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Federal Rule of Evidence 407: Should It Apply to Products Liability?

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FEDERAL RULE OF EVIDENCE 407: SHOULD IT APPLY TO PRODUCTS LIABILITY?

INTRODUCTION

Federal Rule of Evidence 407[1] states that evidence of subsequent remedial measures taken by a defendant after an accident has occurred is inadmissible at trial to prove negligence or culpable conduct on the part of the defendant.[2] It is clear from the plain language of the rule that it applies to causes of action based on negligence.[3] It is less clear, however, whether Rule 407 applies to a strict products liability cause of action.

The federal courts of appeal are split. A clear majority of the circuits has applied Rule 407 to strict products liability cases.[4] Two circuits, on the other hand, have come to the opposite

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1. FED. R. EVID. 407. The rule 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.

2. *Id.*

3. *Id.*

4. *See, e.g.*, Gauthier v. AMF, Inc., 788 F.2d 634 (9th Cir. 1986); Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984); Grenada Steel Indus., Inc., v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983); Hall v. American S.S. Co., 688 F.2d 1062 (6th Cir. 1982); Josephs v. Harris Corp., 677 F.2d 985 (3d Cir. 1982); Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

conclusion.[5] Furthermore, although New York does not follow the Federal Rules of Evidence, it follows a common law rule that seems to fall somewhere in between these two lines of reasoning.[6]

This Comment will focus on the split in the circuits and the reasoning advanced by each circuit for its view on the issue. It will also discuss the rule in New York and how it compares to the interpretation of Federal Rule of Evidence 407 by the federal courts. Part I of this Comment will analyze how Rule 407 advanced from common law into a federal rule of evidence,[7] provide a synopsis of the policy reasons that have been advanced in favor of Rule 407,[8] and discuss the first state case that decided this issue.[9] Part II will define negligence and strict products liability,[10] and will discuss the split in the federal circuit courts on the issue of whether Rule 407 should be applied to actions based on strict products liability.[11] Part III will advance the common law rule that is followed in New York[12] and examine how it compares to the interpretation of Rule 407 given by the federal courts.[13] This Comment will conclude by stating that one interpretation should be chosen, preferably that of the majority, and followed by all courts, state and federal, to prevent forum shopping and create uniformity in the law.[14]

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5. *See, e.g.*, Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977).

6. *See* Cover v. Cohen, 61 N.Y.2d 261, 461 N.E.2d 864, 473 N.Y.S.2d 378 (1984); Caprara v. Chrysler Corp., 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981).

7. *See infra* text accompanying notes 15-29.

8. *See infra* text accompanying notes 30-39.

9. *See infra* text accompanying notes 40-51.

10. *See infra* text accompanying notes 52-71.

11. *See infra* text accompanying notes 72-166.

12. *See infra* text accompanying notes 167-85.

13. *See infra* text accompanying notes 186-90.

14. *See infra* text accompanying notes 191-93.

I. HISTORY

A. Advancement from Common Law to Statute

In 1892, the Supreme Court of the United States, in *Columbia & P.S.R. Co. v. Hawthorne*,[15] held that an alteration or a repair to a product to make it safer, after it had injured a plaintiff, could not be introduced at trial as evidence of a defendant's negligence.[16] The Court listed several policy reasons why this evidence should be excluded.[17] Evidence of this sort was prejudicial as it would distract the jury from the real issue of the case and would result in bias against the defendant.[18] Moreover, the Court took the position that a change in the product made to protect consumers in the future should not be deemed an admission that the product was previously defective.[19] It reasoned that this kind of evidence could not legitimately prove that a defendant had been involved in negligent conduct before the accident.[20]

In 1948 this common law rule was codified in the Model Code of Evidence as Rule 308.[21] This version stated that precautions which are taken to prevent the reoccurrence of an injury were not admissible to prove negligence.[22] A second version was

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15. 144 U.S. 202 (1892).
16. *Id.* at 206, 208.
17. *Id.* at 207.
18. *Id.*
19. *Id.*
20. *Id.*
21. MODEL CODE OF EVIDENCE Rule 308 (1948). *See* Lev Dassin, Note, *Design Defects in the Rules Enabling Act: The Misapplication of Federal Rule of Evidence 407 to Strict Liability*, 65 N.Y.U. L. REV. 736, 744 (1990) ("The Rule's prohibition first appeared in statutory form in 1948 in Rule 308 of the Model Code of Evidence, and mentioned only negligence, saying nothing about other forms of liability or 'culpable conduct.'").
22. MODEL CODE OF EVIDENCE Rule 308. This rule states:

> Evidence of the taking of a precaution by a person to prevent the repetition of a previous harm or the occurrence of a similar harm or the evidence of the adoption of a plan requiring that such a precaution be

contained in the 1952 publication of the Uniform Rules of Evidence as Rule 51.[23] This construction added the term "culpable conduct" to the old rule and stated that evidence of subsequent measures was not admissible to prove either negligence or culpable conduct on the part of the defendant.[24] The version of this exclusionary rule used today is encompassed in Federal Rule of Evidence 407, which went into effect in 1975.[25] This version is similar to the 1952 version in that it includes negligence as well as culpable conduct.[26] The rule was expanded, however, to include certain circumstances in which the evidence of subsequent remedial measures would be admissible.[27] These circumstances include attempting to prove control or ownership of the product, feasibility of the subsequent measure, or to impeach the testimony of a witness.[28]

Soon after the Federal Rules of Evidence were enacted, a question arose in the federal courts as to whether Rule 407, which had existed for many years in common law form, should be interpreted to include actions based on strict products liability.[29] Unfortunately, none of the additions to Rule 407 dealt with this issue. In addition, Congress has not yet made any changes in Rule 407 that address this issue, even though the

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taken is inadmissible as tending to prove that his failure to take such a precaution to prevent the previous harm was negligent.

Id.

23. UNIF. R. EVID. 51 (1952).

24. *Id.* This rule states that "[w]hen after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event." *Id. See* Dassin, *supra* note 21, at 744 ("The subsequent Rule 51 of the Uniform Rules of Evidence, published in 1952, added the phrase 'culpable conduct' without explanation.").

25. FED. R. EVID. 407. For full text of this rule, see *supra* note 1.

26. *Id.*

27. *Id.*

28. *Id.*

29. *See, e.g.*, Cann v. Ford Motor Co., 658 F.2d 54, 57-58 (2d Cir. 1981), *cert denied*, 456 U.S. 960 (1982) ("On this appeal the Canns claim that the court erred in . . . its exclusion of evidence of subsequent remedial measures as to the product liability claim.").

debate has been ongoing since the 1970's. Furthermore, the United States Supreme Court has yet to decide this issue. The interpretation of the rule has been left up to the federal courts. Consequently, the federal courts have provided several different answers to this question.

B. Policy Behind Federal Rule of Evidence 407

The Advisory Committee's Notes list several policies supporting Rule 407.[30] The first states that subsequent remedial measures by a defendant after an accident has occurred should not be admitted into evidence at trial because this type of behavior is not a confession of either negligence or culpable conduct by the defendant.[31] The Advisory Committee stated that this type of action taken by a defendant is in accord with an injury to the plaintiff that occurred through the contributory negligence of the plaintiff or completely by accident.[32] The Notes state that "[t]he rule rejects the notion that 'because the world gets wiser as it gets older, therefore it was foolish before.'"[33] This notion is a well established policy that is used by most of the federal courts that have addressed this issue.[34]

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

31. *Id.*

32. *Id.*

33. *Id.*

34. *See* Kelly v. Crown Equip. Co., 970 F.2d 1273, 1276 (3d Cir. 1992) (rejecting the notion that there is an admission of fault when remedial measures are taken after an injury); Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991) (reiterating the policies of the rule and stating that "[j]urors would too readily equate subsequent design modifications with admissions of a prior defective design"); Flaminio v. Honda Motor Co., 733 F.2d 463, 471 (7th Cir. 1984) ("[T]o 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.'"); Grenada Steel Indus., Inc., v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983) (stating that changes in a product may be made if a manufacturer discovered a better design or manufacturing process or to institute a change that was planned before the injury); Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980) (stating that a defendant who changes a product may simply be taking precautionary measures on a product that did not contain a defect), *cert. denied*, 449 U.S. 1080 (1981); Smyth v. Upjohn Co.,

The second policy for Rule 407 is to motivate manufacturers to take steps to improve their products and make them safer, instead of dissuading them from making changes by presenting evidence of these alterations at trial as proof of the manufacturer's liability.[35] *Flaminio v. Honda Motor Co., Ltd.*[36] stressed this policy.[37] The Seventh Circuit Court of Appeals in *Flaminio* reasoned that Rule 407 is necessary to insure that manufacturers will not ignore defects of which they have become aware in fear that the change will be used against them in court to prove that they were responsible for the occurrence of the accident.[38] Most of the federal circuits agree with this reasoning.[39]

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529 F.2d 803, 804 (2d Cir. 1975) ("[E]vidence of remedial action, being based on hindsight, does not tend to show the defendant had failed to act with reasonable care at an earlier period of time.").

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

36. 733 F.2d 463 (7th Cir. 1984).

37. *Id.* at 469. The court stated:

> A major purpose of Rule 407 is to promote safety by removing disincentive to make repairs . . . after an accident that would exist if the accident victim could use those measures as evidence of the defendant's liability. 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.

Id.

38. *Id.*

39. Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991) (stating that a goal of Rule 407 is to encourage manufacturers to make subsequent changes to their products to make them safer by not using these changes as evidence of defective design); Gauthier v. AMF, Inc., 788 F.2d 634 (9th Cir. 1986) (stating that the purpose of Rule 407 is to encourage manufacturers to remedy dangerous defects in their products without fear that this will be used against them in court); Grenada Steel Indus., Inc., v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983) (stating that voluntary improvement of a product by a manufacturer should be encouraged and there is an assumption that this improvement may be deterred if Rule 407 is not applied); Hall v. American S.S. Co., 688 F.2d 1062 (6th Cir. 1982) (stating that the rationale for Rule 407 is to exclude evidence of subsequent improvements in a lawsuit against a

C. Beginning of Judicial Interpretation of the Exclusionary Rule in Relation to Strict Products Liability

Before Federal Rule of Evidence 407 was enacted in 1975, the Supreme Court of California was faced with the issue of whether its state rule, which prevented evidence of subsequent remedial measures from being admissible at trial, applied to actions based on a theory of strict products liability.[40] The case of *Ault v. International Harvester Co.*,[41] which was the seminal case regarding this issue, was decided based upon section 1151 of the California Evidence Code.[42]

In *Ault*, the plaintiff was injured when the car in which he was a passenger suddenly went out of control and veered off the road into a canyon.[43] The plaintiff relied upon strict products liability, negligence and breach of warranty due to a defective design in

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defendant in order to ensure that these improvements will be made); Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981) (stating that Rule 407 resulted from a fear that manufacturers would not take subsequent remedial measures if evidence of these measures could be used against them in court), *cert. denied*, 456 U.S. 960 (1982); Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980) (stating that Rule 407 was enacted in order to further the public policy of encouraging defendants to change their products without fear that this change will later be used against them at trial), *cert. denied*, 449 U.S. 1080 (1981).

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

41. *Id.*

42. CAL. EVID. CODE § 1151 (West 1966). The section states: "[w]hen, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." *Id.* The wording of Federal Rule of Evidence 407 is almost identical. *See supra* note 1.

43. *Ault*, 528 P.2d at 1150. At the time the accident occurred, the driver was only driving between 10-15 miles per hour and the road surface was dry. *Id.* It was later determined that the car's gear box was broken. *Id.* The plaintiff claimed that the gear box, which was made of aluminum 380, broke as a result of metal fatigue, which caused the car to drive off the road. The defendant, on the other hand, contended that the accident resulted from either a collapse of the road or negligence of the driver, and that the gear box broke as a result of the accident. *Id.* The defendant started making the gear box out of malleable iron instead of aluminum 380 about three years after the occurrence of the accident. *Id.*

the automobile as theories of recovery.[44] During the trial, evidence was admitted which showed that three years after the accident, the defendant changed the composition of the car's gear box, which allegedly caused the accident.[45] On appeal, the defendant contended that the admission of this evidence was in error as it violated section 1151 of the California Evidence Code, which excludes evidence of remedial measures to prove negligence or culpable conduct.[46] The California Supreme Court disagreed with the defendant's assertions that strict products liability was included in the term 'culpable conduct' used in section 1151.[47]

In an en banc opinion, the California Supreme Court held that section 1151 did not apply to strict products liability actions.[48] It reasoned that neither negligence nor culpable conduct are elements of strict products liability and if the legislature wanted to include strict products liability in the statute, it would have used a term other than 'culpable conduct.'[49] It further stated that nothing in the legislative history of the statute indicated that it was meant to include strict products liability.[50] In addition, the public policy proposition on which the rule is based did not relate to strict products liability actions.[51]

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44. *Id.* at 1149. The plaintiff contended that the gear box of the automobile was defective because it was made out of aluminum 380 instead of malleable iron. *Id.* at 1150.

45. *Id.*

46. *Id.* International Harvester Company asserted that the theory of strict liability was encompassed in the term 'culpable conduct' that is used in section 1151 of the California Evidence Code. *Id.*

47. *Id.* at 1151.

48. *Id.* at 1150.

49. *Id.* at 1150-51.

50. *Id.* at 1150.

51. *Id.* The court acknowledged that the public policy of encouraging manufacturers to make changes and repairs to products after the occurrence of an accident applied in full force to actions based on negligence. *Id.* at 1151. According to the court, however, this policy does not extend to strict products liability actions. *Id.* at 1150. The court reasoned that:

> The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will

Even though this brand new issue came into the public light before the Federal Rules of Evidence went into effect, Congress chose not to change Rule 407 to either affirm or deny its application to the area of strict products liability and left the interpretation to the federal courts.

II. DIFFERENT INTERPRETATIONS OF FEDERAL RULE OF EVIDENCE 407

A. Negligence and Culpable Conduct v. Strict Products Liability

Conduct constituting negligence is explicitly covered by Federal Rule of Evidence 407.[52] Negligence is defined as "the failure to use such care as a reasonably prudent and careful person would use under similar circumstances."[53] In order to establish a cause of action based on negligence, four elements must be proven.[54] These elements are duty,[55] breach of that duty,[56] proximate cause[57] and damage.[58] The first two elements of negligence are important here. These elements refer to the fact that the defendant has done something wrong to deserve to be

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forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement.

Id. at 1152.

52. *See supra* note 1.

53. BLACK'S LAW DICTIONARY 1032 (6th ed. 1990).

54. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

55. *Id.* at 164. Duty consists of "[an] . . . obligation, recognized by law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Id.*

56. *Id.* Breach consists of "[a] failure on the person's part to conform to the standard required." *Id.*

57. *Id.* at 165. Proximate cause consists of "[a] reasonably close causal connection between the conduct and the resulting injury." *Id.*

58. *Id.* Damage consists of "[a]ctual loss or damage resulting to the interests of another." *Id.*

held liable for his actions, whether it be inattention, inadvertence or thoughtlessness.[59]

The term 'culpable conduct,' which is also included in Rule 407, has similar implications.[60] The definition of culpable conduct states that "[s]uch conduct normally involves something more than simple negligence and implies conduct which is blamable, censurable, involving the breach of a legal duty or the commission of a fault."[61] This term also implies that the person involved in culpable conduct has engaged in some kind of wrongdoing for which liability will be imposed.[62]

Strict liability, on the other hand, is defined as "[l]iability without fault."[63] The theory of strict liability is that the defendant is involved in conduct which is atypical of the conduct normally engaged in by people in his community, which places potential plaintiffs at a higher risk of danger.[64] Strict liability is also a category that falls under products liability.[65] Strict products liability is applicable to manufacturers as well as other vendors who are responsible for placing products in the stream of commerce.[66] It arises when either a manufacturer or a vendor has sold a product that turns out to be more dangerous than expected and injures a consumer or a bystander.[67] There are two basic policy reasons for holding a manufacturer or vendor strictly liable for any damages caused by a dangerous product. First, these entities are better equipped to bear the expense of the damages caused by the dangerous product.[68] Second, the amount of accidents will be reduced if negligence does not have to be

59. BLACK'S LAW DICTIONARY 1032 (6th ed. 1990).
60. *Id.* at 379.
61. *Id.*
62. *Id.*
63. *Id.* at 1422.
64. *See* KEETON ET AL., *supra* note 54, § 75, at 537.
65. *See* KEETON ET AL., *supra* note 54, § 98, at 692.
66. *See* KEETON ET AL., *supra* note 54, § 98, at 692.
67. *See* KEETON ET AL., *supra* note 54, § 95, at 677.
68. *See* KEETON ET AL., *supra* note 54, § 98, at 692-93. ("The costs of damaging events due to defectively dangerous products can best be borne by the enterprisers who make and sell these products.").

proven in order for a cause of action to exist.[69] Furthermore, because it is sometimes difficult to prove either negligence or fault in these types of cases, the requirement that either be proven should be eliminated.[70]

The argument as to whether strict products liability should be included under Federal Rule of Evidence 407 stems from the fact that the term is not specifically referred to in Rule 407.[71] The questions that need to be answered to decide this issue include whether Congress intended strict products liability to be encompassed under the term 'culpable conduct,' whether the policy reasons behind Rule 407 apply as strongly to strict products liability and should therefore extend Rule 407 to cover this type of conduct, and whether there is some other reason that would justify extending the exclusionary rule to cover strict products liability cases.

B. Minority View: No Strict Products Liability

The minority view followed by two federal circuits is that Rule 407 does not apply to strict products liability cases. In *Herndon v. Seven Bar Flying Service, Inc.*,[72] an airplane crash took the lives of a flying instructor and his student.[73] A defectively

69. *See* KEETON ET AL., *supra* note 54, § 98, at 693. ("The cause of accident prevention can be promoted by the adoption of strict liability and the elimination of the necessity for proving negligence.").

70. *See* KEETON ET AL., *supra* note 54, § 98, at 693.

> It has been said that even if fault or negligence were regarded as the primary justification for the imposition of liability on a manufacturer or other seller for the costs of accidents attributable to defective products, it is often present but difficult to prove, and for institutional reasons and because of the costs of litigation, proof of the existence of fault or negligence in the sale of a defective product should no longer be required.

KEETON ET AL., *supra* note 55, § 98, at 693.

71. *See supra* note 1.

72. 716 F.2d 1322 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984).

73. *Id.* at 1324.

designed pitch trim switch allegedly caused the accident.[74] The composition of the pitch trim switch was later changed by the manufacturer of the airplane and one year after the occurrence of the accident, a notice was sent to all aircraft owners, instructing them to make this change in the planes they already had in their possession.[75] This evidence was admitted at trial.[76]

The Tenth Circuit asserted that the policies in favor of exclusion of subsequent remedial measures[77] do not apply to actions based on strict products liability.[78] The court distinguished negligence from strict products liability by stating that the conduct of the defendant is the issue in negligence cases while in strict liability cases, the issue is the product and whether or not it was defective.[79] Consequently, since the defendant's conduct is not at issue in an action based on strict products liability, there is no reason for it to be excluded using Rule 407.[80] The Tenth Circuit also stated that evidence of subsequent remedial measures was relevant to the proceedings based on Federal Rule of Evidence 401[81] because it could lead the jury to believe that the product in question was indeed in a defective condition before the change was made.[82] The court read Rule 407 to exclude no evidence other than that which would be used

74. *Id.* The pitch trim switch was allegedly being used by the pilot to maintain the altitude of the plane when it became stuck and caused the plane to lose altitude and crash. *Id.*

75. *Id.*

76. *Id.* at 1325-26. The notice sent out by the defendant telling owners to modify the pitch trim switch was contained in Piper Service Bulletin 527. The defendant argued that evidence of this bulletin was inadmissible under Rule 407 because it was a subsequent remedial measure. Plaintiffs contended that Rule 407 did not apply because this was a strict products liability case and the evidence was relevant. *Id.* at 1324-25.

77. *See supra* notes 30-39 and accompanying text.

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

79. *Id.* at 1327.

80. *Id.* at 1328.

81. FED. R. EVID. 401. This rule states that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

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

as proof of negligent or culpable conduct on the part of the defendant.[83] It also stated that if there is any other reason for which the evidence could be used, the rule should not apply and the evidence should be admissible.[84] The Tenth Circuit has reaffirmed *Herndon* in subsequent decisions.[85]

The Eighth Circuit also interpreted Rule 407 to exclude only evidence that would have a tendency to prove negligence or culpable conduct. In *Robbins v. Farmers Union Grain Terminal Ass'n*,[86] the Eighth Circuit applied the rationale of *Ault*,[87] which held that Rule 407 did not apply to actions based on strict products liability, and thus decided that evidence of a subsequent remedial warning was admissible to prove the product was unreasonably dangerous and defective and the defendant should be held strictly liable for the plaintiff's injury.[88] The court also

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83. *Id.* at 1331.

84. *Id. See* Rimkus v. Northwest Colo. Ski Corp., 706 F.2d 1060 (10th Cir. 1983). This case was the first in the Tenth Circuit to state that whenever any other reason exists to admit evidence of subsequent remedial measures, Rule 407 should not apply, including attempting to prove the plaintiff's contributory negligence. *Id.* at 1066.

85. *See* Huffman v. Caterpillar Tractor Co., 908 F.2d 1470, 1481 (10th Cir. 1990) ("[T]his court held that Rule 407 does not apply to strict product liability cases . . . [and] [o]ur panel cannot overrule the court's prior precedent."); Meller v. Heil Co., 745 F.2d 1297, 1301 n.8 (10th Cir.), *cert. denied*, 467 U.S. 1206 (1984). The court held that:

> It strikes the balance, for better or worse, at excluding only that evidence offered to prove negligence or culpable conduct . . . [a]bsent evidence that either Congress, which prescribed the rules, the Supreme Court, which approved the rules, or the Advisory Committee, which drafted the rules, intended otherwise, we should apply Rule 407 as written.

Id.

86. 552 F.2d 788 (8th Cir. 1977).

87. 528 P.2d 1148 (Cal. 1974).

88. *Robbins*, 552 F.2d at 793. In this case, many of the plaintiff's cattle either became sick or died because of an inadequate warning that was on the defendant's protein supplement for cattle. *Id.* at 790. Subsequent to this, the defendant sent a letter to all of its sales people stating that they were to give to new users of the cattle feed a more severe and restrictive warning, which was included in the letter. *Id.* at 792. Evidence of this letter was admitted at trial by the plaintiff in order to prove their theory of strict products liability. *Id.*

made the determination that the subsequent warning was relevant to the case because it could prove that the product was in fact unreasonably dangerous, and that the harm would not have come about if that warning had been given in the first place.[89]

The Eighth Circuit has, however, relaxed its view and has applied Rule 407 to certain products liability actions.[90] In *DeLuryea v. Winthrop Laboratory*,[91] the court recognized that it previously held that Rule 407 did not apply to suits based on strict products liability.[92] However, this case was based on the defendant's failure to give an adequate warning under a strict products liability theory.[93] The court disagreed with the reasoning advanced in *Robbins* by stating that when the issue of the case is failure to give an adequate warning, there is essentially no distinction between negligence and strict products liability theories.[94] Quoting *Werner v. Upjohn Co.*,[95] *DeLuryea* stated that the issue in a case based on failure to give an adequate

89. *Id.* at 794.

90. DeLuryea v. Winthrop Lab., 697 F.2d 222 (8th Cir. 1983).

91. *Id.* This case came about when the plaintiff became severely ill as a result of ingesting medication that was manufactured by the defendant. *Id.* at 223-24. After the plaintiff discontinued using the drug, the defendant manufacturer added further warnings to the drug's package insert about side effects that could appear as a result of taking the drug. *Id.* at 227-28. Evidence of this subsequent warning was admitted at trial. *Id.*

92. *Id.* at 228 (citing *Robbins*, 552 F.2d 788).

93. *DeLuryea*, 697 F.2d at 223-24.

94. *Id.* at 228-29.

95. 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). In this case, the Fourth Circuit stated:

> Our conclusion is supported by the close similarity between negligence and strict liability. The elements of both are the same with the exception that in negligence plaintiff must show a breach of a duty of due care by defendant while in strict liability plaintiff must show the product was unreasonably dangerous. The distinction between the two lessens considerably in failure to warn cases . . . . [U]nder a negligence theory the issue is whether the defendant exercised due care in formulating and updating the warning, while under a strict liability theory the issue is whether the lack of proper warning made the product unreasonably dangerous. Though phrased differently the issue under either theory is essentially the same: was the warning adequate?

Id.

warning, whether based on negligence or strict products liability, turns out to be the same - whether or not the warning was adequate.[96] Consequently, the Eighth Circuit stated that the answer is based on the defendant's conduct and whether the defendant was reasonable in issuing the original warning.[97] Since the focus is on the conduct of the defendant, the Eighth Circuit asserted that this is an area in which strict products liability does encompass negligence or culpable conduct.[98] As a result, it held Rule 407 should apply in products liability actions based on failure to give an adequate warning.[99]

Even though the Eighth Circuit continues to follow the minority view that Rule 407 does not apply to cases based on strict products liability,[100] as time passes it seems to be more willing to make exceptions and apply the rule to exclude evidence of subsequent remedial measures in these types of actions.[101] In a footnote from a recent 1993 decision, the court indicated it may no longer be wise to continue to refrain from applying Rule 407 to strict products liability actions and implied that it would like to try and change this rule if presented with a case upon which all of the circuit judges sat.[102] It would seem, therefore, that even though the Tenth Circuit firmly stands behind its interpretation, the Eighth Circuit may be moving towards the majority view.

C. Majority View: Rule 407 Applies to Strict Products Liability

The majority view, prevalent in the federal courts, states that Rule 407 applies to actions based on strict products liability and subsequent remedial measures taken by defendants should not be

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96. *DeLuryea*, 697 F.2d at 229.

97. *Id.*

98. *Id.*

99. *Id.*

100. *See supra* text accompanying notes 86-89.

101. *See supra* text accompanying notes 90-99.

102. *See* Burke v. Deere & Co., 6 F.3d 497, 506 n.11 (8th Cir. 1993) ("We note, however, that this case illustrates the dangers inherent in our present approach and further note that it may indeed be wise to revisit the issue *en banc* in a proper case."), *cert. denied*, 1145 S. Ct. 1063 (1994).

admitted at trial.[103] The first case to decide this issue was *Roy v. Star Chopper Co.*[104] In this case, the First Circuit briefly stated that the trial court had not abused its discretion when it excluded evidence of repairs made to the machine which harmed the plaintiff.[105] To support this decision, the court cited Rule 407,[106] which implies that it interpreted the rule to apply to strict products liability actions. This implication was affirmed by the First Circuit in *Raymond v. Raymond Corp.*[107] The court in this

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103. *See* Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991) (holding that Rule 407 is applicable to strict products liability actions); Gauthier v. AMF, Inc., 788 F.2d 634 (9th Cir. 1986) (adopting the position that strict products liability cases are governed by Rule 407); Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984) (holding that Rule 407 does apply to cases relying on a theory of strict products liability); Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983) (following the First, Second, Third, Fourth, and Sixth Circuits by deciding that strict products liability cases are controlled by Rule 407); Hall v. American S.S. Co., 688 F.2d 1062 (6th Cir. 1982) (stating that the policy behind Rule 407 applies to negligence as well as strict liability); Josephs v. Harris Corp., 677 F.2d 985 (3d Cir. 1982) (stating that Federal Rule of Evidence 407 applies to lawsuits based on strict products liability); Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981) (holding that Rule 407 applies to actions based on strict products liability), *cert. denied*, 456 U.S. 960 (1982); Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980) (holding that Rule 407 applies to actions based on strict products liability because a defendant will nonetheless be inclined not to make subsequent changes in a product even though their conduct is not an issue in the case), *cert. denied*, 449 U.S. 1080 (1981).

The only two circuits not mentioned in this discussion are the Eleventh Circuit and the District of Columbia Circuit. Neither of these circuits have been faced with the issue of whether Rule 407 applies to strict products liability actions, therefore neither of these circuits have made a ruling on this issue.

104. 584 F.2d 1124 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979). This case involved a strict products liability action that arose when the plaintiff was inspecting an electroplating machine that was manufactured by the defendant. In the course of her inspection, the plaintiff's hand became stuck in the machine and as a result wound up severely deformed. *Id.* at 1128. There were repairs made to the machine after the accident which were not allowed into evidence by the trial court. *Id.* at 1134.

105. *Id.*

106. *Id.*

case reiterated the policy reasons advanced in favor of the rule[108] and distinctly stated that Rule 407 applies to actions based on strict products liability.[109] The First Circuit continues to follow this rule and has even specified that Rule 407 additionally applies to products liability actions that arise from an express warranty.[110]

The Third Circuit also ruled on this issue with minimal discussion. In *Josephs v. Harris Corp.*,[111] the court held that Rule 407 is applicable to lawsuits based on products liability, as long as one of the exceptions stated in Rule 407[112] is not offered

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107. 938 F.2d 1518 (1st Cir. 1991). The court stated: "The First Circuit, however, has at least impliedly accepted [Rule 407's] application in this context . . . . We now explicitly hold that Fed. R. Evid. 407 applies to strict liability cases." *Id.* at 1522. This case involved a strict products liability cause of action based on a defectively designed and manufactured sideloader that was manufactured by the defendant. *Id.* The trial court refused to allow the plaintiff to admit evidence that the defendant added a more secure welding and a backplate to the sideloader after this accident occurred, which the plaintiff wanted to use as proof that the machine was dangerous and defective. *Id.*

108. *Id.* at 1523.

109. *Id.* at 1522.

110. *See* Prentiss & Carlisle Co., Inc. v. Koehring-Waterous Div. of Timberjack, Inc., 972 F.2d 6 (1st Cir. 1992). The focus of this case was an allegedly defective timber harvesting machine made by the defendant which went up in flames as a result of the defect. *Id.* at 7-8. The machine came with an express warranty that it was defect free. *Id.* at 8. After the accident, the defendant issued an interoffice memo and sent a letter to owners of the machine that there was a cable that had the capability of becoming exposed and that it should be rerouted. *Id.* at 9. The court assumed that since Rule 407 applied to strict products liability actions, it also applied to actions based on express warranty. *Id.* at 10.

111. 677 F.2d 985 (3d Cir. 1982).

112. *See supra* note 1.

by the plaintiff.[113] This view has been ratified by other Third Circuit cases.[114]

The first circuit to present a detailed discussion on the issue of whether Rule 407 applies to suits based on products liability was the Fourth Circuit in *Werner v. Upjohn Co.*[115] When the court began its analysis, it stated that even though Rule 407 does not specifically mention strict products liability, that does not mean evidence of subsequent remedial measures should be admissible to prove the defendant's liability in a strict products liability suit.[116] The court then stated that in order to determine if strict products liability is covered by the rule, the policy reasons must be analyzed according to strict liability rather than negligence to see if they apply with equal force.[117]

The Fourth Circuit acknowledged a difference between negligence and strict liability.[118] However, it reasoned that the

113. *Josephs*, 677 F.2d at 990-91. In this case, the trial court did not allow the plaintiff to admit evidence that the defendant sent out a letter with instructions on how to clean their printing press with a warning sticker after the plaintiff was injured by the press. *Id.* at 990. The Court of Appeals for the Third Circuit affirmed this decision based on the fact that in its interpretation, Rule 407 is applicable to products liability suits. *Id.* at 991.

114. *See, e.g.*, Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992) (stating that although the language in Rule 407 states that subsequent remedial measures are inadmissible to prove negligence or culpable conduct, the Third Circuit has continually decided that the rule applies to actions based on strict products liability); Petree v. Victor Fluid Power, Inc., 887 F.2d 34 (3d Cir. 1989) (reaffirming the Third Circuit's position that strict products liability actions are encompassed by Rule 407).

115. 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). This case arose when the plaintiff developed a condition known as pseudo membranous colitis as a result of ingesting a medication manufactured by the defendant, Upjohn Co. *Id.* at 851. The trial court allowed the introduction of the evidence of a warning published by the defendant after the plaintiff was diagnosed with colitis, despite the defendant's objection. *Id.* at 853. The appellate court vacated and remanded the case based on its decision that the admission of the subsequent warning was improper because Rule 407 applies to strict products liability actions and thus, this kind of evidence should have been deemed inadmissible. *Id.*

116. *Id.* at 856.

117. *Id.*

118. *Id.* at 856-57.

distinction was not so great as to allow Rule 407 to be applied to negligence actions and not strict products liability actions.[119] The court held that the policy of encouraging manufacturers to change and improve their products, even after an accident had occurred, was a valid policy for strict products liability as well as for negligence suits.[120] Judge Widener in his opinion wrote:

> It is difficult to understand why this policy should apply any differently where the complaint is based on strict liability as well as negligence. From a defendant's point of view it is the fact that the evidence may be used against him which will inhibit subsequent repairs or improvement. It also makes no difference to the defendant on what theory the evidence is admitted; his inclination to make subsequent improvements will be similarly repressed.[121]

The court rejected the reasoning in *Ault* by stating that the California Supreme Court was not successful in distinguishing between causes of action based on negligence and strict products liability.[122] It also reasoned that not applying Rule 407 to strict products liability actions might do away with the rule altogether, as it could then be possible to apply that rationale to negligence cases.[123]

The Fourth Circuit in *Werner* advanced another policy reason for applying Rule 407 to strict products liability actions. It reasoned that strict products liability suits concern actions that are much less reprehensible than either negligence or culpable conduct.[124] Therefore, because more contemptuous behavior is protected by the rule that excludes evidence of subsequent remedial measures, it is only logical that the rule immunize the

119. *Id.* As mentioned previously, the court in this case also stated that the distinction between negligence and strict products liability becomes even more narrow in a case based on failure to give an adequate warning. In that situation, whether the theory is negligence or strict products liability, the ultimate question that must be answered is whether the warning was adequate. *Id.* at 858.

120. *Id.* at 857.

121. *Id.*

122. *Id.* at 857-58.

123. *Id.*

124. *Id.* at 857.

defendant in an action where his fault need not be proven.[125] *Werner*, and the Fourth Circuit, hold that Rule 407 applies to actions based on strict products liability as well as negligence.[126]

The Sixth Circuit in *Hall v. American Steamship Co.*,[127] agreed with the reasoning in *Werner*.[128] In this case, the court held that even though the claim against the defendant that a vessel was unseaworthy was a type of strict liability, it nonetheless included culpable conduct, and consequently Rule 407 did apply

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125. *Id.* at 856-57. The court stated:

> Culpable conduct normally involves something more than simple negligence and implies conduct which is "blamable; censurable; involving the breach of a legal duty or the commission of a fault. . . . [I]t implies that the act or conduct spoken of is reprehensible or wrong, but not that it involves malice or a guilty purpose." Thus, Congress has determined that such evidence should be excluded not only in cases involving negligence but where the defendant is charged with culpable conduct. Strict liability on the other hand involves conduct which is technically less blameworthy than simple negligence, since the plaintiff need not prove a breach of duty by the defendant other than placing the product on the market. From a policy standpoint it follows that if the rule expressly excludes evidence of subsequent repairs to prove culpable conduct that the same should be true for strict liability.

Id. (citations omitted).

126. *Id.* at 857. *See* Chase v. General Motors Corp., 856 F.2d 17 (4th Cir. 1988). The subject of this suit was a car manufactured by the defendant that the plaintiff had been a passenger in when it crashed as a result of defectively designed brakes. *Id.* at 18. After the accident, the defendant sent a recall letter to the plaintiff stating that its brakes needed to be adjusted. *Id.* at 21. The letter was not admitted at trial, but evidence of the recall was. *Id.* The appellate court held that this evidence was wrongfully admitted and remanded the case to the trial court. *Id.* The court ratified the decision in *Werner* when it stated that this case follows the decision of applying Rule 407 to actions based on strict products liability as well as negligence. *Id.* at 22.

127. 688 F.2d 1062 (6th Cir. 1982). The case was based on the unseaworthiness of a vessel. *Id.* at 1063. The plaintiff in this case was injured when he was on the deck to do the job of hosing it off, as required by ship policy, during rough weather conditions. *Id.* After the plaintiff's injury, the defendant changed its policy and no longer required its employees to hose off the deck in rough weather conditions. *Id.* at 1066. This policy change was admitted at trial over the objections of the defense. *Id.* at 1064.

128. *Id.* at 1062.

to exclude evidence of a subsequent policy change.[129] This reasoning implies that it is possible for actions based on strict products liability to encompass a certain amount of culpable conduct which would call for the application of Rule 407. This implication was confirmed by the Sixth Circuit in *Bryan v. Emerson Electric Co., Inc.*[130]

Based on the policy reasons advanced by the Advisory Committee for Rule 407, the Seventh Circuit also supports the application of the rule to strict products liability actions.[131] *Flaminio v. Honda Motor Co., Ltd.*[132] was a products liability case instituted after the plaintiff's involvement in an accident while driving a motorcycle manufactured by the defendant.[133] The plaintiff alleged that the front tire of the motorcycle suddenly began to wobble, causing it to crash.[134] During the trial, the court refused to allow the plaintiff to admit evidence of blueprints, created after the accident, which tended to prove the defendant was going to make the motorcycle struts two millimeters thicker to prevent the wobble from occurring.[135] The court held that the evidence was properly excluded.[136]

Before making its decision on the applicability of Rule 407, the Seventh Circuit in *Flaminio* considered the views adopted by other circuits.[137] The court disagreed with the assertion that Rule 407 does not apply to strict products liability actions since reference to this type of suit is not contained specifically in the

129. *Id.* at 1066.

130. 1988 WL 90910 (6th Cir. 1988). In this products liability case, plaintiff was injured by defendant's defectively designed ladder. After the accident, the defendant recalled all of the ladders and replaced the defective part. *Id.* at *1. The court of appeals held that the evidence of this subsequent change was properly excluded by the trial court, based on the decision that Rule 407 applied to strict products liability suits. *Id.* at *2.

131. Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984).

132. *Id.*

133. *Id.* at 465.

134. *Id.*

135. *Id.* at 468.

136. *Id.* at 470.

137. *Id.* at 468-69.

rule.[138] The court reiterated the policy of encouraging manufacturers to repair their products.[139] It reasoned that since accidents do not happen very often, some defendants might risk future lawsuits by not repairing the product to avoid the evidence from being used against them in court because the probability of a lawsuit is higher than the probability of another accident.[140] The court further stated that in a products liability case, it is possible that the injury could have been avoided by issuing a stronger warning or curing a defect in the product.[141] If this is true, not applying Rule 407 could wind up dissuading the defendant from making make a much needed change in the product, which would defeat the purpose of Rule 407.[142] Therefore, the court held that Rule 407 is applicable to strict products liability actions.[143]

The Ninth Circuit followed the Seventh Circuit's line of reasoning when it decided *Gauthier v. AMF, Inc.*[144] In *Gauthier*, the court was influenced by the rationale of *Flaminio*, concluding

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138. *Id.* at 469.

139. *Id.*

140. *Id.*

141. *Id.* at 470.

142. *Id.*

143. *Id.* at 469. *See* Probus v. K-Mart, Inc., 794 F.2d 1207 (7th Cir. 1986). In this case the court stated:

> It is also inconsistent with Rule 407 to admit evidence of a change in the plastic end caps to raise the inference that the defendants had recognized the inadequacy of the plastic used at the time the plaintiff purchased the ladder. Accordingly, we hold that the district court did not err in excluding the evidence offered by the plaintiff of the use of another material in the end caps defendants manufactured and sold.

Id. at 1210 (citations omitted).

144. 788 F.2d 634 (9th Cir. 1986). This case involved a products liability cause of action based on defective design. *Id.* at 635. The plaintiff received injuries to his hand when he tried to unclog his snow thrower that was manufactured by the defendant. *Id.* The plaintiff admitted evidence of safety devices utilized on another brand of snow thrower to try and prove defendant's liability. *Id.* at 636. This evidence was apparently utilized to demonstrate subsequent remedial measures to the jury. *Id.* The court held that this evidence should not have been admitted because Rule 407 applies to cases based on strict products liability. *Id.* at 637-38.

that there was no substantial difference between negligence and strict products liability regarding this issue, and the policy of motivating manufacturers to make changes in their products applied to strict products liability.[145] Thus, the court concluded that Rule 407 was applicable to actions based on strict products liability.[146]

The two remaining circuits, the Second and the Fifth, also hold that Rule 407 applies to strict products liability cases, but their reasoning differs from the rest of the circuits. In *Cann v. Ford Motor Co.*,[147] the Second Circuit stated that subsequent warnings and design changes must be looked at in terms of Federal Rule of Evidence 403[148] in order to determine their admissibility at trial.[149] In addition, the court stated that the issue of admissibility of a subsequent design change is directly affected by Rule 407.[150] The court agreed and expanded upon the reasoning in *Werner*.[151] It stated that negligence and strict products liability actions are similar, due to the fact that if the defendant loses, he has to pay, regardless of whether the focus of the case is on the product (as in strict products liability) or on the defendant (as in negligence).[152] Additionally, it stated that the evidence would be

145. *Id.* at 637.

146. *Id.*

147. 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982). This action arose when the plaintiff was injured as a result of a problem with the gear shifting mechanism of a car manufactured by the defendant. The car was put into "park" by one of the plaintiffs, but it then went into reverse and injured the passenger as she was trying to get out of the car. *Id.* at 56. Subsequent to the accident, the defendant changed the design of the transmission and included a warning about the problem in the owner's manual. The trial court would not allow these changes to be presented into evidence at trial. *Id.* at 59. The appellate court affirmed this decision. *Id.*

148. FED. R. EVID. 403. This rule states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

149. *Cann*, 658 F.2d at 59.

150. *Id.*

151. *Id.* at 60.

152. *Id.*

prejudicial to the defendant despite the theory used, and could result in the defendant's failure to take necessary remedial measures to produce a safe product.[153] The court established that strict products liability is encompassed in Rule 407.[154]

The Fifth Circuit in *Grenada Steel Industries, Inc. v. Alabama Oxygen Co.*[155] came to the conclusion that Rule 407 is applicable to strict products liability suits.[156] However, its decision was not based on the common policy reasons advanced by the other circuits.[157] The court, on the other hand, stated that evidence of subsequent remedial measures was not relevant in a product liability action and therefore the rule is applicable.[158] It noted that this evidence had no bearing on whether or not the product had been defective.[159] The Fifth Circuit stated that there was no way for a court to know the reason why a manufacturer changed his product, and the focus of the case instead should be whether the product was defective when it was sold.[160] Evidence from after the accident would only confuse the jury, causing them to focus on what happened after, rather than on what happened prior to the occurrence of the accident.[161] It therefore held that the rule applied to strict products liability actions.[162] This

153. *Id.*

154. *Id. See* Fish v. Georgia Pac. Corp., 779 F.2d 836 (2d Cir. 1985) (holding that a warning given after an event that injured the plaintiff qualified as a subsequent remedial measure as stated in Rule 407 and since the rule includes actions based on strict products liability, the evidence should have been excluded).

155. 695 F.2d 883 (5th Cir. 1983).

156. *Id.* at 888. This case dealt with a products liability suit that arose when a cylinder containing gas provided by the defendant to the plaintiff allegedly containing a defective valve developed a leak and eventually caused a fire and an explosion in the plaintiff's plant. *Id.* at 884-85. The trial court excluded evidence that the defendant eventually stopped making this type of valve and adopted an alternative design instead. *Id.* at 885.

157. *Id.* at 887.

158. *Id.*

159. *Id.*

160. *Id.* at 888.

161. *Id.*

162. *Id.*

holding was affirmed by the Fifth Circuit in *Hardy v. Chemtron Corp.*[163]

Despite the various reasons advanced in favor of the application of Rule 407 to strict products liability actions, it is clear that the majority of the circuits agree with such applications.[164] Since it appears that the Eighth Circuit may embrace the majority view in the near future,[165] the Tenth Circuit might be the only circuit to hold that Rule 407 should not apply to this type of lawsuit.[166]

III. THE NEW YORK RULE

A. Development of the New York Common Law Rule

New York State courts do not follow the Federal Rules of Evidence. The state never legislatively established an evidence rule that specifically deals with the issue of whether subsequent remedial measures should be admissible in products liability cases. New York follows a common law rule that has been established by the New York Court of Appeals.

The Appellate Division, Second Department first faced this issue in *Barry v. Manglass.*[167] The court reiterated the longtime

163. 870 F.2d 1007 (5th Cir. 1989). In this products liability action, the court stated that Rule 407 was applicable to lawsuits based on negligence as well as strict products liability. *Id.* at 1010.

164. *See* cases cited *supra* note 103.

165. *See supra* text accompanying notes 90-99.

166. This is assuming that when the Eleventh and D.C. circuits finally rule on this issue, they will follow the majority's interpretation. The United States District Court for the District of Columbia in *Dine v. Western Exterminating Co.*, stated that it is "persuaded by the majority" even though the issue was not essential to the outcome of the case. 1988 WL 28241 (D. D.C. Mar. 16, 1988).

167. 55 A.D.2d 1, 389 N.Y.S.2d 870 (2d Dep't 1976). In this case, the plaintiff was injured when the car she was a passenger in was struck by a car that went out of control which was manufactured by General Motors and allegedly defective. *Id.* at 3, 389 N.Y.S.2d at 872. After the accident, General Motors sent out two recall letters that were admitted as evidence at trial despite the defense's objection. *Id.* at 4, 389 N.Y.S.2d at 873.

rule that evidence of subsequent remedial measures made by a defendant is inadmissible in cases based on negligence.[168] However, the court also held that the evidence is admissible in products liability actions.[169] It distinguished the two theories of liability by stating that negligence deals with the conduct of the defendant, while products liability deals with the product itself.[170] The court then stated that the rule should not be applied to products liability suits because the conduct of the manufacturer is not at issue in this type of lawsuit.[171] The court also stated that this type of evidence in a products liability case might prove that the product is in fact defective, and therefore is relevant to the case, which may be more important than any bias it may cause the defendant.[172]

The New York Court of Appeals seemed to relax this holding in *Caprara v. Chrysler Corp.*[173] The products liability aspect of this action was submitted to the jury based on the theory that there was a defect in manufacturing.[174] The court, in an opinion written by Judge Fuchsberg, held that evidence of a subsequent change in a product made by a manufacturer was in fact admissible in a strict products liability case involving a manufacturing defect.[175] The court stated that there was an enormous difference between the theories of negligence and strict products liability.[176] It discussed how strict products liability had been adopted to alleviate the plaintiff's burden of proving the

168. *Id.* at 7, 389 N.Y.S.2d at 875.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 10, 389 N.Y.S.2d at 876.

173. 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981). This case, based on theories of products liability and negligence, arose out of a car accident in which the plaintiff was injured as a result of a defect in design and manufacture. *Id.* at 118, 417 N.E.2d at 547, 436 N.Y.S.2d at 252. Evidence of a subsequent design change was admitted into evidence at trial. *Id.* at 119, 417 N.E.2d at 547, 436 N.Y.S.2d at 253.

174. *Id.* at 120, 417 N.E.2d at 548, 436 N.Y.S.2d at 253.

175. *Id.* at 126, 417 N.E.2d at 551, 436 N.Y.S.2d at 257.

176. *Id.*

defendant was aware of the defect.[177] It reasoned that a rule providing for liability without fault was probably not meant to be subjected to another rule that would exclude evidence of subsequent changes in the product which would ultimately be irrelevant to the issue of liability.[178] The court, however, stressed that this decision did not include an answer to the question of whether this kind of evidence would be admissible in a strict products liability action based on a defect in the design of a product.[179]

In *Cover v. Cohen*,[180] New York finally decided the issue of admissibility of subsequent remedial measures in a design defect case.[181] In this case, the New York Court of Appeals held that although this type of evidence was admissible in a strict products liability case based on a manufacturing defect, it was not admissible in such a case based on a design defect or failure to give an adequate warning.[182] The decision was based upon the Appellate Division, Fourth Department's reasoning in *Rainbow v. Albert Elia Building Co., Inc.*[183] The court in *Rainbow* stated that actions based on negligence are similar to strict products liability cases based on a design defect because the issue of whether or not a design was defective is based on an analysis of risk versus utility, which fundamentally turns out to be a negligence test.[184] Therefore, the court in *Cover* held that the exclusionary rule should be applied to strict products liability suits based on design defects.[185]

177. *Id.* at 123-25, 417 N.E.2d at 549-51, 436 N.Y.S.2d at 255-56.

178. *Id.* at 124-25, 417 N.E.2d at 550, 436 N.Y.S.2d at 256.

179. *Id.* at 126, 417 N.E.2d at 551, 436 N.Y.S.2d at 257.

180. 61 N.Y.2d 261, 461 N.E.2d 864, 473 N.Y.S.2d 378 (1984).

181. *Id.*

182. *Id.* at 270, 461 N.E.2d at 868, 473 N.Y.S.2d at 382.

183. 79 A.D.2d 287, 436 N.Y.S.2d 480 (4th Dep't 1981), *aff'd*, 56 N.Y.2d 550, 434 N.E.2d 1345, 449 N.Y.S.2d 967 (1982).

184. *Id.* at 292-93, 436 N.Y.S.2d at 484.

185. *Cover*, 61 N.Y.2d at 270, 461 N.E.2d at 868, 473 N.Y.S.2d at 382.

B. New York Rule in Relation to the Federal Interpretations

The common law rule adopted in New York does not fall within the interpretations of Federal Rule of Evidence 407 advanced by the federal circuits. Rule 407, along with New York's common law rule, states explicitly that evidence of subsequent remedial measures is not admissible at trial to prove the negligence or culpable conduct of a defendant.[186] When deciding whether or not the rule applies to actions based on strict products liability, neither the majority nor the minority of the circuit courts distinguished between cases based on a design defect and cases based on a manufacturing defect. The majority of circuits have decided that Rule 407 applies to all strict products liability cases[187] and the minority have decided that the rule is inapplicable to all cases based on a theory of strict products liability.[188] New York, however, holds that subsequent remedial measures are admissible in manufacturing defect cases[189] and inadmissible in design defect cases.[190] Moreover, this distinction made by the New York courts does not seem to fall in line with the policy reasons for the enactment of Rule 407. If the main purpose behind Rule 407 is to encourage manufacturers to change and improve their products, it seems likely that they will refrain from making these changes if the changes can be used against them by a plaintiff at trial. The manufacturers will not be concerned with distinguishing what type of action is being brought against them. Rather, they will simply decline to make the changes for fear that it will be used to prove their liability. The best interpretation of Rule 407, if the policies for Rule 407 are to be advanced, is that Rule 407 should apply to actions based on strict products liability, in order to prevent evidence of subsequent remedial measures from being admitted at trial.

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186. *See supra* note 1.
187. *See* cases cited *supra* note 103.
188. *See supra* text accompanying notes 72-89.
189. *See supra* text accompanying note 175.
190. *See supra* text accompanying note 182.

CONCLUSION

There is clearly a split in the federal circuit courts concerning whether Federal Rule of Evidence 407 is applicable to cases based on strict products liability, which would exclude evidence of remedial measures taken by a defendant after an accident, from being admitted at trial. The majority, consisting of eight circuits, hold that Rule 407 is applicable to these types of actions.[191] The minority, consisting of two circuits, hold that Rule 407 does not apply in these situations.[192] New York, however, holds that the evidence is admissible in strict products liability actions based on manufacturing defects but is inadmissible in the same type of action based on design defects.[193] While it might seem that each federal circuit and each state is entitled to adopt its own determination as to which interpretation or which rule to follow, a problem does arise as a result of this vast array of decisions. It is quite possible that these different interpretations could lead to forum shopping on the part of the plaintiff, as well as the defendant, when a suit of this nature is commenced. The plaintiff may bring the suit in one court because the law followed by that court states that the evidence is allowable. The defendant might then try to remove or transfer the case to a court that does not permit admission of this evidence. A waste of judicial time and resources as well as confusion would result in deciding these threshold issues. A possible solution to this possible dilemma would be the creation of a uniform rule that state as well as federal courts could adopt. However, since 1974, there has yet to be a uniform principal established by the courts regarding this issue, and as such it appears that the split will remain.

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191. *See supra* text accompanying notes 103-63.
192. *See supra* text accompanying notes 72-89.
193. *See supra* text accompanying notes 173-85.