Admissibility of Remedial Measures Evidence in Products Liability Actions: Towards a Balancing Test

Joyce M. Cartun
Admissibility of Remedial Measures Evidence in Products Liability Actions: Towards a Balancing Test

by
JOYCE M. CARTUN*

In the years since the Federal Rules of Evidence were promulgated, there has been considerable debate over whether the exclusion of evidence of subsequent remedial measures1 should extend to actions based on strict products liability.2 This problem has been addressed at two levels: first, whether the federal rules should apply at all when federal jurisdiction is based on diversity or the exercise of pendent jurisdiction;3 and second, if the federal rules do control, whether they require the exclusion of remedial measures evidence when strict liability is the theory

* Member, Second Year Class.
1. FED. R. EVID. 407 states:
   When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.
3. Compare, e.g., Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984) (in diversity cases where established state law does not exclude remedial measures evidence for a substantive policy reason, the evidence may not be excluded under rule 407) with Flaminio v. Honda Motor Co., 733 F.2d 463, 471 (7th Cir. 1984) (excluding remedial measures evidence is a "procedural judgment" allowing federal law to control despite substantive consequences intended by Congress). For a discussion of the implications of the rules announced in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) and Hanna v. Plumer, 380 U.S. 460 (1965), see Note, Admissibility of Subsequent Remedial Measures Evidence in Diversity Actions Based on Strict Products Liability, 53 FORDHAM L. REV. 1485 (1985).
of the action. The United States Courts of Appeals have answered both of these questions differently. The resulting discord has produced uncertainty for litigants and has encouraged forum shopping.

Since 1982, several Senate bills providing for a national products liability statute have contained provisions that would unify the law regarding admissibility of remedial measures evidence. Given the impact of products liability litigation on interstate commerce and the wide range of standards found in state strict liability laws, Congress understandably is attempting to address the substantive issues of products liability law. If such a move succeeds, it will be even more important that the evidence law governing strict liability claims be uniform. Continuing to allow different treatment of the same evidence, depending only upon the location of the trial, would defeat the main purpose of enacting substantive legislation on a national level, which is to ensure uniform resolution of litigation. Not only would the results still be unpredictable, but forum shopping would continue to be a desirable stratagem.

This Note surveys current judicial and legislative treatment of subsequent remedial measures evidence and argues that a uniform federal standard should be adopted. Section I examines the federal appellate courts' reasoning in the subsequent remedial measures area, including the initial question of whether the federal rule should govern in diversity actions. Section II looks at the Senate's attempts to bring products liability substantive and evidentiary law under federal control. This section then urges Congress to incorporate a clear statement of its intent regarding admissibility of remedial measures into any products liability legislation it passes. Finally, section III proposes that a rule 403-type balancing

---

4. Compare, e.g., Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1327 (10th Cir. 1980) ("Employing Rule 407 to exclude evidence . . . that is relevant and not prejudicial, as determined under Rules 401 and 403, would thwart the policies that underlie strict liability by an illogical imposition of a negligence-based rule of evidence."); cert. denied sub nom. Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc., 466 U.S. 958 (1984) with Flaminio, 733 F.2d at 469 (the policy rationale of encouraging remedial measures applies "whether the basis of liability is the defendant's own negligence or his product's defectiveness or inherent dangerousness"). Many courts apply the federal rule without any Erie analysis; they simply state that the federal evidence rules govern the admissibility of evidence, "[e]ven in diversity cases," Johnson v. William C. Ellis & Sons Iron Works, Inc., 604 F.2d 950, 957 (5th Cir. 1979), or apply the rules without any hint that there might be an issue. See, e.g., Unterburger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980).


test is the appropriate standard for Congress to adopt and, in the absence of congressional action, for the federal courts to apply. Such a rule would allow judges the discretion to admit relevant remedial measures evidence where justice dictates, while still allowing exclusion of such evidence where public policy is more compelling.

I. Admissibility of Subsequent Remedial Measures in Strict Liability Cases

A. The Scope of Rule 407

Federal Rule of Evidence 407 provides that evidence of subsequent remedial measures is not admissible to prove "negligence or culpable conduct in connection with the event." The exclusion of this admittedly relevant evidence is justified by a public policy of encouraging—or not discouraging—the making of repairs.

Rule 407 expressly excludes only evidence offered to prove "negligence or culpable conduct." Both of these terms contain notions of fault. In the case of negligent conduct, a person has failed "to use such care as a reasonably prudent and careful person would use under similar circumstances"; and her act or omission has caused harm to another. Similarly, culpable conduct involves "the breach of a legal duty or the commission of a fault." In addition, it "normally involves something more than simple negligence and implies conduct which is 'blamable [or]
censurable' . . . ."\(^{14}\) Thus, rule 407 explicitly applies only to cases in which some degree of fault or wrongdoing is at issue.

In contrast to its express application to claims based on negligence or culpable conduct, rule 407 does not expressly apply to strict liability claims. A strict liability cause of action has no element of fault,\(^ {15}\) unlike negligence and culpable conduct causes of action. In fact, a defendant can be held liable under strict liability even if he "has exercised all possible care in the preparation and sale of his product."\(^ {16}\) Thus, the express provisions of rule 407 pertaining to negligence and culpable conduct do not govern strict liability. The question remains whether the rule implicitly applies to strict liability causes of action. Before that question can be answered, however, courts must determine whether federal law may be consulted in the issue of admissibility of remedial measures evidence.

B. Federal Rule or State Rule

Federal courts have subject matter jurisdiction of strict liability actions in diversity suits or in the exercise of pendent jurisdiction over nonfederal claims. In these cases, the threshold question for a court's rule 407 analysis is whether federal law may control at all. When state law provides the rule of decision, the \textit{Erie} doctrine, expounded in \textit{Erie Railroad Co. v. Tompkins},\(^ {17}\) limits the application of federal law to procedural matters and requires that substantive issues be left to state law. Distinguishing the Federal Rules of Civil Procedure from federal common law, \textit{Hanna v. Plumer} refined the \textit{Erie} doctrine by authorizing the use of a federal rule that is on point if the matter in question is arguably procedural.\(^ {18}\)


15. \textit{RESTATEMENT (SECOND) OF TORTS} § 402A (1965), which defines strict liability, states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

16. \textit{Id.}

17. 304 U.S. 64 (1938). The term "\textit{Erie} doctrine" embodies a family of cases that defines when a federal court must apply state law in a diversity action. For discussion of the application of the \textit{Erie} doctrine in strict liability cases, see \textit{Note, supra} note 3.

The notion expressed in *Erie*—that the power to create substantive law rests in the states, except where Congress has exercised an existing power to provide a rule of decision—is an important consideration in the Federal Rules of Evidence. Accordingly, where the rules of evidence contain substantive or policy elements, the drafters often indicated that state law should control. Most notably, the rules covering privilege and general competency in civil actions explicitly call for deference to state law when state law provides the rule of decision. In contrast, rule 407 has no such qualifying instruction despite its express purpose to foster a particular substantive policy—encouraging remedial measures.

As a result, the circuit courts that have addressed the issue have taken two divergent analytical paths in deciding whether to apply rule 407 in diversity cases. The first line of reasoning is based on objections to rule 407's substantive content. During the hearings in the House of Representatives, Professor Victor E. Schwartz objected to rule 407 because it purported to govern evidence whose admissibility should be decided under state rules:

> [T]he rule is not based on relevance, but on the goal of encouraging (or at least not discouraging) defendants from making repairs after an accident has occurred. . . . Whether the evidence is excluded or not should be a matter of state policy where state law governs—[as it should be] with any rule whose purpose is not finding truth or expediting a trial, but rather promoting some other value and excluding evidence on that basis.

Thus, according to Professor Schwartz, since the main thrust of rule 407 is the *policy* of encouraging certain activity, state law should provide the rule in the remedial measures area. Following this line of reasoning, the Tenth Circuit, in *Moe v. Avions Marcel Dassault-Breguet Aviation*, held that state law governs the admissibility of remedial measures evidence if it provides the rule of substantive law. In that case, the plaintiffs brought suit under negligence and strict products liability theories for damages incurred in a plane crash. After a verdict in favor of the defendants on all counts, the plaintiffs appealed the exclusion of a "newsflash," published by the defendant, that demonstrated "the need for a warning regarding the insidious danger presented by the autopilot

---

22. 727 F.2d 917, 932 (10th Cir. 1984).
23. *Id.* at 920.
in the Falcon 10 [airplane]."\(^{24}\) The appellate court observed that "[t]he purpose of rule 407 is not to seek the truth or to expedite trial proceedings; rather, in our view, it is one designed to promote state policy in a substantive law area."\(^{25}\) In addition, the court noted the close relationship between a state's products liability law and its rules regarding remedial measures evidence in such cases and stated that the state rule must control "in order to effect uniformity and to prevent forum shopping."\(^{26}\)

Thus, those who argue that state rules for the admissibility of remedial measures evidence should control emphasize the distinction \textit{Erie} drew between substantive and procedural rules. They argue that excluding remedial measures evidence has public policy and social engineering purposes, rather than the efficiency and accuracy goals typically found in procedural rules.

The other circuits that have addressed the issue have not been persuaded by either Professor Schwartz' argument or the Tenth Circuit's reasoning. Rather, if they discuss the issue at all,\(^{27}\) they seem to emphasize the procedural elements of the rules. These courts have found that the federal rule applies regardless of the source of decisional law. For example, the Seventh Circuit, in \textit{Flaminio v. Honda Motor Co.}, acknowledged that since rule 407 was based on a policy to encourage remedial measures, an argument could be made that \textit{Erie} would require the application of state law in this area.\(^{28}\) Nevertheless, the court pointed out that the substantive aspects of rule 407 are "entwined with procedural considerations"\(^{29}\) and ultimately applied the federal rule, even though Wisconsin law provided the substantive rule of decision:

Congress's judgment that juries are apt to give too much weight to

\(^{24}\) \textit{Id.} at 930.
\(^{25}\) \textit{Id.} at 932.
\(^{26}\) \textit{Id.}

\(^{27}\) Some courts simply state without discussion that rule 407 applies to strict liability claims. For example, in Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 885 (5th Cir. 1983), the Fifth Circuit declared that "[i]n matters of procedure . . . such as the admissibility of evidence, federal rules apply." \textit{See also} \textit{McInnis v. A.M.F., Inc.}, 765 F.2d 240, 244-45 (1st Cir. 1985) (federal rules are generally procedural and therefore applicable in diversity actions unless the rule of evidence is truly substantive, such as in rules regarding collateral sources, parole evidence, and statute of frauds); \textit{Johnson v. William C. Ellis & Sons Iron Works}, 604 F.2d 950, 957 (5th Cir. 1979) ("Even in diversity cases, the Federal Rules of Evidence generally govern the admissibility of evidence in the federal courts"). Indeed, the majority of the circuits have not given the matter even this much attention; rather, they assume that the federal rule applies and only discuss the application of the particular rule to the particular case. \textit{See, e.g.,} \textit{Gauthier v. A.M.F., Inc.}, 788 F.2d 634, 636 (9th Cir. 1986); W.R. Murray, Co. v. Shatterproof Glass Corp., 758 F.2d 266, 274 (8th Cir. 1985); \textit{Hall v. American S.S. Co.}, 688 F.2d 1062, 1066 (6th Cir. 1982); \textit{Josephs v. Harris Corp.}, 677 F.2d 985, 990 (3d Cir. 1982); \textit{Cann v. Ford Motor Co.}, 658 F.2d 54, 59 (2d Cir. 1981); \textit{Werner v. Upjohn Co.}, 628 F.2d 848, 853 (4th Cir. 1980), \textit{cert. denied}, 456 U.S. 960 (1982).

\(^{28}\) 733 F.2d 463, 470-71 (7th Cir. 1984).
\(^{29}\) \textit{Id.} at 471.
such [remedial measures] evidence is a procedural judgment . . . that is, a judgment concerning procedures designed to enhance accuracy or reduce expense in the adjudicative process. It is therefore well within the power of Congress to make for the federal courts with respect to any class of cases within their jurisdiction.\(^{30}\)

The *Flaminio* court thus used the *Erie-Hanna* doctrine to justify applying rule 407 because the rule has some procedural purposes. The court, however, omitted a critical step in its analysis. A proper *Erie-Hanna* analysis requires two steps. A court must first determine whether a federal rule is on point. If so, and if it is arguably procedural, the rule governs. If not, a court must ask whether application of federal common law will lead to forum shopping or result in different outcomes between cases tried in state court and cases tried in federal court. An affirmative answer would render the matter substantive and thus governed by state law.\(^{31}\)

The lenient "arguably procedural" standard only applies to enacted rules that are on point.\(^{32}\) The *Flaminio* court did not even address this question and assumed that rule 407 was on point. It is questionable, however, whether rule 407 qualifies, since it explicitly covers only the exclusion of evidence to prove the elements of claims asserting negligent or culpable conduct; that is, its scope may not be "as broad as [its proponents have] urged . . . ."\(^{33}\) Congress did not refer to strict liability claims when it excluded remedial measures evidence. The courts have spent years disagreeing whether the rule should be extended to strict liability actions.\(^{34}\) Thus, it would seem that this rule is not on point, since a rule that is already on point need not be extended by the courts.

When there is no enacted federal rule on point—that is, when federal common law would be applied—the federal rule of law must pass a stricter test than the "arguably procedural" standard for enacted rules on point; it must satisfy *Erie*.\(^{35}\) A court must examine the implications of applying a federal common-law rule and balance the federal policy against the competing interests of preferring state substantive law, encouraging uniformity between federal and state courts, and not encourag-

\(^{30}\) *Id.*

\(^{31}\) See, e.g., Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) ("The nub of the policy that underlies *Erie R.R. Co.* v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result."); see also Hanna v. Plumer, 380 U.S. 460, 467 (1965) ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court . . . . The decision was also in part a reaction to the practice of 'forum-shopping' . . . .").

\(^{32}\) See *Hanna*, 380 U.S. at 471 (Harlan, J., concurring).

\(^{33}\) *Id.* at 470. See supra notes 8-16 and accompanying text.

\(^{34}\) Cf. infra text accompanying notes 38-65.

\(^{35}\) *Hanna*, 380 U.S. at 468.
ing forum shopping.\textsuperscript{36}

The traditional type of forum shopping, in which plaintiffs try to choose the more favorable federal forum, is not very likely to occur here, since the majority rule in the federal courts is not favorable to plaintiffs. Manipulation of forum options, however, can occur. For example, plaintiffs may seek to file in particular state courts, such as the defendant's location, to prevent removal to a federal court.\textsuperscript{37} In addition, plaintiffs may seek to file in those federal circuits where the rule is more favorable. On the other hand, defendants are strongly motivated in most cases to have the case removed to federal court, where remedial measures evidence would usually be excluded.

Finally, different results are frequently reached depending upon the particular trial court, both between federal and state courts and among federal circuits. This forum shopping results in inefficient use of judicial resources and inequitable results from case to case and is precisely the evil \textit{Erie} sought to avoid. Since rule 407 is not an enacted rule on point with respect to strict product liability; and since applying rule 407 both encourages forum shopping and affects outcomes, that rule should not be applied where state law provides the rule of decision.

Because the federal courts differ among themselves, however, this is not merely an \textit{Erie} problem. Unless Congress or the Supreme Court specifically addresses the question whether remedial measures evidence should be excluded in strict liability actions, the foregoing problems will still exist, even if a federal products law preempts state law, eliminating the \textit{Erie} problem. For the conflict among the circuits would continue—no longer over whether to apply federal or state rules, now over whether to apply the federal rule to strict liability actions.

\textbf{C. Applying Rule 407 to Strict Liability Actions}

\textit{(1) Two Circuits Do Not Apply Rule}

Once a court has determined that rule 407 is procedural and generally applicable, it must decide whether rule 407 applies to strict products liability cases in particular. Both the Eighth and the Tenth Circuits have held that rule 407 does not apply to strict product liability cases.\textsuperscript{38} *R. W. Murray, Co. v. Shatterproof Glass Corp.*\textsuperscript{39} was an express warranty prod-

\begin{enumerate}
\item \textsuperscript{37} See 28 U.S.C. § 1441(b) (1982) (where subject matter jurisdiction is not based on a federal question, the case "shall be removable only if none of the . . . defendants is a citizen of the state in which such action is brought").
\item \textsuperscript{39} 758 F.2d at 268-69, 274.
\end{enumerate}
ucts liability action in which the plaintiff sought to introduce evidence that the manufacturer changed the manufacturing materials and methods after the plaintiff purchased glass that accumulated moisture between the panes. Since no negligent or culpable conduct had to be shown, the Eighth Circuit found the breach of warranty action to be analogous to a strict liability action and held that "Rule 407 does not bar the admission of subsequent remedial measures evidence in actions based on strict liability 'since Rule 407 is, by its terms, confined to cases involving negligence or other culpable conduct.'" The court suggested that the appropriate way to fight admission of remedial measures in strict liability actions would be to question the relevance of the evidence.

In another case, Robbins v. Farmers Union Grain Terminal Association, the Eighth Circuit held that evidence of a subsequent warning that a cattle feed supplement could be dangerous was admissible in a strict liability action. The decision endorsed the California Supreme Court's reasoning in Ault v. International Harvester Co. The Ault court held that while the exclusion of remedial measures evidence "may fulfill [an] anti-deterrent function in the typical negligence action, the provision plays no comparable role in the products liability field." The California court did not believe that a mass producer's design decisions would be influenced by whether or not any design changes would then be admissible at trial:

When the context is transformed from a typical negligence setting to the modern products liability field... the "public policy" assumptions justifying this evidentiary rule are no longer valid. The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule of section 1151 [the California evidentiary rule corresponding to rule 407] does not affect the primary conduct of the mass producer of

---

40. Id. at 274 (citations omitted); see also Unterburger v. Snow Co., Inc., 630 F.2d 599, 603 (8th Cir. 1980) ("Fed. R. Evid. 407 does not apply to actions based on strict liability; hence this evidence [of remedial measures] was admissible under the strict liability count."); Farner v. Paccar, Inc., 562 F.2d 518, 528 (8th Cir. 1977) ("Rule 407 does not apply to actions based on strict liability . . . ."); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977) ("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.").

41. Murray, 758 F.2d at 274.
42. 552 F.2d 788, 792 (8th Cir. 1977).
44. Id. at 119, 528 P.2d at 1151, 117 Cal. Rptr. at 815.
goods, but serves merely as a shield against potential liability. The Tenth Circuit has also found that rule 407 does not apply to strict liability actions. In Herndon v. Seven Bar Flying Service, Inc., the representatives of two airplane crash victims brought a strict liability action against the manufacturer of the plane, Piper Aircraft. The plaintiffs had offered as evidence a service bulletin issued by Piper describing a modification that owners should make to a spring. The court reviewed the decisions of other courts and decided that rule 407 should be narrowly construed:

[W]here there is any reason for use of the evidence other than to establish the defendant's negligence, Rule 407 should not apply. The reason that has been recognized is that Rule 407 excludes only evidence which is used to prove defendant's negligence or culpable conduct; its applicability in strict liability cases is not expressly provided for and has been rejected. The Herndon court found exclusion of such evidence inappropriate in strict liability actions, since in such cases "society chooses to place responsibility for the potential losses from producing an unsafe airplane with the manufacturer, regardless of the reasonableness of the manufacturer's design decisions." Barring remedial measures evidence would "thwart the policies that underlie strict liability."

The court rejected the notion that rule 407 should apply to strict liability cases in order to encourage "tort feasors to take steps to remedy a hazardous condition in their control." It also questioned whether admitting such evidence would in fact discourage manufacturers from taking remedial action. First, the court noted that insurers would be unlikely to allow manufacturers to continue operating without taking remedial measures. Second, governmental agencies and juries deliberating on punitive damages would be "unlikely to approve of such callous behavior." In fact, manufacturers might even be encouraged to take remedial measures anyway, since such measures might show good will to a punitive damages jury. Third, there was no empirical evidence that the admissibility of such evidence affects manufacturers' behavior at all.

Finally, the court considered the second rationale for rule 407, rele-

47. *Id.*
48. *Id.* at 1331.
49. *Id.* at 1327.
50. *Id.*
51. *Id.*
52. *Id.* at 1327-28.
53. *Id.* at 1328.
54. *Id.*
55. *Id.*
That rationale states that the mere fact remedial measures were taken does not constitute an admission, "since the conduct is equally consistent with injury by mere accident or through contributory negligence."57 Because the evidence could reasonably be construed an admission of some fault, however, "this ground alone would not support exclusion."58 The general rules of relevancy set forth in rules 401 and 403 must therefore be consulted.

Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."59 Rule 403 provides a balancing test which allows evidence to 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."60 The Herndon court found that the evidence would be relevant under rule 401, but noted that rule 403's balancing test would still have to be satisfied before the evidence could be admitted.61

In sum, the courts addressed three issues in examining whether rule 407 applies to strict liability cases. First, must the rule be applied. The answer to that is clear. Since conduct for which one is strictly liable need not be negligent or culpable, the rule's terms do not mandate its application in strict liability actions.

Second, would and should the policy behind the rule be advanced by applying it to similar situations not expressly covered by the rule. The Eighth and Tenth Circuits have answered this question with a negative. The Robbins, Ault, and Herndon courts all questioned whether applying the exclusionary rule would even have an effect on manufacturers.62 In addition, the Herndon court was concerned that applying this evidentiary rule would, in effect, preempt the substantive policy of strict liability, which is to hold the manufacturer responsible for unsafe products regardless of fault.63

Finally, the courts suggest that the ultimate question in considering subsequent remedial measures evidence is relevance. The Murray court hinted that the relevance of such evidence was questionable in strict liability actions, where the inquiry is the reasonableness of the product's

56. See supra notes 9-10.
57. FED. R. EVID. 407 advisory committee's note.
58. Id.
59. FED. R. EVID. 401 (emphasis added).
60. FED. R. EVID. 403.
61. Herndon, 716 F.2d at 1329.
62. See supra text accompanying notes 45 & 52-55.
63. See supra text accompanying notes 49-50.
unsafe condition. The Herndon court was more explicit in noting that such evidence would still have to be more probative than prejudicial under a rule 403 analysis.

(2) Most Circuits Apply Rule 407 in Strict Liability Cases

Despite the Eighth and Tenth Circuits' positions, the majority of the circuits have held that rule 407 requires the exclusion of remedial measures evidence in strict liability actions. The First and Third Circuits have excluded such evidence under rule 407 with little or no discussion. Other circuits have addressed the problem more fully. For example, the Fourth Circuit in Werner v. Upjohn Co. focused on the policy reasons behind rule 407 and the effect that the admission of remedial measures evidence would have on manufacturers under both negligence and strict liability theories. The plaintiff had sought to introduce evidence that the defendant, a pharmaceuticals producer, had published a subsequent warning that one of its drugs had dangerous side effects. The trial court had admitted the evidence in the negligence and strict liability actions for the purpose of proving the feasibility of an adequate warning. In remanding the case for a new trial, the Fourth Circuit noted that the common-law rule—the model for the federal rule—should be consulted on the issue whether remedial measures should be admitted in strict liability actions:

The rule simply does not speak in terms to the question of whether the evidence should come in to prove strict liability. To resolve this question we must [ask] . . . would the policy behind the common law rule be served or subverted if evidence of subsequent precautionary measures be admitted to prove strict liability.

The court based its decision to exclude on the policy of not discouraging remedial measures, a policy that is desirable regardless of the the-
ory under which a subsequent lawsuit is brought.\textsuperscript{73} In addition, it pointed out that Congress and the common law had excluded remedial measures evidence where the defendant was actually blameworthy for his conduct\textsuperscript{74} and suggested that an innocent defendant should receive at least the same evidentiary protections as one who had done a wrong.\textsuperscript{75}

Similarly, the Sixth Circuit in \textit{Hall v. American Steamship Co.} applied rule 407 to a strict liability action.\textsuperscript{76} In this unseaworthiness case, the defendant objected to the admission of evidence that its policy had changed such that decks would no longer be hosed down during bad weather.\textsuperscript{77} In finding that rule 407 applied, the court held that “culpable conduct” included any conduct “that would impose liability” upon the defendant.\textsuperscript{78} The court also cited \textit{Werner} with approval, and found that, regardless of the definition of “culpable conduct,” the subsequent remedial measures would be excluded at least for the policy reasons underlying rule 407.\textsuperscript{79}

The Seventh Circuit joined the First through Sixth Circuits in excluding evidence of remedial measures in strict products liability actions.\textsuperscript{80} In \textit{Flaminio v. Honda Motor Co.}, two blueprints showing subsequent design changes in a Honda motorcycle’s struts had been offered to show that precautions against “wobble” were feasible.\textsuperscript{81} The court rejected the argument that a manufacturer would take remedial action, without regard for the admissibility of that action in a lawsuit, simply because not taking action would be “not only immoral but reckless.”\textsuperscript{82} Rather, the court pointed out that:

\begin{quote}
[A]ccidents are low-probability events. The probability of another accident may be much smaller than the probability that the victim of the accident that has already occurred will sue the injurer and, if permitted, will make devastating use at trial of any measures that the injurer may have taken since the accident to reduce the danger.\textsuperscript{83}
\end{quote}

The \textit{Flaminio} court recognized that defendants in strict liability might not have any incentive to take remedial action anyway, by virtue

\textsuperscript{73} Id. at 857; see, e.g., \textit{infra} text accompanying notes 107-08.
\textsuperscript{74} \textit{Werner}, 628 F.2d at 856-57.
\textsuperscript{75} Id. at 857; see also Note, \textit{Subsequent Remedial Measures in Strict Liability}, \textit{supra} note 2, at 929.
\textsuperscript{76} 688 F.2d 1062, 1066 (6th Cir. 1982).
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 1066-67.
\textsuperscript{80} See, e.g., \textit{Flaminio v. Honda Motor Co.}, 733 F.2d 463, 469 (7th Cir. 1984); Oberst v. International Harvester Co., 640 F.2d 863, 866 (7th Cir. 1980) (not reversible error to exclude subsequent repairs). See \textit{infra} notes 91-100, for a discussion of the Fifth Circuit’s treatment of the issue, and \textit{infra} text accompanying notes 101-09 for a discussion of the Second Circuit’s analysis.
\textsuperscript{81} \textit{Flaminio}, 733 F.2d at 468.
\textsuperscript{82} Id. at 469.
\textsuperscript{83} Id.
of the fact that the liability is strict. This fact would not, however, make it desirable to remove strict liability actions from the scope of rule 407. Rather, "[i]n those cases where the defendant would have no incentive to take remedial measures anyway, because the accident was unavoidable, rule 407 is academic; there will be, by assumption, no subsequent remedial measures." The assertion that "unavoidable" accidents do not inspire efforts to avoid future accidents is debatable at best. More importantly, however, this statement is misleading because it imputes motive to the term, "remedial measure." The definition given in the rule, however, is an objective one; that is, a measure is remedial if, in fact, it would have made the event less likely to occur. It is irrelevant why the measure was taken.

The Ninth Circuit has most recently addressed the issue of admissibility of remedial measures evidence in strict liability cases. In Gauthier v. A.M.F., Inc., the court followed the reasoning of Flaminio in finding that evidence of a design change made in a snow thrower between 1971 and 1984 was inadmissible under rule 407. The court stated that there was no difference between strict liability and negligence where the public policy of encouraging remedial measure was concerned. Furthermore, the court took issue with the Ault court's contention that large manufacturers would not avoid improving their products: "[I]t is precisely the large manufacturers who are defendants in many product liability suits who are most likely to know about rule 407 and be affected by the decision whether to apply it."

The Fifth Circuit in Grenada Steel Industries, Inc. v. Alabama Oxygen Co., also held that rule 407 applies to exclude remedial measures evidence in strict liability cases, but rested its decision on a rule 403-type balancing analysis more than on the rule 407 policy analysis emphasized in the other circuits. In this case arising out of a fire allegedly caused by defendant manufacturer's gas cylinder valve, the plaintiff had offered evidence of a "differently designed model" of the valve later manufactured by the defendant. First, the court observed that the policy of encouraging change to improve products and make them safer was im-

84. Id. at 469-70.
85. Id. at 470.
86. Id.
87. See FED. R. EVID. 407. The rule excludes evidence of acts which "would have made the event less likely to occur." Id. There is no mention of motivation or purpose behind the action.
88. 788 F.2d 634, 636-37 (9th Cir. 1986).
89. Id. at 637.
90. Id. See supra text accompanying notes 44-45.
91. 695 F.2d 883, 888 (5th Cir. 1983), reh'g denied. 699 F.2d 1163 (1983).
92. See supra text accompanying notes 61 & 101-09.
93. Grenada Steel, 695 F.2d at 885.
important. It ignored, however, the lack of proof that exclusion actually encouraged such change, stating that "the assumption in the rule that [admitting remedial measures evidence] might have a deterrent effect is not demonstrably inapplicable [in strict liability actions]." The court went on to say that its decision "rest[ed] more firmly on the proposition that evidence of subsequent repair or change has little relevance to whether the product in question was defective at some previous time" and was seemingly reluctant to speculate about the effect of evidentiary rules on industry practice or why a design change was or was not made. Thus, instead of basing its decision on the policy rationale, the court based its decision on the confusion which could result if the jury were given evidence of events taking place after the product was alleged defective. In effect, the court, while nominally resting its decision on rule 407, actually applied the rule 403 balancing test, which requires "the exclusion of relevant information if its probative value is substantially outweighed by the danger of confusion." The Second Circuit has also alluded to rule 403-type considerations in its application of rule 407 to strict liability cases. In Cann v. Ford Motor Co., the court described its process in determining whether transmission design modifications and Owner's Manual changes made after an automobile accident were admissible. First, the court stated that rule 403 "requires the court to consider whether the probative value of the evidence is outweighed by the danger of unfair prejudice and confusion." Next, rule 407's exclusion of "post-remedial measures 'to prove negligence or culpable conduct'" must be addressed. Rejecting the argument that rule 407 does not apply in strict liability actions "because such actions do not involve 'negligence or culpable conduct,'" the court stated that "[t]he failure of rule 407 to refer explicitly to actions in strict liability does not prevent its application to such actions." The Cann court stated that Congress had intended the gaps in the rules to be

94. Id. at 887.
95. Id.
96. Id. While surely there are cases in which such evidence would be only slightly relevant, it also seems likely that there are cases in which such evidence would support a stronger inference that a defect existed at an earlier time. In both cases, the evidence would be admissible under rule 401. On the other hand, rule 403 is designed to distinguish between the two situations and would probably require exclusion in the former case.
97. Id. at 887-88.
98. Id. at 888.
99. Id.
100. Id.
102. Id.
103. Id.
104. Id. at 59-60.
105. Id. at 60.
filled in by judges, using "common-law principles" and held that remedial measures evidence should be excluded because it was "common sense" that a party would not act in a way that would "increase the risk of losing a lawsuit." According to the court, the policy underlying the rule was equally applicable to strict liability and negligence:

The application of those [common-law] principles convinces us 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.

... [While] a negligence action places in issue whether the defendant's conduct was reasonable [and] a strict liability action involves whether the product was defective . . . the defendant must pay the judgment in both situations . . . The policy underlying Rule 407 not to discourage persons from taking remedial measures is relevant to defendants sued under either theory . . .

The court concluded its opinion by stating, "Furthermore, as happened here, plaintiffs frequently bring actions sounding in both negligence and strict liability. In sum, we hold that Rule 407 applies to strict liability actions." Presumably, the court was referring to the extra danger of jury confusion when evidence is admissible for one cause of action, but would be inadmissible if the second cause of action were brought alone. This type of issue is commonly found in rule 403 balancing analysis.

D. Summary of Circuit Conflict

The debate whether to apply rule 407 in strict liability actions focuses on three questions. First, what is the rule's intended scope. Second, to what extent would applying the rule to strict liability actions effectuate the policy goals of rule 407. Third, how should the issue of the evidence's relevance, or irrelevance, affect the decision to admit or exclude the evidence.

The first question is one of construction. Those circuits that would admit remedial measures evidence have found that rule 407 is confined by its terms to actions involving negligence or culpable conduct. Thus, since strict liability by definition has no element of culpability or negligence, the rule cannot apply to exclude evidence. In contrast, the circuits that would exclude such evidence generally focus on the rule's policy rationale of encouraging remedial measures and dismiss the argu-
ment that strict liability actions are not within the rule.\textsuperscript{111}

Courts also ask how effective excluding remedial measures evidence would be in furthering rule 407's policy goal of encouraging manufacturers to take such measures. The Eighth and Tenth Circuits generally question whether the existence or nonexistence of the rule has any effect on behavior.\textsuperscript{112} On the other hand, courts which exclude the evidence under rule 407 either assume that the application of the rule would affect behavior,\textsuperscript{113} or defer to Congress by permitting the application of the rule since it is conceivable that it would affect behavior.\textsuperscript{114}

In addition, one court has ruled that the policy of holding product manufacturers strictly liable for unsafe products should be balanced against the rule 407 policy not to discourage remedial measures. That court held that the strict liability policy outweighs the rule 407 policy.\textsuperscript{115}

Finally, courts have discussed the relevance of remedial measures evidence. Whether or not they agree on the application of rule 407, the circuits generally agree that rule 403's "probative value versus unfair prejudice" balancing test must be passed before any evidence is admissible.\textsuperscript{116} Some courts have explicitly rested their decisions on considerations, such as jury confusion and probative value, that are traditionally associated with rule 403 analysis.\textsuperscript{117}

The inability of the Courts of Appeals to reach consensus on the treatment of rule 407 has created uncertainty for litigants, for businesses, and for individuals. In addition, parties are treated differently depending on which circuit hears their case. The situation cries out for Congress to take responsibility and resolve the question. So far, the issue has been addressed only incidentally.

II. Senate Attempts to Bring Products Liability Under Federal Control

For several years, some members of Congress have pushed to pass a bill preempting state substantive law in the products liability area.\textsuperscript{118} Many of these bills have also attempted to unify the standards admitting subsequent remedial measures evidence.\textsuperscript{119} The bills introduced in the Senate since 1982 have addressed this issue in three ways: by strictly

\begin{itemize}
\item \textsuperscript{111} See supra notes 66-109 and accompanying text.
\item \textsuperscript{112} See supra text accompanying notes 42-45 & 52-55.
\item \textsuperscript{113} See supra text accompanying notes 85-86.
\item \textsuperscript{114} See supra text accompanying note 95.
\item \textsuperscript{115} See supra text accompanying notes 49-50.
\item \textsuperscript{116} See supra text accompanying notes 59-61, 91-100 & 102.
\item \textsuperscript{117} See supra text accompanying notes 91-109.
\item \textsuperscript{118} See, e.g., S. 687, 100th Cong., 1st Sess., 133 CONG. REC. 2837 (1987); S. 2631, 97th Cong., 2d Sess., 128 CONG. REC. 13,773 (1982).
\item \textsuperscript{119} See, e.g., S. 2760, 99th Cong., 2d Sess. § 310(b), 132 CONG. REC. 11,745 (1986); S. 2631, 97th Cong., 2d Sess. § 14, 128 CONG. REC. 13,773 (1982).
\end{itemize}
excluding remedial measures evidence; by adopting a rule parallel to rule 407; or by ignoring the problem.\textsuperscript{120} From 1982 through 1985, the bills provided that remedial measures evidence was inadmissible, with a single exception allowing use of such evidence “to impeach a witness for the manufacturer or product seller who has expressly denied the feasibility of such a measure.”\textsuperscript{121} According to the Committee Report on Senate Bill 44, the purpose of this strict provision was to “preserve[ ] the incentive for manufacturers and product sellers to improve their products.”\textsuperscript{122} An additional rationale is that:

this evidence is not relevant to the issue of liability, because liability should be judged at the time the event occurred rather than at a subsequent point in time. Evidence of a subsequent measure, if admitted, may lead a jury to infer wrongful conduct from the fact that a remedial measure was taken after the event occurred.\textsuperscript{123}

This provision would also “avoid[ ] the issue raised in the cases that distinguish strict liability actions from negligence-based actions when applying” rule 407.\textsuperscript{124} The Report endorses the majority rule in the federal courts that “negligent or culpable conduct” actually refers to conduct that would result in liability in general.\textsuperscript{125} “The policy for excluding subsequent remedial measures—to encourage safety—should apply uniformly in all product liability actions.”\textsuperscript{126}

\textsuperscript{120} See, e.g., S. 687, 100th Cong., 1st Sess., 133 CONG. REC. 2857 (1987) (no remedial measures clause); S. 2760, 99th Cong., 2d Sess. § 310(b), 132 CONG. REC. 11,745 (1986) (remedial measures inadmissible to prove liability; exceptions parallel rule 407); S. 100, 99th Cong., 1st Sess. § 13, 131 CONG. REC. 194 (1985) (remedial measures inadmissible unless to impeach manufacturer’s witness who has explicitly feasibility of such measures).

\textsuperscript{121} S. 2631, 97th Cong., 2d Sess. § 14, 128 CONG. REC. 13,773 (1982); S. 44, 98th Cong., 1st Sess. § 14, 129 CONG. REC. 90 (1983); S. 44, 98th Cong., 2d Sess. § 13, 131 CONG. REC. 194 (1984); S. 100, 99th Cong., 1st Sess. § 13, 131 CONG. REC. 194 (1985) [hereinafter cited collectively as \textit{Strict Exclusion Bills}]. The section on remedial measures is identical in each bill and reads as follows:

(a) Except as provided in subsection (b), evidence of any measure taken after an event, which if taken previously would have made the event less likely to occur, is not admissible.

(b) This section does not require the exclusion of evidence of a subsequent measure in an action alleging a product was unreasonably dangerous in design or formulation, if offered to impeach a witness for the manufacturer or product seller who has expressly denied the feasibility of such a measure.

\textit{Id.}

These bills, as well as the later bills, S. 2760, 99th Cong., 2d Sess. § 302, 132 CONG. REC. 11,745 (1986) and S. 687, 100th Cong., 1st Sess., § 302, 133 CONG. REC. 2857 (1987), do provide for admission of remedial measures during the punitive damages phase of a trial. \textit{E.g.}, S. 44, 98th Cong., 1st Sess. § 13(b) (2), 129 CONG. REC. 90 (1983).


\textsuperscript{123} \textit{Id.} at 62.

\textsuperscript{124} \textit{Id.} at 63.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.}
This strict exclusionary rule has been criticized on several fronts. Senator Hollings argued that admitting remedial measures evidence would not discourage such action by manufacturers since by taking such measures they could avoid future lawsuits—and by not taking them they would expose themselves to future liability and punitive damages.127 In addition, it has been pointed out that “manufacturers themselves admit that ‘if a design change needs to be made, we make it.’”128 Critics also take issue with the argument that remedial measures evidence is not relevant. According to Senator Hollings, “[s]uch evidence is relevant, for the manufacturer would not have made the subsequent improvement unless the improvement would make its product safer.”129 The evidence is logically and legally relevant, since it is probable that the product was less safe before the change. Indeed, the term “remedial measures” refers to action that remedies a less safe situation.130 Thus, a more accurate formulation of the problem would state that the evidence of remedial measures is not sufficiently relevant. Since such evidence is relevant according to the rule 401 definition—which only requires that evidence be capable of supporting an inference that the product was not safe131—it is more instructive to characterize the issue in terms of balancing the evidence’s value against the risks inherent in its use.

The rule proposed in these “Strict Exclusion Bills” would narrow the range of evidence admissible under even a broad interpretation of rule 407. It does away with limited admissibility of remedial measures evidence by not allowing such evidence to be considered for proof of any fact.132 It only allows remedial measures into evidence for the single purpose of impeaching a manufacturer’s witness, and even then only if the witness “has expressly denied the feasibility”133 of the remedial measure in question.134 Since the only allowable purpose is impeachment, the jury would have to be instructed that the evidence could only be considered as bearing on the witness’ credibility and not for its truth. Thus ownership, control, and feasibility could never be proven by remedial measures under this rule, whereas rule 407 would permit such evidence if these issues were controverted.135

127. Id. at 102.
130. See id.; Product Liability Act Hearings, supra note 128, at 94.
131. See supra notes 9-10 & 59.
132. Product Liability Act Hearings, supra note 128, at 94.
133. E.g., S. 2631, 97th Cong., 2d Sess. § 14(b), 128 CONG. REC. 13,773 (1982).
134. Product Liability Act Hearings, supra note 128, at 94.
135. See id.
Finally, the proposed rule would clearly favor defendants in strict product liability actions. According to Senator Hollings, "the defendant would essentially determine if evidence of subsequent repairs would be admitted in product liability cases." Senator Hollings, in arguing against the strict exclusion of remedial measures evidence, noted:

One tort law professor concludes that the [proposed] treatment of the admissibility of subsequent remedial measures ... represents a "lowest common denominator approach." He recognizes that the law is in some disagreement but notes that [the bill] "summarily opted for a rule which provides the greatest measure of safety for defendants." The rule favors the defendant by restricting the admissibility of remedial measures when the claimant would want to offer it, and allowing the admission of such evidence when it helps the defendant, such as when the defendant offers the evidence against a punitive damages claim.

Some of these concerns were apparently taken to heart, for the successor to the 1985 bill, Senate Bill 2760, revised the subsequent remedial measures section to essentially mirror rule 407. The main rationale cited is still the policy of preserving "the incentive for manufacturers and product sellers to improve their products." The committee also stated that by admitting damaging evidence, it would unfairly penalize manufacturers who improve their products, thereby placing the manufacturer "who fails to improve its product in a better position at trial than the manufacturer ... who improves its product." While the incentive and fairness issues were important, the major emphasis in the discussion of the rule was on balancing the probative value of such evidence against the risk of jury confusion. The committee was most concerned with the timing of the remedial measures and worried that the jury [would] focus on later events, rather than on the relevant knowledge of the manufacturer at the time of production. Evidence of a subsequent product improvement, if admitted, may lead a jury to

137. Id. (quoting Professor Andrew F. Popper, Washington College of Law).
139. S. 2760, 99th Cong., 2d Sess. § 310(b), 132 CONG. REC. 11,745 (1986). The section states:

(b) Evidence of measures taken after an event, which if taken previously would have made the event less likely to occur, is not admissible to prove liability in any action subject to this title, in connection with the event. This section 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.

Id. (emphasis added to highlight substantive difference between § 310(b) and rule 407).
140. S. REP. No. 422, 99th Cong., 2d Sess. 15 (1986); see id. at 75-76.
141. Id. at 76.
142. Id. at 75-76.
infer that the changes would not have been made if the product was reasonably safe or had adequate warning at the time of manufacture.\textsuperscript{143}

It is interesting that the committee was concerned about the "relevant knowledge of the manufacturer," a factor that is not at issue in a strict liability action.\textsuperscript{144} In such actions, the manufacturer need not be aware of the defect, and the defect need not be correctable.\textsuperscript{145} Rather, in cases of strict liability, society has determined that holding the manufacturer financially responsible for injuries caused by the product is the most appropriate way of spreading the cost of unsafe but useful products among the beneficiaries of those products.\textsuperscript{146}

Finally, the committee noted that remedial measures evidence that would be technically admissible under the rule should not be admitted "if other evidence regarding these matters is reasonably available," a consideration common in rule 403 analysis. Thus, the committee based its recommendation of this section largely on the rule 403-type balancing considerations of jury confusion and the need for the evidence.\textsuperscript{148}

The latest bills, Senate Bills 666 and 687, contain no provision regarding remedial measures evidence.\textsuperscript{149} If passed, the current bills would govern strict products liability cases with a uniform, federal substantive law while the circuits would continue to disagree over the applicable evidentiary law. Many of the same issues that make it desirable for federal legislation to cover the substantive law apply where evidentiary law is concerned.\textsuperscript{150} In addition, many of the same considerations addressed in the foregoing conflict of law section\textsuperscript{151} would result in circuit shopping even if the rule of decision were federal. Yet, the Senate committee considering these bills has recognized that uniformity among the federal circuits is an important goal.\textsuperscript{152}

\textsuperscript{143.} Id. at 75 (emphasis added).
\textsuperscript{144.} RESTATEMENT (SECOND) OF TORTS § 402A (1965). For the text of § 402A, see supra note 15.
\textsuperscript{145.} Id.
\textsuperscript{146.} See supra text accompanying notes 49-50.
\textsuperscript{147.} S. REP. NO. 422, 99th Cong., 2d Sess. 77 (1986).
\textsuperscript{148.} FED. R. EVID. 403 advisory committee's note.
\textsuperscript{149.} S. 666, 100th Cong., 1st Sess., 133 CONG. REC. 2823 (1987); S. 687, 100th Cong., 1st Sess., 133 CONG. REC. 2857 (1987); see also S. REP. NO. 422, 99th Cong., 2d Sess. 83 (1986) (providing that a "section regarding admissibility of evidence" be deleted from the working draft of this predecessor bill).
\textsuperscript{150.} See S. REP. NO. 476, 98th Cong., 2d Sess. 1 (1984):
Conflicting product liability rules have made it difficult for injured persons to know their rights and for manufacturers and product sellers to know their obligations. This has created expensive and burdensome legal costs which are passed on to consumers. The product liability problem has created a serious burden on interstate commerce, and Federal legislation is needed to address the cause of the problem.
\textsuperscript{151.} See supra notes 17-37 and accompanying text.
Since Congress is aware of the evidentiary issues in strict liability claims, the meaning of the silence in the current bills is unclear. Given the change in previous bills from an extremely strict exclusionary rule to the most recent predecessor's rule 407-like provision with its rule 403-like rationale, it is arguable that Congress, by its silence, intends rule 403—which determines the admissibility of all evidence not more specifically provided for elsewhere—to govern the issue. The focus, however, of most circuits is not on rule 403, but on rule 407. If Congress truly intended rule 403 to control, it is likely that Congress would have directed the courts to abandon rule 407 more explicitly.

The opposite argument, that rule 407 should be applied to exclude remedial measures evidence in strict products liability actions, also would require Congress to provide a clearer indication of what it wanted the courts to do. If Congress intended that rule 407 be applied, it should have directed the minority circuits to follow the current majority and apply the rule. Finally, perhaps Congress is consciously avoiding the issue and leaving the courts to resolve the conflict. Unfortunately, this option, which would represent an abdication of legislative responsibility by Congress, seems to be as likely an interpretation as any.

III. Rule 403 Provides Sufficient and Appropriate Standard

If Congress does adopt a federal products liability law, it should include a rule for determining the admissibility of remedial measures evidence in strict liability actions. For the reasons discussed above, an explicit statement from Congress would be very important in achieving the goal of uniform administration of products liability cases. Despite the favor it currently enjoys among the Courts of Appeals, rule 407 is not an appropriate standard. It provides certainty, but at the expense of consumers who might offer as evidence a manufacturer's design change. In addition, the rule's benefits are largely speculative, particularly in light of businesses' admission that they make changes without regard for whether those actions would be admissible at trial.

The most appropriate vehicle for dealing with remedial measures evidence in strict products liability actions is a rule 403-type standard. Such a test would focus the judge's inquiry on the actual value of the evidence and the harm it could do if admitted. It would also highlight the question whether the evidence is even relevant; that is, tending to prove any fact at issue in the case. Moreover, it would allow flexibility in admitting evidence when exclusion would not actually encourage remedial measures by manufacturers. Finally, it would allow a judge to consider as factors in the balancing test the competing policies of

153. See supra notes 17-37 & 149-51 and accompanying text.
154. See supra notes 52-55 and accompanying text.
155. See Product Liability Act Hearings, supra note 128 at 94.
encouraging remedial measures and of holding manufacturers strictly responsible for unreasonably unsafe products. In short, it would give trial judges the discretion to determine whether particular evidence should be admitted in a particular case.\textsuperscript{156} This would provide a more justifiable and even-handed basis for excluding remedial measures evidence. While such a rule would leave some uncertainty for manufacturers, it seems likely that market pressures, insurers, and even the prospect of punitive damage awards would move them to continue improving their products.

Whether or not Congress passes a substantive products liability law, it should indicate the appropriate treatment of remedial measures evidence in strict liability cases. At the very least, Congress knows that a significant problem exists; and since it has tried to address the issue, it appears that it is not satisfied with the courts' disposition of these cases. Congress' changing legislative approach to this issue, however, has created more confusion. As discussed above, the problems are exacerbated when states provide the rules of decision.\textsuperscript{157} The Supreme Court is unlikely to resolve the problem, since it has declined several opportunities to do so in recent years.\textsuperscript{158} Thus, Congress needs to pass clarifying legislation.

In the absence of Congressional action in the substantive area, the appropriate standard for the admissibility of remedial measures evidence in strict liability actions remains a rule 403-type balancing test. As stated above, such a standard provides the trial judge with the discretion to consider the facts of the case in order to determine whether evidence should be admitted. The factors to be weighed include the competing policies, the relevancy and probative value of the evidence, and possible jury confusion.

This approach to the problem has already crept into some courts'

\textsuperscript{156} See Weinstein & Berger, supra note 10, at 407-20:
[The most desirable approach is to treat products liability cases as governed by Rule 403 rather than Rule 407, thereby giving the judge discretion to admit the evidence of subsequent repairs where relevance exceeds prejudice to the defendant.]

Judge Weinstein would also apply rule 403 for negligence and other actions based on culpable conduct. \textit{Id.} at 407-13 ("It would be preferable to abolish rule 407 and to treat the matter [of subsequent remedial measures] under the general principles of relevancy, relying upon rule 403 for guidance.").

\textsuperscript{157} See supra notes 17-37 and accompanying text.

decisions under the guise of rule 407 policy. The Murray, Herndon, Grenada, and Cann courts all referred to relevance as an area of inquiry in strict liability cases. In Herndon, the court pointed out that rule 403’s balancing test would always have to be met. Grenada expressly rested its decision to exclude remedial measures evidence on possible jury confusion. The Cann court balanced the probative value of the evidence against the danger of prejudice and confusion under rule 403 as a threshold test. It concluded its discussion of rule 407 with a reference to the confusion that could result if remedial measures were admitted, since strict liability cases often also include negligence counts. In such cases, evidence must be excluded from one part of the case, but may be admitted in another. Thus, formally adopting a rule 403-type test would merely elucidate the reasoning process some courts are already using. It would also clarify the reasoning for many other courts by structuring the analysis and providing specific factors to balance.

In contrast, current analysis based on rule 407 is either too formalistic or unfocused and overexclusive. The formalistic approach ignores the dangers of admitting remedial measures because the analysis generally ends when the court determines that rule 407 does not apply. The overbroad approach to applying the rule results from the narrow focus of rule 407 on the policy of encouraging remedial measures. Judges using this approach must ignore the probative value such evidence might have and thwart the policies of liberal admission of relevant evidence and of holding product manufacturers responsible for unsafe products. The proposed approach would allow judges to take a middle road and consider all the important factors and policies implicated in admitting or excluding remedial measures evidence in strict liability cases.

159. See, e.g., supra notes 38-41, 56-61, 96-100 & 109 and accompanying text; see also Madden, supra note 2, at 9-10.
161. 716 F.2d at 1328-29.
162. 695 F.2d at 888.
163. 658 F.2d at 59-60.