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SUBSEQUENT REMEDIAL MEASURES AND THE APPLICATION OF CALIFORNIA LAW IN A DIVERSITY ACTION

I. INTRODUCTION

Imagine yourself and a friend are exploring the desert near Mojave, California in your friend’s International Scout. The Scout is a sport utility vehicle manufactured by International Harvester that is similar to a jeep in design and features.¹ As your friend drives down a twenty foot wide road known as “Nine Mile Canyon Road,” the aluminum gearbox fails. As a result of the failure of the gearbox, your friend loses control of the vehicle, and both of you plunge 500 feet over a cliff. You suffer serious injuries from the near fatal plunge.

After your accident, International Harvester changes the design of the gearbox housing from aluminum to malleable iron. Thereafter, you file a products liability suit against International Harvester in California state court. International Harvester has the action removed to federal district court, because it is incorporated in Delaware.

The key to your case is the evidence of the subsequent change in the design of the gearbox housing from aluminum to iron. You contend the use of aluminum for the gearbox housing was a design defect because of its unsuitable characteristics for such a purpose. Specifically, you allege that the aluminum gearbox housing suffered from excessive metal fatigue, and that this design defect was corrected by International Harvester after your accident. International Harvester made the correction by changing the gearbox housing to malleable iron, a stronger metal better suited for use in a gearbox. Is this evidence of a subsequent remedial change to the gearbox admissible against International Harvester?

¹ This hypothetical is loosely based on the facts of Ault v. International Harvester, 528 P.2d 1148 (Cal. 1974).
Under California law, in a cause of action for strict products liability, a plaintiff may prove a manufacturer's liability by showing a manufacturer's subsequent remedial measures. However, the federal courts treat the admissibility of subsequent remedial measures differently. Effective December 1, 1997, Rule 407 of the Federal Rules of Evidence specifically excludes the use of subsequent remedial measures in a strict products liability action to show liability.

This change in the federal rule may lead to forum shopping in strict products liability cases based on design defect. Under the Supreme Court holding in *Erie Railroad Co. v. Tompkins*, a federal court must apply state substantive law in a diversity action. However, under the Rules Enabling Act, the Supreme Court has the power to prescribe rules of evidence applicable in federal court. The 1997 revision of Federal Rule of Evidence 407 now puts California Evidence Code § 1151 in direct conflict with the Federal Rule.

When a direct conflict between a state and federal rules of evidence exists, the proper test to determine which rule applies is no longer the "typical, relatively unguided *Erie* choice." Under the test prescribed in *Hanna v. Plumer*, Rule 407 must be followed in a diversity case unless "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question [does not] transgress [either] the terms of the Enabling Act [or] consti-
The purpose of this comment is to compare Federal Rule of Evidence 407 with California Evidence Code § 1151 to determine which rule should apply in an action based on California law and brought in federal court under diversity jurisdiction. It is the position of this comment that California's section 1151 should prevail. Allowing evidence of subsequent remedial measures is a matter of state concern which helps to define the substantive law of design defect in products liability cases. This policy decision should be effectuated in a case heard in federal court where the claim is based on California law.

This comment will explore the tension between California Evidence Code § 1151 and Federal Rule of Evidence 407. Specifically, this comment will explore the tension between the rules in a products liability case for a design defect in a diversity action based on California substantive law. Part II will begin with a brief overview of products liability law in California. Additionally, Part II will provide the rationale of both California's section 1151, which permits the admission of evidence of subsequent remedial measures, and Federal Rule of Evidence 407, which excludes such evidence. Part II will conclude with an explanation of the choice of law analysis applicable to determine which rule of evidence should be used in a diversity action.

In Part III, the problem of applying Rule 407 in a diversity action will be presented. Part IV analyzes the approaches used to determine which rule of evidence should apply in a diversity action in the Seventh, Ninth, and Tenth Circuits. Finally, Part V proposes that the Ninth Circuit should adopt the rationale of Moe v. Avions Marcel Dassault-Breguet Aviation and apply section 1151 in a diversity ac-

12. Id. at 471 (quoting Sibbach v. Wilson & Co., 312 U.S. 13, 15 (1941)).
13. See infra Part V.
14. See infra Part IV.B.
15. See infra Part IV.B.
16. See infra Part II.
17. See infra Part II.
18. See infra Part II.
19. See infra Part III.
20. See infra Part IV.
21. 727 F.2d 917 (10th Cir. 1984).
tion based on California law.22

II. BACKGROUND

This part begins with an explanation of products liability law as it applies to design defects in California law.23 It then presents California's section 1151, which prohibits the use of evidence of subsequent remedial measures to show negligence.24 The inapplicability of section 1151 to strict products liability will be outlined in a discussion of Ault v. International Harvester.25 Rule 407 will then be discussed, along with a brief history of the Rule.26 Following the discussion of the federal rule, the approaches of the Seventh, Ninth, and Tenth Circuits to the question of whether evidence of subsequent remedial measures is admissible to show liability will be outlined.27 Finally, this part explains the choice of law analysis applicable in the Ninth Circuit as stated in Olympic Sports Products, Inc. v. Universal Athletic Sales Co.28

A. Design Defect in Strict Products Liability Actions Under California Law

In products liability cases for a design defect, the California Supreme Court has promulgated a test of liability for a manufacturer. This test was stated in Barker v. Lull Engineering, Inc.29 Under the Barker test,

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22. See infra Part V.
23. See infra Part II.A.
27. See infra Parts II.C.2, 3, & 4, respectively.
28. 760 F.2d 910 (9th Cir. 1985). See infra Part II.D.
29. 573 P.2d 443, 446 (Cal. 1978). The plaintiff, a forklift operator, was injured when a lift built by the defendant overturned, causing a piece of lumber to fall from the upraised lift and strike the plaintiff. See id. at 447. The plaintiff argued that the forklift was defective due to the failure of defendant to include mechanical arms called "outriggers" in the design of the lift in order to compensate for the instability the machine suffered when lifting loads. See id. at 448. Plaintiff also asserted that the design of the machine was defective since the machine had no seat belts to secure the operator, nor a roll bar to form a cage around the operator while operating the machine. See id. at 448-49. The defendant argued there was no defect in the machine, but rather the plaintiff's inexperience in operating the machine caused the plaintiff's injuries. See id. Plaintiff appealed from a defense verdict, claiming error in the jury instruction stating, "strict liability for a defect in design . . . is based on a finding that the product was unreasonably dangerous for its intended use." Id. The Barker court agreed with the plaintiff and extended the court's rejection of the
a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweigh the risk of danger inherent in such [a] design.\textsuperscript{30}

The burden is initially on the plaintiff. In order to show that a product is defective, the plaintiff must demonstrate that the product did not "perform as safely as an ordinary consumer would expect."\textsuperscript{31} The product failure must be shown to have occurred "when used in an intended or reasonably foreseeable manner."\textsuperscript{32}

Alternatively, the plaintiff may prove that the design of the product "proximately caused his injury."\textsuperscript{33} If so, then the burden shifts to the defendant.\textsuperscript{34} The defendant must then prove that on comparison, that "the benefits of the challenged design outweigh the risk of danger inherent in such a design."\textsuperscript{35}

California adopted a broad interpretation of the term "defect," specifically rejecting the majority definition found in the Restatement of Torts.\textsuperscript{36} The \textit{Barker} court rejected the Restatement definition of a product defect to design defect cases. \textit{See} Barker v. Lull Eng'g, Inc., 573 P.2d 443, 450-51 (Cal. 1978).

\textsuperscript{30} \textit{Id.} at 457.

\textsuperscript{31} Barker v. Lull Eng'g, Inc., 573 P.2d 443, 455 (Cal. 1978).

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{See id.}

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{Id.} Section 402A of the Restatement of Torts, Second reads:

\textbf{§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer}

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the use or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
statement approach for a number of reasons. First, the Barker court noted that the Restatement confined "the application of strict liability to an article which is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." The Barker court "flatly rejected" this limitation based on the knowledge of the defect by the consumer:

We... refuse[e] to permit the low esteem in which the public might hold a dangerous product to diminish the manufacturer's responsibilities caused by that product.... [O]ur rejection of the use of the 'unreasonably dangerous' terminology in Cronin rested in part on a concern that a jury might interpret such an instruction, as the Restatement drafters had indeed intended, as shielding a defendant from liability so long as the product did not fall below the ordinary consumer's expectations as to the product's safety.... [T]he dangers posed by such a misconception by the jury extend to cases involving design defects... indeed, the danger of confusion is perhaps more pronounced in design cases in which the manufacturer could frequently argue that its product satisfied ordinary consumer expectations since it was identical to other items of the same product line with which the consumer may well have been familiar.

The court held that the "unreasonably dangerous" definition of the Restatement was "flawed" because "it treats such consumer expectations as a 'ceiling' on a manufacturer's responsibility under strict liability principles, rather than as a 'floor'.... [A]t a minimum a product must meet ordinary consumer expectations as to safety to avoid being found defective.

Additionally, the court held a jury is not limited to considering the intended use of the product in determining whether or not the product is defective. "[T]he adequacy of a product must be determined in light of its reasonably foreseeable use. [T]he design and manufacture of products

37. See Barker v. Lull Eng'g, Inc., 573 P.2d 443, 455 (Cal. 1978).
38. Id. at 451 (quoting RESTATEMENT (SECOND) OF TORTS, § 402A cmt. I (1965)).
39. Id.
40. Id. at 451 & n.7.
41. See id. at 452 & n.9
should not be carried out in an industrial vacuum but with recognition of the realities of their everyday use."  

In response to the inadequacies of the Restatement test of liability for design defects, the court promulgated a dual standard for determining design defect liability. The purpose of this "two pronged" test is to focus "the trier of fact's attention on the adequacy of the product itself, rather than on the manufacturer's conduct." Additionally, the burden of proof is placed on the "manufacturer, rather than the plaintiff, to establish that because of the complexity of, and trade-offs implicit in, the design process, an injury-producing product should nevertheless not be found defective." The Barker court thus emphasized the difference in strict liability cases: the plaintiff is relieved of "many of the onerous burdens inherent in a negligence cause of action."

Under the first prong of the test, a product may be defectively designed "if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." Under the second prong of the test, a product may be found defective if "through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design." Even if a product satisfies the first prong of the test, the jury may still consider the product under the second prong and find the manufacturer strictly liable on balance. Thus, the Barker test provides an alternative test for strict product liability claims, under which a product may be found to be defective under either prong of a two pronged approach.

Also, the Barker test shifts the burden of proof from the plaintiff to the manufacturer. Once the plaintiff makes a

42. Id. (quoting Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1157 (Cal. 1972)).
43. See Barker v. Lull Eng'g Co., 573 P.2d 443, 455-56 (Cal. 1978).
44. Id. at 456.
45. Id.
46. Id. at 455.
48. Id. (emphasis added).
49. See id. at 456.
50. Id. at 455.
showing that the product’s design is the proximate cause of his injury, the burden shifts to the defendant to prove the product is not defective.\(^\text{51}\)

The allocation of such [a] burden is particularly significant in this context inasmuch as this court’s product liability decisions, from *Greenman* to *Cronin*, have repeatedly emphasized that one of the principle purposes behind the strict product liability doctrine is to relieve the injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action. Because most of the evidentiary matters which may be relevant to the determination of the adequacy of a product’s design under the ‘risk-benefit’ standard e.g., the feasibility and cost of alternative designs are similar to issues typically presented in a negligent design case and involve technical matters peculiarly within the knowledge of the manufacturer, we conclude that once the plaintiff makes a prima facie showing that the injury was proximately caused by the product’s design, the burden should appropriately shift to the defendant to prove, in light of other relevant factors, that the product is not defective. This test . . . explicitly focuses the trier of fact’s attention on the adequacy of the product itself, rather than on the manufacturer’s conduct, and places the burden on the manufacturer, rather than the plaintiff, to establish that because of the complexity of, and trade-offs implicit in, the design process, an injury producing product should nevertheless not be found defective.\(^\text{52}\)

A strict products liability case based on a design defect is distinct from a negligent design case under California law.\(^\text{53}\) The California Supreme Court stated, “[i]n a strict liability case, as contrasted with a negligent design action, the jury’s focus is properly directed to the condition of the product itself, and not the reasonableness of the manufacturer’s conduct.”\(^\text{54}\)

Additionally, the *Barker* court expressly condoned the comparison of the earlier and later product designs of a manufacturer in the second prong of the *Barker* test.\(^\text{55}\) This

\(^{51}\) See id.

\(^{52}\) Id. at 455-56.


\(^{54}\) Id. at 457.

\(^{55}\) Id. at 455.
distinction will be critical in determining whether to apply the California or federal rule regarding evidence of subsequent remedial measures in a diversity action.\textsuperscript{56}

B. The Use of Evidence of Subsequent Remedial Measures Under California State Law

1. California Evidence Code § 1151

California Evidence Code § 1151 states: "[w]hen, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event."\textsuperscript{57}

Section 1151 prohibits the use of subsequent remedial measures to prove negligence or culpable conduct.\textsuperscript{58} Thus, evidence of subsequent design cases may not be used to prove negligence under California law. This evidence is not considered irrelevant; it may be compelling in the eyes of a jury in that it would constitute an admission of wrongdoing on behalf of the defendant.\textsuperscript{59} The purpose of section 1151 is to avoid discouraging people "from making repairs after the occurrence of an accident."\textsuperscript{60}


In Ault v. International Harvester Co.,\textsuperscript{61} the plaintiff was injured as a passenger in a "Scout," a sport utility vehicle manufactured by the defendant.\textsuperscript{62} On November 8, 1964, while traversing a road in the Mojave Desert at about ten to fifteen miles per hour, the driver lost control of the vehicle.\textsuperscript{63}

\textsuperscript{56} See infra Part V. Under the choice of law provisions explained in Part V, infra, the substantive law applied in a diversity case should be California law. See infra Part V.

\textsuperscript{57} CAL. EVID. CODE § 1151 (West 1997).

\textsuperscript{58} See CAL. EVID. CODE § 1151 (West 1997).


\textsuperscript{60} CAL. EVID. CODE § 1151 law revision committee cmt. (West 1997).

\textsuperscript{61} 528 P.2d 1148 (Cal. 1974).

\textsuperscript{62} Id. at 1149.

\textsuperscript{63} See id. at 1150.
The vehicle plunged over the side of a canyon, falling 500 feet to the canyon floor.  

After the accident, it was determined that the gearbox was broken. Plaintiff alleged the gearbox failure made the vehicle lose control and caused his resulting injuries. To support his argument, plaintiff asserted that the gearbox, made from Aluminum 380, was an unsuitable design due to the aluminum's excessive metal fatigue. The plaintiff argued that malleable iron was a safer material from which to construct the gearbox because it would be less likely to fail. Plaintiff sought to show that the defendant had in fact substituted malleable iron for Aluminum 380 in 1967, three years after the accident took place. The lower court found in favor of the plaintiff on the basis that the design was defective. The defendant then appealed from a verdict, arguing that section 1151 excluded the evidence of the metal change and that its admission as evidence was an error.

The California Supreme Court held the evidence was properly admitted because section 1151 did not apply in an action based on strict liability. The court's rationale for allowing the subsequent change in design was simple: section 1151 only applied to negligence and other culpable conduct causes of action.

The Ault court found that the purpose of section 1151 was to exclude evidence of irrelevant, post-accident conduct when proving the defendant's negligence at the time of the accident. The policy of excluding such evidence was necessary to encourage individuals to make repairs or improve-

64. See id.
65. See id.
66. See id.
67. Aluminum "380" refers to the industrial grade of aluminum. For examples of aluminum used in current production vehicles, see Aluminum Assoc., Aluminum Applications for Cars and Light Trucks, (visited Jan. 29, 1999) <http://www.aluminum.org/default3.cfm/30/76/2?CFID=2302828CFTOKEN=32348>. Note that none of the vehicles in production listed on this site have aluminum steering gearboxes. Id.
69. See id.
70. See id at 1149.
71. See id. at 1149-50.
72. Id.
73. Id. at 1150-51.
ments once an accident has occurred. However, the court found this "anti-deterrent" function of the rule had no comparable role in a products liability case. The court held that it would be unrealistic for a manufacturer to not make design changes to correct a defect when the possibility of additional lawsuits and the loss of goodwill might occur if no changes were made. Additionally, the court found that the exclusion of such changes does not affect the manufacturers' "primary conduct," but merely serves as a "shield against potential liability." The court stated:

[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 upon strict liability for recovery on an injury that preceded the improvement. ... The exclusionary rule of section 1151 does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability.]

The court found that the policy of encouraging repairs by excluding subsequent remedial measures was of "doubtful validity" when it would be in the manufacturer's own financial interest to produce safer goods. Therefore, subsequent

75. See id. at 1151 (quoting CAL. EVID. CODE § 1151 law revision committee cmt.).

76. Ault v. International Harvester Co., 528 P.2d 1148, 1152 & n.4 (Cal. 1974). California courts have acted repeatedly to eliminate such "shields against potential liability." In Barker, the California Supreme Court stated that the Restatement test of design defect was unacceptable because the "reasonable expectations" language of 402A served as a "shield against potential liability." Barker v. Lull Eng'g, Inc., 573 P.2d 443, 451 (Cal. 1978). This "shield against potential liability" had been previously rejected by the California Supreme Court in the context of manufacturing defects in Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121 (1972). Barker, 573 P.2d 443, 450 (Cal. 1978).

77. Ault, 528 P.2d at 1152.

78. Ault v. International Harvester Co., 528 P.2d 1148, 1152 (Cal. 1974). The court further quotes note four of the decision:

it can be argued that evidence of subsequent repairs encourages future remedial action. A distributor of mass-produced goods may have thousands of goods on the market. If his products are defective, the distributor would probably face greater total liability by allowing such defective products to remain on the market or by continuing to put more
remedial repairs were not likely to discourage changes in light of their financial interests at stake, and evidence of subsequent remedial repairs were thus admissible in a strict products liability case to show liability.  

C. The Approaches of the Seventh, Ninth, and Tenth Circuits to Federal Rule of Evidence 407

1. Federal Rule of Evidence 407

The current Federal Rule of Evidence 407, effective December 1, 1997, states:

[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 product, a defect in a 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.

Id. at n.4 (quoting Note, Products Liability and Evidence of Subsequent Repairs, DUKE L.J. 837, 845-52 (1972)).

79. See id.

80. FED. R. EVID. 407 (emphasis added). This revision of Rule 407 was effective December 1, 1997. FED. R. EVID. 407. The prior version of Rule 407 was as follows:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.
Rule 407 was originally drafted to adopt "generally accepted" law. The rule first appeared in the Model Code of Evidence, and the original version of the Federal Rule of Evidence was nearly identical to section 1151 of the California Evidence Code. The federal Rule was adopted to carry forward the common law policy of promoting safety by allowing an alleged tort-feasor to take steps to prevent the recurrence of an accident. Therefore, such evidence of subsequent repair could not be used to show that the tortfeasor was negligent. The wisdom of the Rule has been doubted over the years by several commentators.

The basis of Rule 407 has been said to be a consideration of social policy. In this sense the Rule has been called a "quasi privilege." As such, Rule 407 arguably promotes the
policy of "encouraging people to take precautionary measures after an accident by assuring them that such evidence cannot be used as evidence of past negligence." 89

As of December 1, 1997, Rule 407 excludes evidence of subsequent repairs in a strict products liability cause of action, officially adopting the position of a majority of the federal circuits. 90 Rule 407 explicitly excludes the use of subsequent measures to prove a defect in a product or in a product's design. 91 However, Rule 407 is limited to evidence of measures taken by the defendant after the injury-producing event has occurred. "Evidence of measures taken by the defendant prior to the 'event' causing 'injury or harm' do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product." 92

Thus, Rule 407, which once paralleled section 1151, has now been placed in opposition to section 1151. Ironically, Rule 407 was based on the rationale that people should be able to make repairs without fear of being confronted by such repairs in a future negligence claim, just as section 1151 provides. However, while section 1151 specifically limited this rationale to negligence claims, Rule 407 extends this rationale to strict products liability.


The advisory committee for the Federal Rules of Evidence cited, inter alia, Flaminio v. Honda Motor Co. 93 as a

89. Id.
90. FED. R. EVID. 407 Advisory Committee Notes. See also JACK B. WEINSTEIN ET AL., 2 WEINSTEIN'S FEDERAL EVIDENCE § 407.01 (Joseph M. McLaughlin, ed. 2d ed. 1997) ("The general purpose of these amendments is to extend the effect of the subsequent remedies rule to product liability actions and to clarify that the rule applies only to remedial measures made after the occurrence that produced the damages giving rise to the action [Report of the Judicial Conference Committee on Rules of Practice and Procedure (1996)]").
91. FED. R. EVID. 407. Note that the revised rule only applies to measures taken after the occurrence of the event in question, but not after the purchase of the product. See id.; see also infra note 90.
92. FED. R. EVID. 407 Advisory Committee Notes. See also Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988). For a comment arguing that the rule should exclude all evidence of measures taken after the manufacture or design of the product, see Thais A. Richardson, Comment, The Proposed Amendment to Federal Rule of Evidence 407: A Subsequent Remedial Measure That Does Not Fix the Problem, 45 AM. U. L. REV. 1453 (1996).
93. 733 F.2d 463 (7th Cir. 1984).
majority opinion excluding evidence of subsequent repairs. In *Flaminio v. Honda Motor Co.*, the plaintiff, Forrest Flaminio, brought a diversity action in federal court against Honda Motor Company for personal injuries he suffered on a Honda "Gold Wing" motorcycle. Plaintiff sued both American Honda Motor Company (American Honda), the motorcycle distributor, and Honda Motor Company of Japan (Japanese Honda), the motorcycle manufacturer. The plaintiff was injured a few days after he purchased the motorcycle when he decided to ride it after a few drinks. Upon reaching a speed of fifty to seventy miles per hour, the front wheel of the motorcycle began to wobble. When the plaintiff leaned back to determine what the problem was, the motorcycle began to wobble uncontrollably, resulting in a crash and injuries that left the plaintiff a paraplegic.

The plaintiff alleged that both Japanese Honda and American Honda had defectively designed the front struts of the motorcycle, causing the front wheel to wobble. At trial, the jury found Japanese Honda not liable, but American Honda negligent. American Honda was determined to be thirty percent at fault for the accident, and plaintiff was determined to be seventy percent at fault. Therefore, under Wisconsin law, which governed the underlying claim, plaintiff was not entitled to recovery since his negligence was greater than that of the person against whom recovery was

95. 733 F.2d 463 (7th Cir. 1984).
96. *Id.* at 465.
97. *Id.* at 463.
98. *See id.* at 465.
99. *See id.*
100. *See id.*
102. *See id.*
103. *See id.*
104. *Id.* at 466.
The plaintiff appealed his case. Among other arguments, plaintiff asserted that the court improperly excluded two blueprints showing changes in the struts of the motorcycle. These changes included a two millimeter increase in the diameter of the struts by Japanese Honda to eliminate the wobble which plaintiff asserted had caused his injuries. The appellate court held the exclusion of the blueprints was proper under Rule 407. Under Wisconsin law, however, a similar state rule of evidence is inapplicable in products liability cases.

Judge Posner, writing the opinion for the appellate court, expressed the court's rationale for applying Rule 407. First, the court concluded that it must reject the evidence because "culpable conduct" was at issue in the case. Wisconsin law provided that the defendants' blameworthiness must be compared against that of the plaintiff's in a strict liability case, even if the defendant was not blameworthy in a negligence sense, in order to determine if the plaintiff may recover at all.

105. Id.
106. See id.
107. The plaintiff argued that the district court judge failed to properly instruct the jury regarding a finding of failure to warn. Flaminio v. Honda Motor Co., 733 F.2d 463, 466 (7th Cir. 1984). The plaintiff also argued that the district court erred in instructing the jury that the Honda corporations, as parent and subsidiary, were one and the same, for purposes of determining comparative negligence. Id.
108. Id. at 468.
109. Id.
110. Id.
111. See supra note 104.
112. Flaminio v. Honda Motor Co., 733 F.2d 463, 469-70 (7th Cir. 1984). With respect to the choice of law decision, see Part II.D & IV.A, infra.
114. See id. at 469. Judge Posner found that Flaminio's argument that Rule 407 did not apply since his strict product liability claim did not involve Honda's culpability was mislaid. Id. Judge Posner determined that Wisconsin law made the rule applicable since its law required that defendant Honda's blameworthiness had to be compared to Flaminio's, even though Honda was not blameworthy in the negligence sense. Id. (citing Dippel v. Sciano, 155 N.W. 2d 55, 64-65 (1967). In this sense, Rule 407's purpose of promoting safety through encouraging repairs is still accomplished by applying the Rule to strict products liability claims. Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984). Judge Posner found, on balance, that the probability of another accident like Flaminio's was probably lower than the likelihood of evidence of subsequent change being used "devastatingly" against Honda in a products liability
Second, the court found that if it did not use Federal Rule of Evidence 407, the Rule's policy of promoting safety would be threatened because the admission of evidence of subsequent changes would reduce the defendant's incentive to make changes to the product. The court reasoned that the chance of another accident was less likely than a suit against the defendant by the injured party. Seeing the greater likelihood of suit by the injured party would deter a defendant from making changes that could be used "devastatingly" against a defendant at trial.

Finally, the court reasoned that under both negligence and strict liability theories, the safety policy of Rule 407 would be compromised because admission would deter manufacturers from making any changes to their products. If subsequent repair evidence were admissible in a strict liability case, it may deter manufacturers from making any changes in their products, even where "the accident may have been readily avoidable . . . by eliminating some defect . . . . [T]he failure to apply Rule 407 might deter subsequent remedial measures just as much as in a negligence case."

3. The Ninth Circuit in Gauthier v. AMF, Inc.

_Gauthier v. AMF, Inc._ is the controlling case in the Ninth Circuit on admissibility of evidence of subsequent re-

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115. _Id._ at 470.
116. _Id._ at 469.
117. _Id._

A major purpose of Rule 407 is to promote safety by removing the disincentive to make repairs (or take other safety measures) after an accident that would exist if the accident victim could use those measures as evidence of the defendant's liability. One might think it not only immoral but reckless for an injurer, having been alerted by the accident to the existence of danger, not to take steps to correct the danger. But accidents are low probability events. The probability of another accident may be much smaller than the probability that the victim of the accident that has already occurred will sue the injurer and, if permitted, will make devastating use at trial of any measures that the injurer may have taken since the accident to reduce the danger.

118. See _Flaminio v. Honda Motor Co._, 733 F.2d 463, 470 (7th Cir. 1984).
119. _Id._. See _supra_ note 114.
120. 788 F.2d 634 (9th Cir. 1986).
medial repairs. The case was decided under Montana law, which follows the Restatement (Second) of Torts Section 402A definition of design defect for products liability cases.\textsuperscript{121} The case was heard on appeal before Circuit Judges Wallace and Skopil, and District Judge Henderson.\textsuperscript{122} Defendant, AMF, produced a snow thrower with an exposed impeller that injured the plaintiff when he put his hand into the discharge chute to unclog the accumulated snow in the machine.\textsuperscript{123}

The plaintiff alleged that the lack of a "deadman" device on the snow thrower constituted a design defect.\textsuperscript{124} This device would stop the thrower's impeller from throwing snow when the operator's hand left the controls of the thrower.\textsuperscript{125} Alternatively, the plaintiff asserted that the design was unsafe because it lacked a bar or cage to prevent an operator's hand from contacting the impeller.\textsuperscript{126} At trial, plaintiff compared the safety devices of a 1984 Toro snow thrower to defendant AMF's model. After the plaintiff prevailed at trial, defendant asserted on appeal that evidence of another company's design was inadmissible under Federal Rule of Evidence 407.

District Judge Henderson, writing the opinion for the court, rejected the approach of Ault,\textsuperscript{127} and adopted the position that Rule 407 applies to strict products liability cases in a diversity action.\textsuperscript{128} Citing to Flaminio,\textsuperscript{129} the court held that "there is no practical difference between strict liability and negligence in defective design cases,"\textsuperscript{130} and "the public policy rationale to encourage remedial measures remains the same."\textsuperscript{131}

Thus, Gauthier signifies the Ninth Circuit's decision to follow the rationale of the Flaminio court and the Seventh Circuit. By accepting the policy rationale of promoting safety

\textsuperscript{121} See id. at 635.
\textsuperscript{122} See id. at 634. District Judge Henderson, from the Northern District of California, was sitting by designation on this case. See id.
\textsuperscript{123} See id.
\textsuperscript{124} See id.
\textsuperscript{125} See Gauthier v. AMF, Inc., 788 F.2d 634 (9th Cir. 1986).
\textsuperscript{126} See id.
\textsuperscript{127} Ault v. International Harvester Co., 528 P.2d 1148 (Cal. 1974).
\textsuperscript{128} Gauthier v. AMF, Inc., 788 F.2d 634, 637 (9th Cir. 1986).
\textsuperscript{129} Flaminio v. Honda Motor Co., 733 F.2d 463, 470 (7th 1984).
\textsuperscript{130} Gauthier v. AMF, Inc., 788 F.2d 634, 637 (9th Cir. 1986).
\textsuperscript{131} Id.
by encouraging repairs, the Ninth Circuit adopted by reference the rationale expressed by Judge Posner in *Flaminio*.

4. The Tenth Circuit in Moe v. Avions Marcel Dassault-Breuget Aviation

In *Moe*, the families of passengers killed in a plane crash sued the defendant, an aircraft manufacturer, in an action based on strict products liability for failure to warn.\(^{132}\) The airplane, a Falcon 10 model, had been thoroughly tested and certified to fly by the Federal Aviation Administration in 1973.\(^{133}\) It had been in continuous service of the decedent’s employer, Mountain Bell, for two and a half years prior to the crash, with no history of hydraulic or artificial feel systems problems.\(^{134}\)

On the morning of the crash, the airplane took off and ascended to an altitude of 12,000 feet.\(^{135}\) Upon reaching 12,000 feet, the oxygen masks inside the plane fell due to a ground mechanic’s failure to reset the circuit breaker to the masks upon inspection.\(^{136}\) After requesting permission to return to the airport, the pilot experienced difficulty with the controls of the airplane. The pilot completed two 360 degree turns and radioed the tower with a “may day” call, advising the tower that the plane was “out of control.”\(^{137}\) After completing the turns, the plane flew straight for seven miles, and the pilot then requested a landing vector.\(^{138}\) Fifteen seconds later the plane crashed in a wheat field killing all but one passenger and destroying the plane.\(^{139}\)

The plaintiffs alleged, among other things, that the autopilot was defective.\(^{140}\) Plaintiffs’ experts testified that if the autopilot is engaged and the pilot attempted to manually

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132. See *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 920 (10th Cir. 1984).

133. See id.

134. See id. The “artificial feels system” is the autopilot system in the aircraft. Id.

135. See id. at 921.

136. See id. The oxygen mask malfunction was not argued to be the cause of the crash. *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 920 (10th Cir. 1984). It was merely the event that triggered the pilot’s decision to return to the ground for repairs. Id.

137. See id. at 921.

138. See id.

139. See id.

140. See id.
fly the plane, the autopilot would have responded exactly opposite to the pilot's inputs. In the Falcon 10 model, there was no clear warning that the autopilot was still engaged after the pilot attempted to disengage it by using the disengage switch on the yoke.

Plaintiffs appealed the inadmissibility of a document, called "Newsflash 16," which was published in 1978 after the crash of the aircraft, and described the need to warn of a known defect in the aircraft. The trial court had excluded the document, stating that the plaintiffs alleged causes of action based on negligence and failure to warn. Since negligence and failure to warn were similar theories of liability, the trial court held Rule 407 applied equally to both, thus excluding the use of the "Newsflash" as evidence of the defendant's liability for failure to warn. The policy of Rule 407, the trial court stated, is "not [to] discourage persons from taking remedial measures."

However, the appellate court disagreed. The appellate court held that in the absence of contrary state law, the state evidentiary law determined admissibility of subsequent remedial measures in a diversity case. "It is our view that

141. See Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 921 (10th Cir. 1984).
142. See id.
143. See id. at 930. The Newsflash read:
   In the autopilot engaged configuration, the autopilot may fail to disengage when the pilot presses the switch in the control wheel . . . .
   A refusal of the autopilot to disengage, not perceived by the pilot, constitutes an insidious failure which may result in a situation similar to the resulting from an Horizontal Stabilizer trim runaway. Under the action of the Automatical Trim, the Horizontal Stabilizer moves in a direction opposed to that commanded by the pilot. Such a motion is identified by a slow sounding of the clacker.
   Since such a motion can be stopped by the Horizontal stabilizer normal control, only if the counteraction is maintained, it is advisable to:
   1. Rapidly use the emergency Horizontal Stabilizer trim control. Only this action can definitely stop such a Horizontal Stabilizer motion.
Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 930-31 (10th Cir. 1984).
144. Id. at 931.
145. See id.
146. Id.
147. Id. at 931.
148. Id.
149. Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 931 (10th Cir. 1984) (citing Rexrode v. American Laundry Press Co., 674 F.2d 826, 831 (10th Cir. 1982)).
when state courts have interpreted Rule 407 or its equivalent state counterpart, the question whether subsequent remedial measures are excluded from evidence is a matter of state policy. The *Moe* court found that the purpose of Rule 407 was to promote state policy in an area of state law, not for the truth or to facilitate trial proceedings.

The *Moe* court held that when such a conflict arises between the state and federal rule, the state rule controls because: (1) there is no federal products liability law, (2) the law of the state where the injury occurs determines the elements and proof of a products liability action, and these vary from state to state, and (3) a state rule contrary to Rule 407 is so closely tied to substantive law that it must be applied in a diversity action to "effect uniformity and to prevent forum shopping."

The *Moe* court held that products liability is a state cause of action "with varying degrees of proof and exclusion from state to state." It stated that the policy determination of excluding evidence of subsequent change is thus "necessarily a state policy matter." Finally, "[w]here the state law is expressed in product liability cases, these expressions control the application of Rule 407."

The *Moe* court was aware of the implication of *Hanna v. Plumer* in its decision to allow state law to control the admission of evidence of subsequent remedial repairs. The *Moe* court held that while federal standards of sufficiency may determine whether evidence may be admissible, the underlying cause of action in a diversity case was controlled by state law, and thus the "attendant elements and requirement of proof" were determined by state law.

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150. *Moe*, 727 F.2d at 931.
151. *Id.*
152. *Id.* at 932.
153. *Id.*
154. *Id.*
158. *Id.* The *Moe* court cited to *Hildago Properties, Inc. v. Wachovia Mortgage Co.*, 617 F.2d 196, 198 (10th Cir. 1980), regarding the sufficiency of evidence standard. *Id.* See *supra* note 154. The *Moe* court cited to *Safeway Stores v. Fannan*, 308 F.2d 94, 97 (9th Cir. 1962), with respect to the controlling law in
The Moe court found the application of Rule 407 an "unwarranted excursion into the Erie Doctrine" when Rule 407 was applied in conjunction with Rule 403. The Moe court found that since the federal government was a government of enumerated powers limited by the Tenth Amendment, it may not be constitutionally permissible for Congress to enact a rule to "control a single substantive issue." Thus, it was error for the trial court to apply Rule 407 in a diversity action to exclude evidence of the "Newsflash" since application of the Rule was in conflict with state law.

D. Olympic Sports Choice of Law Analysis Applies to Determine Which Rule of Evidence Should be Followed in a Diversity Action Based on California Law

In order to determine whether evidence of subsequent remedial measures may be admitted in a diversity action, a choice of law analysis must be completed. The Ninth Circuit followed the test in Hanna when it stated its choice of law analysis in Olympic Sports Products, Inc. v. Universal Athletic Sales Co.

Under the principles of Hanna, if a state rule and federal rule cover the same situation, an analysis based on the Rules Enabling Act is necessary to determine which rule the underlying cause of action in a diversity case. Moe, 727 F.2d 917, 932.

159. Id. Essentially, the trial court found that Rule 407 was "not governed by or made applicable by state law." Id. The Moe court disagreed with the trial court's ruling "admissibility of evidence in diversity actions is governed exclusively by... the Federal Rules of Evidence." Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984). Federal Rule of Evidence 403 states: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, of misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403

160. U.S. CONST. amend. X.


162. Id. (citing Rexrode v. American Laundry Press Co., 674 F.2d 826, 831 (10th Cir. 1982)).


164. Olympic Sports Prod., Inc. v. Universal Athletic Sales Co., 760 F.2d 910 (9th Cir. 1985).


applies. When a federal rule and state rule are equally applicable to an issue, the federal court must apply the federal rule, and can only refuse to do so if it violates either the Rules Enabling Act or a constitutional restriction.

However, the Enabling Act is limited by its own words: "the rules of procedure 'shall not abridge, enlarge or modify any substantive right." The proper test is "whether the [federal] rule regulates 'judicial process for enforcing rights and duties recognized by substantive law.'"

Additionally, because every procedural rule may be "outcome determinative" at some point in the litigation, the court should consider the twin aims of Erie: "discouragement of forum shopping and avoidance of inequitable administration of the laws." According to the Olympic court, "[t]he proper query is whether the difference between the two rules would be relevant to the plaintiff's initial choice of forum." If, in a diversity action there exists a potential for forum shopping, or the federal rule regulates more than just the process for adjudicating rights under substantive law, then the state rule should trump the federal rule.

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
(b) such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.


167. See Olympic Sports Prod., Inc. v. Universal Athletic Sales Co., 760 F.2d 910, 913 (9th Cir. 1985).
168. See id. at 914.
169. Id. (quoting Hanna v. Plumer, 380 U.S. 460, 471 (1965)).
170. Id.
171. To be outcome determinative is to be "able to choose a different outcome for a lawsuit by filing in federal court rather than in state court." Id. at 913.
172. Olympic Sports Prod., Inc. v. Universal Athletic Sales Co., 760 F.2d 910, 914 (9th Cir. 1985).
173. Id.
174. See id. at 914-15.
III. IDENTIFICATION OF THE PROBLEM

The Ninth Circuit, in *Gauthier*,\(^ {176}\) held that Federal Rule of Evidence 407 should apply in a diversity action.\(^ {176}\) This precedent, applicable to diversity actions in federal court that apply California law, ignores the policy decisions articulated by the California Supreme Court under *Ault v. International Harvester*.\(^ {177}\) Thus, evidence of subsequent remedial measures would be admissible in a strict products liability case brought in a California state court to show liability. However, such evidence would not be admissible in a diversity action applying California law.

In *Moe v. Avions Marcel Dassault-Breguet Aviation*,\(^ {178}\) the Tenth Circuit held that when Colorado state law indicated that evidence of a subsequent remedial measure is admissible to show a failure to warn in state court, it was also admissible as a matter of state substantive law in a diversity case where the underlying cause of action was based on Colorado state law.\(^ {179}\) The Tenth Circuit decided *Moe* in light of controlling Colorado state law, which followed the rationale of *Ault v. International Harvester*.\(^ {180}\)

In order to ensure that the public policy as shaped by California's substantive law\(^ {181}\) is applied in diversity actions for design defects in strict products liability, the Ninth Circuit must necessarily apply the appropriate rationale so that California's rule of law prevails. The Ninth Circuit may reconcile the difference between Federal Rule 407 and California Evidence Code § 1151\(^ {182}\) by adopting the rationale of the Tenth Circuit in *Moe v. Avions Marcel Dassault-Breguet Aviation*.\(^ {183}\)

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175. 788 F.2d 634 (9th Cir. 1986).
176. See id. at 637; see supra Part II.C.4.
177. 528 P.2d 1148 (Cal. 1974).
178. 727 F.2d 917 (10th Cir. 1984).
179. See id. at 931. Colorado law controlling at the time of decision in *Moe* was stated in *Good v. A.B. Chance Co.*, 565 P.2d 217 (Colo. 1977). See id.
180. Id.
181. See supra Part II.A.
182. CAL. EVID. CODE § 1151 (West 1997).
183. 727 F.2d 917 (10th Cir. 1984).
IV. COMPARISON OF THE RATIONALES OF THE SEVENTH, NINTH AND TENTH CIRCUITS


Rule 407 states that evidence of remedial measures taken subsequent to an injury producing event 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."\(^{184}\) California Evidence Code § 1151 states that evidence of remedial measures taken after an injury producing event is not admissible "to prove negligence or culpable conduct in connection with the event."\(^{188}\) Under Ault v. International Harvester, California Evidence Code § 1151 does not exclude such evidence to prove liability in a strict products liability case based on a claim of defective design. Thus, Rule 407 and Section 1151 directly conflict in that Rule 407 prohibits the use of evidence that Section 1151 would allow if the same case were being tried under the California Evidence Code.

Rule 407 was enacted pursuant to the Rules Enabling Act.\(^{186}\) The Rules Enabling Act states that the "Supreme Court shall have the power to prescribe . . . general rules of evidence for cases in the United States district courts . . . ."\(^{187}\) The test for whether Rule 407 is validly enacted is the same as it is for any Federal Rule of Evidence: "whether the rule regulates 'judicial process for enforcing rights and duties recognized by substantive law.'"\(^{188}\) To date, no rule promulgated under the Rules Enabling Act has ever been invalidated under this test.\(^{189}\)

However, the Olympic\(^{190}\) court stated that Erie principles should not be ignored when testing a federal rule under

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184. FED. R. EVID. 407.
185. CAL. EVID. CODE § 1151 (West 1997).
190. 760 F.2d 910 (9th Cir. 1985).
The court held that the rule in question should be examined in consideration of the twin aims of *Erie*: 1) forum shopping and 2) inequitable administration of the laws.  

Under the *Olympic* query, the difference between Section 1151 and Rule 407 is relevant to a plaintiff's initial choice of forum in a strict products liability action based on a design defect. Where a manufacturer has changed a product's design subsequent to the plaintiff's injury, it is the policy of California to allow evidence of that change to be used to show liability. Thus, a plaintiff has the option of using such evidence by bringing suit in a California state court. A defendant would clearly wish to remove to a federal district court on the basis of diversity, if such a move would avoid the use of such evidence. This is the very situation the *Erie* doctrine is designed to resolve—by following the state law in a diversity action.

B. Design Defect Liability Does not Equal Negligence Under California Law

The goal of the *Ault* court was to promote the policy of safety in products marketed in California. By allowing the admission of evidence of subsequent remedial measures, the *Ault* court defined the state's policy of allowing subsequent change as evidence to prove the defective design in an unsafe product. The court, recognizing the purpose of section 1151, determined that the policy of excluding conduct had no place in a strict products liability case since the manufacturer's conduct was not at issue under California strict products liability law. In *Ault*, the court held that the exclusion of such evidence would merely shield the defendant from liability, thus hampering the policy goals of product safety.

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191. See id. at 914 (quoting Hanna v. Plumer, 380 U.S. 460, 464 (1965)).
192. See id.
193. See id. ("The proper query is whether the difference between the two rules would be relevant to plaintiff's initial choice of forum.").
195. See Olympic Sports Prod., Inc. v. Universal Athletic Sales Co., 760 F.2d 910 (9th Cir. 1985).
196. Id.
197. *Ault*, 528 P.2d at 1152.
198. See id. at 1150.
199. See id.
200. Id. California is not alone on this finding. The state of Maine allows the use of evidence of subsequent remedial measures, and their position on this
For a product manufacturer, the risk of innumerable additional lawsuits and the loss of goodwill due to bad publicity are greater catalysts for change than a rule excluding evidence of subsequent repairs.\textsuperscript{201} In short, any protection extended to a defendant manufacturer by excluding such evidence in a cause of action based on strict products liability would be "gratuitous."\textsuperscript{202}

Additionally, the definition of design defect in California under \textit{Barker}\textsuperscript{203} is not "equivalent" to a negligence standard, making the respective cases for negligent design and manufacturing distinct from the same case under strict products liability.\textsuperscript{204} The California Supreme Court in \textit{Barker} specifically rejected the 402A test for design defect in favor of its own two-pronged test that promotes goals of safety.\textsuperscript{205} Under this test, the burden of proof that the design was not defective shifts to the manufacturer, once the plaintiff established a causal link between the injury and the defective design.\textsuperscript{206} The purpose of the shift is to "relieve the injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action."\textsuperscript{207} Specifically, the \textit{Ault} court held that the prohibition of evidence of subsequent remedial measures,

\begin{footnotesize}
\begin{itemize}
\item issue was summed up in a similar conclusion (though somewhat different rationale) when considering this issue:
\begin{quote}
The assumption that a defendant will not take corrective action because he knows that it might be used against him is not persuasive. A defendant as knowledgeable and cold-blooded as the exclusionary rule suggests would probably be aware of the many exceptions, which would make it risky to refrain from making needed repairs. Enlightened self interest would often lead defendants to make repairs despite the possibility of such action being received on the issue of fault. This would surely seem true of a structural change by a national manufacturer.
\end{quote}
\textsuperscript{23} \textsc{Wright & Graham, Jr., supra} note 81.
\item 201. \textit{Ault} v. \textsc{International Harvester}, 528 P.2d 1148 (Cal. 1974).
\item 202. \textit{Id}.
\item 203. 573 P.2d 443, 450-51(Cal. 1978).
\item 204. \textit{Id}. The court also states that:
\begin{quote}
[t]he clear theoretical distinction between these two bases of recovery (negligence and strict products liability) impelled this court in a recent decision to hold that contrary to the Restatement (Rest.2d Torts, § 402A), a plaintiff is not required, in order to prevail on the theory of strict liability, to show that a product is unreasonably dangerous to the user, and that it is sufficient if he demonstrates that it contained a defect which caused him injury.
\end{quote}
\textit{Id}. at 1150 n.2 (citing Cronin v. \textsc{J.B.E Olson Corp.}, 8 Cal. 3d 121, 135 (1972)).
\item 205. \textit{Barker} v. \textsc{Lull Eng’g Co.}, 573 P.2d 443, 446 (Cal. 1978).
\item 206. \textit{See id}. at 454.
\item 207. \textit{Id}. at 455.
\end{itemize}
\end{footnotesize}
while applicable in a negligence action, does not apply in a strict products liability action.\textsuperscript{208} This is consistent with California policy, since strict products liability cases do not involve conduct based on Barker.\textsuperscript{209} Thus, the substantive law of California for design defect cases in strict products liability would affect the plaintiff’s initial choice of forum.\textsuperscript{210}

Finally, the Barker court recognized that most exhibits of such evidence relevant to the determination of a design’s defectiveness are “technical matters peculiarly within the knowledge of the manufacturer.”\textsuperscript{211} It was the holding of the Barker court to place the burden on the manufacturer to explain the complexity of the design process, and the reasons why tradeoffs of alternative designs should not cause the jury to find its product defective.\textsuperscript{212} Without the ability to introduce evidence of subsequent remedial measures taken by a manufacturer, it would be difficult to get a manufacturer, as a defendant, to discuss alternative designs that were available for a product.\textsuperscript{213} Thus, the shifting of the burden of proof under California law would also affect the plaintiff’s initial choice of forum, necessitating a choice of the California rule in a diversity action.

C. The Rationale of the Tenth Circuit Applied in Moe v. Avions Marcel Dassault-Breugget Aviation

The court in Moe v. Avions Marcel Dassault-Breugget Aviation\textsuperscript{214} found that the state law provision on subsequent remedial measures should be accepted, regardless of Rule 407, “in order to effect uniformity and prevent forum shop-

\textsuperscript{208} Ault v. International Harvester, 528 P.2d 1148 (Cal. 1974).
\textsuperscript{209} See id. at 432.
\textsuperscript{210} See supra, discussion on forum shopping Part IV.A.
\textsuperscript{211} Barker, 573 P.2d at 455.
\textsuperscript{212} See id.
\textsuperscript{213} For example, the plaintiff’s strategy in Flaminio v. Honda Motor Co. was to use evidence of subsequent remedial measures in the strut design against the manufacturer, Japanese Honda to show liability for defective design. See Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984). If the plaintiff could have shown both American and Japanese Honda liable, he may have combined their liability in order to show that the defendant, as a single conglomerate, was more at fault than the plaintiff. If the plaintiff had done so, and the court agreed that the two Hondas were one company, he may have recovered damages for a portion of his claim under Wisconsin law. See id.
\textsuperscript{214} 727 F.2d 917 (10th Cir. 1984).
The Moe court further stated that the decision to admit or exclude evidence of subsequent remedial measures is a question of state policy. In addition, the Moe court found that the purpose of Rule 407 is to promote state law in a substantive law area.

Because Rule 407 defines policy in a substantive area of state law, the Moe court held that the state's interpretation of the law should apply, for the following reasons:

(a) there is no federal products liability law, (b) the elements and proof of a products liability action are governed by the law of the state where the injury occurred and these may, and do, for policy reasons, vary from state to state, and (c) an announced state rule in variance with Rule 407 is so closely tied to the substantive law to which it relates (product liability) that it must be applied in a diversity action in order to effect uniformity and to prevent forum shopping.

The Moe court found that where the state law supplies the rule for the decision, there is no reason why the federal rule should be relied upon. Additionally, where the state products liability law is expressed through cases, these cases control the determination of whether subsequent remedial measures are admissible. Even though Rule 407 may be applicable in a diversity action, its use is an "unwarranted incursion into the Erie doctrine." The Moe court based its conclusion on the idea that

even if Congress could constitutionally enact statutes to govern the rights of parties in a given instance, it does not necessarily follow that the Congress, in codifying the law of evidence, may constitutionally enact a narrow statute governing a single substantive issue in a lawsuit which is

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215. Id. at 932.
218. Id. (citing Rexrode v. American Laundry Press Co., 674 F.2d 826, 831 (10th Cir. 1982)).
220. See id.
221. Id.
otherwise to be resolved by reference to state law.\textsuperscript{222}

The rationale of \textit{Moe} holds true, even after the recent change in Rule 407, since the changes to the Rule were made merely to adopt the majority rationale, as stated by the Seventh Circuit in \textit{Flaminio v. Honda Motor Co.}\textsuperscript{223}

D. \textit{The Rationale of the Seventh Circuit in Flaminio v. Honda Motor Co.}

The plaintiff in \textit{Flaminio} made a similar argument, arguing that state law provisions regarding admissibility of evidence of evidence should be applied to a diversity action based on state law. This argument was rejected by the Seventh Circuit.\textsuperscript{224} Although the \textit{Flaminio} court recognized the policy argument that the sooner the remedial changes were made, the less likely more people would be injured, it also recognized that the defendant's costs in terms of liability may rise symmetrically if the evidence of subsequent change is admissible.\textsuperscript{225} Additionally, the court found it likely that large manufacturers were aware of the rules excluding subsequent remedial measures, and this was considered when making subsequent changes.\textsuperscript{226}

With respect to forum shopping, the \textit{Flaminio} court stated that Rule 407 is "entwined" with procedural considerations.\textsuperscript{227} Although the Advisory Committee Notes state that Rule 407 was enacted to "encourag[e] people to take, or at least not [to] discourag[e] them from taking, steps in furtherance of added safety,"\textsuperscript{228} the Rule also has procedural considerations.\textsuperscript{229}

The \textit{Flaminio} court found that Rule 407 had been enacted to limit the jury from overreacting to evidence of subsequent remedial measures, and thus make the improper inference of negligence from such evidence.\textsuperscript{230} Such overreactions "could deter defendants from taking such remedial meas-

\textsuperscript{222} Id. at 933. \textit{See supra} note 154 and accompanying text.
\textsuperscript{223} \textit{See} FED. R. EVID. 407; \textit{Flaminio v. Honda Motor Co.}, 733 F.2d 463 (7th Cir. 1984).
\textsuperscript{224} \textit{Flaminio v. Honda Motor Co.}, 733 F.3d 463, 470 (7th Cir. 1984).
\textsuperscript{225} \textit{See id.}
\textsuperscript{226} \textit{See id.}
\textsuperscript{227} \textit{Id. at} 471.
\textsuperscript{228} \textit{Id.} (quoting FED. R. EVID. 407 Advisory Committee Notes).
\textsuperscript{229} \textit{See} \textit{Flaminio v. Honda Motor Co.}, 733 F.2d 463, 471 (7th Cir. 1984).
\textsuperscript{230} \textit{See id.}
it is only because juries are believed to overreact to evidence of subsequent remedial measures that the admissibility of such evidence could deter defendants from taking such measures. As the Advisory Committee and others have argued... to infer negligence from such measures is to commit the fallacy, to which juries have long been thought prone, of believing that 'because the world gets wiser as it gets older, therefore it was foolish before.'

The Flaminio court stated that since the tendency of a jury to put too much emphasis on evidence of subsequent repairs is a procedural judgment, Rule 407 is a procedural device designed to enhance the accuracy of the adjudicative process. Because the rule has both procedural and substantive effects, making it “rationally capable or classification as either” substantive or procedural, the Flaminio court looked to precedent. It determined that the federal rule should apply, since no rule promulgated under the Rules Enabling Act has ever been invalidated.

However, this procedural concern is questionable since it is based on the Rule as it was written to apply to a negligence cause of action. The Flaminio court held that the Rule is procedural since a jury’s inference of “negligence” from subsequent remedial measures “is to commit the fallacy... of believing that ‘because the world gets wiser as it gets older, therefore it was foolish before.’ This rationale was considered by the Flaminio court to enhance the accuracy of the adjudicative process.

This position of promoting fairness with regard to the defendant loses its power in the context of a corporate manufacturer. Individual self-interest, so important in the decision to protect individual tortfeasors from the evidence of subsequent change in negligence actions, is not present in a corpo-

231. See id.
232. Id. (quoting Hart v. Lancashire & Yorkshire Ry., 21 L.T.R. 261, 263 (Ex. 1869)).
233. See id. at 471.
236. Id. at 471.
237. Id.
238. 23 WRIGHT & GRAHAM, JR., supra note 81.
Although there are many loyal employees of a corporation,

[t]he person who orders the remedial measures may have no knowledge of the facts of the accident and the person involved in the accident may have no part in making the repairs and his knowledge of corporate liability may be such that it cannot be properly imputed to the employer.  

Additionally, this argument of fairness must cut both ways: to the plaintiff and the defendant. Consideration of the plaintiff was made in Ault, and the California Supreme Court held that the admission of such evidence allowed recovery to the plaintiff only to the extent that the ruling would encourage the manufacturer to make repairs rather than face additional plaintiffs.

Finally, the rationale for the adoption of Rule 407 was not based on a policy of fairness, but on the social policy of encouraging, "or at least not excluding the taking of such measures" under the policy of privilege. Thus, evidence of fairness should be considered in other contexts, but not in consideration of Rule 407.

V. PROPOSAL: APPLY CALIFORNIA EVIDENCE CODE § 1151 IN A DIVERSITY ACTION BASED ON CALIFORNIA STRICT PRODUCTS LIABILITY LAW

The Ninth Circuit should adopt a similar rationale consistent with the rationale of the Tenth Circuit in Moe v. Avions Marcel Dassault-Breguet Aviation. Section 1151, which permits the use of subsequent remedial measures in a strict products liability action, defines the substantive policy goal of safety in California. In a diversity action based on Cali-

239. See id.
240. Id.
241. See id.
243. See id.
244. 23 WRIGHT & GRAHAM, JR., supra note 81.
245. See id.
246. 727 F.2d 917 (10th Cir. 1984). Adoption of such a rationale would also be consistent with the Ninth Circuit's holding in Olympic Sports. See supra Part IV.A.
247. CAL. EVID. CODE § 1151 (West 1997).
Products liability is a state cause of action created by state law.\textsuperscript{256} California has developed its own case law for determining liability for defective products.\textsuperscript{251} Under the \textit{Erie} doctrine, California’s substantive law will be the underlying law for a diversity action conducted in a federal court located in California.\textsuperscript{252} To base an underlying claim on California law, and apply a federal rule of evidence that is directly opposite of the policy goals of California, is to go against the policy decisions of the state.\textsuperscript{253} Use of the federal rule also creates an additional set of laws—a modified version of the state law to be applied only in federal courts. This is contrary to the aims of the \textit{Erie} doctrine, since the inconsistent application of California law may encourage forum shopping by defendants.\textsuperscript{254}

Also, the burdens of proof and requisite elements are state created.\textsuperscript{255} The \textit{Barker}\textsuperscript{256} court created a design defect test under California law that is quite different than the 402A test used in Montana law in \textit{Gauthier}.\textsuperscript{257} Contrary to the holding of the \textit{Gauthier} court, this difference is not one of semantics.\textsuperscript{258} California’s test of liability has clearly focused on the product itself, and uses the consumer expectations test

\begin{itemize}
  \item \textsuperscript{249} To date, only one federal court in the Ninth Circuit has addressed whether California Evidence Code § 1151 should apply in a diversity action. \textit{See} \textit{Fasanaro} v. \textit{Mooney Aircraft Corp.}, 687 F. Supp. 482 (N.D. Cal. 1988). In \textit{Fasanaro}, plaintiff sued defendant in a strict products liability action on the theory that, \textit{inter alia}, there were design defects in the defendant’s aircraft. \textit{See id.} at 483. Upon plaintiff’s voluntary dismissal of the Doe defendants in the California state cause of action, defendant removed to district court, and moved that evidence tending to show these design changes be excluded under Rule 407. \textit{See id.} The \textit{Fasanaro} court held that Rule 407 applied, adopting the holding of \textit{Flaminio} v. \textit{Honda Motor Co.}, 733 F.3d 463, 472 (7th Cir. 1984), that since the Rule is arguably procedural, Rule 407 must be applied. \textit{Id.} at 485.
  \item \textsuperscript{250} \textit{See} \textit{Moe} v. \textit{Avions Marcel Dassault-Breguet Aviation}, 727 F.2d 917, 932 (10th Cir. 1984).
  \item \textsuperscript{251} \textit{See} \textit{Barker} v. \textit{Lull Eng’g Co.}, 573 P.2d 443 (Cal. 1978).
  \item \textsuperscript{252} \textit{See} \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64, 74 (1938).
  \item \textsuperscript{254} \textit{See} \textit{Olympic Sports Prod., Inc. v. Universal Athletic Sales Co.}, 760 F.2d 910, 914 (9th Cir. 1985).
  \item \textsuperscript{255} \textit{See} \textit{Barker} v. \textit{Lull Eng’g Co.}, 573 P.2d 443 (Cal. 1978).
  \item \textsuperscript{256} \textit{Id.}
  \item \textsuperscript{257} \textit{Gauthier} v. \textit{AMF, Inc.}, 788 F.2d 634, 635-36 (9th Cir. 1986).
  \item \textsuperscript{258} \textit{Id.} at 637.
\end{itemize}
as a minimum standard for determining liability of a manufacturer. Additionally, California has adopted an alternative test under which a manufacturer may still be held liable even though the product met an ordinary consumer's expectations. Under Barker, once a consumer establishes a causal link between his injury and the product's design, the burden of proof shifts to the manufacturer to prove the design is not defective. In a diversity action in California, these policy decisions would be considered the law in a diversity case since these decisions form the substantive law of the underlying cause of action under Erie.

California has chosen to follow the policy of admitting evidence of subsequent remedial measures in a strict products liability action, a policy that is in harmony with its social goals of safety. In Ault, the court held that the policy goal of Rule 407, i.e. controlling the use of such evidence to limit any impermissible inferences of negligence by a jury, had no comparable role in a strict products liability case. California's policy to admit evidence of subsequent remedial repairs in a strict products liability case promotes safety in California. For this reason, the rule allowing such evidence to be admitted becomes substantive law in the area of products liability in California. For a federal court in a diversity action, where the underlying cause of action is based on California law, to adopt a federal rule of evidence to the contrary is to selectively adopt the California law at the expense of California's policy goal of promoting product safety. As the Moe court indicated, to rely on the federal rule when California has announced a contrary position on this policy "is an unwarranted incursion into the Erie doctrine."

259. See Barker v. Lull Eng'g Co., 573 P.2d 443, 455 (Cal. 1978).
260. See id.
261. See id.
262. See Olympic Sports Prod., Inc. v. Universal Athletic Sales Co., 760 F.2d 910, 913 (9th Cir. 1985).
264. Id.
265. See id. at 1152.
266. See id. See supra Part II.B.2.
267. See Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984).
268. Id.
VI. CONCLUSION

We now revisit the hypothetical question posed at the beginning of this comment: should the evidence of a subsequent remedial change to the gearbox be admitted against International Harvester? The answer is yes.

In the area of products liability, California has developed its own substantive law, which would constitute the underlying law in a diversity action located in California.\textsuperscript{269} Specifically, California has held that evidence of subsequent remedial measures is admissible to show liability in a strict products liability case.\textsuperscript{270} This is a policy decision made by California to promote product safety.\textsuperscript{271} Therefore, although Federal Rule of Evidence 407 explicitly prohibits the use of such evidence to show liability, California Evidence Code Section 1151 should be applied in a diversity case based on California law in order to promote the state's policy of product safety. Thus, evidence of subsequent remedial repairs should also be admissible in a diversity action based on California law, in order to effect the policy decisions of California in the area of products liability,\textsuperscript{272} and to discourage forum shopping under the \textit{Erie} doctrine.\textsuperscript{273}

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\begin{footnotesize}
\textsuperscript{269} See Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978). See also infra Part I.
\textsuperscript{270} See Ault v. International Harvester Co., 528 P.2d 1148, 1151-52 (Cal. 1974). See also supra Part I.
\textsuperscript{271} See id.
\textsuperscript{272} See supra Part V.
\textsuperscript{273} See supra Part IV.A.
\end{footnotesize}