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Limiting Limited Liability: Requiring More Than Mere Subsequence Under Federal Rule of Evidence 407

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LIMITING LIMITED LIABILITY: REQUIRING MORE THAN MERE SUBSEQUENCE UNDER FEDERAL RULE OF EVIDENCE 407

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ABSTRACT

Rule 407 of the Federal Rules of Evidence, the "Subsequent Remedial Measures" Rule, is troubling. This exclusionary rule of evidence prohibits using subsequent remedial measures to demonstrate negligence, culpable conduct, or product defect. But, other than in the title of the rule, the phrase "subsequent remedial measures" does not appear anywhere in the rule's text and the rule itself does not expressly define what measures fall within its purview. This omission creates space for different judicial interpretations of the rule's language and ultimately disparate judicial outcomes. Although the Federal Rules of Evidence lend themselves to fact-specific inquiries that can lead to varying interpretations, disparities in interpreting the same evidentiary rule undermine the explicit purpose and uniformity sought by Congress and the Advisory Committee when the Federal Rules of Evidence were enacted. There must be a consistent interpretive approach to Federal Rule of Evidence ("FRE") 407 to ensure equity among litigants and maintain judicial integrity.

A purposivist interpretation of FRE 407 requires courts to find a nexus between the subsequent remedial measure and the alleged injury before excluding such evidence under the rule. This approach prevents FRE 407 from becoming a rule of unlimited exclusion while also encouraging public safety and remaining true to the ideals behind the Federal Rules of Evidence intended by Congress. Adopting this approach does not leave parties that object to such evidence without recourse because FRE 407 is merely one part of a court's multilayered approach to determining the admissibility of evidence. All evidence remains subject to FRE 401's relevance standard and FRE 403's protection against unfair prejudice. Therefore, any concerns related to the relevance or

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unfair prejudice of subsequent remedial measures may be addressed by those rules.

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INTRODUCTION

Product liability litigation often triggers strong emotions because it frequently involves a highly contested consumer claim that a defective and unreasonably dangerous product has caused injuries. Consumers rely on "Big Pharma" companies to create lifesaving drugs and medical devices; however, the number of product liability lawsuits filed against such companies alleging life-altering injuries has increased dramatically in the past decade.[1] The alleged injuries include loss of limbs, irreversible damage to internal organs, and even loss of life.[2] Jurors, as fact finders, must put their emotions aside, listen to the evidence presented, weigh that evidence carefully, and determine whether the defendant manufacturer, distributor, or pharmaceutical company is, in fact, liable for the consumer's injury. In federal litigation, the Federal Rules of Evidence serve to control the type of evidence parties can submit for a jury's consideration.[3] Their goal is to promote judicial efficiency and ensure fair and just outcomes.[4] But what happens when that goal is not met?

Scenario (1): Imagine suffering from severe pain due to a persistent hernia that can worsen if left untreated. Your doctor recommends surgery, and the surgeon proposes using a surgical mesh implant to support the weak tissue surrounding the area. Given that no other medical approach has seemed to work, you reluctantly opt for the surgery. To your surprise, instead of experiencing relief postsurgery, you experience increased pain that results in additional surgeries to remove the surgical mesh and to reduce the scar tissue stemming from its implantation. You later learn that the surgical mesh was formed with a

[1] *See Drug Distributors and Medical Device Makers Increasingly Targeted in Lawsuits*, LEXISNEXIS (Sept. 29, 2020), https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/drug-distributors-and-medical-device-makers-increasingly-targeted-in-lawsuits [https://perma.cc/MK6C-9UC8] ("[P]harmaceutical and medical device manufacturers faced 2,011 filings in 2019, down slightly from 2018 but far above the average since 2010 and greater than the number of lawsuits in the aircraft, vehicles and asbestos categories.").

[2] *See In re* Bard IVC Filters Prod. Liab. Litig., 969 F.3d 1067, 1070-72 (9th Cir. 2020) (upholding jury award of $3.6 million in damages in product defect case where medical device caused health issues including "severe pain"); Eghnayem v. Bos. Sci. Corp., 873 F.3d 1304, 1311 (11th Cir. 2017) (affirming judgment where plaintiffs alleged transvaginal mesh prescription device caused extreme pain, bleeding, and loss of vaginal sensitivity).

[3] The Federal Rules of Evidence govern the laws of evidence in United States federal courts, but many states have adopted their own version of the FRE with some variations. *See* Daniel Hendrix, Sofia Jeong & Warren Thomas, *Evidence*, 27 GA. ST. U. L. REV. 1, 4 (2010) ("[A]t least forty-two states have . . . adopted evidence codes patterned after the FRE.").

[4] FED. R. EVID. 102 (outlining purposes of Federal Rules of Evidence); *see* Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 154 (2008) ("The Federal Rules of Evidence, first enacted in 1975 after several years of careful consideration, represent the drafters' best effort to strike a delicate balance between the often competing interests of admissibility and preventing unfair prejudice to parties."); *see also* Michael S. Ellis, Comment, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 961-63 (1998).

material known to cause significant complications, including inflammation, organ damage, and infection. Injured and angry, you sue the mesh implant developers for producing a defective product. At trial, the developers move to exclude evidence of *any* actions they engaged in after your surgery, claiming such conduct qualifies as subsequent remedial measures barred by Federal Rule of Evidence ("FRE") 407.[5] Thankfully, the court rejects the developers' argument, concluding that FRE 407 does not apply because the postsurgery actions that the developers wish to exclude are not related to your injury.

The events above occurred to Steven Johns, the plaintiff in the first bellwether trial[6] in the Bard Hernia Mesh multidistrict product liability litigation, *In re Davol, Inc.*[7] Defendants Davol, Inc. and C.R. Bard, Inc. moved to exclude evidence of specific postinjury measures related to their hernia mesh implant under FRE 407.[8] Judge Edmund A. Sargus looked to the history and policy behind the rule to determine that FRE 407 requires a causal connection, or nexus, between the injury-causing event and the subsequent measure.[9] Without such a connection, there would be "no logical limit to the Rule's application."[10] As noted by the district court, "a measure taken ten years after the injury-causing event could be considered a subsequent remedial measure because it is actually *subsequent* and *may* have reduced the likelihood that the harm would have occurred had the measure been in place earlier."[11] That result is untenable. This scenario is more of a question of relevance than of a subsequent remedial measure anticipated by the rule.

Scenario (2): Now imagine suffering from severe pain in your foot after undergoing artificial joint implant surgery. The implant has fractured, and your toe is deformed. Your doctor recommends fusion surgery to correct the fracture and realign the toe. You elect to have the surgery and are hopeful that the pain will subside. To aid recovery, your doctor prescribes a medical device that will provide consistent cold therapy to the surgical site and prevent swelling. Eager to heal quickly, you wear the device continuously throughout the day thinking it

[5] FED. R. EVID. 407.

[6] *See* Paul Cannon, *What Is a Bellwether Trial?*, SIMMONS & FLETCHER, P.C., https://www.simmonsandfletcher.com/product-liability/bellwether-trials/ [https://perma.cc/E95M-38WK] (last visited Dec. 7, 2022) (explaining that bellwether trials are test cases that help predict outcome of future litigation).

[7] 518 F. Supp. 3d 1028, 1032-33 (S.D. Ohio 2021); *see also In re* Davol, Inc., Nos. 2:18-md-2846, 2:18-cv-01320, 2021 WL 5881794, at *1 (S.D. Ohio Dec. 13, 2021) (order denying motion in limine); Ronald V. Miller, Jr., *Hernia Mesh Lawsuits Against C.R. Bard*, LAWSUIT INFO. CTR., https://www.lawsuit-information-center.com/bard-hernia-mesh-lawsuits.html [https://perma.cc/F8VP-NRUU] (last updated Nov. 1, 2022).

[8] *In re Davol, Inc.*, 518 F. Supp. 3d at 1034 (describing substance of defendants' motion in limine).

[9] *Id.* at 1036 ("The better interpretation of Rule 407 is that there must be some sort of causal connection or nexus between the injury-causing event and the subsequent measure.").

[10] *Id.*

[11] *Id.* (emphasis added).

will improve the recovery time. The warning label neither advises against continuous use nor highlights the potential damage such use could cause. Unfortunately, your continued use of the cooling device permanently damages the tissue surrounding the toe. Your doctor must now amputate most of it, leaving you in a worse situation than when you started. You are frustrated and sue the manufacturer, claiming they sold a defective product. You wish to introduce evidence that the manufacturer changed the warning label on the cooling device after your surgery and now cautions against continuous use for more than twelve hours per day. To your dismay, the court excludes the evidence because the manufacturer's label change qualifies as a subsequent remedial measure under the plain meaning of FRE 407.

This is the story of Denise Chlopek in *Chlopek v. Federal Insurance Co.*[12] Chlopek sued Breg, Inc., a medical device manufacturer, and sought to introduce evidence of the change to its product's warning label.[13] The district court denied her request to introduce evidence of changes made to the medical device's warning label under FRE 407.[14] The Seventh Circuit affirmed.[15] Chlopek argued that the defendant's label change was not related to safety concerns, was not a response to her particular injury, and should not have been excluded under FRE 407.[16] Looking to the plain meaning of FRE 407's text, the Seventh Circuit concluded that defendant's motive for making the change was "irrelevant."[17] The Seventh Circuit also found that "[a]ll the rule require[d]" was that the subsequent measure decreased the likelihood of injury.[18] Thus, the Court concluded that the evidence was inadmissible.[19]

Based on the two fact patterns above and the two cases from which they derive, this Article examines FRE 407 and how it permits inconsistent results in two seemingly similar, if not identical, cases. This examination begins with the language and purpose of FRE 407, and why defendants rely upon it when arguing for the exclusion of certain categories of evidence. Unlike most other rules of evidence, FRE 407 is a rule of *exclusion*: it prohibits using subsequent remedial measures to demonstrate negligence, culpable conduct, or product defect.[20] But, other than in the title of the rule, the phrase "subsequent remedial measures" does not appear anywhere in the rule's text. Further complicating matters, FRE 407 does not expressly define what measures qualify as

[12] 499 F.3d 692, 695-97 (7th Cir. 2007).

[13] *Id.* at 700.

[14] *Id.* (determining FRE 407 forbids inferring culpability from label change).

[15] *Id.* at 703 (denying new trial for Chlopek).

[16] *Id.* at 700.

[17] *Id.* (noting policy argument that encouraging jury to infer guilt from label change would disincentivize remedial measures).

[18] *Id.* (noting plain meaning of text of FRE 407).

[19] *Id.* (describing plaintiffs' challenge to exclusion of label change evidence as "sidestep" of FRE 407).

[20] FED. R. EVID. 407.

"subsequent remedial measures."[21] This omission creates an ambiguity with enough space for parties, like the defendants in *In re Davol*, to argue that evidence of *any* conduct subsequent to the plaintiff's alleged injury should be excluded from evidence.[22] This ambiguity also leaves space for varied judicial interpretations of the rule's language, and thus yields varied results.

It is worth noting that the current language of FRE 407 differs from the original language.[23] FRE 407 has not always clearly applied to product liability cases.[24] Originally, it only excluded evidence of subsequent measures "as proof of negligence or culpable conduct," but it did not explicitly state whether those exclusions covered evidence of remedial measures in product liability cases.[25] For that reason, courts universally excluded such evidence in negligence cases.[26] However, with the rising number of strict product liability tort claims in the 1970s, federal courts diverged on whether the rule applied in those circumstances.[27] Neither the text of the rule nor the Advisory Committee's notes addressed the issue.[28] While some circuits found that FRE 407 did not include product liability cases,[29] a majority of the circuits found the rule to be applicable.[30] As a result of this conflict, the Advisory Committee recommended

[21] *See id.*

[22] *In re* Davol, Inc., 518 F. Supp. 3d 1028, 1036 (S.D. Ohio 2021) (requiring "causal connection . . . between the injury-causing event and the subsequent measure").

[23] *See* FED. R. EVID. 407 advisory committee's note to 1997 amendment (noting two changes to original rule).

[24] *See id.*; *see also* Brent R. Johnson, *The Uncertain Fate of Remedial Evidence: Victim of an Illogical Imposition of Federal Rule of Evidence 407*, 20 WM. MITCHELL L. REV. 191, 199-200 (1994) (discussing common law development regarding admissibility of remedial measures); Michele B. Colodney, *Federal Rule of Evidence 407 as Applied to Products Liability: A Rule in Need of Remedial Measures*, 48 U. MIAMI L. REV. 283, 287-95 (1993) (discussing applicability and inapplicability of FRE 407 to product liability cases).

[25] *See* FED. R. EVID. 407 advisory committee's note to proposed rules.

[26] *See* Johnson, *supra* note 24, at 199; Thaïs L. Richardson, *The Proposed Amendment to Federal Rule of Evidence 407: A Subsequent Remedial Measure That Does Not Fix the Problem*, 45 AM. U. L. REV. 1453, 1454-55 (1996) (noting incentivizing safety precautions as rationale behind changes).

[27] *See* Johnson, *supra* note 24, at 199; Colodney, *supra* note 24, at 283.

[28] *See* FED. R. EVID. 407 advisory committee's note to 1997 amendment.

[29] *See* Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977) (stating FRE 407 is confined to "negligent or culpable conduct"); Bizzle v. McKesson Corp., 961 F.2d 719, 721 (8th Cir. 1992) (holding that FRE 407 does not apply to strict liability cases); Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1327 (10th Cir. 1983) (describing circuit courts' split approach to question of applying FRE 407 and holding that FRE 407 is not applicable to strict liability cases); Huffman v. Caterpillar Tractor Co., 908 F.2d 1470, 1480-81 (10th Cir. 1990) (affirming *Herndon*'s approach to FRE 407).

[30] *See* Prentiss & Carlisle Co. v. Koehring-Waterous Div. of Timberjack, Inc., 972 F.2d 6, 10 (1st Cir. 1992) ("Like the majority of circuits, this court has held that Rule 407 applies to strict product liability actions."); Kelly v. Crown Equip. Co., 970 F.2d 1273, 1275 (3d Cir. 1992) ("This court has consistently held that Rule 407 applies to strict liability suits even though the language in the rule refers to inadmissibility to prove *negligent or culpable*

revising the rule and in 1997, FRE 407 was amended to exclude evidence of subsequent measures to prove "a defect in a product or its design,"[31] thus explicitly making the rule applicable in product liability litigation.

Now, twenty-five years later, FRE 407 is once again at the center of a conflict among the federal courts.[32] Although courts are no longer divided on whether FRE 407 applies to product liability cases, courts have not answered clearly whether FRE 407 applies when the remedial measure is *not* causally connected to the injury or harm at the heart of a plaintiff's lawsuit.[33] As with any other statutory text, where ambiguity exists in the Federal Rules of Evidence, courts will utilize conventions of statutory interpretation to determine how to apply the rules to the facts presented.[34] When applying FRE 407 in *In re Davol*, the district court took a purposivist approach—looking to the legislative history and underlying policy of the rule—and narrowly interpreted the rule's exclusionary

conduct."); Knight v. Otis Elevator Co., 596 F.2d 84, 91 (3d Cir. 1979) (excluding evidence of remedial measure in design defect action under FRE 407); Mills v. Beech Aircraft Corp., 886 F.2d 758, 763 (5th Cir. 1989) ("Rule 407, as applied to product liability actions, prevents evidence of subsequent remedial measures from being used as a defendant's admission that a design was defective."); Gauthier v. AMF, Inc., 788 F.2d 634, 637 (9th Cir. 1986) (noting "overwhelming trend" of applying FRE 407 in product liability cases); Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984) (providing rationale for applying FRE 407 in strict liability cases); Grenada Steel Indus., Inc. v. Ala. Oxygen Co., 695 F.2d 883, 886 (5th Cir. 1983) (determining as matter of first impression that FRE 407 applies to strict product liability cases); Hall v. Am. S.S. Co., 688 F.2d 1062, 1066-67 (6th Cir. 1982) (acknowledging circuit split and adopting approach of applying FRE 407 in product liability context); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) ("The failure of Rule 407 to refer explicitly to actions in strict liability does not prevent its application to such actions.").

[31] *See* FED. R. EVID. 407 advisory committee's note to 1997 amendment.

[32] *See* 23 CHARLES ALAN WRIGHT & VICTOR GOLD, FEDERAL PRACTICE AND PROCEDURE § 5282 (2d ed. 2018) (explaining divide among courts on whether defendant's motivation for remedial measure must be connected to injury at issue when applying FRE 407); *In re* Davol, Inc., 518 F. Supp. 3d 1028, 1036 (S.D. Ohio 2021) (chronicling different courts' approaches to applying FRE 407 when there is no causal connection between remedial measure and injury).

[33] *See* WRIGHT & GOLD, *supra* note 32, § 5282.

[34] *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 164 (1988) (interpreting FRE 803(8) by using legislative history of rule); *see also* Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1311-12 (1992) (explaining that Supreme Court considers Federal Rules of Evidence to be legislation subject to "traditional principles of statutory construction"); Randolph N. Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551, 551 (1996) (proposing that difficulties interpreting Federal Rules of Evidence arise because Supreme Court interprets them like statutes, despite their atypical nature); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1739-41 (1995) (contending that, although Federal Rules of Evidence are procedural rules, any approach to interpreting them must confront fact that they are also statutory provisions passed by Congress).

reach.[35] In contrast, the Seventh Circuit in *Chlopek* took a textualist approach—looking to the plain meaning of the rule's text—and interpreted the rule's exclusionary reach more broadly.[36]

By applying different interpretive models to the same rule of evidence, courts unwittingly create confusion and unfairness in litigation. Although these varied approaches are valid, it remains unclear whether under FRE 407 a remedial measure must be in response to a plaintiff's injury or whether the rule applies more broadly and the proffered evidence should be excluded simply because a remedial measure came after the harm.[37] Some scholars have questioned whether a subsequent measure can truly be considered remedial if it was made without the intent of remedying conditions that led to a plaintiff's harm.[38] Given the Advisory Committee's explicit goal to promote public safety when drafting FRE 407, it seems that without a causal connection between the measure and the harm, the answer to this question is no.[39]

Part I of this Article explores the history of FRE 407, policies supporting the rule's development, and series of revisions to it. Next, because the Supreme Court treats the Federal Rules of Evidence as legislation subject to statutory

[35] *In re Davol, Inc.*, 518 F. Supp. 3d at 1036-37 (holding that history of FRE 407 and policy rationales behind it point toward notion that causal connection between remedial measure and injury is required).

[36] Chlopek v. Fed. Ins. Co., 499 F.3d 692, 700 (7th Cir. 2007).

[37] *See* WRIGHT & GOLD, *supra* note 32, § 5282. For courts that have taken textualist approach to FRE 407, see, for example, *In re* Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., Nos. 4:08-MD-2004, 3:07-cv-00101, 3:07-cv-00102, 3:07-cv-00130, 2010 WL 2015146, at *1 (M.D. Ga. May 20, 2010) (holding that subjective intent of defendant in subsequently deciding to stop selling product that caused injury is irrelevant for whether that evidence must be excluded under FRE 407); Bush v. Michelin Tire Corp., 963 F. Supp. 1436, 1449 (W.D. Ky. 1996) (holding defendant's subsequent bead design was remedial under FRE 407 because rule's text does not require defendant to have particular intent); Mills v. Beech Aircraft Corp., 886 F.2d 758, 763 (5th Cir. 1989) (holding that revision of manual was properly excluded as remedial measure under FRE 407 even where reasons for change were unknown). For other courts that have taken a purposivist approach to FRE 407. *See, e.g.*, Susman v. Goodyear Tire & Rubber Co., No. 8:18-cv-127, 2020 WL 1065179, at *7 (D. Neb. Mar. 5, 2020) (denying defendant's motion to preclude evidence of subsequent remedial measure taken prior to injury because advisory committee notes state that intention of FRE 407 was not to exclude such evidence); Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 429 (5th Cir. 2006) (holding that admission of evidence of subsequent measures taken merely to improve product is not barred by FRE 407); *In re* Aircrash in Bali, 871 F.2d 812, 816 (9th Cir. 1989) (finding that comprehensive report dated one day after crash was not remedial measure under FRE 407 because there was no causal connection between report and crash).

[38] *See* Mark G. Boyko & Ryan G. Vacca, *Who Knew? The Admissibility of Subsequent Remedial Measures When Defendants Are Without Knowledge of the Injuries*, 38 MCGEORGE L. REV. 653, 662 (2007).

[39] *See* FED. R. EVID. 407 advisory committee's note to proposed rules (positing that one rationale behind FRE 407 is to encourage steps to make products safer).

interpretation,[40] Part II provides an overview of the two main theories of statutory interpretation—purposivism and textualism—emphasizes their differences, and briefly explores criticism of each theory. Part III highlights the division among the federal courts in their interpretive approaches to FRE 407 in product liability cases by examining *In re Davol* and *Chlopek* and investigating the contrasting outcomes of each case.[41] Part IV calls for a consistent interpretive approach to FRE 407.[42] Although the Federal Rules of Evidence lend themselves to fact-specific inquiries that can lead to varying interpretations,[43] disparities in interpreting the *same* rule undermine the explicit purpose and uniformity sought by Congress and the Advisory Committee when the Federal Rules of Evidence were enacted.[44] For instance, parties can take advantage of this division in two ways. First, parties wishing for the exclusion of subsequent measures that are not related to a plaintiff's injury may seek protection from courts that take a textualist approach like the Seventh Circuit.[45] Second, parties wishing for the inclusion of subsequent measures unrelated to a plaintiff's injury may seek to litigate their cases in courts that take a purposivist approach like the Sixth Circuit.[46] This discrepancy not only creates confusion and inequity but also

[40] *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988); *see also* Weissenberger, *supra* note 34, at 1311-12 ("In virtually every case in which the Court has elected to interpret the textual language of the Federal Rules of Evidence, it has commenced its analysis with the articulated premise that the Federal Rules of Evidence represent a piece of legislation to [be] interpreted in accordance with traditional principles of statutory construction.").

[41] *Compare In re* Davol, Inc., 518 F. Supp. 3d 1028, 1036-37 (S.D. Ohio 2021) (using purposivist approach to hold that safety reasoning behind FRE 407 shows that remedial measure must be triggered by plaintiff's injury to be excluded under rule), *with Chlopek*, 499 F.3d at 700 (using textualist approach to hold that language of FRE 407 does not require causation between safety measure and injury for rule to apply).

[42] Some scholars proposed an amendment to the text of FRE 407 prior to the 2011 revision of the Federal Rules of Evidence. *See, e.g.*, Boyko & Vacca, *supra* note 38, at 673-76. Note that this Article does not agree or disagree with this position. Rather, its focus is on the current conflicting interpretation of the rule and the best way to resolve that conflict as a matter of statutory interpretation.

[43] *See* Jonakait, *supra* note 34, at 553 (describing how inconsistency in evidence law is partly due to fact-specific evidentiary rulings of trial judges).

[44] *See* G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 956-57 (2022) (describing movement for uniform evidence rules); *see also* FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

[45] *See Chlopek*, 499 F.3d at 700 (holding that safety measures taken by defendant after plaintiff's injury were properly excluded from evidence under FRE 407 because motive for measures was irrelevant).

[46] *See In re Davol, Inc.*, 518 F. Supp. 3d at 1036 (holding that defendant's actions were not remedial measures under FRE 407 because policy rationale behind rule requires actions to have been triggered by injury).

encourages forum shopping and makes a mockery of the judicial process.[47] It is doubtful that Congress or the Advisory Committee would want such loopholes to exist.[48] Therefore, to maintain judicial integrity, a uniform interpretation of FRE 407 is necessary.[49]

This Article evaluates the two theories of statutory interpretation in relation to FRE 407, discusses the impact of each approach, and urges courts to take a purposivist rather than a textualist approach to the rule. A textualist approach to FRE 407, which looks to the plain meaning of the rule's text, not only over-excludes potentially relevant, probative evidence from consideration but also allows for unlimited requests to shield any evidence subsequent to an injury-causing event so long as the measure would have made the injury or harm less likely to occur.[50] This result is illogical and begs for a method of interpretation that avoids "an absurd result."[51] A purposivist approach to FRE 407, which requires a nexus between the subsequent remedial measure and the alleged injury, prevents FRE 407 from becoming a rule of unlimited exclusion while encouraging public safety and remaining true to the ideals behind the Federal Rules of Evidence intended by Congress.[52] Finally, this Article notes that if courts adopt the suggested approach, parties that object to this evidence will not be left without recourse. The analysis for excluding subsequent remedial measures does not end with FRE 407. Rather, FRE 407 is merely one part of a court's multilayered approach to determining the admissibility of evidence. All evidence remains subject to FRE 401's relevance standard and FRE 403's

[47] *Cf.* Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 540-44 (2010) (noting that "structural features" of federal court system create uniformity and arguing in favor of uniformity in interpretation of federal law); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73-74 (1938) (citing Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1927)) (describing "defects, political and social," and "mischievous results" inherent in forum shopping).

[48] *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 459-61 (1892) (asserting that courts must presume that legislature did not intend absurd consequences of given statutes); *see also* King v. Burwell, 576 U.S. 473, 494 (2015) (interpreting Affordable Care Act provision to avoid impractical result). English courts endorsed this method of interpretation. *See, e.g.*, Becke v. Smith (1836) 150 Eng. Rep. 724, 726 (Exch. of Pleas).

[49] This Article argues for a uniform approach to FRE 407, not a uniform approach to the Federal Rules of Evidence broadly. Many scholars have debated how the Federal Rules of Evidence should be interpreted and have made fair arguments for each approach. *See generally* Glen Weissenberger, *The Proper Interpretation of the Federal Rules of Evidence: Insights from Article VI*, 30 CARDOZO L. REV. 1615 (2009); Edward J. Imwinkelried, *Whether the Federal Rules of Evidence Should Be Conceived as a Perpetual Index Code: Blindness Is Worse than Myopia*, 40 WM. & MARY L. REV. 1595 (1999); Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267 (1993).

[50] *See Chlopek*, 499 F.3d at 700 (interpreting FRE 407 textually).

[51] *See Church of the Holy Trinity*, 143 U.S. at 460.

[52] *See* FED. R. EVID. 102 (outlining purposes of Federal Rules of Evidence).

protection against unfair prejudice.[53] Therefore, any concerns related to the relevance or unfair prejudice of subsequent remedial measures may be addressed by those rules.

I. THE FEDERAL RULES OF EVIDENCE AND EXCLUSION OF SUBSEQUENT REMEDIAL MEASURES

Originally, the introduction of evidence at trial was governed by common law.[54] However, by the mid-twentieth century, the jury's role in trials expanded, spurring a distrust of the jury's capacity for properly weighing evidence.[55] Soon came a call for a uniform set of rules to ensure consistency throughout federal courts.[56] In January 1963, the Special Committee on Evidence voted to form an Advisory Committee to draft these uniform rules of evidence.[57] The Advisory Committee would be comprised of a broad spectrum of stakeholders within the profession, including practitioners, professors, and judges.[58] The Advisory Committee was appointed in the spring of 1965 and held regular meetings.[59] The Federal Rules of Evidence were submitted to the Supreme Court in 1970,[60] adopted by the Supreme Court in 1972 and transmitted to Congress by the Chief Justice Warren Burger in February 1973.[61] The Federal Rules of Evidence proposed by the Supreme Court, with amendments made by Congress, took effect on July 1, 1975.[62] The stated purposes of the Federal Rules of Evidence

[53] Evidence is generally admissible if it is relevant. *See* FED. R. EVID. 401 (defining relevant evidence); FED. R. EVID. 402. Relevant evidence is excluded, however, where "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

[54] *See* Nunn, *supra* note 44, at 950-56 (tracing evidence law's common law origins).

[55] *See id.* at 951-52 (highlighting how shift in jury's role to passive evaluator led to some of first formal rules of evidence); Teter, *supra* note 4, at 163 ("[T]here is—and always has been—a fear that jurors are susceptible to allowing passions and emotions to determine the outcome of legal proceedings.").

[56] *See* Nunn, *supra* note 44, at 956-62 (summarizing emergence and codification of Federal Rules of Evidence).

[57] FINAL REPORT OF THE SPECIAL COMMITTEE ON EVIDENCE TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES app. A at 2 (1963).

[58] *See id.* (stating that advisory committee on evidence should be "broadly representative" of segments of legal profession).

[59] *See* Letter from Edward W. Cleary, Rep., Advisory Comm. on Rules of Evidence, to Hon. Albert B. Maris, Chairman, Comm. on Rules of Prac. & Proc. (Aug. 30, 1966), https://www.uscourts.gov/sites/default/files/fr_import/EV08-1966.pdf [https://perma.cc/MS4R-VLXM] (providing status update on Advisory Committee's work).

[60] *See* Nunn, *supra* note 44, at 957.

[61] FED. R. EVID. historical note (chronicling history of Federal Rules of Evidence).

[62] *Id.* Most states have adopted the Federal Rules of Evidence in whole or in part. *See* Boyko & Vacca, *supra* note 38, at 657-58 (noting that most states have adopted evidence rule identical to, or substantially similar to, FRE 407); DAVID P. LEONARD, THE NEW WIGMORE:

were to "administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[63]

When proposing the text of FRE 407, the Advisory Committee noted that the rule was meant to incorporate the established doctrine excluding evidence of subsequent remedial measures as proof of culpability.[64] At common law, the inadmissibility of subsequent remedial measures was affirmed by the Supreme Court in the late nineteenth century in *Columbia & Puget Sound Railroad Co. v. Hawthorne*.[65] There, the Court highlighted that it was "settled . . . by the decisions of the highest courts of most of the [s]tates in which the question ha[d] arisen, that the evidence [of subsequent remedial measures] is incompetent," and thus should be excluded.[66]

The doctrine was first codified as Rule 308 of the Model Code of Evidence, which stated:

> Evidence of the taking of a precaution by a person to prevent the repetition of a previous harm or the occurrence of a similar harm or evidence of the adoption of a plan requiring that such a precaution be taken is inadmissible as tending to prove that his failure to take such a precaution to prevent the previous harm was negligent.[67]

In 1969, the inadmissibility of subsequent remedial measures became Rule 4-07 of the Preliminary Draft of Proposed Federal Rules of Evidence for the United States District Courts and Magistrates.[68] Congress adopted FRE 407 when it enacted the revised Federal Rules of Evidence in 1975.[69] Unlike other rules of evidence, FRE 407 was not the subject of floor debate, nor was it discussed during committee hearings in the House of Representatives.[70] When approved, FRE 407 provided:

A TREATISE ON EVIDENCE § 2.3.4 (Richard D. Friedman ed., rev. ed. 2002) (discussing acceptance of rule excluding subsequent remedial measures from evidence throughout U.S. jurisdictions). *But see* R.I. R. EVID. 407 (allowing evidence of subsequent remedial measures).

[63] FED. R. EVID. 102.

[64] FED. R. EVID. 407 advisory committee's note to proposed rules.

[65] 144 U.S. 202, 207 (1892).

[66] *Id.* (excluding evidence that defendant altered conveyor belt after plaintiff's accident and holding that defendant's subsequent alteration of machine after accident could not prove prior negligence).

[67] MODEL CODE OF EVID. R. 308 (AM. L. INST. 1942).

[68] COMM. ON RULES OF PRAC. & PROC. OF THE JUD. CONF. OF THE U.S., PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES (1969), *reprinted in* 46 F.R.D. 161, 236 (1969); *see* WRIGHT & GOLD, *supra* note 32, § 5282.

[69] Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926, 1932 (1975) (amended 1997).

[70] 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 407-2 (1996) (discussing congressional action on FRE 407 and explaining that Congress did not debate it on floor nor in committee hearings).

> 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.[71]

According to the Advisory Committee's notes, FRE 407 excludes evidence of subsequent remedial measures as proof of an admission of fault for two reasons. First, subsequent remedial measures are poor indicators of guilt or culpability.[72] The Advisory Committee noted that "the rule rejects the notion that 'because the world gets wiser as it gets older, therefore it was foolish before.'"[73] Thus, for example, if a product manufacturer develops a better product, it does not necessarily mean that they knew the original product was defective in the first place. Rather, it may simply be a sign of good product development.[74] Second, and more importantly, as a matter of public policy, people will be discouraged from taking steps to improve safety if such measures can be used against them in court.[75] "[F]ear of enhanced liability," absent FRE 407, "could deter that party from taking socially desirable precautions to prevent such accidents from recurring."[76]

When enacted, FRE 407's language focused solely on negligence and culpable conduct and thus was mostly used in negligence actions.[77] However, with the rise of strict product liability litigation in the 1970s, courts began to grapple with the applicability of FRE 407 in those circumstances.[78] Neither the rule itself, nor the Advisory Committee's notes, nor the legislative history of the

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[71] 88 Stat. at 1932.

[72] *See* FED. R. EVID. 407 advisory committee's note to proposed rules ("The [subsequent remedial measure] is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence.").

[73] *Id.* (quoting Hart v. Lancashire & Yorkshire Ry. Co. (1869) 21 LT 261, 263 (Baron Bramwell)).

[74] *See* Boyko & Vacca, *supra* note 38, at 654 ("Would-be defendants frequently improve their products and product safety, whether in response to injuries incurred by other users, business pressures, or simply advances in the state of the art and scientific knowledge.").

[75] *See id.* (explaining that this policy should at least not discourage people from taking steps to increase safety).

[76] Dan M. Kahan, *The Economics—Conventional, Behavioral, and Political—of "Subsequent Remedial Measures" Evidence*, 110 COLUM. L. REV. 1616, 1622 (2010).

[77] *See* Johnson, *supra* note 24, at 199 (explaining that FRE 407 was codification of common law tradition of excluding evidence of subsequent remedial measures in negligence actions); *see also* Richardson, *supra* note 26, at 1454-55.

[78] *See* Colodney, *supra* note 24, at 285; Johnson, *supra* note 24, at 200 (explaining that courts began applying exclusionary doctrine to strict product liability cases). *See generally* Thomas P. Burke II & Elizabeth Fleming, *Hindsight is 20/20: Subsequent Remedial Measures in Litigation*, FOR DEF., Sept. 2011, at 66.

rule, specifically addressed whether FRE 407 applied in those cases.[79] Thus, a split among federal and state courts resulted.[80]

In response, the Advisory Committee recommended that the 1997 amendment to FRE 407 incorporate "the view of a majority of the circuits that have interpreted [it] to apply to products liability actions."[81] At the same time, the Advisory Committee also recommended revisions to clarify the applicability of the rule.[82] The amended version of FRE 407 went into effect in December of 1997.[83]

In 2007, the Advisory Committee joined the movement to make rules of procedure clearer and more consistent and took on the task of restyling the Federal Rules of Evidence to achieve those goals.[84] Because the goal of the restyling project was to make the rules more understandable and to make terminology consistent throughout the rules, the Advisory Committee was careful to note that the revisions were not intended to change the result in any ruling on the admissibility of evidence.[85] This project culminated in the restyled Federal Rules of Evidence taking effect on December 1, 2011.[86] In its restyled form, FRE 407 provides:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> - negligence;
> - culpable conduct;
> - a defect in a product or its design; or
> - a need for a warning or instruction.
>
> But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.[87]

[79] *See* Colodney, *supra* note 24, at 287.

[80] *See id.* at 287-88.

[81] FED. R. EVID. 407 advisory committee's note to 1997 amendment.

[82] *Id.* (noting words added to FRE 407 to clarify that rule does not govern changes made before injury-causing event).

[83] FED. R. EVID. 407 notes (listing dates when FRE 407 amendments went into effect).

[84] *See* Davison M. Douglas, Opening Remarks, *in* Symposium, *The Restyled Federal Rules of Evidence*, 53 WM. & MARY L. REV. 1435, 1438 (2012).

[85] FED. R. EVID. 407 advisory committee's note to 2011 amendment ("There is no intent to change the process for admitting evidence covered by the Rule.").

[86] FED. R. EVID. 407 notes.

[87] FED. R. EVID. 407.

II. STATUTORY INTERPRETATION AND THE FEDERAL RULES OF EVIDENCE

Despite a long scholarly debate[88] surrounding the identity and interpretation of the Federal Rules of Evidence as a statutory code,[89] the Supreme Court has consistently treated the Federal Rules of Evidence as a piece of legislation subject to statutory interpretation.[90] In *Beech Aircraft Corp. v. Rainey*,[91] the Court explicitly stated that "[b]ecause the Federal Rules of Evidence are a legislative enactment, [courts] turn to the 'traditional tools of statutory construction,' in order to construe their provisions."[92] Thus, as with any other statute, when the Federal Rules of Evidence are the subject of a dispute, courts will engage in statutory interpretation to resolve the issue.[93] There are two predominant theories of statutory interpretation: purposivism and textualism.[94]

[88] Note that this Article does not seek to agree or disagree with either side of this debate.

[89] *See supra* Part I; *see also* Glen Weissenberger, *The Elusive Identity of the Federal Rules of Evidence*, 40 WM. & MARY L. REV. 1613, 1614-15 (1999).

[90] *See, e.g.*, United States v. Zolin, 491 U.S. 554, 566-67 (1989) (rejecting interpretation of FRE 104(a) that would make it impossible to prove crime-fraud exception to attorney-client privilege); Huddleston v. United States, 485 U.S. 681, 687-89 (1988) (relying on structure of Federal Rules of Evidence and plain language of FRE 404(b) to conclude that trial courts are not required to make preliminary finding on evidence of similar acts before admitting it); United States v. Owens, 484 U.S. 554, 564 (1988) (rejecting argument that interpretations of Federal Rules of Evidence must coincide with one another); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988). The courts of appeals have applied this approach to the Federal Rules of Evidence to reach similar results. *See, e.g.*, Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1116-17 (5th Cir. 1991) (Clark, C.J., concurring) (criticizing majority for disregarding plain meaning of Federal Rules of Evidence in favor of more expansive reading); United States v. Bauzó-Santiago, 867 F.3d 13, 18 (1st Cir. 2017) (reviewing text and plain meaning of Federal Rules of Evidence before resorting to legislative history in resolving evidentiary issues); United States v. Chavez, 976 F.3d 1178, 1195 (10th Cir. 2020) (applying plain meaning of FRE 1002 to hold that courts cannot admit secondary evidence of original document's contents unless original document has already been admitted into evidence).

[91] *Beech Aircraft Corp.*, 488 U.S. 153.

[92] *Id.* at 163 (citation omitted) (quoting Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987)).

[93] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 53 (2012) ("Interpretation or construction is 'the ascertainment of the thought or meaning of the author of, or of the parties to, a legal document, as expressed therein, according to the rules of language and subject to the rules of law.'" (quoting H.T. Tiffany, *Interpretation and Construction*, *in* 17 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 2 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1900))); *see also* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 697 (2014) ("In legal discourse, the term 'interpretation' typically refers to a reflective, problem-solving process triggered by an uncertainty or puzzle."); *see also, e.g.*, *Beech Aircraft Corp.*, 488 U.S. at 163-70 (looking to language, legislative history, and Advisory Committee's comments to interpret FRE 803(8)(c)); United States v. Salerno, 505 U.S. 317, 321 (1992) (applying plain-meaning doctrine to FRE 804(b)(1)).

[94] *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 2-3 (2022) (noting these two theories' disagreement on how

Although adherents of both theories agree that they are "faithful agents of the legislature"[95] and share the same goal of interpreting statutes, their approaches differ.[96] Purposivists believe that judges should interpret statutes according to the purpose or intent of the legislature,[97] while textualists believe in "enforcing the fair meaning of the words that the legislature enacted."[98] This often leads to heated debates among scholars and the judiciary.[99]

A. *Textualism*

The guiding principle of textualism is that the words of a statute and not the unpublished intent of legislators should prevail.[100] Textualists argue that the enacted text "survived . . . political processes and was duly enacted by Congress, exercising its constitutional power to legislate."[101] Textualists believe that "focusing on 'genuine but unexpressed legislative intent' invites the danger that judges 'will in fact pursue their own objectives and desires' and, accordingly, encroach into the legislative function by making, rather than interpreting, statutory law."[102]

When interpreting the meaning of a statute's text, textualists focus on "*semantic context*," which considers "the way a reasonable person would use language under the circumstances."[103] Textualists then rely on the semantic

to best interpret legislature's intended meaning); *see also* Fallon, *supra* note 93, at 703-26 (comparing value judgments made in interpretive process while applying purposivism versus textualism).

[95] Fallon, *supra* note 93, at 686; *see also* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71 n.2 (2006) (defending traditional role of federal courts as "faithful agents of Congress").

[96] BRANNON, *supra* note 94, at 11 ("Purposivists ask what a reasonable legislator would have been trying to achieve by enacting the disputed statute, while textualists ask what a reasonable English speaker would convey with the disputed words." (footnotes omitted)).

[97] *See id.* at 12.

[98] Fallon, *supra* note 93, at 687.

[99] *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 4 (1998) ("When the Justices divide over interpretive methodology, they usually do so along a fault line between textualists and purposivists."). This Article will not address the differences between modern textualism and modern purposivism versus original textualism and original purposivism. The purpose of this discussion is to provide an overview of the two prevailing approaches while exploring the advantages and disadvantages of each.

[100] Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 17 (Amy Gutmann ed., new ed. 2018) ("It is the *law* that governs, not the intent of the lawgiver."). Justice Scalia notes that textualism should not be confused with strict constructionism, which advocates for texts to be construed strictly. Instead, textualism advocates for texts to be "construed reasonably, to contain all that it fairly means." *Id.* at 23.

[101] BRANNON, *supra* note 94, at 15.

[102] *See id.* (footnote omitted) (quoting Scalia, *supra* note 100, at 17-18).

[103] Manning, *supra* note 95, at 76 (contrasting different elements of context employed by purposivists and textualists).

context to identify the "'objectified' intent" of a statute.[104] Most "textualists decline to use legislative history"[105] because "[t]extualists care about statutory purpose only to the extent that it is evident from the text."[106] If any legislative intent is considered, "textualists give determinative weight to clear semantic cues even then [sic] they conflict with evidence from the policy context."[107]

One of the principal proponents of textualism, Justice Antonin Scalia, dedicated a significant portion of his career as a jurist to advocating for statutory interpretation through textualism.[108] In his majority opinion in *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*,[109] Justice Scalia stated, "we begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'"[110] The text of the statute is given meaning and purpose by context.[111] As noted by Justice Scalia and Bryan Garner in *Reading the Law*, when looking to the purpose of a statute, textualists pose the following limitations: (1) "purpose must be derived from the text," (2) "purpose must be defined precisely," (3) "purpose is to be described as concretely as possible," and (4) "except in the rare case of an obvious scrivener's error, purpose . . . cannot be used to contradict text or to supplement it."[112]

Critics have argued that textualism "is an overly formalistic approach to determining the meaning of statutory text that ignores the fact that courts have been delegated interpretive authority under the Constitution."[113] They also argue that "the theory of legislative supremacy requires courts to seek the meaning that Congress intended to convey."[114]

B. *Purposivism*

The guiding principle of purposivism is that "legislation is a purposive act, and judges should construe statutes to execute that legislative purpose."[115] Justice Stephen Breyer has argued that a judge should give effect to the will of the enacting legislature.[116] Purposivists often argue that in order to "preserve the

[104] *Id.* at 79 (quoting Scalia, *supra* note 100, at 17).

[105] BRANNON, *supra* note 94, at 15.

[106] *See id.* at 14.

[107] Manning, *supra* note 95, at 76.

[108] *See* Scalia, *supra* note 100, at 23-25.

[109] 530 U.S. 1 (2000).

[110] *Id.* at 6 (quoting Conn. Nat. Bank v. Germain, 503 U.S. 249, 254 (1992)).

[111] *See* SCALIA & GARNER, *supra* note 93, at 56 ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.").

[112] *Id.* at 56-57.

[113] BRANNON, *supra* note 94, at 15. *But see* Scalia, *supra* note 100, at 25 ("Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic*! The rule of law is *about* form.").

[114] BRANNON, *supra* note 94, at 15.

[115] ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014).

[116] *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85 , 98-101 (2005).

'integrity of legislation,' judges should pay attention to 'how Congress makes its purposes known, through text and reliable accompanying materials constituting legislative history.'"[117]

"To discover what a reasonable legislator was trying to achieve, purposivists rely on the statute's 'policy context'" to look for the way a reasonable person would address the issues being resolved.[118] They look to the legislative process, consider the problem Congress was trying to solve when it enacted the disputed law, and ask how the statute accomplished that goal.[119] "Purposivists allow sufficiently pressing policy cues to overcome . . . semantic evidence."[120] Two preeminent purposivists, Henry Hart and Albert Sacks, explained, that in interpreting statutes, courts should:

1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either—
   (a) a meaning they will not bear, or
   (b) a meaning which would violate any established policy of clear statement.[121]

Hart and Sacks advocated that "judges should begin by reading statutes very carefully and 'then conjure up plausible organizing purposes for' them, predicated on the assumption 'that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.'"[122] As such, purposivists look to the goal of the statute and then apply that to the words that were enacted.[123]

Critics of purposivism argue that it is likely impossible to find one shared intention behind any given piece of legislation and that it is inappropriate for judges to endeavor to find legislative purpose.[124] Other critics argue that

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[117] BRANNON, *supra* note 94, at 12-13 (quoting KATZMANN, *supra* note 115, at 4).

[118] *Id.* at 13 (footnote omitted) (quoting Manning, *supra* note 95, at 91).

[119] *Id.* at 12.

[120] Manning, *supra* note 95, at 76 (discussing purposivism as major theory of statutory interpretation).

[121] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press, Inc. 1994) (1958).

[122] Fallon, *supra* note 93, at 704 (footnotes omitted) (first quoting Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 249 (1992); and then quoting HART & SACKS, *supra* note 121, at 1378).

[123] *See* Michael Rosensaft, *The Role of Purposivism in the Delegation of Rulemaking Power to the Courts*, 29 VT. L. REV. 611, 611-12 (2005) (summarizing approach of Hart and Sacks as early purposivists).

[124] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430 (2005).

purposivism is too easily manipulable and gives courts the ability to ignore the text and achieve what they believe to be the provision's purpose.[125]

III. FEDERAL COURTS AND THE VARIED INTERPRETATIONS OF FRE 407

FRE 407's silence on the definition of subsequent remedial measures has left courts to interpret the rule utilizing traditional modes of statutory interpretation. On its face, the text of the rule prohibits a party seeking to establish liability for a defective product from introducing any evidence of measures that would have made an earlier injury less likely.[126] This seems like a straightforward exclusionary rule with respect to such evidence. However, if the principal purpose of the rule is to encourage parties to take action to make a product safer, another interpretation of the rule is possible. Under the alternative view, it is permissible to admit evidence of subsequent remedial measures when those measures were not taken (or caused by) the event in which the party was injured.[127] Proponents of this interpretation have argued that those measures should not be excluded by the rule because there would potentially be no limit to the rule's reach.[128] Decades could pass from the time of the injury and the measure, and the evidence would be excluded simply because of its subsequence, despite its potential utility for the proponent of such evidence.[129] Given these two possible interpretations, courts are currently divided on whether FRE 407 applies in product liability actions when subsequent measures are unrelated—or not causally connected—to the plaintiff's injury.[130]

A. *Purposivist Approach: FRE 407 Requires a Nexus Between the Subsequent Measure and the Alleged Injury*

The United States District Court for the Southern District of Ohio recently addressed whether FRE 407 applies when the remedial measure is *not* causally

[125] SCALIA & GARNER, *supra* note 93, at 18 ("The most destructive (and most alluring) feature of purposivism is its manipulability. Any provision of law or of private ordering can be said to have a number of purposes, which can be placed on a ladder of abstraction.").

[126] FED. R. EVID. 407.

[127] *See In re* Davol, Inc., 518 F. Supp. 3d 1028, 1036 (S.D. Ohio 2021).

[128] *See id.*

[129] *See id.*

[130] WRIGHT & GOLD, *supra* note 32, § 5283; *see In re Davol, Inc.*, 518 F. Supp. 3d at 1035 (stating that courts are split as to whether FRE 407 applies to measures unconnected to injury in question); Susman v. Goodyear Tire & Rubber Co., No. 8:18-cv-127, 2020 WL 1065179, at *7 (D. Neb. Mar. 5, 2020) (holding that postmanufacture design changes would not be excluded as subsequent remedial measures under FRE 407); Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 428 (5th Cir. 2006) (stating that courts have excluded evidence of subsequent remedial measures to reduce risk of implying liability for injury or harm alleged); *In re* Aircrash in Bali, 871 F.2d 812, 816 (9th Cir. 1989) (noting that other courts have adopted view that FRE 407 is applicable only where defendant voluntarily participated in subsequent remedial measures).

connected to the injury or harm at the heart of a plaintiff's lawsuit.[131] *In re Davol* was the first bellwether trial in a multidistrict litigation against defendants Davol, Inc. and C.R. Bard, Inc., the manufacturer and the developer of hernia mesh medical devices.[132] The plaintiff, Steven Johns, sought to recover for injuries sustained as a result of the implantation of defendants' allegedly defective hernia mesh medical device made of polypropylene.[133] Plaintiff claimed "[d]efendants knew that polypropylene [was] unsuitable for permanent implantation in the human body and that the [polyglycolic acid] fibers created an increased inflammatory response."[134] Plaintiff sought to introduce defendants' responses to a Federal Drug Administration audit in 2017 (the "2017 FDA audit") and a study initiated by the defendants in reaction to a new European regulation related to surgical mesh (the "DVL-020 study").[135]

Defendants filed a motion in limine to exclude the evidence, arguing that any conduct occurring after plaintiff's implantation surgeries should be excluded as irrelevant, prejudicial, or as subsequent remedial measures under FRE 407.[136] It was apparent that the defendants had taken steps in response to the 2017 FDA audit and changes in European regulations, not the plaintiff's injury.[137] Relying on the history and purpose of FRE 407, the district court found the defendants' proposed interpretation of FRE 407 to be overly broad and concluded that FRE 407 required a nexus between the injury and the measure to be excluded.[138] Because plaintiff's injury did not trigger the defendants' responses to the 2017 FDA audit or the DVL-020 study, neither would be excluded as subsequent remedial measures under FRE 407.[139]

Notably, the district court's analysis did not end with FRE 407. The district court continued analyzing the admissibility of the evidence pursuant to FRE 401 and 403.[140] Ultimately, it excluded the 2017 FDA Audit, deeming it irrelevant

[131] *In re Davol, Inc.*, 518 F. Supp. 3d at 1036.

[132] *See id.* at 1032; Julie Steinberg, *Bard Hernia Mesh Design Flaw, Warning Claims Cleared for Trial*, BLOOMBERG L. (Sept. 2, 2020, 12:17 PM), https://news.bloomberglaw.com/class-action/bard-hernia-mesh-design-flaw-warning-claims-cleared-for-trial. There are over 16,000 plaintiffs in this multidistrict litigation for alleged design defects in the surgical hernia mesh devices. These bellwether trials are being litigated to see how juries will respond to these fact patterns and ultimately assist the multidistrict litigation panel in determining how to proceed and whether to encourage defendants to settle with plaintiffs. *See* Julie Steinberg, *Bard Hit With $255,000 Verdict in Second Hernia Mesh Test Trial*, BLOOMBERG L. (Apr. 18, 2022, 9:27 AM), https://news.bloomberglaw.com/litigation/bard-hit-with-255-000-verdict-in-second-hernia-mesh-test-trial.

[133] *In re Davol, Inc.*, 518 F. Supp. 3d at 1032.

[134] *Id.*

[135] *Id.* at 1034.

[136] *Id.*

[137] *Id.* at 1035. The district court did not address the issue of the responses being caused by third-party government agencies. Therefore, this Article does not address that issue.

[138] *Id.*

[139] *Id.* at 1037.

[140] *Id.* at 1038; *see supra* note 53 and accompanying text.

under FRE 401 and unduly prejudicial under FRE 403.[141] The district court determined that the focus of plaintiff's claims related to defendants' conduct leading up to and during 2015 but the 2017 FDA audit did not include information related to that conduct and thus would likely confuse the jury.[142] However, the district court found that the DVL-020 study was admissible because it was relevant and not unduly prejudicial if offered to demonstrate that defendants could have conducted long-term clinical testing prior to plaintiff's first surgery.[143] The DVL-020 study showed defendants' ability to perform long-term clinical testing earlier, evidence that posed no substantial threat of undue prejudice.[144]

It is relevant to note that had the district court interpreted the rule as defendants had suggested, and excluded the DVL-020 study under FRE 407, the plaintiff would have been denied the opportunity to introduce this potentially highly probative evidence.

B. *Textualist Approach: FRE 407 Only Requires a Subsequent Remedy*

The Seventh Circuit has determined whether FRE 407 applies when the remedial measure is not causally connected to the injury or harm at the heart of a plaintiff's lawsuit differently.[145] In *Chlopek*, the appellant, a former surgical patient, brought a product liability action against Breg, Inc., the manufacturer of a medical device that delivered cooling therapy to reduce swelling at the surgical site.[146] The appellant underwent fusion surgery on their toe, was prescribed the cooling device as part of their postoperative treatment, and allegedly wore the device continuously for several weeks.[147] Because of this continuous usage, appellant suffered permanent damage to the tissue surrounding the operated toe.[148] Doctors had to amputate the damaged tissue, which resulted in the loss of nearly the entire toe.[149] The appellant alleged at trial that the product was defective and that the manufacturer failed to warn against continuous use of the device.[150]

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[141] *In re Davol, Inc.*, 518 F. Supp. 3d at 1038.

[142] *Id.*; *see also In re* Davol, Inc., Nos. 2:18-md-2846, 2:18-cv-01320, 2021 WL 5881794, at *5 n.11 (S.D. Ohio Dec. 13, 2021) (observing that defendants' reaction to 2017 FDA audit was "not triggered by Plaintiff's injury").

[143] *In re Davol, Inc.*, 518 F. Supp. 3d at 1038.

[144] *Id.*

[145] Chlopek v. Fed. Ins. Co., 499 F.3d 692, 700 (7th Cir. 2007) (determining that defendant's motive for undertaking subsequent remedial measure is irrelevant to FRE 407 analysis).

[146] *Id.* at 695.

[147] *Id.* at 695-96.

[148] *Id.* at 697.

[149] *Id.*

[150] *Id.* at 692.

At trial, judgment was entered in favor of the manufacturer based on the jury's finding that the device was not defective,[151] and the plaintiff's motion for a new trial was denied.[152] The plaintiff appealed and alleged errors relating to evidentiary issues.[153] Plaintiff-appellant challenged the exclusion of evidence that the manufacturer changed the warning label on the medical device after the plaintiff's injury pursuant to FRE 407.[154] Plaintiff-appellant argued that the change was not a subsequent remedial measure because it was not prompted by safety concerns (and thus was unrelated to the patient's injury).[155] The Seventh Circuit affirmed the district court's determination and deemed the motive for making the warning label change "irrelevant."[156] Looking to the plain language of the rule, the Seventh Circuit noted that "[a]ll the rule requires is that the measure" reduce the likelihood of injury.[157] The Plaintiff-appellant "wanted the *jury* to conclude that [the device manufacturer] added the warning because the product was unsafe without it."[158] The Seventh Circuit emphasized that FRE 407 "forecloses" this type of inference.[159] Although this is a fair interpretation of FRE 407, it leaves the door open for unlimited exclusion of postinjury evidence under this line of reasoning.

IV. TOWARDS A UNIFORM APPROACH TO FRE 407

Although the Federal Rules of Evidence is a legislative text that should not be limited to one form of interpretation,[160] courts must be mindful of the ramifications each approach will have on judicial outcomes.[161] Consistency in

[151] *Id.* at 692-93.

[152] *Id.* at 695.

[153] *Id.* at 698.

[154] *Id.* at 700.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*; *see also* Mills v. Beech Aircraft Corp., 886 F.2d 758, 763 (5th Cir. 1989) (noting that, instead of attempting to prove or disprove reasons for subsequent product changes, court should consider probative value of such evidence). In *Mills*, the plaintiffs brought a product liability action against an aircraft manufacturer to recover for wrongful death arising out of a crash involving their private airplane. *Id.* at 758-59. At trial, the plaintiffs attempted to introduce evidence of a revision to the plane's manual, which allegedly gave a more detailed explanation of how to install a component—the control arm chain—that was at issue in the case. *Id.* at 763. Taking a textualist approach, the district court excluded the revised manual as a subsequent remedial measure under FRE 407. The Fifth Circuit affirmed and noted that, as in most cases, it is not known why changes are made. *Id.* The introduction of evidence about subsequent changes to product designs confuses the jury. *Id.* In this case, the revision of the manual could have been construed by the jury as an admission. Therefore, FRE 407 was correctly applied in excluding the revised manual. *Id.*

[160] *See* Jonakait, *supra* note 34, at 551.

[161] *See* Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1301 (1995) ("The Federal

evidence law was the goal of the Advisory Committee when drafting the Federal Rules of Evidence and of Congress in enacting the rules.[162] The contradictory outcomes that result from varied interpretations of the same rule of evidence present a threat to judicial integrity. With respect to FRE 407, such inconsistency provides an opportunity for parties to attempt to transfer their cases to courts that apply FRE 407 more favorably to their position. For instance, in a product liability multidistrict litigation such as *In re Davol*, plaintiffs can seek to transfer or consolidate their cases into purposivist jurisdictions where FRE 407 is interpreted more broadly to exclude only those subsequent measures causally connected to the plaintiff's injury, thereby admitting more evidence that could potentially weigh against defendants. Similarly, defendants in multidistrict litigation can seek to transfer or consolidate their cases to textualist jurisdictions where FRE 407 is read more narrowly to bypass the exclusionary nature of the rule and exclude evidence of all subsequent remedial measures that are not connected to the plaintiff's injury. Such attempts at forum shopping fly in the face of the ideals of fairness in litigation that the Federal Rules of Evidence purport to promote.[163] More importantly, inconsistent interpretations of the same rule of evidence create the opportunity for disparate results in seemingly identical cases, which is highlighted by the different outcomes in *Chlopek* and *In re Davol*. This leads to judicial inequity and undermines the judicial process. This calls for an immediate solution.

A. *Textualism and FRE 407: Plain Meaning Interpretation Leads to Absurdity and Undermines the Spirit of the Federal Rules of Evidence*

Textualists maintain that a judge's focus should be confined primarily to the statute's text.[164] However, a textualist approach to FRE 407 opens the door for parties to argue that any measure that occurred after an injury-causing event should be excluded under FRE 407.[165] As noted by other scholars, excluding

Rules of Evidence are special statutes and the approaches to statutory interpretation must be thoughtfully applied to them.").

[162] *See* FED. R. EVID. 102.

[163] *See id.* (stating that Federal Rules of Evidence should be interpreted to promote fair proceedings).

[164] *See* Manning, *supra* note 95, at 73-74 (noting that purposivists' implicit belief in unified intent of multimember legislative body is "fanciful" as compared to reliability of reading meaning into statutes' final wording).

[165] *See In re* Davol, Inc., 518 F. Supp. 3d 1028, 1036 (S.D. Ohio 2021) (noting some courts have held evidence of remedial measures taken years after injury may still be excluded under FRE 407, inviting "no logical limit" to rule's application); *see also In re* Davol, Inc., Nos. 2:18-md-2846, 2:18-cv-01320, 2021 WL 5881794, at *4-5 (S.D. Ohio Dec. 13, 2021) (denying motion in limine because no causal connection existed between alleged injury and subsequent conduct). Although the district court rejected the argument in all of these cases, if this argument were made in the Seventh Circuit or the Fifth Circuit, where those courts have deemed the connection between the remedy and the harm unnecessary, the result would likely have been different. *See In re Davol, Inc.*, 518 F. Supp. 3d at 1034 ("[Defendants] argue that any conduct occurring after Plaintiff's implantation surgeries should be excluded as

such evidence entirely may be an overcorrection: "while allowing the evidence may result in jurors overestimating liability because of hindsight bias, excluding that evidence may result in jurors underestimating liability by taking away relevant information from their consideration."[166] For example, if the district court in *In re Davol* approached FRE 407 in this way, then the jury would not have considered defendants' DVL-020 study—information deemed relevant to demonstrate that defendants could have conducted long-term clinical testing prior to plaintiff's first surgery.[167] A textualist approach to the rule creates an opportunity for defendants to use FRE 407 as a shield to protect all subsequent measures indefinitely by seeking the broadest possible interpretation of the rule. As noted by the district court in *In re Davol*, that approach would be "nonsensical."[168] This method contradicts the inherent purpose of the Federal Rules of Evidence and ignores the rather complex role the Advisory Committee has as an agent of the Supreme Court.[169] It is doubtful the Advisory Committee sought this result when drafting FRE 407.[170]

Some have argued that a textualist approach to FRE 407 is "more solidly based" than a purposivist approach because it does not rely on public policy to support its exclusionary reach.[171] Although this is a fair criticism of purposivism, it fails to resolve the ultraexclusive net that a plain-meaning interpretation of the rule creates. This discrepancy can be resolved by requiring a causal connection between the injury and the subsequent measure that a purposivist approach provides.

B. *Purposivism and FRE 407: Maintaining Equity When Excluding Evidence of Subsequent Remedial Measures*

Purposivists maintain that courts should prioritize interpretations that advance the statute's purpose when ambiguity exists.[172] FRE 407 was created to encourage individuals to engage in remedial measures to promote safety.[173] However, it is unclear whether the stated policy goal of product safety would be

irrelevant, prejudicial, or as a subsequent remedial measure under Federal Rule of Evidence 407.").

[166] *See* Bernard Chao & Kylie Santos, *How Evidence of Subsequent Remedial Measures Matters*, 84 MO. L. REV. 609, 618 (2019).

[167] *In re Davol, Inc.*, 518 F. Supp. 3d at 1037-38.

[168] *Id.* at 1036.

[169] *See* Scallen, *supra* note 161, at 1291.

[170] *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 460 (1892) ("If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."); *see, e.g.*, King v. Burwell, 576 U.S. 473, 488 (2015) (highlighting that if words of statute were given plain meaning, statute would not apply to anyone, which must be incorrect interpretation).

[171] *See* Boyko & Vacca, *supra* note 38, at 671-72.

[172] BREYER, *supra* note 116, at 85 (contending that "judges should pay primary attention to a statute's purpose in difficult cases of interpretation in which language is not clear").

[173] FED. R. EVID. 407 advisory committee's note to proposed rules.

promoted if *any* subsequent measure would be excluded from trial regardless of whether it was remedial or not. The history of FRE 407 shows that "the event causing the injury must be the trigger for the subsequent remedial measure."[174]

The justification behind FRE 407 "requires more than mere subsequence."[175] As previously discussed, the first reason for the Rule focuses on the fact that evidence of subsequent remedial measures is poor proof of fault.[176] However, the exclusion of a measure that occurs years after an event that caused harm may have probative value.[177] "[A]fter enough time, the risk of admitting the evidence is less that the jury will conflate evidence of an innocent accident with evidence of negligence, but that the evidence of the later measure is simply irrelevant," which becomes "the province of Rules 401, 402, and 403—not FRE 407."[178] Thus, a purposivist approach to FRE 407 reduces the likelihood of overexcluding relevant and potentially probative evidence.

CONCLUSION

The Federal Rules of Evidence were enacted to ensure fairness in judicial proceedings and to promote truth in the fact-finding process.[179] FRE 407 serves as a gatekeeper to ensure promoters of public safety are not penalized for engaging in remedial measures.[180] However, FRE 407 should not serve as a limitless shield and exclude all actions that are merely subsequent to an injury-causing event. Yet that is what a textualist interpretation of FRE 407 calls for. Such an approach opens the floodgates for a litany of motions in limine requesting the exclusion of subsequent remedial measures that are not connected to the injury-causing event that may, in fact, have probative value. It also encourages litigants to pursue jurisdictions that interpret the rule more favorably to the party wishing to include or exclude such evidence. Thus, in maintaining the spirit of the drafters of the Federal Rules of Evidence, courts should approach FRE 407 from a purposivist perspective and require that there be a nexus between the injury-causing event and the subsequent measure before the evidence of the subsequent measure will be excluded. Even where FRE 407 is deemed inapplicable, a party may find support for excluding evidence of a

[174] *In re* Davol, Inc., 518 F. Supp. 3d 1028, 1036 (S.D. Ohio 2021).

[175] *Id.*

[176] FED. R. EVID. 407 advisory committee's note to proposed rules.

[177] This probative value may be contrasted with the potential probative value of the DVL-020 study in *In re Davol*. *See In re Davol, Inc.*, 518 F. Supp. 3d at 1037.

[178] *Id.* The Federal Rules of Evidence generally require that evidence be relevant to be admissible. *See* FED. R. EVID. 402. If evidence is not relevant, it is inadmissible. *Id.* Relevant evidence is evidence that tends to prove (or disprove) a fact of consequence. *See* FED. R. EVID. 401. Finally, a court has discretion to exclude relevant evidence if "its probative value is substantially outweighed by" certain dangers. FED. R. EVID. 403.

[179] FED. R. EVID. 102.

[180] FED. R. EVID. 407 advisory committee's note to proposed rules.

subsequent remedial measure elsewhere as the evidence may still be considered irrelevant under FRE 401 or unfairly prejudicial under FRE 403.[181]

[181] As seen in *In re Davol*, defendants' responses to the 2017 FDA audit and the DVL-020 study were ultimately not excluded as subsequent remedial measures. *See In re Davol, Inc.*, 518 F. Supp. 3d at 1037. Had FRE 407 been strictly applied, the plaintiff would not have been able to utilize this potentially probative information in their case.