

FORMA SCIENTIFIC V. BIOSERA AND THE ADMISSIBILITY OF EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES IN STRICT PRODUCTS LIABILITY ACTIONS

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INTRODUCTION

*A place may be left for a hundred years unfenced, when at last some one falls down it; the owner, like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shows that he thought the fence was necessary because he put it up. This is both unfair and unjust. It is making the good feeling and right principle of a man evidence against him.*¹

The above quote exemplifies the historic rationale for the rule excluding subsequent repair evidence.² The rationale has survived to the modern era, codified in Federal Rule of Evidence 407 ("FRE 407") and recognized in all but one state.³ In a situation not uncommon to the law in general, however, the rule has been stretched and made to fit modern developments that were probably not contemplated at the rule's inception.⁴ Although the exclusionary rule came into acceptance during

1. 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 283, at 364 (1st ed. 1904) (quoting *Beever v. Hanson*, 25 L.J. Notes of Cases 132 (1892)).

2. See discussion *infra* Part I.A. This casenote uses the terms "the rule against subsequent repairs," "the rule against evidence of subsequent remedial measures," and "the exclusionary rule" interchangeably.

3. See 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 127, at 26 (2d ed. 1994). Maine is the only state to reject the rule. See *id.*; see also FED. R. EVID. 407.

4. See discussion *infra* Part I.D. Strict products liability in tort was first recognized by a court in 1963. See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98 (5th ed. 1984). Thus, products liability arose almost 100 years after Baron Bramwell announced the rule barring repair evidence in *Hart v. Lincolnshire & Yorkshire Ry.*, 21 L.T.R. (n.s.) 261, 263 (Ex. 1869). See also discussion *infra* Part I.A.

the same period that saw the rise of industrialization—the mid-nineteenth century—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 arguably has stretched the rule beyond its breaking point.⁵

Today, there is a split of authority concerning whether the rule against subsequent repair evidence should be applicable in products liability actions.⁶ Proponents of applying the rule find support in the 1997 amendment to FRE 407 and decisions of the majority of federal courts of appeals to consider the issue.⁷ Opponents of applying the rule find support in the majority of state courts and legislatures to have decided the issue.⁸

Deciding whether or not the exclusionary rule applies is important because the decision may prove outcome-determinative.⁹ In other words, whether or not subsequent remedial evidence is admitted in a products liability case may be dispositive.¹⁰ Therefore, in light of the split of authority between state and federal courts, choosing the forum in which to bring an action becomes critical.¹¹ Different applications of the rule, then, implicate choice of venue and choice of law concerns, leading ultimately to broader concerns of federalism.¹²

This casenote concerns a Colorado case: *Forma Scientific, Inc. v. BioSera, Inc.*¹³ In *BioSera*, decided in the summer of 1998, the Colorado Supreme Court aligned itself with the majority of state courts by holding the rule barring evidence of subsequent repairs inapplicable in products liability actions.¹⁴ This casenote concerns the myriad issues raised by the decision in *BioSera*, and argues that the Colorado position is better reasoned and more justifiable than the conflicting federal position.

5. See *supra* note 4 and accompanying text; see also discussion *infra* Parts I.A, I.D.

6. Amended Federal Rule of Evidence 407 and eight United States Courts of Appeals hold such evidence inadmissible. See 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131. Two United States Courts of Appeals hold such evidence admissible. See *id.* Of state courts to decide the issue, 16 have held subsequent repair evidence admissible, and eight hold the evidence inadmissible. See *id.*

7. See FED. R. EVID. 407 (1997); see also *supra* note 6.

8. See *supra* note 6.

9. See 2 MUELLER & KIRKPATRICK, *supra* note 3, § 133.

10. See *id.*

11. See *id.*

12. See *id.*

13. 960 P.2d 108 (Colo. 1998).

14. See *id.*

Part I explores the history of the rule against admitting evidence of subsequent repairs from its common law origins to the 1997 amendments to FRE 407. Part II analyzes the *BioSera* decision. Part III discusses the choice of venue, choice of law, and federalism issues implicated by the conflicting applications of the rule.

I. THE HISTORY OF EXCLUDING EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES

The rule excluding evidence of subsequent remedial measures is almost 150 years old.¹⁵ A “remedial measure” includes any kind of change, repair, or precaution.¹⁶ The rule applies—and thus bars admission—only when evidence of subsequent repairs is offered for the purpose of proving a party’s conduct.¹⁷ The evidence is always admissible when offered to impeach a witness or to prove any other point that is contested by an opposing party.¹⁸

Almost universally applied, the common law rule was codified in 1975 as Rule 407 of the Federal Rules of Evidence.¹⁹ In 1997, FRE 407 was amended to expressly require the rule’s application in strict products liability cases.²⁰ This amendment reflected the practice of most federal circuit courts that had addressed the issue.²¹ The amended rule, however, now stands in marked contrast to the practice of a majority of state courts.²² Further, the exclusionary rule’s historic application to negligence actions suggests that the amendment improperly carries the rule and its policies far afield of its original concerns.²³

15. See discussion *infra* Part I.A.

16. See 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 407.02[3] (Joseph M. McLaughlin ed., 2d ed. 1998).

17. See 2 MUELLER & KIRKPATRICK, *supra* note 3, § 128.

18. See *id.*

19. See *id.*; see also FED. R. EVID. 407 (1975).

20. See FED. R. EVID. 407 (1997).

21. See *supra* notes 6–8 and accompanying text.

22. See *id.*

23. See discussion *infra* Part I.A.

A. *Origins of the Rule Barring Evidence of Subsequent Remedial Measures*

The common law antecedent to Rule 407 is generally attributed to Baron Bramwell's 1869 decision in *Hart v. Lancashire & Yorkshire Railway Co.*²⁴ In *Hart*, Bramwell excluded evidence of improvements made to railroad tracks by the defendant railroad company after the accident giving rise to the litigation.²⁵

Historically, there have been two rationales advanced for the exclusionary rule: relevancy and extrinsic policy.²⁶ Evidence of subsequent repairs is considered irrelevant on the theory that repairing an injury-causing object indicates merely that the object is "capable of causing . . . an injury, but . . . nothing more."²⁷ A defendant, it is argued, may decide to repair an injury-causing object for any number of reasons beyond tacitly admitting to his fault in the underlying accident.²⁸ Under the relevance rationale, because the inference of negligence that may be drawn from evidence of subsequent repairs is "not the plain and most probable one," such evidence is excludable.²⁹

The second—and clearly most important—rationale for excluding repair evidence concerns extrinsic policy.³⁰ It is believed that the admission of repair evidence "would discourage

24. 21 L.T.R. (n.s.) 261, 263 (Ex. 1869).

25. *See id.*

26. *See* 1 WIGMORE, *supra* note 1, § 283.

27. *Id.* at 363. The relevancy concern is captured in Bramwell's famous quote:

People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be . . . to hold that, because the world gets wiser as it gets older, therefore it was foolish before.

Id. at 364 (quoting *Hart*, 21 L.T.R. at 263).

28. *See id.* Wigmore describes the rationale as follows:

Mere capacity of a place or thing to cause injury is not the fact that constitutes a liability for the owner; it must be a capacity which could have been known to an owner using reasonable diligence and foresight, and a capacity to injure persons taking reasonable care in its use.

Id. at 363.

29. *Id.*

30. *See* 2 MUELLER & KIRKPATRICK, *supra* note 3, § 127. Indeed, Wigmore himself noted that repair evidence would probably not be excludable if relevancy were the only grounds for such exclusion, because inferring fault from a repair is, at least, plausible. *See* 1 WIGMORE, *supra* note 1, §283.

all owners, even those who had genuinely been careful, from improving the place or thing that had caused the injury³¹ out of fear that the change would be used against them to their disadvantage.³² This policy basis is extrinsic because it attempts to influence parties' out-of-court behavior.³³

At early common law, the exclusionary rule was applicable only in negligence actions.³⁴ Further, litigation of the late nineteenth century invoking the rule was generally directed at companies owing a duty of care to their guests.³⁵ It was not until the twentieth century that the rule began to be applied in more varied situations.³⁶ And it was not until after the 1960s and the rise of the theory of strict products liability that the rule's applicability became controversial.³⁷

31. 1 WIGMORE, *supra* note 1, § 283.

32. *See id.* Wigmore quotes an excellent summation of the policy:

The effect of declaring such evidence competent is to inform a defendant that if he makes changes or repairs, he does it under penalty. . . . True policy and sound reason require that men should be encouraged to improve or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers. A rule which so operates as to deter men from profiting by experience and availing themselves of new information has nothing to commend it; for it is neither expedient nor just.

Id. at 364 (quoting *Terre Haute & I.R. Co. v. Clem*, 23 N.E. 965 (Ind. 1889)).

33. *See* 2 MUELLER & KIRKPATRICK, *supra* note 3, § 127.

34. *See* 1 WIGMORE, *supra* note 1, § 283; *see also* JOHN JAY MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE § 100, at 136 (St. Paul, West 1898). McKelvey's formulation of the rule explicitly refers to negligence: "[p]recautions taken by persons, charged with a responsibility for injuries, after the occurring of such injuries are not admissible to show previous negligence." *Id.*

35. This primarily meant actions involving railroad companies. *See* 1 WIGMORE, *supra* note 1, § 283 n.5 (citing pre-1900 cases invoking the rule); *see also* *Ault v. International Harvester Co.*, 528 P.2d 1148, 1151 (Cal. 1974) ("Historically, the common law rule . . . was developed with reference to the usual negligence action, in which a pedestrian fell into a hole in a sidewalk or a plaintiff was injured on unstable stairs . . .") (citations omitted).

36. *See* 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 283 n.1 (3d ed. 1940) (citing post-1900 cases).

37. *See* 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131; *see also* discussion *infra* Part I.D.

B. *The Original Federal Rule 407*

President Gerald Ford signed the Federal Rules of Evidence into law on January 2, 1975.³⁸ The primary reason given for codifying evidentiary rules, which at that time were governed by common law principles, was accessibility.³⁹ The common law of evidence, an accumulation of ambiguous and often contradictory principles, was condensed into sixty-three short and comprehensible rules "printed in a small book easily carried to court, quickly perused and readily understandable."⁴⁰ The rules were an immediate success.⁴¹ In 1980, Colorado adopted the Colorado Rules of Evidence ("CRE"), based on the federal counterpart.⁴²

The rule against admitting evidence of subsequent repairs was codified as Rule 407.⁴³ Like almost every state to adopt a version of the federal rules, Colorado adopted Rule 407.⁴⁴ In 1980, both Colorado Rule of Evidence 407 ("CRE 407") and its federal counterpart read, in part, as follows:

Rule 407. Subsequent Remedial Measures

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.⁴⁵

38. See Joseph M. McLaughlin, *Preface* to 1 WEINSTEIN & BERGER, *supra* note 16, at xix, xxi.

39. See CHRISTOPHER B. MUELLER & LAIRD KIRKPATRICK, *EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS* 2-3 (3d ed. 1996).

40. 2 MUELLER & KIRKPATRICK, *supra* note 39, at 3; see also McLaughlin, *supra* note 38, at xxii.

41. See *id.* By 1998, versions of the Federal Rules of Evidence had been adopted by 41 states. See 6 WEINSTEIN & BERGER, *supra* note 16, at T-1.

42. See 6 WEINSTEIN & BERGER, *supra* note 16, at T-2.

43. See FED. R. EVID. 407 (1975).

44. See 6 WEINSTEIN & BERGER, *supra* note 16, at T-40 to T-45. *But see id.* at T-44 (demonstrating that Rhode Island admits evidence of subsequent remedial measures).

45. COLO. R. EVID. 407 (1980); see also FED. R. EVID. 407 (1975). The full text of the rule continues, "[t]his 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." COLO. R. EVID. 407 (1980); FED. R. EVID. 407 (1975).

Both the text and the drafting of the original rule are important to the analysis in this casenote. First, the text generally adhered to the common law exclusionary rule.⁴⁶ Further, the rationales advanced for the rule were identical to the original policies underlying the common law rule.⁴⁷ Rule 407 did not, however, limit the scope of the rule to negligence actions.⁴⁸ Instead, the drafters applied the rule to claims involving "negligence and culpable conduct."⁴⁹ Culpable conduct, however, was not defined or even mentioned in the advisory committee note.⁵⁰ After the rule was adopted, there was considerable confusion over whether "culpable conduct" encompassed strict liability.⁵¹ This confusion ended in federal practice with the 1997 amendments to Rule 407; but in states that adopted rules similar to the original FRE 407, the debate is still significant.⁵²

The second important feature of the original Rule 407 concerns the circumstances under which it was drafted. Rule 407 received scant attention during the congressional debates over passage of the federal rules.⁵³ The lone criticism came from Professor Victor E. Schwartz, who objected that the rule ignored the *Erie* doctrine.⁵⁴ "[W]hether the evidence is excluded or not should be a matter of state policy where state law governs."⁵⁵ Schwartz's comment is significant because of developments since the original rule was adopted. The current split of authority between state and federal courts on the applicability

46. Compare FED. R. EVID. 407 (1975) with 1 WIGMORE, *supra* note 1, § 283.

47. See FED. R. EVID. 407 advisory committee's note. The Advisory Committee expressly referred to the two grounds for the rule, relevancy and extrinsic policy, and stressed the greater importance of extrinsic policy. See *id.*

48. See FED. R. EVID. 407 (1975).

49. See *id.*

50. See FED. R. EVID. 407 advisory committee's note.

51. See 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131; see also discussion *infra* Part II.B.

52. See FED. R. EVID. 407 (1997); see also discussion *infra* Part III.

53. See 2 WEINSTEIN & BERGER, *supra* note 16, § 407 app. 01[3] (2d ed. 1998). Unlike many of the federal rules under consideration, FRE 407 underwent only one change during the rule-making process (the words "if controverted" were added to the second sentence) and was not changed by Congress, nor was it the subject of floor debate or committee hearings in the House of Representatives. See *id.*; see also 2 MUELLER & KIRKPATRICK, *supra* note 3, § 127.

54. See discussion *infra* Part III for a complete treatment of the *Erie* doctrine questions raised by Rule 407.

55. 2 WEINSTEIN & BERGER, *supra* note 16, § 407 app. 01[3] (quoting Professor Victor E. Schwartz's communication to the House of Representative's Special Subcommittee on Criminal Justice).

of Rule 407, exacerbated by the 1997 amendments to the rule, has led to and will continue to lead to *Erie* choice of law problems.⁵⁶

C. *The Amended Federal Rule 407*

In 1997, FRE 407 was amended.⁵⁷ The rule was extended beyond claims of negligence and culpable conduct to include products liability claims:

When, 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.⁵⁸

Thus, in federal actions, evidence of subsequent remedial measures is now explicitly excluded in products liability actions when offered for the purpose of proving culpability.⁵⁹ This change reflected the majority position of the federal courts interpreting the original version of the rule.⁶⁰ The majority of state courts, however, including Colorado, have interpreted their state counterparts to FRE 407 as inapplicable in products liability actions.⁶¹

D. *The Rise of Products Liability*

The debate over whether or not to extend the exclusionary rule to products liability claims raises questions about the history and nature of products liability litigation itself. Products liability litigation began in the early part of the twentieth century, just before World War I.⁶² For the first fifty years, prod-

56. See discussion *infra* Part III.

57. See FED. R. EVID. 407.

58. *Id.*

59. See *id.*

60. See FED. R. EVID. 407 advisory committee's note.

61. See *supra* note 6 and accompanying text.

62. See MARSHALL S. SHAPO, PRODUCTS LIABILITY AND THE SEARCH FOR JUSTICE 19-26 (1993). Justice Cardozo's opinion in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), is considered one of the first and most important decisions in the creation of the doctrine. See SHAPO, *supra*, at 21-22.

ucts liability actions were based on negligence and warranty theories.⁶³ Then, in the 1960s, a combination of factors led to the acceptance of a strict liability theory for holding manufacturers accountable for their defective products.⁶⁴

The recognition of a theory of recovery sounding in strict liability in tort is significant for two reasons. First, the shift means that a showing of negligence is unnecessary in a strict liability action.⁶⁵ This is significant because, historically, the exclusionary rule was limited to negligence actions.⁶⁶ Thus, applying the exclusionary rule to strict products liability actions is necessarily an enlargement of the original scope of the rule.⁶⁷

Second, and more important, the shift from negligence to strict liability was grounded largely on policy concerns.⁶⁸ Three such concerns have been identified: first, the “deep pockets” theory, which means that large corporations are best able to bear the costs of the accidents caused by their products; second, that such strict liability promotes accident prevention; and third, the difficulty to plaintiffs in proving negligence.⁶⁹ The first and second policies are both extrinsic concerns—both seek

63. See SHAPO, *supra* note 62, at 21–22. In fact, the first products liability case, *Mazetti v. Armour & Co.*, 135 P. 633 (Wash. 1913), based its holding on “a mixture of warranty and negligence theory.” SHAPO, *supra* note 62, at 20.

64. See *id.* at 22–26. The combination of factors included Justice Traynor’s landmark opinion in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963); William Prosser’s article *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); and section 402A (Special Liability of Seller of Product for Physical Harm to User or Consumer) of the Restatement (Second) of Torts (1965).

65. Justice Traynor’s concurring opinion in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944), effectively describes the shift (albeit twenty years early):

I believe the manufacturer’s negligence should no longer be singled out as the basis of a plaintiff’s right to recover In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.

Id.

66. See discussion *supra* Part I.A.

67. See discussion *infra* Parts II.B–D.

68. See Restatement (Second) of Torts § 402A cmt. c (1965).

69. See KEETON ET AL., *supra* note 4, § 98, at 693.

to influence out-of-court behavior. Thus, the rule against subsequent repair evidence and strict products liability are significantly analogous. However, although both have similar ends—accident prevention—the means by which those ends are achieved are different. Strict products liability seeks to deter certain behavior, whereas the exclusionary rule seeks to reward—or at least not punish—certain behavior.⁷⁰ Further, the third policy, mitigating the difficulty of the plaintiff's burden of proof, is directly impeded by the exclusionary rule. Refusing to admit such evidence has a directly negative impact on the plaintiff bringing a products liability action.⁷¹

E. The Rule 407 Controversy Today

The foregoing discussion of both the history of the rule and the history of products liability litigation has suggested several areas of possible conflict and debate over the application of the rule: whether a strict liability claim is sufficiently analogous to a negligence claim to support expanding the rule; the significance of the debate over the scope of "culpable conduct"; whether a state's rule should be applied instead of the federal rule in diversity cases; and finally, and perhaps most importantly, whether the policies promoted by both the rule against subsequent repair evidence and strict products liability theory can be reconciled. The next Part, concerning *Forma Scientific, Inc. v. BioSera, Inc.*, will address all of these issues except the choice of law issue, which is addressed in Part III.

II. *FORMA SCIENTIFIC, INC. V. BIOSERA, INC.*: A CASE STUDY IN THE STATES' MAJORITY POSITION

In the summer of 1998, the Colorado Supreme Court decided the case of *Forma Scientific, Inc. v. BioSera, Inc.*⁷² For the first time, the court decided that CRE 407—which is identical to the original FRE 407⁷³—did not apply to strict liability claims premised on the theory of design defect.⁷⁴ The court

70. See discussion *infra* Part II.E for the significance of this distinction.

71. See *Ault v. International Harvester Co.*, 528 P.2d 1148, 1152 (Cal. 1974).

72. 960 P.2d 108 (Colo. 1998).

73. Compare COLO. R. EVID. 407 with FED. R. EVID. 407.

74. See *BioSera*, 960 P.2d at 111. Design defect is a form of products liability. See Restatement (Second) of Torts § 402A (1965).

based this decision on both the text of the rule and the explanatory note following the rule.⁷⁵ In reaching this decision the court explicitly rejected the approach of the recently revised FRE 407.⁷⁶

A. *The Facts and History of BioSera*

BioSera's factual background showcases the competing concerns underlying the Rule 407 debate. *BioSera*, a seller of blood products, purchased an ultra-cold freezer in 1990 from Forma Scientific ("Forma") for use in storing its products.⁷⁷ The freezer, made in 1990, had an on/off power switch located on the lower back right-hand side of the unit.⁷⁸ The switch was not covered, recessed, or protected in any way.⁷⁹ In April of 1992, janitors employed by *BioSera* inadvertently turned off the freezer while cleaning.⁸⁰ The machine made a beeping sound once it was shut off, but the cleaning crew did not respond.⁸¹ The unit was off from Thursday evening until the following Monday, at which time the fact that it was turned off was discovered.⁸² The blood products stored inside the unit were destroyed, and *BioSera* subsequently brought a strict liability action against Forma alleging, in part, that the on/off switch was designed defectively.⁸³ In January of 1992, before the events giving rise to the action occurred, Forma had already changed the on/off switch on its new refrigerators so that it was larger and more visible.⁸⁴ Finally, a little more than a month before trial in April 1995, Forma decided to add a red light to the power failure switch on their freezer units and was considering adding guards to the on/off switches as a further precautionary measure.⁸⁵

Both the trial court and the court of appeals allowed evidence of subsequent remedial measures—here, the changes

75. See *BioSera*, 960 P.2d at 116–17.

76. See *id.* at 115; see also FED. R. EVID. 407 (1997).

77. See *BioSera*, 960 P.2d at 110.

78. See *id.*

79. See *id.*

80. See *id.*

81. See *id.*

82. See *id.*

83. See *id.*

84. See *id.*

85. See *id.* at 111.

made by Forma to the on/off switch.⁸⁶ However, the trial court and court of appeals allowed the evidence on different grounds: the trial court found CRE 407 not applicable to products liability actions,⁸⁷ whereas the court of appeals would have admitted the evidence via the feasibility exception to CRE 407.⁸⁸ As the state supreme court noted, because the court of appeals allowed the evidence through an exception, the court of appeals' decision impliedly concluded that subsequent remedial evidence was not admissible in strict liability actions.⁸⁹ Thus, on appeal to the Colorado Supreme Court, Forma stated the issue as follows: "[w]hether evidence of post-accident changes in the design of a product is admissible in strict liability cases, when the feasibility of the design alternative is not an issue."⁹⁰ A decision in Forma's favor would necessarily affirm the implicit holding of the court of appeals. The supreme court, however, ruled that such evidence was admissible in strict liability cases.⁹¹ In so ruling, the court avoided the problematic exception issue and created a bright-line rule to follow in future strict liability actions.⁹²

In reaching its ultimate decision, the Colorado Supreme Court addressed all of the critical issues relating to whether or not to admit subsequent remedial evidence in products liability

86. *See id.* at 109.

87. *See id.* at 111 n.7.

88. Both the Colorado rule and the federal rule create extensive exceptions to the rule barring evidence of subsequent remedial measures. *See* COLO. R. EVID. 407; FED. R. EVID. 407. One of these exceptions encompasses situations where the feasibility of a design change is contested. *See* COLO. R. EVID. 407; FED. R. EVID. 407. In other words, when a defendant argues that a design change would not have been feasible at the time of the accident, evidence of a subsequent change is admissible to rebut the defendant's argument. *See* 2 MUELLER & KIRKPATRICK, *supra* note 3, § 132. Such evidence is admissible only for the limited purpose of contradicting the defendant. *See* 2 WEINSTEIN & BERGER, *supra* note 16, § 407.04[3]. However, because the issue of the defendant's conduct is so closely related to the issue of feasibility, the "exception nearly devours the exclusionary principle." 2 MUELLER & KIRKPATRICK, *supra* note 3, § 130. Analysis of the relationship between the rule and its exceptions is beyond the scope of this casenote. For a discussion of this issue see 2 MUELLER & KIRKPATRICK, *supra* note 3, § 130. Here, it is simply important to note that the feasibility exception is conceptually problematic, for the above reasons, and, in strict liability actions, a bright-line rule of either admissibility or exclusion is more in the spirit of the rules, see *infra* Part I.B, than shoeorning such evidence into an exception.

89. *See BioSera*, 960 P.2d at 109.

90. *Id.*

91. *See id.* at 118.

92. *See supra* note 87 and accompanying text.

actions. The remainder of this Part will track the court's decision. The decision will be treated as an outline of the national debate, and will serve as a starting point for presenting the three primary arguments that inhere in the rule: the meaning of "culpable conduct"; the conceptual distinction between strict liability and negligence claims; and the policies underlying both Rule 407 and strict products liability theory.⁹³ First, though, it is important to discuss briefly the split between state and federal courts over this issue.

B. *The Split Between State and Federal Courts*

As mentioned previously, there is a split of authority over whether the bar on subsequent repair evidence applies to strict liability actions.⁹⁴ The division is primarily between state and federal courts.⁹⁵ Some states permit evidence of subsequent remedial measures in strict liability actions statutorily.⁹⁶ Other states permit such evidence based on court decisions.⁹⁷ The 1997 amendment to FRE 407 decided the question for federal courts, but prior to the amendments, eight of ten circuit courts barred subsequent repair evidence in products liability actions.⁹⁸ The decision that started the state court trend of admitting remedial evidence in strict products liability actions was *Ault v. International Harvester Co.*⁹⁹ The *Ault* doctrine will be discussed in detail in the next two sections.

93. See discussion *infra* Part I.E.

94. See discussion *supra* Introduction.

95. See *supra* note 6 and accompanying text; see also 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131.

96. See, e.g., ALASKA R. EVID. 407; HAW. R. EVID. 407; ME. R. EVID. 407; TEX. R. EVID. 407(a). But see NEB. REV. STAT. § 27-407 (1997) (defining "culpable conduct" to specifically include "the manufacture or sale of a defective product").

97. See *BioSera*, 960 P.2d at 113; *Jeep Corp. v. Murray*, 708 P.2d 297, 302 (Nev. 1985); *Shafer v. Honeywell, Inc.*, 249 N.W.2d 251, 257 n.7 (S.D. 1976); *Chart v. General Motors Corp.*, 258 N.W.2d 680, 683-84 (Wis. 1977); see also 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131 n.20.

98. See 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131 n.19.

99. 528 P.2d 1148 (Cal. 1974); see also 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131.

C. *Culpable Conduct and Strict Liability*

When drafted in 1980, CRE 407 was identical to its federal corollary.¹⁰⁰ The comment that supplemented Rule 407 in Colorado, however, was different from the Advisory Committee's comment to FRE 407.¹⁰¹ CRE 407 was supplemented by the comment: "[t]he phrase 'culpable conduct' is not deemed to include proof of liability in a 'strict liability' case based on defect, where the subsequent measures are properly admitted as evidence of the original defect."¹⁰² Thus, the comment to CRE 407 is in direct conflict with the newly amended FRE 407.¹⁰³ However, because the comment to CRE 407 was not binding on the Colorado Supreme Court, in making its decision in *BioSera*, the court had to decide whether to follow the comment or the newly revised federal rule.

To make this decision, the court looked to statutes and decisions in other jurisdictions. The court acknowledged that the division over applicability of the rule was generally between state and federal courts.¹⁰⁴ The Colorado court, then, turned to the leading state court decision construing the meaning of the phrase "culpable conduct": *Ault v. International Harvester Co.*¹⁰⁵ The California Supreme Court decided *Ault* in 1974, the same year that the Federal Rules of Evidence were debated in Congress.¹⁰⁶ In holding strict liability actions to be outside the scope of culpable conduct, the California decision marked the first variation on the previously uniformly applied rule.¹⁰⁷

The *Ault* court held that culpable conduct did not encompass strict liability claims because culpable conduct involves

100. Compare FED. R. EVID. 407 (1975) with COLO. R. EVID. 407 (1980). See also discussion *supra* Part I.B.

101. Compare FED. R. EVID. 407 advisory committee's note with COLO. R. EVID. 407 Colorado committee comment. The Colorado rules were drafted and proposed to the Colorado Supreme Court by a committee of the Colorado Bar Association known as the "Colorado committee." See *BioSera*, 960 P.2d at 112. The Colorado committee comments are explanatory in nature. See *id.*

102. COLO. R. EVID. 407 Colorado committee comment.

103. See *BioSera*, 960 P.2d at 113. Compare FED. R. EVID. 407 with COLO. R. EVID. 407 Colorado committee comment.

104. See *BioSera*, 960 P.2d at 113; see also discussion *supra* Part II.B.

105. 528 P.2d 1148 (Cal. 1974); see *BioSera*, 960 P.2d at 113.

106. See *Ault*, 528 P.2d at 1148; see also 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131, at 48.

107. See 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131, at 49.

blameworthiness.¹⁰⁸ In a strict liability action, the defendant's blameworthiness is not at issue.¹⁰⁹ What is at issue is the defendant's product itself.¹¹⁰ Thus, simply put, culpable conduct, because it contemplates volitional activity, is antithetical to a strict liability action, which does not contemplate volition at all.¹¹¹

In addressing the argument that such a definition of culpable conduct divorced the phrase of any meaning, the *Ault* court pointed out that the phrase contemplates volitional acts that go beyond negligence, such as wanton or reckless misconduct.¹¹² Finally, because the California rule barring subsequent repair evidence only applied to situations involving negligence and culpable conduct, the rule was held inapplicable to strict liability actions.¹¹³

The *Ault* court's decision necessarily demonstrated the intersection between (1) defining "culpable conduct" and (2) the distinction between a negligence and a strict liability action. The next section deals with the second issue, distinguishing between negligence and strict liability actions.

D. Distinguishing Negligence from Strict Liability

A cause of action claiming negligence necessarily requires that the claimant prove the defendant breached a duty of care.¹¹⁴ Strict products liability differs from negligence in that the defendant's conduct is not at issue.¹¹⁵ To prevail, a plaintiff need not show that a defendant acted with intent, recklessness, or negligence.¹¹⁶ All that is at issue in a strict products liability action is whether or not the defendant's product is defective.¹¹⁷ Another important distinction between negligence and strict

108. See *Ault*, 528 P.2d at 1150-51; see also *BioSera*, 960 P.2d at 115 n.13 ("'Culpable conduct' is . . . [b]lamable; censurable; criminal; at fault; involving the breach of a legal duty Such conduct normally involves something more than simple negligence." (quoting BLACK'S LAW DICTIONARY 379 (6th ed. 1990))).

109. See *Ault*, 528 P.2d at 1150.

110. See *id.*

111. See *id.* at 1150-51.

112. See *id.* at 1151 n.3.

113. See *id.* at 1153.

114. See *id.* at 1150.

115. See *id.*; see also discussion *supra* Part II.B.

116. See DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* §2.6.6a, at 2:78 (Supp. 1999).

117. See *Ault*, 528 P.2d at 1150.

liability relates to the policy underlying strict products liability theory.¹¹⁸ Strict liability was adopted, in part, because of the difficulty plaintiffs have in proving defendant manufacturers' negligence.¹¹⁹

The policy behind strict products liability theory is central to any discussion of the rule barring subsequent repair evidence. In fact, the *Ault* court and subsequent courts that have decided the applicability of Rule 407 to strict liability actions have not stopped the discussion at determining the scope of "culpable conduct."¹²⁰ Determining the scope of culpable conduct is clearly secondary. The primary focus and concern in these decisions is whether applying the exclusionary rule to strict liability actions would further the policy motivations underlying the rule.¹²¹

E. The Rule's Policy Motivations and Strict Products Liability Theory

The three arguments for applying the exclusionary rule to strict liability actions are completely intertwined. Thus, it is difficult to discuss (1) culpable conduct without discussing (2) the difference between negligence and strict liability claims. It is even more difficult to discuss either without also discussing (3) the central policy concerns underlying the rule. In this section covering the policies underlying the rule, the connections between all three arguments will become more apparent.

The *BioSera* court, after agreeing with the *Ault* court that culpable conduct did not reach strict liability actions, nevertheless discussed the policy implications of this decision.¹²² The *Ault* court also discussed the policy implications of its decision.¹²³ This is probably due to the overwhelming policy con-

118. See discussion *supra* Part I.D.

119. See *supra* note 69 and accompanying text.

120. See *Ault*, 528 P.2d at 1152. The effect of the California Supreme Court's decision in *Ault* was to define the parameters for subsequent cases addressing this issue. Thus, the debate revolves around two points specifically raised in that decision: (1) the significance of the term "culpable conduct" and whether it encompasses strict liability claims; and (2) the historic rationale underlying the subsequent remedial measures rule and its applicability to strict liability claims. See *BioSera*, 960 P.2d at 113-14.

121. See 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131.

122. See *BioSera*, 960 P.2d at 115-16.

123. See *Ault*, 528 P.2d at 1152.

cerns underlying the rule.¹²⁴ Since the policy behind the rule is to promote responsible behavior, the fear is that exempting strict liability from the exclusionary rule may result in less responsible behavior.¹²⁵ Thus, courts feel obligated to address this policy concern before rejecting the rule out-of-hand.

This policy concern, in fact, fuels the disagreement over whether or not to apply the rule to strict liability cases. Although Judge Richard Posner, a proponent of applying the exclusionary rule to products liability actions, dismissed the *Ault* distinction between negligence and strict liability as "purely semantic,"¹²⁶ his real concern centered on extrinsic policy: "[a] major purpose of Rule 407 is to promote safety by removing the disincentive to make repairs."¹²⁷ One group of proponents of applying the exclusionary rule believes that corporate defendants are not different from individual defendants, and that permitting repair evidence will be a disincentive to manufacturers to produce safer products.¹²⁸ For example, in *Werner v. Upjohn Co.*,¹²⁹ the court reasoned that, because the underlying policy is to encourage improved conditions,

[i]t is difficult to understand why this policy should apply any differently where the complaint is based on strict liability as well as negligence. From a defendant's point of view it is the fact that the evidence may be used against him which will inhibit subsequent repairs or improvement. It makes no difference to the defendant on what theory the evidence is admitted; his inclination to make subsequent improvements will be similarly repressed. The reasoning behind this asserted distinction we believe to be hypertechnical, for the suit is against the manufacturer, not against the product.¹³⁰

Thus, *Werner* addresses all three of the issues concerning the applicability of the exclusionary rule to strict products liability actions. First, the culpable conduct distinction is "hy-

124. See discussion *supra* Part I.A.

125. See 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131.

126. See *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 469 (7th Cir. 1984).

127. *Id.*

128. See, e.g., *id.*; *Werner v. Upjohn Co.*, 628 F.2d 848, 856-57 (4th Cir. 1980); 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131.

129. 628 F.2d 848 (4th Cir. 1980).

130. *Id.* at 857.

pertechnical."¹³¹ Second, the in-court difference between strict liability and negligence actions is immaterial.¹³² Finally, since the policy concerns behind the exclusionary rule are the same in both negligence and strict liability actions, the rule should be applied.¹³³ This is an apt summation of the arguments typically advanced in favor of applying the rule to strict liability actions.¹³⁴

These arguments, however, are bettered by their contrary arguments in *Ault* and cases following the *Ault* doctrine, like *BioSera*.¹³⁵ As shown earlier, both *Ault* and *BioSera* make a persuasive argument in support of defining culpable conduct so as not to include strict liability, and in distinguishing between negligence and strict liability actions.¹³⁶ More important, however, the *Werner* line of cases misstates the policy argument. First, both *Ault* and *BioSera* argue a convincing contrary policy position. Second, the *Werner* line, in discussing the policy behind the exclusionary rule, fails to address the policy concerns behind strict liability theory. Critically, strict products liability theory, like the rule barring subsequent remedial evidence, developed primarily in terms of extrinsic policy concerns, and any discussion of policy in a strict products liability case should address those concerns.¹³⁷

1. Policy in Support of Not Applying the Exclusionary Rule

The *Ault* case impressively made the policy argument for not applying the rule barring subsequent repair evidence to strict products liability actions:

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

131. *See id.*

132. *See id.*

133. *See id.*

134. *See* 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131, at 50–54.

135. "The cases holding that product liability actions should not be subject to FRE 407 have the better of the argument." 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131, at 60.

136. *See* discussion *supra* Parts II.B–C.

137. *See* discussion *supra* Part I.D. The exception is that one rationale for strict products liability was intrinsic to the judicial process, i.e., lessening the burden of proof on plaintiffs. *See id.*

“public policy” assumptions justifying this evidentiary rule are no longer valid. The contemporary corporate mass producers 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 forgo 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 improvements may be admitted *In the products liability area, the exclusionary rule . . . does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability.*¹³⁸

In deciding whether to apply the rule, the *Ault* court addressed two important policy considerations: first, whether the rule will actually have any effect upon the corporate defendant's out-of-court behavior, and second, whether the policy supporting the rule will actually be perverted by its in-court application in products liability actions.¹³⁹ In other words, applying the exclusionary rule to corporate defendants will not serve the primary policy objectives of the rule, and moreover, it may thwart others—namely, the policy objectives behind strict products liability.¹⁴⁰

This reasoning is far more persuasive than that expressed by the *Werner* line. Judge Posner in *Flaminio*, for example, imagines a world where repair evidence is admissible in products liability actions:

It is true that the benefits of subsequent remedial measures to the defendant in avoiding future accidents and their associated liability costs are greater, the larger the scale of the defendant's activity; but, by the same token, the costs of those measures to the defendant, in making it more likely that he will be forced to pay damages for accidents that occurred before the measures were adopted, are also greater. The effects of scale are symmetrical.¹⁴¹

138. *Ault v. International Harvester Co.*, 528 P.2d 1148, 1151–52 (Cal. 1974) (emphasis added).

139. See *id.* at 1152 (citing Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837, 845–52).

140. See discussion *infra* Part II.D.2.

141. *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 470 (7th Cir. 1984).

It is far from obvious, however, that the “effects of scale are symmetrical.” That symmetry depends on the point in time in the product’s run when the defect is discovered and repaired. If that point in time comes near the beginning of the product run, then the potential for future liability clearly outweighs the potential liability for pre-repair accidents. Admittedly, a defect discovered late in a product’s run would tip the scales in the other direction. The real flaw in the Posner/Werner reasoning, however, is the fact that it completely sidesteps the realities of modern corporate decisionmaking. Today, as the *BioSera* court points out:

It is unreasonable to presume that a mass manufacturer of goods takes its cue from evidentiary rules rather than considerations of consumer safety and/or the safety of consumer property. Even taking a less rosy view . . . market forces generally operate to compel manufacturers to improve their products.¹⁴²

One of those “market forces” affecting corporations today is media coverage. A defendant takes huge risks in increased liability for accidents occurring before repairs to a defective product are made; but, by the same token, the potential cost in lost sales for a corporation due to one negative news story about a defective product that remains on the market is far greater. Here, the effects of scale clearly are not symmetrical.¹⁴³ Beyond the realities of corporate decisionmaking, there is another, perhaps greater, argument than all of those dealing exclusively with the policy motivations behind the exclusionary

142. *Forma Scientific, Inc. v. BioSera, Inc.*, 960 P.2d 108, 115–16 (Colo. 1998). The court went on to say: “This is amply demonstrated by the actions taken here by Forma to protect its consumers’ property interests by lessening the risk of inadvertent shut offs of its ultra-cold temperature freezers.” *Id.* at 116.

143. See 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131, at 60. There are other arguments in favor of applying the exclusionary rule to strict liability actions not addressed here due to the limited size and scope of this paper. Briefly, they include, first, the fact that often strict liability claims are paired in the same action with negligence claims. See *id.* at 48. This is tangential to both this paper and the *BioSera* decision. *BioSera* dealt expressly with a strict liability cause of action. See *BioSera*, 960 P.2d at 108. Second, *Ault* will arguably lead to absurd situations, such as in an action alleging both negligence and strict liability theories, where the rule will apply to some theories and not others, leading to jury confusion. See 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131, at 53–54. This argument also seems tangential to the substantive issues addressed in this paper. No such difficulty was present in *BioSera*. See *BioSera*, 960 P.2d at 108.

rule: the competing policy considerations underlying strict products liability theory.

2. Comparing Strict Products Liability Policy with Rule 407 Policy

In most decisions concerning the exclusionary rule and strict liability actions, courts have, somewhat inexplicably, not given weight to the policy considerations underlying both the rule and strict products liability theory.¹⁴⁴ The Colorado Supreme Court, however, tacitly addressed the issue in *BioSera* when discussing the distinction between strict liability and negligence cases.¹⁴⁵ Quoting a ten-year-old court of appeals decision, the supreme court wrote: “in accordance with one of the underlying goals of strict liability of easing the burden of proof for a plaintiff injured by a defective product, the plaintiff is relieved of the requirement of proving the manufacturer’s negligence.”¹⁴⁶ This language, though, was placed in the section of the opinion defining culpable conduct, rather than the section that dealt with the policies of Rule 407.¹⁴⁷

Likewise, the *Ault* court also did not explicitly address the policy underlying strict products liability theory in holding the exclusionary rule inapplicable. However, the *Ault* court made one assertion that seems grounded in one of the policy goals behind strict liability: “[i]n the products liability area, the exclusionary rule . . . serves merely as a shield against potential liability.”¹⁴⁸ One of the goals of strict products liability, historically, was to make it possible for a plaintiff to recover from a defendant when proving negligence was impossible.¹⁴⁹ Permitting companies to “shield” their actions through the invocation of the exclusionary rule thwarts this goal of products liability theory.

144. See discussion *supra* Part I.D (providing overview of the policies underlying strict products liability theory).

145. See *BioSera*, 960 P.2d at 115.

146. *Id.* (quoting *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1246 n.7 (Colo. 1987)).

147. See *BioSera*, 960 P.2d at 115; see also discussion *supra* Parts II.B–C.

148. *Ault v. International Harvester Co.*, 528 P.2d 1148, 1152 (Cal. 1974); see also discussion *supra* Part II.D.1.

149. See KEETON ET AL., *supra* note 4, § 98, at 693.

These two examples, from *BioSera* and *Ault*, demonstrate the extent to which courts weigh the policy interests behind strict liability theory when considering whether to apply the exclusionary rule. That is, courts essentially do not consider strict liability policy. This is unfortunate because that policy seems to provide another avenue for refusing to extend the rule into strict liability actions. As such, policy considerations would bolster the argument against extending the rule in the face of contrary interpretations.

The argument is this: beyond the goal of opening the courthouse doors to more injured plaintiffs, there are two other goals of strict products liability theory.¹⁵⁰ The first goal, according to the deep pockets theory, is to allocate accident costs to the parties best able to bear those costs—manufacturers.¹⁵¹ The second goal of strict products liability theory is promoting accident prevention.¹⁵² While both of these goals are mentioned in subsequent remedial measures cases, they are never mentioned in the context of strict liability theory. Instead, they are mentioned as they relate to the policy goals of the exclusionary rule.¹⁵³ Although this context is undoubtedly important, these goals would be better advanced by arguing them as they relate to strict products liability theory.

Essentially, if courts adopted a balancing test whereby the policy goals of strict liability theory together with the goals of the rule barring subsequent remedial evidence were weighed against the likely results of admitting the evidence, a much stronger case could be made for not extending the rule to products liability actions. Regardless of the effectiveness of this argument, it suggests the next issue of this casenote. The policies underlying both the exclusionary rule and strict liability are substantial, and may even be substantive in the legal sense. In fact, as the *Ault* court noted, the rule may be used as a "shield."¹⁵⁴ Thus, a ruling on a motion to exclude subsequent remedial evidence could determine a case's outcome. The question of which law to apply in an action brought in federal court may therefore be critical.

150. See *id.* at 692–93; see also discussion *supra* Part I.D.

151. See KEETON ET AL., *supra* note 4, § 98, at 692–93.

152. See *id.* at 693.

153. See 2 MUELLER & KIRKPATRICK, *supra* note 3, § 131.

154. See *Ault v. International Harvester Co.*, 528 P.2d 1148, 1152 (Cal. 1974).

III. THE RULE BARRING SUBSEQUENT REMEDIAL EVIDENCE AND THE *ERIE* DOCTRINE

BioSera was decided in Colorado state court. The decision in *BioSera*, and the decisions of many other state courts regarding the exclusionary rule, is clearly at odds with the scope and effect of FRE 407.¹⁵⁵ Such divergent approaches thus make choice of venue a critical consideration in any products liability action.¹⁵⁶ In a case where subsequent repairs may be an issue, a corporate defendant clearly has a distinct incentive to seek removal to federal court where such evidence is inadmissible—unless, of course, the federal court applies state evidence rules instead of the federal rules. Herein lies the *Erie* doctrine issue regarding the exclusionary rule.

Deciding whether or not to extend FRE 407 to state-law-based strict liability actions in federal court diversity suits is by no means without controversy. As one commentator noted, applying the federal rule in such a situation “amounts to an unwarranted incursion upon the *Erie* doctrine—one apparently not intended by Congress, one which is arguably unconstitutional, and one which arguably violates both the Rules of Decision Act and the Rules Enabling Act.”¹⁵⁷ As the foregoing quote makes clear, applying the federal exclusionary rule to a situation that arguably calls for the state rule seems highly questionable. However, prior to the 1997 amendments to FRE 407, the Tenth Circuit was the only federal circuit to apply the state rule when the state and federal rules were in direct conflict.¹⁵⁸ In fact, during the congressional debates over passage of the federal rules, only one commentator raised the point that “whether the evidence is excluded or not should be a matter of state policy where state law governs.”¹⁵⁹ This is unfortunate because the arguments in favor of applying state exclusionary rules where they conflict with FRE 407 are convincing.

155. See *supra* note 6 and accompanying text.

156. Obviously, choice of venue is only relevant in actions in which there is complete diversity, and, thus, federal jurisdiction. See 28 U.S.C. § 1332 (1999).

157. 2 MUELLER & KIRKPATRICK, *supra* note 3, § 133, at 70.

158. See LEONARD, *supra* note 116, § 2.5, at 38 n.12.9.

159. 2 WEINSTEIN & BERGER, *supra* note 16, § 407 app. 01[3] (quoting Professor Victor E. Schwartz's 1973 statement to the House of Representative's Special Subcommittee on Criminal Justice).

This Part begins with a brief overview of the *Erie* doctrine as it relates to the issue of applying either a state exclusionary rule or FRE 407. Next, the minority position of the Tenth Circuit applying the state, rather than federal, rule is discussed. Third, the opposing view of the majority of circuits is considered. Finally, this Part concludes with an evaluation of the opposing positions.

A. *A Brief Overview of the Erie Doctrine As It Relates to Rule 407*

This paper cannot begin to address the myriad issues touched off by the landmark decision of *Erie R.R. Co. v. Tompkins*.¹⁶⁰ It is important, however, to note briefly the *Erie* issues that arise when a federal court, sitting in diversity, is asked to apply a subsequent remedial measures evidentiary rule to a cause of action that sounds in state law.

One of *Erie's* holdings was that a federal court, sitting in diversity, must apply state substantive law in an action that is not expressly governed by federal law.¹⁶¹ Strict products liability is unquestionably an area of state substantive law.¹⁶² Thus, in products liability actions brought in federal courts, state substantive products liability law supplies the rule of decision.

However, it is universally agreed that either the United States Supreme Court or Congress may promulgate federal procedural rules to govern cases brought in federal court.¹⁶³ The *Erie* issue arises, then, regarding whether the exclusionary rule is characterized as substantive or procedural. This characterization determines the rule's applicability: federal courts may apply federal procedural rules in diversity cases, but only so long as those rules do not "abridge, enlarge or modify any

160. 304 U.S. 64 (1938).

161. *See id.* "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." *Id.* at 78; *see also* *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) ("[F]ederal courts sitting in diversity cases, when deciding questions of 'substantive' law, are bound by state court decisions as well as state statutes.").

162. *See* 2 MUELLER & KIRKPATRICK, *supra* note 3, § 133 n.15. Since the enactment of the Federal Rules of Evidence, Congress has proposed legislating products liability, including subsequent remedial measures evidence, but has never enacted a statute. *See id.*; *see also* S. 44, 98th Cong. § 14 (1983).

163. *See* 2 MUELLER & KIRKPATRICK, *supra* note 3, § 133 n.7.

substantive right.”¹⁶⁴ As the following discussion indicates, only the Tenth Circuit has held the exclusionary rule substantive.

B. The Minority View: Moe v. Avions Marcel

Today, the Tenth Circuit is the only federal circuit to apply the state exclusionary rule instead of FRE 407 when the two conflict.¹⁶⁵ The Tenth Circuit decided this issue in *Moe v. Avions Marcel*.¹⁶⁶ The *Moe* court held that whether or not to exclude evidence of subsequent remedial measures is a matter of state policy.¹⁶⁷ The holding is based on the idea that the interests of an individual state in furthering the policies underlying state strict liability law outweigh the interests of the federal courts in applying FRE 407.¹⁶⁸ The court said that when there is a conflict between FRE 407 and its state corollary,

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 of 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

164. 28 U.S.C. § 2072(a)–(b) (1990). The Rules Enabling Act provides, in part, “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence Such rules shall not abridge, enlarge or modify any substantive right.” *Id.* Although the Federal Rules of Evidence were enacted by Congress (after original drafting by the Supreme Court), and thus not governed by the Rules Enabling Act, one commentator noted that, because one purpose of Congress’s action of revising the Rules was to ensure the Rules conformed to the Rules Enabling Act prohibitions, “the Rules of Evidence should be interpreted as if they were subject to the command of the Enabling Act not to abridge, enlarge or modify any substantive right.” 2 MUELLER & KIRKPATRICK, *supra* note 3, § 133 n.14 (quoting Olin Guy Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 401–02 (1977)).

165. *See Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917 (10th Cir. 1984).

166. *Id.*

167. *See id.* at 932.

168. *See id.* Contrast the *Moe* court’s approach in this decision with the discussion, *supra* Part II.E.2, concerning the fact that no court explicitly addresses strict liability policy when deciding whether to apply the exclusionary rule.

action in order to effect uniformity and to prevent forum shopping.¹⁶⁹

The Tenth Circuit's three rationales for applying the state exclusionary rule in *Moe* directly address the *Erie* doctrine issues that arise when determining whether or not to apply FRE 407 in diversity cases.

First, with the exception of the recently amended FRE 407, there is no federal law of products liability.¹⁷⁰ The substantive law of a products liability action, therefore, is necessarily the law of the state in which the federal court hearing the case sits. As the Tenth Circuit stated in its second reason for applying the state exclusionary rule, state law determines, for example, the causes of action, burdens of proof, and statutes of limitation. Although the federal government has constitutional authority under the commerce clause to regulate in this field, there was no federal products liability regulation prior to the 1997 amendment to FRE 407. It seems almost absurd for the federal government to have such a potential effect in this state-dominated area by means of one evidentiary rule.

The Tenth Circuit implies as much in its third rationale for applying the state rule: state rules are closely tied to substantive state products liability law. The federal rules are not closely tied to substantive federal products liability law. The current FRE 407 is not part of a larger regulatory scheme. The application of FRE 407 to state causes of action is an unwarranted and unreasoned intrusion into state practice.¹⁷¹

Although the *Moe* court's reasoning seems persuasive, it is alone among the federal courts of appeal in reaching this conclusion. Much more representative of the federal bench is Judge Posner's majority opinion in *Flaminio v. Honda Motor Co.*¹⁷²

169. *Id.*

170. *Moe* was decided before the 1997 amendments to FRE 407.

171. There is no reason for the Federal Rules of Evidence to treat the exclusionary rule any differently than it treats privileges—by deferring to state practice.

172. 733 F.2d 463 (7th Cir. 1984).

C. *The Majority View: Flaminio v. Honda Motor Co.*

In *Flaminio*, Judge Posner chose to displace a Wisconsin state exclusionary rule with FRE 407.¹⁷³ Posner's decision rested on distinguishing between the substantive and procedural aspects of FRE 407.¹⁷⁴ The substantive/procedural distinction is almost as old as the decision in *Erie* itself.¹⁷⁵ Posner's central argument was that the mere presence of any procedural purpose in a federal rule is sufficient to justify applying a federal rule in direct conflict with a state rule, regardless of whether the rule affects some substantive rights.¹⁷⁶

Posner conceded in *Flaminio* that FRE 407 is based largely on extrinsic policy concerns that are substantive in nature.¹⁷⁷ However, Posner went on to point out that FRE 407 is "entwined with procedural considerations."¹⁷⁸ Posner first cited Baron Bramwell's famous 1869 decision in *Hart v. Lancashire & Yorkshire Railway Co.*,¹⁷⁹ and then argued that Congress passed FRE 407 out of the fear that juries would give too much weight to subsequent remedial evidence.¹⁸⁰ Finally, Posner wrote: "Although Rule 407 has substantive consequences by virtue of affecting incentives to take safety measures after an accident occurs, this just puts the rule in that borderland where procedure and substance are interwoven."¹⁸¹

Faced with the not uncommon situation of a rule which, "though falling within the uncertain area between substance and procedure, [is] rationally capable of classification as either,"¹⁸² Posner reacted by retreating to the bromide that "[d]espite the [Rules Enabling] Act's explicit prohibition against abridging substantive rights, no rule promulgated under its authority has ever been invalidated."¹⁸³ Calling the ar-

173. See *id.* at 471.

174. See *id.*

175. See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); see also discussion *supra* Part III.A.

176. See *Flaminio*, 733 F.2d at 472.

177. See *id.* at 471.

178. See *id.*

179. 21 L.T.R. 261, 263 (1869); see discussion *supra* Part I.A.

180. See *Flaminio*, 733 F.2d at 471.

181. *Id.* at 471-72.

182. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

183. *Flaminio*, 733 F.2d at 472.

gument against applying FRE 407 "melodramatic,"¹⁸⁴ Posner acted as though even questioning the applicability of the federal rule is tantamount to questioning the entire conception of the Federal Rules of Evidence:

We are reluctant to cast a cloud over the whole federal rulemaking enterprise and open a new chapter in constitutional jurisprudence by holding that a procedural rule is beyond even the power of Congress to enact for application to diversity cases, because the rule affects substantive questions that the Erie doctrine reserves to the states.¹⁸⁵

The essential point made by Posner and by the majority of federal circuits to address the issue, is the fact that FRE 407 has at least some procedural purpose sufficient to support the application of the federal rule in diversity cases, regardless of whether that application affects the substantive rights of the parties to the action. However, as pointed out in the following section, the *Moe* minority rationale is far more sensible than the majority position.

D. Only the Minority Position Satisfies the Erie Doctrine

The central flaw in the majority position is that it does not sufficiently address the degree to which the exclusionary rule is substantive, rather than procedural. Posner's argument rests, finally, on the rather thin premise that the exclusionary rule is in the "borderland" between substance and procedure.¹⁸⁶ Posner's example of this borderland is Rule 35 of the Federal Rules of Civil Procedure, which authorizes compulsory medical examinations in diversity actions,¹⁸⁷ and which the Supreme Court has held is valid.¹⁸⁸ Posner argues that Rule 35 is substantive in the sense that it "infringes on personal privacy and makes it harder for plaintiffs to get sizable damage awards in personal-injury cases."¹⁸⁹ Note, however, that both asserted substantive consequences of Rule 35 affect only in-court be-

184. *See id.*

185. *Id.*

186. *See id.* at 471.

187. *See id.* at 472.

188. *See Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

189. *Flaminio*, 733 F.2d at 472.

havior. Rule 35 does not reach so far as to affect out-of-court behavior.

The exclusionary rule, in contrast, clearly reaches out-of-court behavior. Although the exclusionary rule has some in-court procedural consequences, it is overwhelmingly intended to affect policy and behavior—safety promotion—beyond the courthouse. The extended reach of the exclusionary rule thus moves the rule far beyond the borderland of substance and procedure, and into the realm of clear substance. This is the realm of state law that both *Erie* and the Rules Enabling Act prohibit the federal rules from entering. Here, FRE 407 is guilty of abridging, enlarging or modifying substantive—that is, out-of-court—state law rights.

Posner's secondary argument that no rule promulgated under the Rules Enabling Act has ever been invalidated also misses the point, and not simply because the Rules Enabling Act does not expressly encompass the congressionally promulgated Federal Rules of Evidence.¹⁹⁰ First, simply because the Federal Rules of Evidence have survived intact for twenty-five years does not mean that the rules are inviolate in perpetuity. Second, not applying FRE to state-law-based actions does not invalidate the rule. There are instances of federal tort law to which FRE 407 is relevant, such as liability for railroad injuries under the Federal Employer Liability Act ("FELA").¹⁹¹ Thus, the argument that FRE 407 would be rendered moot by not applying it to state-law-based causes of action is wrong. Posner's arguments merely sidestep the issue of whether a single Federal Rule of Evidence can be used by defendants to completely thwart state-based products liability law.

Under federal law, a defendant can remove a case from state to federal court with relative ease.¹⁹² Thus, a corporate

190. *See id.*

191. The Federal Employer Liability Act states that:

Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . , for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51 (1999) (emphasis added).

192. *See* 28 U.S.C. 1441 (1994).

defendant faced with the prospect of litigating an action involving subsequent remedial measures will undoubtedly seek removal to federal court where such evidence is inadmissible. As a result, the plaintiff's ability to recover may end up turning not on the state products liability law, but on the application of an evidentiary rule at odds with the state rule. This is plainly contrary to the dictate of *Erie*: "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."¹⁹³ It seems inconceivable that Congress, in enacting one amendment to an evidence rule, would intend to so affect state substantive law.

Moreover, the majority position's substance/procedure arguments do not adequately address the significant state interests in internally regulating products liability law. As previously stated, the whole of products liability law is founded on opening courthouse doors to injured plaintiffs. Further, each individual state has an interest in the fair treatment of its own citizens and corporations by the producers of goods used and consumed in each state. Until the federal government enacts a scheme to regulate products liability law, it seems presumptuous for federal courts deciding state law claims in diversity actions to completely override state law policy by means of a single evidentiary rule.

The situation presented by the Tenth Circuit's minority position and the Colorado *BioSera* decision adds an interesting wrinkle to the foregoing debate. The Tenth Circuit includes Colorado. Since the Tenth Circuit is the only circuit to apply state exclusionary rules, and the Colorado Supreme Court has clarified in *BioSera* that the exclusionary rule does not apply to Colorado products liability actions, Colorado would now seem to be a prime location for plaintiffs to bring products liability claims involving subsequent remedial measure issues. Thus, whatever policy Congress may have had in mind in enacting the 1997 amendment to FRE 407 can be thwarted easily by forum-shopping plaintiffs. The potential result is a mishmash of results in products liability actions. Such a mishmash may be acceptable when caused by differing state laws, but it seems like simple incoherence when caused by a single federal law.

193. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

CONCLUSION

This casenote has addressed both the applicability of the rule barring evidence of subsequent remedial measures to strict products liability actions and the *Erie* doctrine issues raised by applying FRE 407 in cases where it conflicts with a corollary state rule. The Colorado Supreme Court made the right decision in *BioSera*: in holding subsequent repair evidence admissible in a products liability action, the court clearly elevated products liability policy above the policy underlying the exclusionary rule. Further, the majority position of the federal circuits holding that FRE 407 preempts corollary state rules seems in clear violation of the *Erie* doctrine. The better-reasoned position is the Tenth Circuit minority position, holding the state exclusionary rule applicable. The minority position is sensitive to the *Erie* concern regarding preempting state law in the absence of existing federal law. Finally, the fact that Colorado is in the Tenth Circuit may lead to the reputation of the state, in years to come, as a real plaintiff's jurisdiction for products liability actions.

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