Evidence of Subsequent Remedial Measures and Products Liability: Herndon v. Seven Bar Flying Service, Inc.

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Federal Rule of Evidence 407 (Rule 407), which excludes evidence of subsequent remedial measures to prove negligence or culpable conduct, has been the subject of much recent controversy. The major question is whether the negligence-based exclusionary rule is applicable to strict products liability actions in which negligence and culpable conduct are not at issue. In order to establish a cause of action under a products liability theory, a plaintiff

1. Rule 407 provides:
   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.

2. Subsequent remedial measures include evidence of subsequent installation of safety devices, change in design, recall letters, additional warnings, changes in company rules, changes in product labeling, packaging, or advertising, changes in the choices of materials or components, and discharge of employees. See C. McCormick, Handbook of the Law of Evidence 111 (2d student ed. 1979); S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 177 (3d ed. 1982).

3. See Foster v. Ford Motor Co., 616 F.2d 1304, 1309 n.11 (5th Cir. 1980) (noting conflict among the circuits with respect to whether Rule 407 applies where evidence of subsequent remedial measures is offered to prove a party strictly liable); Twerski, Post-Accident Design Modification Evidence in a Manufacturing Defect Setting: Strict Liability and Beyond, 4 J. Prod. Liab. 143, 143 (1981) (noting the permissibility of admitting subsequent remedial measures in products liability case is the topic of “white hot” debate throughout the country); Comment, The Case for the Renovated Repair Rule: Admission Evidence of Subsequent Repairs Against the Mass Producer in Strict Products Liability, 29 Am. U.L. Rev. 135, 139 (1979) (stating that a re-evaluation of the exclusionary rule by the courts and the legislature is imperative) [hereinafter cited as Comment, Renovated Repair Rule].

4. It is clear from the Restatement (Second) of Torts that concepts of negligence and culpability are not necessary for a finding of strict liability. The basis of strict tort liability is stated in the Restatement (Second) of Torts § 402A (1965):

   Special Liability of Seller of Product for Physical Harm to User or Consumer

   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

   (2) The rule stated in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of the product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.
must prove that the product was defective,\(^5\) that the defective product proximately caused the plaintiff's injury, and that the defect existed when the product left the manufacturer's or distributor's control.\(^6\) A post-accident repair eliminating or modifying the injury-causing characteristic may indicate that the product was defective at the time it left the manufacturer's control and that the manufacturer could have eliminated the injury-causing defect earlier.\(^7\) Therefore, whether Rule 407 applies in strict products liability cases determines whether relevant evidence of subsequent remedial measures will be admitted at trial.\(^8\)

\(^{5}\) A negative approach is taken by the Restatement in that a product is not considered to be defective if it is safe for normal handling and consumption. Restatement (Second) of Torts § 402A comment h (1965). The Restatement concludes that a defect is a condition not contemplated by the user which makes the product unreasonably dangerous to him. Id. § 402A comment i. On the other hand, Dean Prosser has stated that a product is to be regarded as defective if it is not safe for a use that can be expected to be made of it and no warning is given. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 826 (1966). Another suggestion for the test of defectiveness is whether the product is unreasonably dangerous or "not reasonably safe." Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5, 15 (1965).

A defect may arise in the product as a result of the actual manufacturing process involved in making the product or in the design of the product. In addition, a defect may occur if a product is manufactured properly, but because of the nature of the product, a warning of the dangerous qualities of the product or instructions regarding the use of the product is necessary, but not given. Carmichael, Strict Liability in Tort—An Explosion in Products Liability Law, 20 Drake L. Rev. 528, 542 (1971).

\(^{6}\) See Restatement (Second) of Torts § 402A (1965). To state a cause of action under the Restatement, a plaintiff must plead: (1) that the defendant sold a product; (2) that the product was in a defective condition; (3) that the defective condition was unreasonably dangerous to the user or consumer; (4) that the seller was engaged in the business of selling said products; (5) that said product was expected to and did reach the user or consumer without substantial change in condition; (6) that said defect was the proximate cause of the personal injuries or property damage suffered by the consumer or user; and (7) standard allegations as to jurisdiction and damages. Carmichael, supra note 5, at 540.

\(^{7}\) See Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 794 (8th Cir. 1977) (remedial instruction may provide substantial evidence that with a different instruction the harm would not have resulted and thus failure to give the instruction created a defective product); Lollie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974) (the evidence of post-occurrence change was admissible on the issues of whether the design was inadequate and whether there existed an alternative design which would have prevented the accident).

\(^{8}\) See Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 793-94 (Alaska 1981) (evidence of post-occurrence change would tend to show that the product had not lived up to its required standard of safety); Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 319, 281 N.E.2d 749, 753 (1972) (evidence of subsequent remedial measures "is highly probative of the existence of a defect, which is the essence of a strict liability action for a defective product"). Perhaps the most frequent use of such evidence is to prove feasibility. See Boeing Airplane Co. v. Brown, 291 F.2d 310, 315 (9th Cir. 1961) (evidence of change in design was admissible to show that it would have been feasible to incorporate those features in the design at the time the product in question was built); Bendix-Westinghouse Automotive Air Brake Co. v. Latrobe Die Casting Co., 427 F. Supp. 34, 41 (D. Colo. 1976) (defendant's post-accident change in design "underscores the feasibility of precautionary measures"). But see Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120, 130 (6th Cir. 1955) (evidence of post-accident modifications as "hindsight" evidence not properly admissible as to feasibility).
Recently, in *Herndon v. Seven Bar Flying Service, Inc.*,9 the Court of Appeals for the Tenth Circuit upheld the admission of evidence of a post-accident design modification made by a defendant manufacturer. The court concluded that Rule 407 should not apply in strict products liability cases.10 The *Herndon* decision is exemplary of the modern trend toward admitting evidence of subsequent remedial measures in products liability cases.11 Because the modern approach allows admission of the highly persuasive evidence of subsequent remedial measures, a plaintiff has a better chance of recovery in a jurisdiction which follows this trend.

This Recent Case will discuss the applicability of Rule 407 to products liability actions and suggest that the approach taken by the *Herndon* court should be adopted by other circuits. It is important to keep in mind that the focus in a products liability case, unlike that in a negligence action, is on the product itself rather than on the conduct of the defendant.12 An analysis of Rule 407 reveals that it was codified with the negligent defendant in mind;13 thus, the underlying policies of Rule 407 are not applicable in strict products liability cases.14

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10. Id. at 1331. The *Herndon* decision represents the first time that the Tenth Circuit has directly considered the applicability of Rule 407 to a strictly liable product manufacturer. Id. at 1329. Shortly before *Herndon* was decided, however, the Tenth Circuit had an opportunity to address Rule 407 in another context. In *Rimkus v. Northwest Colo. Ski Corp.*, 706 F.2d 1060 (10th Cir. 1983), evidence of post-accident remedial measures was held to be admissible to rebut evidence of a plaintiff's contributory negligence. Id. at 1066.
12. In a strict products liability action, the product itself is on trial, not the manufacturer. Accordingly, the manufacturer's conduct is irrelevant under the strict liability standard. See *Restatement (Second) of Torts* § 402A(2)(a) (1965); Twerski, *supra* note 3, at 153-58; Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837, 846. A products liability case no longer turns on whether the defendant knew or reasonably should have known of the defect. See, e.g., *Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981). Characterizing the manufacturer as negligent serves no legal purpose. E.g., id. at 123, 417 N.E.2d at 550, 436 N.Y.S.2d at 255. Courts have gone so far as to allow a fact-finder to infer that the accident could have only been caused by a product defect when a plaintiff was not able to isolate the defect. See, e.g., *Halloran v. Virginia Chem. Inc.*, 41 N.Y.2d 386, 361 N.E.2d 991, 393 N.Y.S.2d 341 (1977).
13. *Fed. R. Evid.* 407 advisory committee note. The advisory committee noted that "the rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault." *Id.* For a discussion on Rule 407's development as an outgrowth of negligence theory, see Comment, *Subsequently Remedying Strict Products Liability, supra* note 11, at 762-67.
14. See generally *Note, Chart v. General Motors Corp.: Did it Chart the Way for Admission of Evidence of Subsequent Remedial Measures in Products Liability Actions?*, 41 OHIO
Rule 407 is a codification of the common law rule which precludes evidence of remedial measures from being introduced at trial to prove that the defendant's negligence or culpability caused the plaintiff's injury.\(^\text{15}\) Although this common law rule is preserved in almost every jurisdiction\(^\text{16}\) either by judicial interpretation\(^\text{17}\) or statutory codification,\(^\text{18}\) Rule 407 contains several express exceptions that permit the admission of subsequent remedial measures for limited purposes.\(^\text{19}\)

Despite the number of recognized exceptions to the doctrine excluding evidence of subsequent remedial measures, the doctrine has endured over the years in the field of negligence.\(^\text{20}\) Courts disagree, however, as to whether

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\(^\text{15}\) See supra note 13. As early as 1892, the Supreme Court noted that the decisions of the highest courts of most of the states had established that evidence of subsequent repairs was inadmissible in negligence actions. Columbia and Puget Sound R.R. v. Hawthorne, 144 U.S. 202, 207 (1892).

\(^\text{16}\) At least one state has repudiated altogether the rule of exclusion of subsequent remedial measures. Maine's statute provides that "[w]hen, 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 admissible." Me. R. Evid. 407(a). A few jurisdictions have expressly codified the admissibility of subsequent remedial measures in strict liability actions. See ALASKA R. EVID. 407; HAWAII R. EVID. 407; WYO. R. EVID. 407.


\(^\text{18}\) Most states that have codified the common law rule use language that is the same as or similar to Rule 407. For examples of such statutes, see ARK. STAT. ANN. § 28-1001-407 (1979); FLA. STAT. ANN. § 90.407 (West Special Pamphlet 1979); NEB. REV. STAT. § 27-407 (1979); OKLA. STAT. ANN. tit. 12, § 2407 (West 1980); S.D. CODIFIED LAWS ANN. § 19-12-9 (1979); VA. CODE § 8.01-418.1 (1984); WIS. STAT. ANN. § 904.07 (West 1975).

\(^\text{19}\) Evidence of subsequent repairs may be admissible for purposes other than showing culpable conduct. Such purposes include showing control, ownership, impeachment, or feasibility of precautionary measures, if controverted. Fed. R. Evid. 407. For cases admitting evidence for one of these purposes, see Woodard v. Mobil Pipe Line Co., 479 F.2d 557 (5th Cir. 1973) (evidence admissible to show control); Powers v. J.B. Michael & Co., 329 F.2d 674 (6th Cir. 1964) (subsequent warning signs admitted to show joint control); Tyler v. Dowell, Inc., 274 F.2d 890 (10th Cir. 1960) (admissible to rebut testimony of nonfeasibility of change).

\(^\text{20}\) See, e.g., Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971) (post-accident change inadmissible since such evidence, if admitted, would discourage manufacturers from improving the safety features of their products); Limbeck v. Interstate Power Co., 69 F.2d 249 (8th Cir. 1934) (post-occurrence change in construction inadmissible since such evidence not proper as
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the doctrine applies to strict liability actions. A lack of legislative history concerning the congressional intent in adopting Rule 407 is a major impediment to determining whether it should apply to strict products liability actions. Rule 407 was neither the subject of debate nor discussion during the congressional committee hearings on the Federal Rules of Evidence. Moreover, the advisory committee note to Rule 407 fails to address the issue of whether Rule 407 is applicable to products liability actions.

In the absence of congressional guidance, courts look to the policies underlying Rule 407 to determine its applicability to strict products liability actions. The advisory committee note states that the two reasons for Rule 407 are (1) that subsequent conduct is not relevant to the issue of negligence, and (2) that parties should not be deterred from modifying products to increase safety. It is well established that both the relevancy argument and the anti-deterrent policy justify the exclusion of subsequent repair evidence showing a negligent construction before the accident); Bingham Mines Co. v. Bianco, 246 F. 936 (8th Cir. 1917) (post-accident repair inadmissible since such evidence is prejudicial and has no tendency to prove negligence at the time of the accident).

21. Most of the circuits hold that Rule 407 does apply to strict products liability actions. See, e.g., 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); Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Knight v. Otis Elevator Co., 596 F.2d 84 (3d Cir. 1979); Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978), cert. denied, 440 U.S. 916 (1979); Smyth v. Upjohn Co., 529 F.2d 803 (2d Cir. 1975). The Eighth Circuit has held that Rule 407 has no application to strict products liability actions. See, e.g., Unterburger v. Snow Co., 630 F.2d 599 (8th Cir. 1980); Farner v. Paccar Inc., 562 F.2d 518 (8th Cir. 1977); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977). The position of the other circuits is unclear despite the fact that they have had the opportunity to address the issue. See, e.g., Oberst v. International Harvester Co., 640 F.2d 863 (7th Cir. 1980); Brown v. Link Belt Corp., 565 F.2d 1107 (9th Cir. 1977).


22. See S. SALTZBURG & K. REDDEN, supra note 2, at 180 (little evidence of what drafters of Rule 407 intended, but drafters probably intended words to include wanton or willful conduct). But see Werner v. Upjohn Co., 628 F.2d 848, 856-57 (4th Cir. 1980) (Congress determined that evidence of subsequent repair excluded not only in cases involving negligence but also those involving culpable conduct), cert. denied, 449 U.S. 1080 (1981).

23. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 407 [01], at 407-1 (1982).


25. While it is generally accepted that subsequent repair evidence is not relevant to negligence, the advisory committee conceded that under a liberal interpretation of relevancy (which the federal rules employ through the "any tendency" standard) this ground alone would not warrant exclusion. Fed. R. Evid. 407 advisory committee note.

26. The advisory committee noted that the anti-deterrent policy is the more impressive of the two policies underlying Rule 407. Id.
in negligence actions. To determine whether Rule 407 applies to products liability actions, however, courts must decide if the policy considerations pertaining to strict liability are the same as those pertaining to negligence.

The majority of federal circuits apply Rule 407 to strict products liability cases as well as to negligence cases. The Fifth Circuit’s opinion in *Grenada Steel Industries, Inc. v. Alabama Oxygen Co.* exemplifies the majority view. In *Grenada Steel*, the plaintiff sought to recover damages for a fire in its plant which was allegedly caused by a defective valve on a cylinder containing gas. At trial, the plaintiff unsuccessfully attempted to introduce evidence that the valve manufacturer subsequently produced a valve of a different design.

On appeal, the Fifth Circuit upheld the exclusion of the evidence, stating that voluntary design modifications that improve a product and increase its safety should be encouraged. Based upon this policy, the court held that Rule 407 applies to strict liability actions as well as negligence actions. The decision also rested on the proposition that since a post-accident change in design might be made for any of a number of reasons, evidence of a subsequent remedial measure has little relevance in determining whether the product was defective.


28. Rule 407 would apply to strict products liability cases if negligence and strict liability were similar in nature. The standard of strict tort liability used in products liability, however, requires no showing of fault or culpability as does the standard of care to prove negligence. *W. Prosser, Handbook of the Law of Torts* § 75 (4th ed. 1971); Carmichael, supra note 5, at 528.

29. See supra note 21.

30. 695 F.2d 883 (5th Cir. 1983).

31. Id. at 885.

32. Id. A verdict was rendered for the defendants. *Id.*

33. Id. at 887. This anti-deterrent function is one of the two underlying policies of Rule 407. See supra text accompanying notes 25-26.

34. 695 F.2d at 887 (citing *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981)). The *Grenada Steel* court noted that there was no evidence concerning whether the admission of subsequent repair evidence would deter remedial action by manufacturers. The court concluded, however, that Rule 407’s assumption that the admission of subsequent repair evidence might deter the taking of remedial action could not be demonstrated to be inapplicable to manufacturers upon whom strict liability is imposed. *Id.*

The Seventh Circuit has also held that evidence of subsequent repairs is not admissible in a strict products liability action. *Oberst v. International Harvester Co.*, 640 F.2d 863 (7th Cir. 1980). But it cannot be determined whether the *Oberst* court applied Rule 407 or the Illinois rule as developed in case law. Thus, it is unclear whether the Seventh Circuit joined the majority of federal circuits which apply Rule 407 to products liability cases.

35. 695 F.2d at 888. The court noted that the jury’s attention should be directed to the time that the product was manufactured to determine whether the product was reasonably safe.
A contrary view was expressed by the California Supreme Court in the landmark decision of *Ault v. International Harvester Co.* The *Ault* court refused to extend the state's rule excluding evidence of subsequent remedial repairs to suits based on strict liability. California's exclusionary rule, section 1151 of the California Evidence Code, contains language substantially the same as that of Rule 407. The *Ault* court's opinion is representative of the courts which follow the minority view. In *Ault*, a motor vehicle accident victim sued the vehicle's manufacturer, alleging that the accident was caused by a defect in the vehicle's design. At trial, evidence establishing a post-accident design modification was admitted. On appeal, the California Supreme Court held that the rule excluding evidence of subsequent remedial repairs did not apply to strict products liability cases, and thus affirmed the trial court's admission of the evidence.

The *Ault* court based its decision on the language of section 1151 of the California Evidence Code and the rationale underlying that section. The plain language of section 1151 excludes evidence of subsequent remedial measures when the evidence is offered to prove negligence or culpable conduct. Accordingly, the court concluded that the legislature limited the statute's applicability to negligence actions by excluding evidence only if it is offered to prove "negligence or culpable conduct." The court also found

The court determined that since post-accident repairs by definition are made after the time of manufacturing, the introduction of post-accident repair evidence might confuse a jury by "diverting its attention from whether the product was defective at the [time of manufacture] to what was done later." Thus, the court held that Rule 407 conforms to the policy expressed in Rule 403—the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of confusion. Id.


37. Section 1151 of the California Evidence Code provides:

> 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.


39. See *supra* note 21. For example, the Eighth Circuit repeatedly has held that Rule 407 is inapplicable to products liability cases. In *Robbins v. Farmers Union Grain Terminal Ass'n*, 552 F.2d 788, 793 (8th Cir. 1977), the Eighth Circuit determined that the doctrine of strict liability by its very nature does not include negligence or culpable conduct as required by Rule 407.

40. 13 Cal. 3d at 116, 528 P.2d at 1149, 117 Cal. Rptr. at 813.

41. *Id.* The jury returned a verdict of $700,000 in the plaintiff's favor. *Id.*

42. *Id.* at 118, 528 P.2d at 1150, 117 Cal. Rptr. at 814.

43. *Id.* The underlying rationale of § 1151 of the California Evidence Code includes the relevance and anti-deterrent policies. *Id.* at 119-20, 528 P.2d at 1151, 117 Cal. Rptr. at 815. Similarly, these policies support Rule 407. *Fed. R. Evid.* 407 advisory committee note.

44. See *supra* note 37.

45. 13 Cal. 3d at 118, 528 P.2d at 1150, 117 Cal. Rptr. at 814. The court noted that negligence or culpability is not a necessary ingredient in an action based on strict liability. *Id.* The plaintiff may recover if he or she establishes that the product was defective and, thus need not show that the defendant breached a duty of care. *Id.; see also* *Greenman v. Yuba Power Prod.*,
that section 1151's purpose of encouraging repair would not be furthered if the section were applied to a products liability action. Hence, the court refused to gratuitously extend section 1151 to products liability cases.

Unfortunately, the Supreme Court has refused to grant certiorari in a number of cases which have raised the issue of Rule 407's applicability in strict products liability actions. Thus, the conflict among the circuits remains.

The Herndon Decision

Facts and Procedure

In Herndon, a flight instructor and his student were killed in an airplane accident. Their widows brought suit against Piper Aircraft Corp., the airplane's manufacturer, claiming that the accident was the result of a defective pitch trim switch. Piper had modified the design of the pitch trim switch both before and after the accident in order to prevent the switch from malfunctioning.


46. 13 Cal. 3d at 119, 528 P.2d at 1151, 117 Cal. Rptr. at 815. The court reasoned that it was unrealistic to believe that a manufacturer would risk additional lawsuits by foregoing an improvement. Id.

47. Id. The Ault decision was relied on by Judge Swygert in his dissent in Oberst v. International Harvester Co., 640 F.2d 863, 870 (7th Cir. 1980) (Swygert, J., concurring and dissenting in part). Judge Swygert concluded that Rule 407 was inapplicable to products liability actions. He was most persuaded by the Ault court's interpretation of the statute's language and conclusion that the anti-deterrent policy was inapplicable to products liability actions. Id. (Swygert, J., concurring and dissenting in part). Judge Swygert also relied on various Illinois cases which he viewed as holding that the exclusionary rule did not apply to strict liability. Id. at 869 (Swygert, J., concurring and dissenting in part) (citing Mahoney v. Roper-Wright Mfg. Co., 490 F.2d 229 (7th Cir. 1973); Smith v. Verson Allsteel Press Co., 74 Ill. App. 3d 818, 393 N.E.2d 598 (1979); Christopherson v. Hyster Co., 58 Ill. App. 3d 791, 374 N.E.2d 858 (1978); Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972)).


49. 716 F.2d at 1324. Thomas O'Donnell was a student who was practicing instrument flying in a Piper Aztec Aircraft. His instructor on the flight, Charles Herndon, was an employee of Seven Bar Flying Service, Inc. (Seven Bar). Id.

50. Id. The plaintiffs originally filed suit in a New Mexico state court. Piper removed the case to the federal district court. Seven Bar, the appellee, intervened, seeking recovery for loss of its airplane and indemnification for the settlement it made with Mrs. O'Donnell. Id.

51. Id.

52. Id. The pitch trim switch is used to modify a plane's altitude. The pitch trim switch originally used a sponge-like silicone pad underneath the rocker switch to cause it to return to the neutral position as soon as a pilot stopped applying pressure to it. In the first modification, Piper replaced the silicone pad with two small, linked coil springs. Reports which followed revealed that the switch still had a tendency to hang up, so Piper again modified the switch's design by shortening the coil springs. Id.
The owners of Piper airplanes were informed of the necessary modifications through service bulletins. The plaintiffs introduced into evidence Piper Service Bulletin 331, issued prior to the accident, and Piper Service Bulletin 527, published more than one year after the accident. Piper objected to the admission of Service Bulletin 527 at a pretrial conference as well as during the trial. Further, Piper refused to stipulate to the feasibility of the change and denied the existence of a defective design. The trial court allowed the plaintiffs to mention the service bulletins in their opening argument and admitted the bulletins into evidence.

The jury was instructed both on theories of negligence and strict liability. The trial court also instructed the jury that Piper asserted the defense of contributory negligence. The jury assessed Piper's liability at 80% and found that the two victims were each 10% responsible for the accident.

Decision and Rationale

On appeal, the Tenth Circuit affirmed the district court's decision and held that Rule 407 does not apply to strict products liability cases. In making its decision, the court relied on Unterburger v. Snow Co. and D.L. By Friederichs v. Huebner. The court discussed the policy arguments that other courts have used to accept or to reject the use of Rule 407 in products liability cases. The Herndon court first examined the anti-deterrent policy of Rule 407. The court refused to accept the proposition that tortfeasors would be

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53. Id.
54. Id. The plaintiffs also sought to admit two Federal Aviation Administration directives. Id. at 1325. One of the directives required Piper Aztec owners to make the trim switch modifications described by bulletin 527 while the other required the modifications described by bulletin 331. The court sustained Piper's objection to the admission of these directives on the grounds that the possible prejudice of the directives outweighed their probative value under Rule 403. Id.
55. Id. at 1324.
56. Id. at 1325.
57. Id. Piper originally requested that the court give a limiting instruction as to the use of the bulletin as evidence, but did not object to the absence of such instruction. Id.
58. Id.
59. Id.
60. Id. The court determined that Piper should indemnify Seven Bar for 80% of the settlement between Seven Bar and Mrs. O'Donnell and 80% of the value of the aircraft after taking into account tax considerations. Id. at 1325-26.
61. Id. at 1331. The court stated that the Federal Aviation Administration directives tendered by the plaintiffs should have been admitted into evidence. See supra note 54. The court also concluded that it was not plain error for the district court to omit an instruction limiting the jury's use of evidence of remedial measures. 716 F.2d at 1330.
62. 630 F.2d 599 (8th Cir. 1980).
63. 110 Wis. 2d 581, 329 N.W.2d 890 (1983). The Huebner court held that Wisconsin's exclusionary rule was inapplicable to products liability cases where negligence as well as strict liability is pleaded. Id. at 619, 329 N.W.2d at 903. The Huebner court noted that the Wisconsin exclusionary rule was substantially the same as Rule 407. Id. at 599, 329 N.W.2d at 898.
64. 716 F.2d at 1327-29.
encouraged to remedy hazardous conditions if Rule 407 were employed to exclude subsequent repair evidence in products liability actions.55 The court maintained that it was unrealistic to assume that a manufacturer would risk additional lawsuits by foregoing necessary design changes in an effort to avoid the possible use of a modification as evidence by a person already injured.56 In addition, the court determined that governmental agencies and insurers would not tolerate such callous behavior.57 Finally, the court stated that there was no evidence that manufacturers are aware of Rule 407 or, if they are, that they change their behavior because of it.58

The Herndon court next discussed the relevance consideration underlying Rule 407. The court held that under the relevancy standard stated in Federal Rule of Evidence 401 (Rule 401), evidence of subsequent remedial measures is relevant to proving a defect in a product.59 Because evidence of subsequent repairs has a tendency to show that the product was defective at the time of injury, the court reasoned that evidence of subsequent remedial measures was relevant.60 The court noted, however, that a finding of relevancy


66. 716 F.2d at 1327. The Herndon court did not address the issue of whether the anti-deterrent policy applied to corporate giants as well as small manufacturers. The court in D.L. By Friederichs v. Huebner, 110 Wis. 2d 581, 613, 329 N.W.2d 890, 905 (1983), refused to differentiate between giant corporate defendants and small manufacturing defendants. The Huebner court determined that the anti-deterrent rationale applied equally in either situation. Id.

67. 716 F.2d at 1328.

68. Id. Courts have noted that a manufacturer's conduct will not be affected by the interpretation given to Rule 407. See, e.g., Chart v. General Motors Corp., 80 Wis. 2d 91, 101-02, 258 N.W.2d 680, 684 (1977). Rather, the economic reality of increased total liability by allowing defective products to remain on the market will determine a manufacturer's behavior. Id. The court most often cited for this argument is the California Supreme Court in Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974).

69. 716 F.2d at 1328. The definition of relevant evidence is given in Rule 401. "'Relevant evidence' means 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." Fed. R. Evid. 401.

70. 716 F.2d at 1328. For other cases holding that evidence of subsequent remedial measures is relevant to proving a product defect, see Farner v. Paccar Inc., 562 F.2d 518, 527 (8th Cir. 1977) (recall letter probative of the existence of a design defect); Caprara v. Chrysler Corp., 52 N.Y.2d 114, 125, 417 N.E.2d 545, 551, 436 N.Y.S.2d 251, 257 (1981) (post-accident design change added to the probability that the defect caused the accident). But see Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 887 (5th Cir. 1983) (evidence of subsequent repair has little relevance in determining whether a product is defective). The Herndon court was unpersuaded by Grenada Steel's relevancy rationale. 716 F.2d at 1328. Instead, the court held that evidence of subsequent repairs was relevant because the jury could possibly draw the inference that the product at issue was defective before the defendant implemented the remedial measure. Id. at 1328-29.
does not result in automatic admission into evidence.\textsuperscript{71} Under Federal Rule of Evidence 403 (Rule 403), the trial court must still weigh the prejudicial effect of the evidence against its probative value.\textsuperscript{72} The court stated that this determination should be made in the same manner and under the same standards as all other Rule 403 determinations.\textsuperscript{73}

In another aspect of its decision, the \textit{Herndon} court placed great emphasis on the fact that the policies underlying strict liability\textsuperscript{74} conflict with those underlying negligence.\textsuperscript{75} The court noted that in a negligence action the jury's focus is on the defendant's conduct.\textsuperscript{76} Therefore, the court reasoned that the exclusion of subsequent conduct evidence is appropriate in a negligence action because liability is based on the defendant's conduct at the time of the injury.\textsuperscript{77} In contrast, the court noted that in products liability cases the fact-finder's sole inquiry relates to the product—not to the defendant's conduct.\textsuperscript{78} Thus, the court concluded that using Rule 407 to exclude relevant, non-prejudicial evidence of subsequent remedial measures would thwart the policies underlying strict liability.\textsuperscript{79} Because Rule 407 does not expressly apply to products liability cases and because Rule 407's underlying policies do not support its extension, the court refused to hold that Rule 407 is applicable to products liability actions.\textsuperscript{80}

Finally, the \textit{Herndon} court endorsed, in dicta, a new approach to the

\textsuperscript{71} 716 F.2d at 1328-29.
\textsuperscript{72} Id. at 1329. Rule 403 provides:

\textit{Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.}

\textbf{FED. R. EVID. 403.}
\textsuperscript{73} 716 F.2d at 1328.
\textsuperscript{74} There are three generally accepted reasons for applying strict liability in products liability cases. Carmichael, \textit{Strict Liability}, supra note 5, at 531. First is the demand for maximum consumer protection. Second is the policy of shifting the risk of loss from the person injured by the defective product to the manufacturer. Third, by placing goods in the stream of commerce, a manufacturer or distributor represents that the product is safe for use. When such representations are not met, the persons responsible for placing the product into the stream of commerce should be liable for the damages. \textit{Id.}
\textsuperscript{75} 716 F.2d at 1331.
\textsuperscript{76} Id. at 1327. The plaintiff in a negligence action must prove that the defendant breached a duty of care to the plaintiff which proximately caused the plaintiff's injury. W. PROSSER, \textit{supra} note 28, § 30. The standard of care for negligence is what a reasonably prudent person would do under the same or similar circumstances. \textit{Id.} § 32, at 150. Thus, the focus in a negligence action is on the defendant's conduct.
\textsuperscript{77} 716 F.2d at 1327.
\textsuperscript{78} Id.; see \textit{supra} note 12.
\textsuperscript{79} 716 F.2d at 1327. The court conceded that when a plaintiff asserts in the alternative that the manufacturer should be liable under either a negligence or strict liability standard, the trial court may fashion a limiting instruction upon request. \textit{Id.} at 1331. The instruction would inform the jury that the evidence of subsequent remedial measures applied only to the strict liability claim.
\textsuperscript{80} Id.
feasibility exception of Rule 407.\textsuperscript{81} Currently, the feasibility of precautionary measures must be controverted in order to admit evidence of subsequent remedial measures under the exception.\textsuperscript{82} In contrast, the \textit{Herndon} court endorsed an approach where manufacturers are deemed to have controverted the feasibility of remedial measures unless they stipulate that the change was feasible.\textsuperscript{83} Consequently, in order to avoid evidence of subsequent repairs from being admitted at trial, a manufacturer must concede that at the time of the accident it would have been feasible to make a safer product.\textsuperscript{84} The court expressly stated, however, that this ruling was not a basis for its decision.\textsuperscript{85}

**Analysis**

The \textit{Herndon} court reached the meritorious result that Rule 407 does not apply to products liability actions. Yet, the court’s analysis failed to fully discuss either the language or the policy considerations which support Rule 407. The court did, however, adequately discuss the policy distinctions underlying negligence and strict liability.

Rule 407 developed based on both the anti-deterrent policy and relevancy consideration.\textsuperscript{86} In its analysis of the anti-deterrent policy, the court ignored the most important aspect: providing for the safety of consumers.\textsuperscript{87} By excluding evidence of subsequent remedial measures, Rule 407 encourages manufacturers to improve defective designs by assuring the manufacturer that the action taken to improve the product cannot be used against the manufacturer to show its negligence. Thus, consumer safety is increased by the application of Rule 407.

\textsuperscript{81} Id. at 1329. Rule 407 specifically provides that the post-accident evidence need not be excluded if it is offered to show the feasibility of precautionary measures when such measures are controverted. \textit{Fed. R. Evid.} 407. The feasibility exception was adopted because there is little danger that the jury will misuse the evidence by focusing on the wrong time period when feasibility is at issue. \textsc{S. Saltzburg & K. Redden}, \textit{supra} note 2, at 182.

\textsuperscript{82} \textit{Fed. R. Evid.} 407. If the plaintiff's counsel can maneuver a defendant's witness into suggesting that the defendant's product was as safe as possible or that alternative designs were impracticable, then a court would admit the evidence of subsequent repair to show feasibility. \textsc{See}, Note, \textit{The Admissibility of Subsequent Remedial Measures, supra} note 14, at 1429. A plaintiff in a products liability case must usually show that some alternative way of manufacture or design was both safer and feasible. \textsc{S. Saltzburg & K. Redden}, \textit{supra} note 2, at 180.

\textsuperscript{83} 716 F.2d at 1329. The court using this approach will no longer have to analyze the facts of a case to determine whether feasibility is controverted. Feasibility is controverted unless the defendant stipulates to the feasibility. \textit{Id.}

The Fifth Circuit adopted this approach in \textit{Grenada Steel Indus. v. Alabama Oxygen Co.}, 695 F.2d 883 (5th Cir. 1983). The \textit{Herndon} court determined that \textit{Grenada Steel's} discussion of the feasibility exception was noteworthy. 716 F.2d at 1329. The \textit{Herndon} court agreed that this approach would eliminate the difficulty of determining whether a controversy existed. \textit{Id.}

\textsuperscript{84} 716 F.2d at 1329.

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textsc{See supra} notes 25-28 and accompanying text.

\textsuperscript{87} \textsc{See Fed. R. Evid.} 407 advisory committee note.
Similarly, consumer safety is at the heart of strict products liability theory. In fact, strict liability was chosen as the standard for products liability in order to increase consumer safety. Strict liability increases consumer safety by reducing a plaintiff's burden of proof. Since a plaintiff with a reduced burden of proof is more likely to prevail in a lawsuit against a manufacturer, a manufacturer is likely to improve the design of its product to lessen its exposure to liability in a products liability action.

While Rule 407 purports to increase consumer safety, applying Rule 407 to products liability cases actually thwarts the improvement of consumer safety by making it more difficult for a plaintiff to prove that a product was defective. Thus, the court should have used the safety aspect of Rule 407's anti-deterrent policy to support its conclusion that Rule 407 does not apply in a products liability action.

With respect to the relevancy consideration, the Herndon court failed to fully develop its analysis. The court addressed the issue of relevance only as related to the proof of a product defect—one of three elements of a products liability action. Evidence of subsequent repair is also relevant to show that a defect existed when the product was in the manufacturer's control, and that the defect caused the plaintiff's injury—the other two elements of a strict products liability action.

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90. A plaintiff's burden of proof is lessened in a products liability action by changing the jury's focus from the manufacturer's conduct to the product. See supra note 12.

91. Since the necessary facts are usually unavailable to the plaintiff, proving that a product is defective is extremely difficult. See Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791, 843 (1966). Thus, the exclusion of subsequent repair evidence hinders a plaintiff by barring the admission of evidence which is relevant to the claim. See James v. Bell Helicopter Co., 715 F.2d 166 (5th Cir. 1983) (excluded post-accident reports); Josephs v. Harris Corp., 677 F.2d 985 (3d Cir. 1982) (excluded post-accident warning signs); Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978) (refused to admit evidence of post-accident repairs to the machine which inflicted severe injuries to plaintiff's hand), cert. denied, 440 U.S. 916 (1979).

92. The court relied on the liberal "any tendency" standard of Rule 401 to conclude that evidence of post-accident change is relevant to proving a product defect. 716 F.2d at 1328. For the text of Rule 401, see supra note 69.

93. See supra text accompanying notes 5-6.

For example, a subsequent repair indicates that it was feasible for the manufacturer to modify the design of a defective product. Thus, such evidence is relevant to show that the product’s defect existed while the product was under the manufacturer’s control.\(^9\) A remedial measure may also provide substantial evidence that with a different design the harm to the plaintiff would not have resulted. Therefore, remedial measure evidence is relevant to prove that a defective product proximately caused a plaintiff’s injury.\(^9\) In light of the fact that subsequent repair evidence can be relevant to these elements of a products liability action, the court should have strengthened its relevancy analysis by including all of the elements of products liability in its discussion.

A strong point of the court’s relevancy analysis was its discussion of Rule 403. The court stated that before evidence of subsequent repair can be admitted into evidence, its prejudicial effect must be weighed against its probative value under Rule 403.\(^7\) Rule 403’s balancing test acts as a safeguard against the automatic admission of highly prejudicial evidence. The court could have pointed out, however, that in products liability cases, a judge should be allowed to exclude evidence of subsequent repair at his discretion under Rule 403, rather than be compelled to exclude such evidence under the mandate of an arbitrary rule such as Rule 407.\(^9\)

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9. Since many cases today have multiple defendants or indemnity actions, as did *Herndon*, the issue of control is very important because the jury must determine under whose control the product became defective. See *Wallner v. Kitchens of Sara Lee, Inc.*, 419 F.2d 1028 (7th Cir. 1969) (third-party action against an installer of a product for indemnity); *Farr v. Armstrong Rubber Co.*, 288 Minn 83, 179 N.W.2d 64 (1970) (seller entitled to indemnity by manufacturer).

9. See *Robbins v. Farmers Union Grain Terminal Ass'n*, 552 F.2d 788 (8th Cir. 1977) (remedial measure may provide ample evidence that defective product caused plaintiff’s injury); *Lollie v. Ohio Brass Co.*, 502 F.2d 741 (7th Cir. 1974) (post-accident modification evidence is relevant to show that product as designed is incapable of preventing the injury ).

9. 716 F.2d at 1328-29. The court noted that if the evidence of subsequent repairs is unfairly prejudicial, it will be excluded under Rule 403. *Id.* at 1328. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. FED. R. EVID. 403 advisory committee note. When weighing the probative value of evidence against the dangers and considerations listed in Rule 403, the general rule tips the balance in favor of admission. United States v. *Dennis*, 625 F.2d 782 (8th Cir. 1980); United States v. *Day*, 591 F.2d 861 (D.C. Cir. 1978). By restricting Rule 403 to evidence which will cause “unfair prejudice,” the drafters meant to caution courts that mere prejudicial effect is not a sufficient reason to refuse admission. 10 J. *MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE* § 403.10 (2d ed. 1982). Probative evidence frequently will be prejudicial to a party, but its admission will not necessarily cause the fact-finder to make its decision on an improper basis. *Id.*

9. See S. *SALTZBURG & K. REDDEN, supra* note 2, at 102. Rule 403 assumes that trial judges can identify harm which may result from the admission of relevant evidence and can estimate its impact on the jury. *Id.* When evidence is absolutely barred by some other rule, however, the judge has no discretion to admit the evidence. *Id.* at 103. Under Rule 403, the trial judge is given broad discretion in determining whether to admit or exclude evidence.
The *Herndon* court also examined the language of Rule 407.99 While the court stated that Rule 407 is expressly limited in its application to negligence or culpable conduct, it failed to provide any reasoning. The terms negligence or culpable conduct include the concept of fault because Rule 407 is a negligence-based exclusionary rule.100 Fault, however, is not an issue in a strict products liability suit.101 Therefore, as the *Herndon* court concluded, Rule 407's language precludes its application to strict products liability actions.

In addition to addressing the policy considerations and language of Rule 407, the *Herndon* court discussed the distinctive policies underlying negligence and strict liability. This is the only portion of the opinion where the court employed a step-by-step analysis. The court correctly noted that in a negligence action the jury's focus is on the defendant's conduct, while in a strict products liability action the focus is on the product.102 The court appropriately reasoned that in negligence actions Rule 407 fosters the principle of assessing liability based on the reasonableness of a defendant's conduct. Because the focus in a strict liability case is on the product, the court concluded that it would be illogical to encourage such a principle in a products liability action.103

Despite the fact that the court recognized the distinct focus of each theory, the court failed to take into account the distinction between the safety policies of the two theories. The court could have added that, unlike negligence, strict liability was developed to increase product safety by forcing manufacturers to take financial responsibility for injuries caused by defective products.104 Under strict liability, the product has become the focus in a

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99. For the language of Rule 407, see *supra* note 1.

100. The early law of torts was not concerned with the fault of the wrongdoer. W. Prosser, *supra* note 28, § 75. By the close of the nineteenth century, however, fault was recognized as the basis for remedy. *Id.* The doctrine of "never any liability without fault" existed until the emergence of strict liability. *Id.*

101. In a strict liability action against a manufacturer, negligence or culpability is not a necessary ingredient. Ault v. International Harvester Co., 13 Cal. 3d at 118, 528 P.2d at 1150, 117 Cal. Rptr. at 814. The plaintiff may recover if he establishes that the product was defective and need not show that the defendants breached a duty of care. *Id.*; see also Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 62-63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) (manufacturer's liability is established if plaintiff proves that he or she was injured by a defective product while using it for an intended use).

102. 716 F.2d 1327. One reason for the differing focuses of negligence and strict liability is the differing historical development of each theory. The concept of negligence emerged at the beginning of the nineteenth century, while strict products liability has evolved in the twentieth century. W. Prosser, *supra* note 28, § 28, at 139; Carmichael, *supra* note 5, at 528-31. Negligence developed as a theory in which the basis for a remedy was fault, while strict liability imposes liability without requiring proof of fault. W. Prosser, *supra* note 28, § 75, at 492-96.

103. 716 F.2d at 1327; see also *supra* notes 12-14 (discussing the differing theories of negligence and strict products liability).

104. See *supra* note 74.
products liability action in an attempt to increase safety by lessening a plaintiff's burden of proof.\(^\text{105}\) By including this analysis, the \textit{Herndon} court could have clarified the reason for the difference in jury focus between negligence and products liability actions.

A troubling aspect of the opinion is the court's endorsement, in dicta, of a new approach to Rule 407's feasibility exception, while at the same time holding Rule 407 to be inapplicable in strict products liability actions.\(^\text{106}\) The creation of this products liability exception to Rule 407 precludes the need for a new feasibility exception in products liability cases.\(^\text{107}\) Therefore, the feasibility dicta contradicted the court's holding and created confusion within the opinion.

Rather than using the feasibility exception to cloud its decision, the court should have used the feasibility exception to support its conclusion that Rule 407 is inapplicable to a products liability action. When evidence is admitted to show feasibility under Rule 407, the focus is on the product.\(^\text{108}\) Similarly, when evidence would be admitted under a products liability exception to Rule 407, the focus would be on the product.\(^\text{109}\) The existence of a feasibility exception to Rule 407 indicates that courts already recognize the importance of admitting subsequent repair evidence which focuses on the product. A difference between the two exceptions is that feasibility must be controverted before subsequent repair evidence is admitted, while a products liability exception would allow admission of such evidence even if the defendant does not controvert the issue for which the evidence is introduced.\(^\text{110}\) Even though

\(^{105}\) See \textit{supra} note 12. In negligence actions, a defendant can escape liability for a plaintiff's injury if the defendant acted with due care. Caprara v. Chrysler Corp., 52 N.Y.2d 114, 124, 417 N.E.2d 545, 550, 436 N.Y.S.2d 251, 256 (1981). In strict products liability actions, however, a defendant can no longer be relieved of liability by injuring the plaintiff "carefully." \textit{Id.} Manufacturers must take responsibility for their products.

\(^{106}\) See \textit{supra} text accompanying notes 81-85.

\(^{107}\) The feasibility exception is problematic because feasibility must be controverted before evidence of subsequent measures is admissible. See \textit{Fed. R. Evid.} 407. The creation of a products liability exception would eliminate this problem because non-prejudicial evidence of subsequent repairs would be admitted into evidence without meeting a controversy requirement. See Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977).

\(^{108}\) Dean Wade has developed a widely accepted formulation for determining whether a product design is defective. See Phillips v. Kimwood Mach. Co., 269 Or. 485, 499 n.13, 525 P.2d 1033, 1039 n.13 (1974). The factors in Wade's formula indicate that when proving feasibility the focus is on the product. Included in his balancing factors are (1) the availability of a substitute product which would meet the same need and not be as unsafe, and (2) the manufacturer's ability to modify the product without impairing its usefulness or making it too expensive to maintain its utility. \textit{Id.}

\(^{109}\) See \textit{supra} note 12.

\(^{110}\) For cases admitting subsequent repair evidence at trial without a controversy requirement, see Unterburger v. Snow Co., 630 F.2d 599 (8th Cir. 1980); Farner v. Paccar, 562 F.2d 518 (8th Cir. 1977); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977); Caprara v. Chrysler Corp., 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981); Chart v. General Motors, 80 Wis. 2d 91, 258 N.W.2d 680 (1977).
the controversy requirement is mechanical, it could keep relevant, non-prejudicial evidence from being admitted if not met. Because the courts already have recognized the importance of subsequent repair evidence, and because the controversy requirement is merely mechanical, courts should allow for a products liability exception to Rule 407. The Herndon court should have noted that a products liability exception is a logical extension of the feasibility exception. The recognition of the products liability exception would eliminate any unfairness caused by the feasibility exception's controversy requirement.

**IMPACT**

The Herndon decision exemplifies the modern trend toward making Rule 407 inapplicable to strict products liability cases. The major impact of establishing a strict products liability exception to Rule 407 would be to provide added ammunition to consumers seeking to recover damages caused by a defective product. Evidence of subsequent repairs is relevant to proving a defect. Thus, armed with evidence of subsequent repairs, products liability plaintiffs may find it easier to convince juries that a product was defective. Yet, manufacturers will be protected by the Federal Rules of Evidence because evidence of subsequent repairs could still be excluded under Rule 403 if unfairly prejudicial.

Further, the admission of subsequent repair evidence under a products liability exception to Rule 407 would aid in making strict liability “strict.” A products liability plaintiff often does not have access to a manufacturer’s records and memoranda concerning the production process. Prior to the

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111. See Bauman v. Volkswagenwerk Aktiengesell-Schaft, 621 F.2d 230 (6th Cir. 1980) (judgment for plaintiff reversed because post-accident design change admitted without defendant contesting the feasibility of the change); Knight v. Otis Elevator Co., 596 F.2d 84 (3d Cir. 1979) (excluded post-accident elevator button change because feasibility was not controverted); Smyth v. Upjohn Co., 529 F.2d 803 (2d Cir. 1975) (post-accident warnings by drug manufacturer inadmissible since feasibility not controverted).


113. See supra notes 69-70 and accompanying text.

114. One advantage of subsequent repair evidence being governed by Rule 403 in strict products liability cases is the discretion that a judge has to treat each case involving strict liability appropriately. See Knight v. Otis Elevator Co., 596 F.2d 84, 92 (3d Cir. 1975) (not abuse of discretion under Rule 403 to exclude evidence of subsequent repair); Barry v. Manglass, 55 A.D.2d 1, 10, 389 N.Y.S.2d 870, 876 (1976) (recall letter’s relevance outweighed any prejudice in admission of letter into evidence).

115. An injured plaintiff will seldom be able to offer direct evidence that a product was defective. Therefore, the plaintiff must rely on circumstantial evidence such as subsequent repair
evolution of strict liability, a plaintiff would have difficulty recovering for injuries since he did not have enough information to refute a manufacturer’s claim that the product defect was not caused by its negligence.16 Strict liability was adopted as the standard for products liability to eliminate the plaintiff’s burden of proving the manufacturer’s negligence.117 Thus, a products liability exception to Rule 407 would make strict liability “strict” by eliminating a negligence-based exclusionary rule which excludes relevant, non-prejudicial evidence.

The Herndon decision reflects the need for a uniform application of Rule 407 among the federal circuits. Uniformity is necessary to insure that manufacturers will not find their products treated differently from jurisdiction to jurisdiction.” The purpose of the Federal Rules of Evidence is to promote fairness in the administration of evidentiary law.119 The legislative intent was to achieve a uniform system of evidentiary rules for the federal courts.120 These goals would best be accomplished if all the federal circuits adopted the Herndon court’s holding that Rule 407 is inapplicable to products liability actions.

Finally, while indicating a further split among the circuits,121 the Herndon decision opens the door to new issues which must be resolved. The major issue is whether evidence of subsequent repairs is admissible under a products liability exception to Rule 407 when the technology for that repair became available after a plaintiff’s injury.122 Today, evidence of subsequent repairs is admissible under the feasibility exception only if the technology for the repair was available at the time that the product was issued.123 Theoretically,
a products liability exception to Rule 407 would not exclude evidence of subsequent repairs regardless of when the technology developed.\textsuperscript{124} Such evidence could be excluded under Rule 403, however, if the prejudice of the remedial measure outweighed its probative value.\textsuperscript{125} Nevertheless, the implications for products liability plaintiffs and defendants are overwhelming because a plaintiff's burden of proof would be truly lessened, while a defendant's potential exposure to liability greatly increased.

**Conclusion**

Rule 407 is a negligence-based exclusionary rule that traditionally has been extended to exclude evidence of subsequent remedial measures from products liability actions. *Herndon* exemplifies the trend away from applying Rule 407 to products liability actions, where negligence is not at issue. As the *Herndon* court concluded, neither the policy considerations underlying Rule 407 nor the policy distinctions between negligence and strict liability support Rule 407's application to products liability actions. Thus, the courts currently in the majority should follow the *Herndon* court's lead to eliminate the use of a negligence-based rule in a strict liability setting. Until uniformity exists among the circuits, plaintiffs will be subjected to varying burdens of proof, while defendants will be assessed differently, and in some cases unfairly, from circuit to circuit. Because of the split among the circuits regarding Rule 407's applicability in products actions and the questions thereby created, the Supreme Court should grant certiorari to resolve these issues.

\textit{Carol Proctor}

not consider evidence of any technological advancement which became available after the product left the manufacturer's control to determine whether the product was defective. Yet, the defendant manufacturer may introduce evidence of technological advancements to show that design changes were not feasible before the accident. Gray v. General Motors Corp., 434 F.2d 110 (8th Cir. 1970).

Compliance with the state of the art at the time that the product was issued is a statutory defense to a products liability suit in several states. See, e.g., *Ariz. Rev. Stat. Ann.* § 12-683 (1982); *Ind. Code Ann.* § 34-4-20A-4 (Burns Supp. 1983).

\textsuperscript{124} \textit{Cf.} Stephan v. Marlin Firearms Co., 353 F.2d 819 (2d Cir. 1965) (subsequent technological improvement was not relevant to issue of prior defective design).

\textsuperscript{125} See \textit{supra} note 72.