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Federal Rule of Evidence 407 Versus Rhode Island’s Rule 407:

Public Policy Versus Relevance

Vin Greene*

INTRODUCTION

English philosopher and physician, John Locke, once said: “I have always thought the actions of men the best interpreters of their thoughts.” The inherent truth behind this saying is that actions are the empirical evidence of our thoughts, our knowledge, and our realizations. In the world of products liability, it stands to reason that a manufacturer’s changes in product design, implemented after that product has caused injury, manifest an otherwise silent acknowledgment that something was inherently defective with a product.

Despite the fact that remedial measures are often the “best evidence” of a Defendant’s negligence, in most jurisdictions, a Plaintiff cannot introduce such evidence at trial for the purpose of establishing liability. The realm of the courtroom is guarded by rules designed to, among other things, illicit the truth of a matter or issue. The rule governing admissibility of a manufacturer’s subsequent changes in its product does nothing of the kind.

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Rather, the application of Federal Rule of Evidence 407 in the modern industrialized world shields Defendants, preventing their actions, vis-à-vis their product design, from being evaluated by a judge and jury to determine a Defendants' responsibility and fault.

Almost 150 years old in concept, the rule excluding evidence of subsequent remedial measures was codified in Federal Rule of Evidence 407. The rule states:

[w]hen, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction."\(^2\)

Interpreted simply, the rule bars the admission of evidence of subsequent remedial actions when such evidence is offered for the purpose of proving a party's conduct.\(^3\)

I. THE FEDERAL RULE: TIMING IS EVERYTHING

Pursuant to Federal Rule of Evidence 407, evidence of subsequent remedial measures is inadmissible in general negligence cases, as well as in strict liability cases for product defects, design defects, and failures to warn.\(^4\) The 1997 amendment to the rule extended its reach to cover the realm of product liability claims.\(^5\) This amendment, in the context of mass tort product liability matters, forces courts to make rulings on evidentiary matters based solely upon the random timing of injuries. This inequity occurs because the linchpin in the application of Federal Rule 407 is the timing or date of the Plaintiff's alleged injury.\(^6\) Thus, where identical, or substantially

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2. See FED. R. EVID. 407.
3. See Ault v. Int'l Harvester Co., 528 P.2d 1148, 1151 (Cal. 1975); see also Wadswoth, supra note 1.
5. FED. R. EVID. 407 advisory committee's note to 1997 amendment.
similar, mass produced products cause thousands of injuries over a span of years, a Plaintiff’s access to evidence at trial may depend solely on the point in time that his or her misfortune occurred upon the continuum of a Defendant’s remedial changes. The plain text of the rule provides that:

> [w]hen, after an injury or harm allegedly caused by an event, measures that are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in the product, a defect in the product’s design, or a need for a warning or instruction. 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.\(^7\)

Thus, by its clear and explicit terms, Federal Rule of Evidence 407 operates to exclude evidence of remedial measures only when the actions are taken subsequent to the injury of the Plaintiff. The 1997 addition of the words “injury or harm” to Rule 407 clarified that the “event” is, in fact, the accident or injury and not the date of manufacture of the product. Yet, that clarification does nothing more than specifically define the cutoff date upon which a Plaintiff’s ability to access and to use key liability evidence in court. As the Federal District Court in Rhode Island

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\(^7\) FED. R. EVID. 407 (emphasis added).
made clear, "all evidence . . . that occurred prior to the incident . . . will be admitted. This evidence is not governed by Rule 407 and is highly probative as to notice and knowledge. . . ."8 However, "[u]nder 407 . . . measures which take place after the 'event' are excluded. The term 'event' refers to the accident that precipitated the suit."9 In short, timing is everything.10 For a "mass tort"
Plaintiff, the scope of trial will be defined not by the nature or relevancy of the Defendant’s conduct, but simply by the timing of that conduct. As a result, the rule leads to arbitrary and capricious results based solely on the random timing of a hypothetical Defendant’s conduct versus a hypothetical Plaintiff’s injuries.

Take, for example, products liability cases involving implantable medical devices. Imagine two patients, Mr. Smith and Mr. Jones, both implanted on the same day with identical, permanent medical devices. Unbeknownst to both patients, their implants contain the same inherent design flaw, originating with the manufacturer, which will result in the failure of both devices, causing catastrophic injuries. The only distinction between our hypothetical patients is the timing of the failure of these otherwise identical devices: Mr. Smith’s implant will fail within a year after implantation, while Mr. Jones’ implant will fail three years after implantation.

During the years between the occurrence of Mr. Smith’s and Mr. Jones’ injuries, the manufacturer undertakes a number of remedial measures, including multiple product recalls, product redesigns, changes to the product’s warnings and instructions for use, and worst case scenario testing. If both Mr. Smith and Mr. Jones file complaints in the Federal District Court of Rhode Island, and do so on the same day against the same Defendant manufacturer, only Mr. Jones will be permitted to introduce

within the scope of the exclusion even if they occurred subsequent to the design of the product.

11. See Chase v. General Motors Corp., 856 F.2d 17, 20-21 (4th Cir. 1988) (holding trial judge’s use of Rule 407 to exclude evidence of a change in brake design that occurred after manufacture and sale of allegedly defective vehicle but before accident was improper); see also Cates v. Sears, Roebuck & Co., 928 F.2d 679, 685-687 (5th Cir. 1991) (holding court erroneously excluded warning placard to table saw as subsequent remedial measure because Rule 407 applies only to post-accident measures); Roberts, 901 F.2d at 44 (holding that a measure instituted post-manufacture, but pre-injury was not covered under Rule 407, and was consequently admissible); Arceneaux v. Texaco, Inc., 623 F.2d 924, 928 (5th Cir. 1980) (deciding trial judge improperly utilized 407 to exclude evidence of change in position of gas tank that occurred after manufacture of plaintiff’s truck but before accident), cert. denied, 450 U.S. 928 (1981); Rozier v. Ford Motor Co., 573 F.2d 1332, 1343 (5th Cir. 1978) (deciding written document created before the accident was not a subsequent remedial measure).
Defendant's remedial measures as evidence, as Federal Rule of Evidence 407 excludes that evidence only when the actions are taken subsequent to the injury of the Plaintiff. That is the irrational inequity created by application of Federal Rule of Evidence 407 in the world of modern, mass produced products.\textsuperscript{12}

\textsuperscript{12} The author recognizes that there are alternative grounds for admissibility under Federal Rule of Evidence 407. Indeed, it is well known and frequently noted that evidence of subsequent measures is allowed for purposes other than to prove negligence, culpable conduct, a defect in the product, a defect in the product's design, or a need for a warning or instruction. See Rollins v. Bd. Of Governors for Higher Ed., 761 F. Supp. 941 (D.R.I. 1991) ("This Court, however, makes a reservation in accord with Rule 407. Subsequent repairs, alterations, or procedural changes may be admissible if offered to prove ownership, control or feasibility of precautionary measure, if such is controverted. Moreover, defendants should be on notice that such evidence may also be admitted if necessary for impeachment purposes or if plaintiff seeks to admit the evidence for reasons other than to demonstrate the defendants' culpability."). In fact, Rule 407 provides a non-exhaustive list of exceptions: "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." \textsc{Fed. R. Evid. 407}. Because Rule 407 precedes the listed exceptions with the phrase "such as," the exceptions are illustrative, rather than exhaustive. Thus, evidence of remedial measure may be admissible as relevant to claims or defenses in addition to those listed in the rule. Stecyk v. Bell Helicopter Textron, No. 94-1818, 1998 U.S. Dist. LEXIS 16772 (E.D. Pa. Oct. 1, 1998), aff'd 295 F.3d 408 (3d Cir. 2002) (evidence of subsequent remedial measure admissible to rebut assertion of government contractor defense); Rimkus v. Northwest Colorado Ski Corp., 706 F.2d 1060, 1066 (10th Cir. 1983) (allowing introduction of evidence of remedial measures taken by a ski resort after an accident); Kenny v. Southeastern Pennsylvania Transp. Auth., 581 F.2d 351 (3d Cir. 1978) (holding evidence that new fluorescent fixture was installed soon after rape attack properly admitted to counter defendant's inference that light was adequate); see also \textsc{Weinstein & Berger, Weinstein's Federal Evidence} 407-31 to 407-33 (Joseph M. McLaughlin, ed. 2009); see also Werner v. Upjohn Co., 628 F.2d 848, 853 (4th Cir. 1980) ("Federal Rule of Evidence 407, which enacts the common law rule excluding subsequent remedial measures to prove negligence, does, however, permit evidence of subsequent remedial measures to be used to prove the feasibility of such measures, but only if feasibility is controverted by the defendant."); Doyle v. U.S., 441 F. Supp. 701, 709 n.4 (D.S.C. 1977). Rule 407 "cannot be used to exclude evidence offered for 'another purpose,' one of which is 'feasibility of precautionary measures,' if controverted." \textsc{Raymond}, 938 F.2d 1518, 1523 (quoting \textsc{Fed. R. Evid. 407}); see also Dixon v. Int'l Harvester Co., 754 F.2d 573 (5th Cir. 1985); Wetherill v. Univ. of Chi., 565 F. Supp. 1553, 1559 (N.D. Ill. 1983) (interpreting F.R.E. 407 and recognizing that subsequent remedial measures offered to prove "causation" are not subject to rule because "causation" is distinct from "liability"); accord McAdams v. Eli Lilly & Co., No. 77 C 4174,
II. A BRIEF HISTORY OF FRE 407: HOW DID WE GET HERE?

In theory, the policy behind the rule is to promote responsible behavior. The Federal rule is based on a common law concept that a defendant's subsequent repairs are not necessarily an admission of negligence, and that repairs should be encouraged to reduce the possibility of further injuries. The rule's policy-based origins are rooted in the pre-industrial concept of negligence, and it is the post-industrial concept of products liability that has stretched the

1981 U.S. Dist. LEXIS 18187, at *5-6 (N.D. Ill. Oct. 6, 1981); Duchess v. Langston Corp., 769 A.2d 1131, 1148-50 (Pa. 2001) (holding subsequent remedial measures are admissible to prove the "feasibility of precautionary measures" if "controverted."); Estate of Spinosa v. Int'l Harvester Co., 621 F.2d 1154, 1160 n.5 (1st Cir. 1980) (noting where defendant contested feasibility of dual-brake design for pickup truck, trial judge admitted post-accident evidence that design changed after subsequent model year); see Pitasi v. Stratton Corp., 968 F.2d 1558, 1561 (2d Cir. 1992) ("In the present case, Pitasi did not seek to introduce Stratton's subsequent remedial measures in order to prove that Stratton was negligent. Rather Pitasi sought . . . to rebut [Stratton's] defense that Pitasi was contributorily negligent because the dangerous conditions on East Meadow were so obvious and apparent that warning signs or ropes at the trail's side entrances were unnecessary. Rule 407 clearly allows a plaintiff to introduce evidence of remedial measures to rebut such assertions."). Finally, as noted above, Federal Rule of Evidence 407 expressly permits the admission of subsequent remedial measures for impeachment. See Stevens v. Bangor & Aroostook R.R. Co., 97 F.3d 594, 598-99 (1st Cir. 1996); Harrison v. Sears Roebuck & Co., 981 F.2d 25, 31 (1st Cir. 1992); Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613, 622 (8th Cir. 1983) (upholding the admission of evidence of a product recall for the purposes of impeachment of the manufacturer's assertion that it voluntarily withdrew the product where the issue in the case that was hotly contested was whether the defendant had withdrawn the product voluntarily and the court did not grant the defendant's limiting instruction to consider the recall evidence for no purpose other than as an illustration of the case's "background").

The author declines to address these exceptions in this Article in order to streamline the analysis. Although these exceptions to the rule exist, Defendant corporations continue to have a safety net under the Federal rule, because at all times, a court will retain discretion to exclude the evidence. More importantly, the existence of these exceptions provides a separate basis for criticism of the rule. Simply, "[t]he Rule is riddled with exceptions, and the underlying policy rationale for the Rule has been severely criticized." Michael W. Blanton, Application of Federal Rule of Evidence 407 in Strict Products Liability Cases: The Evidence Weighs Against Automatic Exclusion, 65 UMKC L. Rev. 49, 102-03 (1996).

rule beyond its breaking point.\textsuperscript{14}

At common law, the rationale underlying the rule was first put forth in the 1892 United States Supreme Court case \textit{Columbia & Puget Sound R.R. v. Hawthorne}.\textsuperscript{15} There, the United States Supreme Court held that evidence of a subsequently added safety feature to a pulley would not be admissible to show fault.\textsuperscript{16} The Court stated that not only did it find such evidence to be irrelevant, confusing for the jury, and prejudicial to the defendant, but also that, "taking . . . precautions against the future is not to be construed as an admission of responsibility for the past," and admitting such evidence would only be "an inducement for continued negligence."\textsuperscript{17}

The common law enunciated in \textit{Columbia & Puget Sound R.R. v. Hawthorne} ultimately became codified in the Federal rules, when it was signed into law by President Gerald Ford on January 2, 1975. The rule was constructed based on two common law foundations: relevance and public policy, with the latter reaching back to \textit{Columbia & Puget Sound R.R. v. Hawthorne}.\textsuperscript{18} On the issue of relevance, the advisory committee noted, as an example, that a product manufacturer may change a product's design, because it discovered a better design or because it wanted to implement an idea that was conceived before an accident.\textsuperscript{19} The committee advanced, that in a situation such as this, evidence of a subsequent remedial measure would neither address the reasonableness of the actor's conduct nor the foreseeability of risk at the time the conduct occurred, and thus courts should exclude the evidence on the specific issue of fault because it is irrelevant.\textsuperscript{20}

While the concepts underpinning Federal Rule of Evidence 407 were taking shape to address evidentiary issues in negligence actions, almost simultaneously, products liability law itself was developing. While it is an area of law where liability falls upon manufacturers and distributors of products established by the existence of a defect in a product at the time of sale or

\begin{itemize}
  \item \textsuperscript{14} See Wadsworth, supra note 1, at 760.
  \item \textsuperscript{15} 144 U.S. 202, 208 (1892).
  \item \textsuperscript{16} \textit{Id}.
  \item \textsuperscript{17} \textit{Id}.
  \item \textsuperscript{18} See \textit{Fed. R. Evid.} 407 advisory committee's note.
  \item \textsuperscript{19} \textit{Id}.
  \item \textsuperscript{20} \textit{Id}.
\end{itemize}
distribution, early on, plaintiffs who brought claims based on products liability theories were limited to claims of negligence and warranty. Historically, actions based on strict liability arose from a combination of factors which held manufacturers accountable for their defective products.

To understand this concept clearly, it is important to look to the Restatement (Second) of Torts, specifically section 402(a) that focused on products liability. This section, drafted by Dean Wade Prosser and Dean John W. Wade, stated that a manufacturer could be subject to liability for harms caused by a product if the product was sold "in a defective condition unreasonably dangerous to the user or consumer." The focus however, was on manufacturing defects. In essence, the Restatement (Second) failed to shed light on what would be the legal standard for a defect of design. A manufacturer was not subject to liability for failure to warn about a risk that was not known or discoverable at the time the product was made. Thus, there was no objective standard given to allow juries to decide what a good product was as opposed to a bad one . . . what was or was not "unreasonably dangerous."

As products liability litigation evolved, courts struggled with applying the Restatement (Second) to this newly recognized area of liability. Further, since 402(A) seemingly emphasized 'fault', it stood in direct conflict to the policy foundation of Federal Rule of Evidence 407. How was it possible to prove that something should have been manufactured better to begin with, when potentially the best evidence that better design or manufacturing process is the corporation's own subsequent remedial measures, which were

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21. **RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1(b)** (Tentative Draft No. 2, 1995) (stating that product defect is judged at time of sale or distribution); see also Richardson, supra note 13.


23. Id. at 41.

24. Id.

25. Id. at 42.

26. Id. at 41-42.

27. Id. at 42.

28. Id.
barred from being introduced for that exact purpose? The policy may apply to the negligence of an everyday man who erects a fence or fixes a broken stair after someone falls within his home; however, the policy’s application to a manufacturer of mass produced items in the new products liability arena seemed, if anything, contradictory. Thus, there appeared to be no support for the evidentiary exception in the products liability setting.

In an apparent attempt to rectify this ‘muddled state of affairs,’ Federal Rule of Evidence 407 was amended in 1997. The rule now provides that “[w]hen, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction.”

This amendment, which clarified the triggering “event,” also eliminated the distinction between negligence and strict liability, sending a clear message that any “strict liability” exception to the rule excluding subsequent remedial measures was never the initial intention of either the Supreme Court or Congress. Although making the rule applicable in the strict liability realm, the amendment failed to account for distinctions and nuances between negligence and strict liability principles the types of evidence necessary to establish a cause of action under each concept.

“In plain common sense terms... a product that has something wrong with it - a bicycle that has a missing spoke, a cosmetic that contains a glass, a drink that has something in it that should not have been there” is negligence on the part of a manufacturer. On the other hand, design liability “condemns an entire product line...” in essence it deals with products that are

29. Id.
31. See Fed. R. Evid. 407 advisory committee’s note to 1997 amendment.
33. Fielding, supra note 30, at 315-16.
34. See Schwartz, supra, note 22, at 43.
“mismanufactured, which represents a total failure in quality control.” In other words, something is wrong with the product because it was defective to begin with. This is strict liability. The two principles attach liability based on a different set of factual circumstances.\(^{35}\)

Thus, although the Federal Rule was amended in order to “alleviate” conflicts, the amendment focused on the wrong part of the rule.\(^{36}\) The problem was not related to defining whether the rule was applicable in negligence versus strict liability.\(^{37}\) The problem was inherent in the rule, and the concept upon which it is based.\(^{38}\) The exclusion based upon timing of injury, mandated by an unsupported public policy, could not be logically justified, regardless of the liability theory.\(^{39}\) Yet, the rule's flaws become especially apparent in strict liability actions involving mass produced items. Again, how is a plaintiff to present a case to a jury, claiming a design defect, when the most credible and objective evidence indicating whether or not a product was “unreasonably dangerous” from its creation was a manufacturer's subsequent remedial repairs, repairs that “remedied” the inherent fault?\(^{40}\)

In a further twist, Congress ratified the 1997 amendment at the same time that the American Law Institute (ALI) committee drafted the Restatement (Third) of Torts.\(^{41}\) In an attempt to solve the problems in applying the product liability law to these complex lawsuits, the newly drafted Section 2(b) set forth a “reasonable alternative design” (RAD) requirement.\(^{42}\) This section stated that a “design defect exists when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design... and the omission of the alternative design renders the product not reasonably safe.”\(^{43}\) The Restatement advocates for the use of

\(^{35}\) Id.

\(^{36}\) See Wadsworth, supra note 1, at 770.

\(^{37}\) Id.

\(^{38}\) Id.

\(^{39}\) Id.

\(^{40}\) See Schwartz, supra note 22, at 43.

\(^{41}\) Id.

\(^{42}\) See RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2(b) (1998).

\(^{43}\) Id.
subsequent measures in order to show fault. The RAD requirement is a burden that falls on the Plaintiff.

The application of RAD, sans Rule 407, would be logical and workable. For claims arising out of strict products liability, proving that something could have been made better, and that it was reasonable to have been done so at the time is a fair tool. Further, in advancing the RAD requirement, "all evidence of subsequent remedial measures" becomes sufficiently competent and relevant enough to overcome speculative policy considerations. However, the ALI inadvertently promulgated scholarly instruction that was anything but useful. While the ALI grasped for a solution for handling product liability cases, the federal advisory committee was erecting a fortress around all subsequent remedial measures, which effectively left Plaintiffs outside the fortress walls. The exclusionary rule rewarded, or at the very least failed to even consider punishment for certain corporate misbehavior, and the logical hypocrisy between the RAD requirement and Rule 407 ultimately "shifted accident costs to consumers by either precluding their claims or making them harder to establish . . .".

The committee relied on a social policy argument as a substantive basis for the exclusionary rule, which they called "the more impressive ground for exclusion." For under a "liberal theory" of relevance, the first hinge alone would not support the exclusion, because the "inference [of fault] is still a possible one." The social policy argument is that evidence of subsequent remedial repairs should be excluded because manufacturers will be less likely to make safety improvements for fear that such

44. See Fielding, supra note 30, at 306.
45. Id. at 318 & n.92.
46. See Schwartz, supra note 22, at 43-44.
47. Id.
48. See RESTATEMENT (SECOND) OF TORTS § 402A; see also R.I. R. EVID. 407 advisory committee's note.
49. See Fielding, supra note 30, at 316.
50. Id.
51. See Wadsworth, supra note 36, at 765.
52. See FED. R. EVID. 407 advisory committee's note; see also G. Michael Fenner, Evidence Review: The Past Year in the Eight Circuit, Plus Daubert, 28 CREIGHTON L. REV. 611, 619 (1995) ("Evidence need not be conclusive, or even persuasive, to be relevant: it need only make something of consequence to the action somewhat more or less likely.").
changes will be used against them as proof of fault.\textsuperscript{53}

Initially, the policy and enactment of Federal Rule 407 was adopted by twelve jurisdictions, including Delaware, Florida, Idaho, Kentucky, Minnesota, Montana, North Dakota, Pennsylvania, Tennessee, Utah, Vermont, and Guam.\textsuperscript{54} Thirty-four other states mirror the federal rule in regard to negligence claims.\textsuperscript{55} Two states, Connecticut and Missouri, permit evidence to be used in strict liability claims. Two others, Maine and Texas, similarly mirror the federal rule, but allow “Notification of Defect” as an admissible exception to support a product liability claim.\textsuperscript{56} Rhode Island, alone, of all the 50 states, permits evidence of remedial measures under all circumstances.\textsuperscript{57}

III. THE RHODE ISLAND RULE: RELEVANCE RULES THE DAY

A. Why Rhode Island’s Rule Based on Relevance Is Better

The Federal Rules, although suggestive, have no binding power over the states.\textsuperscript{58} In contrast to almost every jurisdiction, Rhode Island’s rules of evidence provide specifically for the admission of subsequent remedial measures as evidence of a manufacturing and design defect. As a result, Rhode Island sails virtually alone in a sea of forty-nine states whose rules mirror the Federal counterpart, albeit to varying degrees.\textsuperscript{59} The other forty-nine states established equivalent or nearly equivalent rules that prevent evidence of subsequent remedial measures from being introduced into evidence in either negligence or product liability claims.\textsuperscript{60} In contrast, Rhode Island’s Rule of Evidence 407 states: “[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is admissible.”\textsuperscript{61} Thus, our hypothetical plaintiffs, Mr. Smith and Mr. Jones, despite their timing differences, have equal access to evidence at trial in Rhode

\textsuperscript{53} Id. at 1460.
\textsuperscript{54} Fielding, \textit{supra} note 30, at 300.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 301.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 300.
\textsuperscript{59} Id. at 300-01.
\textsuperscript{60} Id.
\textsuperscript{61} R. I. R. EVID. 407.
Island's Superior Court, based primarily upon the relevance of the evidence.

Unlike the Federal rule, the linchpin under Rhode Island's rule 407 is not timing but relevancy. The question of admissibility is not directed at the timing of an action, but whether that action can logically and reasonably be connected to a given Defendant's negligence. Protection is afforded to a Defendant not based upon the arbitrary chronology of injuries, but by the mandate that Plaintiff's proffered evidence must comply with the requirements of Rhode Island Rules of Evidence 401 and 402. Moreover, Defendants who undertake remedial measures subsequent to an event or injury are also afforded the added protection, as are all parties, of Rhode Island Rule of Evidence 403. Thus, it should not be assumed that any and all subsequent remedial measures of every type are automatically admissible in Rhode Island simply because Rhode Island chose not to follow the Federal Rule 407 pattern.

62. See Hon. Judith C. Savage & Stephen M. Prignano, A Practical Guide to Evidence on Rhode Island §3.4.2 (2011) (Under the Rhode Island Rules of Evidence, subsequent remedial measures, which, if taken previously, would have made the event less likely to occur, are admissible at trial).

63. R.I. R. Evid. 401 ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); R.I. R. Evid. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of Rhode Island, by Act of Congress, by the General Laws of Rhode Island, by these rules, or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.").

64. See Savage & Prignano, supra note 62, at § 3.4.1. ("Nevertheless, as with all evidence, evidence of subsequent remedial measures is also subject to Rule 403's undue prejudice standard. Thus, in the 'rare cases where it would be unfair or misleading to admit evidence of subsequent remedial measures, Rule 403 gives the trial judge discretion to exclude it.'") (citing Brokaw v. Davol, Inc., 2008 R.I. Super. LEXIS 146 (R.I. Super. Ct. 2008).

65. Id. at §3.4 Judicial Commentary ("Courts are cautious in admitting evidence of subsequent remedial measures for purposes of establishing antecedent negligence (or admitting that evidence for other limited purposes, such as notice) because of the potential for such evidence to be misleading and highly prejudicial. It is important that a party seeking to admit such evidence be prepared, as a threshold matter, to show that the measures taken subsequent to the event in question were designed to remediate or correct the defect at issue and that such measure, if taken previously, would have made the event less likely to occur. Even if that threshold is crossed, Rule 403 still may bar admissibility.").
B. The Public Policy On Which The Federal Rule Is Based Is Not Sound

Rhode Island instituted a more workable and rational rule based upon the logical connection, or lack thereof, of a given piece of evidence to the actual facts in an individual case. It did so because Rhode Island found the following proposed basis for the rule to be flawed: that if subsequent remedial measures were admitted into evidence, then product manufacturers would not take such remedial action in the event of injuries, and thus, products would continue to be made regardless of safety. Rhode Island did not follow Federal Rule of Evidence 407 due, in part, to the absence of any evidence supporting the proposition. Toward the beginning of the comments, the advisory committee explicitly states that Rhode Island was aware that its proposed rule was a complete departure from its federal counterpart. The committee explained that “the proposed rule is consistent with the modern trend and the central notion of relevancy in the rules and is based on a more realistic assessment of the policy considerations underlying the current approach.”

Rhode Island relied on Maine’s “Modern Repair Rule” at the time of the rule’s enactment in 1987. Essentially, Rhode Island found extremely persuasive Maine’s view that “the public policy behind the rule against admissibility was that it would deter repairs. This rationale is unpersuasive today.” The

66. R.I. R. EVID. 403 (“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.”); see SAVAGE & PRIGNANO, supra note 62, at 3.4.1 (“For example, evidence that a defendant installed warning signs on the subject property approximately seven years after the plaintiff’s injury was not allowed because it failed to satisfy the requirements of Rule 407 as an admissible subsequent remedial measure.”) (citing Kurczy v. St. Joseph Veterans Ass’n, 820 A.2d 929, 943 (R.I. 2003)).


68. See id. at 309-10.


70. R.I. R. EVID. 407 advisory committee’s note.

71. Fielding, supra note 30, at 301.

72. R.I. R. EVID. 407 advisory committee’s note (quoting Adviser’s Note to Maine Rule of Evidence 407(a)).
commentary to Rhode Island's Rule 407, while criticizing and rejecting the rationale underlying Federal Rule of Evidence 407, notes that while "[r]ule 407 departs from current Rhode Island law and Federal Rule of Evidence 407 in making evidence of subsequent remedial measures admissible... [t]he proposed Rhode Island rule is based on Maine Rule of Evidence 407(a)." 73 In that regard, the authors relied on similar criticism levied by the commentators in Maine at the policy underlying Federal Rule of Evidence 407, which provided that "[w]hen after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of subsequent measures is admissible." 74 The Maine commentators noted that while "the rule contradicts Maine law 75... [p]ublic policy behind the rule against admissibility was that it would deter repairs. This rationale is unpersuasive today. In some instances subsequent repairs may be evidence of culpability." 76 "[I]t is doubtful that the traditional rule affects primary behavior in either case where the defendant is a large manufacturer or that the individual defendant even knows about the rule. In the rare case where it would be unfair or misleading to admit evidence of subsequent remedial measures, Rule 403 gives the trial judge discretion to exclude it." 77

Simply, "[t]he public policy concern behind [Federal Rule of Evidence] Rule 407 has been subject to a great deal of criticism due to a lack of evidence that manufacturers would avoid correcting a defect and expose the public to further injuries if subsequent remedial measures could be used against them in a pending lawsuit." 78 "It is manifestly unrealistic to suggest that [the] producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effects upon its public image, simply because evidence of... such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the

73. ERIC D. GREEN & ROBERT G. FLANDERS, RHODE ISLAND EVIDENCE MANUAL §407.02, at 134-36 (2005 ed.).
74. MAINE R. EVID. 407(a).
75. MAINE R. EVID. 407(a) (advisor's note).
76. Id.
77. GREEN & FLANDERS, supra note 73, at 136.
improvement."\textsuperscript{79} No studies have been conducted that support this policy proposition. In fact, empirical studies show quite the opposite.\textsuperscript{80} As one commentator noted, "[t]hroughout the rather long and tortuous history of the rule excluding repairs, no court or writer has produced any empirical data showing that the rule has resulted in a single repair or that its absence would discourage repair activity."\textsuperscript{81}

Stated more clearly, the policy underlying Federal Rule of Evidence 407 is logically indefensible in the competitive world of products manufacturing, which mandates improvement and innovation, not only to remain stable, but also competitive.\textsuperscript{82} Many other states have concurred in this assessment.\textsuperscript{83} "[I]t is not reasonable to assume that manufacturers will forego improvements in products in order to avoid admission of the evidence of the improvements against them...."\textsuperscript{84}

The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule... serves merely as a shield against

\textsuperscript{79} Ault v. Int'l Harvester Co., 528 P.2d 1148, 1152 (Cal. 1975).
\textsuperscript{80} Fielding, supra note 30, at 309-10.
\textsuperscript{81} Victor E. Schwartz, \textit{The Exclusionary Rule on Subsequent Repairs -- A Rule in Need of Repair}, 7 FORUM 1, 6 (1971).
\textsuperscript{82} Fielding, supra note 30, at 312.
\textsuperscript{84} Farner v. Paccar, Inc., 562 F.2d 518, 527 (8th Cir. 1977). 2 STEPHEN SALTZBURG \textit{ET AL.}, \textit{FEDERAL RULES EVIDENCE MANUAL}, § 407.02[2] at 407-4 (9th ed. 2006) ("We believe that the articulated social policy does not justify the Rule."); WRIGHT \& GRAHAM, supra note 78, at § 5282 ("[I]n view of the devastating criticisms that have been made of this rationale, it is difficult to see how anyone favoring the preservation of the rule could regard it as a sound justification.").
potential liability.\textsuperscript{85}

In fact, logic in the modern world dictates the opposite conclusion. It is clear that "economic self-interest drives reasonable improvement, not an unnecessary liability shield derivative of a rule that excludes 'evidence for policy reasons quite apart from enabling the trier of fact to reach a correct verdict.'\textsuperscript{86} There is a strong and reasonable expectation that "in spite of man's inherent flaws, with time the world should and must grow wiser."\textsuperscript{87} If anything, "the dubious presence of potential liability, keeps products manufacturers constantly aware" that if an injury does occur, and no remedial measure is taken, the presumption of negligence is heightened.\textsuperscript{88} Because there is sufficient incentive for companies to continue to make repairs following an accident, it seems that the exclusionary rule "serves only to protect defendants who might otherwise be held liable under substantive tort principles . . . without any corresponding benefit to society."\textsuperscript{89} 

Ahead of its time, Rhode Island made the determination in advance of its peers that Section 402(A) clearly set no boundaries between strict liability and negligence for purposes of determining admissibility of subsequent remedial measures.\textsuperscript{90} Recognizing the importance of a consistent and reliable foundation for the application of the law, Rhode Island avoids the inherent conflict that has already begun to overshadow every other jurisdiction and the federal court system once the RAD requirement "intersects with federal rule 407."\textsuperscript{91} Rhode Island has the better rule because it avoided what other jurisdictions did not in this regard, "inconsistent interpretations, split circuits, an invitation to forum shopping due to lack of uniformity, and a general hodgepodge of confusion."\textsuperscript{92}

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\textsuperscript{85} Fielding, supra note 30, at 312.
\textsuperscript{86} Id. at 313 (quoting Schwartz, supra note 81, at 3).
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Schwartz, supra note 81, at 7.
\textsuperscript{90} Fielding, supra note 30, at 310-11.
\textsuperscript{91} Id. at 311.
\textsuperscript{92} Id. at 315.
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IV. THE DAVOL STORY: A CASE STUDY IN REALITY

So how does this affect our hypothetical plaintiffs, Mr. Smith and Mr. Jones? Well, let us bring them into the real world. We will implant them on different dates with ringed polypropylene hernia patches, and multiply them by 1500, resulting in approximately 3000 lawsuits with injuries occurring over a span of years. This is the real world case study playing out today in both the Federal District Court of Rhode Island and Rhode Island's Superior Court. In both venues, there are approximately 1500 cases pending against Defendants, Davol, Inc., and its parent company, C.R. Bard, who designed and manufactured the ringed polypropylene hernia patches. The question is: did Rhode Island's unique evidentiary rule inhibit Davol from undertaking any remedial measures?

A. Davol

Davol focuses its business on products in key surgical specialties, including hernia repair, hemostasis, orthopedics, and laparoscopy. More specifically, Davol designed the Composix® Kugel Mesh Patches (CK Patch) in approximately 2001. Davol submitted a 510k Application to the Federal Drug Administration on January 22, 2001. Following this 510k Application, the CK Patch was authorized by the FDA as a Class II medical device. Davol began manufacturing and distributing the CK Patch in approximately 2001. Immediately after the CK Patches were placed on the market, Davol began receiving actual notices of memory ring failures and CK Patch defects. Knowing those CK Patches were defective, dangerous and already placed on the market, Defendants Davol conducted physician screenings and reviews as early as 2002. An Establishment Inspection Report (EIR) conducted by the FDA in 2006 found that the post market survey validation process of the device was incomplete and failed to include all the data from the physicians surveyed during this time.

As early as September 2004, Defendants uncovered serious problems with the weld process involving the memory recoil ring. Despite attempts to correct the problem at the plant, Davol found the corrective measures to be ineffective and the process still not in control. Davol was aware these weld issues had existed from
On August 30, 2005, Davol initiated a partial CK Patch distribution hold. On December 22, 2005, Davol recalled many sizes of CK Patches under a Class I recall notice. The CK Patch was recalled due to a faulty "memory recoil ring" that can break under pressure. On March 24, 2006, the initial Class I recall on the CK Patch was expanded to include several more sizes of the patch and numerous additional lots of the defective hernia mesh product. On January 10, 2007, the existing recall on the CK Patch was again expanded to encompass further production lots of the defective hernia mesh product.

**B. Davol's Remedial Measures**

In cases currently in suit in the Federal District Court of Rhode Island, because Federal Rule of Evidence 407 applies, the availability of evidence for Plaintiffs has been dictated not by the relevance of that evidence, but by the random timing of the failures of their hernia patches. Conversely, in cases in suit in the Rhode Island Superior Court, where the Rhode Island rule governs, Plaintiffs may seek to admit the evidence of Davol's subsequent remedial measures at trial, as long as the court deems that evidence to be relevant and not unduly prejudicial. This fact pattern is instructive of the fallacy of the policy underlying Federal Rule of Evidence 407 and the copycat state 407 rules. Davol is incorporated under the laws of the State of Rhode Island. It has its principal place of business in the State of Rhode Island. In fact, it has been a Rhode Island corporate citizen for more than 100 years. Davol makes its home where Rhode Island Rule of Evidence 407 - permitting admission of evidence of remedial measures - is the law of the land. Yet, throughout the

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93. See Transcript of Pre-trial hearing at 5:10-15, Whitfield v. Davol, CA No. 1:07-cv-01918-ML-LDA, hearing (May 25, 2010) ("And so with respect to the first three items, that is, the recalls, changes to the product design, revisions to warnings or instructions for use, so long as they relate to pre-explanation, those I think are relevant. Anything after Mr. Whitfield's patch was removed I think is not relevant to this case.").

94. GREEN & FLANDERS, supra note 73; see also Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984) ("It is our view that when state courts have interpreted Rule 407 or its equivalent state counterpart, the question of whether subsequent remedial measures are
life of the CK product line, Davol undertook remedial measures. It undertook ring weld enhancements; engaged in a Class I recall, which it expanded twice; redesigned the product on 2006; undertook internal and external audits; altered its complaint handling, design input, design validation, and design verification procedures and revised its instructions for use. The decisions surrounding the design, manufacture, and sale of the Composix Kugel line were made in Rhode Island. Likewise, the decisions concerning remedial measures at issue were at all times made, in whole or in part, in Rhode Island. All remedial measure were performed or undertaken in the only jurisdiction where subsequent remedial measures are explicitly admissible, subject to a showing of relevancy: Rhode Island.

All of these facts make clear that the public policy underlying Federal Rule of Evidence 407, based on the fear that corporations will not correct product defects if those corrections could be used against them in litigation, is simply not supported by reality. In the one state in the union where remedial measures are explicitly admissible, Davol chose to undertake such measures by recalling and redesigning the CK Patch. Davol, as a Rhode Island resident corporation, could not expect to receive protection from this evidence in the trial court of its chosen domicile. Yet it chose to undertake such measures, albeit too late for the thousands of individuals adversely affected by its product. Therefore, the prospect of having evidence of a subsequent remedial measure used against it in court did not appear to have any effect on Davol's corporate decision-making.

excluded from evidence is a matter of state policy."). See McInnis v. A.M.F., Inc., 765 F.2d 240, 246 n.8 (1st Cir. 1985) (noting that "a Rule excluding evidence of drinking is distinguishable from a 407 type Rule. While the 407 type Rule arguably reflects a substantive policy to encourage remedial measures, a rule limiting the admissibility evidence of drinking cannot reasonably be said to influence the behavior of potential litigants in any way."); Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613, 622 n.7 (8th Cir. 1983) ("Because we hold the evidence in question here admissible even under the federal rule, we need not decide whether, if the state and the federal rules led to different results, the state rule would control. Nevertheless, we recognize factors which counsel respect for the state rule in this case: jurisdiction is based on diversity, the issue is close, and the rationale behind Rule 407 rests on public policy considerations in which the state has a strong interest.").
CONCLUSION

If we believe, like John Locke, that “the actions of men [are] the best interpreters of their thoughts” then we can only conclude that the protection afforded by Federal Rule of Evidence 407, and its progeny throughout the state courts of this country, does nothing to affect the actions of men – or corporations. The somewhat tortured history of Federal Rule of Evidence 407 resulted in a provision that is inapplicable in a post-millennium society of mass produced everything. It results in capricious and arbitrary outcomes in a world where fungibility is often the hallmark of the injurious products. The Davol case study, although single and admittedly unscientific, lends strong credence to the criticisms leveled at Federal Rule of Evidence 407. It seems obvious that in reality, as opposed to theory, “[e]conomic self-interest drives reasonable improvement, not an unnecessary liability shield derivative of a rule that excludes ‘evidence for policy reasons quite apart from enabling the trier of fact to reach a correct verdict.” Stated differently, the Davol story is a manifestation of the well trod criticism of Federal Rule 407: that “[i]t is manifestly unrealistic to suggest that [the] producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effects upon its public image, simply because evidence of . . . such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement.” This admittedly individual anecdote shows that Rhode Island’s Rule 407 is the better way to preserve the rights of the injured and to measure a Defendant’s conduct and liability. Rhode Island, in its status as an outlier on this issue, creates a level playing field by allowing evidence to come in that is not only relevant, but also very probative without concern for an unsubstantiated corporate public policy argument. It is fairer to Mr. Smith, Mr. Jones, and their common Defendant, all three of whom simply must establish, or refute, the relevance of remedial measures evidence.

95. Fielding, supra note 30, at 313 (quoting Schwartz, supra note 81, at 3).
97. Id. at 301.