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A Proposal to Amend Rule 407 of the Federal Rules of Evidence to Conform With the Underlying Relevancy Rationale for the Rule in Negligence and Strict Liability Actions, 3 Seton Hall Cir. Rev. 435 (2007)

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A Proposal to Amend Rule 407 of the Federal Rules of Evidence to Conform With the Underlying Relevancy Rationale for the Rule in Negligence and Strict Liability Actions

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I. INTRODUCTION

The Federal Rules of Evidence provide for the exclusion of otherwise relevant evidence on public policy grounds. Rule 407 is one example. In its current form as amended in 1997, the rule provides:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.[1]

Rule 407 prevents plaintiffs from introducing evidence of remedial measures taken by the defendant after an event that caused an injury or harm in order to prove negligence, culpable conduct, or strict product liability. The primary rationale for such exclusion is that individuals, corporations, or municipalities should not be discouraged from taking remedial measures that may prevent future injury or harm to individuals. While Rule 407 provides for broad exclusion, its current language is limited to remedial measures which are taken *after* an event that may have caused the injury or harm. We suggest that the language of Rule 407 be amended to preclude the admissibility of remedial measures which are taken both before and after an injury. This change will implement the relevancy rationale for the rule.

II. PURPOSE OF 1997 AMENDMENT

The original language of the 1975 version of Rule 407 barred the admissibility of remedial measures taken "after an event"[2] as an admission of negligence or culpable conduct. However, this language

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[1] FED. R. EVID. 407.

[2] *See* Chase v. Gen. Motors Corp., 856 F.2d 17, 21 (4th Cir. 1988) (citing the preamble to the 1975 version of Rule 407 that excluded evidence "[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event").

was ambiguous as to what constituted the critical "event"[3] that would trigger exclusion.[4] The 1997 amendment was intended to clarify this ambiguity by rephrasing the rule to only bar remedial measures taken "after an injury or harm, allegedly caused by an event."[5] Additionally, the 1997 amendment adopted the predominant judicial view that Rule 407 also applies to exclude subsequent remedial measures in strict product liability cases.[6]

The Advisory Committee explained that this change in the language was necessary "to clarify that the rule applies only to changes made *after* the occurrence that produced the damages giving rise to the action."[7] The rule "does not apply to bar evidence of preventive measures taken *before* an accident."[8] The amendment was intended to supersede the "minority view that applied Rule 407 to exclude . . . evidence of pre-accident conduct."[9] The justification was that such evidence need not be excluded under Rule 407 because it could be excluded under Rule 401 and Rule 403 relevancy principles.

III. HISTORY, PURPOSE, AND DEFINITIONS

A. Codification of Common Law

Formalization of the exclusion of subsequent remedial measures as an admission of negligence or culpability was developed by the courts in England and the United States as a common law rule of evidence.[10] It

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[3] *See* DAVID P. LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 2.6.4, at 2:62-1 (Aspen Law & Bus. Supp., 2001) [hereinafter NEW WIGMORE] (explaining that under the original, pre-1997 version of the Rule, "'event' might have included . . . the manufacture of a product in question").

[4] JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 407.05[1], at 407-23 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2005) [hereinafter WEINSTEIN'S FEDERAL EVIDENCE]; *see also* Traylor v. Husqvarna Motor, 988 F.2d 729, 734 (7th Cir. 1993) (finding that the critical "event" was the sale of the allegedly defective product rather than the accident).

[5] FED. R. EVID. 407; *see also* Roberts v. Harnischfeger Corp., 901 F.2d 42, 44 n.1 (5th Cir. 1989) (stating that the term "event" refers to the accident that precipitated the suit); *accord Chase*, 856 F.2d at 21.

[6] FED. R. EVID. 407 advisory committee's note.

[7] *Id.*

[8] WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 4.

[9] WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 4, § 407.05[1], at 407-24.

[10] *See* Columbia & P. S. R. Co. v. Hawthorne, 144 U.S. 202, 208 (1892) (citing Baron Bramwell in Hart v. Lancashire & Yorkshire Ry. Co., 21 Law Times N.S. 261, 263 (1869) for the proposition that "[p]eople do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, *because the world gets wiser as it gets older, therefore it was foolish before.*") (emphasis added)); *see also* Marcie J. Freeman, *Spanning The*

precluded the introduction and circumstantial use of evidence of subsequent remedial measures to show negligence or culpability.[11] As early as 1892, the United States Supreme Court recognized that such evidence is "incompetent"[12] and noted that the only two states that allowed the use of "subsequent changes [as] evidence of prior negligence"–Pennsylvania and Kansas–did not justify their position by "satisfactory reasons."[13] In 1942, the American Law Institute ("ALI") published the Model Code which became the first official collection of common law rules of evidence, including "one of the first, and simplest, promulgations of the remedial measures rule."[14]

Almost immediately after its release, the Model Code met strong opposition from within the ALI itself. The dissenting view – that the Model Code granted excessive discretion to the trial judge[15] – was the major point of contention and is seen as the most "common explanation" for the failure of the Model Code.[16] Noting the rejection of the Model

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Spectrum: Proposed Amendments to Federal Rule of Evidence 407, 28 TEX. TECH L. REV. 1175, 1179 n.23 (1997) (explaining that the Official Comment following the Uniform Rule 51 was a single sentence that "[t]his states the well settled common law rule") (internal citation omitted).

[11] RICHARD O. LEMPERT, SAMUEL R. GROSS & JAMES S. LIEBMAN, A MODERN APPROACH TO EVIDENCE 277 (American Casebook Series 3d ed. 2000) (1977) [hereinafter LEMPERT].

[12] *Columbia*, 144 U.S. at 207. There, a worker was seriously injured in the course of his employment, when a pulley assembly collapsed. The Court held that the trial court improperly admitted evidence of safety modification that took place after the accident as an admission of previous neglect. *Id.* at 208. The Court recognized that:

> The evidence is incompetent because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant.

Id. at 207.

[13] *Id.*

[14] *See* Freeman, *supra* note 10, at 1179 n.29 (reciting Model Code Rule 308: "Evidence of the taking of a precaution by a person to prevent the repetition of a previous harm or the occurrence of a similar harm or evidence of the adoption of a plan requiring that such precaution be taken is inadmissible as tending to prove that his failure to take such a precaution to prevent the previous harm was negligent."
(internal citation omitted)).

[15] *See* Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking"*, 53 HASTINGS L.J. 843, 849 (2002) (explaining that Dean Wigmore, Chief Consultant to the ALI on its Model Code of Evidence, led the opposition by arguing that the Model Code granted excessive discretion to trial judges and complained that the Model Code did not address all the areas of evidence law, "raising the problem of whether the common law aspects of evidence law that were not included would still exist or had been repealed by implication").

[16] *Id.*

Code by the states, the American Bar Association (ABA) collaborated with the National Conference of Commissioners on Uniform State Laws ("NCCUSL") to create the 1953 Uniform Rules of Evidence, which offered another version of the rule against the admissibility of remedial measures.[17] However, this proposed reform was met with the same disinterest as the Model Code. In fact, only three states initially adopted the Uniform Rules.[18] It was not until January 3, 1975 that President Ford signed the new Federal Rules of Evidence into law, thus establishing, at least in the federal courts, an exclusionary rule for subsequent remedial measures.[19]

B. Purpose of the Rule

Exclusion of evidence under Rule 407 is based on public policy considerations and evidentiary rationale.[20] Simply stated, the public policy purpose of Rule 407 is to "encourag[e] people to take, or at least not discourag[e] them from taking, steps in furtherance of added safety"[21] and that such remedial measures are "not an admission"[22] of

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[17] *See* Freeman, *supra* note 10, at 1179 n.31 (citing Uniform Rule 51: "*Subsequent Remedial Conduct.* 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 not admissible to prove negligence or culpable conduct in connection with the event") (internal citation omitted)

[18] *See* Scallen, *supra* note 15, at 851 (stating that only Kansas, New Jersey and Utah adopted the original 1953 Uniform Rules).

[19] *Id.* at 854.

[20] JACK B. WEINSTEIN, WEINSTEIN'S EVIDENCE MANUAL § 7.04[1] (Matthew Bender & Company, Inc., rev. vol. 2006) [hereinafter WEINSTEIN'S EVIDENCE MANUAL].

[21] FED. R. EVID. 407 advisory committee's note.

[22] *See* 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 407:1, at 961-62 (Thomson West Publishing 6th ed. 2006) [hereinafter GRAHAM'S HANDBOOK OF FEDERAL EVIDENCE] (explaining that "remedial measures may be motivated by a desire to exercise the highest care and thus in fact not be an admission of negligence or culpable conduct"). Graham cites Professor Wigmore to explain that:

> if machines, bridges, sidewalks, and other objects, never caused corporal injury except through the negligence of their owner, then his act of improving their condition, after the happening of an injury thereat, would indicate a belief on his part that the injury was caused by his negligence. But the assumption is plainly false; injuries may be and are constantly caused by reason of the inevitable accident, and also by reason of contributory negligence of the injured person. To improve the condition of the injury-causing object is therefore to indicate a belief merely that it has been *capable of causing such an injury*, but indicates nothing more, and is equally consistent with a belief in injury by mere accident, or in contributory negligence, as well as by the owner's negligence. Mere capacity of a place or thing to cause an injury is not the fact that constitutes liability for an owner; it must be a capacity which could have been known to an owner using reasonable diligence and foresight, and a capacity to injure persons taking reasonable care in its use.

negligence, culpable conduct, or strict liability in product design, manufacture, or a need for a warning or instruction. The evidentiary rationale is that such evidence is unfairly prejudicial with little probative value because it has the potential to excite the sympathies of the jury and to lead it to find liability from remedial actions rather than from more relevant and probative evidence.[23]

i. Public Policy Basis

Exclusion is founded on public policy considerations that without the protection afforded by Rule 407, individuals, corporations, and municipalities would not take corrective steps after an injury or harm to prevent similar future injury or harm for fear that evidence of the remedial measures would be used against them in future litigation[24] to circumstantially show negligence, culpability, or strict product liability.[25]

Professor Saltzburg has suggested that this policy justification for exclusion under Rule 407 is flawed because it is probable that a reasonable would-be defendant, even without the protection of Rule 407, "would be very likely to take corrective measures in order to avoid more serious liability for future accidents."[26] Professor Rice has also suggested that the presumption that people may be dissuaded from taking remedial measures, if such evidence could be used as an admission of fault, may

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Id.

[23] WEINSTEIN'S EVIDENCE MANUAL, *supra* note 20, § 7.04[1].

[24] *See* Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984) (opining that if evidence of subsequent remedial measures was "admissible to prove liability, the incentive to take such measures will be reduced"). The court explained that the "major purpose of Rule 407 is to promote safety by removing the disincentive to make repairs (or take other safety measures) after an accident that would exist if the accident victim could use those measures as evidence of the defendant's liability." *Id.* Judge Posner further reasoned:

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

Id.

[25] 2 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 407.02[2], at 407-4 (Matthew Bender 8th ed. 2002) (1975) [hereinafter SALTZBURG MANUAL].

[26] *See id.* at 407-5 (opining that "most defendants would correct a dangerous condition after an accident even if Rule 407 did not exist"). Saltzburg explains that the policy consideration underlying exclusion under the rule comes with an implicit exception that subsequent remedial measures may be admissible when such admissibility would not create a "disincentive to repair." *Id.* § 407.02[2], at 407-6.

be defective because such a conclusion requires an acceptance that 1) the "existence of the privilege against the introduction of such evidence is generally known," which is highly unlikely; and 2) that "people risk future liability through potential injuries to others as a result of the continued existence of the condition, rather than risk the increased possibility of being found liable for the injury that has already occurred by changing that condition."[27] Nonetheless, in spite of serious logical flaws, this policy rationale remains a credible justification for the rule.

ii. Relevancy Basis

The evidentiary basis for the exclusion of evidence of subsequent remedial measures as an admission of negligence, culpability, or material issues in product liability cases is a common sense conclusion that evidence of remedial measures is of "marginal relevance" and almost always substantially more prejudicial than probative.[28] Another view suggests that such evidence "tends to be more persuasive than is logically justified."[29] The concern is that a jury may give excessive weight and consideration to evidence of subsequent remedial measures instead of focusing its attention to other more probative evidence on the material facts in dispute. In fact, subsequent remedial measures are usually not determinative on the finding that the defendant had breached an established duty of care, "because he might have made the repairs to correct conditions that either did not exist or were not apparent until after the accident."[30]

iii. Application in Negligence Cases

Cases arising out of negligence require the plaintiff to show that the defendant had a "duty not to expose the plaintiff to a reasonably foreseeable risk of injury, that the defendant breached that duty as defined by the applicable standard of care, that the breach [proximately] caused the damage, and that there was actual damage."[31] All four

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[27] PAUL R. RICE & ROY A. KATRIEL, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 241 (Matthew Bender 5th ed. 2005) [hereinafter RICE EVIDENCE].

[28] *See* SALTZBURG MANUAL, *supra* note 25, § 407.02[3], at 407-6 (explaining that, by its nature, marginally relevant evidence is "almost always substantially outweighed by the risk of jury confusion created by the introduction of a subsequent remedial measure"); *see also* GRAHAM'S HANDBOOK OF FEDERAL EVIDENCE, *supra* note 22.

[29] RICE EVIDENCE, *supra* note 27, at 240.

[30] *Id.*

[31] Eleanor D. Kinney & William M. Sage, *Resolving Medical Malpractice Claims in the Medicare Program: Can It Be Done?*, 12 CONN. INS. L.J. 77, 115 (2006).

elements must be proved in order to establish a *prima facia* case for negligence.[32]

The policy consideration for applying Rule 407 to negligence cases is that the reasonable person of ordinary prudence, who becomes aware of a dangerous or a potentially injury-causing condition, "may be expected to do everything feasible to remedy that condition regardless of the reasonableness of [his] earlier care."[33] The relevancy basis for exclusion under Rule 407 is the idea that there is no presumptive connection between an injury and breach of an established duty of care.[34] This makes evidence of subsequent remedial measures unfairly prejudicial because the jury may become confused and find liability based on the improper inference that post-injury corrective steps necessarily imply a breach of an established duty of care.

Rule 407 retains the four-part structure of the tort of negligence. It allows would-be defendants an opportunity to "do as they please until they become aware that their actions harm others, at which point they acquire a duty to avoid harms that cost the victim more than they profit the actor."[35] In effect, the rule prevents courts from punishing potential defendants for taking remedial measures that "the law and good citizenship require."[36] It avoids imposing liability on a defendant who did not have a duty of care, established or implied, but who nonetheless made an effort to ensure that similar injury or harm does not take place again, while retaining liability where there has been a clear showing of a breach of a duty of care.[37]

iv. Application in Strict Product Liability Cases

Strict liability cases require the plaintiff to show that the defendant manufactured, sold, or distributed a product that is defective in design or

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[32] *See* Hall v. Arthur, 141 F.3d 844, 850 (8th Cir. 1998) (stating that "[t]he basic elements of a cause of action for negligence are duty, breach, causation, and damages").

[33] LEMPERT, *supra* note 11, at 278.

[34] *Id.*

[35] *See id.* at 279-80 (demonstrating that this construction does not require a dog owner to "muzzle the beast until it reveals its proclivity to bite"). Professors Lempert, Gross, and Liebman explain that Rule 407 retained "this 'one bite for free' conception of negligence." *Id.* at 280.

[36] *See id.* (discussing that duty is established when people knew or should have known about certain hazards). The rule was intended to "afford some protection" to those people who fail to take anticipatory measures (most preferred by tort law), as long as they took subsequent remedial measures (less favored by the tort law because the harm already took place), and not act at all (least preferred by the tort law). *Id.*

[37] *See generally id.*

manufacture, or provides an insufficient warning.[38] Prior to 1997, there was substantial disagreement among the federal circuits as to whether Rule 407 applies to exclude evidence of subsequent remedial measures in strict liability cases.[39] However, the 1997 amendment expressly adopted the majority view,[40] precluding the use of such evidence to show "a defect in a product, a defect in a product's design or a need for a warning or instruction."[41]

Prior to the amendment, the most common and compelling rationale for applying the exclusionary rule to product liability actions was grounded on the social policy "desire" not to deter remedial measures by manufacturers.[42] It has been suggested by Professor Lampert that this justification is not always accurate[43] because corporations are under a common statutory duty to make repairs and may be liable for punitive damages if they "ignore known dangers."[44] In his opinion, this duty and potential statutory liability likely overshadow "any incentive the rules of evidence may give them to forgo making repairs."[45] However, as the Ninth Circuit explained that, practically speaking, there is no "difference between strict liability and negligence in defective design cases," and as such, the "rationale to encourage remedial measures remains the same."[46]

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[38] *See* Charles E. Cantu, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability Under Section 402a of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning that Should Never Meet*, 35 AKRON L. REV. 31, 40 (2001) (exploring the history of the strict liability tort concept). The author explains that the concept of strict liability began as an English judicial construct in *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), and has been accepted by American jurisdictions. *Id.* at 34-35. The author continues to discuss Sections 520 and 402A of the Restatement (Second) of Torts. *See generally id.*; Carlin v. Superior Court, 920 P.2d 1347, 1350 (Cal. 1996).

[39] *See* SALTZBURG MANUAL, *supra* note 25, § 407.02[6], at 407-8 (explaining that the pre-1997 version of the rule prohibited evidence of subsequent remedial measures taken after an event "only if offered to prove 'negligence or culpable conduct'").

[40] *See id.* (expressing the view that "[d]espite the language of the Rule . . . most Courts had held that Rule 407 excluded subsequent remedial measures" in product liability actions); *see also* Kelly v. Crown Equip. Co., 970 F.2d 1273, 1276 (3d Cir. 1992) (opining that Rule 407 applies to "products liability actions generally regardless of the specific theory advanced."); LEMPERT, *supra* note 11, at 281 (expressing the view that the "dominant (though not uniform) view in the federal courts was that FRE 407 applied in strict liability as well as in negligence actions").

[41] FED. R. EVID. 407.

[42] LEMPERT, *supra* note 11, at 281.

[43] *See id.* (noting that this reasoning may not always be convincing because most strict liability defendants are large corporations "to which the rationale of promoting repairs has little force").

[44] *Id.* at 282.

[45] *Id.*

[46] Gauthier v. AMF, Inc., 788 F.2d 634, 637, *amended by* 805 F.2d 337 (9th Cir. 1986) (adopting the position that Rule 407 applies to strict liability cases).

From an evidentiary standpoint, the focus of a judicial inquiry in strict liability cases centers on the "condition of the product 'at the time it leaves the seller's hands'" and not its condition at the time of injury.[47] To admit evidence of remedial measures taken after the event that caused the injury or harm would introduce facts that are outside the scope of the jury's consideration. Consequently, such evidence becomes unfairly prejudicial because it may lead the jury to find liability by considering the condition of the product after remedial measures, rather than focusing on the condition of the product at the time that it was released into the stream of commerce.[48]

C. Remedial Measures

The remedial measures contemplated by Rule 407 are "any kind of change, repair, or precaution."[49] While this definition is broad, "acts that do nothing to make the harm less likely to occur should not be excluded under Rule 407."[50] This means that remedial measures must actually, or be reasonably calculated to, prevent future harm.[51] Otherwise, if the conduct does nothing to reduce the potential of future injury or harm, it cannot implicate the social policy underlying the rule of encouraging injury-reducing repairs.[52] This policy would also not be implicated by acts that were not done voluntarily because use of such remedial actions at trial would not deter other potential defendants from taking remedial measures that may save them from later litigation.[53]

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[47] Bogosian v. Mercedes-Benz of N. Am., 104 F.3d 472, 481 (1st Cir. 1996) (internal citation omitted).

[48] *See generally id.*

[49] WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 4, at § 407.02[3]; *see also* LEMPERT, *supra* note 11, at 277 (providing examples of remedial measures such as lowered speed limits, new chemical formulas, and revised rules and practices); RICE EVIDENCE, *supra* note 27, at 239 (explaining that "changes in a product's design, warnings to consumers on particular dangers in using a product, the imposition of safety procedures, changes in methods of operation, the discontinuation of certain practices, the installation of new or different equipment, the discharge of an old employee or retention of a new one, as well as the repair of a defective condition" constitute remedial measures within the language of the rule and its judicial application).

[50] GRAHAM'S HANDBOOK OF FEDERAL EVIDENCE, *supra* note 22, § 407:1, at 960.

[51] *See generally id.*

[52] *Id.*

[53] *See* Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 888 (9th Cir. 1991) (explaining that the policy of not discouraging would-be defendants from taking remedial actions would not be implicated when such measures are compelled by governmental mandate).

i. Measures Taken by Third Party

It is recognized that remedial measures taken by a nonparty to the litigation are outside the scope of exclusion under Rule 407.[54] For example, in *Dixon v. International Harvester Co.*,[55] the plaintiff employee sued the defendant tractor manufacturer for personal injuries that allegedly resulted from a defective cab design.[56] The Fifth Circuit allowed evidence that after the plaintiff's injury, his employer, who was not a party to the litigation, took protective steps to prevent future similar injuries by modifying the tractor cab design.[57] The court held that evidence of remedial steps taken by a nonparty were outside the scope of Rule 407 and were circumstantially admissible to show that the tractor was improperly designed.[58] The court reasoned that the policy of not "discouraging defendants from making necessary repairs or changes to products or dangerous conditions" was not applicable where the remedial measures were taken by a nonparty to the litigation.[59]

Similarly in *TLT-Babcock v. Emerson Electric Co.*,[60] the Fourth Circuit held that evidence of remedial modifications to the design of a ventilation system was properly admitted because it was made by the city, a nonparty to the litigation, and not by the defendant who originally designed the system.[61] The court reasoned that circumstantial use of such evidence was proper because a nonparty "will not be inhibited from taking remedial measures if such actions are allowed into evidence against the defendant."[62]

In *Louisville & Nashville Railroad Co. v. Williams*,[63] the court distinguished the exclusion of subsequent remedial measures taken by a defendant from a nonparty. The Fifth Circuit opined that the admissibility of preventive remedial measures by a defendant should not be used against that defendant at trial as an implied admission of liability.[64] However, remedial measures taken by a nonparty can be admitted against a defendant because the nonparty will not be dissuaded from taking future remedial measures since the evidence in question is

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[54] MICHAEL H. GRAHAM, EVIDENCE: TEXT, RULES, ILLUSTRATIONS AND PROBLEMS 449 (The Nat'l Inst. for Trial Advocacy 1983) [hereinafter GRAHAM TEXT, RULES, ILLUSTRATIONS AND PROBLEMS].

[55] 754 F.2d 573, 583-84 (5th Cir. 1985).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 583.

[60] 33 F.3d 397, 400 (4th Cir. 1994).

[61] *Id.*

[62] *Id.*

[63] 370 F.2d 839, 844 (5th Cir. 1966).

[64] *Id.*

not being offered against it.[65] The court reasoned that evidence of repairs made by the State Highway Department, which was not a party to the suit, was properly admitted as circumstantial proof that a railroad crossing was hazardous before and after the injury and prior to the repair.[66]

Professor Saltzburg has suggested that since the express language of the rule does nothing to distinguish "between measures taken by defendants and nondefendants" it should be used to exclude "*any* measure which, if taken, would have made the event less likely to occur," regardless of who takes such measures.[67] Our proposal does not incorporate this view because as Saltzburg himself notes, courts usually hold that Rule 407 is inapplicable to exclude remedial measures taken by "parties who are not responsible for the injury or harm"[68] since a nonparty to the litigation "will not be inhibited from taking remedial measures if [those] measures are used against a defendant."[69]

In line with Saltzburg's observation, the Third Circuit in *Diehl v. Blaw-Knox*[70] opined that "admission of remedial measures by a non-party necessarily will not expose that non-party to liability, and therefore, will not discourage the non-party from taking the remedial measures in the first place."[71] Citing a myriad of cases, the court noted that each of the circuits to address the issue has concluded that "Rule 407 does not apply to subsequent remedial measures taken by a nonparty."[72] Courts can still exclude evidence of subsequent remedial measures taken by nonparties under Rule 403 as being unfairly prejudicial, or under Rule 401 and Rule 402 as not relevant.[73]

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[65] *Id.*

[66] *Id.*

[67] SALTZBURG MANUAL, *supra* note 25, § 407.02[9], at 407-13.

[68] *Id.* (internal citation excluded).

[69] WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 4, § 407.05[2], at 407-26; *see also* GRAHAM'S HANDBOOK OF FEDERAL EVIDENCE, *supra* note 22, § 407:1, at 953 n.2 (discussing that remedial measures taken by a "person not a party to the litigation are outside the scope of Rule 407" because this "will not expose that non-party to liability, and therefore will not discourage the non-party from taking the remedial measures in the first place").

[70] 360 F.3d 426, 430 (3d Cir. 2004).

[71] *Id.*

[72] *Id.* at 429.

[73] *See* WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 4, § 407.05[2], at 407-26 n.10 (citing several cases to support the proposition that even though the language of rule 407 does not preclude the admissibility of subsequent remedial measures taken by a non-party, such evidence must still be relevant under Rule 401 and more probative than prejudicial under Rule 403 before it is admitted).

ii. Governmental Mandate

Rule 407 does not exclude evidence of subsequent remedial measures "taken by a party . . . in response to government regulations."[74] This exception to the exclusionary force of the rule is a recognition that the social policy behind the rule of encouraging corrective measures to reduce future harm does not apply when corrective action is "mandated by a superior governmental authority,"[75] because such mandate would not, in other circumstances, dissuade the defendant from taking remedial actions.[76]

Several circuits have discussed the issue extensively. For instance, the Fifth Circuit in *Arceneaux v. Texaco, Inc.*,[77] opined that evidence of remedial measures "made solely in response to new federal environmental requirements," and not in response to the accident that gave rise to the suit, was not a remedial measure contemplated by Rule 407 and was admissible.[78] In *In re Aircrash in Bali, Indonesia*,[79] the Ninth Circuit held that when remedial measures were not taken voluntarily by the defendant, "the admission of [such] measure[s] into evidence does not 'punish' the defendant for his efforts to remedy his safety problems."[80] Additionally, the Eighth Circuit in *O'Dell v. Hercules, Inc.*,[81] explained that evidence of remedial measures compelled by superior governmental authority is circumstantially admissible against a defendant "because the policy goal of encouraging remediation would not necessarily be furthered by exclusion of such evidence."[82]

IV. THE 1997 AMENDMENT DOES NOT FULLY IMPLEMENT THE PUBLIC POLICY OF THE RULE

Legal scholars have argued that the 1997 amendment to Rule 407, that expressly limits exclusion of remedial measures to those taken after an event causing injury or harm, does not properly implement the public

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[74] *See* GRAHAM TEXT, RULES, ILLUSTRATIONS AND PROBLEMS, *supra* note 54, at 450 (explaining that such evidence will not adversely affect the policy of the Rule and that such evidence may be received only if it is relevant under Rule 401 and not subject to Rule 403 exclusion as overly prejudicial).

[75] WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 4, § 407.05[3].

[76] *See generally id.*

[77] 623 F.2d 924 (5th Cir. 1980).

[78] *Id.* at 928. The court, however, affirmed the district court's exclusion of the evidence on relevancy and undue prejudice grounds under Rule 401 and Rule 403.

[79] 871 F.2d 812 (9th Cir. 1989), *cert. denied sub nom.*, Pan Am. World Airways, Inc. v. Causey, 493 U.S. 917 (1989).

[80] *Id.* at 817.

[81] 904 F.2d 1194 (8th Cir. 1990).

[82] *Id.* at 1204.

policy that underlies the rule.[83] Professor Rice reasons that if potential defendants may be held to have implied their negligence, culpability, or strict product liability by taking remedial measures, there would be no incentive to take precautions at the time they become apparent.[84] In effect, would-be defendants would purposefully hold off on taking remedial measures in order to take advantage of the "one bite for free" concept.[85]

The limiting language of the rule fails to recognize the nature of the critical event that is central in both negligence and strict liability cases.[86] Professor Rice reasons that since the purpose of the subsequent remedial measures rule is to encourage safety measures, "it should be of no consequence that the safety measure (including a design change) was taken *before* the accident that gave rise to the action."[87] Specifically, in negligence cases, a defendant cannot be held liable for an injury that follows remedial measures because the defendant would "not have breached [its] duty of care at the time of the injury, regardless of its earlier negligence."[88] In strict product liability cases, the requirement of injury as a prerequisite for exclusion of remedial measures does nothing to encourage would-be defendants to "come forward with voluntary recalls or repairs to their products" before injury occurs.[89] It also fails to recognize that evidence of remedial measures is not required to find a defendant strictly liable.[90] Evidence that the product was defective at the

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[83] *See* NEW WIGMORE, *supra* note 3, § 2.6.4, at 2:66 (opining that "the recent amendment to Rule 407, which categorically provides that the exclusionary provision is inapplicable to pre-accident remedial measures, is ill-advised."). The author argues that the limitation "fails to do justice to the policy goals supporting the application of the exclusionary rule." *Id.* (citation omitted).

[84] *See* RICE EVIDENCE, *supra* note 27, at 248 (explaining that the purpose of taking any remedial measures in the first place is to "prevent future injury to others").

[85] *See supra* note 35 and accompanying text.

[86] RICE EVIDENCE, *supra* note 27, at 248; *see also* NEW WIGMORE, *supra* note 3, § 2.6.4, at 2:60-61 (discussing that the "policy of the rule appears to apply even if the event that gave rise to the subsequent remedial measure was not the accident at issue in the litigation").

[87] NEW WIGMORE, *supra* note 3, § 2.6.4, at 2.61 (emphasis in original).

[88] *Id.*, at § 2.6.4, at 2:66 (expounding that when an entity takes affirmative measures to remedy a known issue, it cannot be held to have violated its duty of care, regardless of when the remedial measure was taken).

[89] RICE EVIDENCE, *supra* note 27, at 248.

[90] *See* Email from Anthony T. Pierce, Partner, Akin Gump Strauss Hauer & Feld, L.L.P., to Eugene Goryunov, JD Candidate, The John Marshall Law School (Sep. 25, 2006, 8:58 AM CST) (on file with authors) (opining that corporations should be encouraged to take remedial measures, both pre- and post-event). Mr. Pierce explains that such encouragement "should come in part, by giving a company the benefit of not having the fact that it saw and tried to fix a problem come back to haunt them if the fix doesn't work." *Id.*

time that it was released into the stream of commerce will be sufficient to establish a *prima facia* case.[91]

Prior to the 1997 amendment, a number of federal circuits excluded evidence of post-manufacture pre-accident remedial measures under the authority of Rule 407, not per Rule 403, holding that the policy of the rule required that such modifications be excluded when offered to show negligence, culpability, or strict product liability. While these cases constitute a minority position, they correctly reflect the underlying public policy. Some courts have defined the "event" language in the rule as the date of sale. For example, in *Petree v. Victor Fluid Power, Inc.*,[92] the plaintiff argued that the trial court improperly refused to admit evidence that the defendant manufacturer began to affix warning labels on a hydraulic press prior to the accident.[93] The court reasoned that exclusion under Rule 407 was based on sound public policy intended to encourage manufacturers to take remedial measures in order to prevent potential or future harm.[94] The Third Circuit held that the trial court did not abuse its discretion when it excluded evidence of post-sale pre-accident warning modifications under this rule because the underlying policy was "equally as supportive of exclusion of evidence of safety measures taken before someone is injured by a newly manufactured product" as after the injury.[95] Later, in the same circuit, in *Kelly v. Crown Equipment Co.*,[96] the court affirmed the district court's exclusion of post-manufacture, pre-accident modifications to a forklift under Rule 407.[97] The Third Circuit relied on *Petree* and recognized that since "people are loath to take actions which increase the risk of losing a lawsuit," the rule can properly be applied to exclude pre-accident conduct as a matter of social policy.[98] The court ultimately held that while the express language of Rule 407 did not require the exclusion of pre-accident remedial measures, the policy considerations that form the basis of the rule justify such exclusion.[99]

Some other courts have treated the "event" language in the rule as being the date of manufacture. On point, in *Mills v. Beech Aircraft Corp.*,[100] the plaintiff, the decedent's survivor, brought suit against the defendant aircraft manufacturer alleging that the defective design of the

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[91] NEW WIGMORE, *supra* note 3, § 2.6.4, at 2:66.
[92] 831 F.2d 1191 (3d Cir. 1987).
[93] *Id.* at 1197.
[94] *Id.* at 1198.
[95] *Id.*
[96] 970 F.2d 1273 (3d Cir. 1992).
[97] *Id.* at 1276.
[98] *Id.*
[99] *Id.* at 1278.
[100] 886 F.2d 758 (5th Cir. 1989).

airplane's control assembly caused the aircraft to crash.[101] The plaintiff tried to introduce a revised shop manual, published shortly before the accident, explaining how to install the control assembly such as to avoid locking-up the ailerons.[102] The court noted that the exclusion of post-manufacture pre-accident remedial measures under Rule 407 "would conform to the policy expressed in Rule 403" of excluding evidence that may confuse the jury.[103] The court reasoned that evidence of "subsequent changes in the product or its design threatens to confuse the jury by diverting its attention from whether the product was defective at the relevant time to what was done later."[104] The jury's attention should be "directed to whether the product was reasonably safe at the time it was manufactured" and not at the remedial measures taken after the fact.[105] As such, the Fifth Circuit held that the modified manual was properly excluded under Rule 407 because it could have been viewed by the jury as an admission of a defect in product design.[106]

Similarly, in *Wusinich v. Aeroquip Corp.*,[107] the plaintiff was injured while operating the defendant's hose assembly machine when his pant leg was caught in the revolving hose.[108] He alleged that as he pulled his leg away from the machine in an effort to reach the shut-off switch, the machine toppled over him, causing the protective guard to open and to expose the plaintiff to the rotating machinery.[109] Prior to trial, the defendant filed a motion *in limine* to exclude evidence of subsequent remedial measures, such as additional stabilization control to prevent tipping and other safety features, taken by the company after the 1968 manufacture of the machine, but prior to the 1991 injury.[110] The district court held that evidence of pre-accident, post-manufacture remedial measures should be excluded because the "policy concerns behind Rule 407, such as promoting the improvement of product safety, significantly outweigh Plaintiffs' request for admission of subsequent remedial measures."[111]

Other federal courts, prior to the 1997 amendment, have held that the language of Rule 407 did not require exclusion of post-manufacture

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[101] *Id.* at 760.
[102] *Id.* at 762.
[103] *Id.* at 763 (citing Grenada Steel Indus. v. Al. Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983)).
[104] *Id.*
[105] *Id.*
[106] *Id.* at 762.
[107] 843 F. Supp. 959 (E.D. Pa. 1994).
[108] *Id.* at 960.
[109] *Id.*
[110] *Id.* at 960-61.
[111] *Id.* at 962.

pre-accident remedial measures. However, these courts still concluded that such evidence was properly excluded under Rule 403 so as to further the policy basis for Rule 407. For example, in *Raymond v. Raymond Corp.*,[112] the decedent was operating a 1981 Model 75 sideloader in the course of his employment at Edgcomb Metals in 1987.[113] He was fatally injured when his sideloader collided with a steak beam.[114] On appeal from a verdict in the defendant's favor on the question of defective product design,[115] the plaintiff alleged that the district court had improperly excluded evidence of pre-accident remedial measures and moved *in limine* to introduce evidence regarding the "addition of a back-plate to [the defendant's] Model 76 sideloader, which was first manufactured in 1983," two years after the manufacture of the Model 75 sideloader at issue and also four years before the accident.[116] After finding that Rule 407 applies to strict liability cases,[117] the court held that only measures which take place after the "event" causing injury or harm are excluded under the express language of the rule.[118] Since the design modifications took place prior to the accident, the court noted that Rule 407 does not preclude the admissibility of such evidence.[119] However, the court excluded the evidence in question under Rule 403 as being more prejudicial than probative, relying on the relevancy basis underlying Rule 407 as a reason.[120] Such evidence could reasonably confuse the jury and divert its attention from the condition of the product at the time that it entered the stream of commerce to other matters outside of the scope of the jury's review.

Further on point, in *Bogosian v. Mercedes-Benz of North America*,[121] the plaintiff was seriously injured in 1992 when her daughter's 1986 Mercedes Benz 560 SEL rolled from its parking spot and struck her down and ran over her ankle.[122] In a suit for strict liability, the plaintiff alleged that a park ignition interlock, which would have prevented her from removing her key if the car was in any other gear than "park," would have prevented her injury.[123] The plaintiff wanted to introduce evidence showing that Mercedes Benz began to install a park

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[112] 938 F.2d 1518 (1st Cir. 1991).
[113] *Id.* at 1520.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 1522.
[117] *Id.*
[118] *Id.* at 1523.
[119] *Id.*
[120] *Id.* at 1524.
[121] 104 F.3d 472 (1st Cir. 1997).
[122] *Id.* at 475.
[123] *Id.*

ignition interlock system in all 1990 models.[124] Citing *Raymond*, the court stated that the exclusion of evidence under the express language of Rule 407 "does not apply where, as here, the modification took place before the accident that precipitated the suit."[125] Ultimately, the First Circuit held that evidence of pre-injury modifications, while not expressly excluded by Rule 407, must nonetheless be excluded under Rule 403 as it "may reasonably be found unfairly prejudicial to the defendant and misleading to the jury" for resolving the strict liability claim.[126] The court reasoned that the policy behind Rule 407, of not discouraging preventive acts that would reduce the chance of future injury or harm, would be furthered if such evidence were excluded.[127]

The Fifth Circuit, in *Foster v. Ford Motor Co.*,[128] was faced with similar facts. There, the decedent was killed when his 1975 Ford truck swerved and collided into a second truck that was heading in the opposite direction.[129] The decedent's widow and two minor children brought a wrongful death suit against the manufacturer of the truck, Ford Motor Co., alleging that the truck's suspension system was defective.[130] On appeal, the plaintiffs complained that the district court had improperly excluded evidence that some time after the manufacture and sale of the Ford truck in question, but before the accident itself, "Ford changed the spacer block assembly for 1976 and 1977 model trucks, casting it as one unit."[131] The plaintiffs intended to show that had the decedent's truck incorporated the alternative design, the accident would not have occurred.[132] However, the court noted that Ford had already conceded that the alternative design was feasible.[133] As such, the policy and relevancy considerations supporting exclusion under Rule 407 allowed the court to properly exclude evidence of pre-injury remedial measures by applying Rule 403 in order to protect defendants who take the initiative to make preventive corrections from implying any wrongful conduct as "cumulative, [and] at worst, unfair, misleading or confusing."[134]

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[124] *Id.* at 480.
[125] *Id.* at 481.
[126] *Id.*
[127] *Id.*
[128] 621 F.2d 715 (5th Cir. 1980).
[129] *Id.* at 717.
[130] *Id.*
[131] *Id.* at 720.
[132] *Id.*
[133] *Id.* at 721.
[134] *Id.*

As a result of differing judicial interpretation and application of Rule 407, the need for clarification was necessary. During the April 22, 1996 meeting of the Judiciary Advisory Committee in Washington D.C., two unnamed commentators proposed to extend the rule to *products liability* actions in order to "bar evidence of remedial measures taken after the sale of the product even if the changes occurred before the event causing injury or harm."[135] This proposal was rejected as being unnecessary without the benefit of a discussion or reasons.[136] Even though the Advisory Committee failed to undertake a revision of the rule, some independent organizations and courts had recognized the need to expand exclusion under Rule 407 and to include pre-event remedial measures regardless of the underlying cause of action – negligence or strict products liability.[137]

A. The National Conference of Commissioners on Uniform State Laws (NCCUSL)

One of the most influential proponents of a revision to the language of the Federal Rules of Evidence as a whole, including Rule 407, is the NCCUSL, a non-profit unincorporated association comprised of approximately three hundred commissioners – law practitioners and legal academicians.[138] The organization is endorsed by the ABA to promote uniformity among state rules and procedures.[139] The NCCUSL has been working toward uniformity in state laws since 1892,[140] and began its partnership with the American Law Institute (ALI) in 1940 to produce the UCC.[141]

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[135] Minutes of Meeting of Apr. 22, 1996, ADVISORY COMM. ON EVIDENCE RULES, *available at* http://www.uscourts.gov/rules/Minutes/ev4-2296.htm (last visited Apr. 22, 2007).

[136] *Id.*

[137] *See* Part IV [A]–[B] for a discussion of the NCCUSL and Evidence Project treatment of Rule 407, proposing revisions to the rule to exclude all remedial measures regardless of when they were taken.

[138] Unif. Law Comm'rs, Nat'l Conference of Comm'rs on Unif. State Laws, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11 (last visited Oct. 26, 2006).

[139] *See id.* (explaining that before an act can be officially adopted as a Uniform or Model Act, a majority of no less than 20 states must approve that act). Once this happens, the Uniform or Model Act is "officially promulgated" for consideration by state legislators for adoption exactly as written to "promote uniformity in the law among the states." *Id.*

[140] *Id.*

[141] Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and its Lessons for Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393, 394 n.3 (2003).

Unlike the language of the current Rule 407 of the Federal Rules of Evidence, the proposed Rule 407 within the Uniform Rules of Evidence would preclude the admissibility of evidence of post-manufacture, pre-injury remedial measures.[142] This expansion of the scope of exclusion under the rule is achieved by defining the term "event" to include the "sale of a product to a user or consumer" in the last sentence of the rule.[143] Defining the scope of the critical "event" was intended to reflect the judgment of the commissioners that the social policy of the rule would be better served if all would-be defendants were given "an incentive to take remedial measures before the injury, or harm, giving rise to the cause of action."[144]

B. The Evidence Project

Professor Paul Rice is another influential legal authority and reform proponent. He has been a constant critic of the Advisory Committee on the Federal Rules of Evidence, as well as the current state of the Federal Rules.[145] In order to further his reform initiative, Professor Rice has established the Evidence Project,[146] an extensive agenda of proposed changes to the Federal Rules of Evidence created through a seminar course in evidence taught at the Washington College of Law of the American University.[147] Professor Rice explains that the proposed revisions to the Federal Rules are intended to create "consistency within the rule and between the rules, consistency with the theory of our adjudicatory process, [and] consistency with the Constitution."[148]

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[142] UNIF. RULES OF EVID., Rule 407. Subsequent Remedial Measures:
If, after an event, measures are taken that, if taken previously, would have made injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. Evidence of subsequent measures may be admissible if offered for another purpose, such as impeachment or, if controverted, proof of ownership, control, or feasibility of precautionary measures. An event includes the sale of a product to a user or consumer.
NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIF. RULES OF EVIDENCE ACT (Jul. 23-30, 1999), *available at* http://www.law.upenn.edu/bll/ulc/ure/evid1200.htm (amended Mar. 8, 2005) (last visited Apr. 22, 2007).

[143] *Id.* at Rule 407 Comment.

[144] *Id.*

[145] *Symposium: Association of American Law Schools, Annual Meeting, Evidence Section Program: The Politics of [Evidence] Rulemaking*, 53 HASTINGS L.J. 733, 734 (2002).

[146] *See id.* (stating that Professor Rice is the acting Director for the Evidence Project).

[147] *See id.* at 766 (explaining that the purpose of the Evidence Project is to approach the rules of evidence from a position of simple consistency).

[148] *Id.*

The proposed Rule 407, as presented by the Evidence Project, would result in the total exclusion of all evidence of remedial measures, regardless of when they were taken.[149] This result is accomplished by removing any reference to the critical "event" language that would otherwise trigger exclusion under the rule.[150] Professor Rice notes that the limitation in the current Rule 407 of the Federal Rules of Evidence, excluding evidence of remedial measures only if taken after an event that causes injury or harm, makes the rule difficult to apply especially in situations where the decision to repair was made before an accident, but the repair was not actually made until after the accident, or where studies about the need for repair were made before the accident, but the decision to make such repairs followed the accident. [151] He concludes that "if all remedial measure[s] were made privileged, the current difficulties and conflicts [in applying the rule] would be avoided."[152]

C. Illinois Exclusion of Remedial Measures

Illinois evidentiary rulings, like Federal Rule 407,[153] exclude evidence of remedial measures in negligence[154] and strict liability actions.[155] However, in a substantial departure from the Federal Rule,

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[149] *See* Paul R. Rice, *The Evidence Project: Revised Rule 407. Remedial Measures Commentary, available at* http://www.wcl.american.edu/pub/journals/evidence/commentary/a4r407c.html (last visited Sep. 17, 2006) (discussing the policy rationale behind the proposed revision to Rule 407).

[150] Revised Rule 407. Remedial Measures:

> Remedial measures are not admissible to prove negligence, or culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. Evidence of remedial measures may be offered for another purpose, such as impeachment or, if controverted, proof of ownership, control, or feasibility of precautionary measures. A party may not call or examine a witness on a matter primarily for the purpose of impeachment with evidence of remedial measures.

Paul R. Rice, *The Evidence Project: Revised Rule 407. Remedial Measures, available at* http://www.wcl.american.edu/pub/journals/evidence/a4r407.html (last visited Sep. 17, 2006).

[151] *See* E-mail from Professor Paul Rice, Director of The Evidence Project, Washington College of Law at American University, to Eugene Goryunov, JD Candidate, The John Marshall Law School (Oct. 18, 2006, 10:05 AM CST) (on file with authors) (explaining that the exclusion under the rule is intended to prevent remedial measures from constituting an implied admission and that the limitation of excluding only post-event remedial measures "makes little sense, is inconsistent with the logic of the rule and makes the rule difficult to apply").

[152] *Id.*

[153] *See* JOHN E. CORKERY, ILLINOIS CIVIL & CRIMINAL EVIDENCE 133 (Law Bulletin Publ'g Co., 2000) (stating that "Illinois case law on subsequent remedial measures has been found comparable to the Federal Rule of Evidence 407").

[154] *See, e.g.*, Schaffner v. Chi. & N. W. Transp. Co., 541 N.E.2d 643, 647 (Ill. 1989).

[155] *See, e.g.*, Davis v. Int'l Harvester Co., 521 N.E.2d 1282, 1287 (Ill. App. Ct. 1988).

Illinois courts do not admit evidence of remedial measures taken prior to the event that gave rise to the cause of action.[156] Illinois courts have reasoned that to allow the admissibility of evidence of post-manufacture preventive changes would have an adverse effect on future safety advancements.[157] For this reason, Illinois courts exclude evidence of improvements made before or after an event causing an injury in both strict liability and negligence cases.[158] This is also the position of several other state courts.[159]

In a strict liability case, *Smith v. Black & Decker*,[160] the plaintiff brought suit against the manufacturer of a power miter saw after he accidentally amputated his left hand.[161] He alleged that the design of the saw was defective because it was not equipped with a right lower blade guard.[162] On appeal, the Illinois appellate court held that the trial court had properly granted the defendant's motion to exclude evidence of post-

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[156] *See* MICHAEL H. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE, § 407.1, 234 (8th ed. 2004) [hereinafter GRAHAM ILLINOIS EVIDENCE]; *see also* Worsley v. Farmington Pizza Co., 750 N.E.2d 1242, 1244 (Ill. App. Ct. 2001) (citing Carrizales v. Rheem Mfg. Co., 589 N.E.2d 569 (Ill. App. Ct. 1991); Smith v. Black & Decker, Inc., 650 N.E.2d 1108 (Ill. App. Ct. 1995) to show that evidence of post-manufacture but pre-injury remedial measures are excluded in product liability cases).

[157] GRAHAM ILLINOIS EVIDENCE, *supra* note 156.

[158] *Id.*; The Illinois 89th General Assembly attempted to codify an exclusionary rule for remedial measures in the Civil Justice Reform Amendments of 1995. However, the entire reform was held unconstitutional by the Illinois Supreme Court for reasons unrelated to subsequent remedial measures. The legislation had the following language:

> When measures are taken which, if taken previously, would have made an event less likely to occur, evidence of the subsequent measures is not admissible to prove a defect in a product, negligence, or culpable conduct in connection with the event. In a product liability action brought under any theory or doctrine, if the feasibility of a design change or change in warnings is not controverted, then a subsequent design change or change in warnings shall not be admissible into evidence. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose such as proving ownership, control, or impeachment.

735 ILL. COMP. STAT. ANN. 5/2-2105 (2007), *amended by* P.A. 89-7 § 15, *invalidated by Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1995).

[159] The Supreme Court of Kansas, in *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299 (Kan. 1993), held that the language of the Kansas strict product liability statute prohibits the introduction of post-manufacture remedial measures. This exclusion is justified on the reasoning that a product's defects should be judged as of the time when the product in question leaves the control of the manufacturer. *Id.* at 1308. Similarly, the Supreme Court of Montana, in *Rix v. General Motors Corp.*, 723 P.2d 195 (Mont. 1986), held that Mont. R. Evid. 407 precluded the admissibility of remedial measures taken after the date of manufacture because such evidence is "not probative of whether a product was defectively designed at the time of manufacture." *Id.* at 202.

[160] 650 N.E.2d 1108 (Ill. App. Ct. 1995).

[161] *Id.*

[162] *Id.* at 1111.

manufacture, pre-injury modifications to the miter saw.[163] The court reasoned that "the same policy consideration, i.e., the potential chilling effect on safety improvements is present in product liability actions as in negligence actions regardless of whether the modifications were pre-injury or post injury."[164]

Several years later in *Brown v. Ford Motor Co.*,[165] the plaintiff, a survivor of a van explosion, brought a product liability action against the defendant manufacturer alleging that faulty nylon fuel lines in the van melted and leaked gasoline, and that this was the direct cause of the explosion.[166] The Illinois appellate court found that the trial court properly excluded evidence that after the sale of the van in question, but before the accident, the defendant had changed the fuel lines from plastic to metal.[167] Citing *Smith v. Black & Decker*, the court held that the public policy underlying the exclusion of remedial measures applies to bar the admissibility of such evidence, regardless of whether it was taken before or after the accident.[168]

In *Carrizales v. Rheem Mfg. Co.*,[169] a case based on a negligence cause of action, the plaintiff sued the defendant manufacturer to recover damages for personal injuries sustained when flammable vapors from his clothing were ignited by the flame of a gas-fired hot water heater.[170] Noting that the relevant time period in a negligent manufacture cause of action is the "time of sale or manufacture,"[171] the court reasoned that to allow the admissibility of pre-injury remedial measures to show negligence would "have a chilling effect on the incentive to improve safety" in mass-produced and widely-used products.[172] The Illinois appellate court held that the exclusion of evidence that the manufacturer of a water heater had placed warning labels on its heaters after the date of manufacture, but before the date of injury, was proper.[173]

V. PROPOSAL TO AMEND RULE 407

Though we reach the same conclusion as Professor Rice, our proposal relies more on the evidentiary relevancy rationale for amending

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163 *Id.*
164 *Id.*
165 714 N.E.2d 556 (Ill. App. Ct. 1999).
166 *Id.* at 557.
167 *Id.* at 559.
168 *Id.*
169 589 N.E.2d 569 (Ill. App. Ct. 1991).
170 *Id.* at 571-72.
171 *Id.* at 583.
172 *Id.* at 584.
173 *Id.*

the rule than the social policy rationale that Professor Rice and his project have advanced. Nonetheless, we endorse the language that he has proposed for amending Rule 407. The amended rule should read as follows:

> Remedial measures are not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. Evidence of remedial measures may be admitted if offered for impeachment or another purpose, if controverted, such as proving ownership, control, or feasibility of precautionary measure.

Removing the "after an injury or harm" language from the text of the current rule is intended to explicitly state that exclusion under the rule is not restricted to remedial measures taken after an event.[174] The removal of any language referring to an "event" is aimed at reducing confusion as to the meaning or scope of the rule. Although terms can be qualified or defined within the text of a rule, removing the phrase completely would foster uniform decisions and encourage consistency, both textual and logical, within the rule in question and between all of the rules together.[175] This proposed rule would clearly bring Rule 407 into conformity with the public policy that underlies the exclusion of remedial measures as an admission of negligence, culpability, product defect, a defect in a product's design, or a need for a warning or instruction.

VI. CONCLUSION

The proposed amendment to the current Rule 407 of the Federal Rules of Evidence will encourage, without limitation, individuals, corporations, and municipalities to make remedial measures that would prevent future injury or harm. Such remedial measures, whether taken before or after an injury, must not be deemed to be admissions of negligence, culpability, a product defect, a defect in a product's design, or a need for a warning or instruction. When courts admit evidence of pre-injury remedial actions they act contrary to the public policy of the rule and create a danger of jury confusion by providing them evidence that is more prejudicial than probative on the material issues in the case.

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[174] This modification is aimed to do away with the limitation in the rule created by the Advisory Committee that exclusion under the rule applies *only* to remedial measures taken after an event. *See supra* Part II .B for further discussion.

[175] Even though the NCCUSL version of the proposed language of Rule 407 defines event as including "the sale of a product to a user or consumer," *supra* note 142 at 23, this qualification does not foreclose possible confusion and potentially different applications of the exclusionary rule to pre-injury remedial measures.

To counter this problem, some federal courts have excluded pre-injury remedial measures under a Rule 403 balancing process. In their view, Rule 403 operates to further the policy that underlies Rule 407. In our view, Rule 403 is not the answer. In order to promote logical consistency within Rule 407 and among the other Federal Rules of Evidence, the rule itself, and not Rule 403, should control the exclusion of evidence of remedial measures.