NOTES

STRICT LIABILITY AND THE ADMISSIBILITY OF EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES UNDER EVIDENCE RULE 407

I. INTRODUCTION

Courts traditionally have refused plaintiffs permission to introduce evidence of subsequent remedial measures as proof of a defendant's negligence or culpable conduct. The Federal Rules of Evidence codified the common law position. Rule 407 recognizes that, while subsequent remedial measures do not in fact constitute an admission of prior negligence or culpable conduct, a jury is likely to infer such an admission. Accordingly, the rule generally excludes evidence of subsequent remedial measures. The exclusionary policy is also guided by a desire not to inhibit manufacturers from undertaking subsequent repairs out of fear that such measures in the future could be deemed an admission of earlier fault.

Although Rule 407 does not expressly address strict liability actions, a majority of the circuits that have considered the issue have held that Rule 407 does apply in strict products liability actions. The Ninth Circuit has taken this view. However, Alaska has codified the minority position; the Alaska rule expressly permits a plaintiff to

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1. FED. R. EVID. 407.
3. Id.
5. Gauthier v. AMF, Inc., 788 F.2d 634, 637 (9th Cir. 1986).
6. See infra notes 44-60 and accompanying text. Only the Eighth and Tenth Circuits have rejected the application of Rule 407 to strict liability actions. See Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1322, 1331 (10th Cir. 1983); Unterberger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980); Robbins v. Farmer's
prove the defective condition of a product in a strict liability action through the use of evidence of subsequent remedial measures.\(^7\)

In accordance with the position taken by the Alaska legislature, the Alaska Supreme Court, in *Caterpillar Tractor Co. v. Beck*, held that the policy reasons justifying the exclusion of such evidence in negligence actions are not applicable in a strict products liability action.\(^8\)

There is thus a direct conflict between the respective Ninth Circuit and Alaska positions which could influence the outcome of a case depending on whether the action is filed in state or federal court.

This note will focus on the conflicting federal and Alaska rules and the policy reasons underlying the respective positions. First, the note will examine the federal rule. The note will next discuss the Alaska rule, its origins, and determinant policy considerations which will be contrasted with the Ninth Circuit approach. Case law construing and applying the two rules will be considered in explication of the policy arguments and to suggest bases for criticism.

Finally, the note will focus on the weaknesses of the Alaska policy and highlight some of the consequences of this rule. Principal among these problems is the great potential for prejudice to defendants that arises when evidence of subsequent remedial measures is admitted. Moreover, because the Alaska rule conflicts with the Ninth Circuit construction of Federal Rules of Evidence 407, plaintiffs likely will engage in forum shopping.

### II. FEDERAL RULES OF EVIDENCE 407

Federal Rules of Evidence 407 prohibits the introduction of evidence concerning remedial measures, taken after an accident, which would have made the event less likely to occur if taken previously, to prove negligence or culpable conduct in connection with an event. However, the rule does allow evidence of subsequent remedial measures to prove ownership, control, or feasibility of precautionary measures, if controverted, or for impeachment purposes.\(^9\)

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7. ALASKA R. EVID. 407 provides:

[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 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 impeachment or, if controverted, proving ownership, control, feasibility of precautionary measures, or defective condition in a products liability action.


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Two primary reasons traditionally have been advanced to justify the exclusion of remedial measures as proof or an admission of fault. First, "the conduct is not in fact an admission since the conduct is equally consistent with injury by mere accident or through contributory negligence." As Baron Bramwell stated in *Hart v. Lancashire and Yorkshire Railway Co.*, people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be (as I have often had occasion to tell juries) to hold that, because the world gets wiser as it gets older, therefore it was foolish before.

The Federal Rules of Evidence thus reflect the conclusion that subsequent remedial measures do not constitute an admission of prior misconduct. This explanation alone would not support the exclusion of evidence under a liberal theory of relevancy because an inference of misconduct still is possible. However, the Advisory Committee found another "and more impressive, ground for exclusion resting on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." The crux of the Advisory Committee's decision to bar such evidence is the belief that permitting evidence of subsequent remedial measures to come in...

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11. *Id.*
14. The Federal Rules thus seem to acknowledge that a jury is likely to infer a manufacturer's admission of prior misconduct from the fact that that manufacturer later undertook remedial measures on that product. The advisory committee found that the mere fact that a manufacturer took subsequent remedial measures did not warrant such an inference, and in effect it rejects the suggested inference that fault is admitted. 56 F.R.D. 183, 226. Thus, the advisory committee refuses to allow the introduction of such evidence for the purpose of demonstrating negligence or culpable conduct. Moreover, since the jury is likely to infer an admission of prior misconduct, evidence of subsequent remedial measures is highly prejudicial. *See infra* text accompanying notes 140-42.
16. *Id.*
would discourage repairs and deter desirable safety measures.¹⁷ This view is articulated by Wigmore, who states:

An argument of policy has always been invoked to strengthen the case for exclusion. That argument is that the admission of such acts, even though theoretically not plainly improper, would be liable to over-emphasis by the jury, and that it would discourage all owners, even those who had genuinely been careful, from improving the place or thing that has caused the injury, because they would fear the evidential use of such acts to their disadvantage; and thus not only would careful owners refrain from improvements, but even careless ones, who might have deserved to have the evidence adduced against them, would be refraining from improvements subject[ing] innocent persons to the risk of the recurrence of the injury.¹⁸

While the rule adopted by the Advisory Committee for the above reasons disallows evidence of subsequent remedial measures to show negligence or culpable conduct, the rule does render such evidence admissible in certain cases for other purposes. The rule expressly allows the admission of evidence of subsequent remedial measures to demonstrate ownership or control, existence of a duty, and feasibility of precautionary measures (if controverted) and for impeachment purposes.¹⁹ Furthermore, it should be emphasized "that this list is not exclusive, but merely illustrative."²⁰

When evidence of subsequent remedial measures is offered for a purpose other than to show negligence or culpable conduct, its admissibility is governed by the general rules of relevance²¹ and protection against undue prejudice.²² In addition, the purpose for which it is offered must be controverted. Unless a genuine issue is present, the evidence is automatically excluded.²³

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¹⁷. 10 MOORE'S FEDERAL PRACTICE § 407.02 (1987).
¹⁸. Eastern Airlines, Inc. v. American Cyanamid Co., 321 F.2d 683, 690 (5th Cir. 1963) (citing 2 J. WIGMORE, EVIDENCE § 283, 151-52 (3d ed. 1940)).
¹⁹. FED. R. EVID. 407.
²⁰. 10 MOORE'S FEDERAL PRACTICE § 407.02, at 152.
²¹. Federal Rules of Evidence 401 provides that "'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." Federal Rules of Evidence 402 states that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 401, 402.
²². Federal Rules of Evidence 403 embodies a balancing test: "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." FED. R. EVID. 403.
III. ALASKA RULES OF EVIDENCE 407

Alaska Rules of Evidence 407 similarly precludes plaintiffs from demonstrating negligence or other culpable conduct through the introduction of evidence of subsequent remedial measures. However, in addition to permitting evidence of later measures to come in for impeachment purposes or to prove controverted ownership, control, or feasibility of precautionary measures, the Alaska rule expressly permits plaintiffs to use evidence of subsequent remedial measures to demonstrate a product's defective condition in a strict liability action.24 Thus, while the commentary to Alaska Rule 407 states that the "rule is modeled on Federal Rule 407,"25 the Alaska rule differs from the federal rule in that it permits the use of subsequent remedial measures to prove product defects in strict liability actions. The commentary to Alaska Rule 407 articulates the same justifications and policy considerations for the exclusionary portion of the rule as furnished by the federal rules advisory committee. They are: first, to indicate that the conduct is not an admission; second, to encourage repairs; third, to avoid prejudice to a cautious defendant since a jury may read more into the evidence than is warranted.26 However, the Alaska commentary continues, "unlike most rules that have been promulgated, this Rule explicitly excepts from the reach of the exclusionary rule the use of subsequent remedial measures to show a defect in a product."27 While the Alaska rules committee conceded that "there are few cases and few scholarly discussions of the applicability of this exclusionary principle in products liability cases,"28 it believed its innovative approach was warranted by the differences between a strict products liability action and the traditional negligence action at which the federal rule was aimed. To support its position that the reasons for the general exclusionary rule do not apply in a products liability action, the commentary cited Bachner v. Pearson29 which highlights the differences between the two types of actions:

The focus of attention in strict liability cases is not on the conduct of the defendant, but rather on the existence of the defective product which causes injuries. Liability is attached, as a matter of policy, on the basis of the existence of a defect rather than on the basis of the defendant's negligent conduct.30

25. ALASKA R. EVID. 407 advisory committee's note.
26. Id.
27. Id.
28. Id.
The promulgators of Alaska Rule 407 thus do not believe that any of the three grounds traditionally supporting exclusion are applicable in a products liability action. Rather, the committee noted that "evidence of subsequent repairs or improvements may be highly probative as to the existence of a defect in a product at the time of an accident." The rules committee thus rejected the traditional position that such subsequent repairs are not evidence of negligence or culpable conduct at the time of the accident.

Particular emphasis is placed in the commentary to Alaska Rule 407 on the inapplicability in products liability actions of the second and third grounds traditionally advanced to justify the exclusionary policy. The Alaska rule contends that the traditional public policy rationale of encouraging (or at least not deterring) repairs is inapplicable because of the nature of the products liability actions. The evidence rules commentary derives its principal support for this position from *Ault v. International Harvester Co.*, a 1975 California Supreme Court case. *Ault* is the seminal case which admits evidence of subsequent remedial measures in strict products liability actions on the grounds that the policy reasons traditionally supporting exclusion are simply inapplicable in products liability actions. The case warrants a detailed examination.

The plaintiff in *Ault* was injured in an accident involving a "Scout," a vehicle manufactured by defendant, International Harvester. The plaintiff alleged that the defective design of the vehicle caused the accident and sought recovery under theories of strict liability, breach of warranty, and negligence. To prove defective design, the plaintiff offered evidence that the defendant had changed the metal used in its gearboxes. On appeal, the defendant attacked the admission of this evidence to prove product defect. Primarily, defendant argued that the admission of the evidence violated section 1151 of the California Evidence Code which is virtually identical to Federal Rule 407.

31. *Id.*

32. The Alaska rules committee noted, "the rationale of not discouraging repairs or improvement does not justify excluding this evidence in the products liability case." *Id.*


34. *Id.* at 116, 528 P.2d at 1149, 117 Cal. Rptr. at 813.

35. *Id.* The gearbox of the vehicle in question had been manufactured from aluminum 380. Plaintiff claimed that this material was defective for the purpose for which it had been used, since it was insufficiently malleable. At the trial, plaintiff had introduced evidence that the defendant had later changed the metal it used in its gearboxes to a more malleable iron. The jury subsequently awarded plaintiff $700,000. *Id.*

36. *Id.* at 117, 528 P.2d at 1150, 117 Cal. Rptr. at 814. California Evidence Code § 1151 is similar to Federal Rule 407 and provides, in relevant part, "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken
The defendant argued that the exclusionary rule should apply because, while a defendant manufacturer in a strict liability case might not be blameworthy in a legal sense, the evidence could be used to indicate that the defendant was blameworthy in a moral sense and thus guilty of "culpable conduct" within the ambit of section 1151. The defendant also attempted to demonstrate that if culpable conduct was construed merely to be synonymous with negligence, the phrase would have no meaning within the context of section 1151. Finally, the defendant contended that culpable conduct encompassed strict liability because a plaintiff may recover if he establishes the product was defective, and he need not show any breach of care by defendant.

Despite defendant's arguments, the California Supreme Court, per Justice Mosk, declined to find admission of the evidence a violation of section 1151. The court based its conclusion on two grounds. First, the court found that the language and legislative history of section 1151 demonstrated that strict products liability actions were not within the exclusionary scope of the rule. The court noted that "section 1151 by its own terms excludes evidence of subsequent remedial or precautionary measures only when such evidence is offered to prove negligence or culpable conduct." The court found that demonstrating negligence or culpability is not a necessary element of a strict liability action. Thus, the court's survey of the history and purposes of 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." CAL. EVID. CODE § 1151 (West 1966).

37. Id. at 118, 528 P.2d at 1151, 117 Cal. Rptr. at 815. Regarding this point, the court noted that if the legislature had intended to include strict liability cases within section 1151, "it would have used an expression less related to and consistent with affirmative fault than 'culpable conduct.'" Id.

38. Id. The court dismissed this argument in a footnote, claiming that there were "types of faulty conduct other than negligence which are encompassed within 'culpable conduct,' such as wanton and reckless misconduct." Id. n.3. See infra text accompanying note 87.


40. Id. at 117-18, 528 P.2d at 1150, 117 Cal. Rptr. at 814. The court noted: The language and the legislative history of section 1151 demonstrate that the section is designed for cases involving negligence or culpable conduct on the part of the defendant, rather than to those circumstances in which a manufacturer is alleged to be strictly liable for placing a defective product on the market. Furthermore, we are not persuaded that the rationale which impelled the legislature to adopt the rule set forth in the section for cases involving negligence is applicable to suits founded upon strict liability, and we therefore decline to judicially extend the application of the section to litigation founded upon that theory.

Id.

41. Id. at 118, 528 P.2d at 1150, 117 Cal. Rptr. at 814.
section 1151 led it to conclude that the rule had not been intended to apply in strict products liability actions.

Second, and most importantly, Ault's holding rests on the California Supreme Court's belief that the public policy rationale central to section 1151 of the California Evidence Code simply does not carry much weight in the context of a strict products liability action. The court recognized that admitting evidence of subsequent repairs to prove negligence might deter a person from making repairs after the occurrence of an accident. However, the court believed that:

When the context is transformed from a typical negligence setting to the modern products liability field, however, 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.42

Thus, the court found that rather than advancing the policy goals which section 1151 was intended to further, extending the rule to products liability actions would in fact undermine the purpose of strict liability and serve "merely as a shield against potential liability."43 Ault has become the leading case holding that in a strict products liability action, evidence of subsequent remedial measures may be introduced to show the defective condition of a product on the ground that the policy justifications advanced to support an exclusionary rule are inapplicable in products liability actions.

The rationale underlying the Ault decision has been followed in two circuits.44 The Tenth Circuit decision in Herndon v. Seven Bar Flying Service, Inc. is noteworthy for its detailed consideration and evaluation of Rule 407.45 Herndon involved an action brought by the widows of persons killed in an airplane crash against the manufacturer

42. Id. at 120, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16. This passage is cited in the commentary to Alaska Rules of Evidence 407. The Alaska commentary also noted that the "manufacturer of a product makes more of a business judgment than a humanitarian gesture" in deciding whether to make repairs so that there was no need to protect a manufacturer making such a humanitarian gesture from unwarranted inferences. ALASKA R. EVID. 407 advisory committee's note.

43. Id. at 1152.

44. See Unterberger v. Snow Co., Inc., 630 F.2d 599, 603 (8th Cir. 1980); Robbins v. Farmer's Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977); but see Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1322, 1331 (10th Cir. 1983); DeLurye v. Wintrop Laboratories, 697 F.2d 222, 228-29 (8th Cir. 1983); see infra note 60.

45. 716 F.2d 1322, 1326-30 (10th Cir. 1983).
of the allegedly defectively designed aircraft.\textsuperscript{46} The Court of Appeals for the Tenth Circuit concluded that the trial court had correctly construed Rule 407 of the Federal Rules of Evidence by permitting the plaintiff to demonstrate the defective design of the trim switch which had allegedly caused the crash through introduction of remedial measures subsequently undertaken by the aircraft manufacturer.\textsuperscript{47} The Tenth Circuit undertook a lengthy survey of the purposes of Federal Rules of Evidence 407 before concluding that the policy reasons traditionally advanced for an exclusionary rule were inapplicable to product manufacturers in strict liability actions.\textsuperscript{48} The court first noted that the purpose behind strict liability, with its focus on the product at the time of manufacture, would be frustrated by an exclusionary rule.\textsuperscript{49} Since the responsibility for a defective design in a strict liability action is on the manufacturer, regardless of the reasonableness of the manufacturer's conduct at the time, "[e]mploying Rule 407 to exclude evidence of the product's safety 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."\textsuperscript{50}

The Tenth Circuit also enumerated several reasons why it found the rationale unpersuasive that admitting evidence of subsequent remedial measures would have the unfortunate consequence of discouraging manufacturers from making repairs. First, the court reiterated the notion that it would be unrealistic to assume that manufacturers would risk countless future lawsuits simply to preclude the possible use of these later remedial measures as evidence against them.\textsuperscript{51} Herndon also stressed that insurers would certainly object if their insured manufacturers refused to undertake remedial measures.\textsuperscript{52} Additionally, the court noted that both governmental agencies and juries contemplating damage claims would serve as a sufficient deterrent to a manufacturer's possible decision not to repair.\textsuperscript{53} Finally, Herndon pointed out that "there is no evidence which shows that manufacturers even know about the evidentiary rule or change their behavior because of it."\textsuperscript{54}

\textsuperscript{46} Id. at 1324.
\textsuperscript{47} Id. at 1325. Piper had modified the design of the trim switch following the accident, and it also issued a service bulletin, introduced into evidence by plaintiffs, instructing owners of such aircraft to modify their switches. \textit{Id.} at 1327.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id. The court completely neglected the possible prejudicial impact of such evidence. See infra notes 140-42 and accompanying text.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 1328.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
Herndon also dismissed defendants' arguments concerning the possibility that a jury might be confused by evidence of post-accident remedies. Since "such evidence is unquestionably 'relevant,' as that term is defined by Rule 401, there is no justification for excluding it under Rule 407 where the trial court determines that the potential of the evidence to confuse or prejudice the jury does not substantially outweigh the probative value."\(^{55}\) Evidently, the court found the balance sufficiently satisfied to justify admitting the evidence. Thus, the Tenth Circuit, like the California Supreme Court in *Ault*, construed Rule 407 as permitting the admission of the evidence.

In *Robbins v. Farmer's Union Grain Terminal Association*,\(^{56}\) the Eighth Circuit also followed the *Ault* approach. The court upheld an award of damages to plaintiff on alternative theories of negligence, breach of implied warranty, and strict liability, over defendant's objection, among others, that the trial judge had improperly permitted plaintiff to introduce evidence of subsequent remedial measures in connection with the strict liability count.\(^{57}\) The court, invoking *Ault*, found the policy underlying Rule 407 of not deterring subsequent remedial measures inapplicable in strict liability actions.\(^{58}\) *Robbins* also rejected defendant's relevancy challenge to the admission of such evidence.\(^{59}\) Thus, the Eighth Circuit found that the admission of evidence of subsequent remedial measures in a strict liability case did not violate Rule 407.\(^{60}\)

The Alaska rules committee has found the *Ault* rationale equally persuasive. The case is cited at length as authority for Alaska's unique Rule 407 and its sanction of the use of evidence of subsequent remedial measures to demonstrate a prior defective condition. Defendants in Alaska have challenged the Alaska policy on several occasions.\(^{61}\) However, courts have upheld the admission of the evidence by invoking Alaska Rule 407 and continuing to follow *Ault*. *Caterpillar Tractor Co. v. Beck*\(^{62}\) is one example. In *Beck*, a widow brought a wrongful death action against the manufacturer of a vehicle which she

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55. Id.
56. 552 F.2d 788 (8th Cir. 1977).
57. Id. at 792.
58. Id. at 793.
59. Id. at 793-94.
60. See also Unterberger v. Snow Co., Inc., 630 F.2d 599, 603 (8th Cir. 1980). *But see* DeLuryea v. Wintrop Laboratories, 697 F.2d 222 (8th Cir. 1983) (holding that in a failure-to-warn case involving a prescription drug, evidence of subsequent remedial measures was inadmissible, for the issues involved in such a case were essentially the same as those in failure-to-warn negligence cases, where such evidence was inadmissible). Id. at 228-29.
alleged was responsible for her husband's death.\textsuperscript{63} Judgment was entered in favor of the widow, whereupon the manufacturer appealed and the widow cross-appealed.\textsuperscript{64} At a conference preceding the new trial, Judge Warren Taylor made several evidentiary rulings which resulted in an appeal to the supreme court.\textsuperscript{65} The evidentiary ruling which is important for purposes of the present discussion concerns the admissibility of evidence of post-injury accidents and design changes.\textsuperscript{66}

The supreme court affirmed the trial court since "Alaska Rule of Evidence 407, which provides that, in a products liability action, evidence of subsequent measures is admissible toward the feasibility of alternative designs as well as defective condition."\textsuperscript{67} The court noted that since the rule expressly permitted the use of subsequent remedial measures to show a defective condition, the evidence was properly admitted. In refusing to disturb the trial court rulings, the supreme court noted, "We have consistently declined to rewrite the rules of practice from the bench, and decline to do so here. . . . Rule changes are more appropriately accomplished by amendment upon recommendation of the rules committee, the bench, and the bar."

The supreme court described the Alaska rule as consistent with the policy followed in the majority of jurisdictions,\textsuperscript{69} and then enunciated the public policy rationale first advanced in \textit{Ault} for admitting the evidence.\textsuperscript{70} The supreme court also rejected the manufacturer's challenge that the evidence was irrelevant, and therefore inadmissible, under Alaska Rules of Evidence 402.\textsuperscript{71} The court stated that "evidence about the character of the product, as reflected in subsequent

\textsuperscript{63.} \textit{Id.} at 792. Plaintiff's husband was operating a front-end loader which rolled over an embankment and killed him. Plaintiff alleged that the loader was defective because it did not have a rollover protective shield—an overhead protective canopy designed to withstand and reduce the risk of a rollover, thus protecting the operator from being injured. \textit{Id.}

\textsuperscript{64.} \textit{Id.} at 790.

\textsuperscript{65.} \textit{Id.}

\textsuperscript{66.} \textit{Id.} at 793. The trial court had held the evidence admissible toward "(a) the dangerous or defective condition of the 944 front-end loader; (b) causation; (c) the feasibility of alternative designs; and (d) to impeach various contentions of Caterpillar regarding the safety of the loader." \textit{Id.}

\textsuperscript{67.} \textit{Id.}

\textsuperscript{68.} \textit{Id.}

\textsuperscript{69.} See infra note 84 for a contradiction of this description.

\textsuperscript{70.} \textit{Beck}, 624 P.2d at 794.

\textsuperscript{71.} \textit{Alaska R. Evid.} 402. Alaska Rules of Evidence 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska legislature, by these rules, or by other rules adopted by the Alaska Supreme Court. Evidence which is not relevant is not admissible.

See infra note 123.
modifications or accidents, is highly probative in strict liability cases and therefore is not excludable on relevancy grounds."  

*Dura Corp. v. Harned*  

is a more recent example of the admissibility of subsequent remedial measures in products liability cases in Alaska. In *Dura*, the supreme court again refused to disturb the trial court's evidentiary rulings regarding the admissibility of subsequent remedial measures, since "in a products liability action, evidence of subsequent remedial measures is admissible to prove the feasibility of alternative designs as well as to prove a defective condition." The court permitted the plaintiff to prove that the manufacturer had attempted to take remedial measures following the accident, on the ground that evidence of subsequent repairs or improvement may be highly probative as to the existence of a defect in a product at the time of an accident. Thus, manufacturers being sued in Alaska state courts can continue to expect to be confronted with evidence of any subsequent remedial measures that they may have undertaken as "proof" that their product was defective at the time of manufacture.

IV. THE NINTH CIRCUIT REJECTION OF *AULT* AND ITS PROGENY

The Ninth Circuit in *Gauthier v. AMF, Inc.*, held that Federal Rules of Evidence 407 is applicable in a strict liability case alleging defective design, thus refuting *Ault* and thereby conflicting directly with Alaska Rule 407 and the cases purporting to apply that rule. In *Gauthier*, the plaintiff sustained injuries while using a snow thrower manufactured by defendant AMF and sued under a strict liability in tort theory based upon three different design defects. Gauthier had placed his hand inside the discharge chute of the running thrower in an attempt to unclog snow that got caught in the machine. To substantiate his defective design claims, Gauthier brought into court a 1984 model snow thrower to compare to the 1971 model he alleged

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73. *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985). This case involved a suit by an employee injured in the explosion of a portable air tank manufactured by defendant. Plaintiff alleged that the manufacturer was liable under both a negligence and a strict liability in tort theory and was permitted to introduce evidence of subsequent remedial measures taken by the manufacturer in connection with the strict liability count. Plaintiff prevailed and was awarded compensatory damages.

74. *Id.* at 411.

75. *Id.*

76. 788 F.2d 634 (9th Cir. 1986).

77. *Id.* at 635. Gauthier alleged failure to provide adequate warning, failure to incorporate "deadman" control devices, and failure to employ a discharge chute suit to prevent hands from contacting the motor while running. *Id.*

78. *Id.*
was the cause of his injuries. He thereby informed the jury of subsequent remedial design changes undertaken by the industry.\textsuperscript{79} The Ninth Circuit found that the United States District Court for the District of Montana had erred by allowing the plaintiff to introduce this highly prejudicial evidence and, thus, reversed and remanded the case for new trial.\textsuperscript{80}

As the court of appeals noted, "Rule 407 states that subsequent remedial measures are ‘not admissible to prove negligence or culpable conduct in connection with the event.’ The question . . . is whether conduct that results in strict liability should be considered ‘culpable conduct’ under the rule."\textsuperscript{81} Gauthier, in contrast to Ault and Beck, answered this question in the affirmative. The court of appeals recognized that while Ault found the public policy considerations of Federal Rules of Evidence 407 inapplicable in strict product liability cases, "most Circuits have come to the opposite conclusion and held that there is no practical difference between strict liability and negligence in design cases and the public policy rationale to encourage remedial measures remains the same."\textsuperscript{82} Gauthier, following the majority trend, held the "reasoning in those cases to be persuasive and adopt[ed] the position that Rule 407 applies to strict liability cases."\textsuperscript{83} Since Gauthier accepts the rationale proffered by other circuits, some of these decisions will be examined in depth below.

V. CRITICISM OF THE AULT/ALASKA APPROACH

Despite contrary assertions by the Alaska Supreme Court in Beck,\textsuperscript{84} the Ault/Alaska Rule 407 approach has not been followed in the majority of circuits and has often been the subject of extensive criticism. This section will highlight, by category, some of the flaws in the logic underlying the decision not to extend the general exclusionary policy to strict liability actions.

A. Strict Liability as "Culpable Conduct"

While the majority in Ault rejected the manufacturer’s argument that "culpable conduct" subsumed the conduct of a manufacturer held

\textsuperscript{79} Id. at 636.
\textsuperscript{80} Id.
\textsuperscript{81} Id. (citing FED. R. EVID. 407).
\textsuperscript{82} Id. at 637. See supra note 4.
\textsuperscript{83} Id. at 637.
\textsuperscript{84} Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 793-94 (Alaska 1981). The Beck court asserted that Alaska "Rule 407 is consistent with the majority of jurisdictions. It admits evidence that is highly probative of the existence of a defect, which is the essence of a strict liability action for a defective product." Id. However, the majority of jurisdictions do not use this approach. See supra note 4.
strictly liable, there is authority to the contrary. The legislative history and commentary to Rule 407 does not provide a definitive resolution to this question. It is certain, however, that Congress intended that courts rely on common law principles in filling the gaps left after enactment of the Federal Rules of Evidence.

Justice Clarke's dissent in *Ault* argued that "[c]ulpable conduct includes conduct breaching a legal duty. Because a plaintiff seeking recovery on a product liability theory must prove the defendant breached his legal duty not to place a defective product in the stream of commerce, [the exclusionary rule] is applicable to [strict liability actions]." Justice Clarke also derived support for the position from the definition of "culpable" in *Black's Law Dictionary.* In *Black's Law Dictionary,* "culpable" is defined as "blamable, censurable, involving the breach of a legal duty or the commission of fault. That which is deserving of moral blame." Thus, the definition of "culpable" embraces both moral fault and the breach of a legal duty.

Strict liability is premised on the theory that a manufacturer has a legal duty to prevent a defect capable of causing injury. As the Restatement (Second) of Torts explains, "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. . . ." Under a strict liability theory, it is a breach of duty to manufacture a defective, unreasonably dangerous product. Since an excellent argument can thus be made that conduct for which a manufacturer is strictly liable can be deemed culpable conduct within the meaning of Federal Rules of Evidence 407, "the result should be no different [in strict liability or negligence] on policy grounds as long as strict liability is not distinguishable on some other ground."

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85. See *supra* notes 37-38 and accompanying text.
86. Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) (citing Werner v. Upjohn Co., Inc., 628 F.2d 848, 856 (4th Cir. 1980); S. SALTSBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 411-13 (1975)).
87. *Ault*, 528 P.2d at 1155 (Clarke, J., dissenting).
88. *Id.* As Justice Clarke noted, while the definition of culpable "connotes moral blameworthiness or moral fault . . . the definition is not restricted to the latter concept, and clearly includes legal blameworthiness and legal fault." *Id.*
89. BLACK'S LAW DICTIONARY 341 (5th ed. 1979). This definition explicitly substantiates defendant's claim in *Ault* that "culpable" encompasses morally blameworthy conduct, which claim was summarily dismissed by the court. See *supra* notes 37-38 and accompanying text.
B. Differences Between Strict Liability and Negligence Are Irrelevant for Purposes of Policy Goals of Rule 407

As Gauthier noted,93 there is substantial authority94 supporting the proposition that the differences between an action premised on strict liability in tort and one sounding in negligence are insignificant in terms of the policy of Rule 407, Ault or Beck notwithstanding. In Flaminio v. Honda Motor Co., Ltd.,95 the Seventh Circuit explored the differences between negligence and strict products liability actions. The plaintiff in Flaminio was rendered a paraplegic after he was involved in an accident while riding on his new motorcycle manufactured by defendant Honda Motor Co.96 He alleged that the accident was caused by the defective design of the motorcycle, or alternatively, from the manufacturer's failure to warn of certain dangerous propensities of the motorcycle.97 The trial court found the plaintiff negligent and thus seventy percent responsible for the accident himself.98 Plaintiff appealed this decision and charged that the trial court had erred in failing to give a strict liability instruction and that Federal Rules of Evidence 407 was inapplicable to such strict products liability actions.99 In reaching the merits, the Seventh Circuit considered the distinctions between strict liability and negligence. While acknowledging that certain differences existed between the two types of actions, Judge Posner's opinion for the court found them irrelevant for the purposes of that particular action. He specifically noted the similarity between defect in design100 and negligence suits:

Strict liability is something of a misnomer in products cases. There is liability only if a product is defective or unreasonably dangerous, and the concepts of "defect" and "unreasonableness" bring into play factors of cost and risk similar to those that determine negligence, an objective standard that is independent of what the particular defendant knew or could have done. . . . As one court said recently, "in a defective design case, there is no practical difference

93. Gauthier, 788 F.2d at 637.
95. 733 F.2d 463 (7th Cir. 1984).
96. Id. at 465.
97. Id.
98. Id.
99. Id. at 467-68.
100. Both Beck, supra note 63, and Ault, supra note 35, involved allegations of design defect. These courts evidently came to a conclusion opposite that reached by Judge Posner.
between strict liability and negligence. The test for an 'unreasona-
bly dangerous' condition is equivalent to a negligence standard of
reasonableness." 101

Thus, the court held that the trial judge's failure to give a strict liabil-
ity instruction was unlikely to constitute reversible error. 102

While Flaminio may oversimplify somewhat the distinction be-
tween products liability actions sounding in negligence and those
under a strict liability theory, as the Second Circuit noted in Cann v.
Ford Motor Co., 103 "no distinction between the two (negligence and
strict products liability causes of action) justifies the admission of evi-
dence of subsequent remedial measures in strict products liability
actions." 104

The differences between the two sorts of actions are not important
for the purposes of Rule 407 and the policy goals it is designed to
further. The majority of circuits applying the rule to strict liability are
correct. 105 Rule 407 was enacted so that manufacturers would not be
deterred from undertaking subsequent repairs or improvements on
their product. If this reasoning is equally applicable to strict products
liability actions, then the policy behind Rule 407 would be thwarted
by permitting plaintiffs suing in strict liability to introduce such
evidence. 106

In Ault, the California Supreme Court based its holding primarily
on the supposition that "it is manifestly unrealistic to suggest that
such a producer will forego making improvements in its product, and
risk innumerable additional law suits and the attendant adverse effect
upon its public image, simply because evidence of adoption of such
improvements may be admitted in an action founded on strict liability
for recovery on an injury that preceded the improvement." 107 Both
the commentary to Alaska Rule 407 108 and the Alaska Supreme
Court's holding in Beck 109 explicitly adopt this assumption.

101. Flaminio, 733 F.2d at 467 (citing Birchfield v. International Harvester Co.,
726 F.2d 1131, 1139 (6th Cir. 1984) (citation omitted)).
102. Id.; see also Bolm v. Triumph Corp., 422 N.Y.S.2d 969, 973-74 (1969) (hold-
ing that Federal Rules of Evidence 407 applied to strict liability defect in design cases
because the standard in such cases is essentially the same as the reasonable man negli-
gence standard).
103. 658 F.2d 54 (2d Cir. 1981).
104. Id. at 60.
105. See supra note 4.
106. See Werner v. Upjohn Co., Inc., 628 F.2d 848, 860 (4th Cir. 1980), cert. de-
nied, 449 U.S. 1080 (1981). The Fourth Circuit noted, "to find such an exception
would subvert the policy goals . . . of . . . rule 407. . . ." Id.
107. Ault, 528 P.2d 1152; see supra notes 42-43 and accompanying text.
108. See supra note 32.
109. See supra notes 62-72 and accompanying text.
While the Ault court justifies its holding on this assumption, "the Ault court offers no basis for distinguishing between the two theories." In Cann v. Ford Motor Co., the Second Circuit rejected the California Supreme Court's attempt to distinguish the applicability of the public policy goals behind the exclusionary rule in negligence and in strict liability actions. The plaintiffs in Cann sued Ford Motor Company for injuries sustained when their Ford-manufactured car, which Mr. Cann had put in "park" and left running, shifted suddenly into reverse, causing injury to Mrs. Cann. On appeal, the plaintiffs alleged that the trial court had erred in excluding evidence they sought to introduce concerning subsequent remedial measures undertaken by Ford. The Second Circuit found the policy considerations justifying the exclusionary rule of Federal Rules of Evidence 407 equally applicable in strict liability actions, notwithstanding the focus on the defendant's conduct in negligence actions and the exclusive concern with the product in strict liability. The different focus certainly did not warrant a variant application of the policy goals of Rule 407 to strict liability and negligence. As the Second Circuit noted:

"The defendant must pay the judgment in both situations, regardless of where the jury's attention is focused when they found against him. Since the policy underlying Rule 407 not to discourage persons from taking remedial measures is relevant to defendants sued under either theory, we do not see the significance of the distinction. A potential defendant must be equally concerned regardless of the theoretical rubric . . . ."

In Werner v. Upjohn Co., Inc., the Fourth Circuit questioned the validity of a distinction between the applicability of Rule 407 to negligence and strict liability in terms of public policy:

"It is difficult to understand why this policy should apply any differently where the complaint is based on strict liability as well as negligence. From a defendant's point of view it is the fact that the evidence may be used against him which will inhibit subsequent repairs or improvements. It makes no difference to the defendant on what theory the evidence is admitted; his inclination to make subsequent improvements will be similarly repressed. The reasoning behind this asserted distinction we believe to be hypertechnical, for the suit is against the manufacturer, not against the product."

Similarly, the Fifth Circuit has noted that the "assumption in [Rule 407] that it might have a deterrent effect is not demonstrably

110. Werner, 628 F.2d at 858.
111. Cann, 658 F.2d 54, 56 (2d Cir. 1981). Plaintiff claimed that the gearshift was constructed in such a manner that the car could appear to be in "park" even if not.
112. Id. at 57-58.
113. Id. at 60.
114. Id. (emphasis in original).
inapplicable to manufacturers upon whom strict liability is imposed."\textsuperscript{116} \textit{Flaminio v. Honda Motor Co., Ltd.} also held that since policy considerations underlying Rule 407 are as pertinent in strict liability as in negligence actions, a strict liability plaintiff should be precluded from introducing evidence of subsequent remedial measures.\textsuperscript{117} Judge Posner recognizes that in certain strict liability cases, the application of Rule 407 would be academic. The defendant would have no incentive, regardless of Rule 407, to take remedial measures because the accident was unavoidable.\textsuperscript{118} However, "especially in a product case, the accident may have been readily avoidable either by eliminating some defect or by warning the consumer of some inherent danger, and in such a case failure to apply Rule 407 might deter subsequent remedial measures just as much as in a negligence case."\textsuperscript{119} Thus, since a plaintiff could make the same use of the evidence in a strict products liability action as in a negligence action, and since it will be used against the defendant manufacturer who must pay the judgment in both types of cases, from a policy standpoint, no valid reason exists for according differential treatment to the two types of actions. The \textit{Ault}/Alaska approach really does not substantiate its view that strict liability and negligence ought to be treated differently from the standpoint of public policy. While both \textit{Ault}\textsuperscript{120} and \textit{Herndon}\textsuperscript{121} questioned the assumption that the admission of such evidence in fact would dissuade manufacturers from making such repairs, courts are increasingly questioning the validity of the distinction between negligence and strict liability for the purposes of Rule 407 and choosing not to risk dissuading manufacturers from taking subsequent remedial measures.

C. Lack of Relevance of Subsequent Remedial Measures

The commentary to both Alaska Rules of Evidence 407 and Federal Rule 407 provides that evidence of subsequent remedial measures does not constitute an admission of prior fault, since such conduct (the taking of remedial measures) is equally consistent with injury by accident or through the plaintiff's own fault.\textsuperscript{122} Since subsequent remedial measures are not necessarily indicative of prior fault, such evidence

\begin{itemize}
  \item \textsuperscript{116} Grenada Steel Indus., Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883, 887 (5th Cir. 1983). However, the \textit{Grenada} decision was based primarily on a relevancy rationale. \textit{See infra} text accompanying notes 130-32.
  \item \textsuperscript{117} \textit{Flaminio}, 733 F.2d at 469-70.
  \item \textsuperscript{118} \textit{Id.} at 469.
  \item \textsuperscript{119} \textit{Id.} at 470.
  \item \textsuperscript{120} \textit{See supra} notes 42-43 and accompanying text.
  \item \textsuperscript{121} \textit{See supra} notes 51-54 and accompanying text.
  \item \textsuperscript{122} \textit{See supra} notes 11-14, 26 and accompanying text.
\end{itemize}
could be excluded on the ground that it is not relevant. The Fourth Circuit held in *Werner v. Upjohn Co., Inc.* that the lack of probative value of evidence concerning subsequent remedial measures justified excluding such evidence. The court assumed that:

the product [was] defective, and thus overlook[ed] the situation where the product is not defective but could be made better. The manufacturer who undertakes precautionary measures in this setting will face the risk of liability for an injury caused by an earlier nondefective version of the product based on evidence of his subsequent act which made the product safer but in no way supports an inference that the initial version of the product was defective.

The Fifth Circuit also considered at length the potential relevance of subsequent remedial measures in strict products liability actions in *Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc.* Grenada Steel sued Alabama Oxygen following the occurrence of a fire in one of Grenada Steel's plants. Plaintiffs charged that a gas leak caused the fire and that the leak resulted from the defective condition of a valve on the cylinder in which defendant had delivered the gas to plaintiffs. Plaintiffs had attempted to prove that the valve was defective through the introduction of evidence that the design of the valve in question subsequently had been altered. The Fifth Circuit believed that the policy behind Federal Rule 407 was applicable in strict products liability actions. However, its decision to exclude the evidence was based chiefly "on the proposition that evidence of subsequent repairs or changes has little relevance to whether the product in question was defective at some previous time."

The *Grenada* court was concerned that members of the legal profession were not particularly well suited to explore the reasons why a manufacturer made a change in a product and, thus, to evaluate whether such a change indicated prior wrongdoing:

A priori judgments concerning why manufacturers do or do not alter their products, made by such dubious experts as judges, lawyers, and law professors, suffer from excessive reliance on logical deduction and surmise without the benefit of evidence of industry practice.

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123. *FED. R. EVID.* 401, 402. *See supra* note 21. Similarly, Alaska Rules of Evidence 401 provides: "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." Alaska Rules of Evidence 402 provides for the exclusion of any evidence that is not relevant. *See supra* note 71.


125. 695 F.2d 883 (5th Cir. 1983).

126. *Id.* at 885.

127. *Id.*

128. *Id.*

129. *See supra* note 116 and accompanying text.

130. 695 F.2d at 887.
or economic factors. It seems to us, with no greater expertise than like-trained lawyers and judges, that changes in design or in manufacturing process might be made after an accident for a number of different reasons: simply to avoid another injury, as a sort of admission of error, because a better way has been discovered, or to implement an idea or plan conceived before the accident. Therefore, the court deemed that admission of evidence of subsequent changes in design in the valve was erroneous.

The relevancy rationale articulated in Grenada Steel has not been uniformly accepted. The commentary to both Federal Rules of Evidence 407 and Alaska Rules of Evidence 407 notes that while subsequent remedial measures are not admissions of prior misconduct, under a liberal theory of relevancy, this ground alone would not support exclusion because the inference is still permissible. However, even if deemed relevant, evidence could still be excluded under a balancing test in which the probativity of the evidence is weighed against the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time under Rule 403. Thus, even if one were to reject the rationale proffered in Werner and admit the evidence on the grounds that it is probative and thus relevant, the balancing test still provides a mechanism whereby the admission of the evidence could be challenged.

In Beck, the Alaska Supreme Court rejected the defendant manufacturer's argument that evidence of later design changes was irrelevant and therefore inadmissible. The defendant manufacturer,  

131. Id. at 887-88; but see Herndon, supra notes 44-55 and accompanying text.
132. 695 F.2d at 888.
133. See, e.g., Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1322, discussed supra at notes 44-55. Herndon stated, "[t]he Fifth Circuit's relevancy rationale . . . is unconvincing. Under Rule 401, evidence is 'relevant' if it has any tendency to make the existence of a fact more or less probable than it would be without the evidence. Evidence of subsequent repairs is thus relevant because a possible inference the jury can draw is that the product at issue was defective before defendant implemented the remedial measures." Id. at 1328.
134. ALASKA R. EVID. 407 advisory committee's note; FED. R. EVID. 407.
135. FED. R. EVID. 403. See supra note 22. Similarly, Alaska Rules of Evidence 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ALASKA R. EVID. 403.
136. Beck, 624 P.2d 790, 793. Defendant had attempted to rely on the court's statement in footnote 52 of Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979), that design defects were to be "measured by the knowledge and information which existed when the product left the manufacturer's hands." Id. The court dismissed this earlier pronouncement (of footnote 52) as "dictum." Id. Accordingly, "its meaning should be limited to the principle that a substantial change in the product after it leaves the manufacturer's hands will ordinarily defeat a claim based on strict tort liability." Id.
however, claimed that the criteria of Alaska Rule of Evidence 403 provided an alternative ground for the exclusion of the evidence, since the evidence was more prejudicial than probative.\textsuperscript{137} The supreme court addressed this issue in a footnote, stating that the "[e]xclusion of prejudicial evidence under Rule 403 is discretionary with the trial court."\textsuperscript{138} Since no specific evidence had been proffered, the court found it "impossible" to rule whether there had been an abuse of discretion.\textsuperscript{139} The Alaska Supreme Court thus did not preclude the possibility that evidence of subsequent remedial measures could be challenged in the future for its prejudicial impact.

D. Prejudicial Impact of Evidence of Subsequent Remedial Measures and Dangers of Forum Shopping

There is abundant authority that the prejudicial nature of evidence concerning subsequent remedial measures furnishes an independent ground for its exclusion.\textsuperscript{140} The commentary to Alaska Rules of Evidence 407 and Federal Rules of Evidence 407 implicitly recognizes that although the conduct does not in fact constitute an admission, juries will be likely to construe the evidence as such and there is thus a (rebuttable) presumption that the evidence should be excluded.\textsuperscript{141} Moreover, as the Seventh Circuit aptly reasoned in Flaminio, "[i]t is only because juries are believed to overreact to evidence of subsequent remedial measures that the admissibility of such evidence could deter defendants from taking such measures."\textsuperscript{142} Thus, in a sense, the whole policy of Rule 407 flows from the perceived prejudicial impact of such evidence.

The Alaska rule's prejudicial impact on defendants creates another related problem. Because discrepancy between the Ninth Circuit and the Alaska rule could effect the outcome of a dispute, plaintiffs are likely to engage in forum shopping. While state substantive law applies in diversity suits,\textsuperscript{143} in matters of procedure, such as the admissibility of evidence, federal rules apply.\textsuperscript{144} Federal Rules of

\begin{itemize}
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id. at n.6.
\item \textsuperscript{139} Id.
\item \textsuperscript{141} See supra notes 13-14, 27 and accompanying text.
\item \textsuperscript{142} Flaminio, 733 F.2d at 471.
\item \textsuperscript{143} Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
\item \textsuperscript{144} Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 885 (5th Cir. 1983). See also Flaminio v. Honda Motor Co., 733 F.2d at 471-72; but see Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984), cert. denied, 469 U.S. 853 (1984) (holding that "when state courts have interpreted Rule
Evidence 1101 explicitly states that the Federal Rules of Evidence are to be applied in all federal courts. *Erie Railroad Co. v. Tompkins* held that, while the federal courts must apply state substantive law in diversity actions, federal procedural law would control.\(^{145}\) In *Hanna v. Plumer*\(^{146}\) the Court noted that "the twin aims of the Erie Rule [were]: discouragement of forum shopping and avoidance of inequitable administration of the laws."\(^{147}\) Since Alaska Rules of Evidence 407 allows plaintiffs to introduce evidence which can be quite damaging to defendants, plaintiffs will almost certainly favor suing in state courts, while defendants will want to remove to federal court, in order to take advantage of the Ninth Circuit construction of Federal Rule 407 as applicable in strict products liability actions. As noted above, evidence of subsequent remedial measures can have a very prejudicial impact on defendants. Conversely, it will be to a plaintiff's advantage to sue in a jurisdiction where the evidence is deemed admissible. Since the Alaska rule of evidence directly conflicts with the exclusionary interpretation of Rule 407 in the Ninth Circuit, the potential of parties engaging in forum shopping remains high as long as the discrepancy exists.

VI. CONCLUSION

Alaska Rules of Evidence 407 conflicts directly with the interpretation of Federal Rules of Evidence 407 followed in the majority of the federal courts of appeals, including the Ninth Circuit. The rationale with which Alaska has attempted to draw a distinction between negligence and strict products liability actions is flawed and is not supported by the policy underlying Rule 407. The policy of the rule will be severely undermined if Alaska continues to admit evidence of subsequent remedial measures in strict liability actions. The differences between negligence and strict liability are insignificant, especially in a defective design action, in terms of the policy of Rule 407. Moreover, with application of the Alaska rule, defendants are faced with prejudice as a matter of course in Alaska state courts. In view of the conflict of the Alaska rule with the Ninth Circuit as well as the majority of federal jurisdictions, and the dangers of forum shopping which arise therefrom, Alaska should fall in line with the majority of state and

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\(^{145}\) 304 U.S. 64 (1938).

\(^{146}\) 380 U.S. 460 (1965).

\(^{147}\) *Id.* at 468.
federal jurisdictions and follow an exclusionary policy in strict liability actions as well as those actions sounding in negligence.

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