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## Rule 407: Subsequent Remedial Measures

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## RULE 407: SUBSEQUENT REMEDIAL MEASURES

Federal Rule of Evidence 407 states:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.<sup>1</sup>

Federal Rule of Evidence 407 states that a party may not introduce evidence of subsequent remedial measures when the evidence is offered to establish culpable conduct or negligence.<sup>2</sup>

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1. FED. R. EVID. 407. It should be noted that the word “event” as it appears in Rule 407 “refers to the time of the accident or injury to the plaintiff, not to the time of manufacture of the product or creation of the hazard.” *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470, 1481 (10th Cir. 1990). Therefore, “[b]y its terms, clearly the Rule does not encompass remedial measures taken *before* the ‘event’ in question.” *Id.* See *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1523 (1st Cir. 1991) (stating that “[u]nder Rule 407, only measures which take place after the ‘event’ are excluded. The term ‘event’ refers to the accident that precipitated the suit”). It should also be noted that “Rule 407 only applies to a defendant’s voluntary actions.” *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 888 (9th Cir. 1990).

2. *Id.* Moreover, “[e]vidence of subsequent measures is no more admissible to rebut a claim of non-negligence than it is to prove negligence directly.” *Hardy v. Chemtron Corp.*, 870 F.2d 1007, 1011 (5th Cir. 1989). In *Hardy*, the plaintiff argued that evidence of a design change made after an accident should have been admitted at trial in order to “impeach [the defendant’s] ‘trial position’ that negligent wiring had not caused [the plaintiff’s] injury . . . .” *Id.* at 1010-11. The court, in determining that the evidence was properly excluded, stated that this argument, “minus a double negative, amounts to saying that [the plaintiff] should have been allowed to adduce evidence of the rewiring to prove [the defendant’s] negligence.” *Id.* at 1011. However, it has been held that evidence of subsequent remedial measures may be admissible to prove that a plaintiff was not contributorily negligent. *Rimkus v. Northwest Colorado Ski Corp.*, 706 F.2d 1060 (10th Cir. 1983). In *Rimkus*, the court held that evidence of repairs made after a skiing accident was admissible at trial and stated that “[w]here it relates to the alleged

This rule codifies the common law doctrine “which excludes evidence of subsequent remedial measures as proof of an admission of fault.”<sup>3</sup> There are two justifications for the exclusion of subsequent remedial measures. First, evidence of a subsequent repair is of little probative value, since the repair may not be an admission of negligence and may not necessarily demonstrate a lack of due care.<sup>4</sup> Second, the introduction of such evidence might prevent people from taking safety precautions in order to make the subject of the accident more secure as a response to the accident.<sup>5</sup> The Rule thus seeks to further the public policy of promoting subsequent remedial measures.

A large variety of remedial measures may be inadmissible pursuant to Rule 407: “As a basic principle the rule will apply to any measure which, if taken prior to the accident, would have made the injury less likely to occur.”<sup>6</sup> For example, Rule 407

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contributory negligence of plaintiff [the evidence] should not be considered prejudicial.” *Id.* at 1063, 1066.

3. FED. R. EVID. 407 advisory committee's note.

4. *Id.* (stating that “[t]he conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence”). See GLENN WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE § 407.3, at 132 (2d ed. 1995) (stating that “evidence of subsequent remedial actions is thought to have low or nonexistent probative value in establishing negligence”).

5. FED. R. EVID. 407 advisory committee's note. See 2 MCCORMICK ON EVIDENCE § 267, at 200 (John William Strong ed., 4th ed. 1992) (asserting that “[t]he predominant reason for excluding such evidence, however, is not lack of probative significance, but rather a policy against discouraging the taking of safety measures”).

6. WEISSENBERGER, *supra* note 4, § 407.2 at 132 (stating that “[v]irtually any kind of subsequent remedial action is within the purview of Rule 407, and the Rule is not directed simply to the repair of a mechanical device after the mechanical device causes personal injury”). *But cf.* Patrick v. South Central Bell Tel. Co., 641 F.2d 1192, 1196 (6th Cir. 1980) (holding that evidence of repairs which merely restored the accident site to the condition before the accident and did not remedy the dangerous condition was not excludable pursuant to Rule 407 because “the Rule prohibits evidence of post-accident changes that make things different or better than they were at the time of an accident”); Rozier v. Ford Motor Co., 573 F.2d 1332, 1343 (5th Cir. 1978) (stating that in a negligence action, it is not appropriate to invoke Federal Rule of Evidence 407 to exclude evidence of a subsequent remedial measure where

has been applied to prevent the admission of evidence of rule changes made by a company, the firing of an employee, installing safety devices,<sup>7</sup> or changing a business practice.<sup>8</sup>

A problem has arisen, however, regarding the interpretation of the terms “negligence” and “culpable conduct.” In particular, the question of whether Federal Rule of Evidence 407 applies to actions based on strict products liability has been the subject of vigorous debate among the federal circuit courts. Neither the text of the rule nor the Advisory Committee’s Note address the issue of whether Rule 407 should apply to these types of actions.<sup>9</sup> However, courts have looked at the underlying rationale of the rule as well as the policy reasons behind the rule to determine if Rule 407 should be extended to cover strict products liability cases.<sup>10</sup> On one hand, it has been asserted that the term “culpable conduct” encompasses “the creation of a product defect,”<sup>11</sup> and that the policy behind Rule 407 applies with equal force to actions based on strict products liability.<sup>12</sup> On the other hand, it

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it was made pursuant to a government mandate, because it was not made “out of a sense of social responsibility”).

7. FED. R. EVID. 407 advisory committee’s note.

8. MCCORMICK, *supra* note 5, § 267 at 201. On the other hand, since the policy for excluding evidence of subsequent remedial measures does not apply when they are done by a third person, this evidence is usually admissible. *Id.*; See *Grenada Steel Indus., Inc. v. Alabama Oxygen Co.*, 695 F.2d 883, 889 (5th Cir. 1983) (stating that “neither the text of rule 407 nor the policy underlying it excludes evidence of subsequent repairs made by someone other than the defendant”) (citations omitted).

9. See FED. R. EVID. 407; FED. R. EVID. 407 advisory committee’s note.

10. See WEISSENBERGER, *supra* note 4, § 407.5 at 136 (stating that “[t]he issue, however, is not necessarily resolved by focusing upon a literal reading of the text of the rule. Some courts and commentators would rather look to whether the policies that underlie Rule 407 are furthered by admitting this type of evidence”).

11. *Traylor v. Husqvarna Motor*, 988 F.2d 729, 733 (7th Cir. 1993) (citing *Flaminio v. Honda Motor Co., Ltd.*, 733 F.2d 463 (7th Cir. 1984) and *Probus v. K-Mart, Inc.*, 794 F.2d 1207 (7th Cir. 1986)).

12. *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). In *Werner*, the court stated that

has been argued that the policy behind Rule 407 does not apply to strict products liability because strict liability focuses on the defective nature of the product, while negligence focuses on the defendant's conduct.<sup>13</sup> Additionally, it has been asserted that major producers would not avoid making changes to a product known to be defective and take the risk of being sued by others merely to avoid admission of this evidence at trial.<sup>14</sup> As a result, the federal circuits are split concerning whether or not strict products liability falls within the language of Rule 407.<sup>15</sup> The

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[i]t is difficult to understand why this policy should apply any differently where the complaint is based on strict liability . . . . From a defendant's point of view it is the fact that the evidence may be used against him which will inhibit subsequent repairs or improvement. It makes no difference to the defendant on what theory the evidence is admitted; his inclination to make subsequent improvements will be similarly repressed.

*Id.* at 857. See *Gauthier v. AMF, Inc.*, 788 F.2d 634, 637 (9th Cir. 1986); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 469 (7th Cir. 1984) (stating that "[i]n either case [of negligence or strict products liability], if evidence of subsequent remedial measures is admissible to prove liability, the incentive to take such measures will be reduced").

13. *Herndon v. Seven Bar Flying Svc., Inc.*, 716 F.2d 1322, 1327 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984).

14. *Id.* at 1327. See WEISSENBERGER, *supra* note 4, § 407.5 at 136. Weissenberger states:

The advocates of admitting evidence of a subsequent remedial measure argue that an action based upon strict product liability does not require the plaintiff to prove that the manufacturer was negligent in its design, manufacture or marketing of a product. The plaintiff need only prove the product was in a defective condition and unreasonably dangerous when it left the possession of the manufacturer. Logically, because the plaintiff need not prove manufacturer negligence, evidence of subsequent remedial measures should be admissible to prove the defect in the product that injured the plaintiff. . . . [In addition,] [p]roponents of admitting evidence of subsequent remedial measures in products liability actions argue that it is absurd to believe that a manufacturer would forgo repairs in a product's design or manufacture in order to avoid the admission at trial of evidence of its subsequent changes in the product.

*Id.*

15. See Patricia A. Brass, Comment, *Federal Rule Of Evidence 407: Should It Apply To Products Liability?*, 11 TOURO L. REV. 253, 263, 267-68

great majority of the circuits apply Rule 407 to bar evidence of subsequent remedial measures in strict products liability cases.<sup>16</sup> However, a minority of the circuits, specifically the Eighth and the Tenth Circuits, allow evidence of subsequent remedial measures to be admitted in strict products liability cases.<sup>17</sup>

After Rule 407 was enacted, the United States Court of Appeals for the Second Circuit held that this rule applies to strict products liability actions.<sup>18</sup> In *Cann v. Ford Motor Company*,<sup>19</sup> the Second Circuit further explained that although Rule 407 does not specifically mention strict products liability, the drafters of the Federal Rules of Evidence “left many gaps and omissions in the rules in the expectation that common-law principles would be applied to fill them.”<sup>20</sup> The court determined that the policy

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(1994) (stating that “[t]he minority view followed by two federal circuits is that Rule 407 does not apply to strict products liability cases” while “[t]he majority view, prevalent in the federal courts, states that Rule 407 applies to actions based on strict products liability and subsequent remedial measures taken by defendants should not be admitted at trial”).

16. See, e.g., *Gauthier v. AMF, Inc.*, 788 F.2d 634 (9th Cir. 1986); *Flaminio v. Honda Motor Co.*, 733 F.2d 463 (7th Cir. 1984); *Grenada Steel Indus., Inc., v. Alabama Oxygen Co.*, 695 F.2d 883 (5th Cir. 1983); *Hall v. American S.S. Co.*, 688 F.2d 1062 (6th Cir. 1982); *Josephs v. Harris Corp.*, 677 F.2d 985 (3d Cir. 1982); *Cann v. Ford Motor Co.*, 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *Roy v. Star Chopper Co.*, 584 F.2d 1124 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

17. See, e.g., *Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); *Robbins v. Farmers Union Grain Terminal Ass’n*, 552 F.2d 788 (8th Cir. 1977).

18. *Cann v. Ford Motor Co.*, 658 F.2d 54, 60 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982).

19. *Cann v. Ford Motor Co.*, 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982). In *Cann*, the plaintiff was injured by a car manufactured by the defendant. *Id.* at 56. The plaintiff thought the car was in “park” and attempted to get out. *Id.* Because of a defect in the car, it slipped into reverse, striking and injuring the plaintiff as she was getting out. *Id.* At trial, the court barred evidence of an extra instruction added to the owner’s manual and a change in the design of the transmission which were both made after the accident occurred. *Id.* at 59. The Second Circuit affirmed this decision. *Id.*

20. *Id.* at 60.

behind Rule 407 of promoting subsequent remedial measures applied to strict products liability actions.<sup>21</sup> The court reasoned that though the focus of negligence and strict products liability actions may be different, "the defendant must pay the judgment in both situations, regardless of where the jury's attention focused when they found against him."<sup>22</sup> Thus, the Second Circuit determined that "although negligence and strict products liability causes of action are distinguishable, no distinction between the two justifies the admission of evidence of subsequent remedial measures in strict products liability actions."<sup>23</sup> Accordingly, in order to preserve the policy reasons set forth in the Advisory Committee's Note of Rule 407, the Second Circuit held that Rule 407 was intended to encompass actions based on strict products liability.<sup>24</sup>

In *In re Joint Eastern District and Southern District Asbestos Litigation*,<sup>25</sup> the Second Circuit held that a manufacturer's warning placed on its asbestos product subsequent to an asbestos-related death was a remedial measure and therefore inadmissible pursuant to Rule 407.<sup>26</sup> The court explained that "[w]e have previously held that Rule 407 applies in all products liability

21. *Id.* The court stated that "[s]ince the policy underlying Rule 407 not to discourage persons from taking remedial measures is relevant to *defendants* sued under either theory, we do not see the significance of the distinction [between the two]." *Id.*

22. *Id.* The Second Circuit asserted that "[a] potential defendant must be equally concerned regardless of the theoretical rubric under which this highly prejudicial, and extremely damaging evidence, is admitted." *Id.* (citations omitted).

23. *Id.*

24. *Id.*

25. 995 F.2d 343 (2d Cir. 1993), *rev'd on other grounds sub nom. Malcom v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993). *In re Joint Eastern & Southern District Asbestos Litigation* was based on exposure of numerous people to asbestos which resulted in personal injuries, and in some cases, death. *Id.* at 344. Many of the complaints were consolidated and tried together. *Id.* During trial, evidence of a warning placed on the asbestos after the plaintiffs were exposed was admitted. *Id.* at 345. The Second Circuit concluded that the evidence should have been excluded pursuant to Rule 407. *Id.*

26. *Id.* at 345.

actions, whether founded on negligence or strict liability in tort.”<sup>27</sup>

In contrast, the Eighth and Tenth Circuits do not apply Rule 407 to strict products liability cases.<sup>28</sup> In *Herndon v. Seven Bar Flying Service, Inc.*,<sup>29</sup> the Tenth Circuit held that “rule [407] should be narrowly construed. . . . [I]ts applicability in strict liability cases is not expressly provided for and has been rejected.”<sup>30</sup> The court reasoned that because the issue in negligence cases concerns the defendant’s conduct and strict products liability cases focuses on the defective nature of the product, the policy behind the rule does not apply to strict products liability actions.<sup>31</sup>

27. *Id.*

28. *See supra* note 17 and accompanying text.

29. 716 F.2d 1322 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984). In *Herndon*, following a fatal airplane crash, the manufacturer subsequently replaced a defectively designed pitch trim switch which was the alleged cause of the accident. *Id.* at 1324. A notice which instructed aircraft owners to modify the pitch trim switch was allowed into evidence by the trial court. *Id.* at 1325.

30. *Id.* at 1331.

31. *Id.* at 1327. *See Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470, 1481 (10th Cir. 1990) (refusing to overrule prior precedent from the Tenth Circuit holding that Rule 407 is inapplicable to cases based on strict products liability); *see also Robbins v. Farmers Union Grain Terminal Ass’n*, 552 F.2d 788 (8th Cir. 1977). The Eighth Circuit stated that

[w]e have applied the *Ault* rationale in allowing proof of post-occurrence design modification and to a subsequent remedial instruction, and find no reason to bar its applicability to Rule 407 since Rule 407 is, by its terms, confined to cases involving negligence or other culpable conduct. The doctrine of strict liability by its very nature does not include these elements.

*Id.* at 793. *But see DeLuryea v. Winthrop Lab.*, 697 F.2d 222 (8th Cir. 1983). In *DeLuryea*, the Eighth Circuit held that in a strict liability action based on failure to provide an adequate warning, Rule 407 is applicable to exclude evidence of the subsequent warning. *Id.* at 228-29. The court reasoned that in inadequate warning cases, the issue is whether the warning was adequate, regardless of whether it was gauged in terms of negligence or strict products liability. *Id.* at 229. The court stated that



the conclusion in *Robbins* -- that the doctrine of strict liability by its nature does not include negligence or culpable conduct -- does not apply to the circumstances in this case. . . . The issue of due care in giving adequate warning, essentially in the same terms used to define negligence, is placed squarely in the strict liability instruction. Foreseeability is an inherent consideration in determining negligence, and the instruction makes it so with respect to strict liability. . . . [The] [d]efendant's conduct in giving the warning is in issue. Consequently, the reasoning in *Robbins*, that strict liability does not include negligence or culpable conduct, does not apply to the circumstances of this case.

*Id.* at 228-29. Thus, the Eighth Circuit made an exception to its general rule not to apply Federal Rule of Evidence 407 to strict products liability actions, holding that Rule 407 excluded evidence of a subsequent remedial measure in a failure to warn case framed in terms of strict liability. *Id.* at 229. As a result, the Eighth Circuit has questioned the propriety of its determination that Rule 407 does not apply to actions based on strict products liability. *Burke v. Deere & Co.*, 6 F.3d 497 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1063 (1994). The court in *Burke* stated in a footnote that "this case illustrates the dangers inherent in our present approach [of refusing to apply Rule 407 to cases based on strict products liability] and . . . it may indeed be wise to revisit the issue en banc in a proper case." *Id.* at 506 n.11. Nevertheless, the *Burke* court held that Rule 407 did not apply to the plaintiff's action to recover for personal injuries, which was based on strict liability. *Id.* at 501, 506. Accordingly, it determined that evidence of a field modification program and a decal program instituted after the plaintiff's accident was admissible to prove the existence of a dangerous defect in the defendant's product. *Id.* at 506 (stating that "[i]t is the law of this circuit that Rule 407 of the Federal Rules of Evidence, which prohibits the introduction of subsequent remedial measures to demonstrate the negligence or culpable conduct of the defendant, does not preclude the introduction of such evidence in strict liability cases"). The Eighth Circuit has not yet changed its view to that of the majority, and still declines to apply Rule 407 to strict products liability actions other than those concerning a failure to warn. *See generally* *Wood v. Morbark Indus., Inc.*, 70 F.3d 1201, 1207 n.3 (11th Cir. 1995) (stating that "[t]he Eighth Circuit originally refused to apply Rule 407 to strict liability cases. . . . [but] the court has found exceptions to this circumscription and even has questioned the sagacity of its original view") (citations omitted); *Lockley v. Deere & Co.*, 933 F.2d 1378, 1386 (8th Cir. 1991) (holding that "the existence and substance of the decal program constituted evidence of a subsequent remedial measure that was relevant to the strict liability issue and not precluded by Fed.R.Evid. 407"); *Donahue v. Phillips Petroleum Co.*, 866 F.2d 1008, 1013 (8th Cir. 1989) (stating that "[i]t has long been the law of this Circuit that Rule 407 does not preclude the introduction of evidence of subsequent remedial measures in a strict liability case").

The leading example of the minority view regarding the admissibility of subsequent remedial measures in strict products liability actions is the California Supreme Court's decision in *Ault v. International Harvester Co.*,<sup>32</sup> a case decided prior to the enactment of the Federal Rules of Evidence. In *Ault*, the court held that the prohibition against admitting subsequent remedial measures into evidence did not extend to strict products liability cases.<sup>33</sup> The court explained that the text of section 1551 of the California Evidence Code<sup>34</sup> did not include strict liability actions.<sup>35</sup> In addition, the court asserted that the policy reasons behind the rule did not apply to actions based on strict products liability, because the rule would not encourage safety precautions in this type of situation.<sup>36</sup> The California Supreme Court stated that the most prevalent type of defendant in a products liability action is a company that engages in the mass production of goods.<sup>37</sup> This type of producer would not avoid improving its product and risk further lawsuits merely because the change

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32. 528 P.2d 1148 (Cal. Sup. Ct. 1974). In *Ault*, the plaintiff received injuries as a result of a car accident involving an automobile manufactured by the defendant. *Id.* at 1149. Plaintiff alleged that the accident was caused by a defectively designed gear box. *Id.* Evidence at trial indicated that the defendant changed the design of the gear box after plaintiff's accident. *Id.*

33. *Id.* at 1150.

34. CAL. EVID. CODE § 1151 (West 1966). The section states: "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." *Id.*

35. *Ault*, 528 P.2d at 1150 (stating that "[s]ection 1151 by its own terms excludes evidence of subsequent remedial or precautionary measures only when such evidence is offered to prove negligence or culpable conduct. In an action based upon strict liability against a manufacturer, negligence or culpability is not a necessary ingredient").

36. *Id.* The California Supreme Court reasoned that "[w]hile the provisions of section 1151 may fulfill [an] anti-deterrent function [and encourage individuals to make subsequent repairs] in the typical negligence action, the provision plays no comparable role in the products liability field." *Id.* at 1151.

37. *Id.* at 1152.

could be admissible against it in a single pending lawsuit.<sup>38</sup> The court believed that “[i]n the products liability area, the exclusionary rule of section 1151 does not affect the *primary conduct* of the mass producer of goods, . . . [therefore] the purpose of section 1151 is not applicable to a strict liability case.”<sup>39</sup> The court noted that these types of producers have economic incentives to improve their defective products, and do not need the incentive provided by the exclusionary rule.<sup>40</sup> Despite the similarities between section 1151 of the California Evidence Code and Rule 407, the drafters of the Federal Rules of Evidence chose not to address this issue, leaving the decision to the federal courts.

Rule 407 lists additional purposes which can justify the admission of subsequent remedial measures.<sup>41</sup> The evidence may be admitted “when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.”<sup>42</sup> This list is illustrative, and

38. *Id.*

39. *Id.* (emphasis added). In addition, it stated that “[i]n the products liability area, the exclusionary rule of section 1151 . . . serves merely as a shield against potential liability.” *Id.* at 1152.

40. *Id.*

41. FED. R. EVID. 407.

42. FED. R. EVID. 407. *See Pitasi v. Stratton Corp.*, 968 F.2d 1558 (2d Cir. 1992). In *Pitasi*, a skier sued a ski resort for paralysis he sustained when he skied down a trail which was closed due to dangerous conditions. *Id.* at 1560. Only the top entrance to the trail had been blocked off, and the trail was accessible from other entrances which had not been blocked off and could be entered by crossing over from other trails. *Id.* Immediately after the accident, the defendants placed ropes and warning signs by all of the possible entrances to the dangerous trail. *Id.* The defendant’s main defense at trial was that the plaintiffs were contributorily negligent because the dangerous conditions were so obvious that no signs or barricades were needed at the side entrances to the trail. *Id.* The court held that the plaintiff was entitled to introduce evidence of the subsequent remedial measure because the plaintiff was using the evidence to rebut the defendant’s claim that barriers at the side entrance were not feasible because the dangerous conditions were so obvious. *Id.* at 1561; *see also* *Clausen v. Sea-3, Inc.*, 21 F.3d 1181, 1191-92 (1st Cir. 1994) (holding that evidence of replacement of a ramp made after the plaintiff fell and injured himself was admissible even though it was a subsequent remedial measure because “control of the ramp area where [the plaintiff’s] injury

does not limit the purposes for which subsequent remedial measures may be admissible.<sup>43</sup> In order for this evidence to be admitted at trial, the other purpose must be in dispute.<sup>44</sup> In

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occurred was a material issue in [the] case"); *Traylor v. Husqvarna Motor*, 988 F.2d 729, 734 (7th Cir. 1993) (stating that there was "no basis for excluding [evidence of the subsequent remedial measure] to impeach testimony by [the defendant's] expert witnesses. Rule 407 expressly permits the use of evidence of subsequent repairs for purposes of impeachment").

43. See *Werner v. Upjohn Co.*, 628 F.2d 848, 856 (4th Cir. 1980) (stating that "[w]e agree[] that the exceptions listed in Rule 407 . . . are illustrative and not exhaustive"), *cert. denied*, 449 U.S. 1080 (1981). However, the court in *Upjohn* also asserted that "Rule 407 promotes an important policy of encouraging subsequent remedial measures. If this policy is to be effectuated we should not be too quick to read new exceptions into the rule because by so doing there is a danger of subverting the policy underlying the rule." *Id.* at 856; see also *Unterburger v. Snow Co.*, 630 F.2d 599, 603 (8th Cir. 1980) (allowing evidence of a subsequent remedial measure in a negligence action for the purposes of identifying the grain elevator that caused the plaintiff's injury when there was a dispute over which model had caused the accident); *Kenny v. Southeastern Pennsylvania Transp. Auth.*, 581 F.2d 351, 356 (3d Cir. 1978) (allowing evidence of a remedial measure taken at the scene of a rape after the rape took place to show that the lighting conditions at the scene were adequate when the rape occurred), *cert. denied*, 439 U.S. 1073 (1979); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978) (stating that the policy behind Rule 407 of encouraging further safety precautions would allow this type of evidence to show that a defendant had "knowledge of the dangerous condition").

44. FED. R. EVID. 407. See FED. R. EVID. 407 advisory committee's note (stating that "[t]he requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission"). See *Hull v. Chevron Inc.*, 812 F.2d 584 (10th Cir. 1987). In *Hull*, Chevron sought to introduce evidence that the person they hired to drill a well was in control of the day-to-day drilling operations, and that Chevron had no control over the forklift which injured the plaintiff. *Id.* at 585-86. The Tenth Circuit affirmed the district court's exclusion of the evidence based on the fact that the issue of control of the forklift was not in dispute. *Id.* at 587. The court of appeals stated that "Chevron's proffered evidence would be either cumulative or trespass inferentially into the Rule 407 prohibited terrain of proof of culpable conduct." *Id.*

addition, the evidence is subject to balancing under Federal Rule of Evidence 403.<sup>45</sup>

Even though the New York evidence rules have not been codified, the New York common law rule concerning subsequent remedial measures, when applied to ordinary negligence cases, is similar to Rule 407 and is based upon the same policy considerations. In *Corcoran v. Village of Peekskill*,<sup>46</sup> the New York Court of Appeals held that evidence of subsequent remedial measures was not admissible at trial to prove negligence because "such evidence has no legitimate bearing upon the defendant's negligence or knowledge . . . ." <sup>47</sup> The court reasoned that this type of evidence did not prove that the object alleged to have caused the plaintiff's injuries was not safe prior to the occurrence of the accident.<sup>48</sup> In addition, the court explained that the introduction of such evidence could cause prejudice and place undue bias in the minds of the jury.<sup>49</sup> It believed that a jury would view the evidence as an admission of negligence by the defendant which, in fact, it is not.<sup>50</sup>

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45. FED. R. EVID. 407 advisory committee's note; FED. R. EVID. 403. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

46. 108 N.Y. 151, 15 N.E. 309 (1888). In *Corcoran*, the issue was whether evidence that a fence was constructed around an area of property where the plaintiff had been injured should have been admitted at trial. *Id.* at 154, 15 N.E. at 309.

47. *Id.* at 155, 15 N.E. at 310.

48. *Id.* at 155, 15 N.E. at 309. The court stated that [s]uch evidence does not tend to prove that the party sued knew, or was bound to know, that the machine or structure was imperfect, unsafe or out of repair. . . . [and] has no tendency whatever . . . to show that the machine or structure was not previously in a reasonably safe and perfect condition, or that the defendant ought, in the exercise of reasonable care and diligence, to have made it more perfect, safe and secure.

*Id.* at 155, 15 N.E. at 309-10.

49. *Id.* at 155, 15 N.E. at 310.

50. *Id.* at 155-56, 15 N.E. at 309-10. The court stated that this would be unfair to a defendant because a determination of negligence should be based on

However, New York's application of the exclusionary rule to products liability cases follows neither the majority nor the minority circuit court rule. In determining the admissibility of subsequent remedial measures in actions based on strict products liability, New York makes a distinction between manufacturing defect and design defect cases.

In *Caprara v. Chrysler Corp.*,<sup>51</sup> the court of appeals held that evidence of subsequent remedial measures was admissible against the defendant to prove that the plaintiff was injured by the defectively manufactured product.<sup>52</sup> The court reasoned that it had adopted strict liability as a theory of recovery to alleviate the burden on a plaintiff of proving the defendant's negligence.<sup>53</sup> In a strict liability case, a plaintiff does not have to prove that the defendant knew or should have known that its product was defective.<sup>54</sup> Instead, a plaintiff must prove that there was a defect in the product when it left the defendant's control and the defective condition was a major contributing factor in causing the plaintiff's injuries.<sup>55</sup> Thus, the court of appeals determined that it could not adopt a rule excluding evidence of subsequent remedial measures, even though the evidence may suggest that the defendant was negligent.<sup>56</sup> This is because negligence is simply

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the facts at the time the injury occurred, and not what happened afterward. *Id.* at 155, 15 N.E.2d at 310.

51. 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981). In *Caprara*, the plaintiff was injured in an automobile accident that occurred as a result of a defective ball joint which caused the automobile to swerve uncontrollably and crash. *Id.* at 118, 417 N.E.2d at 547, 436 N.Y.S.2d at 252-53. The plaintiff was rendered a quadriplegic. *Id.* at 118, 417 N.E.2d at 547, 436 N.Y.S.2d at 252. At trial, the plaintiff adduced evidence that the design of the ball joint was altered about four years after this accident. *Id.* at 119, 417 N.E.2d at 547, 436 N.Y.S.2d at 253.

52. *Id.* at 126-27, 417 N.E.2d at 551, 436 N.Y.S.2d at 257.

53. *Id.* at 123, 417 N.E.2d at 549-50, 436 N.Y.S.2d at 255.

54. *Id.*

55. *Id.* at 124, 417 N.E.2d at 550, 436 N.Y.S.2d at 255-56.

56. *Id.* at 124-25, 417 N.E.2d at 550, 436 N.Y.S.2d at 256 (stating that "[i]n alleviating the problems of proof consumers formerly faced in [negligence] cases, it cannot have been intended to countenance an evidentiary rule which would so sweepingly exclude postaccident design evidence of a

irrelevant in a products liability action.<sup>57</sup> In addition, the court determined that evidence of the design change was relevant to the existence of a manufacturing defect in the automobile.<sup>58</sup> Thus, the court held that the evidence was properly admitted.<sup>59</sup> However, the *Caprara* court chose not to decide whether the common law rule excluding evidence of subsequent remedial measures was applicable to strict products liability cases involving a design defect.<sup>60</sup>

In *Cover v. Cohen*,<sup>61</sup> the New York Court of Appeals rendered a decision on the issue of design defects. In *Cover*, the court held that in design defect cases, evidence of subsequent remedial measures is not admissible to show that the defendant was at fault.<sup>62</sup> The court of appeals based its decision on the reasoning in *Rainbow v. Albert Elia Building Co.*<sup>63</sup> In *Rainbow*, the

defect simply because it touches on prior conduct which under present law is irrelevant to liability”).

57. *Id.*

58. *Id.* at 125-26, 417 N.E.2d at 551, 436 N.Y.S.2d at 256-57.

59. *Id.* at 126, 417 N.E.2d at 551, 436 N.Y.S.2d at 257.

60. *Id.*

61. 61 N.Y.2d 261, 461 N.E.2d 864, 473 N.Y.S.2d 378 (1984). In *Cover*, the plaintiff was injured when a car designed and manufactured by the defendant went out of control and crushed him against the wall of a building, causing the need to amputate his leg. *Id.* at 267, 461 N.E.2d at 866, 473 N.Y.S.2d at 380. One of the plaintiff's theories at trial was that a design defect in the car was the proximate cause of the accident. *Id.* at 268, 461 N.E.2d at 867, 473 N.Y.S.2d at 381. Evidence concerning a government safety standard adopted after the vehicle was manufactured and of a service bulletin disseminated after the sale of the vehicle was admitted at trial. *Id.* at 271, 274, 461 N.E.2d at 869, 871, 473 N.Y.S.2d at 383, 385. The court of appeals declared that it was error to admit both pieces of evidence. *Id.* at 272, 274, 461 N.E.2d at 869, 871, 473 N.Y.S.2d at 383, 385.

62. *Id.* at 270, 461 N.E.2d at 868, 473 N.Y.S.2d at 382.

63. 79 A.D.2d 287, 436 N.Y.S.2d 480 (4th Dep't 1981), *aff'd*, 56 N.Y.2d 550, 434 N.E.2d 1345, 449 N.Y.S.2d 967 (1982). In *Rainbow*, the plaintiff was injured when his motorcycle collided with a parked car. *Id.* at 288, 436 N.Y.S.2d at 481. His right leg was seriously injured, and he commenced a strict products liability suit against the manufacturer. *Id.* at 289, 436 N.Y.S.2d at 481-82. The plaintiff asserted that there was a defect in the design of the motorcycle because there were no crash bars on the side, which would have protected his legs. *Id.* at 289, 436 N.Y.S.2d at 481. The plaintiff sought to

appellate division determined that design defect cases are similar to negligence cases and different from manufacturing defect cases because they call for a balance between the risk posed by the product and utility of the product, and reasonable care must be considered.<sup>64</sup> This is essentially a negligence standard.<sup>65</sup> For that reason, it concluded that the rationale of the court in *Caprara* did not apply to design defects, and admission of this evidence was not allowed.<sup>66</sup> Hence, the court in *Cover* determined that design defect cases are subject to the common law rule excluding evidence of subsequent remedial measures, since they are similar to actions based on negligence.<sup>67</sup>

In addition, New York courts have established exceptions to the common law rule prohibiting the admission of subsequent remedial measures at trial. The courts have determined that in negligence cases, this evidence may be admitted to prove issues other than negligence. The New York Court of Appeals has explicitly stated that evidence of subsequent remedial measures is

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introduce evidence of a safety study conducted after the accident to prove that the motorcycle should have contained crash bars. *Id.* at 290, 436 N.Y.S.2d at 482. The appellate division decided that the evidence had been properly excluded as a post-accident modification. *Id.* at 292-93, 436 N.Y.S.2d at 483-84.

64. *Id.* at 292-93, 436 N.Y.S.2d at 484.

65. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 169-171 (5th ed. 1984). Prosser states that:

Negligence is a matter of risk - that is to say, of recognizable danger of injury. It has been defined as "conduct which involves an unreasonably great risk of causing damage," or, more fully, conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm." . . . Against this probability, and gravity, of the risk, must be balanced in every case the utility of the type of conduct in question. . . . While many risks are caused by simple carelessness, many other risks may reasonably be run, with the full approval of the community.

*Id.*

66. *Id.* at 293, 436 N.Y.S.2d at 484.

67. *Cover*, 61 N.Y.2d at 270, 461 N.E.2d at 868, 473 N.Y.S.2d at 382.



admissible to impeach the credibility of a witness.<sup>68</sup> Moreover, it has been held that this type of evidence “may be admissible if an issue of control and maintenance exists.”<sup>69</sup> However, the court of appeals has cautioned that “[w]here such evidence becomes admissible on some other theory or on another issue, such as control, impeachment or feasibility of precautionary measures, [judges] have thought it best . . . to accompany its receipt with appropriate limiting instructions.”<sup>70</sup>

Federal Rule of Evidence 407 and the New York common law rule are similar in that both rules prohibit the admission of this

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68. *Bush v. Delaware, L. & W. R.R. Co.*, 166 N.Y. 210, 216, 59 N.E. 838, 840 (1901). In *Bush*, the plaintiff's intestate was killed when the bridge he was passing over, which was constructed and maintained by the defendant, collapsed. *Id.* at 213-15, 59 N.E. at 839-40. The plaintiff claimed that the accident occurred as a result of the defendant's negligence. *Id.* at 213, 59 N.E. at 839. At trial, evidence of a subsequent remedial measure was admitted to “contradict[] the testimony of the defendant's witnesses[,]” and not to prove the negligence of the defendant. *Id.* at 216, 59 N.E. at 840. The court held that the evidence was admissible for this purpose. *Id.* See *Schechtman v. Lappin*, 161 A.D.2d 118, 121, 554 N.Y.S.2d 846, 848 (1st Dep't 1990) (stating that in an action based upon negligence, because the “plaintiff submitted [the] evidence [of subsequent repairs] to impeach the defendants' credibility . . . the admission of this testimony into evidence was not error”).

69. *Klatz v. Armor Elevator Co.*, 93 A.D.2d 633, 637, 462 N.Y.S.2d 677, 680 (2d Dep't 1983). In *Klatz*, the plaintiffs sued an elevator company on a theory of negligence for injuries sustained when the elevator fell two stories. *Id.* at 633-34, 462 N.Y.S.2d at 678. The defendants were contractually obligated to “service, inspect and repair the elevator.” *Id.* at 634, 462 N.Y.S.2d at 678. The plaintiffs requested production of the service record for that particular elevator in order to ascertain if any subsequent repairs had been made. *Id.* at 635, 462 N.Y.S.2d at 679. The court held that these records were inadmissible because there was no issue of control or maintenance, based on the fact that the defendants were contractually obligated to maintain and repair the elevator. *Id.* at 637, 462 N.Y.S.2d at 680. See *Niemann v. Luca*, 214 A.D.2d 658, 625 N.Y.S.2d 267 (2d Dep't 1995); *Cacciolo v. Port Auth. of N.Y.*, 186 A.D.2d 528, 588 N.Y.S.2d 350 (2d Dep't 1992); *Olivia v. Gouze*, 285 A.D. 762, 765, 140 N.Y.S.2d 438, 441 (1st Dep't 1955) (stating that “[t]hrough proof of repairs made after the accident was not admissible as to negligence, it was material and relevant as to control and maintenance”), *aff'd*, 1 N.Y.2d 811, 135 N.E.2d 602, 153 N.Y.S.2d 71 (1956).

70. *Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 122, 417 N.E.2d 545, 549, 436 N.Y.S.2d 251, 255 (1981).

type of evidence at trial to prove that the defendant was negligent. Rule 407 also explicitly excludes this type of evidence to prove the defendant's culpable conduct.<sup>71</sup> The courts of New York do not seem to address this issue.

In addition, both rules allow admission of evidence of subsequent remedial measures for purposes of impeachment, as well as proving control of the object that caused the accident.<sup>72</sup> Rule 407 and cases interpreting the rule also permit this evidence for purposes of showing feasibility of precautionary measures, ownership, knowledge, identification, and condition.<sup>73</sup> Presumably, New York courts would admit this evidence if these non-liability issues were raised.

However, federal law and New York law differ concerning whether the rule barring evidence of subsequent remedial measures extends to actions based on strict products liability. While a majority of the federal circuits apply Rule 407 to exclude evidence of subsequent remedial measures in strict products liability actions and a minority do not, neither position distinguishes between actions based on a manufacturing defect or a design defect. New York, on the other hand, does. The New York courts apply the exclusionary rule to strict products liability actions based on a design defect, but do not apply it to actions

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71. FED. R. EVID. 407. *See* *Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191 (3d Cir. 1987). In *Petree*, the plaintiff sued the the defendant for personal injuries suffered as a result of a design defect in a hydraulic press manufactured by the defendant. *Id.* at 1192. After the press that injured the plaintiff was sold, but before the plaintiff's accident, the defendant began putting warnings on its newly manufactured presses concerning a danger that part of the machine could be expelled if installed improperly. *Id.* at 1197. The plaintiff sought to introduce this evidence to show that even though "the design of the press ha[d] not changed since 1959[,] . . . the decal shows that the defendant was aware of the projectile hazard before the time of the plaintiffs injury in 1983." *Id.* The Third Circuit held that the evidence was inadmissible pursuant to Rule 407 and stated that "the trial court acted properly in refusing to admit the 1980 warning decal as evidence of *culpable conduct*." *Id.* at 1198-99 (emphasis added).

72. FED. R. EVID. 407.

73. *Id.*

based on a manufacturing defect. Thus, Federal Rule of Evidence 407 and New York common law are similar in their treatment of evidence concerning subsequent remedial measures in negligence cases, but differ in the way they apply the exclusionary rule to actions based on strict products liability.