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ARTICLES

SUBSEQUENT REMEDIAL CONTRACTUAL MEASURES: THE CASE FOR APPLYING RULE 407'S BAR ON SUBSEQUENT REMEDIAL MEASURES IN BREACH OF CONTRACT CLAIMS

Benjamin Sheppard

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I. INTRODUCTION

Imagine you are preparing a new insurance coverage agreement for 2020 effective April 1, 2020.[1] One exclusion provision from the 2019 policy in particular stands out to you. It is the microorganism exclusion, which bars coverage for losses "directly or indirectly arising out of or relating to: mold, mildew, fungus, spores, or other microorganisms of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health."[2] Reviewing this exclusion provision, you believe in light of the COVID-19 pandemic it should be made crystal-clear that it includes viruses. Therefore, you add an exclusion for "losses attributable to any communicable disease, including viruses," to the new 2020 policy.[3]

As you weather the COVID-19 pandemic, your business begins to experience litigation over your insurance policy. Your policyholders expect the 2019 agreement to cover losses attributable to the COVID-19 pandemic.[4] To support said position, one plaintiff argues your addition of the communicable diseases exclusion in the 2020 policy supports their position that the 2019 policy covers losses attributable to the COVID-19 pandemic.[5] Yet, you know this added language was only meant to clarify future policies, *not* show that the 2019 policy covered losses attributable to the COVID-19 pandemic. Whether a federal court will admit this evidence depends on the circuit in which it sits.[6]

Federal courts are divided on whether Rule 407, which bars evidence of subsequent remedial measures, applies to modified language in contractual agreements.[7] The majority approach applies Rule 407 to contract cases because such disputes apply under the plain meaning of Rule 407 and implicate its policy goals.[8] On the other hand, a minority of circuits do *not*

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[1] Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co., No. 21-1316, 2021 U.S. App. LEXIS 36396, at *4 (7th Cir. Dec. 9, 2021).

[2] *Id.* at *4–5.

[3] *Id.* at *4.

[4] *See id.* at *2–5.

[5] *Id.* at *13–14.

[6] Memorandum from Daniel J. Capra, Philip Reed Professor of L., Fordham Univ. Sch. of L., to Advisory Comm. on Evidence Rules (Apr. 1, 2021).

[7] *See id.*

[8] *See* discussion *infra* Section III.A.

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apply Rule 407 to contract cases because Rule 407 is written with tort-based language and the policy goals of Rule 407, such as preventing future injuries, are in their opinion not implicated in contract disputes.[9]

This Article argues the majority approach, that Rule 407 applies in breach of contract cases, is the correct application for future courts to apply when tasked with this matter. Following this introductory Part I, this Article proceeds in four parts. Part II introduces the reader to Rule 407 by explaining the Rule's history, application, and policy goals. Part III explores the split among federal courts regarding Rule 407's applicability to contract cases. This portion articulates the rationale for both the majority and minority approaches to Rule 407 in breach of contract disputes. Part IV argues for the majority approach. The majority approach applies the plain-meaning approach to Rule 407's text and fulfills the Rule's policy objective.[10] Part V displays how the Federal Rules of Evidence could be amended to conclusively adopt the majority approach for all future contract cases in the federal court system.

II. PRECEDING REMEDIAL HISTORY, APPLICATION, AND INTENT: A PRIMER ON RULE 407

Rule 407's objective is to incorporate the traditional common law exclusionary rule concerning subsequent remedial measures.[11] This section

[9] *See* discussion *infra* Section III.B.

[10] *See* discussion *infra* Section III.A.

[11] Albrecht v. Balt. & Ohio R.R. Co., 808 F.2d 329, 331 (4th Cir. 1987) ("Federal Rule of Evidence 407 enacted the common law rule excluding subsequent remedial measures to prove negligence, with certain exceptions."); Hyjek v. Anthony Indus., 944 P.2d 1036, 1037 (Wash. 1997) ("[Federal Evidence Rule 407] codifies the common law doctrine which excludes evidence of subsequent remedial measures as a proof of an admission of fault."); Irene W. Bruynes, *Strict Liability and the Admissibility of Evidence of Subsequent Remedial Measures Under Evidence Rule 407*, 5 ALASKA L. REV. 333, 333 (1988) ("The Federal Rules of Evidence codified the common law position."); Thais L. Richardson, *The Proposed Amendment to Federal Rule of Evidence 407: A Subsequent Remedial Measure That Does Not Fix the Problem*, 45 AM. U. L. REV. 1453, 1454 (1996) ("Federal Rule of Evidence 407 is the codification of the common-law rule that excludes evidence of subsequent remedial measures as proof of an admission of fault."); Brian C. McManus, *Admissibility of Evidence of Subsequent Remedial Measures in Strict Liability Some State Courts Fail to Follow Federal Rule 407 That This Evidence Is Just as Irrelevant in Strict Liability as in Negligence Actions*, 70 DEF. COUNS. J. 240, 241 (2003) ("In 1975, Federal Evidence Rule 407 codified the common law exclusionary rule in the federal courts."); Jason Drori, *Using Subsequent Remedial Measures to Help Satisfy Problematic Causation Requirements in Toxic Torts Cases*, 10 SUFFOLK J. TRIAL & APP. ADVOC. 69, 73 (2005) ("Rule 407 embodied the post-*Hawthorne*

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briefly examines the common law origins of the rule, the statutory evolution of Rule 407, and the policy rationale underlying the exclusion of subsequent remedial measures.

A. The History of Federal Rule 407

The common law doctrine excluding subsequent remedial measures was first adopted by English courts in the mid-nineteenth century.[12] In 1869, Baron Bramwell of the English Court of Exchequer laid the Rule's foundation when he wrote:[13]

> People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before.[14]

The English exclusion of subsequent remedial measures gradually migrated to U.S. courts in the mid to late nineteenth century.[15] By the late nineteenth century, the doctrine became a well-settled rule in American law.[16] In 1892, the U.S. Supreme Court solidified Rule 407's acceptance in

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common law doctrine, serving as an exclusionary umbrella that bars evidence such as subsequent installation of safety devices, a change in company regulations and practice, or discharge of employees.").

[12] Mark G. Boyko & Ryan G. Vacca, *Who Knew? The Admissibility of Subsequent Remedial Measures When Defendants Are Without Knowledge of the Injuries*, 38 MCGEORGE L. REV. 653, 654 (2007) ("The genesis of the subsequent remedial measures rule is a decision from an English court in 1869."); Arnold S. Rosenberg, *Motivational Law*, 56 CLEV. ST. L. REV. 111, 123 (2008) ("[T]he rule of evidence law making evidence of subsequent remedial measures inadmissible in tort cases to prove negligence or culpability originated in the English chancery courts. . . .").

[13] Seaside Resorts, Inc. v. Club Car, Inc., 416 S.E.2d 655, 661 n.2 (S.C. Ct. App. 1992); Leliefeld v. Johnson, 659 P.2d 111, 133 (Idaho 1983) (J. Bilstine, dissenting in part); Joseph A. Hoffman & George D. Zuckerman, *Tort Reform and Rules of Evidence: Saving the Rule Excluding Evidence of Subsequent Remedial Actions*, 22 TORT & INS. L.J. 497, 498–99 (1987).

[14] Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R N.S. 261, 263 (1869).

[15] Jaime A. Walker, *Taking Remedial Measures to Amend Maryland Rule of Evidence 5-407 to Explicitly Apply to Products Liability Actions*, 31 U. BALT. L. REV. 137, 140 (2001) ("English courts adopted the doctrine in 1869, and soon thereafter American courts embraced the practice of excluding evidence of subsequent remedial measures.").

[16] *E.g.*, Nalley v. Hartford Carpet Co., 51 Conn. 524 (Conn. 1884); Hodges v. Percival, 23 N.E. 423 (Ill. 1890); Terre Haute & Indianapolis Ry. v. Clem, 23 N.E. 965 (Ind. 1890); Shinners v. Proprietors of Locks & Canals, 28 N.E. 10 (Mass. 1891); Lombar v. E. Tawas, 48 N.W. 497 (Mich. 1891); Morse v. Minneapolis & St. Louis Ry., 16 N.W. 358 (Minn. 1883); Corcoran v. Peekskill, 15 N.E. 309 (N.Y. 1888); Ely v. St. Louis, Kan. City & N. Ry., 77 Mo. 34 (Mo. 1882); Mo. Pac. Ry. v. Hennessey, 12 S.W. 608

American law with *Columbia & Puget Sound Railroad Co. v. Hawthorne*.[17] In *Hawthorne*, the plaintiff sued a sawmill operator after a pulley fell on the plaintiff, and to prove negligence, sought to introduce evidence that the defendant altered the machinery after the accident to prevent the pulleys from falling.[18] The Court held that the plaintiff's evidence of defendant's subsequent remedial measures was irrelevant because "taking . . . precautions against the future is not to be construed as an admission of responsibility for the past."[19] Moreover, the Court also rejected such evidence because it exposed the defendant to unfair prejudice by creating juror confusion of the issues.[20] Following the Supreme Court's decision in *Hawthorne*, the common law began routinely excluding subsequent remedial measures in negligence cases.[21]

B. Adoption of Federal Rule 407

Throughout the nineteenth and much of the twentieth century, there were no successful statutory attempts to codify the rule against subsequent

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(Tex. 1889); *but see* St. Louis & S.F. Ry. Co. v. Weaver, 11 P. 408, 419 (Kan. 1886) (admitting evidence of subsequent remedial measures); W.E. Brumby III et al., Note, *Evidence of Subsequent Remedial Measures in Products Liability Actions: Recent Conflict in the Circuit Courts*, 35 MERCER L. REV. 1389, 1390 (1984); Brian Fielding, *Rhode Island's 407 Subsequent Remedial Measure Exception: Why It Informs What Goes Around Comes Around in Restatements (Second) & (Third) of Torts, and a Modest Proposal*, 14 ROGER WILLIAMS U. L. REV. 298, 308 n.49 (2009) ("Although a few American courts initially resisted the doctrine, it was eventually accepted in every state except Kansas and South Dakota.").

[17] *See* Tuer v. McDonald, 701 A.2d 1101, 1105 (Md. 1997); Victor E. Schwartz et al., *Respirators to the Rescue: Why Tort Law Should Encourage, Not Deter, the Manufacture of Products that Make Us Safer*, 33 AM. J. TRIAL ADVOC. 13, 22 (2009) ("In 1892, the Supreme Court solidified the rule's place in American law, holding that a subsequent alteration or repair by a defendant is not competent evidence of negligence.").

[18] Columbia & P.S.R. Co. v. Hawthorne, 144 U.S. 202, 202–04 (1892).

[19] *Id.* at 207.

[20] *Id.* at 207–08 (citing *Morse*, 16 N.W. at 359).

[21] Brent R. Johnson, *The Uncertain Fate of Remedial Evidence: Victim of an Illogical Imposition of Federal Rule of Evidence 407*, 20 WM. MITCHELL L. REV. 191, 199 (1994); Michael W. Blanton, Comment, *Application of Federal Rule of Evidence 407 in Strict Products Liability Cases: The Evidence Weighs Against Automatic Exclusion*, 65 UMKC L. REV. 49, 55 (1996); *e.g.*, Atchison, T. & S. F. R. Co. v. Parker, 55 F. 595, 597 (8th Cir. 1893); Barber Asphalt Pav. Co. v. Odasz, 60 F. 71, 73 (2d Cir. 1894); Motey v. Pickle Marble & Granite Co., 74 F. 155, 159 (8th Cir. 1896) ("[A] rule that [evidence of subsequent remedial measures] is competent would impose a penalty upon the master for making such repairs and changes, would constitute them a confession on his part of a prior wrong, and would thus deter him from improving his machinery and his methods.").

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remedial measures.[22] Despite earlier attempts to codify a uniform evidentiary standard, only one came to universal acceptance in the 1970s.[23] That uniform standard only fully blossomed after two long years in various congressional committees and subcommittees when Congress submitted the Federal Rules of Evidence for President Gerald R. Ford's approval.[24] On January 2, 1975, President Ford signed the Federal Rules of Evidence into law, effective July 1, 1975.[25]

Congress's primary motivation for codifying a uniform federal evidentiary standard was accessibility.[26] Before the codification of the Federal Rules of Evidence, evidentiary rules were governed by common law principles that were an accumulation of confusing and often contradictory rules.[27] However, the new Federal Rules of Evidence reformed the confusing and contradictory common laws into a set of only sixty-three condensed and comprehensible rules.[28] As Professors Christopher B. Mueller & Laird Kirkpatrick elegantly described, the new rules were "printed in a small book easily carried to court, quickly perused and readily understandable."[29]

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[22] Blanton, *supra* note 21, at 55.

[23] *Id.*; William J. Horvath, Note, *No More Splitting: Using a Factual Inquiry to Determine Similar Motive Under Federal Rule of Evidence 804(B)(1)*, 45 VAL. U. L. REV. 157, 162 n.24 (2010).

[24] Jon R. Waltz, *The New Federal Rules of Evidence: An Overview*, 52 CHI.-KENT L. REV. 346, 348–49 (1975) (chronicling the progression of the Federal Rules of Evidence through Congress); Joseph Norena, *The Tendency to See Propensity: How Admitting Defendant-Authored Rap Lyrics as Evidence of Motive or Intent Can Look Like Inadmissible Character Evidence*, 22 U. DENV. SPORTS & ENT. L.J. 147, 157–58 (2019).

[25] John Melvin, *What Are the Chances? A Response to Professor Milich's View of 404(b)*, 9 J. MARSHALL L.J. 40, 82 (2016); Mark I. Bernstein, *Jury Evaluation of Expert Testimony Under the Federal Rules*, 7 DREXEL L. REV. 239, 261 (2015) ("[After Ford's signing of the law] the original revolutionary changes, as proposed by Wigmore decades earlier, were adopted.").

[26] *See* Leslie A. Lunney, *Protecting Juries from Themselves: Restricting the Admission of Expert Testimony in Toxic Tort Cases*, 48 SMU L. REV. 103, 115 (1994); Daniel R. Murray & Timothy J. Chorvat, *State Gladiators Go High Tech with Records—Will the Feds Follow?*, 54 OKLA. L. REV. 573, 573 (2001) ("The adoption of the Federal Rules of Evidence in 1975 represented a major advance, ensuring that a uniform and predictable set of principles would govern the admission of evidence in federal courts throughout the United States.").

[27] *See* Maureen A. Howard & Jeffery C. Barnum, *Bringing Demonstrative Evidence in from the Cold: The Academy's Role in Developing Model Rules*, 88 TEMP. L. REV. 513, 524 (2016); *see Development in the Law—Privileged Communication: I. Introduction: The Development of Evidentiary Privileges in American Law*, 98 HARV. L. REV. 1454, 1461 (1985).

[28] David Wadsworth, Forma Scientific v. Biosera *and the Admissibility of Evidence of Subsequent Remedial Measures in Strict Products Liability Actions*, 71 U. COLO. L. REV. 757, 762 (2000).

[29] CHRISTOPHER B. MUELLER & LAIRD KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS § 1.2 (5th ed. 2018).

The Rule remained unchanged for over twenty years until 1997.[30] In 1997, the Supreme Court amended the Rule to include cases in which "negligence or culpable conduct" are not necessary elements, such as products liability.[31] The 1997 amendment resolved a circuit split favoring the majority of circuits that held the rule applied in products liability actions.[32] Today, Rule 407 reads as follows:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> • negligence;
>
> • culpable conduct;
>
> • a defect in a product or its design; or
>
> • a need for a warning or instruction.
>
> But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.[33]

The first sentence of Rule 407 excludes evidence of repairs, safety precautions, or modifications taken after a harm or breach causing "event."[34] It prohibits the use of such evidence to prove that the defendant was "negligent" or "culpable" for not having taken such precautions before the injury causing "event."[35] Rule 407's current language is broader than previous exclusionary rules.[36] At common law, the rule was typically phrased

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[30] *See* Eileen A. Scallen, *Proceeding with Caution: Making and Amending the Federal Rules of Evidence*, 36 SW. U. L. REV. 601, 610 (2008).

[31] *See* Harley D. Caudle, *Plaintiffs' Attorneys v. Common Sense: Applicability of Arkansas Rule of Evidence 407 in Strict Liability*, 61 ARK. L. REV. 91, 92 (2008); Alan J. Lazarus et al., *Recent Developments in Products, General Liability, and Consumer Law*, 33 TORT & INS. L.J. 605, 616 (1998) ("[T]he rule as amended will expressly apply to strict products liability cases. . . .").

[32] Ralph Ruebner & Eugene Goryunov, *A Proposal to Amend Rule 407 of the Federal Rules of Evidence to Conform with the Underlying Relevancy Rationale for the Rule in Negligence and Strict Liability Actions*, 3 SETON HALL CIR. REV. 435, 437 (2007) ("Additionally, the 1997 amendment adopted the predominant judicial view that Rule 407 also applies to exclude subsequent remedial measures in strict product liability cases."). *Compare* Donahue v. Phillips Petrol. Co., 866 F.2d 1008, 1013 (8th Cir. 1989) (holding Rule 407 does not apply to products liability), *with* Chase v. Gen. Motors Corp., 856 F.2d 17, 22 (4th Cir. 1988) (holding Rule 407 applies to products liability).

[33] FED. R. EVID. 407.

[34] *Id.*

[35] *Id.*

[36] Blanton, *supra* note 21, at 57.

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to include only subsequent "repairs."[37] Consequently, courts applied Rule 407 to cover the following varied actions: changed policies or procedures,[38] placing new warnings or instructions on products,[39] conducting disciplinary hearings,[40] modifying designs,[41] and altering regulations.[42]

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[37] *Id.* at 56.

[38] Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1567–68 (11th Cir. 1991) (after accident in which sliding glass door shut crushed plaintiff's foot, later practice of keeping door open excluded); Stahl v. Bd. of Comm'rs, 244 F. Supp. 2d 1181, 1188 (D. Kan. 2003) (evidence physical fitness requirement suspension after plaintiff filed a gender discrimination lawsuit excluded on 407 grounds); Rollins v. Bd. of Governors for Higher Educ., 761 F. Supp. 939, 942 (D.R.I. 1991) (holding board inquiry investigation in response to plaintiff's injury that made recommendations and proposed procedure changes to prevent future injuries inadmissible as subsequent remedial measure); Luera v. Snyder, 599 F. Supp. 1459, 1463 (D. Colo. 1984) (refusing to admit subsequent remedial measure of changed police department policies following incident that gave rise to plaintiff's civil rights lawsuit); Alimenta (U.S.A.), Inc. v. Stauffer, 598 F. Supp. 934, 940 (N.D. Ga. 1984) (finding inadmissibility where plaintiff sought to introduce third-party report suggesting defendant change policies and procedures to prevent future breaches of fiduciary duties).

[39] Yates v. Ortho-McNeil-Janssen Pharms., Inc., 808 F.3d 281, 292 (6th Cir. 2015) (finding inadmissible subsequent remedial measure where defendant modified a birth control warning label to include risk of stroke); Rosa v. TASER Int'l, Inc., 684 F.3d 941, 948 (9th Cir. 2012) (finding 2009 warning not admissible to prove what was known in 2003); *In re* Joint E. Dist. & S. Dist. Asbestos Litig., 995 F.2d 343, 345 (2d Cir. 1993) (new warnings on asbestos product); Haynes v. Am. Motors Corp., 691 F.2d 1268, 1272 (8th Cir. 1982) (publication of revised owner's manual with information that could have prevented plaintiff's injury excluded because it was a subsequent remedial measure); Cann v. Ford Motor Co., 658 F.2d 54, 59 (2d Cir. 1981) (change in owner's manual advising to turn off ignition before leaving car excluded).

[40] Nolan v. Memphis City Schs, 589 F.3d 257, 273–74 (6th Cir. 2009) (refusing to permit testimony that principal and coach were no longer assigned to teaching duties on Rule 407 grounds); Wanke v. Lynn's Transp. Co., 836 F. Supp. 587 (N.D. Ind. 1993) (finding inadmissible subsequent remedial measure where plaintiff sought to introduce evidence defendant terminated their injury-causing driver); Specht v. Jensen, 863 F.2d 700, 701–02 (10th Cir. 1988); Bullock v. BNSF Ry. Co., 399 P.3d 148, 157 (Kan. 2017) ("So like the panel, we conclude from the federal caselaw addressing the similar Rule 407 that evidence of post-accident employee discipline is a subsequent remedial measure prohibited by K.S.A. 60-451 when offered to show negligence or culpable conduct.").

[41] Benedict v. Zimmer, Inc., 405 F. Supp. 2d 1026, 1035–36 (N.D. Iowa 2005) (modified hip replacement device not admissible to prove prior device had a design defect); Hardy v. Chemetron Corp., 870 F.2d 1007, 1010–11 (5th Cir. 1989) (altered wiring in bacon slicer so safety features would disable motors preventing future injuries not admissible); Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221, 1229 (5th Cir. 1984) (modifications to skip hoist after plaintiff's injury not admissible under Rule 407); Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991) (modifications of sideloader inadmissible); Billiot v. Elevating Boats, Inc., No. 92-2100, 1993 WL 414641 (E.D. La. Oct. 7, 1993) (holding defendant's redesign of a boat's winch inadmissible because it was a subsequent remedial measure).

[42] First Sec. Bank v. Union Pac. R.R. Co., 152 F.3d 877, 881 (8th Cir. 1998) (directing employees to aggressively enforce regulations inadmissible as a subsequent remedial measure); SEC v. Geon Indus., Inc., 531 F.2d 39, 52 (2d Cir. 1976) (holding new regulation concerning brokerage practices inadmissible under Rule 407).

The second sentence enumerates certain exceptions if such evidence is offered for a legitimate purpose other than to prove the defendant's culpability.[43] First, the rule provides for the admission of subsequent remedial measures for purposes of impeaching witnesses or testimony.[44] If a defendant were to assert that all reasonable care was exercised at the time of the injury, the plaintiff may impeach the defendant's testimony by proffering evidence of subsequent remedial measures.[45] Second, the rule carves out an exception for proving that the defendant had control or ownership of the instrument or premises that caused the plaintiff's injury.[46] For example, in *Clausen v. Sea-3, Inc.*, the First Circuit Court of Appeals admitted evidence that the defendant replaced a ramp after a fall to show the defendant controlled the ramp when ownership was disputed.[47] Third, a subsequent remedial measure may be admitted where the defendant denies such a precaution was actually feasible.[48] Thus, the exception applies where a defendant asserts the design is the safest possible, could not have been made safer, or had to be designed in a particular way.[49]

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[43] *See* FED. R. EVID. 407.

[44] *Id.*

[45] *E.g.*, *In re* Air Crash Disaster, 86 F.3d 498, 531 (6th Cir. 1996) ("Moreover, Rule 407 does not preclude evidence of subsequent measures offered for purposes of impeachment."); Pitasi v. Stratton Corp., 968 F.2d 1558 (2d Cir. 1992) (holding subsequent remedial measure involving closure of dangerous ski trail entrance that caused plaintiff's injuries admissible for the limited purpose of impeachment when defendant testified the trail's dangers were so obvious there was no need for any signs, ropes, or warnings); *but see* Kelly v. Crown Equip. Co., 970 F.2d 1273, 1278 (3d Cir. 1992) (evidence of subsequent remedial design changes not admissible to impeach defendant's testimony that forklift design was excellent and proper but did *not* testify design was the best or only design available).

[46] FED. R. EVID. 407.

[47] Clausen v. SEA-3, Inc., 21 F.3d 1181, 1191 (1st Cir. 1994); Ginsburg v. City of Ithaca, 5 F. Supp. 3d 243, 249 (N.D.N.Y. 2014); Doyle v. United States, 441 F. Supp. 701 (D.S.C. 1977); Hull v. Chevron U.S.A., Inc., 812 F.2d 584, 587 (10th Cir. 1987) (refusing to admit subsequent remedial measure where control of forklift was not in dispute); Specialty Prods. Int'l., Ltd. v. Con-Way Transp. Servs., Inc., 410 F. Supp. 2d 423, 428 (M.D.N.C. 2006) (requiring actual dispute concerning control or ownership).

[48] *See* FED. R. EVID. 407; John Blakely Low, *Federal Rule of Evidence 407 and Strict Products Liability—The Rule Against Subsequent Repairs Lives on*, 48 J. AIR L. & COM. 887, 902 (1983).

[49] *E.g.*, McGaughey v. City of Chicago, 84 C 10546, 1987 WL 12213 (N.D. Ill. Mar. 18, 1987) (admitting evidence of altered police department fingerprinting practices after plaintiff's injury because the defendant disputed the feasibility of such remedial measures); Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1020 (9th Cir. 1985) (admitting altered instructions when defendant testified in a copyright action that defendant's instruction had to be the same as the plaintiff's because of lack of feasible alternatives); Grenada Steel Indus., Inc. v. Ala. Oxygen Co., Inc., 695 F.2d 883 (5th Cir. 1983), *reh'g denied*, 699 F.2d 1163 (5th Cir. 1983) (admitting evidence of differently designed model when defendant disputed plaintiff's experts suggestion an alternative design was feasible); Alvarez v. Gulf Oil

C. Policy Rationale Behind Rule 407

Courts and commentators generally justify Rule 407's existence on three distinct policy objectives.[50] First, the exclusion of subsequent remedial measures is based on general relevance considerations.[51] Second, Rule 407 furthers the policy goal of encouraging people to undertake repairs, which justifies the Rule's existence.[52] Third, the exclusionary rule helps eliminate potential jury confusion and unfair prejudice that may result if such evidence was admitted.[53]

1. Low Probative Value

Evidence that a defendant engaged in remedial measures after an injury occurred has a low probative value regarding the defendant's negligence or culpability.[54] The mere fact that a defendant made subsequent remedial

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Corp., 84-325 CMW 1985 WL 6282 (D. Del. Aug. 19, 1985) (holding feasibility exception inapplicable to plaintiff's evidence of repainted vessel steps after injury because the defendant never contested the feasibility of repainting the steps).

[50] *E.g.*, Erin G. Lutkewitte, *A Problem in Need of Repair: Louisiana's Subsequent Remedial Measures Rule*, 67 LA. L. REV. 195, 196–97 (2006).

[51] Eleanor Swift, *Rival Claims to "Truth,"* 49 HASTINGS L.J. 605, 611 n.21 (1998) ("These rules of exclusion are also justified by the low probative value of some of the excluded admissions. At least for repairs and offers to pay expenses, probative value may be low because of the ambiguity of the essential inference from the party's statement or conduct to the party's belief in his or her guilt or fault."); Arthur A. Best & W. Matthew Pierce, *The Incongruous Relationship Between Federal Rule of Evidence 407 and the Restatement (Third) of Torts Products Liability Elements of Proof*, 91 DENV. U.L. REV. ONLINE 61, 62 (2014) ("[B]ehavior subsequent to an injury has low probative value about conditions prior to the injury.").

[52] Williams v. BNSF Ry. Co., 359 P.3d 158, 161 (N.M. App. 2015) ("One basic purpose of Rule 11–407 is to encourage a party to make repairs or modifications after an accident by removing the threat of legal liability for doing so."); Jane A. Wilson, *VI. Evidence*, 45 MD. L. REV. 765, 772 (1986) ("To encourage repairs and safety improvements, evidence of those acts should not be treated as implied admissions of prior negligence or culpability."); Carol Brass, *A Proposed Evidentiary Privilege for Medical Checklists*, 2010 COLUM. BUS. L. REV. 835, 872 (2010) ("Admitting evidence of the subsequent remedial measures would discourage the owner from undertaking those measures, leaving the safety hazard in place and endangering the public's safety.").

[53] Thakore v. Universal Mach. Co. of Pottstown, 670 F. Supp. 2d 705, 712 (N.D. Ill. 2009); Craig A. Livingston & John C. Hentschel, *Finding Fault with Ault—Why the Exclusion of Subsequent Design Change Evidence in Product Liability Cases Makes Sense, Even in California*, 78 DEF. COUNS. J. 285, 289 (2011).

[54] McCarthy v. 390 Tower Associates, LLC, 800 N.Y.S.2d 875, 881 (N.Y. Sup. Ct. 2005); State v. Martin, 944 A.2d 867, 883 (Vt. 2007) ("Indeed, the potential for confusion in evidence of remedial measures is recognized because of their potential for unfair prejudice and low probative value.");

measures is not probative of wrongdoing.[55] A jury's determination of a defendant's culpability should be determined "according to what the defendant knew or should have known prior to the accident, not what the defendant knew as a result of the accident."[56] Therefore, changes made after an injury, or establishment of a cause of action, are not probative of the defendant's conduct prior to the plaintiff's injury.[57]

2. Policy Reasons Encouraging Repairs

The primary reason behind the exclusion of subsequent remedial measures is to encourage defendants to make corrective repairs to prevent future accidents.[58] Both courts and commentators believe such evidence

McFarland v. Bruno Mach. Corp., 626 N.E.2d 659, 661 (Ohio 1994) ("[S]ubsequent remedial measures is thought to have minimal or nonexistent probative value in establishing negligence."); Robert G. Lawson, *Modifying the Kentucky Rules of Evidence—A Separation of Powers Issue*, 88 KY. L.J. 525, 581 (2000) ("[Rule 407] seeks to promote fact-finding accuracy by excluding evidence thought to have low probative value."); *but see* Jerome A. Hoffman, *Res Gestae's Children*, 47 ALA. L. REV. 73, 93 (1995) ("Evidence of subsequent remedial measures must have some probative value in addition to the tempting, but categorically impermissible, inference that, because the defendant remedied a defect after an accident, he was negligent in failing to do so beforehand.").

[55] Cech v. State, 598 P.2d 584 (Mont. 1979), *on reh'g*, 604 P.2d 97 (Mont. 1979); Duchess v. Langston Corp., 769 A.2d 1131, 1134 (Pa. 2001) ("[S]ubsequent repairs are not relevant, as they may be occasioned by a new and potentially different set of circumstances and/or corresponding duties prevailing at the later time."); Anthony Longo, *In Defense of* Bulger v. CTA *A Defense Lawyer's Perspective on the Bulger Court's Finding that Evidence of Subsequent Remedial Measures Is Not Admissible Against a Defendant*, 94 ILL. B.J. 254, 255 (2006) ("[E]vidence of subsequent remedial measures is not probative of prior negligence, as later carefulness may simply be an attempt to exercise the highest standard of care."); *Rule 407: Subsequent Remedial Measures*, 12 TOURO L. REV. 425, 426 (1996) ("[E]vidence of a subsequent repair is of little probative value, since the repair may not be an admission of negligence and may not necessarily demonstrate a lack of due care.").

[56] C. Bowman Fetzer, Jr., *Navigating Through the Variations and Admissibility of Conduct Required to Support Punitive Damages at Sea*, 13 LOY. MAR. L.J. 27, 48 (2014) (quoting Adams v. Chevron USA, Inc., 383 F. App'x 447, 452 (5th Cir. 2010)); *see also* Greene v. Sibley, Lindsay & Curr Co., 177 N.E. 416, 417 (N.Y. 1931) (opinion by Cardozo J.) (explaining a defendant's conduct must be judged in the light of the possibilities apparent at the time, and not by looking backward "with the wisdom born of the event.").

[57] Hall v. Burns, 569 A.2d 10, 19 (Conn. 1990); Walker, *supra* note 15, at 143; Jennifer Wimsatt Pusateri, *It Is Better to Be Safe When Sorry: Advocating a Federal Rule of Evidence that Excludes Apologies*, 69 U. KAN. L. REV. 201, 237 (2020).

[58] McFarland v. Bruno Mach. Corp., 626 N.E.2d 659, 661 (Ohio 1994) ("[Excluding evidence of subsequent remedial measures] is based on the social policy of encouraging repairs or corrections."); Wusinich v. Aeroquip Corp., 843 F. Supp. 959, 961 (E.D. Pa. 1994) ("The public policy behind Federal Rule of Evidence 407 is to encourage manufacturers to make improvements for greater safety."); Yardman v. San Juan Downs, Inc., 906 P.2d 742, 749 (N.M. App. 1995) ("One of the basic purposes of [the rule

would discourage safety precautions if defendants feared subsequent remedial measures could be used as an admission of fault or for liability.[59] The rule excluding such evidence encourages people to take remedial measures without fear of adverse consequences.[60] However, some commentators have questioned the soundness of this rationale, explaining defendants would likely fix things anyway out of fear of additional injuries or greater liability.[61] Nonetheless, this justification is one oft-cited reason why courts exclude subsequent remedial measures under Rule 407.[62]

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excluding subsequent remedial measures] is to encourage a party to initiate and implement steps to promote safety by removing the disincentive to make repairs or modifications following an accident."); Annie Soo Yeon Ahn, *Friendly Limiting Instructions*, 52 U.S.F. L. REV. 353, 354 (2018) ("[The exclusion of subsequent remedial measures is] to encourage individuals to take measures to improve product safety.").

[59] Hallmark v. Allied Prods. Corp., 646 P.2d 319, 325 (Ariz. Ct. App. 1982) ("The rationale . . . is that people in general would be less likely to take subsequent remedial measures if their repairs or improvements would be used against them in a lawsuit arising out of a prior accident. By excluding this evidence, defendants are encouraged to make such improvements."); *McFarland*, 626 N.E.2d at 661 ("The argument behind this policy reason is that a defendant would be less likely to take subsequent remedial measures if the repairs or corrections could be used as evidence against the defendant at trial."); Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423, 458 (2015) ("The suppression of potentially probative evidence serves to motivate firms and individuals to improve safety without fear that the introduced improvement will be used in court as an implicit admission of fault or responsibility for the accident."); R. Collin Mangrum, *Nebraska's Evidentiary Rules on Relevancy*, 29 CREIGHTON L. REV. 119, 195 (1995) ("From an efficiency or public interest perspective, if [subsequent remedial measures] are admissible, then actors may avoid taking such measures in fear of increasing the costs associated with possible litigation."). *But see* Laura B. Grubbs, Note, *Something's Gotta Give: The Conflict Between Evidence Rule 407 and the Feasible Alternative Design Requirement*, 45 BRANDEIS L.J. 781, 789, 793–94 (2007) (questioning the soundness of excluding subsequent remedial measures); Michele B. Colodney, *Federal Rule of Evidence 407 As Applied to Products Liability: A Rule in Need of Remedial Measures*, 48 U. MIAMI L. REV. 283, 317–20 (1993) (questioning the policy rationale concerning Rule 407).

[60] *See* John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1250 (2006).

[61] *E.g.*, Aviva Orenstein, *Apology Excepted: Incorporating A Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. UNIV. L. REV. 221, 222–23, 230–33 (1999) (questioning the soundness of Rule 407 under a feminist analysis).

[62] *E.g.*, Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984) ("A major purpose of Rule 407 is to promote safety by removing the disincentive to make repairs."); Douglas McKeige, Note, *Federal Rule of Evidence 407: Can It Override Conflicting State Law?*, 59 TUL. L. REV. 1577, 1586 (1985) ("Because a defendant manufacturer might refrain from curing a defect in his product if his action could be used as evidence of the injurious product's defectiveness and his liability, rule 407 guarantees exclusion of such evidence. The repair is encouraged and, once made, subsequent purchasers of the improved product are not endangered.").

3. Jury Confusion and Unfair Prejudice

The third policy goal behind Rule 407 is that evidence of subsequent remedial measures could create jury confusion and be unfairly prejudicial to the defendant.[63] A jury may view the evidence of a subsequent remedial measure as an admission of liability or a concession that the defendant's actions created the plaintiff's cause of action.[64] Excluding such evidence prevents juror confusion and simultaneously furthers the policy goal of repairs.[65]

III. A CIRCUIT SPLIT: DOES RULE 407 EXCLUDE EVIDENCE OF SUBSEQUENT CONTRACTUAL CHANGES?

The U.S. Courts of Appeals disagree on whether Rule 407 applies to modified language or clarifications in breach of contract cases. The minority view—held by the Eighth Circuit and district courts from the First, Seventh, and Eleventh Circuits—is that Rule 407 does not apply to breach of contract or warranty cases. The minority view refuses to exclude this evidence, reasoning that such financial injury is not within the purview of Rule 407 that talks in tort-based terms of negligence and culpable conduct. By contrast, the majority of circuits hold that Rule 407 applies to breach of warranty or warranty cases because the intent of the Rule is to apply in a broad array of matters.

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[63] Huss v. Yale Materials Handling Corp., 538 N.W.2d 630, 634 (Wis. Ct. App. 1995) (holding evidence of subsequent remedial measures should be excluded because of concerns regarding unfair prejudice and jury confusion); David P. Leonard, *Rules of Evidence and Substantive Policy*, 25 LOY. L.A. L. REV. 797, 803 n.19 (1992).

[64] Fielder v. R.V. Coleman Trucking, Inc., No. 16CV23, 2018 WL 1384121 at *7 (N.D.W. Va. Mar. 19, 2018) ("The risk that a jury may draw inferences from this evidence that Rule 407 identifies as impermissible leads the Court to further exclude the evidence under Rule 403."); Herzog v. Lexington Tp., 657 N.E.2d 926, 932 (Ill. 1995) ("[There] is a general concern that a jury may view such conduct as an admission of negligence."); Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 902 (1988) ("The [policy goal] for the [exclusion of subsequent remedial measures] is that the jury may overvalue the probative worth of evidence of a subsequent repair."); Elaine A. Carlson, *Tort Reform: Redefining the Role of the Court and the Jury*, 47 S. TEX. L. REV. 245, 271–72 (2005); Jaclyn Wilcox, *"Sufficiently in Conflict": The Reservation of Illinois Rule of Evidence 407*, 53 UIC J. MARSHALL L. REV. 403, 411 (2020).

[65] Randolph L. Burns, Note, *Subsequent Remedial Measures and Strict Products Liability: A New—Relevant—Answer to an Old Problem*, 81 VA. L. REV. 1141, 1146–49 (1995) (articulating said position).

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A. Majority View: Rule 407 Excludes Evidence of Subsequent Contractual Changes

The earliest circuit court to adopt the majority view that Rule 407 applies to subsequent contractual language changes was the Fourth Circuit in *Dennis v. Cnty. of Fairfax*.[66] In *Dennis*, Appellant Lathan Dennis, a black employee of defendant, filed a complaint alleging racial discrimination in the workplace.[67] In 1989, Dennis began work at the Fairfax County Department of Transportation.[68] "At the time of Dennis's hiring, Gary Erenrich served as Deputy Director of the Department, while Robert Moore headed the Planning Division. Robert Kuhns directed the particular section in which Appellant worked, and Don Ostrander, a Planner III, was Appellant's immediate supervisor."[69] In 1990, Ostrander resigned from the county's employ and created a vacancy for the Planner III position.[70] Despite Dennis's requests to fill said position, the defendant instead eliminated the position.[71]

In January 1992, Dennis learned that Charles Denney, a white co-worker, had been denigrating his work performance.[72] In response, Dennis requested a meeting with Denney and Kuhns (now Dennis's immediate supervisor following Ostrander's departure) to discuss the situation.[73] At the meeting, Dennis demanded Denney explain the remarks.[74] Shortly thereafter, a "vociferous argument" ensued with Denney who refused to explain his comments and leaving.[75] As Denney walked out, Dennis followed him down the hall until the two men reached Chief Moore's office.[76] Outside the office, Dennis again demanded Denney apologize, but Denney only responded with

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[66] *See* Memorandum from Daniel J. Capra, Philip Reed Professor of L., Fordham Univ. Sch. of L., to Advisory Comm. on Evidence Rules (Apr. 1, 2021), *supra* note 6, at 295, 299–300 n.15.
[67] Dennis v. Cnty. of Fairfax, 55 F.3d 151, 152 (1995).
[68] *Id.*
[69] *Id.* at 152–53.
[70] *Id.* at 153.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

expletives.[77] Upon hearing the disturbance, Moore emerged from his office and told the men to cease.[78]

Following this verbal altercation, Moore began an internal investigation.[79] He interviewed witnesses and spoke with both Dennis and Denney.[80] After the investigation wrapped, Moore issued a written reprimand to Dennis (which was to remain in his personnel file) but issued Denney an oral reprimand.[81] Moore inferred the difference in treatment occurred because Dennis was yelling the loudest, and Moore believed at the time Dennis was the more culpable party.[82] Unconvinced, Dennis submitted a grievance claiming Moore took unequal action between him and Denney based on racial bias.[83] The grievance prompted an investigation from Deputy Director Erenrich who determined both Dennis and Denney acted "equally abysmally" and deserved to be similarly disciplined. Thus, Erenrich permanently withdrew from Dennis's personnel file the disciplinary memorandum stemming from the incident because Denney only received an oral reprimand.[84] This did not appease Dennis who filed a charge with the Equal Employment Opportunity Commission ("EEOC") who issued a right-to-sue letter.[85]

Shortly after the EEOC complaint, Dennis obtained his 1992 performance review from Kuhns.[86] The review qualified Dennis for a pay raise despite the ratings in five categories dropping below their 1991 levels.[87] However, Dennis's overall score remained the same as in his 1991 evaluation.[88] In response, Dennis complained to Kuhns regarding the five decreased individual ratings, and Kuhns increased one score.[89] Still upset, Dennis filed an internal grievance claiming Kuhns lowered the five

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *See id.* at 154.
[83] *Id.* at 153.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*

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individual scores because Dennis filed a complaint with the EEOC.[90] Eventually, Deputy Erenrich reviewed the complaint and agreed to raise the other four scores to their 1991 levels.[91]

Nonetheless, Dennis filed suit, alleging in his complaint various incidents of racial discrimination in violation of § 1981 and Title VII.[92] The U.S. District Court for the Eastern District of Virginia granted the defendant's motion for judgment as a matter of law.[93] From that judgment, Dennis appealed to the U.S. Court of Appeals for the Fourth Circuit.[94]

Dennis argued the defendant's subsequent corrective action amounted to a concession that discrimination took place.[95] In Dennis's view, the removal of the written reprimand from his personnel file, and the language modifications regarding his five scores in his 1992 performance report, were tacit admissions of racial bias.[96]

The Fourth Circuit disagreed.[97] Instead, the Fourth Circuit held, "[a]s a general matter, voluntary remedial acts are no basis for subsequent liability."[98] Applying Rule 407, the court held that the removal of the written reprimand and the subsequent language changes in Dennis's 1992 scores could not establish racial discrimination.[99] From a policy perspective, the Fourth Circuit worried that allowing the admission of the defendant's corrections would dissuade employers from investigating allegations of workplace discrimination because any subsequent corrective actions could be used against that employer in future litigation.[100] Moreover, doing so would frustrate the intent of Congress to encourage the resolution of workplace racial discrimination grievances.[101] In the court's view, employers would be better off ignoring allegations rather than investigating them if

[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *See id.*
[94] *See id.*
[95] *See id.* at 153–54.
[96] *Id.*
[97] *See id.* at 154.
[98] *Id.* at 153–54.
[99] *See id.*
[100] *Id.* at 154.
[101] *See id.*

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Dennis's position prevailed.[102] Therefore, the court forbid the admission of the withdrawal of Dennis's written reprimand and the subsequent remedial language changes to Dennis's 1992 report.[103] *Dennis* is significant for its clear articulation of the majority position that Rule 407 applies to subsequent language changes.[104] Notably, *Dennis* is an employment law case and holds that where an employer makes language modifications to an employee's performance review, that subsequent remedial language cannot be used to advance a claim of racial discrimination because it is excluded on Rule 407 grounds.[105]

The next circuit to address the issue was the Tenth Circuit in *Hickman v. GEM Ins. Co.*[106] In *Hickman*, the class members alleged that defendant, Gem Insurance Company, wrongfully refused to pay certain hospital room and board charges by limiting their reimbursement.[107] To support their claim, the class members proffered evidence that following the initiation of their class action, the defendant eliminated its limitation for such charges in other contracts.[108] In brief reference,[109] the Tenth Circuit said the changed language was a subsequent remedial measure and an admission on Rule 407 grounds.[110] However, the court did not explain why it held the language modification was a subsequent remedial measure.[111] Nonetheless, *Hickman* is notable in that it applied Rule 407 to subsequent remedial language, and thereby adopted the majority approach.[112]

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[102] *Id.*

[103] *See id.* at 154–55.

[104] *See* Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 30, 2021, at 299–300 n.15 (citing to a memorandum from Professor of Law at Fordham University School of Law Daniel J. Capra to the Advisory Committee on Evidence Rules, which was subsequently included in this report).

[105] *Dennis*, 55 F.3d at 153–155; Charles C. Warner, *Motions in Limine in Employment Discrimination Litigation*, 29 U. MEM. L. REV. 823, 846 (1999) (explaining *Dennis*'s implications regarding employment discrimination claims).

[106] *See* Hickman v. GEMS Ins. Co., 299 F.3d 1208 (10th Cir. 2002).

[107] *Id.* at 1210.

[108] *See id.* at 1214. Defendant conceded they modified the language of their contracts per advice of their lawyer. *Id.* at 1214 n.8.

[109] Smith v. United Healthcare Servs., No. 00-1163 ADM/AJB, 2003 U.S. Dist. LEXIS 15102, at *32 (D. Minn. Aug. 28, 2003) (describing the *Hickman* court's Rule 407 analysis as a "passing reference").

[110] *Hickman*, 299 F.3d at 1214.

[111] *Id.*

[112] *See generally* Hickman v. GEMS Ins. Co., 299 F.3d 1208 (10th Cir. 2002).

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Following *Hickman*, the Seventh Circuit in *Pastor v. State Farm*, considered this issue.[113] In *Pastor*, the plaintiff Pastor's car windshield was damaged in an accident.[114] The plaintiff then had her windshield repaired, which took about an hour, and filed a claim with her car insurer, State Farm.[115] State Farm paid the plaintiff's repair bill, but did not pay the additional $10 that the plaintiff claimed she was owed by virtue of a clause in the insurance policy that obligated the defendant to "pay you $10 per day if you do not rent a car while your car is not usable."[116]

The plaintiff argued that the word "day" in the insurance policy meant any part of the day, no matter how small, in which the car was unusable—including the mere one hour she spent waiting on repairs.[117] By contrast, the defendant argued the term "day" meant a period of time encompassing twenty-four hours.[118] To support the plaintiff's contention, she sought to introduce evidence of a subsequent version of the insurance policy in which the defendant made explicit that the term "day" meant twenty-four hours.[119]

Writing for the Seventh Circuit, Judge Posner[120] held that the introduction of the subsequent language modification violated Rule 407 because the wording change was a subsequent remedial measure.[121] The Seventh Circuit found Rule 407 is not limited to "repair" in the literal sense and could be considered in the context of changed contractual language.[122] The court found that Rule 407 applied in other contexts outside of repairs,

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[113] Pastor v. State Farm Mut. Auto. Ins., 487 F.3d 1042 (7th Cir. 2007).
[114] *Id.* at 1044.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 1045.
[118] *Id.*
[119] *Id.*
[120] Some commentators have deemed *Pastor* to be especially "influential" by virtue of Posner's authorship. *See* Randy Maniloff, *Is An Assault On The Flood Exclusion Coming?*, LAW360 (Sept. 22, 2017, 1:17 PM), https://www.law360.com/articles/966679/is-an-assault-on-the-flood-exclusion-coming- ("Not only is the Seventh Circuit influential, but the decision was written by its recently retired scion, Judge Richard Posner. Posner's opinions are respected. [As part of preparing for an interview that (Maniloff) did of Judge Posner in 2014, (Maniloff) calculated that in about 1,700 cases, courts cited to a Posner opinion with the added notation '(Posner, J.)' to make the point of its author. And in about 1,000 cases, courts did the same, but by expressly stating that a case it was citing to was penned by Posner.]").
[121] *Pastor*, 487 F.3d at 1045.
[122] *Id.*; Dusenbery v. United States, 534 U.S. 161, 172–73 (2002); Lust v. Sealy, Inc., 383 F.3d 580, 585 (7th Cir. 2004).

such as in an employment disciplinary proceeding.[123] Introducing the plaintiff's evidence of the changed contractual language would have the impact of introducing a subsequent remedial measure; an action to avert future liability to prove culpable conduct.[124] Furthermore, the *Pastor* court considered its decision's policy effects writing, ". . . to use at trial a revision in a contract to argue the meaning of the original version would violate Rule 407 . . . by discouraging efforts to clarify contractual obligations, thus perpetuating any confusion caused by unclarified language in the contract."[125] Therefore, introducing the plaintiff's evidence of the defendant's subsequent changed language would violate Rule 407's bar on the admission of subsequent remedial measures.[126]

Following *Pastor*, in 2012, the Third Circuit joined the majority and became the latest circuit to find that Rule 407 applied to contract claims.[127] In *Reynolds*, Frank Reynolds, the plaintiff, applied and enrolled in the University of Pennsylvania's Executive Masters in Technology Management ("EMTM").[128] In 2002, at the time of his enrollment, Reynolds claimed he was told EMTM students would be considered graduates and alumni of Wharton, University of Pennsylvania Engineering ("Penn Engineering"), and the University of Pennsylvania.[129] However, in Fall 2003, Reynolds claimed he learned that he would *only* be considered a graduate of Penn Engineering and *could not* represent himself as a Wharton student, or Wharton alumnus upon graduation.[130]

At trial, Reynolds sought to introduce evidence of town hall meetings between University of Pennsylvania administrators and its students.[131] In addition, Reynolds sought admission of a version of the University of Pennsylvania's website revised in 2004, in which the school clarified the benefits it expected to grant EMTM students.[132] The district court refused to

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[123] *Pastor*, 487 F.3d at 1045; Maddox v. City of Los Angeles, 792 F.2d 1408, 1417 (9th Cir. 1986).
[124] *Pastor*, 487 F.3d at 1045.
[125] *Id.*
[126] *Id.*
[127] *See* Advisory Comm. on Evidence Rules, *supra* note 104.
[128] Reynolds v. Univ. of Pa., 483 F. App'x 726, 728 (3d Cir. 2012).
[129] *Id.*
[130] *Id.*
[131] *Id.* at 729.
[132] *Id.*

admit the proffered evidence on the grounds that it was a subsequent remedial measure.[133]

On appeal, the Third Circuit affirmed the district court's holding that the town hall meeting and the 2004 website alterations were subsequent remedial measures inadmissible under Rule 407.[134] The Third Circuit relied on the "plain text" of Rule 407, holding that the rule used "culpable conduct" rather than the narrower phrase "tortious conduct."[135] Notably, the Third Circuit found "culpable conduct" more expansive than "tortious conduct" because "culpable conduct" included any guilty or blameworthy behavior and could be applied in tort cases, but also to contract cases.[136] The *Reynolds* court found persuasive *Hickman* and *Pastor*'s policy goal of encouraging language clarifications to prevent confusion.[137] Therefore, the Third Circuit affirmed the district court's exclusion of the two pieces of evidence on Rule 407 grounds.[138]

With *Reynolds*, the Third Circuit became the most recent circuit to adopt the majority approach that Rule 407 applies in contract cases.[139] Moreover, the *Reynolds* court's grounding is unique in that it relies on a plain-meaning analysis of Rule 407's text to exclude subsequent remedial language changes in contract cases.[140] Yet, *Reynolds* is not binding precedent,[141] meaning while it has persuasive value it is not binding on the Third Circuit and its district courts.[142]

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[133] *See id.* at 730.
[134] *See id.* at 730–33.
[135] *Id.* at 731.
[136] *Id.*
[137] *Id.* at 731–32.
[138] *Id.* at 733.
[139] Advisory Comm. on Evidence Rules, *supra* note 104.
[140] *Reynolds*, 483 Fed. App'x at 731.
[141] *Id.* at 726.
[142] *See* Plumley v. Austin, 574 U.S. 1127, 1131 (2015) ("True enough, the decision below is unpublished and therefore lacks precedential force in the Fourth Circuit."); *see also* Thomas E. Daley, *Reassessing the Role of the Reilly's Wholesale Factors in Override Protests Following the Federal Circuit's Decision in Safeguard Base Operations*, 50 PUB. CONT. L.J. 497, 514 n.124 (2021) ("Unpublished decisions do not constitute binding precedent, but the decisions may be used as 'guidance or persuasive reasoning.'").

B. Minority View: Rule 407 Does Not Apply to Contractual Language Modifications

The Eighth Circuit and district courts from the First, Seventh, Eighth, and Eleventh Circuits refuse to exclude contractual language modifications because in their view Rule 407 speaks in the tort-based language of "negligence" and "culpable conduct."[143]

In 1985, the Eighth Circuit considered whether Rule 407 applied in contract cases. In *R.W. Murray, Co. v. Shatterproof Glass Corp.*, the Eighth Circuit found Rule 407 inapplicable to a breach of warranty case.[144] *Shatterproof* was an express warranty contract action in which the plaintiff, Murray, sought to introduce evidence that defendant modified their manufacturing materials and process after plaintiff procured glass that gathered moisture between the building's panes.[145] The defendant objected on Rule 407 grounds.[146] However, the Eighth Circuit found "Rule 407 does not bar the admission of subsequent remedial measures evidence in actions based on strict liability 'since Rule 407 is, by its terms, confined to cases involving negligence or other culpable conduct.'"[147] Consequently, the court allowed in plaintiff's evidence in this contract case.[148]

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[143] R.W. Murray, Co. v. Shatterproof Glass Corp., 758 F.2d 266, 274 (8th Cir. 1985) (holding 407 only applies where negligence or culpable conduct finding is required); Mowbray v. Waste Mgmt. Holdings, Inc., 45 F. Supp. 2d 132, 141 (D. Mass. 1999) (refusing to apply Rule 407 in breach of warranty dispute because no proof of culpability or mental state are required); Smith v. Miller Brewing Co. Health Benefits Program, 860 F. Supp. 855, 857 n.1 (M.D. Ga. 1994) ("[W]hen the dispute concerns the terms of a contract, changes in the language that make the intent of the drafter clearer, the court should consider that change in evaluating the disputed term."); Williston Basin Interstate Pipeline Co. v. Factory Mutual Ins. Co., 270 F.R.D. 456, 463 (D.N.D. 2010) ("[T]here is nothing in the language of Rule 407 or its commentary that suggests the Supreme Court intended Rule 407 to apply to changes in contract language."). Notably, the two district court decisions within the Seventh Circuit that preceded *Pastor* are effectively overruled. All the Chips, Inc. v. OKI Am., Inc., No. 88 C 8373 1990 WL 36860, at *4 (N.D. Ill.) (finding Rule 407 inapplicable to breach of contract because no showing of fault required); Smith v. United Healthcare Servs., No. 00-1163 ADM/AJB, 2003 U.S. Dist. LEXIS 15102 at *32 (same result).

[144] *All the Chips, Inc.*, 758 F.2d 266, 274 (8th Cir. 1985).

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

A closer look at *Shatterproof* merits scrutiny. First, *Shatterproof* considered both contract and products liability issues.[149] In doing so, the *Shatterproof* court relied on earlier precedents holding Rule 407 did not apply in products liability cases because such causes of action did not require proof of negligence or culpable conduct.[150] However, in 1997, the Supreme Court amended Rule 407 to explicitly apply to products liability actions.[151] Consequently, the persuasive value of *Shatterproof* is questionable due to the effect of the 1997 amendments.[152]

The 1997 amendments also cloud the persuasiveness of all but two of the district courts that adopted the minority approach.[153] Despite the 1997 amendments, the United States District Court of Massachusetts adopted the minority approach in 1999.[154] *Mowbray* is a breach of contract case pertaining to a breach of warranty.[155] In 1992, plaintiff Mowbray entered into an asset sale with defendant Waste Management wherein in exchange for shares of Waste Management stock plaintiff sold "substantially all of the assets of Waste Disposal, Inc."[156] At the time, of this agreement defendant represented to plaintiff their three most recent yearly earnings reports as; $562,135,000, $684,762,000, and $ 606,323,000.[157] However, on February 24, 1998, Waste Management issued a press release stating the three most recent yearly earnings reports were inaccurate.[158]

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[149] *See id.* at 270–71; *e.g.*, Joyce M. Cartun, *Admissibility of Remedial Measures Evidence in Products Liability Actions: Towards a Balancing Test*, 39 HASTINGS L.J. 1171, 1178–79 (1988) (describing *Shatterproof* as a "products liability action.").

[150] *See All the Chips, Inc.*, 758 F.2d at 274; Reynolds v. University of Pennsylvania, 483 Fed. App'x 726, 732 n.3 (3d. Cir. 2012).

[151] *Reynolds*, 483 Fed. App'x at 732 n.3; Matthew A. Cartwright, *Subsequent Remedial Measures in Strict Product Liability Actions*, 68 PA. B.A.Q. 171, 178 n.43, 181 (1997) (observing *Shatterproof* preceded the 1997 amendments).

[152] *See Reynolds*, 483 Fed. App'x at 732, 732 n.3 (considering said finding and adopting the majority approach that Rule 407 applies to contract cases).

[153] *See generally* Advisory Comm. on Evidence Rules, *supra* note 104, at 300 n.16 (listing years of decisions for the minority approach district courts and showing most of the minority district courts adopted the minority approach preceding the 1997 amendments).

[154] *See* Mowbray v. Waste Mgmt. Holdings, 45 F. Supp. 2d 132, 140–41 (D. Mass. 1999).

[155] *Id.*

[156] *Id.* at 134.

[157] *Id.* at 134–35.

[158] *Id.* at 135.

Consequently, Mowbray viewed the press release as an admission dispositive of his breach of contract claim.[159] Defendant opposed the press release's admission on Rule 407 grounds.[160]

The *Mowbray* court disagreed with defendant and found Rule 407 inapplicable to the evidence.[161] To support their position, defendant relied on several cases where courts held "a defendant's revision of Securities and Exchange Commission filing [were] inadmissible to prove violations of federal securities law."[162] The U.S. District Court of Massachusetts found these cases inapplicable because they involved "defendant's culpability [as] an essential element."[163] The court found culpability as a nonessential element in the case as plaintiff only needed to show the facts of a breach.[164] Specifically, the court found Rule 407's policy justifications inapplicable because a breach of contract requires no showing of fault to prevail.[165] Therefore, the *Mowbray* court allowed in the evidence of the press release.[166]

Mowbray is significant because it forcefully and concisely explains the minority approach.[167] In particular, *Mowbray*'s approach is grounded on a safety rationale—viewing the primary applicability of Rule 407 as one pertaining to protections of bodily harm and tort claims not contract claims where no personal injury occurs.[168]

Following *Mowbray*, the United States District Court of North Dakota adopted the minority approach with a published decision from 2010.[169] *Williston Basin Interstate Pipeline Co.*, concerned a motion to compel discovery.[170] The case revolved around an insurance coverage dispute

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[159] *Id.*
[160] *See id.* at 140.
[161] *See id.* at 140–41.
[162] *Id.* at 140.
[163] *Id.*
[164] *Id.* at 141.
[165] *Id.*
[166] *Id.*
[167] *See* Smith v. United Healthcare Servs., No. 00-1163 ADM/AJB, 2003 U.S. Dist. LEXIS 15102, at *33–34.
[168] *See id.* at 34.
[169] *See* Williston Basin Interstate Pipeline Co. v. Factory Mut. Ins. Co., 270 F.R.D. 456 (D.N.D. 2010); *see* Chapman v. Hiland Operating, LLC, No. 1:13-cv-052, 2013 U.S. Dist. LEXIS 182152 at *2–3 (D.N.D. Dec. 26, 2013) (applying *Williston Basin*'s precedent to admit in evidence due to exceptions in Rule 407).
[170] *Williston Basin*, 270 F.R.D. at 457.

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wherein the Plaintiff was an additional insured by Defendant during the period from 2002 through 2006.[171] For the years 2003–2006, the agreement covered the loss of stored gas at plaintiff's Elk Basin Storage Reservoir on a "per occurrence" basis excluding certain limits and deductions.[172]

However, in January 2006, Williston Basin discovered "Howell/Andarko," a separate entity that drilled four natural gas wells in Elk Basin Storage Reservoir's vicinity and produced and converted gas from the reservoir.[173] Howell/Andarko drilled the four wells at various dates between 2002 through 2004.[174]

As a result, in June 2009, plaintiff "submitted a proof of loss" to defendant "for the claimed loss of gas" at the Elk Basin Storage Reserve stemming from Howell/Andarko's actions.[175] Defendant, Factory Mutual denied coverage on the grounds that the loss of gas from Howell/Andarko was a single occurrence and began in 2002 before plaintiff had coverage for the gas at issue.[176] Thus, Williston Basin filed a complaint seeking reimbursement for its loss in court.[177]

During the discovery phase, Williston Basin sought information regarding the term "occurrence."[178] In particular, defendant's policies issued to plaintiff between 2002 through 2006 did *not* contain a definition of "occurrence."[179] However, beginning in 2007 Factory Mutual began defining "occurrence" in its policies.[180] As a result, plaintiff sought documents pertaining to defendant's decision to define "occurrence" because such items could prove relevant to its contract claim.[181]

Factory Mutual in several arguments including Rule 407 grounds objected to this request.[182] Regarding Rule 407, Factory Mutual relied on

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[171] *Id.* at 459–60.
[172] *See id.*
[173] *Id.* at 457–58.
[174] *Id.* at 458.
[175] *Id.*
[176] *Id.*
[177] *See id.*
[178] *Id.* at 459.
[179] *Id.*
[180] *Id.* at 459–60.
[181] *See id.* at 460.
[182] *See id.* at 460–64.

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Pastor to argue Rule 407 bars evidence of subsequent policy revisions.[183] *Pastor* proved unconvincing to the U.S. District Court of North Dakota.[184] Instead, the *Williston Basin Interstate Pipeline Co.* court found "Rule 407 limited to evidence of subsequent remedial measures" causing injury or harm.[185] The Court cited *Shatterproof* and *Mowbray* to hold nothing in the text or commentary of Rule 407 suggesting it applies to contract cases.[186] Finally, the U.S. District Court of North Dakota emphasized the matter was one pertaining to discovery and "Rule 407 is a rule of admissibility and not one of discovery."[187] Therefore, because Rule 407 was inapplicable to the discovery context and could lead to additional relevant evidence the court rejected Factory Mutual's *Pastor* argument.[188]

Williston Basin Interstate Pipeline Co. deserves great scrutiny. Some commentators have held out this case to stand for the proposition that Rule 407 is inapplicable in contract cases.[189] However, the impact of *Williston Basin Interstate Pipeline Co.* is narrower because it occurred within the discovery context. As explained by one court, ". . . Rule 407 is a rule of admissibility at trial; it is not a rule governing pretrial procedure."[190] Weinstein's evidence manual[191] elaborates on this point:

> [T]he standard of admissibility established by Rule 407 for evidence of subsequent remedial measures is not the same as that for pretrial discovery. Some courts have failed to make the distinction and denied discovery on the grounds of

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[183] *See id.* at 463.

[184] *See id.*

[185] *Id.*

[186] *Id.* at 463–64 (first citing R.W. Murray, Co. v. Shatterproof Glass Corp., 758 F.2d 266, 274 (8th Cir. 1985); then citing Mowbray v. Waste Management Holdings, Inc., 45 F. Supp. 2d 132, 141 (D. Mass. 1999)).

[187] *Id.* at 464.

[188] *Id.* at 463–64.

[189] *See, e.g.*, Syed Ahmad & Casey Coffey, *As good as new? Rule 407 and subsequent policy modifications*, WESTLAW TODAY (Dec. 28, 2021), https://today.westlaw.com/Document/I4734b9dd682111ec9f24ec7b211d8087/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true (expanding reach of *Williston Basin Interstate Pipeline Co.* to compare with nondiscovery cases).

[190] Jumper v. Yellow Corp., 176 F.R.D. 282, 284 (N.D. Ill. 1997).

[191] Weinstein's evidence manual is a seminal treatise on the Rules of Evidence. *E.g.*, John Henderson Duffus et al. as Amici Curiae Supporting Respondents, Delisle v. Crane Co., 258 So. 3d 1219 (Fla. 2019) ("Judge Weinstein, [is] a renowned expert on the law of evidence."); *see also* David A. Sonenshein & Ben Fabens-Lassen, *Has the Residual Exception Swallowed the Hearsay Rule?*, 64 U. KAN. L. REV. 715, 717 (2016) (describing author Weinstein as "renowned.").

> relevance. The better view is to permit discovery, not only because Rule 407 is essentially a rule of public policy rather than of relevancy, but also because subsequent remedial measures might be admissible to prove a consequential, material fact in issue other than negligence.[192]

A number of U.S. courts have adopted Weinstein's view regarding Rule 407's inapplicability during discovery.[193] It follows this diminishes the impact of *Williston Basin Interstate Pipeline Co.*'s holding because it concerned a discovery dispute rather than a trial issue.[194] Thus, it is reasonable to conclude the U.S. District Court of North Dakota did not need to opine on whether Rule 407 applies in contract cases because it could require defendant to produce the evidence on the inapplicability of the rule in the discovery context. Nonetheless, the *Williston Basin Interstate Pipeline Co.* court's reliance on case law stemming from the minority approach shows the minority view can be adopted by other district courts to find Rule 407 inapplicable in contract cases.[195]

IV. THE MINORITY VIEW TAKES AN INCORRECT APPROACH AND REACHES THE WRONG OUTCOME

This section advocates against the minority approach and argues future federal courts when tasked whether to apply Rule 407 to contract cases should adopt the majority approach. The minority approach disavows the

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[192] 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, 407[07] at 407–44 (1996).

[193] *See Jumper*, 176 F.R.D. at 284 (first citing Miner v. Kendall, No. 96-1126-MLB, 1996 U.S. Dist. LEXIS 18801, at *2 (D. Kan. Sept. 27, 1996); then citing Trzeciak v. Apple Computers, Inc., No. 94 Civ. 1251, 1995 U.S. Dist. LEXIS 428, at *2, *8 n.1 (S.D.N.Y. Jan. 15, 1995); then citing Capellupo v. FMC Corp., Civ. No. 4-85-1239, 1988 U.S. Dist. LEXIS 3792, at *6 (D. Minn. May 3, 1988); then citing Sencon Sys., Inc. v. W.R. Bonsal Co., No. 85 C 8250, 1987 U.S. Dist. LEXIS 4567, at *2 (N.D. Ill. June 4, 1987); then citing Vardon Golf Co. v. BBMG Golf Ltd., 156 F.R.D. 641, 651 (N.D. Ill. 1994)); *see also*, *e.g.*, Rubin v. Macy's Retail Holdings, Inc., No. 20-142-JWD-SDJ, 2021 U.S. Dist. LEXIS 1420, at *5–7 (M.D. La. Jan. 5, 2021) (holding Rule 407 is inapplicable during the discovery phase because Rule 407 is one about admissibility not discoverability).

[194] *See* Williston Basin Interstate Pipeline Co. v. Factory Mut. Ins. Co., 270 F.R.D. 456, 458 (D.N.D. 2010); *see also* Chapman v. Hiland Operating, LLC, No. 1:13-cv-052, 2013 U.S. Dist. LEXIS 182152 at *2–3 (D.N.D. Dec. 26, 2013) (relying on *Williston Basin Interstate Pipeline Co.* to hold in a discovery dispute "Rule 407, however, is a rule of admissibility and not a rule of discovery.").

[195] *See Williston Basin Interstate Pipeline Co.*, 270 F.R.D. at 463–64 (citing *Shatterproof* and *Mowbray*, 45 F. Supp. 2d 132, for adoption of minority view).

plain language of Rule 407 in favor of an approach that drastically undermines Rule 407's policy goals.

A. Rule 407's Plain Language Shows It Applies in Contract Cases

The minority approach's refusal to apply Rule 407 effectively violates the rules of statutory interpretation. The Supreme Court directs courts to first approach statutory interpretation in a mechanic manner by initially examining the text itself.[196] This rule is often referred to as the plain meaning rule,[197] and the Court describes it as follows: "[i]f the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted."[198] While the text is the most important source when

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[196] *E.g.*, Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 37 (1998) ("[If] [t]he language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical."); Caminetti v. United States, 242 U.S. 470, 485 (1917) (holding statutory interpretation dictates a court look at the text itself, and that no interpretation is necessary if the statutory text is clear); INS v. Phinpathya, 464 U.S. 183, 189 (1984) (emphasizing statutory analysis begins with the text itself). Sandra Yoo, *Determining Rights to Resell:* Kirtsaeng v. John Wiley & Sons, 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 123, 124–25 (2013); Janet Hetherwick Pumphrey, *Trade Regulation—the "Bona Fide Offer" of Sale Requirement in the Petroleum Marketing Practices Act:* Slatky v. Amoco Oil Co., 11 W. NEW ENG. L. REV. 389, 407 (1989) ("Statutory interpretation has traditionally looked first to the plain meaning of the words of the statute in seeking to find a clear and unambiguous meaning."); *see also* John M. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 338 (1976) ("[The first rule of statutory interpretation is always] (1) read the statute, (2) Read the Statute, (3) READ THE STATUTE!").

[197] *E.g.*, Maine v. Thiboutot, 448 U.S. 1, 13 (1980) ("[P]lain meaning is always the starting point."); *see also* Shane Roberts, *Drugs and Racketeering Don't Mix: The Potential Achilles' Heel of the National Prescription Opiate Litigation*, 89 GEO. WASH. L. REV. 173, 185–86 (2021).

[198] Lake Cnty. v. Rollins, 130 U.S. 662, 670 (1889); United States v. Mo. Pac. R. Co., 278 U.S. 269, 278 (1929) ("[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."); United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 95–96 (1820) ("The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."). The plain meaning rule traces its origins to biblical times. *In re* Kolinsky, 100 B.R. 695, 704 (Bankr. S.D.N.Y. 1989) ("[T]he concept calling for strict construction of statutes has roots in the Old Testament: 'You shall not add to the word which I command you, nor take from it.' (Deut. 4:2)"); Eric W. Lam, *The Limit and Inconsistency of Application of the Plain Meaning Rule to Selected Provisions of the Bankruptcy Reform Act of 1994*, 20 HAMLINE L. REV. 111, 112 (1996) ("The concept of strict construction of statutes may be rooted in the Old Testament."). A modern version of the rule can be traced to nineteenth century England and its progeny in early American courts. Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 434 (1994); Eric S. Lasky, *Perplexing Problems with*

interpreting a statute other intrinsic sources may be used.[199] Intrinsic sources include grammar and punctuation,[200] the act's components,[201] and the linguistic canons of statutory interpretation.[202] However, further construction or artistry of the statute are prohibited unless this initial reading reveals ambiguity or creates an absurd or unreasonable result.[203]

The majority of circuits took the proper approach by applying the "plain meaning" rule to Rule 407. Finding one natural reading, the majority's interpretation ceased.[204] Starting at the text, the words of Rule 407 exclude "evidence of the subsequent measures is not admissible to prove: *negligence or culpable conduct . . . .*"[205]

The words, "negligence," and "culpable conduct," are significant. Negligence is traditionally defined as failing to employ a reasonable standard of care.[206] Additionally, and most significant to contract cases, the definition of culpable conduct is where "such conduct normally involves something

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Plain Meaning, 27 HOFSTRA L. REV. 891, 894 (1999); *but see* William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania*, 59 SMU L. REV. 3, 32–33 (2006) (describing inconsistent applications of the plain meaning rule in Colonial Pennsylvania).

[199] *See, e.g.*, Roberts v. Sea-Land Servs., Inc., 566 U.S. 93, 101 (2012); Linda D. Jellum, *The Art of Statutory Interpretation: Identifying the Interpretive Theory of the Judges of the United States Court of Appeals for Veterans' Claims and the United States Court of Appeals for the Federal Circuit*, 49 U. LOUISVILLE L. REV. 59, 63 (2010); Melanie C. Schneider, *The Imprecise Draftsmanship of the Lautenberg Amendment and the Resulting Problems for the Judiciary*, 17 COLUM. J. GENDER & L. 505, 514 (2008) ("When interpreting the meaning of a statute, a court always begins with 'intrinsic sources,' which include the text itself, punctuation, syntax, and cannons of construction.").

[200] *See, e.g.*, Nielsen v. Preap, 139 S. Ct. 954, 965 (2019).

[201] *See, e.g.*, Burgess v. United States, 553 U.S. 124, 133 (2008) (considering act's definitions section); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 589–90 (2004) (finding purpose and findings clause guided statutory interpretation).

[202] *See, e.g.*, Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1171 n.5 (2021). The linguistic canons are rules intuitively applied to understand the writer or speaker's meaning. FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 86 (2009); Jill M. Fraley, *Scaled Legislation and New Challenges in Statutory Interpretation*, 101 KY. L.J. 233, 251–53 (2013); NEIL GORSUCH ET AL., A REPUBLIC, IF YOU CAN KEEP IT 55 (2019) ("[Judges use canons to determine] what might a reasonable person have thought the law was at the time."). For example, Justice Antonin Scalia explained the canon *noscitur a sociis*, that words should not be read in isolation but within context, with the following example: "If you tell me, 'I took the boat out on the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 26 (1997).

[203] Shapiro v. United States, 335 U.S. 1, 31 (1948).

[204] *E.g.*, *Reynolds*, 483 Fed. App'x at 731–33.

[205] FED. R. EVID. 407 (emphasis added).

[206] *Negligence*, BLACK'S LAW DICTIONARY 1032 (6th ed. 1990).

more than simple negligence and implies conduct which is blamable, censurable, involving the breach of a legal duty or the commission of a fault."[207] Moreover, the term infers an individual involved in the culpable conduct engaged in wrongdoing for which liability may be imposed.[208]

By choosing the words, "culpable conduct," the drafters allowed Rule 407 to apply to a broad array of evidence.[209] A breach of contract action involves culpable conduct, as contractual obligations are voluntary agreements wherein both contracting parties agree to certain bargaining terms.[210] In doing so, this creates certain obligations each party owes to the other contracting party.[211] In the event that one party does not fulfill its contractual obligations to the other party, contract law dictates that said party has breached their obligations to the other party.[212] In breaching their obligations, that party acts with culpable conduct because they have broken a promise they intended to fulfill to the other party.[213] As a result, the breaching party has committed the definition of "culpable conduct" against the other party because they breached a legal duty (contractual obligation) for which legal liability may be imposed (contractual damages).[214]

As explained, a contract falls under Rule 407's "culpable conduct" criteria. Rule 407's applicability is not limited to repairs in the literal sense.[215] Instead, Rule 407 excludes a broad array of corrective action following any type of injury.[216]

If the drafters of Rule 407 wanted a narrower focus, they could have chosen the words "tortious conduct."[217] By electing the broader phrase of "culpable conduct," which applies to any blamable conduct "involving the

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[207] *Culpable conduct*, BLACK'S LAW DICTIONARY 379 (6th ed. 1990).

[208] *Id*.

[209] *See* Vardon Golf Co. v. BBMG Golf Ltd., 156 F.R.D. 641, 652 (N.D. Ill. 1994).

[210] Ian Ayres & Gregory Klass, *One-Legged Contracting*, 133 HARV. L. REV. F. 1, 3–4 (2019).

[211] Aditi Bagchi, *Interpreting Contracts in a Regulatory State*, 54 U.S.F. L. REV. 35, 69 (2019) (explaining contract creation creates certain obligations).

[212] *See generally* Amy B. Cohen, *Reviving* Jacob and Youngs, Inc. v. Kent*: Material Breach Doctrine Reconsidered*, 42 VILL. L. REV. 65, 75 (1997) (explaining impact of breach on both contracting parties).

[213] *See* Monu Bedi, *Contract Breaches and the Criminal/Civil Divide: An Inter-Common Law Analysis*, 28 GA. ST. U. L. REV. 559, 605–07 (2012).

[214] *See supra* notes 211–12 and accompanying text.

[215] *See Dusenbery*, 534 U.S. at 172–73.

[216] *See supra* notes 37–41 and accompanying text.

[217] Reynolds v. Univ. of Pennsylvania (Reynolds II), 747 F. Supp. 2d 522, 535 (E.D. Pa. 2010).

breach of a legal duty,"[218] the drafters intended to not confine Rule 407 to only tort cases.[219]

The majority followed the correct approach of statutory interpretation by reviewing the text of Rule 407. The majority applies the proper method of statute interpretation—they begin by examining Rule 407's text first.[220] Finding only one natural reading of Rule 407, the majority's duty of interpretation terminates and applies the Rule in contract cases.[221]

The minority's interpretative approach to Rule 407 is fatally flawed, because rather than considering the "plain-meaning rule" and declaring it to be inconclusive to the case at hand,[222] they instead brush aside the rule altogether.[223] At a minimum, the minority needed to find an ambiguity within the text,[224] or uncover an absurd or unreasonable result that applying the "plain meaning rule" to Rule 407 would generate.[225]

Mowbray succinctly explains the minority's neglect of the plain-meaning rule. Before rejecting Waste Management's argument largely on policy grounds, the U.S. District Court of Massachusetts failed to consider the definition of "culpable conduct."[226] Instead, the *Mowbray* court relied on non-binding authority and policy to conclude Rule 407 was inapplicable in contract actions.[227] The proper approach would have been for the minority to uncover an ambiguity within Rule 407's text or determine the plain meaning

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[218] BLACK'S LAW DICTIONARY, *supra* note 207.

[219] *Reynolds II*, 747 F. Supp. at 535.

[220] *See supra* notes 200–02 and accompanying text; *e.g.*, *Reynolds*, 483 Fed. App'x at 730–31.

[221] *See* Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000) (en banc) ("[W]here courts should always begin and where they often should end it as well, which is with the words of the statutory provision.").

[222] United States v. Selby, 333 F. Supp. 2d 367, 370–71 (D. Md. 2004).

[223] *E.g.*, Mowbray v. Waste Mgmt. Holdings, 45 F. Supp. 2d 132, 140–41 (D. Mass. 1999) (failing to consider the definition of "culpable conduct" in their analysis of Rule 407 applicability to contract action).

[224] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95–96 (1820) (Marshall, C.J.) ("Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest."); United States v. Harris, 177 U.S. 305, 310 (1900) ("Where there is no ambiguity in the words there is no room for construction.").

[225] *See* Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 454–55 (1989) (holding courts may look beyond the plain meaning where it creates an "odd result").

[226] *See Mowbray*, 45 F. Supp. 2d at 140–41.

[227] *Id.*

created an absurd result.[228] The minority failed to render such an analysis.[229] A thoughtfully reasoned analysis revealing either of the aforementioned reasons could rest on sufficient policy considerations.[230]

By failing to follow the plain-meaning approach, the minority creates undesired results. In doing so, they fail to give effect to the judiciary and Congress who enacted Rule 407 to apply in contract cases by choosing the broad words of "culpable conduct."[231] Effectively, the minority is bending and breaking the words of Rule 407 to create a new rule that does not apply in contract cases.[232]

Beyond ignoring the will of Rule 407's drafters, the minority's approach creates troubling precedent for future courts. It is standard protocol for courts to consider precedent for guidance in selecting the proper method of statutory interpretation.[233] What the minority approach does is effectively create precedent to disavow the well-established plain-meaning rule.

To elaborate on this point, by way of example, there is a circuit split concerning 18 U.S.C. § 2113(a) (the Federal Bank Robbery Act).[234] In its essence, the circuits are split regarding whether to apply the plain-meaning rule to 18 U.S.C. § 2113(a) (the minority approach) or focus on Model Penal Code's Substantial Step Analysis coupled with policy considerations.[235]

The first circuit to consider whether 18 U.S.C. § 2113(a) required actual force, violence, or intimidation was the Second Circuit.[236] In *United States v.*

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[228] *See Mowbray*, 45 F. Supp. 2d at 140–41; *Wiltberger*, 18 U.S. (5 Wheat.) at 76; *Harris*, 177 U.S. at 310.

[229] *See generally Mowbray*, 45 F. Supp. 2d at 140–41.

[230] *See generally* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1309 (2009).

[231] Reynolds v. Univ. of Pa., 747 F. Supp. 2d 522, 535 (E.D. Pa. 2010).

[232] *See generally* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 290–92 (1988).

[233] *E.g.*, Shaw v. Jendzejec, 717 A.2d 367, 369 (Me. 1998).

[234] Jennifer M. Lota, *Analyzing 18 U.S.C. § 2113(a) of the Federal Bank Robbery Act: Achieving Safety and Upholding Precedent Through Statutory Amendment*, 7 SETON HALL CIRCUIT REV. 445, 450–61 (2011) (explaining the majority and minority case law regarding 18 U.S.C. § 2113(a)).

[235] *See id.* The minority approach requires a defendant use *actual* force, violence, or intimidation during the failed bank robbery to be convicted under 18 U.S.C. § 2113(a). *E.g.*, United States v. McFadden, 739 F.2d 149, 150–51 (4th Cir. 1984). Conversely, the majority approach only requires the defendant *attempt* to use force, violence, or intimidation during a failed bank robbery plot to be convicted under 18 U.S.C. § 2113(a). *E.g.*, United States v. Bellew, 369 F.3d 450, 453–57 (5th Cir. 2004).

[236] Paul R. Piaskoski, *The Federal Bank Robbery Act: Why the Current Split Involving the Use of Force Requirement for Attempted Bank Robbery Is Really an Exception*, 109 J. CRIM. L. & CRIMINOLOGY

Stallworth, the Second Circuit held proof of actual force, violence, or intimidation is not necessary under 18 U.S.C. § 2113(a).[237] However, in reaching this holding, the Second Circuit did not consider that the plain meaning of 18 U.S.C. § 2113(a) requires *actual* force, violence, or intimidation.[238] Moreover, the Second Circuit failed to find an ambiguity in the text or that the plain-meaning of the statute created an absurd result.[239] Instead, the *Stallworth* court merely considered attempt doctrine and policy objectives.[240] This is not the proper method of statutory interpretation.

Beyond *Stallworth* interpreting 18 U.S.C. § 2113(a) incorrectly in its own case, *Stallworth* had a negative ripple effect both within the Second Circuit and across the United States.[241] Following *Stallworth*'s lead, the Second Circuit in *United States v. Jackson* held 18 U.S.C. § 2113(a) does not require actual force, violence, or intimidation.[242] The *Jackson* court relied heavily on *Stallworth*'s holding to reach this conclusion.[243] This occurred because precedent within their circuit often binds courts under the doctrine of stare decisis.[244] Nevertheless, this highlights a major problem with the doctrine of stare decisis, it tends to aggravate and eternalize initial mistakes.[245]

These initial mistakes can also ripple throughout the opinions of other circuit courts. Oftentimes, circuit courts look to case law from their sister

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675, 686 (2019) (describing the Second Circuit as "laying the groundwork," for the majority approach to 18 U.S.C. § 2113(a)).

[237] United States v. Stallworth, 543 F.2d 1038, 1041 (2d Cir. 1976).

[238] *See Stallworth*, 543 F.2d.; 18 U.S.C. § 2113(a) ("[W]hoever, by force and violence, or by intimidation, takes, or attempts to take . . . .").

[239] *See Stallworth*, 543 F.2d.

[240] *See id.* at 1040–41.

[241] *See* Michael Rizzo, *The Need to Apply the "Plain Meaning" Rule to the First Paragraph of 18 U.S.C. § 2113(a) Is "Plain": A Bank Robber Must Have Used Actual Force and Violence or Intimidation*, 17 GEO. MASON L. REV. 227, 230–33 (2009).

[242] United States v. Jackson, 560 F.2d 112, 116–17 (2d Cir. 1977).

[243] *See id.* at 113–20.

[244] *In re* Barakat, 173 B.R. 672, 677 (Bankr. C.D. Cal. 1994) ("The doctrine of stare decisis, therefore, not only binds lower courts within a circuit to a court of appeals decision from that circuit, but also binds the court of appeals to its own rulings.") (citing 2A Fed. Proc. L. Ed. § 3:704 (1994)).

[245] Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUM. 62, 118 (2018) ("Stare decisis requires judges to knowingly replicate previous mistakes . . . ."); *see generally* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 462 (2015) (describing overruling a prior precedential decision requires clearing "stare decisis' high bar.").

circuits for help resolving similar matters.[246] However, this becomes problematic where the case relied upon incorrectly applies the methods of statutory interpretation. Regarding 18 U.S.C. § 2113(a), *Stallworth*'s and *Jackson*'s incorrect application of the methods of statutory interpretation began a trend wherein the Fourth Circuit, Sixth Circuit, and the Ninth Circuit erroneously adopted the majority approach that only requires attempted force, violence, or intimidation during a bank robbery plot.[247]

This detailed example also applies regarding Rule 407. The minority approach to Rule 407's applicability to contract claims is both binding precedent and persuasive to other courts. *Shatterproof* is binding precedent within the Eighth Circuit,[248] meaning the Eighth Circuit and its district courts must apply *Shatterproof*'s incorrect holding to admit evidence of subsequent remedial measures in contract claims. Even though the district court decisions do not hold precedential effect within their district,[249] they still maintain persuasive value for other courts considering whether Rule 407 applies in contract cases.[250] Moreover, the erroneous minority approach has proven to be quite persuasive for some courts.[251]

It is concerning that the statutory interpretation eschewing minority approach to Rule 407 has proliferated throughout the United States.[252] Most relevant to this Article, this approach refuses to engage in the proper method of statutory interpretation in considering the meaning of "culpable conduct," ultimately creating an erroneous holding regarding Rule 407's inapplicability to contract cases.[253] Thereby creating a negative ripple effect through both binding precedent and erroneous persuasive authority.[254] On a final note, the

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[246] *E.g.*, Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel or Vessels, 636 F.3d 1338, 1341 (11th Cir. 2011) ("[W]e find our sister circuit's reasoning highly persuasive.").

[247] Rizzo, *supra* note 241, at 230–33.

[248] *See* R.W. Murray, Co. v. Shatterproof Glass Corp., 758 F.2d 266, 274 (8th Cir. 1985).

[249] Hart v. Massanari, 266 F.3d 1155, 1163 (9th Cir. 2001) (noting federal trial court opinions are *not* binding precedent); Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1179–80 (2006) (explaining in detail this concept).

[250] *See generally* Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366, 420 (2009) ("Nevertheless, even nonbinding court decisions are treated as persuasive legal authority.").

[251] *E.g.*, Mowbray v. Waste Mgmt. Holdings, 45 F. Supp. 2d 132, 140–41 (relying on *Shatterproof* and nonbinding district court decisions to hold Rule 407 inapplicable in contract cases).

[252] *See* Advisory Comm. on Evidence Rules, *supra* note 104, at 299–301.

[253] *See supra* text and accompanying notes 208–39.

[254] *See supra* text and accompanying notes 253, 255–56.

minority approach could give future courts license to depart from the well-established plain-meaning rule and instead ignore the meaning of the statute's or federal rule's text and jump to largely policy considerations.[255]

B. Policy Goals Indicate Rule 407 Applies to Breach of Contract Claims

Even if courts venture beyond the text of Rule 407,[256] evidence of subsequent remedial measures in contract cases plainly implicate Rule 407's policy goals.[257] Rule 407's primary policy goal is to encourage repairs.[258] This policy goal applies to breach of contract cases. To use a contract revision at trial to argue the meaning of the original contract term violates the essence of Rule 407.[259] Doing this would discourage efforts to clarify contractual obligations, for fear that such an action would be used against the party in litigation, thus perpetuating confusion.[260]

Beyond encouraging repairs, applying Rule 407 to contract claims is applicable because their inclusion at trial is of low probative value.[261] Subsequent remedial contractual measures are not relevant because they may be brought on by possibly new and or different circumstances.[262] The meaning of contractual language should be based on the plain meaning of the contractual words and the understanding of the parties at the time of the agreement, not what the defendant did in future contracts.[263] Changes to future contractual language are not indicative of the meaning of terms used in prior contracts and should not be used to interpret their meaning.[264]

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[255] *See generally* Rizzo, *supra* note 241, at 246–49.

[256] Generally, courts should only focus on the statutory text and not rely on policy considerations in reaching their decisions. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2381 (2020) (". . . [I]t bears noting that such a policy concern cannot justify supplanting the text's plain meaning."). However, given the minority's tendency to consider supposed policy objectives it is pertinent to consider Rule 407's policy objectives. *E.g.*, *Mowbray*, 45 F. Supp. 2d at 141.

[257] Pastor v. State Farm Mut. Auto Ins. Co., 487 F.3d 1042, 1045 (7th Cir. 2007) ("And to use at a trial a revision in a contract to argue the meaning of the original version would violate Rule 407 of the Federal Rules of Evidence, the subsequent-repairs rule, by discouraging efforts to clarify contractual obligations, thus perpetuating any confusion caused by unclarified language in the contract.").

[258] *See supra* text and accompanying notes 58–62.

[259] *Pastor*, 487 F.3d at 1045.

[260] *Id.*; Reynolds v. Univ. of Pa., 483 F. App'x 726, 728 (3d Cir. 2012); *see generally supra* text and accompanying notes 1–6.

[261] *See supra* text and accompanying notes 54–57.

[262] *See* Duchess v. Langston Corp., 769 A.2d 1131, 1134 (Pa. 2001).

[263] *See supra* text and accompanying notes 55–56.

[264] *Id.*

V. SUBSEQUENT REMEDIAL MEASURES TO CONCLUSIVELY APPLY RULE 407 TO CONTRACT DISPUTES

To resolve the divide among the federal courts Congress should amend Rule 407 to specifically cover contract actions. If the rule were modified to conclusively cover contract actions, it should read as follows:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
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> • negligence;
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> • culpable conduct;
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> • a defect in a product or its design; ~~or~~
>
> • a need for a warning or instruction; ~~or~~
>
> • a breach of contract.
>
> But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.[265]

The proposed language has the conclusive effect of adopting the majority approach that Rule 407 applies to breach of contract actions. In the past, Rule 407 has been amended to resolve a split amongst federal courts.[266] For example, in the past, federal courts were divided on whether Rule 407 applies to products liability actions.[267] To resolve the split concerning Rule 407's applicability to products liability actions the Advisory Committee on the Federal Rules of Evidence adopted an amendment clarifying that the rule

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[265] FED. R. EVID. 407.

[266] *E.g.*, Munasar v. Alaska Tanker Co., No. CV 11-04044 RS, 2012 WL 7187321, at *1–2 (N.D. Cal. Oct. 17, 2012) ("Before 1997, the Circuits split as to whether Rule 407 applied to actions based on strict liability in addition to those based on negligence. In apparent response to the split, Congress amended Rule 407 to add language regarding product defects and the need for warnings."); *see also* Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DIS. RES. 239, 295 n.217 (2002); Edward J. Imwinkelried & James R. McCall, Minnesota v. Philip Morris, Inc.*: An Important Legal Ethics Message Which Neglects the Public Interest in Product Safety Research*, 87 KY. L.J. 1127, 1153–54 (1999).

[267] *Compare* Donahue v. Phillips Petroleum Co., 866 F.2d 1008, 1013 (holding Rule 407 does not apply to products liability), *with* Chase v. General Motors Corp., 856 F.2d 17, 22 (holding Rule 407 applies to products liability).

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does apply to products liability actions.[268] In 1997, the U.S. Supreme Court promulgated the amendment that Rule 407 conclusively cover products liability actions and the U.S. Congress allowed the modified 407 language to take effect.[269]

A similar course should be taken to amend Rule 407 to make clear it applies in contract claims. The process to amend a Federal Rule of Evidence requires approval by several different groups.[270] The process commences with the Advisory Committee on Evidence Rules.[271] The Advisory Committee is composed of twelve members of the legal community who review and suggest changes to the Rules.[272] Regarding Rule 407's applicability to contract claims, the Advisory Committee acknowledged the divergence among the federal courts but took no position on the matter.[273] It is therefore prudent the Advisory Committee vote to amend Rule 407 to make clear it applies to contract actions.

Following the Advisory Committee's approval, an evidentiary amendment proceeds to the Standing Committee, which has the option to present the amended rule for public hearing and comment.[274] After a public hearing, the Standing Committee may either approve, modify, or reject the new proposed rule.[275] Should the standing committee approve the modifications, it "forwards the proposal to the Judicial Conference."[276] If approved by the Judicial Conference, the proposal moves to the U.S.

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[268] Evan Stephenson, *Alone and Out of Excuses: The Tenth Circuit's Refusal to Apply Federal Rule of Evidence 407 to Product Liability Actions*, 36 N.M. L. REV. 391, 391–92 (2006).

[269] *Id.* at 392.

[270] *See* Tom Lininger, *Should Oregon Adopt the New Federal Rules of Evidence?*, 89 OR. L. REV. 1407, 1409 n.10 (2011) (highlighting the various groups who must approve a federal evidentiary rule modification).

[271] Robert A. Weninger, *Amended Federal Rule of Evidence 408: Trapping the Unwary*, 26 REV. LITIG. 401, 402 n.1 (2007).

[272] Nathan R. Sellers, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 LOY. U. CHI. L.J. 327, 337 n.79 (2011) (explaining creation of the Advisory Committee).

[273] *See* Advisory Comm. on Evidence Rules, *supra* note 104, at 299–301 (articulating the rationale for both the majority and minority approaches).

[274] *See* Helen A. Anderson, *The Psychotherapist Privilege: Privacy and "Garden Variety" Emotional Distress*, 21 GEO. MASON L. REV. 117, 146 n.204 (2013).

[275] *Id.*; *see also* Amy Levine, *Researching Federal Court Rules*, 40 COLO. LAW. 79, 80 (May 2011).

[276] Brooke D. Coleman, *#SoWhiteMale: Federal Procedural Rulemaking Committees*, 68 UCLA L. REV. DISCOURSE 370, 377 (2020).

Supreme Court.[277] Upon acceptance, the Supreme Court then has until May 1 to review the proposal.[278] If the Court advances the suggested rule modification to Congress, the new rule becomes law on December 1 of that same year, unless Congress vetoes it within seven months.[279]

Consequently, this process is arduous,[280] and takes at least "two to three years" from start to finish.[281] In addition, some commentators have described the Advisory Committee's general approach to evidentiary rule amendments as an "if it ain't broke, don't fix it" approach.[282]

Despite this conservative approach to making amendments,[283] Rule 407 should be amended to definitively resolve the split regarding its applicability in breach of contract cases. Rule 407's inconsistent application is troubling for multiple reasons. Each year, federal district courts consider approximately 25,421 contract dispute cases.[284] This means in those 25,421 cases the outcome regarding a plaintiff's proffer of a subsequent remedial measure to prove culpability in a breach of contract case is inconsistent across the United States. Circuit splits are incredibly problematic because it

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[277] Jeffrey L. Rensberger, *Of Hats and Robes: Judicial Review of Nonadjudicative Article III Functions*, 53 U. RICH. L. REV. 623, 646 (2019).

[278] *See* 28 U.S.C.A. § 2074 (West); Elizabeth L. DeCoux, *Are the 2011 Changes to Federal Rules of Evidence 413–415 Invalid? The Rules Enabling Act and the Drafters' Definition of Stylistic*, 34 N.C. CENT. L. REV. 136, 148–49 (2012).

[279] *See* 28 U.S.C.A. § 2074 (West); Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 689–90 (2002).

[280] *See* Alicia K. Corcoran, *The Accountant-Client Privilege: A Prescription for Confidentiality or Just a Placebo?*, 34 NEW ENG. L. REV. 697, 731–32 (2000) (describing the process for amending Federal Rules of Evidence as "lengthy,"); *see also* Marcie J. Freeman, *Spanning the Spectrum: Proposed Amendments to Federal Rule of Evidence 407*, 28 TEX. TECH L. REV. 1175, 1205 (1997) (declaring the amendment process as a "trek.").

[281] Jamie Ayers, *To Plead or Not to Plead: Does the Prison Litigation Reform Act's Exhaustion Requirement Establish a Pleading Requirement or an Affirmative Defense?*, 39 U.C. DAVIS L. REV. 247, 276 n.216 (2005) ("Amending a rule can be difficult because the rulemaking process takes a minimum of two to three years for a suggestion to be enacted as a rule.").

[282] *See* Sam Stonefield, *Rule 801(d)'s Oxymoronic "Not Hearsay" Classification: The Untold Backstory and a Suggested Amendment*, 5 FED. CTS. L. REV. 1, 67 (2011).

[283] Nicole E. Crossey, *Machine Translator Testimony and the Confrontation Clause: Has the Time Come for the Hearsay Rules to Escape from the Stone Age?*, 12 DREXEL L. REV. 561, 596 (2020) ("[T]he Advisory Committee on Evidence Rules amends the Rules conservatively.").

[284] *See* F. Andrew Hessick, *Standing and Contracts*, 89 GEO. WASH. L. REV. 298, 319 n.143 (2021).

means the Federal Rules of Evidence are not being uniformly enforced or applied to litigants across the country.[285]

Moreover, this split can lead to forum shopping[286] by counsel seeking favorable law regarding Rule 407's applicability in breach of contract cases.[287] In doing so, litigants further certain negative perceptions regarding forum shopping. First, forum-shopping overburdens certain courts by adding disputes that ordinarily would not be heard in said court.[288] Second, forum shopping creates unnecessary expenses as one party choses the most favorable forum instead of the simplest or most convenient one.[289] Third, forum-shopping generates negative perceptions regarding the American legal systems equity.[290]

All of the above concerns are implicated regarding Rule 407's split concerning its applicability in breach of contract disputes. The American legal systems depend on predictability and uniformity across the United States.[291] The split described in this Article threatens those sacred principles. One way to conclusively end the split is to amend Rule 407 (as suggested in this Article) to definitively apply in breach of contract cases.

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[285] Lindsey Edinger, *Creating Confusion Rather than Clarity: The Sixth Circuit's (Lack of) Decision in* Tree of Life Christian Schools v. Upper Arlington, 58 B.C. L. REV. E-SUPPLEMENT 182, 192 (2017).

[286] Forum shopping is defined as "the practice of choosing the most favorable jurisdiction or court in which a claim might be heard." *Forum Shopping*, BLACK'S LAW DICTIONARY 681 (8th ed. 2004).

[287] *See generally* Carl Tobias, *Dear Justice White*, 30 ARIZ. ST. L.J. 1127, 1146 (1998); Mallory A. Gitt, *Removal Jurisdiction over Mass Actions*, 90 WASH. L. REV. 453, 473 (2015).

[288] *See generally* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 924–25 (2001).

[289] *See* Kevin A. Meehan, *Shopping for Expedient, Inexpensive & Predictable Patent Litigation*, B.C. INTELL. PROP. & TECH. F., Nov. 2008, at 1, 3 ("For starters, choosing an inconvenient venue increases transaction costs by adding travel expenses, local counsel fees, and billable hours spent litigating jurisdictional issues.").

[290] *See* Hanna v. Plumer, 380 U.S. 460, 467 (1965).

[291] *See* Stephanie Sullivant, *Restoring the Uniformity: An Examination of Possible Systems to Classify Franchisees for Workers' Compensation Purposes*, 81 UMKC L. REV. 993, 1021 (2013) (describing the American legal system's ideals); *see also* M. Jason Hale, *Federal Questions, State Courts, and the Lockstep Doctrine*, 57 CASE W. RES. L. REV. 927, 938–39 (2007) (explaining the importance of certain values in a legal system).

VI. CONCLUSION

It is time for Rule 407 to conclusively apply in contract cases. Rule 407 bars the admission of *any* subsequent remedial measure to prove culpable conduct among others. Culpable conduct is a term of art with a broad definition: one broad enough to reach contract cases. Such words signify Rule 407 reaches beyond mere tort claims.[292]

While Rule 407's plain language shows its drafters intended for it to apply in contract claims, applying the Rule to contract cases furthers policy objectives.[293] To permit at trial the introduction of subsequent remedial contract measures to prove breach of contract, disincentives individuals from altering future contract language for fear of adverse legal repercussions.[294] In addition, the mere fact that a defendant altered future contractual language should be indicative of the meaning of the contract at issue in the dispute.[295]

The majority of federal courts that considered this issue follow this analysis. However, a minority of federal courts do not and refuse to apply Rule 407 to contract disputes. The minority approach argues Rule 407 talks in tort-based terms and that the Rule's policies are not implicated in contractual disputes. These courts effectively disregard the plain-meaning rule and Rule 407's policy goals to reach this obtuse result.

Future courts when tasked with this issue should follow the majority approach that is supported by both the plain-meaning rule and Rule 407's policy goals. However, the Rules of Evidence may be amended to effectively end the circuit split. Rule 407 should be amended to explicitly include that subsequent remedial measures may not be admitted to prove culpability in breach of contract claims. Accordingly, amending Rule 407 to explicitly apply to breach of contract claims, furthers the Rule's policy goals, ends a long-standing circuit split, and provides uniformity across the courts in breach of contract claims.

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[292] *See supra* text and accompanying notes 211–22.
[293] *Id.*
[294] *See supra* text accompanying notes 262–70.
[295] *Id.*

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