Subsequent Remedial Measures in Strict Liability: Later Opinions as Evidence of Defects in Earlier Reasoning

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NOTES

SUBSEQUENT REMEDIAL MEASURES IN STRICT LIABILITY: LATER OPINIONS AS EVIDENCE OF DEFECTS IN EARLIER REASONING

When the Federal Rules of Evidence were first proposed, opponents voiced considerable concern over the possibility that codification would stultify the development of evidentiary law.\(^1\) Perhaps to calm that fear, the drafters specifically provided that the rules should be construed to promote the "growth and development" of evidentiary law.\(^2\) Yet, over the years, some federal courts have strictly construed the rules, occasionally suggesting that evidentiary precepts must be expressly stated in the rules.\(^3\) Such was the case in early opinions addressing the question of whether Federal Rule of Evidence 407 should apply to actions founded on strict liability theory.\(^4\) More recently, however, there has been a trend among

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1. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 1 (3d ed. 1982). The authors noted that the fear of stultification is a common concern when codification of any common law body of law is suggested. Id.

2. FED. R. EVID. 102, which states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

3. Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977). See also Unterburger v. Snow Co., 630 F.2d 599 (8th Cir. 1980) (applying a restrictive approach to rule 407 in a products liability case); Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977) (reaffirming the conclusion reached in Robbins).

4. See, e.g., Robbins, 552 F.2d at 793. The Eighth Circuit stated that Federal Rule of Evidence 407 "is, by its terms, confined to cases involving negligence or other culpable conduct." Id. Refusing to apply the rule to a case premised on strict liability theory, the court said, "[T]he doctrine of strict liability by its very nature, does not include these elements." Id. See also Arceneaux v. Texaco, Inc., 623 F.2d 924 (5th Cir. 1980), cert. denied, 450 U.S. 928 (1981). In Arceneaux, the court held that rule 407 did not apply to a remedial action that was taken before the accident. While refusing to apply rule 407, the court held that the evidence was irrelevant because the design change was mandated by federal environmental standards, rather than by any alleged defect in the fuel tank in question. Because rule 407 specifically requires only exclusion of measures taken "after the event," FED. R. EVID. 407, the Arceneaux court apparently found that measures taken before the event could not be excluded based on rule 407.
the federal circuit courts to interpret rule 407 more liberally.\textsuperscript{5}

Rule 407 prohibits the admission of subsequent remedial measures to prove "negligence or culpable conduct."\textsuperscript{6} The rule does not, however, require the exclusion of evidence "when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."\textsuperscript{7} Essentially a codification of the common law, rule 407 was adopted with little controversy and was not mentioned in the congressional committee reports on the Federal Rules of Evidence.\textsuperscript{8} In recent years, however, the rule has sparked a controversy that could determine whether the drafters' goal of encouraging remedial actions will be realized in products liability cases.\textsuperscript{9} The initial question is whether rule 407 applies to strict liability actions.\textsuperscript{10} The answer could affect all products


\textsuperscript{6} FED. R. EVID. 407 states:
When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. See infra notes 16-22 and accompanying text for a discussion of the policy considerations behind the rule.

\textsuperscript{7} FED. R. EVID. 407. The list of exceptions is not exclusive, but rather illustrative. Explaining the rationale for exceptions, S. Saltzburg and K. Redden noted: "Even though the principal argument in favor of the Rule is that it encourages people to make repairs and thus provides for maximum public safety, this argument is not so strong as to require that such evidence be excluded no matter what the purpose for which it is offered." S. SALTZBURG & K. REDDEN, supra note 1, at 177.


\textsuperscript{9} Cf. Smyth v. Upjohn Co., 529 F.2d 803 (2d Cir. 1975) (per curiam) (noting that distinctions between mass-produced products cases and cases involving products which are not mass produced would, if accepted, allow evidence of subsequent repair to be introduced in negligence cases involving mass-produced products). See also infra text accompanying notes 126-31; see generally Kobayashi, Products Liability Lawsuits—Part I: Admissibility Questions and Miscellaneous Evidentiary Developments, 25 TRIAL LAW. GUIDE 297, 321-22 (1981) (questioning whether the subsequent remedial measures rule should apply to any products liability cases).

\textsuperscript{10} While numerous commentators have noted the controversy surrounding this issue in recent years, most have concluded that rule 407 is not, and should not be, applicable to actions founded on strict liability theory. See generally Kobayashi, supra note 9, at 346-47.
liability cases, whether based on negligence, strict liability or warranty theories. Admission of subsequent remedial measures in strict products liability cases could portend the demise of rule 407 and its goal of encouraging repairs in all products liability actions. Conversely, if the courts resolve the debate by applying the rule to strict liability suits, the increasing number of grounds for exceptions to the rule could be stemmed, sending a clear message to manufacturers and sellers of products that the public policy of fostering improved safety is alive and that their actions in enhancing consumer safety will be rewarded rather than punished.

While the federal courts are split on the issue, there appears to be a growing trend in favor of applying the rule to all types of products liability cases.

This Note will trace the decisions that have considered the admissibility of subsequent remedial measures in products liability cases based on strict liability theory. Furthermore, it will analyze the application of rule 407 to five categories of strict products liability cases: (1) defective design; (2) defective manufacture (product malfunction); (3) inadequate safety device;
(4) failure to warn of defect; and (5) failure to warn of an unavoidably
dangerous product.\textsuperscript{15} Finally, this Note will examine the trend toward application of rule 407 to strict products liability cases in the federal circuit courts and explain why application of the rule is necessary to advance the policy objective of improving product safety.

I. THE RATIONALE BEHIND THE RULE

A. Dual Considerations: Limited Probative Value and Public Policy Require Exclusion

The advisory committee note pertaining to rule 407 articulates "two grounds" for excluding subsequent remedial measures: remedial conduct does not constitute an admission of responsibility for a prior accident, and public policy requires courts to foster "steps in furtherance of added safety."\textsuperscript{16} Referring to the first reason for excluding evidence of subsequent repairs, the Supreme Court Advisory Committee on Rules of Evidence stated that the rule is a rejection of the notion that "because the world gets wiser as it gets older, therefore it was foolish before."\textsuperscript{17} The courts have consistently asserted that actions taken with the benefit of hindsight are not relevant to show what should have been done earlier.\textsuperscript{18} Although this was the "conventional" reason for exclusion under the common law, the advisory committee noted that, under the federal rule, exclusion of subsequent remedial measures does not rest solely on the limited relevance of the evidence.\textsuperscript{19} Subsequent actions, according to the committee, might be relevant under the liberal theory of relevance embodied in the federal rules because it is "possible" to infer an admission of prior fault from a later remedial measure.\textsuperscript{20} Thus, the compelling ground for exclu-

\textsuperscript{15} Some courts have indicated that distinctions can be made depending upon the type of flaw or failure involved. \textit{See, e.g.}, Werner v. Upjohn Co., 628 F.2d at 858 (noting that distinctions between strict liability and negligence are slight in failure-to-warn cases). \textit{But see} Cann v. Ford Motor Co., 658 F.2d at 60 (extending the rationale of Werner to a case involving both design defect and failure-to-warn of the hazard).

\textsuperscript{16} FED. R. EVID. 407 advisory committee note.

\textsuperscript{17} Id. (quoting Baron Bramwell in Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. (n.s.) 261, 263 (1869)).

\textsuperscript{18} In one of the earliest cases on the issue of subsequent repairs, the United States Supreme Court noted, "the taking of such precautions against the future is not to be construed as an admission of responsibility for the past . . . ." Columbia & Puget Sound R.R. v. Hawthorne, 144 U.S. 202, 207 (1892). \textit{E.g.}, Smyth v. Upjohn Co., 529 F.2d 803, 805 (2d Cir. 1975).

\textsuperscript{19} FED. R. EVID. 407 advisory committee note.

\textsuperscript{20} Id. \textit{But see} Grenada Steel, 695 F.2d at 887-88 (evidence of subsequent repair or change has little relevance to whether the product in question was defective at a previous time and the probative value is outweighed by the danger of confusion).
sion of subsequent precautionary measures appears to be the second ground for exclusion: "a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety."21 The drafters' concern for improved safety is clear from their assertion that the social policy of encouraging added safety is a "more impressive, ground for exclusion" than is the limited probative value of the evidence.22

B. The Extent of the Rule and Its Limitations

The drafters of rule 407 emphasized that courts have traditionally used the principle of encouraging added safety to exclude evidence of various subsequent remedial measures, including repairs, the addition of safety devices, revisions in company rules, employee discharges, and design modifications.23 Furthermore, the advisory committee specifically noted that the federal rule was framed to cover all such measures calculated to improve safety.24

Although rule 407 contains some exceptions to the requirement of exclusion, the explanation of these exceptions indicates that the committee believed a great degree of relevance is required before the probative value of the evidence can overcome the strong public policy objective of encouraging improved safety.25 Safety-improving measures may thus be introduced to prove "ownership, control, or feasibility" only if those issues are "controverted."26 Similarly, such evidence may be used for "impeachment."27 But the advisory committee emphasized that a "genuine issue" must be presented before a court may even consider admitting subsequent remedial

22. Id.
23. Id. The advisory committee note illustrates application of the rule through two examples from common law. In Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961), a subsequent design modification was admitted to show that design changes and safeguards were feasible. In Powers v. J.B. Michael & Co., 329 F.2d 674 (6th Cir. 1964), subsequent warnings put out by a road contractor were used to show that the road was under its control. Repairs, safety device additions, discharge of employees and changes in company rules are also listed by the advisory committee as subsequent remedial measures which have been excluded under the common law. FED. R. EVID. 407 advisory committee note. The note, however, does not suggest that the list is exhaustive, but rather speaks generally of all "steps in furtherance of added safety." Id.
24. FED. R. EVID. 407 advisory committee note. The committee did not include design modifications in its list of possible subsequent remedial measures, but by illustrating the scope of the rule with a design modification case, Brown, it suggests that such modifications fall within the rule. See supra note 23.
25. See FED. R. EVID. 407 advisory committee note.
26. Id.
27. Id.
measures. Exclusion is "automatic" absent a genuine issue.

The advisory committee did not define the terms "controverted" and "genuine issue." The committee said that an admission of an issue by opposing counsel would result in an automatic exclusion of subsequent remedial measures on that issue. The advisory committee note does not suggest, however, that failure to make an admission means that the issue is controverted, or that, absent an admission, there should be an automatic inclusion of the evidence of subsequent repair. Rather, when the evidence is not automatically excluded, the advisory note stated that "the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403" before a decision can be made on the admissibility of a subsequent remedial measure.

II. THE EARLY CASES: RULE 407 MAY ONLY APPLY IN NEGLIGENCE ACTIONS

Prior to enactment of the Federal Rules of Evidence, the Supreme Court of California in an unprecedented decision held that the California evidence rule on the admissibility of subsequent remedial measures was inapplicable to strict products liability cases. Reasoning that the public policy considerations behind the rule were not valid in strict products liability cases, the court in Ault v. International Harvester Co. held that a plaintiff may use evidence of a subsequent remedial measure to prove product defect. The Ault court stressed the inapplicability of the goal of

28. Id. "The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present . . . ." Id.

29. Id.

30. Id.

31. Id.

32. Id.

33. While the rules were enacted on Jan. 2, 1975, their effective date was actually Jul. 1, 1975, 180 days after enactment. Pub. L. No. 93-595, 88 Stat. 1926 (1975).

34. CAL. EVID. CODE § 1151 (West 1966) which states: "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." FED. R. EVID. 407 advisory committee note cites the California Evidence Code § 1151 as an example of a comparable state rule, along with Kansas Code of Civil Procedure § 60-451 and New Jersey Evidence Rule 51. But the California Evidence Code only requires exclusion when a party attempts to use the subsequent measure to prove negligence or culpable conduct. The Federal Rule, however, also requires exclusion for proof of ownership, control, or feasibility when those issues are not controverted.


36. Id. at 114, 528 P.2d at 1149, 117 Cal. Rptr. at 814.

37. Id. at 114, 528 P.2d at 1150, 117 Cal. Rptr. at 814. In Ault, the plaintiff was injured
encouraging repairs in a case involving mass-produced products.\textsuperscript{38} A mass producer, the court reasoned, would not “risk innumerable additional lawsuits and the attendant adverse effect upon its public image” merely to avoid admission of the evidence in the first lawsuit.\textsuperscript{39} The threat of future increased liability for failure to remedy a product defect is a sufficient im- petus to encourage the mass producer to take remedial actions.\textsuperscript{40} Therefore, the court concluded, exclusion of subsequent remedial actions only provides “a shield against potential liability.”\textsuperscript{41}

The \textit{Ault} court also considered whether the phrase “culpable conduct” included the actions of manufacturers who were sued under strict liability theory.\textsuperscript{42} If the legislature had intended to apply the rule to strict liability, the court asserted, a phrase without the connotation of “affirmative fault” would have been used.\textsuperscript{43} The dissent, however, argued that “culpable conduct” includes a manufacturer’s breach of a legal duty by placing a defective product in the marketplace.\textsuperscript{44} Thus, concluded the dissent, the language of the rule covered strict liability cases.\textsuperscript{45}

The \textit{Ault} court’s dual rationale—that the additional impetus of exclusion is unnecessary to encourage remedial action in a products liability case and that culpable conduct does not apply to strict liability actions—was followed in early federal circuit court decisions concerning rule \textit{407}.\textsuperscript{46} The Eighth Circuit adopted the \textit{Ault} rationale in \textit{Robbins v. Farmers Union Grain Terminal Association},\textsuperscript{47} the earliest circuit court decision to hold rule \textit{407} inapplicable to strict products liability actions.\textsuperscript{48}

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\textsuperscript{38} Id. at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 118, 528 P.2d at 1151, 117 Cal. Rptr. at 815. \textit{But see id.} at 124, 528 P.2d at 1155, 117 Cal. Rptr. at 819 (Clark, J., dissenting).
\textsuperscript{43} Id. at 118, 528 P.2d at 1151, 117 Cal. Rptr. at 815.
\textsuperscript{44} Id. at 124, 528 P.2d at 1155, 117 Cal. Rptr. at 819 (Clark, J., dissenting).
\textsuperscript{45} Id.
\textsuperscript{46} See, e.g., \textit{Robbins v. Farmers Union Grain Terminal Ass’n}, 552 F.2d 788, 793 (8th Cir. 1977).
\textsuperscript{47} 552 F.2d 788 (8th Cir. 1977).
\textsuperscript{48} Id. at 793. While the court cited to \textit{Sterner v. United States Plywood-Champion
In *Robbins*, the plaintiff offered evidence of a subsequent warning to demonstrate that a prior warning was inadequate, thus making the product defective under the strict liability count.\(^{49}\) In addition, the evidence was offered to demonstrate the feasibility of giving an alternative warning under the negligent failure to warn count.\(^{50}\) Agreeing with the trial court's ruling that rule 407 does not apply to causes of action brought under strict liability theory, the Eighth Circuit held that “[r]ule 407 is, by its terms, confined to cases involving negligence or other culpable conduct.”\(^{51}\) Strict liability, the court stated, does not include either of those issues.\(^{52}\) Quoting the Supreme Court of South Dakota, the *Robbins* court stated that in a products liability case the focus is on the defect in the product, not on any culpable acts of the manufacturer.\(^{53}\) Furthermore, “the pure economics” of possible mass liability for a defect under strict liability theory obviates the need for excluding subsequent remedial measures in products liability cases.\(^{54}\) Thus, agreeing with *Ault*, the appeals court concluded that admission of subsequent remedial measures in products liability cases would not violate public policy by deterring remedial actions.\(^{55}\)

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\(^{49}\) *Robbins*, 552 F.2d at 792.

\(^{50}\) Id.

\(^{51}\) Id. at 793.

\(^{52}\) Id.

\(^{53}\) Id. (“[a] product liability case looks to a defect in the product rather than any culpable act by the manufacturer”) (quoting Shaffer v. Honeywell, Inc., 249 N.W.2d 251, 257 n.7 (S.D. 1976)).

\(^{54}\) Id. (quoting *Shaffer*, 249 N.W.2d at 257 n.7).

\(^{55}\) Id. (citing *Ault*, 13 Cal.3d at 121-22, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16).
Having decided that the evidence was admissible despite rule 407, the Robbins court addressed the purposes for which the evidence could be used in a strict liability case. Under the strict liability count, the court held that the subsequent remedial measure was relevant to demonstrate both the existence of a prior defect and that the defect caused the injury. Additionally, the evidence was relevant to the issue of feasibility, including any of the components that are encompassed by that issue: cost, practicality and technological possibility of marketing a nondefective product.

56. The Robbins case was brought under both negligence and strict liability theory. *Id.* at 792.

57. *Id.* at 793-95.

58. *Id.* at 794 (purportedly relying on Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974) (per curiam)). The Eighth Circuit noted that the distinction between negligence and strict liability is that in the former “we are talking about the reasonableness of the manufacturer's actions in selling the article without a warning,” while in the latter “we are talking about the condition (dangerousness) of an article which is sold without any warning.” *Id.* at 794-95 n.15 (quoting Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974)). Moreover, the court noted that the same process is occurring whether the suit is based upon negligence theory or strict liability theory: “weighing the utility of the article against the risk of its use.” *Id.* The court further noted the similarity between the two theories: “A way to determine the dangerousness of the article, as distinguished from the seller's culpability, is to assume the seller knew of the product's propensity to injure as it did, and then ask whether, with such knowledge, he would have been negligent in selling it without a warning.” *Id.* (quoting Phillips, 269 Or. 485, 525 P.2d 1033, 1039 (1974)).

If the existence of a defect depends upon whether the manufacturer would have been negligent to sell the product if he knew of its propensity to harm, then using a subsequent remedial measure to prove the existence of a defect is equivalent to using the remedial measure to prove he would have been negligent had he known of the propensity to harm. See the Sixth Circuit's opinion in Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232-33 (6th Cir. 1980) (equating use of a subsequent remedial measure to prove negligence with use of a subsequent remedial measure to prove design defect). See also infra text accompanying notes 168-80.

59. Robbins, 552 F.2d at 794. The court stated that a subsequent remedial measure “may provide substantial evidence that with a different instruction the harm would not have resulted (causation) . . .” *Id.* Even if that is true, however, the fact that a different instruction may not have resulted in the harm sued upon does not mean that the original instruction caused the harm. Furthermore, while causation has always been an element of cases based on negligence, causation has never been an exception to rule 407 in negligence cases.

60. *Id.* The Robbins court noted that in cases where a product is allegedly made defective by the manufacturer's failure to give adequate instructions, knowledge of the dangers of failing to give a particular instruction is not an element of strict liability. *Id.* at 794-95 n.15. The Eighth Circuit also made note of the confusion over this issue. *Id.* Assuming that foreseeability of the danger is an element in strict liability, the court said that evidence of technological possibility "implies knowledge that such instructions could have been used to make the product safe or, at least, implies that such knowledge could be obtained through 'the application of reasonably developed human skill and foresight.'" 552 F.2d at 794 (quoting RESTATEMENT (SECOND) OF TORTS § 402A, comment S). Further, the court ob-
The United States Court of Appeals for the Eighth Circuit did not balance the probative value of the evidence against its possible negative impact in Robbins. The court apparently concluded that a limiting instruction would adequately remedy any confusion of the issues or prejudice where the evidence was admissible on the strict liability count but inadmissible on the negligence count.

Unfair prejudice was expressly addressed, however, in a subsequent Eighth Circuit case. In Farner v. Paccar, Inc., the appeals court found that although there was a danger of prejudice involved in the admission of a recall letter issued by a truck manufacturer, the risk of prejudice did not outweigh the letter's probative value. The letter, according to the Farner court, was probative of both "the existence of a design defect" and

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61. See Robbins, 552 F.2d at 792-95; but see Grenada Steel, 695 F.2d at 887-88 (applying rule 407 to a strict liability case on the dual grounds of policy and low probative value balanced against the danger of confusion).

62. Robbins, 552 F.2d at 792, 795. The court noted, however, that the defendant failed to request a limiting instruction or to object to the trial court's failure to give a limiting instruction. Id. at 792.

63. 562 F.2d 518 (8th Cir. 1977).

64. Id. at 527. Noting that admissions and exclusions of evidence are within the discretion of the trial court, the court found no abuse of discretion. Id. at 528.

65. Id. at 527. Although the court did not specifically mention rule 403, that rule is applicable to the court's discussion of probative value and unfair prejudice. FED. R. EVID. 403. Addressing the possible negative impact of otherwise relevant evidence, the rule states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. The rule "is designed as a guide for the handling of situations for which no specific rules have been formulated." Fed. R. Evid. 403 advisory committee note. The advisory committee note on rule 403 says, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Id. The note further says that "consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction" in deciding whether evidence should be excluded on the grounds of unfair prejudice. Additionally, the availability of other means of proof may also be considered, the note says. Id.
of the manufacturer's "negligent failure to warn of known dangers." Additionally, the court found that because there was independent evidence of a spring failure in the plaintiff's truck and in other trucks equipped with the same suspension system, the danger of prejudice was reduced. Similarly, the prejudicial effect was reduced, according to the Eighth Circuit, because the jury already knew of the recall campaign from the deposition of a service employee of the seller. In addition to discussing the possible danger of prejudice, the court in *Farner* reiterated its earlier holding that rule 407 is not a bar to the admission of subsequent remedial measures in strict liability actions.

The two Eighth Circuit decisions were equally restrictive in their reading of rule 407. Both interpreted the silence of the rule on the issue of strict liability to mean that the rule does not cover that issue. Although the *Farner* opinion may be more thorough in that it addressed the problem of prejudice, that opinion also suggested an apparent inconsistency. Rule 407 is based on both the low probative value of the evidence and the policy of encouraging repairs. Yet, the *Farner* opinion appears to conclude that the

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66. *Farner*, 562 F.2d at 527 (emphasis added). Although the evidence may have been probative of negligent failure to warn of known dangers, Federal Rule of Evidence 407 requires exclusion of evidence introduced for the purpose of demonstrating negligence, regardless of relevancy. *FED. R. EVID.* 407.

67. *Farner*, 562 F.2d at 527. *But see* *FED. R. EVID.* 403 (requiring the consideration of "needless presentation of cumulative evidence" in deciding admissibility). The rule suggests that probative value should be weighed against considerations of cumulativeness. It does not suggest that the cumulativeness of evidence reduces the possibility of unfair prejudice. *Id.*


69. *Id.* at 527 n.17. In explaining the decision, the court suggested that the policy of promoting subsequent remedial measures was sufficiently effectuated through the requirements of the National Traffic and Motor Vehicle Safety Act which imposes a civil penalty of up to $1,000 for each violation with respect to each motor vehicle in issue, not to exceed $800,000 for any related series of violations. *Id.* at 527 n.16 and accompanying text. That act requires manufacturers to report known defects in vehicles, and in some cases, requires recalls of vehicles. Failure to report a known defect is a violation of the act and subject to the civil penalties under 15 U.S.C. § 1398(a) (1976 & Supp. 1983). The court further states that "it is not reasonable to assume that manufacturers will forego improvements in products in order to avoid admission of the evidence of the improvements against them ...." 562 F.2d at 527. Although the logic of the court's comments with respect to the deterrent effect of the civil penalties under the National Traffic and Motor Vehicle Safety Act appears valid, the same argument could be used to suggest admission of evidence of a subsequent recall in a case involving negligence. Moreover, the court noted that admissions made under a duty imposed by law may be excluded where the statute expressly makes the communication confidential, or where such privilege is necessarily implied in order to further public policy objectives. *Id.* at 526. Nevertheless, the court dismissed the defendant's contention that the public policy objective of encouraging subsequent remedial measures implied confidentiality.
probative value of the evidence is not a valid ground for exclusion, even in a negligence case.

III. COMMON LAW PRIOR TO THE CODE: DID FARNER AND ROBBINS MISREAD IT?

While Robbins and Farner were based on a precode line of federal cases, it is perhaps telling that these precode decisions admitted evidence of subsequent remedial measures for reasons other than that the defendant was sued under strict liability theory.\(^7\) Not one of the precode federal decisions cited by Farner and Robbins actually held that the doctrine of excluding subsequent remedial measures was inapplicable to strict liability cases. Yet, in each case, strict liability was the theory under which the action was brought.

The first case in the precode line, Wallner v. Kitchens of Sara Lee, Inc.,\(^7\) was decided over five years before the effective date of the Federal Rules of Evidence.\(^7\) In Wallner, a maintenance company repairman was injured when he slipped on a wet and oily floor at a Sara Lee bakery plant and caught his hand in the exposed drive mechanism of a conveyor belt manufactured by Thiele Engineering Company.\(^7\) The plaintiff alleged that the oil on the floor came from one of two canisters that were attached to the conveyor unit and lubricated the drive mechanism. He sued Sara Lee for negligence, complaining that the bakery permitted oil from the canisters to spray on the floor; that it failed to install an adequate drainage system on the conveyor belt; that it failed to properly clean the floor and that it failed to place guards around the conveyor belt’s moving parts.\(^7\)

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\(^7\) Eg., Sterner v. U.S. Plywood-Champion Paper, Inc., 519 F.2d 1352 (8th Cir. 1975) (postmanufacture, postaccident repair is admissible to demonstrate the plaintiff’s preaccident knowledge); Lolie v. Ohio Brass Co., 502 F.2d 741 (7th Cir. 1974) (per curiam) (subsequent remedial measures are admissible against the party who did not make the repairs and the policy of encouraging repairs is inapplicable to one who does not make the repairs); Mahoney v. Roper-Wright Manufacturing Co., 490 F.2d 229 (7th Cir. 1973) (evidence of postaccident design changes admissible in a strict liability suit to demonstrate feasibility of alternative design and to demonstrate what the defendant knew or should have known if the design alternative was available when the product was manufactured or sold); Hoppe v. Midwest Conveyor Co., 485 F.2d 1196 (8th Cir. 1973) (subsequent remedial measure is admissible under strict liability count to demonstrate feasibility); Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1028 (7th Cir. 1969) (remedial measures may be admitted under negligence count to prove control and may be admitted under strict liability count because the objecting party did not make the repair).

\(^7\) 419 F.2d at 1028.


\(^7\) Wallner, 419 F.2d at 1031.

\(^7\) Id.
The plaintiff's case against Thiele was based on strict liability theory. The machine, manufactured and designed by Thiele, was unreasonably dangerous, the plaintiff asserted, because of the absence of safety guards and because of an inadequate drainage system that allowed oil and water to be sprayed on the floor.\textsuperscript{75}

After the accident, Sara Lee placed guards over the three lowest rungs of the vertical conveyor belt, installed additional lubricators and attached drain lines to the lubrication system.\textsuperscript{76} The Seventh Circuit held that photographs showing the subsequent remedial measures were admissible.\textsuperscript{77} Specifically, the \textit{Wallner} court stated that the rule against admission of subsequent remedial measures was inapplicable to the two defendants in that case. The court did not require exclusion as to Sara Lee because there was a "significant dispute concerning who was responsible for the repair and daily maintenance of the conveyor."\textsuperscript{78} Thus, under the negligence count there was a genuine issue of control, the court suggested. Similarly, the rule was inapplicable to Thiele because Thiele "did not make the changes in question."\textsuperscript{79}

While the \textit{Wallner} court did state that postaccident changes are "properly introduced for any purpose except to demonstrate ... negligence," the context of the statement indicated that the court had merely determined that remedial measures could be used to show who "controlled the conveyor and possessed a duty to make structural changes ... ."\textsuperscript{80} Moreover, although the court allowed the subsequent repair to be used against Thiele, it did so not because Thiele was sued under strict liability theory, but because Thiele did not make the repair. Noting that the rule is "based upon the salutary policy of avoiding jury prejudice and encouraging persons to make repairs following an accident," the \textit{Wallner} court concluded the rule's policy of encouraging repairs is inapplicable to one who does not make the repairs.\textsuperscript{81}

As the \textit{Wallner} court allowed evidence of a subsequent repair to be used to show control over the product in question, four years later, in \textit{Hoppe v.}

\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at 1032.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} As noted earlier, rule 407 specifically provides that the prohibition against admission of subsequent remedial measures does not require exclusion when the evidence is offered to prove control and control is controverted. \textit{See supra} notes 6, 26-29 and accompanying text.
\textsuperscript{81} \textit{Wallner}, 419 F.2d at 1032.
Midwest Conveyor Co., the Eighth Circuit permitted a subsequent repair to be introduced for the purpose of demonstrating the feasibility of alternative design. In Hoppe, the conveyor arms of a hoist system crushed the foot of an automobile plant employee when the employee turned a valve located directly above the conveyor arms. The suit against Midwest Conveyor Co. was based on the theories of strict liability and breach of warranty, alleging that the conveyor-hoist system was defectively designed.

Prior to the purchase of the hoist by General Motors, Midwest Conveyor Co. had submitted a diagram of the conveyor system showing the manual control valve in a location away from the machine’s moving parts. During installation, however, the valve was placed directly above the conveyor arms. After the accident, the valve was moved to conform to the original diagram.

The Eighth Circuit held that the preinstallation plan was admissible under strict liability and warranty theory to demonstrate the feasibility of an alternative design. The appeals court disagreed with the trial court’s contentions that the preinstallation plans were irrelevant and that the only real issue was the condition of the machine at the time of installation. Elaborating, the Hoppe court noted that many factors that might not be relevant to prove negligence are relevant to prove defective design, including the design of products manufactured by competitors, “alternate designs and post-accident modification of the machine,” the safety record of the machine and the cost and feasibility of alternate designs.

In support of the proposition that postaccident modifications are relevant in a defective design case, the Hoppe court quoted a decision holding that evidence of postoccurrence changes is “relevant and material in deter-

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82. 485 F.2d at 1196. See also Fed. R. Evid. 407 advisory committee note (discussing exceptions to the rule, including feasibility).
83. Hoppe, 485 F.2d at 1201-02. While Hoppe was decided before the Federal Rules of Evidence became effective, the case demonstrates the common law basis for rule 407’s feasibility exception.
84. Id. at 1198-99.
85. Id. at 1202.
86. Id. at 1199.
87. Id.
88. Id. at 1201-02. Although the preinstallation plans actually demonstrated the preaccident, preinstallation design, they also were an accurate representation of the position to which the control valve was moved after the accident. The plans could thus be viewed as a representation of the subsequent remedial measure.
89. The trial court also excluded proof as to whether the valve could have been feasibly and economically located elsewhere, and testimony as to the location of the valve as set forth in the plans and specifications. Id.
90. Id. at 1202.
mining that a design alternative is "feasible." Thus, the holding in Hoppe was limited to the proposition that postaccident changes are admissible to prove feasibility in a defective design case.

In accordance with the approach taken by the Wallner court, the Eighth Circuit in Hoppe concluded that a subsequent remedial measure is relevant to some issues in a strict liability case. The third major opinion in this precode line of cases also considered the issue of relevance, but only after it addressed the public policy goal of encouraging subsequent remedial actions. In Lolie v. Ohio Brass Co., the Seventh Circuit held that a subsequent repair was admissible against a party who did not make the postaccident change. The case involved a strict liability action based on defective design. In Lolie, a coal miner was killed when a steel rail struck a power cable and a series of metal clips holding the cable to the roof of the mine gave way. The decedent's wife alleged that the metal clips manufactured by the defendant were defectively designed and unreasonably dangerous. The jury, however, found that the mine operator's negligence in unloading the steel rail was the sole cause of the accident. Despite the plaintiff's proffer, the jury did not hear evidence that, after the accident, the state mine inspector directed the mine operator to strengthen the clip device system by tying the cable in place with rope every sixty feet.

Although the Seventh Circuit stated that the trial court should have ad-

91. Id. at 1202 n.3 (emphasis added) (quoting Sutkowski v. Universal Marion Corp., 281 N.E.2d 749, 753 (Ill. App. 1972)): If the feasibility of alternative designs may be shown by the opinions of experts or by the existence of safety devices on other products or in the design thereof we conclude that evidence of a post occurrence change is equally relevant and material in determining that a design alternative is feasible.

92. The court did not address whether a postaccident modification may be used to prove the existence of a defect.

93. Hoppe, 485 F.2d at 1201-02.

94. Lolie v. Ohio Brass Co., 502 F.2d 741 (7th Cir. 1974) (per curiam).

95. Id.

96. Id. The court stated that the social policy of encouraging people to make repairs is not applicable to a third party who did not make the repairs. Although the court did not explain its rationale for this holding, it is conceivable that, in a case involving several defendants, exclusion vis a vis the repairing party and admission vis a vis the nonrepairing party might encourage each party to race the other in the quest to become the repairer. But the rule could have the opposite effect where control over the instrument of harm is at issue. In that situation, each party might be encouraged not to make the repair for fear that evidence of subsequent repair could be used to show his control. See supra text accompanying notes 76-80.

97. Lolie, 502 F.2d at 743.

98. Id. at 743.

99. Id. at 743-44.
mitted the evidence, it held that exclusion was not reversible error. Ex-
plaining its decision, and referring to the then-proposed Federal Rules of
Evidence, the court noted the two possible reasons for excluding remedial
evidence: (1) the social policy of encouraging increased safety, and (2) the
irrelevance of the evidence to the issue of negligence. The court held
that the public policy of encouraging repairs was inapplicable to a defend-
ant, such as the manufacturer in this case, who did not make the repairs.

Having disposed of the "primary" ground for exclusion, the Lolie
court addressed the relevance issue in the context of strict liability theory.
To impose strict liability upon a defendant under Illinois law, a plaintiff
must prove that the product did not meet the required standard of
safety. This requires proving that the product, as designed, could not
have prevented the accident, that there was an alternative design that
could have prevented the accident and that the alternative design was fea-
sible. Relying on Hoppe, the court said that evidence of subsequent re-
medial measures would be relevant if it "tended to satisfy the plaintiff's
burden on any of these issues . . . ." Then, without specifying which of
these three issues the subsequent repair would tend to prove, the court
concluded that the evidence was relevant.

Read in the context of the cases relied upon by Lolie, it appears that
the Seventh Circuit's decision was limited to the pronouncement that a
subsequent remedial measure is relevant to both the existence and the fea-
sibility of alternative designs. Naturally, since a subsequent design is an
alternative to the original product, it could perhaps be relevant to the issue

100. Id. at 744.
101. Id. at 744 n.1 and accompanying text (citing Fed. R. Evid. 407 advisory committee
note).
102. Id. at 744; see also supra note 96.
103. Lolie, 502 F.2d at 744. The Supreme Court Advisory Committee on Rules of Evi-
dence referred to the policy of encouraging repairs as the "more impressive" rationale. Fed.
R. Evid. 407 advisory committee note. This suggests that evidence must be excluded where
admission would violate the paramount social policy. It does not, however, suggest that
evidence must be admitted where the only objection to it is that it violates the rule's other
ground for exclusion, namely, the low probative value of the evidence. Therefore, the Lolie
court found it necessary to consider the relevance of the evidence. Lolie, 502 F.2d at 744.
104. Id.
105. Id.
106. Id. (emphasis added) (citing Hoppe, 485 F.2d at 1202; Wallner, 419 F.2d at 1032;
Sutkowski, 5 Ill. App. 3d at 318-20, 281 N.E.2d at 752-53; Brown v. Quick Mix Co., 75
Wash. 2d 833, 454 P.2d 205, 209-10 (1969)).
107. Lolie, 502 F.2d at 744.
108. See supra note 106.
109. Each of the cases cited by Hoppe held that the evidence was admissible to prove
feasibility or another recognized exception to rule 407, such as control in Wallner, 419 F.2d
at 1032.
of substitute products. It is questionable, however, that a subsequent design could tend to prove that the original product was incapable of preventing the accident. The fact that a subsequent design might prevent a particular type of accident does not show that the earlier design caused the accident or that it was incapable of preventing the accident.

Whereas Wallner, Hoppe and Lolie all involved strict liability actions based on allegations of design defect, the fourth major case in this common-law line involved an allegedly defective product made unsafe because it was accompanied by an inadequate warning. In Sterner v. U.S. Plywood-Champion Paper, Inc., the plaintiff was burned when a can of all-purpose cement he was using burst into flames. In addition to claiming that the defendant manufacturer was strictly liable because the allegedly inadequate warning of flammability made the product defective, the plaintiff argued alternatively that the defendant was negligent in failing to provide a reasonable warning. The evidentiary questions revolved around three warnings: one before the accident and two following the accident.

The majority opinion did not distinguish between the preaccident and postaccident warnings, instead characterizing all the warnings as "subsequent alterations." The court did, however, hold them to be admissible for different purposes. The preaccident warning was relevant to show the

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110. This would relate to assertions that there was an alternative design that could have prevented the injury, and that the alternative design was feasible. See supra note 105 and accompanying text.
111. 519 F.2d 1352 (8th Cir. 1975).
112. Id. at 1353.
113. Id. The label on the can purchased by the plaintiff read: "DANGER, EXTREMELY FLAMMABLE MIXTURE. DO NOT USE NEAR FIRE OR FLAME. . . . Avoid using spark producing electrical equipment." Id. The can further warned the user to extinguish all flames and pilot lights, use in a well-ventilated area, and keep the product away from heat, sparks and flame until vapors are gone. In using the product, the plaintiff claimed to have extinguished the pilot lights in the kitchen, but admitted that he did not disconnect the refrigerator and that he used an electric fan for ventilation. Id.
114. Id. As in this case, plaintiffs in products liability cases often plead negligence, strict liability and breach of warranty alternatively.
115. Id. Prior to the date of purchase, the defendant manufacturer revised the warning on the cement to make it more emphatic. Id. at 1354. Later, after the accident, the warning was changed on two more occasions, each time making its point more emphatically than before. Id. See also id. at 1355 (Henley, J., concurring) (noting that the two later changes were made after the accident). The language of the three postmanufacture warning changes was not mentioned in the opinion. The court noted, however, that at trial the plaintiff's expert testified that the product had a flash point equivalent to gasoline. Id. at 1353. Furthermore, an employee of the defendant testified that in order to use the product safely in the kitchen of the plaintiff's mobile home, all electric appliances, even a kitchen wall clock, would have to be unplugged. Id.
116. Id. at 1354. The concurring opinion, however, suggests that only the two post-accident changes fell within the general rule, and that the postmanufacture, preaccident repair
“plaintiff’s preaccident knowledge.” The postaccident changes were relevant to the issue of the “feasibility of providing more explicit, detailed and understandable warnings.”

Like its predecessors in this line of cases, Sterner appears to be merely a precode common-law application of the doctrine embodied in rule 407. Despite the apparent attempts of Farner and Robbins to find in these decisions some federal authority for the proposition that a distinction may be made between subsequent repairs based on the theory of the suit, whether brought in negligence or strict liability, no such distinction was made in Wallner, Hoppe, Lolie or Sterner. In admitting evidence of subsequent remedial measures, each of these precode federal decisions relied on either the purpose for which the evidence was offered, such as feasibility or control, or the fact that the defendant did not make the repairs. Additionally, each of these cases suggests that the public policy principle of encouraging subsequent remedial measures is equally applicable to products actions, whether based on negligence or founded on strict liability theory.

IV. Precursory Opinions: Laying the Groundwork for Exclusion in Strict Liability Cases

A. The Fallacy of Ault

Given the dearth of federal authority for the proposition that rule 407 is inapplicable to strict liability actions, it becomes apparent that the California Supreme Court’s decision in Ault was the sole precept for the Eighth Circuit’s rulings in Farner and Robbins. The Ault court’s holding that the public policy of encouraging subsequent repairs does not apply to strict liability cases was initially challenged by the Second Circuit in Smyth v. Upjohn Co., a short, but well-reasoned per curiam decision. Although Smyth involved an action based on negligence, the Second Circuit’s deci-
sion is significant because it points out that Ault's policy rationale—if accepted—could apply to all products liability actions, regardless of whether the suit is in negligence, strict liability or warranty theory.\textsuperscript{121} Smyth suggests that the distinction, if any, is not the theory of the suit, but whether the product involved was mass produced. Additionally, the Smyth case suggests that the public policy considerations must be coupled with an examination of the probative value of the evidence before a decision can be made on admissibility.\textsuperscript{122}

In Smyth, the plaintiff took an antibiotic drug that he alleged was the cause of his subsequently diagnosed colitis.\textsuperscript{123} Although the drug label warned that the medication could cause "persistent diarrhea" and "enterocolitis," warnings published after Dr. Smyth ingested the drug were more emphatic and eventually recommended treatment for side effects.\textsuperscript{124} Smyth sued for negligent failure to warn and sought to introduce evidence of the subsequent warnings.\textsuperscript{125}

On appeal, the Second Circuit first directed its attention to the policy behind exclusion of subsequent remedial measures: that admission of the evidence might discourage remedial action in a potentially dangerous situation.\textsuperscript{126} Citing Ault, the Second Circuit noted that the plaintiff's argument in favor of admission of a subsequent remedial measure was that exclusion to encourage steps in furtherance of added safety is unnecessary where the product at issue was mass produced.\textsuperscript{127} Because there could be additional law suits involving the product, the argument suggests, the mass producer needs no additional incentive to make his product safer.\textsuperscript{128}

While the Ault court had accepted that argument, the Smyth court did

\textsuperscript{121} See id. at 804-05.

\textsuperscript{122} Id. at 805; see also Grenada Steel, 695 F.2d at 887-88 (holding that rule 407 applies to strict liability on the dual grounds of relevance and policy).

\textsuperscript{123} Smyth, 529 F.2d at 803. The plaintiff, a doctor, treated himself with the antibiotic Lincomyc. He developed diarrhea two days after beginning treatment, and although he stopped treatment of the drug after four days, the side-effects continued for six weeks, resulting in hospitalization. Id.

\textsuperscript{124} Id. at 803-04 nn.1-2 and accompanying text.

\textsuperscript{125} Id. at 803-04. In a case involving drug warnings, a plaintiff may usually plead alternatively, suing in negligence for negligent failure to give an adequate warning, or in strict liability for failure to warn of an unavoidably dangerous product. See generally Werner, 628 F.2d 848 (where the plaintiff sued under both negligence and strict liability in a drug warning case).

\textsuperscript{126} Smyth, 529 F.2d at 804. See also Fed. R. Evid. 407 advisory committee note.


\textsuperscript{128} Smyth, 529 F.2d at 804. The plaintiff said the mass producer would make the repair in any event, with or without the rule prohibiting admission.
not find such reasoning to be compelling. The rule against admission of subsequent remedial measures, the Smyth court asserted, might be more forcefully supported by the public policy justification of encouraging repairs in a case where the product in question was not mass produced. Nevertheless, the court concluded that the public policy rationale "still has some weight" in cases involving mass-produced products. Rejecting the Ault rationale, the Smyth court emphasized that some manufacturers might weigh the risk of additional suits against the risk of initial liability and conclude that their potential liability was lower by maintaining the status quo.

But the Smyth court did not rest its decision solely on public policy considerations. Noting that relevance was the second reason for excluding evidence of subsequent remedial measures, the court discussed the limited probative value of the evidence. The court listed four firmly established

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129. Id. at 805. The Smyth court emphasized, however, that "this has by no means been established" by the plaintiff. Id.

130. Id.

131. Obviously, if the evidence were admitted in the first case sued upon, it would help establish initial liability. Furthermore, if the subsequent repair is the only evidence from which a jury could infer defect, then by refraining from taking subsequent remedial actions, the defendant could avoid both initial liability and future liability. This point is made succinctly in Werner, 628 F.2d at 857, where the Fourth Circuit noted that the Ault court's conclusion that a mass-producer risks increased liability by not repairing "assumes that the product is defective, and overlooks the situation where the product is not defective but could be made better." Id.

132. Smyth, 529 F.2d at 805. Several cases that have held rule 407 applicable to strict liability cases appear to have been decided solely on the grounds of relevance. One recent decision holding rule 407 applicable to strict liability cases was Josephs v. Harris Corp., 677 F.2d 985, 990-91 (3d Cir. 1982). The Josephs court specifically noted that it was considering "the relevance of these remedial measures in light of Rule 407 of the Federal Rules of Evidence." Id. at 990. The plaintiff's attorney had argued that the policy of encouraging repairs did not apply to subsequent remedial measures taken in strict liability cases. Telephone interview with Arthur D. Rabelow, Artzt & Rabelow Associates, Bensalem, Pa. (Oct. 6, 1982). But the court did not address the policy issues. Josephs, 677 F.2d at 990-91. Holding that subsequent remedial measures may only be admitted where ownership, control or feasibility are controverted, and finding that those issues were not controverted, the Third Circuit refused to overturn the trial court's decision to exclude the evidence. Id. at 991.

In reaching that conclusion, the Third Circuit relied on an earlier Third Circuit case, Knight v. Otis Elevator Co., 596 F.2d 84, 91-92 (3d Cir. 1979), and Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232-33 (6th Cir. 1980) (subsequent remedial measure may not be used to demonstrate defect). In Knight, the plaintiff had sued Otis Elevator Co. for negligence, strict liability and breach of warranty. Knight, 596 F.2d at 86. Addressing the subsequent remedial measure in one short paragraph, the Knight court made no mention of the public policy grounds for exclusion under rule 407. Id. at 91-92. Rather, the court concluded that feasibility must be controverted under the rule. Because the jury had already heard evidence that it would have been easy, simple and inexpensive to modify the elevator in question by placing safety guards around the elevator buttons, the Third Circuit concluded that evidence that these repairs had actually been made "would have been cumula-
reasons for finding the evidence inadmissible to prove negligence: (1) taking precautions against the future is not an admission of responsibility for the past; (2) subsequent actions have “no legitimate tendency to prove” prior negligence; (3) such evidence is “calculated to distract” the jury from the real issue; and (4) the evidence is aimed at prejudicing the jury against the defendant. Furthermore, the court noted that the plaintiffs in Smyth did not need to demonstrate the feasibility of an alternative warning, as that issue was not controverted. Nor was the evidence needed to show Upjohn’s prior knowledge of the drug’s dangers, as there was sufficient independent evidence on that issue. Therefore, the court said, the evidence would be irrelevant to feasibility, cumulative as to prior knowledge, and its only effect would be to create prejudice.
The significance of *Smyth* is that it coupled the considerations of policy and relevance to reach its conclusion. Weighing the risk of deterring remedial actions against the social goal of encouraging added safety, the court determined that policy considerations required exclusion. Then, balancing the limited probative value of the evidence against the danger of prejudice, the *Smyth* court found the relevance scales weighed heavily toward exclusion. By employing both balancing tests, *Smyth* addressed whether the value of the evidence and the attendant risk of prejudice offset the public policy considerations.

**B. Automatic Exclusion**

1. *Absence of Probative Value as the Basis for Exclusion*

Although exclusion of subsequent remedial measures under rule 407 rests ultimately, as the advisory committee noted, on the dual considerations of public policy and probative value, it is not always necessary to address both issues. As the United States Court of Appeals for the Fifth Circuit found in *Luda Foster v. Ford Motor Co.*, an examination of the

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Foster v. Ford Motor Co., 616 F.2d 1304 (5th Cir. 1980). In that case, Ford Motor Co. proffered evidence that the designer of a haylift attachment made postaccident modifications to the attachment after the plaintiff had been injured when a bale of hay slid off the hayfork attached to the Ford tractor's front-end loader. *Id.* at 1306, 1309 n.11. At trial, the trial court refused to allow evidence of the postaccident modification, and dismissed Ford Motor Co.'s third-party strict liability claim for contribution against the designer of the hayfork attachment. Remanding the cause for retrial, the Fifth Circuit instructed the trial court to consider the subsequent remedial measure in light of rules 407 and 403. *Id.* at 1309 n.11. While observing that there is a conflict among the circuits over whether rule 407 applies to strict liability actions, the Fifth Circuit said that even if the trial court concluded rule 407 does not apply to strict liability, admission of the evidence “must be considered in light of Rule 403.” *Id.*

137. *Smyth*, 529 F.2d at 805.


139. 621 F.2d 715 (5th Cir. 1980). In *Foster*, a truck driver's widow sued Ford Motor Co. for the wrongful death of her husband. *Id.* at 717. The plaintiff contended and Ford stipulated that a dowel pin attached to the suspension system separated from the vehicle's spacer block and fell into the axle pad. *Id.* The issue was whether that fact rendered the truck defective. At trial, the plaintiff alleged that the loosening of the one-inch dowel pin caused a shift in the left front suspension assembly, including the spacer block, spring leaves and U-bolts. *Id.* at 718. According to the plaintiff's theory of the accident, the slippage of these components resulted in the driver's loss of control over the vehicle. Ford maintained, however, that the dowel pin was simply a remnant of the manufacturing process, and that it played no role in the stability of the suspension system. *Id.* at 717-18. Thus, Ford contended, the loosening of the dowel pin did not render the truck defective, nor cause a loss of control over the vehicle. *Id.* On appeal, the plaintiff argued that the trial court had erred in refusing to admit evidence that after manufacture of the truck and before the accident Ford Motor Co. had changed the design of the assembly, casting it as a single unit. *Id.* at 720.
probative value may occasionally dispose of the need to address the over-
riding public policy concerns.

Foster involved a design change in the suspension assembly of a 1975
model truck manufactured by Ford. The truck driven by plaintiff's de-
cedent was manufactured with a two-part suspension system, whereas later
models were fitted with a single-unit suspension system. The plaintiff
contended that the defective design of her husband's truck had caused him
to lose control of the vehicle.

Although the plaintiff challenged exclusion of the postmanufacture,
preaccident design change on the grounds that rule 407 does not apply to
strict liability cases, the Fifth Circuit stated that it need not decide that
issue. Noting the split among the circuits, the Foster court refused to
consider whether the public policy goal of encouraging subsequent reme-
dial measures requires exclusion in strict products liability cases.
Rather, the court addressed the evidentiary questions on the basis of rule
401 and rule 403.

In analyzing the relevance of the design change, the Foster court found
the change to be without probative value since Ford had already conceded
at trial that the use of a single-unit system was "technologically feasible
and economically practical." Turning its attention to rule 403, the court

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140. Id. at 717-18.
141. Id. at 720. The design change was made before the accident took place. Id.
142. Id. at 720-21.
143. Id. Several months after the Foster case, the Fifth Circuit decided in Arceneaux v.
Texaco, Inc., 623 F.2d 924 (5th Cir. 1980), cert. denied, 450 U.S. 928 (1981), that rule 407’s
reference to actions taken “after the event” refers to actions taken after the accident, and
does not refer to actions taken after manufacture but before the accident. Id. at 928. But the
court held that the evidence of post-manufacture design change was irrelevant to the issue of
faulty design under rules 401 and 402 and should therefore be excluded. Id. In a suit for
negligent design, the court noted, the post-manufacture design change is not probative of
"whether a product was designed with reasonable care for safety in the use for which it was
manufactured, measured by the knowledge available both at the time of design and manufac-
ture." Id. (emphasis added).
144. Foster, 621 F.2d at 721. Refusing to consider whether the evidence might have been
relevant to some other issue not raised during the offer of proof, the Foster court said it
could address only the precise purpose for which the evidence was actually offered. Id.
(citing FED. R. EVID. 103(a)(2)). Rule 103(a)(2) states:
Error may not be predicated upon a ruling which admits or excludes evidence
unless a substantial right of the party is affected, and

(2) In the case ruling is one excluding evidence, the substance of the evidence
was made known to the court by offer or was apparent from the context within
which questions were asked.
FED. R. EVID. 103(a)(2). At trial, the evidence was only offered to prove feasibility. Decid-
ing the relevance of the evidence on the issue of feasibility, the court cited rule 401. Rule
401 states: “‘Relevant evidence’ means evidence having any tendency to make the existence
held that the evidence "[a]t best . . . would have been cumulative" because Ford's concession was sufficient to find for the plaintiff on the issue of feasibility, and because the jury was given extensive evidence from both sides as to how a redesigned system would have worked. Of greater concern to the court was that the introduction of a model of the redesigned system could have been unfairly prejudicial to the defendant or misleading and confusing to the jury.

The approach taken by the Foster court, relying solely on rules 401 and 403, suggests that the public policy concern of encouraging repairs should not be addressed until it has been determined that the probative value of the evidence outweighs any of the concerns embodied in rule 403. Thus Foster suggests that exclusion under rule 407 may be based entirely on the low probative value of the evidence, without ever addressing the "other, and more impressive, ground for exclusion," namely, public policy.

2. Failure to Controvert as the Basis for Exclusion

By providing for automatic exclusion, the drafters of rule 407 appear to have made a judgment that subsequent remedial measures are of low probative value when the issue on which the evidence is offered has not been

of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. The advisory committee note to that rule states:

An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Fed. R. Evid. 401 advisory committee note (emphasis added). The implication, therefore, is that rule 404 and those following it, including rule 407, are rules of relevance, and that the same result accomplished by a rule such as rule 407 should also be accomplished if a court applied only rules 401 and 403.

145. Foster, 621 F.2d at 721 (citing Fed. R. Evid. 403). For text of rule 403, see supra note 65.

146. Foster, 621 F.2d at 721.

147. Id. But cumulativeness and unfair prejudice may, in some cases, be interrelated. "'Unfair prejudice' within [the context of rule 403] means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee note. "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. . . . The availability of other means of proof may also be an appropriate factor." Id. (emphasis added). Thus, where the evidence is both cumulative and unfairly prejudicial, the advisory committee note suggests that exclusion is the proper course.

148. See Fed. R. Evid. 407 advisory committee note. See also infra notes 25-32 and accompanying text. Accord Josephs, 677 F.2d at 990-91; Knight, 596 F.2d at 91-92.

expressly controverted. In *Oberst v. International Harvester Co.*, the Seventh Circuit expressly held that rule 407 applies to strict liability actions, but refused to admit evidence of a design change because the feasibility of using an alternative design was not controverted.

In *Oberst*, the challenged design "defect" was a dual-strap bunk re-

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150. *Id.* Exclusion is automatic when feasibility, ownership or control are not controverted. *Id.*

151. 640 F.2d 863 (7th Cir. 1980).

152. *Id.* at 866. *But see id.* at 867 (Swygert, J., concurring in part and dissenting in part).

The dissent concluded that rule 407 should not apply to strict liability, and is one of the most detailed opinions written by a federal circuit judge taking that position. Judge Swygert states:

In strict liability cases, an exclusionary rule is unlikely to achieve its ostensible objective, primarily because the exceptions to the rule make exclusion uncertain, if not unlikely. Ultimately, admissibility depends upon the effectiveness of the plaintiff's trial tactics in getting the defendant to "controvert" feasibility or opening itself to impeachment. Many defendants may be unaware of the rule. It is illogical to assume that such defendants will alter their behavior because of it. Of the defendants who are aware of the rule, most will be insured. Their insurers are likely to encourage or require them to mitigate losses by taking remedial measures, regardless of the existence of an exclusionary rule. Some remedial measures may be required by regulatory authorities. Potential defendants are not likely to violate regulatory mandates because of the lack of an exclusionary rule. With respect to the federal rule, in particular, because most products liability cases are litigated in state court, the only basis for federal jurisdiction being diversity, the coercive effect of an exclusionary rule is negligible.

*Id.* at 870 (Swygert, J., concurring in part and dissenting in part). The same arguments, of course, would apply equally to suits brought under negligence theory. Furthermore, when a third party forces a manufacturer to take a remedial measure, the probative value of the evidence as an admission is even lower than when the manufacturer acts voluntarily. *Cf.* FED. R. EVID. 407 advisory committee note (explaining the limited relevance of remedial conduct, the note says: "The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence."). Judge Swygert concluded that because rule 407 may not serve effectively to exclude evidence of subsequent remedial measures, rule 403 should be used instead. *Oberst*, 640 F.2d at 870 n.8 (Swygert, J., concurring in part and dissenting in part). The drafters of rule 407, however, suggested that rule 407 should work *with* rule 403 to exclude remedial evidence. FED. R. EVID. 407 advisory committee note.

153. *Oberst*, 640 F.2d at 866. *But see id.* at 868 (Swygert, J., concurring in part and dissenting in part). Judge Swygert said a defendant must make an unequivocal concession on feasibility in order to make that issue uncontroversial under rule 407. *Contra* FED. R. EVID. 407 advisory committee note (allowing a defendant to gain automatic exclusion by admitting feasibility, but not suggesting that failure to make an admission makes an issue uncontroversial). In this case, Judge Swygert suggested, the defendant's expert controverted the feasibility of employing an alternative design by arguing that the alternative design was unnecessary and that the design used at the time of the accident may have been more effective in certain types of accidents. *Oberst*, 640 F.2d at 868 (Swygert, J., concurring in part and dissenting in part). *But see Werner*, 628 F.2d at 855 (distinguishing between contesting the feasibility of using an alternative warning and contesting the necessity of using an alternative warning).
straint system employed in the sleeping compartment of a truck. International Harvester switched to a woven-mesh system after the accident. Arguing that the subsequent remedial measure was admissible for any purpose and was not restricted to impeachment or to rebutting a denial of feasibility, ownership or control, the plaintiff contended that rule 407's exception clause is applicable only where the central issue of the case is negligence or culpable conduct.

In rejecting that reading, the Seventh Circuit implied that subsequent remedial measures generally have little probative value, regardless of whether the central issue is negligence or strict liability. The court reached this conclusion despite rule 407's nonexclusive list of permissible uses of remedial measures. The failure to consider other possible uses, however, may have been due to the plaintiff's apparent failure to suggest a purpose for which the evidence might have been more probative.

C. Are Remedial Measures Probative of the Existence of a Defect?

In Longenecker v. General Motors Corp., the Ninth Circuit specifically decided that a recall letter advising Chevrolet Impala owners that their cars should be retrofitted with a restraint to limit "engine lift" was relevant to demonstrate the existence of a defect in the car's engine mounts.

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154. Oberst, 640 F.2d at 864. The plaintiff also alleged that the truck cab's interior was defective, but no subsequent remedial measures were taken with respect to that portion of the truck. Id.
155. Id. at 867.
156. Id. at 866. The plaintiff contended that the first sentence of rule 407 applies only to negligence and culpable conduct, and that the second sentence is expressly an exception to the first in cases involving negligence or culpable conduct. But see text of FED. R. EVID. 407 (references to negligence, culpable conduct, ownership, control and feasibility appear to be mentioned as elements of a case, and there is no express limitation as to applicability of the rule based on the theory of the case).
157. See Oberst, 640 F.2d at 866 (the decision does not even mention the social policy of encouraging parties to make repairs); see also id. at 867 n.2 (Swygert, J., concurring in part and dissenting in part) (stating that rule 407 is based primarily upon the social policy of encouraging repairs, and not upon relevancy).
158. See FED. R. EVID. 407 (subsequent remedial measures may be admitted in some cases "when offered for another purpose, such as proving ownership, control or feasibility ..." (emphasis added)). See also Werner, 628 F.2d at 856 (exceptions listed in the rule are intended to be illustrative and not exhaustive).
159. 594 F.2d 1283 (9th Cir. 1979).
160. Id. at 1286.
161. Id. Although the recall letter stated that engine lift would occur only upon rapid acceleration, if at all, and although the driver of the Impala testified that he had not accelerated when he lost control, the court held that the recall letter was relevant to the proposition that "there was a flaw" in the engine mounts. Id. General Motors argued that the evidence was of little probative value on the issue of defect because the circumstances under which engine separation could occur were not present. Id.
The plaintiff had contended that the alleged defect had caused the 1966 Impala to become uncontrollable.\textsuperscript{162}

Upholding the admissibility of the recall letter on the defect issue, the Ninth Circuit emphasized that it was not deciding the question under rule 407.\textsuperscript{163} Because General Motors' only objection was that the probative value did not outweigh the prejudicial effect,\textsuperscript{164} the Longenecker ruling was limited to rule 403's considerations. The court did not decide whether a recall letter is a subsequent remedial measure, or whether rule 407 applies to strict liability cases.\textsuperscript{165} Nor did the court reach the ultimate question of whether the social policy goal of encouraging repairs in a potentially dangerous situation outweighs the possible probative value of the evidence.\textsuperscript{166} Clearly, a recall letter may be more probative of the existence of a defect than would less drastic remedial measures since recall implies an exigent need to remedy an existing condition.\textsuperscript{167} Still, it is precisely because the need for remedial measures may be greater in such cases, that the public policy against inhibiting measures in furtherance of added safety through exclusion may be most compelling. Therefore, failure to invoke rule 407 when the evidence could be highly probative of defect may be a fatal flaw.

Indeed, in \textit{Bauman v. Volkswagenwerk Aktiengesellschaft}\textsuperscript{168} the Sixth Circuit found that admission of a subsequent remedial measure to prove defect was a "basic error" under rule 407, requiring reversal and remand.\textsuperscript{169} The rationale used in \textit{Bauman} implicitly demonstrated the Sixth

\begin{itemize}
  \item \textsuperscript{162} \textit{Id.} at 1285. In \textit{Longenecker}, the plaintiff was injured when a 1966 Chevrolet Impala went out of control, traveled 145 feet across a median strip, hit a concrete abutment, flipped into the air and landed on the roof of the plaintiff's Volkswagen. \textit{Id.} Contending that the driver of the Impala lost control because of a defect in the car's engine mount, the driver of the Volkswagen sued General Motors Corp. in strict liability for defective design and manufacture. \textit{Id.}
  \item \textsuperscript{163} \textit{Id.} at 1286. At trial the defendant did not object under rule 407. \textit{Id.}
  \item \textsuperscript{164} \textit{Id.}
  \item \textsuperscript{165} \textit{Id.} It is clear, however, that a recall is the first step in furtherance of added safety where a product is already on the market.
  \item \textsuperscript{166} \textit{Id.} In negligence cases, rule 407 appears to be a determination that no matter how much probative value the evidence of repair has on the issue of negligence, the social policy of encouraging repairs should control. Thus, it is never necessary to weigh the probative value of the evidence as proof of negligence against the negative impact of the evidence. Exclusion in the issue of negligence is automatic. \textsc{Fed. R. Evid.} 407.
  \item \textsuperscript{167} It is questionable that a manufacturer would go to the time, expense and trouble of recalling his product where the need was minor. It might be reasonable to assume, however, that a manufacturer would change the product in the future, without remedying products already sold, where the need for change was slight.
  \item \textsuperscript{168} 621 F.2d 230 (6th Cir. 1980).
  \item \textsuperscript{169} \textit{Id.} at 232-33. Accord \textit{Estate of Spinosa v. International Harvester Co.}, 621 F.2d 1154, 1160 n.5 (1st Cir. 1980). In \textit{International Harvester}, the driver of a 1966 pickup truck
Circuit's view that rule 407 applies to strict liability cases. Additionally, the Bauman court equated the use of a subsequent measure to demonstrate defect with employment of the evidence to establish negligence.

In Bauman, the plaintiffs brought suit under the theories of negligence, and her daughter were killed and a son injured when the truck manufactured by the defendant went out of control and crashed into a bridge abutment. Id. at 1156. Contending that a pinhole developed in the brake tubing, causing a sudden failure of the brake system, the decedent's estates argued that the truck was defective because it did not have a dual brake system. Id. at 1160-61. After manufacture of the truck, but before the accident, International Harvester changed to a dual brake design. Id. at 1161. The First Circuit held that "post-manufacture evidence can not be used to prove the defective design of the product at the time it was manufactured." Id. at 1160 n.5 (citing R. Hursh & H. Bailey, American Law of Products Liability § 9:19, at 308 (2d ed. 1974)). But the court noted that because International Harvester contended that design modification was not feasible, the evidence was admissible to rebut that contention. 621 F.2d at 1160 n.5.

170. 621 F.2d at 232-33. It is somewhat unclear whether Bauman actually held that rule 407 is applicable to strict liability cases. Compare S. Saltzburg & K. Redden, supra note 1, at 180-81 (noting that although the Bauman suit was brought under both negligence and strict liability, the Sixth Circuit "did not specifically address the question whether Rule 407 applies when evidence is offered in a products liability case only to prove a defect") with Josephs, 677 F.2d at 991 (citing Bauman for the proposition that rule 407 applies to products liability cases based on strict liability theory). But see Hall v. American Steamship Co., 688 F.2d 1062, 1066-68 (6th Cir. 1982) (in which the Sixth Circuit definitively held that rule 407 applies to strict liability cases). Even if the Sixth Circuit had not clarified its position with its ruling in Hall, the Bauman court clearly failed to adopt a strict liability exception to rule 407. Additionally, the Bauman court's express equation of negligence with defect appears to support this point, for defect is the essential element in a strict products liability case. See Restatement (Second) of Torts § 402A (1974):

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

171. Bauman, 621 F.2d at 232-33. The court stated, "[t]he plaintiffs simply claimed that the design was changed to remedy a defect—a reason the Rule expressly forbids the jury to consider." Id. at 233. In the next breath, the court stated, "[w]e believe the jury considered the evidence as showing negligence and we must therefore order a new trial." Id. Previously, the court had noted, the subsequent remedial measure was almost the only evidence "from which the jury could infer a design defect . . . ." Id. at 232. Therefore, the court said, a correct ruling on the admissibility of the evidence was "crucial" since without the evidence being used to show defect, that issue might not have been established. Id. at 232. In fact, the court said that the only other evidence presented on the issue of defect was, by itself, "barely sufficient" to send the issue to the jury. Id. at 233.
strict liability, and breach of warranty, arguing that the door latch on their Karmann Ghia was defectively designed and that repeated blows to the door handle caused a premature opening of the door during a "'moderate' sideswipe collision."172 Noting that the public policy rationale behind rule 407 is to encourage improved product safety without forcing producers to risk an increase in past liability, the Sixth Circuit held the use of a subsequent remedial measure to prove defective design was impermissible under the rule.173

Although the plaintiffs purportedly introduced the subsequent design change in the door latch to prove feasibility, the Bauman court emphasized that issue was not controverted.174 Indeed, the evidence was actually used for the forbidden purpose of proving defect, the court said.175 Moreover, the Sixth Circuit stated, the error was compounded by the trial judge's refusal to instruct the jury not to consider the evidence as proof of defect or negligence.176 Additionally, the subsequent remedial measure was the only evidence from which the jury could have inferred defect,177 save for some tests that were "barely sufficient" to send the defect issue to the jury.178 As a result, the court intimated, Volkswagen was forced to increase

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172. *Id.* at 231-32. The plaintiffs in *Bauman* were driving a Karmann Ghia Volkswagen when they collided with a 1968 Plymouth. *Id.* at 231. After side-swiping the Plymouth repeatedly, the Karmann Ghia pulled ahead and crashed into a large fencepost. *Id.* The central issue at trial was whether the Karmann Ghia's passenger door opened prematurely during the "'moderate' sideswipe collision." *Id.* at 232. The plaintiffs contended that the door latch was defectively designed and that repeated side-swipe blows to the door handle caused the latch to open prematurely. *Id.* Volkswagen, however, contended that the door opened when the fencepost struck the car door, bending the actuating rod inside the door. *Id.*

173. *Id.* at 233. "That the design was changed to remedy a defect [is] a reason the Rule expressly forbids the jury to consider," the court said. *Id.*

174. *Id.* The court distinguished controversion of the feasibility of making a design change from controversion of the reasons for making a design change. *Id.* Volkswagen had contended that it changed the design to comply with new government regulations, while the plaintiffs contended the change was made to remedy a defect. *Id.*

175. *Id.*

176. *Id.* The trial court instructed the jury to consider the evidence of design change "solely as to whether or not . . . there was a feasible alternative in design." *Id.* (quoting Tr. Vol. III, at 83). The Sixth Circuit said this was not sufficient. *Id.* In a close case, the court said, the jury instruction should specifically prohibit the jury from considering the evidence on forbidden issues. The failure to so instruct the jury, the Sixth Circuit said, would be unfairly prejudicial to the defendant. *Id.*

177. *Id.* at 232.

178. *Id.* at 232-33. The evidence which would have been "barely sufficient" to send the issue of defect to the jury consisted of "hammer tests" to determine the sensitivity of the door latch. *Id.* at 233. In the tests, an expert for the plaintiffs leaned his back against the inside of the driver's door while his assistant hit the passenger door handle with a rubber mallet. *Id.* On average, the door required two blows to open.
liability for the past because it decided to improve its product, to a result the drafters of rule 407 specifically intended to avoid.

Bauman's significance is that it emphasizes the interrelationship between the public policy of encouraging repairs and the probative value of the evidence. Where evidence of subsequent repair is the only substantial evidence from which a jury could infer defect, public policy demands exclusion; admission would force increased liability, discouraging future repairs. That conclusion, while perhaps valid, is not fully supported in the Bauman opinion. Certainly, the decision draws the clear parallel between the use of a subsequent measure to prove negligence in a negligence suit and the use of the evidence to prove defect in a strict liability suit. It fails, however, to consider whether there are any reasons why the policy of encouraging repairs should not apply to strict liability cases.

That question was considered by Ault, Robbins and Farner. But until recently, Smyth was the only case that challenged the public policy conclusions reached in those decisions, and it did so in the context of a negligence case involving a mass-produced product. The cases that had considered rule 407 in the strict liability context either concluded that subsequent remedial measures are of low probative value and that the risks of prejudice, cumulativeness, or confusion outweighed the possible value, or they balanced probative value against policy without first fully addressing the contention that exclusion is not needed to encourage repairs in strict liability cases. Thus, although these cases emphasize that the first basis for exclusion—low probative value coupled with negative impact—may itself be sufficient to prohibit use of the evidence, they left in their wake doubt as to the validity of the policy of encouraging repairs in the strict liability context.

V. THE TREND TOWARD APPLICATION OF RULE 407 IN STRICT PRODUCTS LIABILITY ACTIONS

As doubt cries for certainty, splits among the federal circuits on important issues lead to calls by the legal community for resolution. In the case of rule 407 and its applicability to strict liability product actions, some authors have suggested that the federal circuits are so hopelessly in conflict that Supreme Court review of the issue is a necessity. The Supreme

179. Id. at 232. The court stated that the admissibility question became "crucial" because without the evidence of subsequent remedial measures the jury would have had to rely solely on the "barely sufficient" tests conducted by the plaintiffs' expert. Id. at 232-33. See also supra note 178.

180. See FED. R. EVID. 407 advisory committee note.

Court has had the opportunity to decide the issue over the past few years, but each time it has refused to grant certiorari.\textsuperscript{182} As at least one circuit judge has noted, recognition of exceptions to rule 407 has clouded application of the rule with uncertainty.\textsuperscript{183} In addition, the conflict among the circuits has left manufacturers in a quandary.\textsuperscript{184} While subsequent remedial measures may be inadmissible in one jurisdiction where their products are sold, in another, such measures may be admissible to prove that their earlier products were defective. The situation has led some legal observers to call for the drafting of a new uniform rule.\textsuperscript{185} But congressional action or Supreme Court review may not be necessary to achieve uniformity. In the current controversy over the applicability of rule 407 to strict products liability actions, the effective reasoning of recent decisions from several circuits may signal both the vitality of rule 407 and the demise of uncertainty.\textsuperscript{186}

\textbf{A. Werner v. Upjohn}

The first fully-reasoned challenge to the contention that rule 407 is inapplicable to strict liability cases arose in \textit{Werner v. Upjohn}.\textsuperscript{187} In \textit{Werner}, the Fourth Circuit held that the express exceptions to rule 407 must be

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\textsuperscript{183} \textit{Oberst}, 640 F.2d at 870 (Swygert, J., concurring in part and dissenting in part); see \textit{supra} note 152.

\textsuperscript{184} The need for uniformity in the products liability area is one of the central focuses of \textit{Note, The Case for the Renovated Repair Rule: Admission of Evidence of Subsequent Repairs Against the Mass Producer in Strict Products Liability}, 29 Am. U.L. Rev. 135 (1979). The contention of the article is that manufacturers and consumers need a uniform evidentiary rule on which they can rely in strict products liability cases. The rule suggested by the author is admission of subsequent remedial measures for the purpose of proving defect. \textit{Id.} at 179-80.

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{See Werner}, 628 F.2d at 853-60; \textit{Cann}, 658 F.2d at 59-60; \textit{Grenada Steel}, 695 F.2d at 885-89; \textit{Hall} 688 F.2d at 1066-68; see also \textit{Josephs}, 677 F.2d at 990-91; \textit{McGowne v. Challenge-Cook Bros.}, 672 F.2d 652, 665 (8th Cir. 1982) (citing \textit{Cann} and noting that the state of the law on the applicability of rule 407 to strict liability cases appears to be changing). In \textit{McGowne}, the Eighth Circuit specifically refrained from overturning a trial court decision to exclude evidence of subsequent changes to a warning in a case involving strict liability. Overturning the case on other grounds, the Eighth Circuit instructed the trial court to use its discretion and to consider the appropriate law as it stands at the time of retrial. \textit{Id.} at 665. \textit{But see} Kobayashi, \textit{supra} note 9, at 346-47 (while the author apparently approves of the \textit{Werner} court's reasoning, he concludes that the debate will continue, and that the \textit{Ault} rationale will ultimately prevail).

narrowly construed to effectuate the paramount public policy of encouraging safety-improving measures.\textsuperscript{188} For the same reason, emphasized the court, there should be a presumption against recognizing new exceptions.\textsuperscript{189}

\textsuperscript{188} Id. at 855. In \textit{Werner}, the Fourth Circuit addressed the use of a subsequent remedial measure to demonstrate the feasibility of giving an alternative warning on the antibiotic drug ingested by the plaintiff. \textit{Id}. The trial judge had admitted the post-accident warning over Upjohn's objections. \textit{Id}. at 853. The Fourth Circuit noted that the later warning was more emphatic, alerting readers of the possibility of fatality and advising that the drug should only be used for serious infections where less toxic antibiotics might not be appropriate. \textit{Id}. Confronted with admission of this evidence, Upjohn argued that its earlier warning was adequate since it included all of the consequences which eventually befall the plaintiff. \textit{Id}. at 852. In his final instructions to the jury, the trial judge said the subsequent warning should be considered only as evidence of the feasibility of issuing a stronger preaccident warning. \textit{Id}. at 853. Yet throughout the trial and during the closing argument, the plaintiff's counsel had used the evidence to show antecedent negligence, asking witnesses whether Upjohn "should have" issued the 1975 warning in 1974, telling the jury Upjohn knew the drug had caused fatalities but "didn't tell the doctors until much later," and arguing that it was "a violation of duty" to wait until 1975 to make the changes in the warning. \textit{Id}. at 854. Despite the trial judge's instructions to the jury, the plaintiff was "permitted" to use the evidence to prove Upjohn's prior negligence, the Fourth Circuit said. \textit{Id}. A plaintiff may not "insulate reversal by pointing to a limiting instruction given at the close of his case" when throughout the trial he used the evidence for "a forbidden purpose," the \textit{Werner} court declared. \textit{Id}. The court noted that a limiting instruction is the "usual solution" in cases where the jury could make either a permitted or a forbidden inference from the evidence. But, here the plaintiff in error used the evidence to prove negligence despite the limiting instruction of the trial judge. The trial court's limiting instruction did not cure the improper use of the evidence. \textit{Id}. In addition, when the evidence was first presented to the jury, the judge only told the jury that they could not use the evidence to infer negligence or culpable conduct. He failed, however, to tell the jury how the evidence could be used until the very end of the trial, after both sides had rested their cases. \textit{Id}. at 853. After considering the misuse of the evidence, the \textit{Werner} panel next turned to the permissible use of subsequent remedial measures under rule 407's express exceptions. \textit{Id}. at 854.

Although rule 407 allows admission of subsequent remedial measure to rebut an assertion that making the change before the accident occurred was not feasible, the \textit{Werner} court said feasibility was not an issue in this case. \textit{Id}. at 854-55. Werner's counsel argued that Upjohn "controverted" the feasibility of giving an earlier warning by not conceding the issue. \textit{Id}. at 855. But the Fourth Circuit, drawing from the rule's language, held that "an affirmative concession is not required" to make feasibility a nonissue. \textit{Id}. Further defining the rule's requirement that feasibility be "controverted," the \textit{Werner} court said that a challenge to the "necessity" of a different warning is not equivalent to challenging the "feasibility" of the alternative warning. \textit{Id}. The court noted, "Upjohn does not argue that it could not have written a stronger warning, it argues that the 1974 warning was adequate given the knowledge that it had at the time. This defense simply does not raise an issue of feasibility." \textit{Id}. Specifically, Upjohn said that because the phrase "minor or trivial infections" lacked a precise definition, it was not necessary, and possibly harmful, to tell doctors not to use the drug in such cases. Rather, Upjohn stated, physicians were adequately advised of the proper occasions for use of the drug in the Food and Drug Administration-approved \textit{INDICATIONS}. \textit{Id}. 189. \textit{Id}. at 856-58.
In Werner, the plaintiff sued Upjohn Co. under the theories of negligence, breach of warranty and strict liability, claiming he developed colitis as a result of an inadequate warning on Upjohn’s penicillin-substitute drug, Cleocin.\textsuperscript{190} The central issue in the case was the adequacy of a 1974 preinjury warning Upjohn had issued for the drug.\textsuperscript{191} On that issue, the Fourth Circuit said, no evidence was more “important” than a postinjury warning issued by the defendant in 1975.\textsuperscript{192}

Although the trial judge had admitted the subsequent warning under rule 407’s feasibility exception,\textsuperscript{193} the Fourth Circuit stressed that even when the evidence is offered for a concededly permissible purpose, admission must not be freely granted.\textsuperscript{194} Reasoning that liberal admission of subsequent remedial evidence would subvert the policy of encouraging remedial action, the court suggested that such evidence should only be admitted when the need for it is found to outweigh the attendant risk of violating public policy.\textsuperscript{195} Quoting from McCormick on Evidence, the court suggested three factors that should be considered in deciding need: (1) that the issue on which the evidence is offered is of “substantial importance”; (2) that it is “actually, and not merely formally in dispute”; and (3) that the issue is not capable of proof by inference from other convenient evidence.\textsuperscript{196} Following from this obvious precept that the express exceptions should not be allowed to overwhelm the rule, the Fourth Circuit con-

\textsuperscript{190} Id. at 851. Werner’s complaint alleged that Upjohn had been negligent in either marketing or selling the drug, and in failing to adequately warn of the drug’s dangerous side effects, that Upjohn had breached either an express or an implied warranty, and that Upjohn was strictly liable for marketing an unreasonably dangerous drug. Id.; see also id. at 858 n.4 and accompanying text (quoting \textsc{Restatement (Second) of Torts} § 402A comment k (1977) and distinguishing between an unavoidably unsafe product and a product made unreasonably dangerous or defective by a failure to give a proper warning). Werner claimed that after five days of taking the Upjohn drug, he developed nausea, severe diarrhea and dehydration and that eventually a large portion of his colon had to be removed. Id. at 852.

\textsuperscript{191} Id.

\textsuperscript{192} Id. at 853. The 1975 postinjury warning stated in part: “Clindamycin can cause severe colitis which may end fatally. Therefore, it should be reserved for serious infections where less toxic antimicrobial agents are inappropriate . . . .” Id. In contrast the 1974 warning stated in part: “Severe and persistent diarrhea, which may be accompanied by blood and mucus, and which may be associated with changes diagnosed as ‘pseudomembranous colitis,’ has been reported in association with the administration of Cleocin HCL (clindamycin HCL hydrate).” Id. at 852.

\textsuperscript{193} Id. at 853.

\textsuperscript{194} Id. at 855-56, (quoting \textsc{McCormick on Evidence} § 275, at 668-69 (2d ed. 1972)).

\textsuperscript{195} Id.

\textsuperscript{196} Id. The court noted that feasibility was not an issue in the case. Id. at 856. Additionally the court stated, “[i]f feasibility were to be found at issue in the case at bar, it is difficult to imagine a situation where it would not arguably be in issue.” Id. at 855.
sidered the possible impact of granting free admission in situations not expressly covered by the rule.

If the express exceptions mentioned in rule 407 should not be allowed to subvert the congressional policy of encouraging remedial action, it is clear that the use of remedial evidence for purposes not mentioned in the rule should not be allowed to defeat congressional intent. But because the exceptions stated in rule 407 are "illustrative and not exhaustive," as the Werner court conceded, unmentioned purposes present a complicated problem.

In Werner, the plaintiff noted rule 407 does not mention the use of remedial measures to prove strict liability. Although some courts have used the rule's silence to conclude that strict liability must be an unstated exception, the Fourth Circuit was not so hasty. Keeping in mind the precept that admission could defeat the goal of encouraging repairs, the Werner court emphasized that the Federal Rules of Evidence contain many "gaps" and that Congress, by enacting the rules, did not intend to

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197. Id. at 856. See also supra note 158. The court considered possible exceptions for strict liability, 628 F.2d at 856-57, for products liability, id. at 857-58, for breach of warranty, causation and punitive damages, id. at 858-59. The sheer number of possible exceptions to the rule against admission of subsequent remedial measures supports the court's conclusion that free admission of evidence on the grounds of exception would subvert the rule's purpose of encouraging repairs. See Note, Products Liability and Evidence of Subsequent Repairs, 1972 Duke L.J. 837, 845. The author stated:

Limitations on the applicability of the rule excluding evidence of subsequent repairs and improvements have effectively limited the benefit which the defendant derives from the general exclusionary rule. Instead of excluding most evidence of subsequent repairs, courts appear willing, if not eager, to admit such evidence. With the rule so restricted in its application and subject to many exceptions, it will be a rare plaintiff who cannot find a justification for introducing evidence of subsequent repairs, particularly when several defendants have been joined in the action. The rule no longer appears to be one of general exclusion; rather, the rule for evidence of subsequent repairs may now be a positive rule of admissibility subject only to the exception that evidence of subsequent repair is admissible unless it is used against the party who made the repair as an admission of his negligence. Id. (citations omitted) (emphasis in the original). While this analysis may have been somewhat premature in sounding the death knell for the rule against admission of subsequent remedial measures, it suggests the danger of allowing too many exceptions to the rule.

198. Werner, 628 F.2d at 856.


200. Compare Werner, 628 F.2d at 856 ("The mere fact that Rule 407 by its terms only excludes evidence of subsequent precautionary measures to prove negligence or culpable conduct does not necessarily mean that the evidence should be admissible to prove strict liability.") with Robbins, 552 F.2d at 793 (concluding that rule 407 is "by its terms, confined to cases involving negligence or other culpable conduct. The doctrine of strict liability by its very nature, does not include these elements."). See also Herndon v. Seven Bar Flying Service, Inc., 52 U.S.L.W. 2157, 2158 (10th Cir. 1983) (holding that subsequent remedial measures are admissible for "any purpose" besides demonstrating the defendant's negligence).
"wipe out the years of common law development in the field of evidence . . ."). Therefore, in filling rule 407's omission with regard to strict liability, the Fourth Circuit considered whether there was any reason to distinguish strict liability from the stated forbidden purposes of negligence and culpable conduct. A thorough examination of that question, the court reasoned, is the only way to determine whether the policy behind the rule would be violated by making a new exception for strict liability.

To determine whether a distinction should be drawn between remedial measures offered to prove strict liability and remedial measures offered to prove negligence or culpable conduct, the Fourth Circuit first examined the character of the conduct involved. "Culpable conduct," the court stated, involves acts of a party that are more blameworthy than simple negligence. In contrast, the court noted, strict liability is a concept applied when a party's acts are less deserving of blame compared to the conduct of one who is negligent. Following the reasoning of the court, it cannot be argued that the acts of one who may be strictly liable are more noxious than those of one who has been negligent or has engaged in culpable conduct. Therefore, the court unanimously concluded that if Congress and the common law were willing to offer some protection to one accused of the greater infractions to achieve policy objectives, "the result should be no different" in strict liability, where the conduct involved is "technically less blameworthy."

Prior courts that have held the rule to be inapplicable to strict liability failed to consider the character of the conduct; consequently, their conclusions that Congress intended to exclude strict liability from coverage may

201. Werner, 628 F.2d at 856 (citing S. Saltzburg & K. Redden, supra note 1, at 411-13).
202. Werner, 628 F.2d at 856.
203. Id.
204. Id. at 856-57.
205. Id. (quoting Black's Law Dictionary (4th ed. 1978), the Werner court noted that culpable conduct "implies that the act or conduct spoken of is reprehensible or wrong, but not that it involves malice or a guilty purpose.").
206. Werner, 628 F.2d at 857.
207. Id. But see Ault, 13 Cal. 3d at 126, 528 P.2d at 1155, 117 Cal. Rptr. at 819 (Clark, J., dissenting) (concluding that the phrase "culpable conduct" includes any breach of a legal duty, and in the case of strict liability, culpable conduct includes breach of a duty to refrain from marketing a defective product). Judge Clark reaches the same ultimate conclusion: that the rule against admission of subsequent repairs applies to strict liability. But his method of reaching that conclusion is to define culpable conduct to include the concept of strict liability. Id. See also Hall, 688 F.2d at 1066 (concluding that "culpable conduct" includes operation of a vessel in an unseaworthy condition, an act for which the actor may be held strictly liable).
have been somewhat misguided. 208 Certainly, these earlier decisions may have been correct in concluding that "culpable conduct" is not equivalent to conduct for which one may be held strictly liable. 209 Similarly, courts that have admitted remedial evidence in strict liability cases may have been correct in determining that the rule against admission of remedial evidence can serve "as a shield against potential liability." 210 Nevertheless, if Congress intended to provide a "shield" for parties accused of more blameworthy conduct, it is apparent that the less blameworthy conduct involved in strict liability should be equally protected if it would serve the policy of encouraging repairs.

With a view toward encouraging safety-improving actions, the Fourth Circuit focused on whether distinctions between negligence and strict liability would warrant different treatment under rule 407. 211 The rationale behind the rule, the court explained, is that people generally will not take actions that can be used against them. 212 Under negligence theory, the court noted, the central issue is the defendant's conduct, and the focus is on the defendant himself. Under strict liability, however, the issue is the dangerousness of the product, with the focus on the product. 213 But, the Werner court said, that distinction is "hypertechnical" because "the suit is against the manufacturer, not against the product," regardless of theory. 214 Therefore, the court concluded, the policy of encouraging remedial action by excluding repair evidence should be served as effectively in strict liability as in negligence. 215 in neither case does the manufacturer want to be

208. See discussion of Ault, Robbins, and Farner, supra text accompanying notes 33-69.
209. Ault, 13 Cal. 3d at 118, 528 P.2d at 1150-51, 117 Cal. Rptr. at 814-15; Robbins, 552 F.2d at 793, 795; Farner, 562 F.2d at 527 n.17. But see supra note 207.
210. See, e.g., Ault, 13 Cal. 3d at 120-22, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16; Robbins, 552 F.2d at 793 n.10 (quoting Ault).
211. Werner, 628 F.2d at 857; but see Ault, 13 Cal. 3d at 120-21, 558 P.2d at 1151-52, 117 Cal. Rptr. at 815-16; Robbins, 552 F.2d at 793 n.10 (quoting Ault); see also Ault 13 Cal. 3d at 120 n.4, 528 P.2d at 1152 n.4, 117 Cal. Rptr. at 816 n.4.
212. Werner, 628 F.2d at 857.
213. Id. This distinction may actually strengthen, rather than weaken, the argument that rule 407 should apply to strict liability. It is precisely because the focus is on the defendant's conduct in a negligence action that the defendant's later conduct is, to some degree, relevant to the issue of past conduct. As the advisory committee noted, it is possible to infer that a person was negligent in the past from his later conduct. Fed. R. Evid. 407 advisory committee note. But, in the strict liability situation, because the focus is on the product itself, the manufacturer's conduct does not convey any information about the product itself. Phrased another way, the manufacturer's conduct is relevant only to what the manufacturer thought about his product, and does not demonstrate anything about the actual safety of the product.
214. Werner, 628 F.2d at 857.
215. To further bolster its argument that no distinction should be made between cases based on negligence theory and those based on strict liability theory, the Werner court examined the two concepts in the context of a failure-to-warn case. Id. at 858. Under either
found liable, and the assumption that he will not take steps that can be used against him remains undisturbed. That conclusion, however, did not end the Werner court's extensive analysis. The court went on to consider whether any other factors might alter the rule's assumptions.

Noting that some courts have concluded that a mass-producer does not need the impetus of the rule against admission of subsequent repairs to encourage him to improve product safety, the Werner court examined the validity of that argument. The argument is based on the concept that the threat of additional law suits would give the mass-producer sufficient incentive to take subsequent remedial actions. The flaw in this

theory, the court noted, the plaintiff was focusing on the issue of the adequacy of the warning. If the warning was found to be adequate, the defendant would be neither negligent nor strictly liable, the court stated. Furthermore, the court stated, because this case involved failure to warn of an unavoidably dangerous drug, there was no difference in the standard for liability under negligence and strict liability. Under either theory, the balancing test to be applied by the jury is essentially the same: in negligence, the jury balances the burden of the risk against the gravity and probability of the harm; with an unavoidably dangerous drug, the jury must weigh the benefits of the drug against the seriousness and frequency of its undesirable consequences to determine whether the drug is made defective by the absence of a particular warning. Compare Judge Learned Hand's statement of this balancing test as applied to negligence in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) with Werner, 628 F.2d at 858 n.4 and accompanying text (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment k) (suggesting the balancing test to be applied to strict liability cases involving unavoidably dangerous products).

See, e.g., Ault, 13 Cal. 3d at 113, 528 P.2d at 1148, 117 Cal. Rptr. at 812.

Ault, 628 F.2d at 855-56.

Ault, 13 Cal. 3d at 120-22, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16. The Ault court reasoned that the owner or maker of a single instrument of injury, such as an unstable staircase, might be deterred from making a postaccident repair if the repair could be used as evidence of his previous negligence. Id. at 120, 528 P.2d at 1151, 117 Cal. Rptr. at 815. But, the Ault court stated that although the rule against admission may fulfill this antideterrent function in the typical negligence action, the provision plays no comparable role in the products liability field. Id. The Ault court concluded:

When the context is transformed from a typical negligence setting to the modern products liability field, however, the "public policy" assumptions justifying this evidentiary rule are no longer valid. The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule of section 1151 does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability. In short, the purpose of section 1151 is not applicable to a strict liability case and hence its exclusionary rule should not be gratuitously extended to that field.

This view has been advanced by others. It has been pointed out that not only is
argument, the *Werner* court explained, is that it assumes a defect in the product.\textsuperscript{220} Furthermore, it completely ignores the situation where a manufacturer decides to improve his nondefective product.\textsuperscript{221} Where the earlier version of the product is not defective, the court said, the manufacturer who takes the precautionary measure of improving his product after an accident risks the imposition of liability as a result of that decision.\textsuperscript{222} Clearly, this would violate rule 407's public policy of not deterring remedial action.\textsuperscript{223} Furthermore, the *Werner* court realized, in such situations, the evidence of improvement "in no way supports an inference that the initial version of the product was defective."\textsuperscript{224} This, of course, relates to the second ground for excluding remedial evidence: improvements, even those furthering safety, are not in fact an admission of prior fault.\textsuperscript{225}

Thus, the intrinsic flaw in the argument that mass producers should be
treated different from other defendants runs counter to rule 407 on the dual considerations of public policy and relevance. Rule 407 does not assume that only those eventually found liable need the protection of exclusion to encourage repairs. Nor does the rule assume that every individual sued for negligence was in fact negligent. It is apparent that, even in situations not involving mass-produced products, public-minded individuals are likely to correct dangerous situations. Similarly, as the drafters of rule 407 realized, self-interest is often a motivating factor. While the non-negligent person may be reluctant to take remedial measures that can later be used against him, the negligent person may decide to repair to avoid a second suit. Yet, the rule makes no distinction based on whether a defendant was actually negligent. Thus, there appears to be no basis for concluding that a mass producer is any more self-interested than any other defendant.

In considering the implications of creating a new exception for mass producers, the court again noted that unstated exceptions should no more be allowed to defeat congressional intent than should express exceptions. An exception for mass producers, the court stressed, could “effectively override Rule 407” because it would encompass all products liability cases. Courts adopting the mass producer exception failed to offer a basis for concluding that a manufacturer sued under strict liability would be any more inclined to take subsequent remedial measures without benefit of the rule than would a producer sued under negligence theory. Yet, as Werner emphasized, Congress made no exceptions for negligence actions brought against manufacturers of mass-produced products.

When Congress adopted rule 407, plaintiffs had been bringing products liability suits against manufacturers under negligence theory for many that the pre-accident product was “not unreasonably dangerous,” and thus not defective. Werner, 628 F.2d at 860. Werner, 628 F.2d at 857.

229. Id. As was the case in Werner, a products liability case may be brought under negligence theory, strict liability theory and warranty theory. Id. at 851.

230. Id. at 858. See Ault, 13 Cal. 3d at 120-22, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16; Robbins, 552 F.2d at 793 n.10.

231. Id. at 859. See Ault, 13 Cal. 3d at 120-22, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16; Robbins, 552 F.2d at 793 n.10.

years. If Congress, then, had intended to exclude any cases involving mass-produced products, negligence cases involving such products would have been a likely target for exception. Indeed, as the Werner court discerned, Congress specifically decided to exclude evidence of remedial measures to prove negligence, regardless of whether the item in question was mass-produced. Thus, the fact of mass production should not warrant admission of remedial measure in strict liability actions.

The reasoning of Judge Widener’s opinion in Werner provides a sound basis for examining proposed exceptions to rule 407 while ensuring that the goal of encouraging remedial measures will be promoted. Working from the premise that unstated exceptions should not be granted more freely than express exceptions, the Werner method compares the proposed exception with the forbidden purposes. The focus is on whether distinctions can be made either on the grounds of the character of the conduct or the applicability of the rule’s theory that exclusion will encourage repairs. Additionally, the approach emphasizes that Congress did not assume fault in deciding to exclude remedial evidence offered to prove negligence. Finally, the Werner method considers whether conclusions reached on the proposed exception would apply with equal force to negligence or culpable conduct. This thorough approach ensures that new exceptions will not violate rule 407's public policy mandate to promote added safety.

233. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), is considered the forerunner of products liability actions based on negligence. In that case, Justice Cardozo held that a plaintiff could recover for injuries caused by the negligence of a manufacturer despite the lack of privity between the plaintiff and the defendant manufacturer. Additionally, the case held that lacking privity, the plaintiff did not need to show that cars in general are “inherently dangerous.” Rather, the plaintiff merely needed to show that the product was “reasonably certain to place life and limb in peril when negligently made . . . .” Id. at 389, 111 N.E. at 1053.

234. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), is considered by many legal authorities to be the seminal case of modern strict products liability theory. That case stated that the purpose of strict liability for defective products “is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.” Id. at 62-63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

235. Werner, 628 F.2d at 858.
236. Id. at 856.
237. Id. at 856-57.
238. Id. at 857.
239. Id. at 857-58.
240. Id.
B. Cann v. Ford Motor Co.

One year after the *Werner* decision, the Second Circuit had the opportunity to examine the Fourth Circuit's approach. In adopting the *Werner* approach, the Second Circuit held, in *Cann v. Ford Motor Co.*,241 that the policy of promoting safety requires exclusion of remedial measures in strict liability cases.242 The probative value of the evidence must be weighed against the dangers of prejudice and confusion, the court said.243 The decision thus addressed rule 407's dual concerns of public policy and low probative value.

The *Cann* case arose when a 1976 Mercury Marquis slipped unexpectedly into reverse.244 Claiming that the vehicle's transmission was defective because it could appear to be in "park" when it was actually "hung up" between gears, the plaintiffs brought an action under negligence, strict liability, and warranty theories.245 A unanimous Second Circuit rejected the plaintiffs' argument246 that remedial measures should have been admitted because rule 407 does not apply to strict liability theory.247

The *Cann* court noted the division among the circuits over whether rule 407 applies to strict liability.248 The court emphasized, however, that rule 407's failure to specifically mention strict liability does not require restricting application of the rule to subsequent remedial measures taken in negligence and culpable conduct cases.249 Where the rules are silent, the court stated, common law principles must be applied to fill the "gaps" and achieve the policy objectives mandated by Congress.250 Omissions in the Federal Rules of Evidence, *Cann* recognized, must not be utilized to defeat congressional purpose.251 Thus, following the *Werner* approach, the court considered whether the congressional purpose of not deterring remedial measures is applicable to defendants sued in strict liability cases.252

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242. Id. at 60.
243. Id. at 59. See also FED. R. EVID. 403; Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 94 (2d Cir. 1980).
244. *Cann*, 658 F.2d at 56.
245. Id.; see also id. at 56 n.1.
246. Id. at 59.
247. Id. at 60.
249. *Cann*, 658 F.2d at 60 (citing *Werner*, 628 F.2d at 856; S. SALTZBURG & K. REDDEN, supra note 1, at 411-13. *Contra Herndon*, 52 U.S.L.W. 2158 (rule 407 does not apply where the evidence is offered for any purpose other than to prove negligence).
250. *Cann*, 658 F.2d at 60.
251. Id.; accord *Werner*, 628 F.2d at 856-58.
252. *Cann*, 658 F.2d at 59-60.
As many courts have found, the purpose underlying rule 407 is to ensure that the threat of legal liability will not discourage individuals from taking remedial measures. The Second Circuit noted in Cann that the rule embodies a "common sense recognition" that people avoid actions that can later be used against them. The fear that people will refrain from doing anything that increases the probability of losing a lawsuit, the court realized, prompted enactment of rule 407. Recognizing this rationale, the Second Circuit then examined the potential effect of allowing admission of subsequent remedial measures in strict liability cases.

In the context of rule 407, the Cann decision held, the theoretical distinctions between negligence and strict liability are not controlling. Conversely, the court found that the defendant's concern over the legal consequences of repair would be the same under either negligence or strict liability. In both cases, admission of remedial evidence would be damaging to the defendant, the court said. Under either theory, the court added, the admission of damaging evidence could mean that "the defendant must pay the judgment." Therefore, the court concluded, the policy of encouraging remedial actions by excluding damaging use of remedial measures is applicable to a defendant sued under either theory.

C. The Trend Toward Exclusion: Achieving the Goal

Rule 407 seeks to motivate defendants to repair without contemplating the legal ramifications of their remedial acts. It does so by simply removing the threat of damaging uses of the evidence. Admitting evidence of subsequent remedial measures in strict liability cases while excluding it in negligence cases would, as the Cann opinion stated, leave a "gap" in
rule 407 through which one "extremely damaging" and "highly prejudicial" use of the evidence could enter.

The initial impact of ignoring rule 407's precept in strict liability cases would be to create uncertainty. A manufacturer who had not yet been sued could not determine the legal ramifications of his remedial acts until he knew the theory of the prospective suit. The more subversive impact would be to delay or deter remedial steps in general. In Cann, the court recognized that plaintiffs "frequently" elect to bring an action under both negligence and strict liability theories. If the evidence could be used on a strict liability count, then a defendant might refrain from taking remedial measures. A defendant would only be able to repair with the assurance that the evidence would not be used against him if negligence were the only count against him. But, the possibility of delay might persist even after the suit is filed because the Federal Rules of Civil Procedure allow for liberal amendment of pleadings. Indeed, under these rules, a strict liability count could be asserted at almost any time, even in the middle of the trial. Uncertainty over the cause of action and, consequently, over the admissibility of remedial evidence, then, might discourage remedial measures.

The risk of chilling a defendant's remedial actions by holding out the threat of admissibility on a strict liability count, however, depends upon whether admission on that count could cause a parallel threat of liability. Thus, in Cann the Second Circuit began its consideration of the evidentiary issue with the assertion that courts must evaluate postaccident warnings and postaccident design modifications under rule 403's balancing test. Admissibility, the court noted, is controlled by whether the limited probative value of the evidence is outweighed by "the danger of unfair prejudice

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264. *Cann*, 658 F.2d at 60 (citing *Bauman*, 621 F.2d at 233).
265. *Cann*, 658 F.2d at 60 (citing *Smyth*, 529 F.2d at 804).
266. *Cann*, 658 F.2d at 60.
267. See, e.g., *Herndon*, 52 U.S.L.W. at 2158 (holding that rule 407 does not apply to strict liability cases, the Tenth Circuit held that a limiting instruction should be used where the evidence is inadmissible on a negligence count and admissible on a strict liability count).
268. See *Cann*, 658 F.2d at 60. Since the statute of limitations is the only time concern for the prospective plaintiff, it is possible, depending upon the jurisdiction, that a suit could be filed many months after an accident.
269. *Id.*
270. See *id.*
271. FED. R. CIV. PRO. 15.
272. FED. R. CIV. PRO. 15(b) (amendments to conform to the evidence may be made "at any time, even after judgment").
and confusion." Although the court ultimately based its decision to uphold exclusion of the evidence on the grounds that rule 407 does apply to strict liability, it is clear that the damaging nature of the evidence played a significant role in the court's conclusion. It is precisely because the evidence is "extremely damaging" and "highly prejudicial" that a defendant "must be equally concerned" over its possible admission, regardless of the theory of the suit. Clearly, the Cann court would not have concluded that the threat of admission on a strict liability count could deter remedial action if there were no risks posed by admission.

The risks posed for the defendant, then, and the ultimate threat of liability in an eventual trial are really the essence of why rule 407 should include strict liability. The Cann court appeared to emphasize this point by expressly using the balancing test of rule 403. In contrast, the Werner court may have relied on the unmistakably damaging nature of the evidence when used as proof of defect in strict liability to complete its logical inference that admission would "overwhelm" the rule. Thus, both courts found, there is no distinction between negligence and strict liability that justifies different treatment of subsequent remedial measures under these theories.

The general structure of rule 407 supports the conclusion that the damaging nature of remedial evidence requires exclusion. As the advisory committee note states, where remedial evidence is not automatically excluded, the damaging nature and the limited probative value of the evidence must be considered. Unlike the California rule considered by the Ault court, rule 407 does not automatically admit evidence when it is not offered to prove negligence or culpable conduct. Indeed, in rule

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273. Cann, 658 F.2d at 59 (quoting Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 94 (2d Cir. 1980); see also FED. R. EVID. 403 & FED. R. EVID. 407 advisory committee note.
274. See Cann, 658 F.2d at 59-60. Compare Herndon, 52 U.S.L.W. at 2157-58 where the Tenth Circuit did not balance the probative value of the evidence against its prejudicial impact, and thus reached a different result than it did the Second Circuit in Cann.
275. Cann, 658 F.2d at 60.
276. See id.
277. Id. at 59-60; accord Grenada Steel, 695 F.2d at 888 (the use of rule 407 should conform to the policy expressed in rule 403).
278. See Werner, 628 F.2d at 857.
279. FED. R. EVID. 407 advisory committee note. But see Herndon, 52 U.S.L.W. at 2157-58 in which the Tenth Circuit failed to consider the damaging nature of the evidence. In that case, the Tenth Circuit merely noted that evidence of a subsequent remedial measure is relevant to the issue of defect because it is "possible" to draw an inference of defect from the repair.
280. Ault, 13 Cal. 3d at 113, 528 P.2d at 1148, 117 Cal. Rptr. at 812 (ruling on CAL. EVID. CODE § 1151 (West 1966)). See supra note 34 for text of code.
281. FED. R. EVID. 407 advisory committee note.
407, Congress appears to have determined that any use of the evidence that could threaten a defendant with liability could deter remedial action.

The principles enunciated in Werner and Cann appear to signal a more exhaustive approach to the issue of rule 407's applicability to strict liability cases. In concluding that remedial measures taken in strict liability cases fall within the scope of rule 407, earlier courts relied heavily on the low probative value of the evidence. Although low probative value alone may be a sufficient basis for exclusion, consideration of probative value is an insufficient basis for admission. Before admitting evidence of remedial measures, courts must go on to determine whether admission would deter remedial measures, thus addressing rule 407's policy concerns. The decisions of the Second and Fourth Circuit offer an effective elucidation of the policy considerations underlying rule 407 in the setting of strict liability.

In examining the policy of encouraging repairs, these courts expose the faulty reasoning of cases finding the rule inapplicable to strict liability. Although the threat of additional lawsuits may be a sufficient incentive to repair defective products, that threat cannot be assumed when the product is not defective. Furthermore, remedial evidence is no less damaging to a defendant in the context of strict liability than in a negligence setting. Clearly, then, the threat of admission can deter remedial measures in general. If courts must guard against subverting congressional policy objectives in the context of rule 407's express exceptions, then they must be equally vigilant where the proposed exception would sneak through a "gap" in the rule.

The influence of this valid reasoning is likely to be extensive. Many circuits have already found rule 407 applies to strict liability, based on relevance concerns alone. The policy arguments simply offer those circuits an additional reason for excluding remedial measures in strict liability. Undecided circuits should and probably will consider the policy concerns so well stated in Werner and Cann. Even the Eighth Circuit,

282. See, e.g., Bauman, 621 F.2d at 230; supra notes 168-80 and accompanying text; see also Foster, 621 F.2d at 721.

283. See, e.g., the Sixth Circuit's opinion in Bauman, 621 F.2d 230; the Third Circuit's opinion in Josephs, 677 F.2d at 990-91 and the most recent case on the issue, the Fifth Circuit's opinion in Grenada Steel, 695 F.2d at 885-89.

284. See the Sixth Circuit's recent opinion on this issue in Hall, 688 F.2d at 1062. In that case the Sixth Circuit expressly adopted the Werner-Cann approach. Id. at 1066-68. Adding to the Werner court's policy arguments on the issue, the Sixth Circuit also held that "culpable conduct" as used in rule 407 may include conduct for which a party is held strictly liable. Id. at 1066. See also Grenada Steel, 695 F.2d at 887-88, adopting the Werner-Cann holding based on the grounds of policy and relevance, id., and noting that the Eighth Circuit stands alone in refusing to apply rule 407 to strict products liability cases. Id. at 886. But see Herndon, 52 U.S.L.W. at 2157-58. In Herndon, the Tenth Circuit dismissed the policy argu-
often cited for its decisions admitting remedial evidence in strict liability cases, recently cited Cann and noted the development in this area.\textsuperscript{285} Refusing to insist on its earlier rulings, the Eighth Circuit has simply instructed lower courts to rely on the developing law then controlling and to exercise their discretion in this "changing" area. If the signal of change was missed when the Fourth Circuit decided the issue, then the Second Circuit's assent and the Eighth Circuit's apparent acquiescence make it clear.

VI. Conclusion

The unmistakable trend toward exclusion of remedial measures in strict liability cases is a welcome development. The federal circuits have been divided on this issue for too long. By addressing the policy objectives established by Congress, the Fourth and Second Circuits have made eventual uniformity among the circuits possible. Moreover, uniformity is desirable, for uncertainty can undermine the goal of encouraging safer products and defeat the purpose behind the rule.

Barbara Strong Goss

\textsuperscript{285} McGowne, 672 F.2d at 665, rev'd on other grounds.