial measures is consistent with injury due to contributory negligence); Grenada Steel Indus., Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883, 888 (5th Cir. 1983) (stating that there are various reasons why changes in design might be made after accident). *See generally* MORRIS K. UDALL & JOSEPH M. LIVERMORE, LAW OF EVIDENCE § 87, at 194 (2d ed. 1982) (stating that post-accident changes are often motivated by factors other than consciousness of fault).

30. FED. R. EVID. 407 advisory committee's note; *see also* FED. R. EVID. 801(a) (defining "statement" as "nonverbal conduct of a person, if it is intended by him as an assertion"); FED. R. EVID. 801(d)(2)(A) (defining "admission" as party opponent's statement offered against him in either his individual or representative capacity).

because it has discovered a better design or because it wants to implement an idea conceived before the accident.[31] Because evidence of a subsequent remedial measure addresses neither the reasonableness of an actor's conduct nor the foreseeability of risk at the time the conduct occurs,[32] courts should exclude the evidence on the issue of fault because it is irrelevant.[33]

The Advisory Committee points out, however, that the relevancy ground by itself may not justify excluding the evidence in every case.[34] The Committee Note recognizes that under the liberal theory of relevance adopted in the Federal Rules of Evidence,[35] "the inference [of fault] is still a possible one."[36] To bolster the relevancy argument, therefore, the Advisory Committee relies on what it calls a "more impressive ground for exclusion,"[37] the social policy of encouraging people to make safety improvements by eliminating the fear that such changes will later be used against them as proof of fault.[38]

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31. *See Grenada Steel Indus.*, 695 F.2d, at 888 (stating that manufacturer may have changed product design only based on cost, acceptance in marketplace, or feasibility of making change contemporaneously with others); *see also* Berger, *supra* note 13, at 23-24 (noting low probative value and potential for confusion of subsequent repair evidence).

32. Randolph L. Burns, Note, *Subsequent Remedial Measures and Strict Products Liability: A New—Relevant—Answer to an Old Problem*, 81 VA. L. REV. 1141, 1167 (1995).

33. *See* FED. R. EVID. 402 (stating that irrelevant evidence is not admissible).

34. FED. R. EVID. 407 advisory committee's note.

35. The Federal Rules of Evidence define relevant evidence as any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401; *see also* G. Michael Fenner, *Evidence Review: The Past Year in the Eighth Circuit, Plus* Daubert, 28 CREIGHTON L. REV. 611, 619 (1995) ("Evidence need not be conclusive, or even persuasive, to be relevant: it need only make something of consequence to the action somewhat more or less likely.").

36. FED. R. EVID. 407 advisory committee's note; *see also* Burke v. Deere & Co., 6 F.3d 497, 505 (8th Cir. 1993) (finding subsequent remedial measure relevant to existence of dangerous defect, causation, assumption of risk, and comparative fault), *cert. denied*, 114 S. Ct. 1063 (1994). According to Professor Margaret Berger, Advisory Committee Reporter, the rule's drafters "were willing to risk losing some relevant evidence" for policy reasons of encouraging repairs. Berger, *supra* note 13, at 23.

37. FED. R. EVID. 407 advisory committee's note; *see Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 303 (1973) (statement of Prof. Victor E. Schwartz) (stating that rule is based on substantive policy goal of encouraging repairs).

38. FED. R. EVID. 407 advisory committee's note; *see* Columbia & Puget Sound R.R. v. Hawthorne, 144 U.S. 202, 208 (1892) (arguing that admitting evidence of subsequent repairs to prove negligence is inducement for continued negligence). *But see* Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837, 848-50 (arguing that evidence of subsequent repairs may actually encourage future remedial action to extent that admission of such evidence results in recovery by injured plaintiffs).

The Committee Note also indicates that Rule 407 is not a complete bar to the introduction of evidence of subsequent remedial measures.[39] Pursuant to the second sentence of the rule, if evidence is relevant to and offered on a controverted issue[40] in the litigation other than the defendant's negligence or culpable conduct, it will be admissible for the limited purpose of proof on that issue.[41] For example, if a defendant denies ownership or control of the instrumentality in question, the plaintiff may introduce evidence that the defendant subsequently took remedial measures with regard to the instrumentality to prove either that the defendant owned the instrumentality or that it was under the defendant's control.[42] Further, if the defendant testifies as to the safe condition of the instrumentality prior to an injury, the plaintiff will be permitted to impeach this testimony through evidence of the subsequent repairs.[43]

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39. *See* FED. R. EVID. 407 advisory committee's note (stating that subsequent remedial measures may be used to demonstrate "ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment").

40. The requirement that the issue be controverted calls for "automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission." FED. R. EVID. 407 advisory committee's note. In other words, if a manufacturer stipulates that an alternative design was feasible, feasibility is not a contested issue, and evidence of the subsequent repairs cannot come in for this purpose. This requirement is logical because if an issue is not controverted, no evidence is needed to prove it. *See* Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991) (stating that feasibility exception is not applicable where parties stipulated to feasibility). Rule 407 requires that evidence of a subsequent remedial measure sought to be admitted under an exception must be controverted because of the common law concern that the liberal admission of evidence under an exception would undermine the public policy behind the rule. *See generally* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5286, at 131 (1980) (reasoning that person contemplating remedial measure would be "no less deterred by knowledge that his action might be used to show feasibility of precautionary measures than he would by the fear that it might be offered to show negligence").

41. FED. R. EVID. 407.

42. *See, e.g.*, Mehojah v. Drummond, 56 F.3d 1213, 1214-15 (10th Cir. 1995) (holding evidence that defendant erected fence between pasture and highway admissible to prove control over and feasibility of building fence); Powers v. J.B. Michael & Co., 329 F.2d 674, 677 (6th Cir.) (finding evidence that defendant posted danger signs after accident admissible "only as it tended to prove that this part of the highway was under the control of the defendant"), *cert. denied*, 377 U.S. 980 (1964); Uptain v. Huntington Lab, Inc., 723 P.2d 1322, 1328 n.4 (Colo. 1986) (stating that defendant's belief that feasibility was controverted rendered evidence of ability to affix new label admissible in warnings case).

43. *See, e.g.*, Pitasi v. Stratton Corp., 968 F.2d 1558, 1560-61 (2d Cir. 1992) (holding that trial court committed reversible error in excluding evidence of ski resort's order to place warning signs and ropes across entrances to trail immediately after skier's accident where defendant ski resort stated that risk posed by trail was so obvious that there was no need for any warning); Muzyka v. Remington Arms Co., 774 F.2d 1309, 1313-14 (5th Cir. 1985) (holding that trial court abused discretion in not permitting plaintiff to proffer evidence of remedial measures where defendant argued that product in question was best and safest on market); Anderson v. Malloy, 700 F.2d 1208, 1212-14 (8th Cir. 1983) (finding that trial court erred in excluding evidence of remedial measures to impeach defendants' testimony that they had taken every security measure possible).

Even when evidence of subsequent remedial measures falls under one of the exceptions to the exclusionary rule, however, the court retains discretion to exclude the evidence.[44] As the Committee Note points out, the court must consider "the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time."[45] In addition, if the evidence is admitted pursuant to an exception, that evidence is subject to a limiting instruction at the opposing party's request.[46]

Although the exclusionary rule clearly applies in actions based on negligence,[47] courts are divided when a plaintiff seeks recovery under a theory of products liability.[48] Because neither the language of Rule 407 nor the Advisory Committee Notes to the rule provide guidance on the rule's applicability to products liability actions, courts have relied on both the policy behind Rule 407 and the differences between negligence and strict liability to support opposing positions.[49]

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44. *See* FED. R. EVID. 403 (allowing for exclusion of otherwise relevant evidence if its probative value is substantially outweighed by prejudice or confusion or is waste of time). Nevertheless, despite restrictions on the admissibility of evidence of subsequent repairs to show ownership or control or for impeachment purposes, courts seldom opt to exclude such evidence. *See* James J. Bolner, Jr., Note, *Swallowing Rule 407 with the Impeachment Exception:* Palmitter v. County Board of Road Commissioners, 5 COOLEY L. REV. 223, 223-33 (1988) (suggesting that admissibility of subsequent repairs to impeach credibility of defense witnesses may render Rule 407's exclusionary function ineffective); Brent R. Johnson, Comment, *The Uncertain Fate of Remedial Evidence: Victim of an Illogical Imposition of Federal Rule of Evidence 407*, 20 WM. MITCHELL L. REV. 191, 215 (1994) (arguing that exceptions "swallow the rule" because of ease of which plaintiffs avoid exclusion under Rule 407). Professor Saltzburg remarks that "[e]ven with the rule as it stands, it has been said that an adept lawyer is almost always able to show a subsequent repair for some permitted purpose." RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 191-92 (2d ed. 1982). In effect, as one commentator has noted, the exclusionary rule "has become a rule of general admissibility, subject only to the exception that the evidence cannot be admitted to prove negligence." Debra J. Hackford, Comment, *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, 154 (1979). While the topic is outside the scope of this Comment, this Comment proposes that judges exercise greater discretion in admitting evidence under an exception to Rule 407 by admitting subsequent repair evidence only when there is no alternative method of proof.

45. FED. R. EVID. 407 advisory committee's note.

46. *See* FED. R. EVID. 105 (providing that, upon request, court shall instruct jury to limit consideration of evidence that is admissible for one purpose but not another).

47. *See* FED. R. EVID. 407 (stating that "evidence of subsequent remedial measures is not admissible to prove negligence").

48. *See supra* note 12 and accompanying text (discussing split in federal circuits on question of whether Rule 407 applies to actions brought under theory of strict products liability). For a discussion of the theories of products liability, see Part II.B.

49. *Compare* Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991) (holding that Rule 407 applies to strict liability cases) *and* Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984) (barring evidence of subsequent remedial measures in strict liability cases) *with* Burke v. Deere & Co., 6 F.3d 497, 506 (8th Cir. 1993) (holding that Rule 407 does not preclude introduction of evidence of subsequent remedial measures in strict liability cases), *cert. denied*, 114 S. Ct. 1063 (1994). *See infra* Part I.C (discussing debate over applicability of Rule 407 to strict products liability actions).

B. Products Liability

Products liability is a tort liability rule applicable to manufacturers and distributors of products, established by the existence of a defect in a product at the time of sale or distribution.[50] A plaintiff may bring a products liability action alleging a manufacturing defect,[51] a design defect,[52] or a defect due to inadequate instructions or warnings[53] under any one or a combination of the theories of negligence, breach of warranty, or strict liability in tort.[54] Although each of these theories of liability is distinct,[55] the desired result, namely

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50. *See* RESTATEMENT, *supra* note 6, § 402A cmt. g (explaining that strict products liability applies only where product is unreasonably dangerous "at the time it leaves the seller's hands"); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1(b) (Tentative Draft No. 2, 1995) [hereinafter RESTATEMENT DRAFT] (stating that product defect is judged at time of sale or distribution). This Comment discusses products liability law as it is stated in the *Second* and *Third Restatement Drafts.*

51. A product contains a manufacturing defect "when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." RESTATEMENT DRAFT, *supra* note 50, § 2(a).

52. A product contains a design defect:

> when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

RESTATEMENT DRAFT, *supra* note 50, § 2(b).

53. A product is defective due to inadequate instructions or warnings:

> when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

RESTATEMENT DRAFT, *supra* note 50, § 2(c).

54. *See* RESTATEMENT DRAFT, *supra* note 50, § 2 cmt. m ("[T]he traditional doctrinal categories of negligence, strict liability, or implied warranty of merchantability may be utilized in doctrinally characterizing the claim."). For a discussion of the differences between the theories of negligence and strict liability, see *infra* note 56 and accompanying text.

55. For a plaintiff to recover successfully on a negligence claim, plaintiff must prove that the defendant owed a duty of care, that the defendant breached that duty, that the plaintiff was injured, and that the defendant's breach proximately caused the injury. *See* KEETON ET AL., *supra* note 6, § 30, at 164-65 (outlining traditional elements needed to maintain negligence cause of action). The focus in a negligence action, therefore, is on the defendant's conduct before and at the time of the event that gives rise to the plaintiff's injury. *See id.* § 30, at 170 (explaining that defendant's conduct "must be judged in the light of the possibilities apparent to him at the time, and not by looking backward 'with the wisdom born of the event.'" (quoting Greene v. Sibley, Lindsay & Curr Co., 177 N.E. 416, 417 (N.Y. 1931))). Accordingly, negligence, which focuses on the conduct of the manufacturer, might allow a finding that in distributing a defective product, a "defendant with meager resources was not negligent because it was too burdensome for such a defendant to discover risks or to design or to warn against them." RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a; *see also* Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1037-38 (Or. 1974) (stating that greater burden is placed on manufacturer in strict liability than in negligence because law assumes knowledge of product's dangerous propensity that may not be reasonable to expect in negligence).

Strict liability, on the other hand, holds the manufacturer "to the standard of knowledge available to the relevant manufacturing community at the time the product was manufactured." RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a. Unlike proof under a negligence theory, the

that the manufacturer will bear the cost of placing a defective product in the stream of commerce, is the same.[56]

Early products liability law focused on manufacturing defects, or defects due to a physical departure from a product's intended design.[57] In the early 1960s, courts began to hold manufacturers of defective products liable for the injuries caused by such defects regardless of the fact that the plaintiff would be barred from bringing suit under either a negligence or warranty theory.[58] The rationale behind such "strict" liability was that "a product unit that fails to meet the manufacturer's design specifications thereby fails to perform its intended function and is, almost by definition, defective."[59]

Design defects and defects based on inadequate instructions or warnings, on the other hand, arise when the product conforms to the intended design, but the design itself, or its sale without adequate instructions or warnings, renders the product unreasonably dangerous.[60] In response to a number of restrictive rules that made recovery difficult to obtain in cases of design defect or defect due to inadequate instructions or warnings,[61] in the 1960s, courts began to impose liability without fault on manufacturers of products with

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emphasis in strict products liability is on the product itself and not on the conduct of the manufacturer. *Id.* *But see infra* note 76 and accompanying text (discussing use of negligence standard in strict liability actions based on design defect and defect due to inadequate instructions or warnings). Traditionally, under a theory of strict products liability, a plaintiff did not need to prove that the manufacturer breached a reasonable standard of care in manufacturing the product, but only that the product was legally defective. *See* Greenman v. Yuba Power Prods., 377 P.2d 897, 900 (Cal. 1962) (holding that plaintiff who was injured by defective power tool was not required to prove anything other than that he was injured while using tool as manufacturer intended). For a discussion of the factors that render a product legally defective, see *supra* notes 51-53. The *Third Restatement Draft* places an additional burden on the plaintiff to prove that the product was legally defective at the time of sale or distribution. RESTATEMENT DRAFT, *supra* note 50, § 1(b).

56. The theory of strict products liability rests on two policy arguments. First, those who support holding a manufacturer strictly liable for any damages caused by a dangerous product the manufacturer places in the stream of commerce argue that manufacturers are better able than consumers to bear the costs of damages. Because the manufacturer seeks to gain a profit from its activities, it occupies a better position than the consumer to bear the cost of an injury caused by that product. The second policy argument buttresses this economic rationale, putting forth the proposition that manufacturers will exercise greater care in developing and producing products if plaintiffs are not required to prove negligence. RESTATEMENT DRAFT, *supra* note 50, § 2 cmt. a. This line of reasoning is consistent with the policy rationale behind Rule 407 because it encourages manufacturers to develop safer products. *See supra* note 38 and accompanying text (discussing public policy behind Rule 407).

57. RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a.

58. *See* Hennigsen v. Bloomfield Motors, Inc., 161 A.2d 69, 77 (N.J. 1960) ("Recovery of damages does not depend upon proof of negligence or knowledge of the defect.").

59. RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a.

60. RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a.

61. *See* RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a.

design defects[62] and defects due to inadequate instructions or warnings.[63]

The imposition of strict liability regardless of the product defect at issue was predicated on the rationale of section 402A of the *Restatement (Second) of Torts*.[64] Section 402A is a rule of strict liability that makes the manufacturer of a defective product subject to liability even though the manufacturer has "exercised all possible care in the preparation and sale of the product."[65]

According to the drafters of the *Third Restatement Draft*, however, it has become evident over time that section 402A, created to deal with liability for manufacturing defects, cannot appropriately be applied to cases of design defects or defects based on inadequate instructions or warnings.[66] In response, the *Third Restatement Draft* states explicitly

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62. *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962) (noting that, to establish manufacturer's liability, plaintiff need only prove injury occurred while using product properly and as a result of defect of which plaintiff was unaware.

63. *See* Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 558-59 (Cal. 1991). In *Anderson*, the court held:

> The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial.

Id. For example, under this standard, a small manufacturer who releases a defective product into the stream of commerce will be held liable for a consumer's injuries if it did not warn of known risks that accompany the use of that product, even if it was not economically efficient to do so given the relatively small risk involved. *See supra* note 74 and accompanying text (explaining why courts consider products liability theories "strict").

64. *See* KEETON ET AL., *supra* note 6, § 98, at 694 (explaining that American Law Institute's adoption of § 402A of the Second Restatement of Torts in 1965 led to its wide acceptance by American courts as the rule for strict products liability). Section 402A provides:

> Section 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT, *supra* note 6, § 402A.

65. RESTATEMENT, *supra* note 6, § 402A cmt. a.

66. *See* RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a. The *Third Restatement Draft* in relevant part states:

> A product unit that fails to meet the manufacturers design specifications thereby fails to perform its intended function and is, almost by definition defective. However, when the product unit meets the manufacturer's own design specifications it is necessary to go outside those specifications to determine whether the product is defective.

Id.

that design defects and defects due to inadequate instructions or warnings are to be judged by a reasonableness standard[67] at the time of sale or distribution,[68] a standard that mirrors the substantive products liability law of many states.[69]

Nevertheless, even while imposing liability on manufacturers only upon a showing that the product in question is "unreasonably dangerous,"[70] many courts continue to characterize the liability based on this standard as being "strict."[71] The authors of the *Third Restatement Draft* explain that this "rhetorical preference" is the result of several factors. First, if a product causes injury while being put to a reasonably foreseeable use, the product manufacturer is imputed with knowledge of the risks attendant to such use.[72] Second, by characterizing a claim in terms of strict liability rather than in terms of negligence, courts can limit the introduction of defenses such as comparative or contributory negligence.[73] Finally, by focusing on the product rather than on the conduct of the manufacturer, courts avoid a negligence standard that may be "too forgiving of a small manufacturer who might be excused for its ignorance of risk or for failing to take adequate precautions to avoid risk."[74] Thus, while the theory of strict liability may have become the "paramount" basis of liability for product manufacturers,[75] elements of the traditional

67. RESTATEMENT DRAFT, *supra* note 50, § 2(b)-(c).

68. RESTATEMENT DRAFT, *supra* note 50, § 1(b).

69. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-683 (1992) (providing that defendant shall not be liable in products liability action if product conformed with state of the art at time that defendant first sold product); COLO. REV. STAT. § 13-21-403(1)(a) (1987) (stating that it shall be rebuttably presumed that product was not defective if product conformed to state of the art at time of sale); IOWA CODE ANN. § 668.12 (West 1987) (providing state of the art defense in products liability actions); TENN. CODE ANN. § 29-28-105(a) (1980) (stating that manufacturer or seller of product shall not be liable in products liability action unless product was unreasonably dangerous or defective at time it left control of manufacturer or seller).

70. RESTATEMENT, *supra* note 6, § 402A. "Reasonableness" is the standard traditionally used to determine negligence; *see also supra* note 6 (defining negligence as failure to use such care as was reasonable under circumstances).

71. RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a. *See, e.g.*, Ferguson v. F.R. Winkler Gmbh & Co. KG, 79 F.3d 1221, 1224 (D.C. Cir. 1996) (stating that second step in "determining whether a seller should be strictly liable" is that "the product [must have been] sold in a defective condition unreasonably dangerous to the consumer") (alteration in original); Lohr v. Medtronic, Inc., 56 F.3d 1335, 1351 (11th Cir. 1995) (stating that "strict products liability action under Florida law would ask the jury" if product was "'in a condition unreasonably dangerous to the user'" when it left possession of manufacturer (quoting Fla. Standard Jury Mstr., § PL 4, 5)); Whitted v. General Motors Corp., 58 F.3d 1200, 1204 (7th Cir. 1995) (stating that Indiana law imposes strict liability on those who place into stream of commerce products that are in defective condition unreasonably dangerous to consumers).

72. RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a.

73. RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a.

74. RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a.

75. JOHN W. WADE ET AL., TORTS 694 (9th ed. 1994).

negligence theory have found their way back into the strict liability scheme.[76]

In response to the difficulty that courts have had in distinguishing the theories of negligence and strict liability when determining whether a product is defective,[77] the authors of the *Third Restatement Draft* have provided the explicit criteria needed to establish the existence of a defect in a products liability action.[78] In addition to offering a solution to much of the confusion that surrounds the application of products liability law, the *Third Restatement Draft* provides answers to the debate surrounding the applicability of Rule 407 to products liability actions.[79]

C. *The Debate over the Applicability of Rule 407 to Actions Brought Under a Theory of Products Liability*

A split of authority has developed among federal courts on the issue of whether Rule 407 encompasses claims for which fault is not at issue.[80] The debate centers on the distinctions between negligence and strict products liability and on whether the policy of encouraging repairs is comparable under each theory.

Only the U.S. Courts of Appeal for the Eighth and Tenth Circuits have determined that the exclusionary rule is not applicable in

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76. *Id.*; *see also* RESTATEMENT DRAFT, *supra* note 50, § 2 cmt. a (stating that design defects due to inadequate instructions or warnings achieve same general objectives as does liability predicated on negligence). Most courts agree that "[f]or the liability system to be fair and efficient," manufacturers should be held accountable for knowledge of "risks and risk-avoidance techniques" reasonably attainable at the time of distribution. RESTATEMENT DRAFT, *supra* note 50, § 2 cmt. a.

77. *See* RESTATEMENT DRAFT, § 1 cmt. a (noting that even though resolution of claims alleging design defect and defect due to inadequate instructions or warnings requires application of "reasonableness test," many courts "insist" on speaking of this liability as strict). For examples of courts applying a reasonableness standard to "strict" liability actions, see *supra* note 71.

78. Section 1 of the *Third Restatement Draft* states that a product is defective if it contains a manufacturing defect, design defect, or defect due to inadequate instructions or warnings at the time of sale or distribution. RESTATEMENT DRAFT, *supra* note 50, § 1(b). Section 2 sets out what is needed to establish each of the 3 types of defects under § 1. *Id.* § 2.

79. The *Third Restatement Draft* provides that the time of sale or distribution is the point at which liability will be determined in a strict products liability action. RESTATEMENT DRAFT, *supra* note 50, § 1(b). Accordingly, any knowledge that the manufacturer acquires after this point is irrelevant. *See id.* § 2 cmt. a ("For the liability system to be fair and efficient, most courts agree that the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution."). Application of the exclusionary rule to measures taken after this point, therefore, is consistent with the application of the rule to measures taken after an accident or injury in a negligence action. *See infra* notes 123-32 and accompanying text for a more detailed discussion of the timing issue.

80. *See supra* note 12 and accompanying text (discussing split in federal circuits on whether Rule 407 applies to actions brought under theory of strict products liability).

products liability actions based on strict liability.[81] The reasoning behind this theory is that the language of the rule expressly limits its application to claims in which fault must be proven,[82] and that because fault is irrelevant under a theory of strict liability,[83] the rule cannot apply.[84] Further, proponents of liberal admissibility rules argue that the social policy underlying Rule 407 is not applicable to strict products liability actions because the economic interests of manufacturers are promoted by taking remedial measures, and the rules of evidence play no part in that determination.[85]

In refusing to apply Rule 407 to products liability actions, the Eighth and Tenth Circuits follow the minority rule. These two circuits adopted the rationale of the California Supreme Court in *Ault v. International Harvester Co.*,[86] which reasoned that because the focus in strict products liability cases is on the product itself and not on the manufacturer's conduct, the policy justification for excluding evidence of remedial measures does not exist.[87] The court in *Ault* found that the exclusionary rule's primary function is to encourage safety measures.[88] Thus, it concluded that the rule could be applied logically only where negligence is at issue.[89] Further, the court reasoned that it would be "manifestly unrealistic" to believe that a manufacturer would forego making remedial measures to a defective

81. *See, e.g., In re* Joint E. Dist. & S. Dist. Asbestos Litig., 995 F.2d 343, 345 (2d Cir. 1993) (excluding evidence of warnings on asbestos packaging); Kelly v. Crown Equip. Co., 970 F.2d 1273, 1275 (3d Cir. 1992) (excluding evidence of forklift design changes); Chase v. General Motors Corp., 856 F.2d 17, 22 (4th Cir. 1988) (excluding evidence of brake design changes). *But see* Burke v. Deere & Co., 6 F.3d 497, 506 n.11 (8th Cir. 1993) (stating that panel was bound by circuit precedent and that issue should be reviewed by circuit en banc).

82. FED. R. EVID. 407 (stating that evidence of subsequent remedial measures is not admissible to prove "negligence or culpable conduct").

83. *See supra* part I.B (discussing products liability law).

84. *See* Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1331 (10th Cir. 1983) (stating that Rule 407 does not apply where there is no issue of culpability).

85. *See* Ault v. International Harvester Co., 528 P.2d 1148, 1152 (Cal. 1974) (finding it unlikely that producer would forego improving its product, thereby risking additional lawsuits and negative publicity, solely because evidence of such improvements would be admissible); *see also* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND STATE COURTS ¶ 407[02], at 407-15 (1995) (arguing that even if manufacturers were as "cold-blooded" as rule suggests, it would be risky to refrain from making needed repairs); *cf.* Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 887-88 (5th Cir. 1983) ("[J]udgments concerning why manufacturers do or do not alter their products, made by such dubious experts as judges, lawyers, and law professors, suffer from excessive reliance on logical deduction and surmise without the benefit of evidence of industry practice or economic factors.").

86. 528 P.2d 1148 (Cal. 1974).

87. Ault v. International Harvester Co., 528 P.2d 1148, 1150 (Cal. 1974).

88. *Id.* at 1151.

89. *Id.*

product, thereby risking more lawsuits with the possibility of punitive damages and tarnishing its public image.[90]

The majority of the federal circuits reject the arguments in favor of admissibility of subsequent remedial measures and extend the scope of the exclusionary rule to apply to actions brought under a theory of strict products liability.[91] These courts reason that there is no practical difference between strict liability and negligence in defective design cases and the public policy rationale to encourage remedial measures remains the same.[92] Moreover, proponents of the exclusionary rule argue that the policy behind the rule is particularly applicable to manufacturers because they are the defendants "most likely to know about Rule 407 and be affected by the decision whether to apply it."[93]

The majority rule employs a rationale similar to the one used by the Fourth Circuit in *Werner v. Upjohn Co.*[94] In *Werner*, the court found that, regardless of the theory used to require a manufacturer to pay damages, the deterrent to taking remedial measures is the same, namely the fear that the evidence may ultimately be used against the manufacturer in a lawsuit.[95] Similarly, in *Flaminio v. Honda Motor Co.*,[96] Judge Posner of the Seventh Circuit explained:

> One might think it not only immoral but reckless for an injurer, having been alerted by the accident to the existence of danger, not to take steps to correct the danger. But accidents are low-probability events. The probability of another accident may be much smaller than the probability that the victim of the accident that has already occurred will sue the injurer and, if permitted, will make devastating use at trial of any measures that the injurer may have taken since the accident to reduce the danger.[97]

In short, a majority of the federal circuit courts have held that admitting evidence of subsequent remedial measures will discourage manufacturers from instituting safety measures, regardless of whether the claim is brought under a theory of negligence or strict liability.[98]

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90. *Id.* at 1152.
91. *See supra* note 12 (citing cases that reflect split in circuits).
92. Gauthier v. AMF, Inc., 788 F.2d 634, 637 (citing Flaminio v. Honda Motor Co., 733 F.2d 463, 467 (7th Cir. 1984)), *amended*, 805 F.2d 337 (9th Cir. 1986).
93. *Id.* (citing *Flaminio*, 733 F.2d at 470).
94. 628 F.2d 848 (4th Cir. 1980).
95. Werner v. Upjohn Co., 628 F.2d 848, 856-57 (4th Cir. 1980).
96. 733 F.2d 463 (7th Cir. 1984).
97. Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984).
98. *See* Berger, *supra* note 13, at 2-13 (providing survey of circuit court decisions on issue of applicability of Rule 407 to strict products liability actions).

II. ANALYSIS

The Advisory Committee on Evidence Rules has proposed the following amendment to Rule 407:

> Rule 407. Subsequent Remedial Measures
>
> When, after an injury or harm allegedly caused by an event, measures are taken ~~which~~ that, if taken previously, would have made the ~~event~~ injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event. This rule does not require the exclusion of.~~ Evidence of subsequent measures may be ~~when~~ offered for another purpose, such as impeachment or ~~if controverted, proving~~ proof of ownership, control, or feasibility of precautionary measures~~, if controverted, or impeachment.~~[99]

The Advisory Committee proposes to amend Federal Rule of Evidence 407 in two respects.[100] The first change adopts the majority rule of the federal circuit courts that Rule 407 should apply to products liability actions.[101] The second change defines the event giving rise to the lawsuit as the point after which evidence of remedial measures will be excluded.[102] The Advisory Committee emphasizes that "[e]vidence of measures taken by the defendant prior to the 'event' do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product."[103]

A. *The Expansion of the Scope of the Exclusionary Rule to Cover Products Liability Actions*

The Advisory Committee points out in the Note to its proposed amendment that the amendment "adopts the view of a majority of the

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99. *Advisory Committee Report, supra* note 14.

100. *Advisory Committee Report, supra* note 14.

101. *See Advisory Committee Report, supra* note 14 (proposing to add language of "a defect in a product, a defect in a product's design, or a need for a warning or instruction" to Rule 407).

102. *See Advisory Committee Report, supra* note 14 (suggesting that words "an injury or harm allegedly caused by" be added to Rule 407 to clarify when rule applies).

103. *Advisory Committee Report, supra* note 14; *see also In re* Aircrash in Bali, Indon., 871 F.2d 812, 816 (9th Cir. 1989) (finding exclusionary rule not applicable to safety report prepared by defendant before accident); Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988) (holding that "event" referred to in Rule 407 is accident in question and that Rule 407 does not exclude evidence with respect to changes made before that event); Rozier v. Ford Motor Co., 573 F.2d 1332, 1335 (5th Cir. 1978) (allowing into evidence document prepared before accident that showed alternative fuel tank locations in claim based on negligent design of fuel tank); Kociemba v. G.D. Searle & Co., 683 F. Supp. 1579, 1580-81 (D. Minn. 1988) (finding no bar to admission of FDA regulation promulgated one month before injury, although regulation did not take effect until after injury).

circuits that have interpreted Rule 407 to apply to products liability actions."[104] Although the Advisory Committee does not provide any reasons for its preference for the majority approach,[105] an analysis of the minority rule demonstrates its weaknesses and lends support to the Advisory Committee's decision.[106]

The rationale for admitting evidence of subsequent remedial measures in strict products liability actions is rooted in the theoretical differences between negligence and strict products liability. The argument follows that while liability in negligence is based on the conduct of the manufacturer, strict liability focuses only on the defectiveness of the product.[107] Thus, because there is no negligent conduct to influence in strict products liability actions, application of the exclusionary rule arguably would serve no purpose.[108] For example, a product manufacturer that negligently places a product on the market will be held liable under a theory of strict liability for any accident caused by that product, not because of the manufacturer's negligence, but simply because it placed the product in the stream of commerce.[109]

Courts that reject this rationale assert that the distinction between negligence and strict liability does not justify a refusal to apply Rule 407.[110] These courts recognize that regardless of the theory under which a manufacturer could potentially be sued, if evidence of subsequent remedial measures is admissible to prove liability, the incentive to take remedial measures is greatly diminished.[111] Even

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104. *Advisory Committee Report, supra* note 14; *see* Berger, *supra* note 13, at 2-13 (providing survey of law in federal circuits and determining that majority apply exclusionary rule regardless of theory of recovery).

105. *Advisory Committee Report, supra* note 14. *But see* Advisory Committee on Evidence Rules, Minutes of the Meeting 4 (Oct. 17-18, 1994), *available in* WESTLAW, US-RULESCOMM database (discussing advisability of amending Rule 407 so as to impose uniformity throughout circuits and to prevent forum shopping).

106. See *supra* notes 82-90 and accompanying text for a discussion of the minority rationale for admitting evidence of subsequent remedial measures in strict products liability actions.

107. *See* Ault v. International Harvester Co., 528 P.2d 1148, 1152 (Cal. 1974) (noting that negligence actions focus on defendant manufacturer's conduct, whereas strict liability actions focus on nature of product); *see also* Henderson, *supra* note 8, at 1-24 (arguing that Rule 407 should not be applicable in strict products liability actions).

108. *See supra* note 85 and accompanying text (discussing argument that policy behind Rule 407 has no bearing in strict liability context). *See generally* Hackford, *supra* note 44, at 155-64 (discussing recent trend of courts, "misapplying negligence theory to strict liability").

109. *But see supra* notes 67-68 and accompanying text (stating that liability is actually based on standard of reasonableness).

110. *See* Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) (holding that rule's goal, to encourage remedial measures, is relevant to defendants sued under either negligence or strict liability theory).

111. *See, e.g.*, Kelly v. Crown Equip. Co., 970 F.2d 1273, 1276 (3d Cir. 1992) (finding no difference in effect on defendant under strict liability or negligence cause of action); Gauthier v. AMF, Inc., 788 F.2d 634, 637 (believing rationale for exclusion of evidence—to encourage

when a manufacturer's conduct is not affected by the rule's policy of encouraging repairs, the majority rule recognizes that Rule 407's applicability is no longer an issue; the manufacturer who has no incentive or duty to make repairs after an accident will not, by assumption, take any remedial measures.[112] In other words, the rule may have no impact on manufacturers who will not take remedial measures for economic reasons. Rather, the rule protects those manufacturers who do implement safety measures from having these measures used against them.

Courts dismissing the distinction between negligence and strict liability as "hypertechnical" focus on the realistic rather than the academic implications of applying the exclusionary rule in strict products liability.[113] These courts have pointed out that in a product case in which injury or damage easily may have been avoided, either by eliminating a defect or by warning the consumer of danger, failure to apply the exclusionary rule will deter subsequent remedial measures as strongly as in a negligence case.[114] In addition, even though the imposition of strict liability relieves plaintiffs of the burden of proving fault that they face in a negligence context, the two theories cannot be so easily distinguished because of the important role negligence continues to play in product suits.[115]

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remedial measures—to be same under either theory), *amended*, 805 F.2d 337 (9th Cir. 1986); Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984) (stating that under either theory, incentive to take subsequent remedial measures is reduced if measures may be used against defendant); *see also supra* notes 92-97 and accompanying text (discussing rationale for applying Rule 407 to strict products liability actions). *But see* John M. Kobayashi, *Products Liability Lawsuits—Part I: Admissibility Questions and Miscellaneous Evidentiary Developments*, 1981 TRIAL LAW. GUIDE 297, 321 (arguing that anti-deterrent premise "does not nowadays seem to bear much of a relationship to reality").

112. *See Flaminio*, 733 F.2d at 470 (stating that in cases where defendant would have no incentive to take remedial measures because accident was unavoidable, Rule 407 is merely "academic").

113. *See* Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983) (stating that "real question is whether the product or its design was defective at the time the product was sold" and not why manufacturer made particular design change to product after accident); *accord* RESTATEMENT DRAFT, *supra* note 50, § 1(b) (stating that product should be judged "at the time of sale or distribution").

114. *Flaminio*, 733 F.2d at 470; *see also* Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) (finding no significant distinction between negligence and strict liability theories and, therefore, admitting evidence of subsequent remedial measures in strict products liability case).

115. *See* Paul D. Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 531 (1974) (stating that to prevail by showing that defendant did something wrong is easier than proving that product is technically defective). Almost every products liability action contains a negligence count. WADE ET AL., *supra* note 75, at 699 n.4. *But see* James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 277-78 (1990) (arguing that convergence of two theories creates confusion).

Courts that favor applying the exclusionary rule in strict products liability also consider the probative value of subsequent repair evidence.[116] These courts argue that the "real" question is whether the product was defective at the time it left the manufacturer's control, and the jury's attention should be directed to what the manufacturer knew or should have known at the date of sale or distribution.[117] The introduction of evidence of subsequent modifications, therefore, potentially confuses the jury by diverting its attention from whether the product was defective at the time it left the manufacturer's control to what was done later.[118] Because of its potential to alter the scope of the substantive law if admissible, the majority approach excludes evidence of subsequent remedial measures regardless of the theory under which the plaintiff seeks recovery.[119]

The Advisory Committee's proposal to amend Rule 407 in accordance with the majority rule is consistent both with the public policy that supports the exclusionary rule and with substantive products liability law. The first proposed amendment, therefore, should be adopted.

B. The Problem of Applying the Exclusionary Rule to Post-Accident Remedial Measures Only

Limiting Rule 407 to evidence of post-injury modifications is a natural result of applying the rule as it is applied in negligence actions.[120] This limitation, however, fails to do justice to the policy

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116. *Cf. supra* note 76 (citing sources that state that manufacturer will be held liable only for knowledge reasonably attainable at time of distribution). Because manufacturers in such a case are held to a negligence-like standard, the same relevancy grounds for exclusion are applicable. *See supra* note 32 and accompanying text (discussing relevancy grounds supporting exclusionary rule). Further, the probative value of post-sale, pre-accident remedial measures is obviously more attenuated than post-accident measures, especially when that evidence is not corroborated by evidence of other accidents. *See infra* part II.B (discussing problem of applying exclusionary rule only to post-accident measures).

117. *Grenada Steel Indus.*, 695 F.2d at 888.

118. *Id.*

119. *Cf.* Moe v. Avions Marcel Dassault-Brequet Aviation, 727 F.2d 917, 932 (10th Cir.) (holding that "an announced state rule in variance with Rule 407 is so closely tied to the substantive law to which it relates (products liability) that it must be applied in a diversity action in order to effect uniformity and to prevent forum shopping"), *cert. denied*, 469 U.S. 853 (1984). In light of Rule 407's potential to affect state law, the rule should conform to the *Restatement*'s formulation of products liability law, as that formulation is a statement of what courts and legislatures are doing around the country. *See* KEETON ET AL., *supra* note 6, § 98, at 694 (stating that nearly every state has adopted liability for products as embodied in the *Restatement*).

120. Roger W. Frazier, Note, *Excluding Subsequent Design Modifications in Product Liability Litigation: The Propriety of a Post-Sale Versus a Post-Accident Exclusion*, 29 ARIZ. L. REV. 621, 627 (1987). The issue of notice illustrates the problem with such an approach. *See id.* at 629 n.49. An accident puts a defendant on notice that some safety measure may be in order, and Rule 407

goals supporting the application of the exclusionary rule in products liability actions.[121] The extension of the exclusionary rule's scope to include post-sale changes would not conflict with, but rather would supplement the goals of Rule 407 by encouraging manufacturers to implement safety measures.[122]

The differences between the theories of negligence and strict liability are not significant enough to require different approaches when it comes to the goal of not deterring manufacturers from implementing safety measures.[123] One difference between the two theories that cannot be overlooked, however, is the issue of timing.[124] Under a negligence theory, a manufacturer who alleviates the danger of a product before injury occurs cannot be held liable for the subsequent injury because the manufacturer will not have breached a duty of care at the time of the injury, regardless of its earlier negligence.[125] In strict products liability, however, the act for which the manufacturer may later be liable is the release of the product into the stream of commerce.[126]

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is designed to encourage such action. *Id.* Manufacturers who take pre-accident remedial measures, however, lack such notice. *Id.* Thus, if the rule excludes only post-accident repairs, manufacturers are given no incentive to take remedial measures unless and until an accident occurs. *Id.* at 630.

121. Frazier, *supra* note 120, at 627; *see also* Petree v. Victor Fluid Power, Inc., 831 F.2d 1191, 1198 (3d Cir. 1987) (finding policies support application of exclusionary rule when subsequent remedial measures are offered as admission that product was defective at time of sale); Readenour v. Marion Power Shovel, 719 P.2d 1058, 1062 (Ariz. 1986) (excluding pre-accident changes to encourage remedial measures that help decrease danger of future accidents).

122. *See Readenour*, 719 P.2d at 1062 ("[T]he extension of the prohibition to include [post-sale] pre-accident change fosters the same policy as that embodied in Rule 407."); *see also* Colodney, *supra* note 9, at 305 (stating that social policy of encouraging repairs is not served if Rule 407 is limited to post-injury measures in case of products causing injury that may not surface for years, such as radiation or prescription drugs). The decision to extend the scope of the exclusionary rule to cover post-sale changes would not affect the strict liability imposed for manufacturing defects. *See supra* note 76 (stating that different standard applies for design defects and defects due to inadequate instructions or warnings).

123. *See supra* part II.A (arguing that expansion of scope of Rule 407 to cover strict liability actions is consistent both with public policy behind exclusionary rule and with substantive products liability law).

124. *See* Frazier, *supra* note 120, at 628-29 (noting courts' failure to consider timing issues and describing impact of applying same timing considerations in both negligence and strict liability cases).

125. Frazier, *supra* note 120, at 629.

126. *See supra* note 50 and accompanying text (discussing time at which product is deemed defective for purposes of establishing liability). A "stricter" strict liability scheme would hold the manufacturer accountable for everything known or knowable about the product up to the date of the trial. *See* Burns, *supra* note 32, at 1161 (determining such "hindsight" liability would resemble absolute liability). Such a practice is inconsistent with the exclusion of evidence of subsequent remedial measures both before and after an accident. *Id.* at 1161-64. According to one commentator, evidence of a scientific advancement or development in design theory after the product was sold should be admissible only to prove a duty to warn. Hackford, *supra* note 44, at 142.

Because the time of sale or distribution is the point in time at which liability will be determined in a strict products liability action,[127] any product knowledge acquired after the point of distribution is irrelevant.[128] If evidence of a remedial measure taken before injury occurs may be used against the manufacturer in a subsequent lawsuit, the manufacturer will lose the incentive to take the measure until after injury has occurred.[129] Extending the scope of the exclusionary rule to cover post-manufacture, pre-injury modifications, therefore, serves the policy goals of Rule 407.[130] Further, if Rule 407 operates to admit evidence of remedial measures taken after the time of distribution, it will expand the scope of liability by holding a manufacturer responsible for knowledge acquired after the time at which it released the product to the public.[131] In other words, the Advisory Committee's proposed Rule 407 would have the potential to alter substantive law.[132]

The Third Circuit currently stands alone in expanding the scope of the exclusionary rule to cover pre-injury remedial measures.[133] The

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127. RESTATEMENT DRAFT, *supra* note 50, § 1(b).

128. *See* RESTATEMENT, *supra* note 6, § 402A cmt. g (stating that liability attaches only when product is in unsafe condition when it leaves seller's hands); RESTATEMENT DRAFT, *supra* note 50, § 2 cmt. c (stating that plaintiff in products liability case must prove reasonable alternative was available at time of sale).

129. *See supra* note 120 (illustrating problem with limiting exclusionary rule's scope to post-accident repairs).

130. *See supra* notes 113-16 and accompanying text (arguing that similarities in approach taken under negligence and strict liability render policy goals behind Rule 407 equally applicable in both cases).

131. *See supra* note 119 and accompanying text (discussing implications of applying Rule 407 to substantive law). Although the Advisory Committee considered the issue, it adopted the majority view that the Federal Rules of Evidence apply in diversity cases; *see also* Berger, *supra* note 13, at 2 (stating that no circuit, with possible exception of Tenth, views issue of subsequent repair evidence in substantive terms); Renee Dosick, Note, *The State of the Art Defense and Time Rule in Design and Warning Defect Strict Liability Cases*, 38 RUTGERS L. REV. 505, 521-36 (1986) (discussing implications of post-sale versus post-injury exclusion on substantive law).

132. The importance of the question has been summarized as follows: "The subsequent repair rule, though superficially a procedural-evidentiary rule, has an important substantive impact on the law of products liability. The rule's application, or its nonapplication, can have great consequences in a products liability suit." Joseph M. Costello & Michael Weinberger, *The Subsequent Repair Doctrine and Products Liability*, 51 N.Y. ST. BUS. J. 463, 499 (1979).

133. *See* Berger, *supra* note 13, at 22-23; *see also* Rollins v. Board of Governors for Higher Educ., 761 F. Supp. 939, 940 (D.R.I. 1991) (stating that public policy underlying Rule 407 is not served by admitting evidence of subsequent repairs, even if decision to make repairs was made prior to incident being litigated); Frazier, *supra* note 120, at 626-30 (arguing that date of sale as effective date for excluding evidence of subsequent design modifications is more consistent with underlying policy goals of Rule 407 and with theory of products liability as embodied in § 402A of *Second Restatement*); *cf.* Uniform Product Liability Act § 107(a), 44 Fed. Reg. 62,728 (1979) [hereinafter U.P.L.A.]. The U.P.L.A. states in relevant part:

> (A) Evidence of changes in (1) a product's design, (2) warnings or instructions concerning the product, (3) technological feasibility, (4) "state of the art", or (5) the custom of the product seller's industry or business, occurring after the product was manufactured, is not admissible for the purpose of proving that the product was

court explained its reasoning in *Petree v. Victor Fluid Power, Inc.*,[134] a case involving a decal warning of possible injury from improper use that the defendant affixed to all of its hydraulic presses manufactured after 1980.[135] The plaintiff, whose employer purchased a hydraulic press in 1959, was injured by the machine in 1983.[136] Finding that Pennsylvania imposes strict liability for manufacturers whose products are defective at the time of sale, the court determined that the plaintiff could recover only if injury from a particular use was foreseeable at the time the product left the manufacturer's control.[137] The court explained that when the manufacturer's liability was predicated on a theory of failure to warn regarding improper use of the product by the consumer, the negligence concept of foreseeability had insinuated itself into the strict liability cause of action.[138] The court concluded that "the policies supporting Rule 407 counsel exclusion of proof of subsequent remedial measures when offered in strict liability cases as an admission that the product was defective at the time of sale."[139]

Those who oppose expanding the rule to cover pre-injury remedial measures do not believe that manufacturers will be discouraged from making repairs when an accident has not yet occurred.[140] In a memorandum to the Advisory Committee, Professor Margaret Berger, the Committee Reporter, recommends that the Committee adopt this rationale in its amendment to Rule 407.[141] To further support this recommendation, Professor Berger states that evidence of pre-injury remedial measures is probative, citing as an example the situation in which a manufacturer changes its product design after delivery to the public but before any injury.[142] Although Professor Berger states

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defective in design under Subsection 104(B) or that a warning or instruction should have accompanied the product at the time of manufacture under Subsection 104(C).

Id. Several states have similar legislation. *E.g.*, ARIZ. REV. STAT. ANN. § 12-6-87 (1992 & Supp. 1995); COLO. REV. STAT. § 13-21-404 (1987); IDAHO CODE § 6-1406 (1990). *But see* Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1311 (Kan. 1993) (discussing Kansas' products liability statute that is similar to U.P.L.A. but excludes phrase "at the time of manufacture" and therefore includes post-sale duty to warn).

134. 887 F.2d 34 (3d Cir. 1989).

135. Petree v. Victor Fluid Power, Inc., 887 F.2d 34, 36 (3d Cir. 1989).

136. *Id.*

137. *Id.* at 36 nn.3-4, 40; Petree v. Victor Fluid Power, Inc., 831 F.2d 1191, 1194-95, 1198 (3d Cir. 1987).

138. *Petree*, 831 F.2d at 1198.

139. *Id.*

140. *See* Berger, *supra* note 13, at 24 (stating that application of rule to pre-injury measures addresses "hypothetical future cases—cases especially hypothetical because no accident has yet occurred." (citing Taylor v. Husquarna Motors, 988 F.2d 727, 733 (7th Cir. 1992))).

141. Berger, *supra* note 13, at 24.

142. Berger, *supra* note 13, at 24.

that this situation has bearing on the issue of failure to warn,[143] she fails to address how it bears on the issue of product defect. This Comment argues that while pre-injury repair evidence may be probative on the issue of failure to warn, it is not probative of the issues that Rule 407 addresses.

The Advisory Committee's proposal to limit the scope of Rule 407 to post-accident measures is inconsistent both with the public policy that supports the rule and with substantive products liability law. The second proposed amendment therefore should be reconsidered.

III. RECOMMENDATION

Consistent with substantive products liability law and the public policy of encouraging manufacturers to take steps in furtherance of added safety, the following recommendation for amending Federal Rule of Evidence 407 should be adopted:

> Rule 407. Subsequent Remedial Measures
> (a) In an action based on a theory of negligence and in which ~~When, after an event,~~ measures ~~are~~ were taken ~~which~~ after the event giving rise to the action that, 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.
> (b) In an action based on a theory of design defect or defect due to inadequate warning or instruction and in which measures were taken after the event that put into the stream of commerce the product that causes personal injury or property damage, and that, if taken previously, would have made the personal injury or property damage less likely to occur, evidence of the subsequent remedial measure is not admissible to prove a defect in a product, a defect in a product's design, or a need for a warning or instruction.
> (c) ~~This rule does not require the exclusion of~~ Evidence of subsequent remedial measures may be ~~when~~ offered for ~~another purpose, such as~~ impeachment or, if controverted, ~~proving~~ proof of ownership, control, or feasibility of precautionary measures~~, if controverted, or impeachment~~.

In accordance with the public policy of encouraging repairs that supports Rule 407, the recommendation outlined in this Comment excludes evidence of remedial measures taken after an event that gives rise to litigation, regardless of the theory under which the action is brought. This recommendation is consistent with the Advisory Committee's proposed amendment to Rule 407, which expands the

143. Berger, *supra* note 13, at 24.

scope of the rule to actions brought under a theory of products liability.

In addition, the recommendation outlined in this Comment expands the scope of Rule 407 in products liability actions even further by excluding evidence of remedial measures taken after a manufacturer releases its product into the stream of commerce. Because substantive products liability law does not hold manufacturers liable for product defects that were not known or knowable at the time of sale or distribution,[144] the Advisory Committee's proposed amendment, which excludes only evidence of remedial measures taken after the event giving rise to the litigation,[145] allows for the introduction of post-sale, pre-accident remedial measures. Such evidence is highly prejudicial and is irrelevant to the issue of liability. Unlike the Advisory Committee's proposed amendment, this Comment's recommendation complements substantive products liability law by excluding evidence that is irrelevant to a determination of liability.

Further, the recommendations set forth in this Comment would have the practical effect of applying Rule 407 in an even-handed manner to all product litigation. Thus, in cases in which a plaintiff brings suit under theories of both negligence and strict products liability,[146] the exclusionary rule would apply to all evidence of product modification made after the time at which the manufacturer releases its product into the stream of commerce.

CONCLUSION

The primary justification of Rule 407 is to encourage manufacturers to take steps in furtherance of added safety. Accordingly, the rule must reflect this policy in theory as well as in application. The Advisory Committee's proposal to amend the scope of the exclusionary rule to cover strict products liability actions supports the policy of encouraging safety measures. Limiting the scope of the exclusionary rule to measures taken after personal injury or property damage, however, undermines the policy of the rule because it does not protect manufacturers at the point in time in which the remedial measures can be beneficial to the public. With the expansion of Rule 407 to cover actions brought under a theory of strict products liability,

144. RESTATEMENT DRAFT, *supra* note 50, § 1 cmt. a.

145. *Advisory Committee Report*, *supra* note 14.

146. *See* Karen A. DiLisio, *The Admissibility of Subsequent Remedial Measures in a Products Liability Case*, 3 PROD. LIAB. L.J. 222, 237 (1992).

this Comment urges the Advisory Committee to adopt a definition of "event" that is consistent both with the public policy supporting the rule and with substantive products liability law.