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Who Knew? Admissibility of Subsequent Remedial Measures when Defendants are Without Knowledge of the Injuries

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I. INTRODUCTION

Federal Rule of Evidence 407 and equivalent state court rules prohibit the introduction of subsequent remedial measures for the purpose of demonstrating

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negligence, culpable conduct, or product defect.[1] The rule breaks down, however, in application and purpose, when a defendant undertakes a new safety measure after the plaintiff's injury but before the defendant had knowledge of the loss. Such a situation is not uncommon. Would-be defendants frequently improve their products and product safety, whether in response to injuries incurred by other users, business pressures, or simply advances in the state of the art and scientific knowledge. Toxic exposure cases, where exposure often predates diagnosis of the injury by a decade or more, represent a prime and growing example of cases where defendants are likely to have made significant product or warning improvements which, if taken before the plaintiff's exposure, may have prevented the injury. Even traditional products liability cases encounter this problem. For example, a manufacturer of industrial equipment may introduce a guard to a machine simply to make the product more competitive with other models without knowledge that plaintiff John Doe injured himself the week before on the old, unguarded machine. Should evidence that the machine now comes with a guard be admissible?

The literal text of Rule 407 suggests not. Yet allowing such measures into evidence may not have the same chilling effect as when the measure was taken in response to the plaintiff's injury. In such circumstances, it can be argued the defendant never feared the measure would be used against it. Since the policies behind Rule 407 may not support the exclusion of such evidence, should the rule still be applied?

This article explores Rule 407, its policy underpinnings, courts' differing interpretations of the rule, and how the rule should be applied to defendants who take subsequent remedial measures without knowledge of a plaintiff's injury. Finally, this article suggests an interpretation of and amendment to Rule 407 that clarifies the rule and furthers its policy bases.

II. BACKGROUND AND CURRENT STATUS OF THE EXCLUSION OF SUBSEQUENT REMEDIAL MEASURES

A. *Early Developments*

The genesis of the subsequent remedial measures rule is a decision from an English court in 1869.[2] This rule was first rejected by American courts but eventually adopted by almost every state.[3] In 1883, the Minnesota Supreme Court held that evidence of a defendant's repairs to an allegedly defective switch was

1. FED. R. EVID. 407.

2. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5282 (Supp. 2006) (citing Hart v. Lancanshire & Yorkshire Ry. Co., 21 L.T.R. (N.S.) 261 (1869)).

3. *Id.*

inadmissible to prove negligence.[4] Subsequent remedial measures, the court explained, were not indicative of negligent conduct.[5] The court reasoned:

> A person may have exercised all the care which the law required, and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and *virtually holds out an inducement for continued negligence.*[6]

By 1892, the United States Supreme Court had weighed in and held that a subsequent alteration or repair by a defendant is not competent evidence of negligence.[7] In *Columbia & Puget Sound Railroad Co. v. Hawthorne*, the plaintiff sued a saw-mill owner for damages he suffered when a pulley fell on him.[8] The plaintiff claimed the saw-mill owner was negligent for not properly designing the machinery.[9] To prove negligence, the plaintiff introduced evidence that the saw-mill owner changed the machinery after the accident to keep the pulleys from falling.[10] The Court noted some difference of opinion amongst state courts on the issue of subsequent remedial measures but determined that most states found such evidence inadmissible.[11] The Court further reasoned that the two states that did admit such evidence, Pennsylvania and Kansas, did so without "satisfactory reasons."[12]

Rule 308 of the Model Code of Evidence, approved in 1942, first codified the inadmissibility of subsequent remedial measures.[13] The model rule provided:

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

4. Morse v. Minneapolis & Saint Louis Ry. Co., 16 N.W. 358, 359 (Minn. 1883).
5. *Id.*
6. *Id.* (emphasis added).
7. Columbia & Puget Sound R.R. Co. v. Hawthorne, 144 U.S. 202, 206-07 (1892).
8. *Id.* at 202.
9. *Id.* at 202-03.
10. *Id.* at 203.
11. *Id.* at 207.
12. *Id.*
13. Michael W. Blanton, *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).

> taken is inadmissible as tending to prove that his failure to take such a precaution to prevent the previous harm was negligent.[14]

Later, Uniform Rule of Evidence 51 was promulgated and stated, "[w]hen after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event."[15] This rule eventually served as a model for the first part of Rule 407.[16]

Before Rule 407 was adopted, Missouri proposed its own evidence code, which contained a provision concerning subsequent remedial measures but also contained exceptions to the general rule.[17] The exception to the proposed Missouri rule provided:

> Nothing in [the general rule] shall be construed to render inadmissible evidence of such subsequent remedial conduct when such evidence is relevant for purposes other than to prove prior negligence or other culpable conduct, as for example, but not exclusively, (1) to prove duty, ownership or control, if denied, or (2) to prove the feasibility or practicability, if denied, of remedial conduct at the time of or prior to the occurrence involved.[18]

These exceptions later formed the basis for the second sentence of Rule 407.[19]

B. Rule 407

From these common law developments and in an effort to adopt a uniform evidence code, Congress initially approved Rule 407, which stated:

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

14. MODEL CODE OF EVIDENCE R. 308 (1942).

15. UNIF. R. EVID. 51 (1953).

16. Blanton, *supra* note 13, at 55-56 (citing 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5281 (1980)).

17. WRIGHT & GRAHAM, *supra* note 2, § 5281.

18. *Id.* § 5281 n.12.

19. Blanton, *supra* note 13, at 56; *see also* Shelton v. S. Ry., 139 S.E. 232, 234 (N.C. 1927) (listing common law exceptions to the inadmissibility of subsequent remedial measures).

> purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.[20]

Rule 407 remained unchanged until 1997, when Congress amended the rule to create two major changes. Rule 407 now reads:

> When, after *an injury or harm allegedly caused by* an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, *a defect in a product, a defect in a product's design, or a need for a warning or instruction.* This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.[21]

The two major changes in the 1997 Amendment were (1) the relevant time period during which the subsequent remedial measures were taken changed from "after an event" to "after an injury or harm allegedly caused by an event" and (2) subsequent remedial measures could no longer be used to demonstrate product defects.[22] The first change was meant to clarify that Rule 407 only applies to changes made after a plaintiff is injured, rather than after a defendant engages in its allegedly tortious conduct.[23] The reason for this change was the belief "that manufacturers [would not] be discouraged from making repairs when an accident [had] not yet occurred."[24] The second change expanded the application of Rule 407 to strict liability actions, which some courts rejected.[25] While the latter amendment has been well-covered in existing legal scholarship[26] and falls beyond the scope of this article, the former change is relevant to the problem at hand.

Most states have subsequent remedial measure rules that are identical or substantially similar to the federal rule,[27] while others differ only in expressly

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20. FED. R. EVID. 407 (1975) (superseded in 1997).

21. *Id.* (emphasis added to highlight changes).

22. *Id.* advisory committee's note (1997). The authors include failure to warn or instruct within the category of product defects.

23. *Id.*

24. *See* Thais L. Richardson, *The Proposed Amendment to Federal Rule of Evidence 407: A Subsequent Remedial Measure That Does Not Fix The Problem*, 45 AM. U. L. REV. 1453, 1475 (1996).

25. FED. R. EVID. 407 advisory committee's note (1997). *See generally* Blanton, *supra* note 13, at 61-80; Thomas C. Fincham, *Federal Rule of Evidence 407 and Its State Variations: The Courts Perform Some "Subsequent Remedial Measures" of Their Own in Products Liability Cases*, 49 UMKC L. REV. 338, 341-47 (1981).

26. *See* Marjorie A. Shields, Annotation, *Admissibility of Evidence of Subsequent Remedial Measures Under Rule 407 of Federal Rules of Evidence*, 158 A.L.R. FED. 609 §§ 3[a]-[b] (1999); Blanton, *supra* note 13; Richardson, *supra* note 24, at 1466-68; Randolph L. Burns, Note, *Subsequent Remedial Measures and Strict Products Liability: A New—Relevant—Answer to an Old Problem*, 81 VA. L. REV. 1141 (1995).

27. A majority of states retain the 1974 version of the subsequent remedial measures rule. ALA. R.

providing that the doctrine does not apply in strict liability cases.[28] A minority of jurisdictions have not codified a rule of evidence parallel to Rule 407 and instead rely on their common law as a source for the doctrine.[29]

The last sentence in Rule 407 provides several exceptions to the subsequent remedial measures rule.[30] These exceptions play an important role in the application of the rule and it has been argued that the rule is actually a rule of inclusion except when such evidence is offered for a very narrow purpose.[31]

III. POLICY REASONS UNDERLYING RULE 407

Three distinct grounds support the subsequent remedial measures rule. The first is that subsequent remedial measures are irrelevant to proving negligence, culpable conduct, or product defects.[32] The second is a social policy consideration encouraging individuals, companies, and other entities to take remedial measures to prevent further injuries.[33] The third, an alternative to the first, is that although the evidence may be relevant, its admission would be more prejudicial than probative.[34] A look at case law and the Advisory Committee Notes demonstrates the relative importance and usefulness of these grounds.

EVID. 407; ARIZ. R. EVID. 407; ARK. STAT. ANN. § 16-41-101, R. 407 (2005); COLO. R. EVID. 407; DEL. R. EVID. 407; IND. R. EVID. 407 (2007); KAN. STAT. ANN. § 60-451 (2006); LA. CODE EVID. ANN. art. 407 (2007); MD. RULE 5-407; MICH. R. EVID. 407; MINN. R. EVID. 407; MISS. R. EVID. 407; MONT. CODE ANN., CH. 10, R. 407 (2005); NEV. REV. STAT. § 48.095 (2007); N.H. R. EVID. 407; N.M. R. EVID. 11-407; N.C. GEN. STAT. § 8C-1, R. 407 (2006); OHIO R. EVID. 407; OKLA. STAT. tit 12, § 2407 (2007); OR. REV. STAT. § 40.185 (2005); R.I. R. EVID. 407; S.C. R. EVID. 407; S.D. CODIFIED LAWS § 19-12-9 (2007); VA. CODE ANN. § 8.01-418.1 (West 2007); WASH. R. EVID. 407; W.VA. R. EVID. 407; WIS. STAT. ANN. § 904.07 (West 2006). A minority of states have updated their evidence codes to reflect the 1997 amendment. FLA. STAT. ANN. § 90.407 (West 2006); IDAHO CODE ANN. § 6-1406 (2005); KY. R. EVID. 407; ME. R. EVID. 407; N.D. R. EVID. 407; PA. R. EVID. 407; TENN. R. EVID. 407; TEX. R. EVID. 407; UTAH R. EVID. 407; VT. R. EVID. 407.

28. *See* CONN. CODE OF EVID. § 4-7; HAW. R. EVID. 407; IOWA R. EVID. 5.407.

29. Boggs v. Lay, 164 S.W.3d 4 (Mo. Ct. App. 2005); Royals v. Ga. Peace Officer Standards & Training Council, 474 S.E.2d 220 (Ga. Ct. App. 1996); Niemann v. Luca, 625 N.Y.S.2d 267 (N.Y. App. Div. 1995); Stevens v. Boston Elevated Ry. Co., 69 N.E. 338 (Mass. 1904); Hodges v. Percival, 23 N.E. 423 (Ill. 1890).

30. FED. R. EVID. 407.

31. WRIGHT & GRAHAM, *supra* note 2, § 5282. The exceptions to Rule 407 are not explored in this article. For further elaboration of the exceptions, see Robert K. Harris, *The Impeachment Exception to Rule 407: Limitations on the Introduction of Evidence of Subsequent Measures*, 42 U. MIAMI L. REV. 901 (1988) (discussing impeachment); Kimberly Eberwine, Note, *Hindsight Bias and the Subsequent Remedial Measures Rule: Fixing the Feasibility Exception*, 55 CASE W. RES. L. REV. 633 (2005) (discussing feasibility).

32. Eric L. Vinson, *Applying Federal Rule of Evidence 407 in Strict Liability: A Discussion of Changes to the Rule*, 16 REV. LITIG. 773, 779-80 (1997).

33. *Id.* at 780.

34. Troja v. Black & Decker Mfg. Co., 488 A.2d 516, 522 (Md. Ct. Spec. App. 1985).

A. The Courts

The Minnesota Supreme Court discussed two of the grounds in *Morse v. Minneapolis & Saint Louis Railway.*[35] The *Morse* court concluded that when a person gets into an accident, it is consistent with the exercise of reasonable care for that person to adopt additional safeguards to prevent further accidents, and thus such action is irrelevant to prove negligence.[36] At no point was this individual negligent or otherwise at fault.[37] The adoption of additional safeguards was consistent with reasonable care rather than negligence.[38] The *Morse* court also recognized the public policy concern that admitting evidence of subsequent remedial measures "virtually holds out an inducement for continued negligence."[39]

Almost a century later, the California Supreme Court, in *Ault v. International Harvester Co.*, also recognized the dual purpose of excluding evidence of subsequent remedial measures.[40] The *Ault* court reasoned that California's subsequent remedial measures rule "originally rested on the notion that such repairs were completely *irrelevant* to the issue of [the] defendant's *negligence* at the time of the accident."[41] In addition, the *Ault* court recognized that "courts and legislatures have frequently retained the exclusionary rule in negligence cases as a matter of 'public policy,' reasoning that the exclusion of such evidence may be necessary to avoid deterring individuals from making improvements or repairs after an accident has occurred."[42]

Despite the dual purposes described in *Morse* and *Ault*, some courts have relied exclusively on the relevancy basis for excluding evidence of subsequent remedial measures.[43] In *Grenada Steel Industries v. Alabama Oxygen Co.*, the Fifth Circuit affirmed a district court's decision to exclude evidence of subsequent remedial measures taken after an acetylene gas leak resulted in an explosion.[44] The *Grenada Steel* court acknowledged that some courts rely on the policy basis for excluding subsequent remedial measures, but explained it was basing its decision instead "on the proposition that evidence of subsequent repair or change has little relevance to whether the product in question was defective at some previous time."[45]

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35. Morse v. Minneapolis & Saint Louis Ry. Co., 16 N.W. 358, 359 (Minn. 1883).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. Ault v. Int'l Harvester Co., 528 P.2d 1148, 1151 (Cal. 1974).
41. *Id.* (citing Sappenfield v. Main St. & A.P.R. Co., 27 P. 590, 593 (1891)).
42. *Id.*
43. Burns, *supra* note 26, at 1166.
44. Grenada Steel Indus., Inc. v. Ala. Oxygen Co., Inc., 695 F.2d 883, 884-85 (5th Cir. 1983).
45. *Id.* at 887.

As an alternative to the relevance ground, a third basis courts use to exclude evidence of subsequent remedial measures is that such evidence would be more prejudicial than probative.[46] Evidence is relevant if it tends to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without that evidence.[47] As pointed out by the court in *Troja v. Black & Decker Manufacturing*, "[i]n theory, evidence of any subsequent modification may be relevant, because the inference could be drawn that the product was defective before the manufacturer implemented the remedial measures."[48] However, just because evidence may be relevant is not the end of the inquiry.[49] If the probative value of evidence is substantially outweighed by the danger of unfair prejudice, then it is inadmissible, even if relevant.[50] This third policy was also recognized by the Supreme Court in *Columbia & Puget Sound Railroad Co. v. Hawthorne*, where the Court held that evidence of subsequent remedial measures "had no legitimate tendency to prove that the defendant had been negligent before the accident happened, *and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant.*"[51]

As explained more fully below, the courts' interpretations of the subsequent remedial measures rule and their explanations of its underlying policy play an important role in how the courts apply the rule to those situations not falling neatly within its bounds.[52] However, it is also worthwhile to examine the Advisory Committee's Notes to Rule 407 as we explore the underpinnings of the rule.

B. *Advisory Committee Notes*

The Advisory Committee's 1972 Notes accompanying Rule 407 indicate that Congress was adopting the common law's subsequent remedial measures rule.[53] The Advisory Committee also noted that Rule 407 rests on two grounds.[54] First, subsequent remedial measures are not "an admission, since the [remedial measure] is equally consistent with injury by mere accident or through

46. Troja v. Black & Decker Mfg. Co., 488 A.2d 516, 522 (1985); *see also* Krause v. Am. Aerolights, Inc., 762 P.2d 1011, 1015-16 (Or. 1988) ("Perhaps the best rationale for the application of the rule is that triers of fact, particularly juries, may overreact to evidence of subsequent remedial measures.").

47. *See* FED. R. EVID. 401.

48. *Troja*, 488 A.2d at 522.

49. Burns, *supra* note 26, at 1166.

50. FED. R. EVID. 403.

51. Columbia & P. S. R.R. Co. v. Hawthorne, 144 U.S. 202, 207 (1892) (emphasis added).

52. *See infra* Part IV.

53. FED. R. EVID. 407 advisory committee's note (1975) ("The rule incorporates conventional doctrine . . . .").

54. *Id.*

contributory negligence."[55] "Put another way, the exclusion of subsequent remedial measures rejects the suggested inference that such measures are an admission of fault and that they are therefore relevant to proving fault."[56] This echoes the relevancy rationale as explained in *Morse*.[57] Despite the long-standing relevancy basis, the Advisory Committee found that this alone was not sufficient to exclude evidence of subsequent remedial measures.[58]

The Advisory Committee's second ground in support of Rule 407 acknowledged the social policy basis for excluding evidence of subsequent remedial measures.[59] The Advisory Committee stated that social policy should encourage individuals "to take, or at least not discourag[e] them from taking, steps in furtherance of added safety."[60] Between the two justifications for Rule 407, the Advisory Committee said the social policy rationale was a "more impressive" ground.[61]

Interestingly, the Advisory Committee did not find that the prejudicial effect outweighing the probative value was a rationale supporting the exclusion of subsequent remedial measures.[62] The Committee noted that, even if the evidence were admitted under one of the exceptions, "factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403."[63] Thus, although Rule 403 may be used to exclude evidence of subsequent remedial measures, its application is merely a final attempt to exclude such evidence after it falls outside the exclusionary scope of Rule 407. This comment appeared again in the Advisory Committee's Notes following the 1997 Amendment.[64]

IV. A TEMPORAL PROBLEM AND TWO SOLUTIONS

Just as abandoning the doctrine of subsequent remedial measures would "virtually hold[] out an inducement for continued negligence,"[65] so too do the lingering questions of its application. One such question is whether the defendant's "remedial measure" must necessarily come after it has *notice* of the

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55. *Id.*

56. Burns, *supra* note 26, at 1148.

57. *See* Morse v. Minneapolis & Saint Louis Ry. Co., 16 N.W. 358, 359 (Minn. 1883); *see also supra* text accompanying notes 4-6, 36-38 (describing the *Morse* rationale).

58. FED. R. EVID. 407 advisory committee's note (1975) ("Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one.").

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.*

63. *Id.*

64. FED. R. EVID. 407 advisory committee's note (1997) ("Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.").

65. Morse v. Minneapolis & Saint Louis Ry. Co., 16 N.W. 358, 359 (Minn. 1883).

plaintiff's injury, or is it sufficient that the measure be taken after the harm? Certainly, in most cases, the distinction is without a difference. Defendants often would not undertake a remedial measure but for a plaintiff's injury, and even if a defendant were contemplating a safety improvement before the harm, there is a good chance it will learn of the plaintiff's injury at or near the time of the injury-causing event. But this is not always the case.

Defendants make safety improvements for a variety of reasons, not simply in response to accidents. Prudent would-be defendants also improve the safety of their products or property as part of general improvements or to prevent accidents from happening in the first place. These improvements are part of the ordinary course of business. When they occur before a plaintiff's accident, they are admissible, but not troublesome, because a jury is likely to find evidence of any improvements before the accident to be a sign that the defendant exercised reasonable care. When improvements are in reaction to a plaintiff's accident, their admissibility is limited by Rule 407 and its state law progeny, and their exclusion or admissibility can be justified for the policy reasons discussed above.[66]

What should be the result if the defendant improves its warning, its product, or its property before it has knowledge of the accident, but after the plaintiff's injury? Admitting such evidence is far less likely to discourage safety improvements because the person making the improvement does not know of the plaintiff's injuries, and therefore, is unlikely to anticipate a lawsuit at all.[67] Although after making the improvement the prospective defendant believes the chances of an accident are reduced, it still appreciates the potential for litigation as preventative measures are not infallible.[68] However, as far as the potential defendant knows, no accidents have taken place yet, and therefore, it believes that any improvements it takes will only be seen as prudent and cautious. In this scenario, there is no risk of discouraging safety improvements. Still, a literal reading of Rule 407 suggests the doctrine of subsequent remedial measures would bar the admissibility of the improvement.

But that is not the last of it. Certainly, evidence that a defendant was considering making an improvement before gaining knowledge of a plaintiff's injury is relevant to show whether the failure to make the improvement earlier was reasonable. Indeed, can a defendant's improvement be "remedial" at all if not made with the intent to remedy the conditions which led to a plaintiff's harm? Does this matter? Ultimately, would a decision on these questions have a chilling

66. *See supra* Part III.

67. *Cf.* Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055, 1060 (7th Cir. 1987) (discussing why a defendant's decision to make a safety improvement is admissible if that decision was made prior to plaintiff's injury).

68. For example, after placing a warning label on its product a manufacturer does not believe lawsuits alleging negligence and strict liability will vanish. The manufacturer is aware that lawsuits may continue to be filed despite its efforts to improve its product.

effect on a would-be defendant's willingness to improve its warning, product, or property?

These queries are not entirely rhetorical. With the rise of toxic tort litigation, in which defendants may not learn of a plaintiff's injury until decades after exposure, these questions become all the more important. Solutions from existing case law are varied both in reasoning and result. Some courts have adopted a literal approach to this problem, trying to adhere to the text of Rule 407 to solve this dilemma.[69] However, this literal approach has its own variations in how closely the text is read. Meanwhile, other courts have adopted a policy-based approach to determine how to interpret Rule 407. Under the policy approach, courts look at whether the underlying policies of the rule justify a given result.

A. Solution #1—The Literalist (and Quasi-Literalist) Approach

The first possible resolution to this dilemma is to read Rule 407 literally and follow its terms. But this method of interpreting Rule 407 can be used to justify either position. On the one hand, Rule 407 is titled "Subsequent Remedial Measures," and it has been argued that a measure is not *remedial* if it is not taken in reaction to a specific injury or event.[70] Therefore, notice of the injury, or at least the event causing the injury, would be required. On the other hand, Rule 407 may be read to apply whenever a measure is taken "after an injury or harm allegedly caused by an event."[71] There is little doubt that a literal reading of the first sentence of Rule 407 does not require notice to the defendant.[72] Still, courts have used the plain text of Rule 407 on both sides of this debate.

In *Van Gordon v. Portland General Electric Co.*, the Oregon Supreme Court "literally" interpreted its subsequent remedial measures rule and held that the doctrine did not bar evidence of a remedial measure taken before the defendant received notice of plaintiff's injury.[73] In that case, a two-year-old child was injured by scalding water on May 20, 1978, when he slipped and fell into a hot spring.[74] The plaintiff alleged the defendant property owner had been reckless in failing to warn visitors to the hot springs of the possible danger of extremely hot water and that the defendant had knowledge of the danger before the accident.[75] At the time of the plaintiff's accident, the defendant maintained three signs reading "HOT WATER."[76] Four months after the accident, but two months before learning of it,

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69. *See supra* Part IV.A.

70. *See infra* text accompanying notes 73-84; *see also* Trytko v. Hubbell, Inc., 28 F.3d 715 (7th Cir. 1994) (arguing that measures taken must be subsequent *and* remedial); WRIGHT & GRAHAM, *supra* note 2, § 5285 (stating that the "event" referenced in Rule 407 must "trigger[] the remedial measure.").

71. *See* FED. R. EVID. 407.

72. *See id.*

73. Van Gordon v. Portland Gen. Elec. Co., 693 P.2d 1285, 1290 (Or. 1985).

74. *Id.* at 1287.

75. *Id.*

76. *Id.* at 1288.

the defendant replaced those signs with new warnings which stated: "CAUTION HOT WATER SOME WATER & ROCK TEMPERATURE IN THIS AREA ARE HIGH ENOUGH TO CAUSE BURNS" and "ACTIVITIES OF CHILDREN & PETS SHOULD BE MONITORED CLOSELY."[77]

Justice Jones, writing the unanimous *en banc* opinion, applied Oregon's subsequent remedial measures rule to allow the admission of the new signs into evidence.[78] Justice Jones determined that the doctrine of subsequent remedial measures could not be applied when the measure was not taken to specifically remedy the plaintiff's accident.[79] In so holding, Jones wrote, "the so-called 'subsequent remedial measures' rule does not apply because there was no evidence presented by the plaintiff or [the defendant] that these new signs were erected because of the injury to the plaintiff."[80] Rather, the court held, measures must "reflect hindsight gained from the ... accident."[81] Interestingly, Justice Jones justified this application on textual grounds by relying on "the plain language of the rule" and an unpacked understanding of the word "after."[82] Thus, the Oregon Supreme Court "literally" read the doctrine of subsequent remedial measures to require that the measures taken be a specific response to the plaintiff's accident.[83] Therefore, the *Van Gordon* rule is that "a defendant must know of the prior event in order to fashion a safety measure to remedy any hazard that caused the event."[84]

This "literal" interpretation of Rule 407 and the doctrine of subsequent remedial measures ignores various issues including the definition of "remedial" and whether the measure must be "remedial" at all under Rule 407 or its state equivalents, including the Oregon rule. It is worth noting that the word "remedial" does not appear in the body of Rule 407.[85] Further, even if the measure must be "remedial," it is not clear whether such a requirement demands that a defendant's actions be taken in reaction to a plaintiff's injury or even the event causing the injury. A standard definition of "remedial"—"[i]ntended to correct, remove, or lessen a wrong, fault, or defect"—requires only knowledge of a defect, not knowledge that the defect has caused an injury.[86] The *Van Gordon* rule skips several steps in reaching its conclusion, including a leap over the definition of "remedial." Practically speaking, a

77. *Id.*

78. *Id.* at 1288-90. Oregon's Rule of Evidence 407, mirroring the federal rule, had not been adopted at the time of the plaintiff's accident. However, the court noted that both rules "merely restate[] decisional law in Oregon," and therefore, facilitated their discussion of the doctrine of subsequent remedial measures. *Id.* at 1288.

79. *Id.* at 1290.

80. *Id.* at 1289.

81. *Id.* at 1290.

82. *Id.* at 1289-90.

83. *Cf.* WRIGHT & GRAHAM, *supra* note 2, § 5285. "Rule 407 only applies when the remedial measure is offered to prove negligence or culpable conduct 'in connection with the event.' *The reference is to the event that triggered the remedial measure.*" *Id.* (emphasis added).

84. *Van Gordon*, 693 P.2d at 1289.

85. *See* FED. R. EVID. 407.

86. BLACK'S LAW DICTIONARY 1319 (8th ed. 2004).

defendant need not know of a prior accident or injury to fashion a safety measure to remedy a hazard; the defendant need only know of the hazard itself (e.g., the scalding hot water or the lack of a guard on a machine). Although *Van Gordon* holds itself out as a case applying a literalist approach, it should, more properly, be categorized as a quasi-literalist approach.

The better-reasoned literalist approach more strictly adheres to the text of Rule 407 itself. In its current form, Rule 407 applies "[w]hen, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur . . . ."[87] Strictly reading this text, evidence of a subsequent measure is inadmissible if the measure *could have prevented* the injury,[88] regardless of whether it was taken in response to the injury or was intended to prevent similar injuries. In other words, a defendant need not know of the injury-causing event or the hazard that caused it so long as the measure could have cured the hazard. Under this approach, the "subsequent" requirement is met whenever the measure is taken after the injury or harm. This strict-literalist approach more closely follows the text of Rule 407 than the quasi-literalist approach of *Van Gordon*.

The Seventh Circuit followed this strict-literalist approach in *Kaczmarek v. Allied Chemical Corporation*.[89] In *Kaczmarek*, the plaintiff truck driver was injured when a hose connecting his tank trailer to a receiving tank broke loose from its intake valve and squirted sulfuric acid on his leg and groin.[90] "The district court refused to admit evidence that after the accident [the defendant] replaced the coupling on its hoses with a different and perhaps safer one."[91] Although the coupling replacement occurred after the defendant had knowledge of the plaintiff's injury, *Kaczmarek* is useful because the defendant's *decision* to replace the coupling occurred before the injury.[92] Because the decision to fix the existing problem was made before the plaintiff's injury took place, and thus before the defendant had knowledge of the injury, its similarity to *Van Gordon* is evident. Although *Van Gordon* and *Kaczmarek* raise slightly different questions, the approach in *Kaczmarek* is nonetheless instructive, as the defendants in both cases decided to remedy the existing problem before they knew of the plaintiffs' injuries. In addition, the underlying policies for Rule 407 are arguably not furthered in either case.

In *Kaczmarek*, Judge Posner, writing for the panel, refused to budge from his plain reading of Rule 407, holding: "[a]lthough a fair argument can thus be made

87. FED. R. EVID. 407.

88. Although the text of Rule 407 requires that the measure "*would* have made the injury or harm less likely to occur," this is equivalent to "could have prevented." Rule 407 does not require the measure to have absolutely prevented the injury; it only requires a lessening of the likelihood. *See id.*

89. 836 F.2d 1055 (7th Cir. 1987).

90. *Id.* at 1056.

91. *Id.* at 1060.

92. *Id.*

that Rule 407 should not apply to a case such as this where the remedial measure is adopted pursuant to a decision taken before the accident, we are unwilling to carve out an exception for this case."[93] Although clearly interested in the policy implications in cases where the decision to make a remedial measure is made before the defendant has notice of the plaintiff's injury, Posner held to a literal reading of the rule.[94] In particular, he wrote:

> There is nothing wrong with a court's interpolating an exception into a statute or rule when necessary to serve the draftsmen's purposes; it is done all the time. But the considerations pro and con [*sic*] exception sought in this case are too closely balanced for us to want to complicate the administration of Rule 407 by creating such an exception to its refreshingly lapidary prose.[95]

As *Van Gordon* and *Kaczmarek* demonstrate, courts that agree on a literal interpretation of Rule 407 may, nevertheless, disagree as to its application where a remedial measure is undertaken before the defendant has knowledge of the plaintiff's injury. The Oregon Supreme Court in *Van Gordon* determined that, because the subsequent measure must be "remedial," it must be in specific response to the plaintiff's accident.[96] Therefore, Rule 407 cannot apply to measures taken where defendant is without notice of the accident.[97] Meanwhile, the Seventh Circuit in *Kaczmarek* literally construed the first sentence of Rule 407 and held that the rule applies whenever the measure is undertaken after the plaintiff's accident, even in a case where absolutely no policy interest justifies the exclusion.[98] However, Judge Posner's reference to a "fair argument" that Rule 407 should not apply in such cases implies the boundaries of Rule 407 may not be etched in stone.[99]

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93. *Id.*

94. *Id.*

95. *Id.* Although holding that Rule 407 could be used to exclude evidence of subsequent remedial measures taken after the plaintiff's accident, Posner's literalist opinion favored the plaintiff in many respects. *Id.* Evidence of the defendant's *decision* to make the remedial measure was admissible because it predated the accident. *Id.* Therefore, "the incremental evidentiary impact of the fact that the decision was carried out is unlikely to be great." *Id.* Presumably, most defendants confronted with the *Kaczmarek* decision would prefer evidence of their subsequent remedial measure to be admitted because once the jury knows of the decision to make the measure, there is little to gain from hiding evidence that the remedial measure was implemented. *Id.* *See also In re* Air Crash Disaster, 86 F.3d 498, 529 (6th Cir. 1996) (holding that Rule 407 excludes evidence of a subsequent remedial measure by a defendant even when the evidence is offered by the defendant who took the measure in order to prove the culpability of an adversary). "Courts have been wary to restrict the scope of Rule 407. We should not be too quick to read new exceptions into the rule because by doing so there is a danger of subverting the policy underlying the rule." *Id.*

96. Van Gordon v. Portland Gen. Elec. Co., 693 P.2d 1285, 1289 (Or. 1985).

97. *Id.* at 1289.

98. *Kaczmarek*, 836 F.2d at 1060.

99. *Id.*

B. Solution #2—The Policy Approach

The second possible resolution to the temporal problem of subsequent remedial measures is to focus on the safety policy underlying Rule 407. The Supreme Court of Iowa employed a policy-centric approach in *Doe v. Johnston*.[100] *Doe* involved a medical malpractice action based on the plaintiff contracting AIDS from a tainted blood transfusion.[101] The patient, a fifty-year-old unidentified man, underwent a total hip replacement performed by the defendant, Dr. Johnston, in February 1985.[102] As part of the plaintiff's post-operative recovery, Dr. Johnston ordered a blood transfusion.[103] Two years later, the plaintiff learned the donor of the transfused blood carried HIV, and subsequent tests confirmed the plaintiff had acquired the disease.[104] The lawsuit centered around whether the transfusion was medically necessary and whether Dr. Johnston "breached the standard of medical care by failing to warn [the plaintiff] of the risk of acquiring AIDS through blood transfusion or, in the alternative, failing to advise him of the possibility of self-donating the necessary units of blood."[105]

At trial, the plaintiff sought to introduce evidence that in early 1986, Dr. Johnston began informing his patients about the risk of AIDS from blood transfusions and the advisability of self-donating.[106] Dr. Johnston argued that the evidence should be excluded under Iowa's subsequent remedial measures rule because the plaintiff's procedure occurred in 1985.[107] The trial court agreed with Dr. Johnston and interpreted Iowa Rule of Evidence 407[108] literally so as to apply whenever the remedial measure is taken after the "event."[109] Although the plaintiff argued the "event" was the doctor learning of the injury, the trial court determined the "event" was the blood transfusion.[110]

On appeal, the Iowa Supreme Court took a policy-oriented approach to resolve the issue.[111] Justice Neuman, writing for the court, stated that "the policy behind the rule, which is to encourage people to take steps to increase public safety . . . would not be served if evidence of defendants' changed behavior could

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100. Doe v. Johnston, 476 N.W.2d 28 (Iowa 1991).

101. *Id.* at 30.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 33.

107. *Id.*

108. Iowa Rule of Evidence 407 reads, in pertinent part: "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event." IOWA R. EVID 407.

109. *Doe*, 476 N.W.2d at 33.

110. *Id.*

111. *Id.*

be used to prove liability just because defendant was unaware that any injury or accident had occurred."[112] Thus, "the policy underlying the rule should apply not only when the safety measures are taken in reaction to an accident, but also when they are taken merely upon discovery that change is needed."[113]

Almost as an afterthought, the court also held that a plain reading of the rule made the triggering event "the same as the act giving rise to [the claim of] negligence."[114] Although not discussed in *Doe v. Johnston*, a more careful analysis of the policies behind the doctrine of subsequent remedial measures further supports its application where the measure is taken after the event causing the plaintiff's injury, rather than after the plaintiff's injury occurs.[115]

V. LITERALIST VS. POLICY APPROACHES: GUIDANCE FROM THIRD PARTY MEASURES AND POST-ACCIDENT INVESTIGATIONS

The question of whether to apply Rule 407 to bar evidence of measures taken before a defendant has knowledge of a plaintiff's injury can be informed by the debate over whether the doctrine of subsequent remedial measures applies to measures taken by third parties and to post-accident investigations. In all of these situations, potential conflicts between a literal reading of Rule 407 and its underlying policies threaten to upset the certainty of outcome the rule was designed to create.

Most courts considering the third party issue hold that Rule 407 does not exclude subsequent remedial measures made by someone other than the defendant.[116] But at least one court has noted that Rule 407 is written in the passive voice, excluding evidence "when measures are taken that . . . would have made the injury or harm less likely" and does not expressly limit the exclusion to cases where the defendant made the remedial measure.[117] Nonetheless, majority-rule courts point to two factors buttressing their argument.

First, these courts note that Rule 407 was implemented so defendants would not be discouraged from improving the safety of their products or premises for fear it would be used against them in court.[118] Because the person performing the

112. *Id.* at 34 (citing Petree v. Victor Fluid Power, Inc., 881 F.2d 1191, 1198 (3d Cir. 1987)).

113. *Id.* (citing *Petree*, 881 F.2d at 1198). It is important to note that *Doe* was decided before the 1997 amendment to the federal rule, which changed the applicable time from an "event" to "after an injury or harm allegedly caused by an event." *See* FED. R. EVID. 407.

114. *Doe*, 476 N.W.2d at 34.

115. *See infra* Part VI.C.

116. *See, e.g.*, Mehojah v. Drummond, 56 F.3d 1213, 1215 (10th Cir. 1995); TLT-Babcock, Inc. v. Emerson Elec. Co., 33 F.3d 397, 400 (4th Cir. 1994); Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 888 (9th Cir. 1991); O'Dell v. Hercules, Inc., 904 F.2d 1194, 1204 (8th Cir. 1990); Dixon v. Int'l Harvester Co., 754 F.2d 573, 583 (5th Cir. 1985); Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974); Steele v. Wiedemann Mach. Co., 280 F.2d 380, 382 (3rd Cir. 1960).

117. Padillas v. Stork-Gamco, Inc., 2000 U.S. Dist. LEXIS 14373, at *3 (E.D. Pa. Oct. 2, 2000).

118. *See, e.g.*, *TLT-Babcock, Inc.*, 33 F.3d at 400; *Pau*, 928 F.2d at 888.

remedial measure is not a defendant, there is no risk the measure will be used against the third party and, accordingly, there is no need to protect the incentives to make the improvement.[119] In other words, someone who is not a defendant and will not become a defendant has no need to be protected by Rule 407. Further, someone who is not now a defendant, but fears becoming one in the future, has an incentive to undertake a subsequent remedial measure because a plaintiff may decide at trial that it is more important to introduce evidence of the remedial measure than to name the marginal defendant to the case.[120]

Second, the majority-rule courts cite Rule 407's Advisory Committee Notes to justify their position that subsequent remedial measures by third parties are admissible.[121] The Notes state that "[t]he rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault."[122] Logically, these cases reason, fault cannot be "admitted" at trial by someone who is not a party; therefore, evidence of subsequent remedial measures by a non-party cannot be an admission of fault.[123] Thus, Rule 407 does not require evidence of subsequent remedial measures by non-defendants be excluded.[124] In addition, the Advisory Committee was already aware of courts' interpretations of the rule when the 1997 amendments to Rule 407 were made. Therefore, the Advisory Committee has tacitly approved the majority's position.[125]

Thus, a majority of courts addressing whether Rule 407 extends to remedial measures by non-defendants have abandoned a literal interpretation of the text in favor of reading the rule to fit the policy of encouraging (or at least not discouraging) subsequent repairs.[126] Furthermore, in justifying their decisions, these courts either do not or cannot rely on the policy reasons based on such measures being irrelevant or unduly prejudicial.[127] Rather, the only policy

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119. For similar reasons, courts have admitted evidence of government mandated subsequent remedial measures, holding that exclusion of evidence under Rule 407 is only required to protect defendants' incentives to make voluntary remedial measures. *See O'Dell*, 904 F.2d at 1194.

120. Because plaintiffs may "defendant shop" so as to ensure that evidence of the remedial measure is admissible, some have questioned whether the rule should also exclude evidence of subsequent remedial measures by "potential defendants." *See Mehojah*, 56 F.3d at 1216-17 (McKay, J., dissenting) ("Plaintiffs could choose to sue only some potential defendants in order to have evidence of other potential defendants' subsequent remedial measures admitted. This would contravene the public policy embodied in Rule 407.").

121. Diehl v. Blaw-Knox, 360 F.3d 426, 430 (3rd Cir. 2004).

122. FED. R. EVID. 407 advisory committee's note (1975); *see also Diehl*, 360 F.3d at 430.

123. *Diehl*, 360 F.3d at 430.

124. *See* Raymond v. Raymond Corp., 938 F.2d 1518, 1524 (1st Cir. 1991) ("[T]here is no rationale for excluding third party subsequent repairs under the Rule.").

125. *Diehl*, 360 F.3d at 430.

126. Pennsylvania has adopted a rule specifically limiting the application of the doctrine of subsequent remedial measures to measures undertaken by a defendant. *See* PA. R. EVID. 407.

127. In another sense, however, it is difficult to see how evidence of a subsequent remedial measure by a non-defendant is any more relevant than evidence of a subsequent remedial measure by a defendant. Indeed, it is likely to be more prejudicial as the jury only sees that someone else had to pick up the slack in the wake of the defendant's negligence, culpable conduct, or defective product.

justification is that one should not be discouraged from taking remedial measures for fear of it being used in a later court proceeding to prove negligence.[128]

From this discussion it might appear that applying a policy-based approach to the temporal problem is reasonable given the similarities between it and the third party situation. However, there is one key distinction between them. Rule 407 does not define, anywhere, who must take the measure for it to be inadmissible. In relevant part, the rule simply states, "When, after an injury or harm allegedly caused by an event, *measures are taken* . . . ."[129] While not a stretch to argue that failing to use limiting language means the rule applies to any measure, no matter who took it, this is a more tenuous argument than can be made to the temporal problem. While Rule 407 does not say by whom the measure must be taken, it does partially answer the temporal question by limiting its application to measures taken "after an injury or harm allegedly caused by an event."[130] As a result, while policy arguments may be useful in allowing courts to interpolate an exception permitting the admission of remedial measures taken by third parties, it is more difficult to justify deviating from a plain reading of Rule 407 when deciding whether a defendant must have notice of the plaintiff's injury.

The position that courts should interpret Rule 407 so that the rule best adheres to the policy of encouraging people to take safety precautions is further undermined by the majority literalist approach used in another Rule 407 situation—the admission of defendants' post-accident investigations and reports. Here, a slim majority of jurisdictions hold that evidence of post-accident investigations and reports are admissible under Rule 407 because, "by themselves, post-accident investigations would not make the event 'less likely to occur;' only the actual implemented changes make it so."[131] Moreover, read literally, Rule 407 requires that the measure *could have been taken before the accident*, while accident investigations cannot occur before an accident.[132] From a policy standpoint, admitting evidence of investigations and reports has a chilling effect on a would-be defendants' incentives to investigate and determine what remedial measures might be appropriate to increase product safety.[133] Still, only a minority

128. This policy has been both widely cited and emphatically criticized. *See infra* text accompanying notes 139-42; *see also* Blanton, *supra* note 13, at 60 (citing commentators critical of this policy justification).

129. FED. R. EVID. 407 (emphasis added).

130. *Id.*

131. Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 430 (5th Cir. 2006); *see also* Prentiss & Carlisle Co. v. Koehring-Waterous Div. of Timberjack, Inc., 972 F.2d 6, 9-10 (1st Cir. 1992) (following a literalist approach in admitting evidence of post-accident "stress tests"); Fasanaro v. Mooney Aircraft Corp., 687 F. Supp. 482, 486-87 (N.D. Cal. 1988) (admitting evidence of post-event tests); Ensign v. Marion County, 914 P.2d 5, 7-8 (Or. Ct. App. 1996) (following a literalist approach for accident reports).

132. *Brazos River Auth.*, 469 F.3d at 428 (following a literalist approach regarding subsequent measures taken to improve products subject to breach of warranty claims because "the admission of evidence of changes made merely to improve a product, as distinguished from remedial measures that make an 'injury or harm less likely to occur,' is not barred by the rule").

133. *Id.* at 30.

of courts follow this policy approach and exclude such evidence.[134] Thus, despite the additional safety that could be afforded to the public by applying Rule 407 to post-accident investigations, most courts have adhered to the literal text of Rule 407 and have refused to allow the policy to overtake the text.

VI. THE SUGGESTED INTERPRETATION AND AMENDMENT

Given the foregoing analysis, how should courts interpret Rule 407 when presented with the question of the admissibility of a defendant's subsequent remedial measures taken without knowledge of the plaintiff's injury? Two options—the policy approach and the textual approach—are set forth and explored below. This article also provides a suggested amendment to Rule 407 that will further its underlying policy goals.

A. Option #1—The Policy Approach

The first option for determining Rule 407's applicability in the context of the unknowing defendant problem is a policy-based approach. Under this approach, a court would examine the underlying policies of Rule 407 and base the admissibility of the evidence on whether these policies would be furthered. As previously explained, three policies justify the exclusion of subsequent remedial measures.[135] The first is relevance. However, reliance on relevance should be greatly discounted, if not completely ignored, for three reasons. First, the Advisory Committee specifically states this is a weak justification for the rule.[136] Second, relevance is not used in the context of subsequent remedial measures by third parties, which has a greater need for reliance on policy considerations.[137] Third, and most importantly, there is no reason to believe that the introduction of evidence of subsequent remedial measures taken before knowledge of a plaintiff's injury is any more relevant than measures taken after knowledge of the injury. For these reasons, the relevancy policy does not provide much guidance in analyzing Rule 407's applicability to the unknowing defendant problem.

The next justification for a policy-based approach is that Rule 407 serves the function of precluding the admission of evidence that is more prejudicial than probative. However, this is illusory as Rule 403 already fully addresses this problem.[138]

The final justification is that Rule 407 is used to encourage, or at least not to discourage, individuals from taking steps in furtherance of added safety. This

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134. *See id.* (citing Alimenta v. Stauffer, 598 F. Supp. 934, 940 (N.D. Ga. 1984)); Martel v. Mass. Bay Transp. Auth., 525 N.E.2d 662, 664 (Mass. 1988).

135. *See supra* Part III.

136. *See supra* note 58 and accompanying text.

137. *See supra* notes 116-28 and accompanying text.

138. *See supra* notes 63-64 and accompanying text.

justification has been highly criticized. As commentators have noted, "[t]here is only skimpy evidence that tort defendants behave in the way that this argument supposes."[139] In *D.L. v. Huebner*, the Wisconsin Supreme Court critiqued this policy justification as having "little, if any, basis in reality."[140] The court noted there was "no empirical evidence that persons are aware of this evidentiary rule or that their actions are in any way affected by its existence."[141] The court further pointed out that "[a] person would probably prefer to correct a defect (even if evidence of this remedial action is admitted to prove negligence) rather than expose many other members of the public to similar injuries and thus face numerous lawsuits arising out of each of these injuries."[142] Without empirical research to determine whether individuals are encouraged to take additional steps to ensure safety because of Rule 407, it is unclear whether this third policy justification holds true. At best, we can only say this justification does not clearly support the admissibility or exclusion of evidence of subsequent remedial measures taken by defendants without knowledge of the plaintiff's injury.

In short, when confronted with the unknowing defendant situation, the justifications for a policy-based approach to analyzing Rule 407 are weak. The underlying policies are not furthered and they do not strongly favor admissibility or exclusion of such evidence. Instead, as described below, a strict literalist approach may be better suited for the analysis.

B. Option #2—The Textual Approach

The second option for determining Rule 407's applicability in the context of the unknowing defendant problem is a textual approach. Under this approach, a court would examine only the text of Rule 407 and would base the admissibility of the evidence on the text, without determining if the policies underlying Rule 407 are furthered. As explained above, the policy approach is weak, and at best, unclear.[143] In contrast, a textual approach is more solidly based and because the policy bases are not examined, it is not subject to the critiques that weaken and muddy the policy approach. Moreover, the textual approach has been utilized by courts in the post-accident investigation context which, like the unknowing defendant problem, could further safety policies if applied, notwithstanding the text of Rule 407.[144]

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139. WRIGHT & GRAHAM, *supra* note 2, § 5282.

140. D.L. v. Huebner, 329 N.W.2d 890, 902 (Wis. 1983).

141. *Id.*

142. *Id.*; *see also* Ault v. Int'l Harvester Co., 528 P.2d 1148, 1152 (Cal. 1974) (rejecting application of California's version of Rule 407 in strict liability cases).

143. *See supra* Part VI.A.

144. *See supra* notes 131-34 and accompanying text.

C. A Proposed Amendment

Although we favor the textual approach for applying Rule 407 when the defendant is without knowledge of the plaintiff's injury, amending the rule as described below could more clearly resolve the temporal problem of subsequent remedial measures. Moreover, an amendment would also further the underlying policies adhered to by proponents of the doctrine. The suggested amendment is minor and simply blends the pre-1997 and post-1997 rules. The suggested language for Federal Rule of Evidence 407 reads:

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

This amendment maintains the current Rule 407's applicability to strict liability claims, but the first sentence is changed from excluding evidence of subsequent remedial measures taken "after an injury or harm allegedly caused by an event" to the pre-1997 Amendment language of "after an event."[145] The purpose of this change is to define the applicable time period for undertaking subsequent remedial measures as after the potential cause of injury exists (i.e., the defendant's negligent act or manufacture of a defective product), rather than after someone is injured. A strict reading of the rule in conjunction with our amendment advances the underlying policies of Rule 407.[146]

If Rule 407 is about relevance, then our proposed amendment makes sense. The relevancy argument is that additional safety measures fail to shed any light on whether a defendant was or was not negligent or whether a product was or was not defective.[147] There is no reason why safety measures taken after the potential cause of injury exists, but before the injury takes place, are any more relevant to show negligence or product defectiveness than safety measures taken after the injury occurred. The rationale of *Morse* is no less applicable.[148] In fact, the time period set forth in *Morse*—after the occurrence of an injury—is under-inclusive to the extent if fails to capture remedial measures taken after the defendant's negligent act but before the plaintiff's injury.

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145. *Compare* FED. R. EVID. 407 (1975), *with* FED. R. EVID. 407 (2006).

146. Because Rule 403 adequately covers the potential for prejudice to outweigh the probative value of subsequent remedial measures and is, in reality, not a policy basis for Rule 407 at all, this "policy" concern will not be addressed. *See supra* notes 63-64 and text accompanying note 138.

147. *See* Morse v. Minneapolis & Saint Louis Ry. Co., 16 N.W. 358, 359 (Minn. 1883).

148. *Id.*

Perhaps amending the first sentence of Rule 407 back to its pre-1997 language would change nothing because some pre-1997 court decisions only applied the rule to measures taken after accidents occurred. However, it must be remembered that the amendment works in conjunction with the strict literalist application of Rule 407.[149] When read literally, courts should apply the rule to measures taken after potential causes of injuries exist because the creation of a source of injury can be read into a broad interpretation of "event." But to assist those judges who continue to look outside the text of the rule for enlightenment on what the "event" is, the Advisory Committee Notes, or even the rule itself, should also be amended to reflect that the term "event" is meant to be broadly construed to include the existence of a potential cause of an injury.

However, as discussed above, the relevancy justification is not the strongest reason for Rule 407.[150] Historically, the strongest support for Rule 407 has been predicated on increasing, or at least not decreasing, safety.[151] If Rule 407 is truly about promoting safety, then the current version of Rule 407 furthers that aim in most instances. But when the defendant takes the remedial measures without knowledge of the plaintiff's injury, it is, at best, unclear whether admitting this evidence undermines the safety policy.

Adopting the proposed amendment and reading the rule in a strict-literalist sense either furthers, or at least does not harm, the safety policy. As described above, reading the suggested amendment in a strict-literalist sense (and supported by the proposed amendment to the Advisory Committee Notes) would cause measures taken after the potential cause of injuries exists to be excluded from evidence. If, as the policy argument goes, defendants will take steps to make their products or premises safer when the threat that their actions will come back to haunt them later in court is extinguished, then it follows that excluding the same evidence at any point after a dangerous condition exists would encourage, or at least not discourage, defendants from taking additional precautionary measures. Although it is not clear that the proposed amendment and the adoption of a strict-literalist analysis of Rule 407 would ensure an increase in safety measures, it undoubtedly provides more incentive for doing so than the current rule.

Regardless of whether one subscribes to a literalist approach, a policy approach, or a combination thereof, the proposed amendment furthers both. If the rule is to remain, then its underlying policies should be effectuated at least in theory, if not in practice. The current version of Rule 407, and the methods in which courts interpret it, does not fully accomplish this task—additional changes are needed.[152]

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149. *See supra* Part VI.B.

150. FED. R. EVID. 407 advisory committee's note (1975).

151. *See supra* notes 39, 42, 59-61 and accompanying text.

152. It is important to note that most states did not amend their version of Rule 407 to reflect the 1997 Amendment changing the relevant time period from an "after an event" to "after an injury or harm allegedly caused by an event." These states could, but would not need to, amend their rules of evidence; their courts

D. Application of the Proposed Amendment

By way of example, assume a manufacturer of industrial equipment creates a new machine and sells it on January 1, 2008. On June 1, 2008, someone is injured while working with the machine. On August 1, 2008, the manufacturer, without knowledge of the June 1 accident, adds a guard to the machine which, if used in the original design, would have prevented the worker's accident. The injured worker then files suit. In this hypothetical, a court would be presented with the following question: Is the manufacturer's addition of a guard to the machine on August 1, two months after the plaintiff's June 1 injury but before learning of the injury, admissible to prove the manufacturer was negligent or that the machine was defective?[153] Applying the proposed amendment to Rule 407 and using a strict-literalist interpretation, a court would first determine when the "event" took place. As discussed, the "event" is interpreted broadly to include when the potential cause of injuries existed. In the hypothetical, the potential cause of the injury is the manufacture of the machine without a guard and this existed on January 1. Thus, any measures taken after January 1 that would have made the injury or harm less likely to occur would be inadmissible to prove negligence or a product defect. Because the manufacturer added a guard to the machine subsequent to January 1, and adding a guard would have prevented the plaintiff's injury, the evidence is inadmissible unless used for another purpose.

From a policy perspective, application of the proposed amendment makes sense. With respect to relevance, the manufacturer's addition of a guard does not show it was negligent at the time of manufacture nor does it show the machine was defective at the time of manufacture. For all we know, the manufacturer exercised all due care on January 1 when the machine was manufactured. Alternatively, the manufacturer could have fallen short of meeting the standard of care imposed by the law. In terms of defectiveness, the state of the art for the machine could not have included the guard until August 1 when the manufacturer promptly complied and caused the product to conform. Alternatively, these type of injuries could have been well known to result from machines without guards and all other manufacturers could have included guards on their machines. The point is that introduction of the manufacturer's addition of the guard into evidence neither favors or disfavors negligence or defectiveness. After learning of these underlying facts, one may conclude that adding the guard confirmed that the manufacturer was negligent or the product was defective, but the introduction of the addition of the guard into evidence is not what ultimately proved negligence or defectiveness; the additional facts already performed this task. The

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would only have to adopt a strict-literalist approach to interpreting the already-existing rule. *But see* DEL. R. EVID. 407; FLA. STAT. ch. § 90.407; IDAHO R. EVID. 407; ME. R. EVID. 407; MINN. R. EVID. 407; N.D. R. EVID. 407; OHIO R. EVID. 407; 42 PA. R. EVID. 407; TEX. R. EVID. 407; UTAH R. EVID. 407; VT. R. EVID. 407. These states define the relevant time period as after the injury or harm.

153. *See supra* Part I.

introduction of subsequent remedial measures adds nothing probative in and of itself.

The stronger safety policy argument is also furthered, or at least not hindered, in the hypothetical. Because safety measures taken after the machine was manufactured on January 1 were inadmissible, the manufacturer had an incentive to add the guard at any point after this date, or at least was not discouraged from adding a guard at any point after January 1. At best, the manufacturer would have added the guard on January 2 and prevented the plaintiff's injuries. Here, the safety policy argument is a complete success. At worst, the manufacturer never adds a guard, the law of negligence and strict liability operates in the absence of Rule 407, and the safety policy is neither advanced nor harmed. Between these two extremes lies a situation where the manufacturer adds a guard on August 1. The plaintiff is already injured, so the safety policy is not furthered as applied to the plaintiff, but just as in the case where the manufacturer never adds a guard, the safety policy is neither advanced nor hindered. However, the addition of the guard on August 1 might have saved another person from being injured on August 2, or another on October 15, or another on November 12. These other injuries would not have been prevented if the manufacturer waited until December 1, when it learned of the plaintiff's injury, to add the guard. It may never be known whether the manufacturer's decision to add the guard was influenced by its knowledge of Rule 407, but admitting evidence of the addition of the guard to prove negligence or defectiveness is a limiting rule erring on the side of reduced safety rather than erring on the side of increased safety. Because our amendment would bar this evidence, it promotes the potential for increased safety.

VII. CONCLUSION

The question raised by this article is whether Rule 407 applies when a defendant is without knowledge of a plaintiff's injuries but remedies an unsafe situation nonetheless.[154] The text of Rule 407 is silent on a defendant's knowledge, but at least one court has superimposed knowledge as a requirement for the rule to be applicable.[155] This interpretation of Rule 407 is based on a loose textual reading of the rule.[156] A better-reasoned reading of Rule 407 is a strict-literalist interpretation that does not require the defendant to have knowledge of the plaintiff's injury.[157] This strict-literalist reading not only more closely follows the text of Rule 407, it also furthers the policies underlying the rule by limiting

154. *See supra* Parts I and IV.

155. Van Gordon v. Portland Gen. Elec. Co., 693 P.2d 1285, 1289 (Or. 1985).

156. *See supra* Part IV.A (critiquing the Oregon Supreme Court's "literal" reading in *Van Gordon*).

157. *See supra* text accompanying notes 87-88.

irrelevant or unduly prejudicial evidence from being introduced at trial and providing an atmosphere for increased safety.[158]

Although adoption of a strict-textualist reading of Rule 407 would solve the differing interpretations facing courts presented with this question, more can be done to further the purpose of Rule 407.[159] Amending Rule 407 to define the pertinent time period as after an injury-causing source exists strengthens the relevancy and public safety policy bases for the rule.[160]

The current version of Rule 407 and the varying interpretations of how it applies leave this evidentiary rule without a solid foundation and causes uncertainty and confusion for product manufacturers and owner of premises. A minor amendment in conjunction with a choice by courts to strictly read the text of Rule 407 would solve these problems. And, if the public safety rationale for the rule is true—that product manufacturers and premises owners will be forthcoming in taking additional safety measures—then this amendment will also better serve the public by removing dangerous conditions before more people are injured.

158. *See supra* Part VI.B.

159. *See supra* Part VI.C.

160. *See supra* Parts VI.C-D.

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