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Admissibility of Subsequent Remedial Measures Evidence in Diversity Actions Based on Strict Products Liability

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ADMISSIBILITY OF SUBSEQUENT REMEDIAL MEASURES EVIDENCE IN DIVERSITY ACTIONS BASED ON STRICT PRODUCTS LIABILITY

INTRODUCTION

Federal Rule of Evidence 407 (Rule 407)[1] represents a policy decision to promote post-accident repairs[2] by excluding evidence of subsequent remedial measures[3] when offered to prove negligence or culpable conduct.[4] To a lesser extent,[5] the rule is premised on the procedural judg-

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1. Fed. R. Evid. 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.

For a general discussion, see 2 D. Louisell & C. Mueller, Federal Evidence §§ 163-165 (1978); C. McCormick, McCormick on Evidence § 275 (3d ed. 1984); 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶¶ 407[01]-[02] (1982); 2 J. Wigmore, Evidence in Trials at Common Law § 283 (Chadbourn rev. ed. 1979).

2. Fed. R. Evid. 407 advisory committee note; *see* Moe v. Avions Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir.), *cert. denied*, 105 S. Ct. 176 (1984); Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974); Ault v. International Harvester Co., 13 Cal. 3d 113, 119, 528 P.2d 1148, 1151, 117 Cal. Rptr. 812, 815 (1975) (en banc); C. McCormick, *supra* note 1, § 275, at 815; 2 J. Weinstein & M. Berger, *supra* note 1, ¶ 407[01], at 407-7; J. Wigmore, *supra* note 1, § 283, at 174-75; *cf.* 2 D. Louisell & C. Mueller, *supra* note 1, § 164, at 241 ("[T]here may well be another, largely unstated, policy basis behind the Rule. It appears unseemly, and it may even be unfair, to allow, as evidence offered against a person over his objection, proof that he reacted sensibly and constructively to the fact that an accident occured.").

3. "Subsequent remedial measures" include any actions, "which, if taken previously, would have made the [accident] less likely to occur." Fed. R. Evid. 407; *see, e.g.*, Columbia & P.S.R.R. v. Hawthorne, 144 U.S. 202, 203, 208 (1892) (installation of safety devices); Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1324-25 (10th Cir. 1983) (modification of equipment), *cert. denied*, 104 S. Ct. 2170 (1984); DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 227-28 (8th Cir. 1983) (change in package insert); SEC v. Geon Indus., 531 F.2d 39, 52 (2d Cir. 1976) (change in regulations); Smyth v. Upjohn Co., 529 F.2d 803, 803-04 (2d Cir. 1975) (change in warning); Eastern Air Lines, Inc. v. American Cyanamid Co., 321 F.2d 683, 691 (5th Cir. 1963) (recommendation to abate nuisance); Boeing Airplane Co. v. Brown, 291 F.2d 310, 315-16 (9th Cir. 1961) (change in design); Steele v. Wiedemann Mach. Co., 280 F.2d 380, 382 (3d Cir. 1960) (purchase order of equipment for subsequent repairs); Limbeck v. Interstate Power Co., 69 F.2d 249, 252 (8th Cir. 1934) (change in construction); Armour & Co. v. Skene, 153 F. 241, 244-45 (1st Cir.) (dismissal of employee), *cert. denied*, 206 U.S. 562 (1907).

4. Rule 407 does not bar subsequent remedial measures evidence when offered for a purpose other than proving negligence or culpable conduct if the other purpose is controverted. *See* Fed. R. Evid. 407. Subsequent remedial measures evidence has been admitted as proof of defendant's ownership or control of the premises, duty to repair, possibility or feasibility of precautionary measures, and of facts contradicting those testified to by the adversary's witness. *See* C. McCormick, *supra* note 1, § 275, at 816-17.

Subsequent remedial measures made by a third party are admissible against a defendant. *See* Farner v. Paccar, Inc., 562 F.2d 518, 528 n.20 (8th Cir. 1977) (exclusionary policy does not apply when subsequent repairs made by third persons); Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974) (same). Evidence of subsequent remedial

ment that such evidence is substantially more confusing to the jury than it is relevant in determining whether negligence or culpable conduct exists.[6] Similar or identical rules are in effect in every state[7] except Maine.[8] Although these rules apply in negligence actions,[9] state courts disagree as to whether application in strict products liability[10] furthers the underly-

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measures made by one defendant has been held admissible against another defendant. *See* Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1028, 1032 (7th Cir. 1969) (policy of encouraging repairs does not apply when evidence is admitted against another defendant).

5. Flaminio v. Honda Motor Co., 733 F.2d 463, 472 (7th Cir. 1984); D.L. by Friederichs v. Huebner, 110 Wis. 2d 581, 605, 329 N.W.2d 890, 901 (1983); 2 D. Louisell & C. Mueller, *supra* note 1, § 164, at 239; *see* Fed. R. Evid. 407 advisory committee note ("The conduct is not in fact an admission . . . . The other, and more impressive, ground for exclusion rests on a social policy . . . .").

6. *See* Fed. R. Evid. 403 advisory committee note; R. Lempert & S. Saltzburg, A Modern Approach to Evidence 192 (2d ed. 1982).

7. Thirty states have formally enacted such rules. *See* Ark. Stat. Ann. § 28-1001 (Rule 407) (1979); Cal. Evid. Code § 1151 (West 1966); Fla. Stat. § 90.407 (1978); Kan. Stat. Ann. § 60-451 (1983); Neb. Rev. Stat. § 27-407 (1979); Nev. Rev. Stat. § 48.095 (1979); Okla. Stat. Ann. tit. 12, § 2407 (West 1980); Or. Rev. Stat. § 40.185 (Rule 407) (1981); S.D. Codified Laws Ann. § 19-12-9 (1979); Va. Code § 8.01-418.1 (Supp. 1984); Alaska R. Evid. 407; Ariz. R. Evid. 407; Colo. R. Evid. 407; Del. Unif. R. Evid. 407; Hawaii R. Evid. 407; Iowa R. Evid. 407; Mich. R. Evid. 407; Minn. R. Evid. 407; Mont. R. Evid. 407; N.J. R. Evid. 51; N.M. R. Evid. 407; N.C. R. Evid. 407; N.D. R. Evid. 407; Ohio R. Evid. 407; Tex. R. Evid. 407; Utah R. Evid. 51; Vt. R. Evid. 407; Wash. R. Evid. 407; Wis. R. Evid. 904.07; Wyo. R. Evid. 407.

The other states apply the common law. *See, e.g.*, Fine v. Giant Food Stores, Inc., 163 F. Supp. 231, 236 (D.D.C. 1958), *rev'd on other grounds*, 269 F.2d 542 (D.C. Cir. 1959); Dixie Elec. Co. v. Maggio, 294 Ala. 411, 415, 318 So.2d 274, 277 (1975); Shegda v. Hartford-Conn. Trust Co., 131 Conn. 186, 188, 38 A.2d 668, 669 (1944); Atlantic Coast Line R.R. v. Sellars, 89 Ga. App. 293, 297, 79 S.E.2d 35, 39 (1953); Alsup v. Saratoga Hotel, 71 Idaho 229, 236-37, 229 P.2d 985, 990 (1951); Kyowski v. Burns, 70 Ill. App. 3d 1009, 1016, 388 N.E.2d 770, 775 (1979); Cincinnati, H. & D. Ry. Co. v. Armuth, 180 Ind. 673, 685-86, 103 N.E. 738, 742-43 (1913); Chesapeake & O. Ry. Co. v. Jenkins, 312 Ky. 470, 474, 227 S.W.2d 906, 909 (1950); Armstrong v. State Farm Fire & Casualty Co., 423 So. 2d 79, 82 (La. App. 1982); Long v. Joestlein, 193 Md. 211, 220, 66 A.2d 407, 411 (1949); National Laundry Co. v. City of Newton, 300 Mass. 126, 127, 14 N.E.2d 108, 109 (1938); Chicago Mill & Lumber Co. v. Carter, 209 Miss. 71, 77-78, 45 So. 2d 854, 855 (1950); Steoppelman v. Hays-Fendler Constr. Co., 437 S.W.2d 143, 152 (Mo. Ct. App. 1968); Panagoulis v. Philip Morris & Co., 95 N.H. 524, 525, 68 A.2d 672, 673-74 (1949); Danielson v. City of New York, 283 A.D. 1019, 1019, 131 N.Y.S.2d 136, 138 (1954) (per curiam); Pressler v. City of Pittsburgh, 419 Pa. 440, 443-44, 214 A.2d 616, 618-19 (1965); McGarr v. National & Providence Worsted Mills, 24 R.I. 447, 457, 53 A.320, 324 (1902); Maus v. Pickens Sentinel Co., 258 S.C. 6, 12, 186 S.E.2d 809, 811 (1972); Belote v. Memphis Dev. Co., 51 Tenn. App. 423, 369 S.W.2d 97, 106 (1962); Redman v. Community Hotel Corp., 138 W. Va. 456, 469-70, 76 S.E.2d 759, 766 (1953).

8. Me. R. Evid. 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 admissible." The Maine legislature found Federal Rule 407's policy rationale unpersuasive and therefore decided to admit subsequent remedial measures evidence unless exclusion under Rule 403 is proper. *See* Me. R. Evid. 407 advisers' note, *quoted in* 2 Wigmore, *supra* note 1, § 283, at 183.

9. But see *supra* note 7.

10. To establish strict liability in tort, a plaintiff must prove that the defendant marketed a defective—unreasonably dangerous—product. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on Torts § 99, at 695 (5th ed. 1984) [hereinafter

ing social policy.[11]

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cited as Prosser & Keeton]. A product can be unreasonably dangerous due to a manufacturing defect, design defect or the manufacturer's failure to provide adequate warnings for use of a product. *See id.*

A manufacturing defect exists when a product leaves a defendant's possession in an obviously flawed or unintended condition. This action bears no resemblance to negligence because the condition of the product, not the defendant's conduct, is at issue. *See id.*

Depending on the jurisdiction, a plaintiff, in order to prove a design defect, must show either that the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer," *id.* at 698, or that "the magnitude of the danger outweighs the utility of the product," *id.* at 699. Although the inquiry focuses on the condition of the product, the defendant's conduct is at issue in much the same way as it is in negligence actions because a variation of the reasonable person standard is applied. *See id.* But see *infra* note 70 and accompanying text.

When a defendant fails to adequately warn users of a risk related to the product, the inquiry is almost identical to that in negligence because the plaintiff must prove that "the defendant designer knew or should have known in the exercise of ordinary care of the risk or hazard about which he failed to warn." *Id.* at 697.

Courts typically determine whether subsequent remedial measures are admissible in strict products liability without distinguishing the three theories. The Eighth Circuit, however, admits evidence of subsequent remedial measures in strict products liability, *see* Unterburger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980), unless the action is based on the manufacturer's failure to provide adequate warnings, *see* DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 228-29 (8th Cir. 1983). New York admits subsequent repairs evidence in strict products liability actions based on a manufacturing defect, *see* Caprara v. Chrysler Corp., 52 N.Y.2d 114, 125-26, 417 N.E.2d 545, 551, 436 N.Y.S.2d 251, 256-57 (1981), but excludes such evidence in a design defect action, *see* Rainbow v. Albert Elia Bldg. Co., 79 A.D.2d 287, 292-94, 436 N.Y.S.2d 480, 484-85 (1981), *aff'd mem.*, 56 N.Y.2d 550, 434 N.E.2d 1345, 449 N.Y.S.2d 967 (1982).

11. A majority of state courts holds that the rule does not apply to strict products liability. Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir.), *cert. denied*, 105 S. Ct. 176 (1984); Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1333 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 2170 (1984); *see, e.g.*, Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 794 (Alaska 1981) (exclusionary policy inapplicable in strict products liability); Burke v. Illinois Power Co., 57 Ill. App. 3d 498, 514, 373 N.E.2d 1354, 1369 (1978) (post-occurrence changes admissible in strict products liability action). Many state courts follow the reasoning set forth in the landmark case of Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974):

> 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 . . .
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> . . . [N]ot only is the policy of encouraging repairs and improvements of doubtful validity in an action for strict liability since it is in the economic self interest of a manufacturer to improve and repair defective products, but . . . the application of the rule would be contrary to the public policy of encouraging the distributor of mass-produced goods to market safer products.

Id. at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816; *accord* Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 794 (Alaska 1981); Good v. A.B. Chance Co., 39 Colo. App. 70, 78-79, 565 P.2d 217, 224 (1977); Shaffer v. Honeywell, Inc., 249 N.W.2d 251, 257 n.7 (S.D. 1976); Chart v. General Motors Corp., 80 Wis. 2d 91, 101-02, 258 N.W.2d 680, 683-84 (1977); Caldwell v. Yamaha Motor Co., 648 P.2d 519, 523-25 (Wyo. 1982).

Several states hold that the exclusionary policy applies to strict liability. *See, e.g.*, Hall-

Erie Railroad Co. v. Tompkins[12] established that federal courts may apply federal procedural law but must apply state substantive law in diversity actions.[13] *Hanna v. Plumer*[14] dictates that when there is a direct

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mark v. Allied Prods. Corp., 132 Ariz. 434, 440-41, 646 P.2d 319, 325-26 (1982); Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 65-66, 388 N.E.2d 541, 561-62 (1979); Smith v. E R Squibb & Sons, Inc., 405 Mich. 79, 91-93, 273 N.W.2d 476, 480-81 (1979); Price v. Buckingham Mfg., 110 N.J. Super. 462, 464-65, 266 A.2d 140, 141 (App. Div. 1970) (per curiam); LaMonica v. Outboard Marine Corp., 48 Ohio App. 2d 43, 44-45, 355 N.E.2d 533, 535 (1976).

12. 304 U.S. 64 (1938).

13. *See id.* at 78. The *Erie* decision was based on interpretation of § 34 of the Federal Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C. § 1652 (1982)), commonly referred to as the Rules of Decision Act, which provided: "[T]he laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply." *Id.*

In Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), the Supreme Court held that the Rules of Decision Act referred only to state statutory law; therefore, federal courts were free to decide what the common law of a state was or should be. *See id.* at 17-18. *Erie* held that the *Swift* decision rendered impossible equal protection of the laws because it made substantive rights vary according to whether enforcement was sought in the state or federal court. By declaring that federal courts are without power to set state substantive law, the Court overruled *Swift* and established the modern interpretation of the Rules of Decision Act:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State. . . . And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie, 304 U.S. at 78.

The *Erie* doctrine evolved substantially as courts struggled to define the distinction between substantive and procedural law. However, five decades of *Erie* interpretation have failed to provide courts with adequate guidelines. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 468, 471, 473-74 (1965) (conflict between a federal and state rule must be resolved in favor of the federal rule; discouragement of forum shopping and avoidance of inequitable administration of the laws are principal concerns); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536-38 (1958) (courts should inquire whether a rule is "merely a form and mode of enforcing [a right] and not a rule intended to be bound up with the definition of the rights and obligations of the parties" and should balance federal policy interests against those of the state) (citations omitted); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) ("[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court."); Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 747 (2d ed. 1973) (courts should distinguish "those rules of law which characteristically and reasonably affect people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive"); Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 725 (1974) (a substantive rule is "a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process").

14. 380 U.S. 460 (1965).

conflict between state law and the express language of a federal rule, the federal rule controls.[15] If there is no direct conflict, however, the court must look to the policies underlying *Erie* to determine whether state or federal law governs.[16] "Discouragement of forum shopping and avoidance of inequitable administration of the laws" are principal concerns.[17] Nonetheless, federal courts, with few exceptions, routinely ignore the *Erie* question and determine, as a matter of federal law, the applicability of Rule 407 in strict products liability actions.[18] Only two circuits have

15. *See id.* at 471-74. The Court further stated:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. at 471.

Unlike the Federal Rules of Civil Procedure, which were promulgated by the Supreme Court, the Federal Rules of Evidence are not subject to either the Enabling Act or The Rules of Decision Act because the rules were enacted by Congress. *See* C. Wright, Law of Federal Courts § 93, at 621 (4th ed. 1983). Courts are therefore bound only by the Constitution when deciding whether a Federal Rule of Evidence is valid.

> [However,] neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

Hanna, 380 U.S. at 471-72. For an excellent discussion of the constitutional origins of the *Erie* doctrine, see C. Wright, *supra*, § 56, at 359-64.

Hanna is the only Supreme Court case that involved a direct collision between a state and federal rule. The Court viewed the clash between Fed. R. Civ. P. 4(d)(1), authorizing substitute service of process, and the state statute requiring in-hand service as "unavoidable [because the federal rule] says—implicitly, but with unmistakable clarity—that in-hand service is not required in federal courts." *Hanna*, 380 U.S. at 470. The Court stated, however, that in measuring a federal rule against the standards in the Enabling Act and the Constitution, a court "need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts." *Id.* at 473 (citation omitted).

16. Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980).

17. *See Hanna*, 380 U.S. at 468. But see *infra* note 85.

18. Flaminio v. Honda Motor Co., 733 F.2d 463, 470 (7th Cir. 1984); *see, e.g.*, Josephs v. Harris Corp., 677 F.2d 985, 991 (3d Cir. 1982) (Rule 407 applies to strict products liability); Unterburger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980) (Rule 407 does not apply to strict products liability); Roy v. Star Chopper Co., 584 F.2d 1124, 1134 (1st Cir. 1978) (Rule 407 applies to strict liability), *cert. denied*, 440 U.S. 916 (1979).

Although most states admit evidence of subsequent remedial measures in strict products liability actions, see *supra* note 11 and accompanying text, the majority of circuit courts have held that Rule 407 bars such evidence. *See, e.g.*, Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984); Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983); Hall v. American S.S. Co., 688 F.2d 1062, 1066-67 (6th Cir. 1982); Josephs v. Harris Corp., 677 F.2d 985, 990-91 (3d Cir. 1982); Cann v. Ford Motor Co., 658 F.2d 54, 59-60 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); Werner v. Upjohn Co., 628 F.2d 848, 855-57 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); Roy v. Star Chopper Co., 584 F.2d 1124, 1134 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979). Even in negligence actions, a conflict between the state and federal rule

addressed the *Erie* issue; they have reached different results.[19]

This Note presents varying methods of *Erie* analysis that consider both the social policy and relevance underpinnings of Rule 407 in the strict products liability context. Part I establishes that Rule 407 does not conflict with contrary state products liability law. It then demonstrates that a strict reading of *Hanna* dictates the application of state law in order to discourage forum shopping and inequitable administration of the law. Part II illustrates that even if *Hanna* permits a more probing examination of the *Erie* question, similar results will obtain. Under one approach, state interests in the application of its own law simply outweigh countervailing federal interests. Under a second approach, state law must control because Rule 407's underlying policy is intended to affect conduct outside the litigation. This Note concludes that the *Erie* doctrine requires deference to state policy decisions regarding admissibility of subsequent repairs evidence.

I. THE *HANNA* CONFLICT TEST

The *Hanna* conflict test establishes the presumptive validity of federal rules[20] when a federal rule is on point and is within the scope of the

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may occur in the First Circuit because Maine admits subsequent repairs evidence. See *supra* note 8.

19. In Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir.), *cert. denied*, 105 S. Ct. 176 (1984), plaintiffs, claiming both negligence and strict products liability, sought to introduce evidence of subsequent remedial measures, *see id.* at 920, 923. The Tenth Circuit held exclusion of subsequent remedial measures in a products liability action to be a matter of state policy:

> We hold that when such conflicts arise, because Rule 407 is based primarily on policy considerations rather than relevancy or truth seeking, the state rule controls because (a) there is no federal products liability law, (b) the elements and proof of a products liability action are governed by the law of the state where the injury occurred and these may, and do, for policy reasons, vary from state to state, and (c) an announced state rule in variance with Rule 407 is so closely tied to the substantive law to which it relates (product liability) that it must be applied in a diversity action in order to effect uniformity and to prevent forum shopping.

Id. at 932.

In Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984), the Seventh Circuit reached the opposite conclusion. Plaintiffs, in a products liability action, sought to introduce subsequent repairs evidence pursuant to the Wisconsin rule. The Seventh Circuit barred the evidence under Federal Rule 407. Judge Posner stated:

> Although Rule 407 has substantive consequences by virtue of affecting incentives to take safety measures after an accident occurs . . . . Rule 407 is not based on substantive considerations only. An important though not the primary reason for the rule was distrust of juries' ability to draw correct inferences from evidence of subsequent remedial measures. Although it was a mild distrust, as shown by the exceptions built into the rule, it is enough to establish the rule's constitutionality in diversity cases.

Id. at 471, 472.

20. *See* Wright, *Procedural Reform: Its Limitations and its Future*, 1 Ga. L. Rev. 563, 574 (1967) ("To borrow a phrase of Professor Degnan's, the implication of *Hanna* is not

Federal Rules Enabling Act,[21] thereby rendering *Erie* analysis unnecessary.[22] The Court reasoned that *Erie* is not a constraint on Congressional power to prescribe "housekeeping rules"[23] for the federal courts.[24] The *Hanna* formulation, therefore, although simplifying the inquiry for the courts,[25] has placed with the Rules' drafters a burden to ensure that federal rules are consonant with *Erie* principles.[26]

In enacting the Federal Rules of Evidence Congress was apparently acutely aware of the *Erie* problem.[27] Privileges, for example, were considered a facet of substantive state law.[28] Consequently, privileges were

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that the federal rules are valid because wise men made them, but because wise men thought carefully before making them.").

21. See *supra* note 15.

22. Hanna v. Plumer, 380 U.S. 460, 471 (1965); C. Wright, *supra* note 15, § 59, at 383.

23. "Housekeeping" or procedural rules are "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." Ely, *supra* note 13, at 724 (footnotes omitted). Examples include rules of judicial notice, hearsay, qualification of witnesses, expert and opinion testimony, authentication, and most aspects of relevancy. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 Colum. L. Rev. 353, 361-62 (1969).

24. *See Hanna*, 380 U.S. at 473 ("*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules."); *see also* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949) (*Erie* affects how "the federal court administers the state system of law in all except details related to its own conduct of business").

25. *See* C. Wright, The Law of Federal Courts § 59, at 276 (3d ed. 1976); Ely, *supra* note 13, at 717; *cf.* Walker v. Armco Steel Corp., 446 U.S. 740, 748 (1980) (when a federal rule applies, the sole question is whether the rule is within the scope of the Rules Enabling Act). Prior to *Hanna*, the Court, in Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958), sought to establish a more comprehensive analysis, which required inquiry into whether a rule is "merely a form and mode of enforcing the [right] and not a rule intended to be bound up with the definition of the rights and obligations of the parties." *Id.* at 536 (citation omitted). Crucial to this analysis was a balancing of federal policy interests in applying the federal rule with countervailing state interests in the application of its own rule. *See id.* at 537-38. See *infra* notes 52-53 and accompanying text. The *Byrd* Court held that the Seventh Amendment established a "strong federal policy" in favor of jury trials which outweighed the state interests in its contrary rule. *See id.* The *Byrd* approach became cumbersome, however, as federal courts struggled with this intricate balancing of interests. Ely, *supra* note 10, at 709.

26. Report of American Bar Association, Special Committee, Federal Rules of Procedure, 38 F.R.D. 95, 102-03 (1965); C. Wright, *supra* note 15, § 59, at 383; Wright, *supra* note 20, at 572; *see Hanna*, 380 U.S. at 471, 476 (Harlan, J., concurring).

27. *See* Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 105-08 (1962); Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives*, 122 U. Pa. L. Rev. 594, 595-602 (1974); *Separation of Powers and the Federal Rules of Evidence*, 26 Hast. L.J. 1059, 1060 (1975).

28. *See* Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555-56 n.2 (2d Cir. 1967); Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463, 466 (2d Cir. 1962); Palmer v. Fisher, 228 F.2d 603, 608 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956); 2 D. Louisell & C. Mueller, *supra* note 1, § 204, at 476; 2 J. Weinstein & M. Berger, *supra* note 1, ¶ 501[01], at 501-13.

expressly left to determination in accordance with state law.[29] Similarly, rules of competence,[30] presumptions[31] and relevance[32] defer to state law principles. Rule 407, which is not a typical "housekeeping rule,"[33] also

29. *See* Fed. R. Evid. 501. The Federal Rules of Evidence, when submitted to Congress, defined nine specific non-constitutional privileges approved by the Supreme Court and the Advisory Committee, *see* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 234-58 (1973) (deleted rules 502-510), as well as four constitutional privileges stated in Rule 501, *see id.* at 230-34. The original text of Rule 501 gave effect only to these delineated privileges and those enacted by Congress. *Id.* (deleted rule 501). Due to the *Erie* controversy surrounding privileges, Congress finally adopted the following text of Rule 501:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501.

30. Fed. R. Evid. 601 provides:

> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

31. Fed. R. Evid. 302 provides:

> In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which state law supplies the rule of decision is determined in accordance with state law.

32. Fed. R. Evid. 402 provides:

> All 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 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Whether a fact is "of consequence" is determined by state substantive law. *See* 1 J. Weinstein & M. Berger, *supra* note 1, ¶ 401[03], at 401-16 to -19 (1982); Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 Tex. L. Rev. 371, 374-75, 392 (1977).

33. Chief Judge Weinstein posits three types of evidence rules. *See* Weinstein, *supra* note 23, at 361-73. The majority of evidence rules are those "designed for all kinds of litigation and intended to achieve a more effective and truthful result in the litigation process." *Id.* at 361. Although rules governing a particular evidentiary judgment may differ in form, they are intended to achieve the same procedural result. Therefore any "divergence between state and federal practice is due only to some disagreement about which will achieve the better result in most cases." *Id.*

A second category includes those rules that are "intimately connected with special substantive rules having a strong effect on the substantive-procedural balance in a narrow class of cases." *Id.* Whether state or federal rules control under *Erie* principles "requires consideration of state policy." *Id.* at 363. For example, whether a presumption is substantive or procedural in nature depends on whether it furthers a state policy. Chief Judge Weinstein illustrates the proper *Erie* analysis:

> [I]n insurance cases where there is a presumption against suicide, shifting the

encroaches on state substantive law.[34] Indeed, its strong social policy underpinnings are often considered its primary justification.[35]

Because the elements of various strict products liability claims closely resemble those of negligence, however, such claims may fall within the literal scope of Rule 407. Although this gives rise to an apparent conflict between state law and the federal rule, the breadth of Rule 407 may only be determined by reference to its underlying policies as they relate to strict products liability. The divergent approaches among the states regarding the treatment of strict products liability claims, however, underscores the complexity of this issue. Resolution of the scope question would invariably require federal courts to intrude into those predominantly state social policy decisions. In light of Congressional concerns with *Erie* principles, it is unlikely that the drafters intended such an intrusion.[36] Inclusion of Rule 407 among the federal rules can perhaps best be explained as the codification of a universally recognized common law principle[37] that evidence of subsequent remedial measures is inadmis-

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burden of proof provides the equivalent of a substantive rule. But a presumption such as that establishing the receipt of a mailed letter is so generally applied and so clearly a rule of convenience that it can be treated as a rule of procedure. Classification requires an analysis of the reason giving rise to the presumption.

Id. at 364 (footnotes omitted).

The final class of rules includes those "designed to achieve independent substantive impact, regardless of the class of case in which they appear." *Id.* at 361. Because these rules promote extrinsic substantive policies in all cases, the state rule normally controls under *Erie*. Privileges fall into this category. *Id.* at 370.

Although Rule 407 arguably falls within the third category, *see* 2 D. Louisell & C. Mueller, *supra* note 1, § 166, at 259 n.8; Weinstein, *supra* note 23, at 370, it is more consistent with the second because the rule is not designed solely to further an extrinsic policy; it also has a procedural basis. Rule 407's substantive-procedural complexion is therefore dependent on whether it is applied for relevance or social policy reasons.

34. See *supra* notes 19, 33, *infra* note 87.

35. See *supra* notes 2, 5, 6 and accompanying text.

36. *See* Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 933 (10th Cir.) (quoting 2 D. Louisell & C. Mueller, *supra* note 1, § 166, at 264), *cert. denied*, 105 S. Ct. 176 (1984); *see also* 2 J. Weinstein & M. Berger, *supra* note 1, at 407-1 ("Congress made no change in Rule 407, and it was neither the subject of floor debate, nor the subject of discussion during the course of committee hearings on the Rules in the House of Representatives.").

Apparently, the Special Subcommittee simply disregarded the following communication from Professor Victor Schwartz:

> "[R]ule 407 excludes evidence of subsequent remedial measures when offered to prove negligence or culpable conduct. As the Advisory Committee notes, the rule is not based on relevance, but on the goal of encouraging (or at least not discouraging) defendants from making repairs after an accident has occurred . . . . [W]hether the evidence is excluded or not should be a matter of state policy where state law governs. . . . A similar situation would exist with any rule whose purpose is not finding truth or expediting a trial, but rather promoting some other value and excluding evidence on that basis."

2 J. Weinstein & M. Berger, *supra* note 1, at 407-2 (ellipses in original) (quoting Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, Rules of Evidence (Supp.), H.R. Ser. No. 2, 93d Cong., 1st. Sess. 303 (1973).

37. *See* Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1327 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 2170 (1984); Werner v. Upjohn Co., 628 F.2d 848, 856 (4th Cir.

sible to prove negligence. In the absence of a common law application to strict products liability, Rule 407 should be construed to avoid a conflict with state law. All states have strict products liability rules that coexist with parallels to Rule 407.[38]

In *Walker v. Armco Steel Corp.*,[39] despite the literal language of the rule at issue, the Court construed the federal rule governing commencement of actions as not conflicting with state law due to the absence of the drafters' intention to affect state statutes of limitations.[40] The Court clarified the proper method of *Erie* analysis when a federal rule is at issue. A court must ascertain the scope of the federal rule.[41] If the rule is not sufficiently broad to cover the issue in dispute, the court can apply federal law only if to do so is consistent with *Erie* principles.[42] Recently, several states have enacted detailed products liability statutes that include sections on admissibility of evidence.[43] Other states have amended their subsequent remedial measures rules to expressly exempt or include products liability cases.[44] Several others use language identical to that in Rule 407 but have amended the advisory comments to indicate whether

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1980), *cert. denied*, 449 U.S. 1080 (1981); Eastern Air Lines, Inc. v. American Cyanamid Co., 321 F.2d 683, 690 (5th Cir. 1963); 2 D. Louisell & C. Mueller, *supra* note 1, § 163, at 235 & n.36.

38. See *supra* notes 7-8, *infra* notes 43-45.

39. 446 U.S. 740 (1980).

40. *Id.* at 750-51.

41. *Id.* at 749-50.

42. *See id.* at 750-53.

43. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-686 (1982) (subsequent remedial measures inadmissible as evidence of a defect in products liability action); Colo. Rev. Stat. § 13-21-404 (Supp. 1984) (evidence of scientific advancements discovered after sale of product by manufacturer inadmissible except to show duty to warn); Mich. Comp. Laws Ann. § 600.2946 (West Supp. 1984-1985) (subsequent remedial measures inadmissible; evidence of conformity with state of the art, laws or regulations admissible); Neb. Rev. Stat. § 27-407 (Supp. 1978) (subsequent remedial measures inadmissible to prove negligence or culpable conduct which includes manufacture or sale of defective product).

The Model Uniform Product Liability Act contains the following provision:

> Evidence of changes in (1) a product's design, (2) warnings or instructions concerning the product, (3) technological feasibility, (4) "state of the art", or (5) the custom of the product seller's industry or business, occurring after the product was manufactured, is not admissible for the purpose of proving that the product was defective in design under Subsection 104(B) or that a warning or instruction should have accompanied the product at the time of manufacture under Subsection 104(C).
>
> If the court finds that the probative value of such evidence substantially outweighs its prejudicial effect and that there is no other proof available, this evidence may be admitted for other relevant purposes if confined to those purposes in a specific court instruction. Examples of "other relevant purposes" include proving ownership or control, or impeachment.

Model Uniform Product Liability Act § 107(A) (1979).

44. *See, e.g.*, Neb. Rev. Stat. § 27-407 (1978) (exclusionary rule applies in products liability action); Alaska R. Evid. 407 (subsequent remedial measures evidence admissible in products liability action); Hawaii R. Evid. 407 (same); Tex. R. Evid. 407 (same).

the rule is to apply in such actions.[45] These legislative policy determinations evince a clear intent to admit or exclude subsequent remedial measures evidence in products liability actions. With no indication that the drafters of Rule 407 intended to affect strict products liability claims,[46] Rule 407 is simply not broad enough to encompass the strict liability issue. A federal court must therefore look to the policies underlying *Erie* to determine whether state law applies.[47]

The *Hanna* decision seems to reduce this inquiry to consideration of "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[48] Subsequent remedial measures evidence can be extremely damaging to a defendant's case.[49] Plaintiffs are therefore likely to choose the forum more favorable to admission while defendants will seek a forum that will exclude such evidence. Consequently, when federal and state courts differ regarding the admissibility of subsequent repairs evidence in strict liability suits, forum shopping concerns and avoidance of inequitable administration of the law dictate the application of state law.[50]

II. ALTERNATIVE MODES OF *ERIE* ANALYSIS

A. *Balancing State and Federal Interests*

Some courts have read *Hanna* to permit a more comprehensive *Erie* analysis when a federal rule and state law are not in direct conflict.[51] These courts often rely on the pre-*Hanna* formula established by the Supreme Court in *Byrd v. Blue Ridge Rural Electric Cooperative*,[52] which requires that state interests be weighed against countervailing federal in-

45. *See, e.g.*, Mich. R. Evid. 407 committee note (exclusionary rule applies); Wyo. R. Evid. 407 committee note (subsequent remedial measures evidence admissible).

46. *Cf.* Walker v. Armco Steel Corp., 446 U.S. 740, 749-51 (1980) (state rule for commencement of actions controls because no indication that federal rule was ever intended to affect statutes of limitations). See *supra* notes 27-32, 34, 36-37 and accompanying text.

47. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980).

48. Hanna v. Plumer, 380 U.S. 460, 468 (1965) (footnote omitted).

49. Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 233 (6th Cir. 1980); *see* Caprara v. Chrysler Corp., 52 N.Y.2d 114, 134-35, 417 N.E.2d 545, 555-56, 436 N.Y.S.2d 251, 262 (1981) (Jasen, Jones, Meyer, JJ., dissenting) (subsequent design changes will in almost all cases determine the result in strict liability actions).

50. Note, *Rule 408 and* Erie*: The Latent Conflict*, 12 Ga. L. Rev. 275, 293-94 (1978) ("A choice of forum motivated by the desire to exclude specific, detrimental evidence is, however, a choice of the sort condemned by *Erie*, a deliberate effort to circumvent the policies of the state.") [hereinafter cited as *Rule 408 and* Erie]. See *infra* note 85.

51. *See, e.g., In re* Grand Bahama Petroleum Co. v. Asiatic Petroleum Corp., 550 F.2d 1320, 1325 (2d Cir. 1977); Miller v. Davis, 507 F.2d 308, 314 (6th Cir. 1974); Szantay v. Beech Aircraft Corp., 349 F.2d 60, 63-64 (4th Cir. 1965).

52. 356 U.S. 525 (1958); *see* C. Wright, *supra* note 15, § 59, at 386 ("Byrd v. Blue Ridge has not been overruled, nor its interest-balancing technique repudiated, and, when faced with the typical relatively unguided Erie choice, its approach has been found useful.") (footnote omitted).

terests which must themselves be balanced against the likelihood that application of federal law will be outcome determinative.[53]

As previously discussed, Rule 407 embodies a policy decision to encourage post-accident repairs.[54] State courts that bar subsequent repairs evidence in strict products liability actions reason that the policy behind the rule applies regardless of whether a claim is premised on negligence or strict liability.[55] Courts that admit the evidence consider the policy to be of doubtful validity in strict products liability because the modern mass producer will not forego making repairs at the risk of incurring substantial future liability.[56] In addition, these courts reason that the focus in strict products liability is often on the product rather than on the defendant's conduct.[57]

Whether the policy underlying Rule 407 is applicable in strict products liability is a judgment best reserved to the states.[58] Although there are other social policy-oriented federal evidence rules, those rules promote particular federal interests.[59] For example, Rule 408 excludes evidence of offers to compromise. This rule furthers the federal policy of promoting offers to compromise[60] in order to reduce the workload of the federal

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53. *See Byrd*, 356 U.S. at 536-38.

54. See *supra* note 2.

55. *See, e.g.*, Hallmark v. Allied Products, 132 Ariz. 434, 440-41, 646 P.2d 319, 325-26 (1982); Smith v. E R Squibb & Sons, Inc., 405 Mich. 79, 91-93, 273 N.W.2d 476, 480-81 (1979).

56. *See, e.g.*, Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 793-94 (Alaska 1981); Ault v. International Harvester Co., 13 Cal. 3d 113, 120, 528 P.2d 1148, 1152, 117 Cal. Rptr. 812, 816 (1974) (en banc); Chart v. General Motors Corp., 80 Wis. 2d 91, 101-02, 258 N.W.2d 680, 683-84 (1977); Caldwell v. Yamaha Motor Co., 648 P.2d 519, 523-25 (Wyo. 1982). See *supra* note 11.

57. *See, e.g.*, Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 794 (Alaska 1981); Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 319, 281 N.E.2d 749, 753 (1972); Shaffer v. Honeywell, Inc., 249 N.W.2d 251, 257 n.7 (S.D. 1976).

58. *See* 2 J. Weinstein & M. Berger, *supra* note 1, ¶ 407[03], at 407-15. ("In diversity cases, *Erie* concerns should require that [products liability] statutes be given effect because of their largely substantive content."). *But see* Flaminio v. Honda Motor Co., 733 F.2d 463, 472 (7th Cir. 1984) ("We are reluctant to cast a cloud over the whole federal rulemaking enterprise and . . . [hold] that a procedural rule is beyond even the power of Congress to enact . . . because the rule affects substantive questions that the *Erie* doctrine reserves to the states.").

59. Fed. R. Evid. 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

60. The Advisory Committee notes state that the rule resembles Rule 407 because exclusion may be based on two grounds: "(1) The evidence is irrelevant, since the offer

courts.[61] No equivalent federal policy supports Rule 407;[62] rather the rule is a codification of state tort law policy.[63] Moreover, unlike Rule 408, the social policy rationale, as opposed to the relevance ground, underlying Rule 407 has been recognized as the "controlling" ground for exclusion of subsequent remedial measures evidence by the courts.[64] Accordingly, state interests in assessing the effectiveness of Rule 407's exclusionary policy in strict liability actions far exceed any federal interests in making such determinations.[65] The state interests therefore must govern.

In addition to the social policy justifications, however, Rule 407 is designed to exclude evidence of low probative value.[66] Federal Rule of Evidence 403 allows exclusion of evidence that the court determines to be substantially more confusing to the jury than probative.[67] Rule 407 reflects the drafters' determination that a Rule 403 balance should always be struck in favor of excluding subsequent remedial measures evidence in actions involving negligence or culpable conduct.[68] The

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may be motivated by a desire for peace rather than from any concession of weakness of position . . . (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes." Fed. R. Evid. 408 advisory committee note.

61. Weinstein, *supra* note 23, at 370 n.75; *Rule 408 and* Erie, *supra* note 50, at 290.

62. 2 J. Weinstein & M. Berger, *supra* note 1, ¶ 407[02], at 407-12.

63. See *supra* notes 7, 11, 19, 37.

64. 2 J. Weinstein & M. Berger, *supra* note 1, ¶ 407[02], at 407-9 & n.5. See *supra* note 2.

65. Federal courts often decide this question as a matter of federal law. *See, e.g.*, Flaminio v. Honda Motor Co., 733 F.2d 463, 468-70 (7th Cir. 1984) (exclusionary policy applies to strict products liability); Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1331 (10th Cir. 1983) (subsequent remedial measures admissible in strict products liability primarily because of exclusionary policy), *cert. denied*, 104 S. Ct. 2170 (1984); DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 228-29 (8th Cir. 1983) (exclusionary policy applies to strict liability action based on manufacturer's failure to warn due to strong similarity to negligence); Hall v. American S.S. Co., 688 F.2d 1062, 1067 (6th Cir. 1982) (exclusionary policy applies to strict liability); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) (same); Werner v. Upjohn Co., 628 F.2d 848, 855-58 (4th Cir. 1980) (same), *cert. denied*, 449 U.S. 1080 (1981).

66. *See* Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 887 (5th Cir. 1983); Ault v. International Harvester Co., 13 Cal. 3d 113, 118-19, 528 P.2d 1148, 1151, 117 Cal. Rptr. 812, 815 (1975) (en banc); Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 65, 388 N.E.2d 541, 561 (1979); Fed. R. Evid. 407 advisory committee note. See *supra* notes 6, 43, *infra* note 69.

67. Fed. R. Evid. 403 provides:

> 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.

68. *See* Fed. R. Evid. 403 advisory committee note (the rules in Art. IV of the Federal Rules of Evidence, which include Rule 407, are "concrete applications evolved for particular situations" of Rule 403's balancing of probative value against prejudice); 23 C. Wright & K. Graham, Federal Practice and Procedure § 5282, at 91 (1980) (advisory committee suggests that federal relevance rules are concrete applications of the balancing required under Rules 401 and 403); *cf.* Columbia & P.S.R.R. v. Hawthorne, 144 U.S. 202, 207 (1892) ("the evidence . . . has no legitimate tendency to prove that the defend-

principal rationale is that a defendant's subsequent repairs are simply a normal response to an accident and therefore not necessarily indicative of negligent conduct.[69]

Whether this relevance rationale applies in strict products liability actions is unclear. In a claim alleging defective design, for example, evidence of subsequent remedial measures may be highly probative because it is unlikely that a manufacturer would incur the cost of altering a product's design unless it was defective.[70] The danger of jury confusion would be minimal. When the strict products liability claim is that the manufacturer failed to warn of a defect, however, the necessary inquiry is so closely related to that in a negligence action[71] that use of Rule 407's procedural balance is appropriate to enhance accurate fact-finding. A

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ant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant"); Smyth v. Upjohn Co., 529 F.2d 803, 805 (2d Cir. 1975) (subsequent remedial measures excluded in failure to warn case because proponents could not point to countervailing probative value to offset prejudice); Model Unif. Prod. Liab. Act § 107(A) (1979) (court can admit evidence of subsequent repairs only if the probative value outweighs its prejudicial effect and no other proof is available); N.Y. Proposed Code of Evid. § 407 comment (evidence of subsequent remedial measures is not probative of wrongful conduct and can therefore be highly prejudicial). *But see* Wellborn, *supra* note 32, at 394 (Rule 407 is an exclusionary rule of different nature than Rule 403, which does not promote extrinsic policy).

69. *See* Fed. R. Evid. 407 advisory committee note ("The conduct is not in fact an admission . . . . [T]he rule rejects the notion that 'because the world gets wiser as it gets older, therefore it was foolish before.' ") (quoting Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. (n.s.) 261, 263 (1869)); 2 J. Wigmore, *supra* note 1, § 283, at 174-75 ("To improve the condition of the injury-causing object is therefore to indicate a belief merely that it has been *capable of causing such an injury*, but indicates nothing more . . . .") (emphasis in original).

70. *See* R. Lempert & S. Saltzburg, A Modern Approach to Evidence 194 (2d ed. 1982). To prove a design defect, a plaintiff must normally show that an alternative design was both safer and feasible. Subsequent remedial measures are highly probative because "a business is not likely to change a product unless the change promotes safety and is feasible." *Id. But see* Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 887-88 (5th Cir. 1983) (Although cost may be a consideration, design changes may be made after an accident "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.").

71. [In a failure to warn case] a claimant . . . must, according to the generally accepted view, prove that the manufacturer-designer was negligent. There will be no liability without a showing that the defendant designer knew or should have known in the exercise of ordinary care of the risk or hazard about which he failed to warn. Moreover, there will be no liability unless manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public. Although this ground of recovery is sometimes referred to as strict liability, it is really nothing more than a ground of negligence liability . . . .

Prosser & Keeton, *supra* note 10, § 99, at 697; *see* DeLuryea v. Winthrop Laboratories, Inc., 697 F.2d 222, 228-29 (8th Cir. 1983) (language in strict liability and negligence instructions nearly identical in failure to warn cases; issues of due care and forseeability inherent considerations in both theories); Werner v. Upjohn Co., 628 F.2d 848, 858 (4th Cir. 1980) (minimal distinction between negligence and strict liability, especially in failure to warn cases), *cert. denied*, 449 U.S. 1080 (1981).

federal court may, therefore, have an interest in excluding subsequent repairs evidence on Rule 407's relevance grounds.[72] This interest must be considered in light of countervailing state interests in admitting such evidence.[73] Several states have decided that admission is appropriate only because exclusion does not effectively achieve its policy goals.[74] Exclusion therefore hinders no state desired social policy. Nonetheless, federal interests in applying Rule 407 for its relevance rationale are minimal because Rules 402[75] and 403[76] provide alternative procedural means by which the court may keep irrelevant or misleading evidence from the jury.

The defective design example is illustrative. When a design change is the result of technology developed after the manufacture of the product at issue, evidence of the design change may be excluded either because it is substantially more confusing to the jury than it is relevant under Rule 403[77] or because it is irrelevant under Rule 402.[78] Similar arguments can be made for actions alleging defective manufacture. Often in these cases the only issue is whether the product itself, and not the manufacturing process or the product's design, is defective.[79] Under these circum-

72. *See, e.g.*, Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 887 (5th Cir. 1983); Smyth v. Upjohn Co., 529 F.2d 803, 805 (2d Cir. 1975); *cf.* Columbia & P.S.R.R. v. Hawthorne, 144 U.S. 202, 207 (1892) (common law applied).

73. See *supra* note 53 and accompanying text.

74. See *supra* note 56 and accompanying text. In New York, however, the decision to admit evidence of subsequent repairs in strict products liability actions is designed in part to lessen the plaintiff's burden of proof. *See* Caprara v. Chrysler Corp., 52 N.Y.2d 114, 123-25, 417 N.E.2d 545, 549-50, 436 N.Y.S.2d 251, 255-56 (1981). In *Caprara*, the court reasoned that because strict liability developed to ease consumers' problems of proof, the evidence should be admitted if a reasonable person could find any probative value. *See id.* at 123-26, 417 N.E.2d at 549-51, 436 N.Y.S.2d at 255-57. The court further explained that in strict liability the scienter requirement has been removed in order to impose a heavy burden of cost and responsibility on the manufacturer, who is in the best position to eliminate the danger. *See id.* at 123, 417 N.E.2d at 549-50, 436 N.Y.S.2d at 255. Because burden of proof is typically a question governed by state law, *see* Palmer v. Hoffman, 318 U.S. 109, 117 (1943); Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 210-12 (1939); Federal Ins. Co. v. Areias, 680 F.2d 962, 964 (3d Cir. 1982), the state interest in admitting subsequent repairs evidence in these circumstances is somewhat stronger than in the usual case.

75. See *supra* note 32.

76. *See* Cann v. Ford Motor Co., 658 F.2d 54, 59 (2d Cir. 1981). See *supra* note 67 and accompanying text.

77. *See* R. Lempert & S. Saltzburg, *supra* note 70, at 194 n.13. See *supra* note 6.

78. *See* Rainbow v. Albert Elia Bldg. Co., 79 A.D.2d 287, 294, 436 N.Y.S.2d 480, 485 (1981) (in design defect case, inquiry should be limited to technology existing at time of manufacture), *aff'd mem.*, 56 N.Y.2d 550, 434 N.E.2d 1345, 449 N.Y.S.2d 967 (1982); Prosser & Keeton, *supra* note 10, § 99, at 701 ("It is generally agreed that a product cannot be regarded as defectively designed . . . because after the sale . . . there was a technological breakthrough. . . . [T]he courts have almost universally held that the feasibility of designing a safer product must be determined as of the time the product was designed."); *cf.* Olson v. A.W. Chesterton Co., 256 N.W.2d 530, 540 (N.D. 1977) (focus is on product in all strict products liability actions, and therefore probative value of state-of-the-art evidence is negligible).

79. Caprara v. Chrysler Corp., 52 N.Y.2d 114, 123, 417 N.E.2d 545, 549, 436

stances, evidence of subsequent remedial measures is irrelevant under Rule 402. Reliance on Rule 407's procedural rationale is thus unnecessary.

Federal interests in applying Rule 407's relevance rationale are further diminished when balanced against the final factor in the *Byrd* test—the likelihood that applying federal law will be outcome determinative.[80] Outcome determination, redefined in *Hanna* as discouragement of forum shopping,[81] heavily favors applying state law.[82] Accordingly, even *Byrd*'s sophisticated balancing approach dictates that state law control the admissibility of subsequent remedial measures evidence in strict products liability actions.

B. *Harlan's "Primary Private Activity" Approach*

Assuming that *Hanna* permits more than consideration of forum shopping and equitable administration of the laws when there is no direct conflict between state law and a federal rule,[83] Justice Harlan's often-cited concurring opinion in *Hanna* presents an *Erie* formulation that merits attention.[84] Harlan believed that the proper mode of *Erie* analysis requires a court to inquire whether a rule would "substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation."[85] Because the social policy un-

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N.Y.S.2d 251, 255 (1981); Halloran v. Virginia Chems. Inc., 41 N.Y.2d 386, 388, 361 N.E.2d 991, 993, 393 N.Y.S.2d 341, 343 (1977); *see* Prosser & Keeton, *supra* note 10, § 99, at 695 ("[A] flaw in a product is defined as an abnormality or a condition that was unintended, and makes the product more dangerous than it would have been as intended."). See *supra* note 10.

80. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536-37 (1958). See *supra* note 49.

81. 'Outcome-determination' analysis was never intended to serve as a talisman. . . . [C]hoices between state and federal law are to be made not by application of any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule. . . . The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws.

Hanna v. Plumer, 380 U.S. 460, 466-68 (1965) (footnotes and citations omitted).

82. See *supra* notes 48-50 and accompanying text.

83. See *supra* note 51 and accompanying text.

84. *See* Hanna v. Plumer, 380 U.S. 460, 474-78 (1965) (Harlan, J., concurring).

85. *Id.* at 475. Justice Harlan further stated that the majority's interpretation of *Erie* overemphasized the role of forum shopping and understated the importance of federalism—of the allocation of judicial power between state and federal systems:

Erie recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs. . . . Thus, in diversity cases *Erie* commands that it be the state law governing primary private activity which prevails.

Id. at 474-75 (footnote omitted); *cf.* Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 387 & n.23 (1964) ("the tendency of the law must always be to narrow the field of uncertainty" that the *Swift v. Tyson* decision created) (quoting O. Holmes, The Common Law 127 (1881)).

derlying Rule 407 is intended to affect conduct outside the litigation,[86] Harlan's "primary private activity" test also leaves to the state the assessment of whether the rule effectively achieves its social policy in strict products liability actions.[87] Moreover, Harlan's interpretation of *Erie* cannot be read without reference to *Hanna*'s strongly expressed forum shopping concerns.[88] Consequently, even when a federal court seeks to exclude evidence on Rule 407's relevance grounds, state law must control.

CONCLUSION

Because there is no indication that the drafters of Rule 407 intended to encroach on issues of state tort law policy, the rule does not automatically control in federal diversity actions based on strict products liability. Rather, it can be applied only when consistent with *Erie* principles. *Hanna v. Plumer*'s emphasis on discouraging forum shopping seems to require that state law govern in such actions. Closer consideration of the *Erie* question also yields this conclusion. State social policy interests in applying state law supersede countervailing federal interests in applying Rule 407 on relevance grounds because other evidence rules adequately safeguard these interests. Moreover, dangers of forum shopping minimize whatever federal interests may exist.

Harlan's "primary private activity" test also dictates that state law control insofar as the policy underlying Rule 407 is intended to affect conduct outside the litigation. Consequently, all methods of *Erie* analysis command federal courts to follow state law when deciding whether

86. Some commentators question whether Rule 407 actually affects conduct outside the litigation because it is unlikely that the ordinary defendant is aware of the rule. *See* 2 D. Louisell & C. Mueller, *supra* note 1, § 164, at 240; 2 J. Weinstein & M. Berger, *supra* note 1, ¶ 407[02], at 407-10. The exclusionary rule, however, seems to have such an effect in products liability. Several insurance companies advise their clients not to undertake any subsequent repairs until accident litigation is concluded. Report of the Comm. of Dep't of Justice 9-10 (1970), *cited in* 2 D. Louisell & C. Mueller, *supra* note 1, § 164, at 240 n.55 *and* in 2 J. Weinstein & M. Berger, *supra* note 1, ¶ 407[01], at 407-6 n.10. Furthermore, large manufacturers, who are defendants in hundreds or thousands of products liability suits, are the ones most likely to know about the rule and be influenced by it. *See* Flaminio v. Honda Motor Co., 733 F.2d 463, 470 (7th Cir. 1984).

87. Where a Federal Rule has little to do with fact ascertainment, and serves instead a wholly extrinsic policy not closely connected with the proper exercise of some federal power . . . then it is highly doubtful that the Rule may be viewed as consistent with the *Erie* doctrine if applied in cases where state law supplies the rule of decision. Where Evidence law excludes certain kinds of proof because of such extrinsic policy concerns, there is good reason to consider such law to be part of the fabric of the substantive law, and to treat it as substantive for *Erie* purposes.

2 D. Louisell & C. Mueller, *supra* note 1, § 166, at 260.

88. See *supra* note 17.

subsequent remedial measures evidence is admissible in strict products liability actions.

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