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Comments: Taking Remedial Measures to Amend Maryland Rule of Evidence 5-407 to Explicitly Apply to Products Liability Actions

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TAKING REMEDIAL MEASURES TO AMEND MARYLAND RULE OF EVIDENCE 5-407 TO EXPLICITLY APPLY TO PRODUCTS LIABILITY ACTIONS

I. INTRODUCTION

Assume that the defendant is a mass producer of automobile seat belts. The plaintiff claims that she suffered injury as a result of the seat belt's design defect and wishes to introduce evidence of subsequent remedial measures taken by the defendant to change the belt's design.[1] If this were a negligence suit, most jurisdictions would unanimously agree that such evidence is inadmissible.[2] However, in a products liability action, admissibility of the evidence depends upon in which jurisdiction the suit is filed.[3]

In 1997, Federal Rule of Evidence 407 was amended, explicitly extending the exclusion of evidence of subsequent remedial measures to products liability actions.[4] The amended rule provides that evidence

1. Subsequent remedial measures include procedural changes, changes in material or personnel, repairs, and "other precautionary actions made after an event." Wilson v. Morris, 317 Md. 284, 297, 563 A.2d 392, 398 (1989).
2. *See, e.g.*, Jennings v. United States, 207 F. Supp. 143, 148-49 (D. Md. 1962) (stating that defendant's deepening of a drainage ditch after an automobile accident allegedly caused by poor drainage was inadmissible to prove negligence); City of Miami Beach v. Wolfe, 83 So. 2d 774, 776 (Fla. 1955) (holding evidence of repairs to a hole in the sidewalk after plaintiff was injured were inadmissible to demonstrate negligence); Tuer v. McDonald, 347 Md. 507, 532, 701 A.2d 1101, 1113 (1997) (holding evidence of a change in hospital protocol after the death of a patient inadmissible to prove negligence); Hadges v. N.Y. Rapid Transit Corp., 18 N.Y.S.2d 304, 305-06 (1940) (holding that the trial court in a negligence action improperly admitted evidence that defendant repaired a stairway after plaintiff's accident therein). *But see* Porchia v. Design Equip. Co., 113 F.3d 877, 880 (8th Cir. 1997) (stating that the law of the eighth circuit does not mandate the exclusion of evidence of subsequent remedial measures in products liability cases); Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322 (10th Cir. 1983) (holding that Rule 407 does not extend to products liability actions).
3. Evidence of the seat belt design change, a subsequent remedial measure, in a products liability claim would be inadmissible in all federal courts. *See infra* notes 4-6 and accompanying text. However, state courts are divided on whether to apply Rule 407 to products liability actions. *See infra* notes 7-8 and accompanying text.
4. FED. R. EVID. 407. The amended rule reads:

   > When, after an injury or harm allegedly is caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, *a defect in a product, a defect in a product's design, or a need for a warning or instruction.* This rule does not require the exclusion of evidence

of subsequent remedial measures may not be used to prove a product or design defect or to prove that the product should have been accompanied by an instruction or warning.[5] The amendment adopted the view of a majority of the federal circuits.[6]

Although the amendment clarified application of the exclusionary rule at the federal level, state courts remain divided on the issue.[7] Many states refuse to exclude evidence of subsequent remedial measures in products liability actions.[8] Maryland's current rule, 5-407,

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of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id. (emphasis added).

5. *Id.*; Forma Scientific, Inc. v. BioSera, Inc., 960 P.2d 108, 112-13 (Colo. 1998) (discussing the amendment to Federal Rule 407); Duchess v. Langston Corp., 769 A.2d 1131, 1137-38 (Pa. 2001) (stating the language of Federal Rule 407 and comparing it to Pennsylvania Rule of Evidence 407).
6. *See, e.g.*, Wood v. Morbark Indus., Inc., 70 F.3d 1201, 1209 (11th Cir.1995) (holding that the trial court properly excluded evidence of a design change because Rule 407 applies to products liability claims); Joint E. Dist. & S. Dist. Asbestos Litig. v. Armstrong World Indus., Inc., 995 F.2d 343, 345 (2d Cir. 1993) (acknowledging that Rule 407 applies in all products liability actions); Raymond v. Raymond Corp., 938 F.2d 1518, 1525 (1st Cir. 1991) (holding that evidence of repairs made by the defendant six years after the manufacture of the product were inadmissible in the products liability action); Guathier v. AMF, Inc., 788 F.2d 634, 637 (9th Cir. 1986) (holding inadmissible under Rule 407 evidence of subsequent design changes in a products liability action); Flaminio v. Honda Motor Co., 733 F.2d 463, 469-70 (7th Cir. 1984) (stating that Rule 407 required exclusion of subsequent remedial measures in products liability actions); Grenada Steel Indus., Inc. v. Ala. Oxygen Co., Inc., 695 F.2d 883, 888 (5th Cir. 1983) (opining that post-accident design changes were properly excluded because Rule 407 applies to products liability claims); Josephs v. Harris Corp., 677 F.2d 985, 990 (3d Cir. 1982) (stating that Federal Rule 407 applies to products liability actions); Werner v. Upjohn, Inc., 628 F.2d 848, 856-57 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (holding that the policy behind Rule 407 is best served by extending its application to products liability actions); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980) (holding that the District Court's admission of evidence of a design change violated Federal Rule 407); Dine v. W. Exterminating Co., No. CIV.A.86-1857-OG, 1988 WL 28241, at *2 (D.D.C. Mar. 16, 1988) (holding that evidence of subsequent remedial measures is inadmissible in a products liability claim). *But see* Porchia v. Design Equip. Co., 113 F.3d 877, 880 (8th Cir. 1997) (stating that the law of the Eighth Circuit does not mandate the exclusion of evidence of subsequent remedial measures in products liability cases); Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322 (10th Cir. 1983) (holding that Rule 407 does not extend to products liability actions).
7. *See infra* note 8.
8. *See, e.g.*, KY. R. EVID. 407 (2001) (acknowledging Rule 407's inapplicability to products liability actions); TEX. R. EVID. 407 (2001) (stating that "[n]othing in this rule shall preclude admissibility in products liability cases based on strict liability"); Schelbauer v. Butler Mfg. Co., 673 P.2d 743, 754 (Cal. 1984) (holding that a judge has discretion to admit evidence of subsequent remedial measures in a products liability case); Caldwell v. Yamaha Motor Co., 648 P.2d 519, 523 (Wyo. 1982) (stating that the provisions of

does not explicitly state whether it applies to products liability actions,[9] opting to leave the issue to development through the case law.[10] Although the Court of Special Appeals of Maryland in *Troja v. Black & Decker Manufacturing Co.*[11] held that Rule 5-407 applies to products liability actions,[12] an amendment to 5–407 codifying this holding, and expanding upon it, is necessary.

This Comment examines the admissibility of evidence of subsequent remedial measures in products liability actions in Maryland. Part II provides background information regarding the application of Rule 407 to negligence actions.[13] Part II also clarifies the distinctions between negligence actions and those actions based in strict liability.[14] In Part III, this Comment explores federal and state courts' reasoning for deciding whether or not to apply the exclusionary rule to products liability actions.[15] Part III also analyzes the 1997 amendment to the federal rule.[16] Part IV examines the development of Rule 5-407 in Maryland law, including the Maryland Evidence Committee's 1993 recommendation to the Court of Appeals of Maryland.[17] Finally, in Part V, the author will propose how Maryland should amend its current rule to explicitly apply to products liability actions.[18]

Wyoming Rule of Evidence 407 are inapplicable to strict liability concepts). *But see* Troja v. Black & Decker Mfg. Co., 62 Md. App. 101, 114, 488 A.2d 516, 522 (1985) (holding that Maryland Rule 5-407 applies to products liability actions); Dixon v. Jacobsen Mfg. Co., 637 A.2d 915, 924 (N.J. Super. Ct. App. Div. 1994) (stating that New Jersey Rule of Evidence 407 is applicable to products liability, as well as negligence); Duchess v. Langston Corp., 769 A.2d 1131, 1145 (Pa. 2001) (holding that Pennsylvania Rule of Evidence 407 precludes use of a "subsequent design change as substantive evidence of a product defect").

9. MD. R. EVID. 5-407. Rule 5-407 states:

> (a) In general. When, after an event, measures are taken which, if in effect at the time of the event, 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.
>
> (b) Admissibility for Other Purposes. 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.

10. LYNN MCLAIN, MARYLAND PRACTICE: MARYLAND RULES OF EVIDENCE § 2.407.4 (1994). Although the Court of Special Appeals of Maryland has applied the common law exclusionary rule to products liability cases, the Court of Appeals of Maryland refused to approve a codification of the rule. *Id.*
11. 62 Md. App. 101, 488 A.2d 516, *cert. denied*, 303 Md. 471 (1985).
12. *Id.* at 114, 488 A.2d at 522.
13. *See infra* notes 22-56 and accompanying text.
14. *See infra* notes 57-69 and accompanying text.
15. *See infra* notes 70-89 and accompanying text.
16. *See infra* notes 90-93 and accompanying text.
17. *See infra* Part IV.
18. *See* discussion *infra* Part V.

II. EVOLUTION OF RULE 5-407

In order to adequately discuss extending Rule 5-407 to explicitly include products liability actions, one must first have a clear understanding of the rule's application to negligence suits. This section first traces the rule's common law origins and its codification at the federal level,[19] then examines the rationale behind Rule 407.[20] After this foundation is laid, this section will identify the similarities and differences between negligence and products liability actions.[21]

A. Negligence and Rule 407

1. Common Law Origins

The general rule of excluding evidence of subsequent remedial measures originated in the common law.[22] English courts adopted the doctrine in 1869, and soon thereafter American courts embraced the practice of excluding evidence of subsequent remedial measures.[23] Recognizing that the majority of state courts had adopted an exclusionary rule barring admission of evidence of subsequent remedial measures, the United States Supreme Court adopted the same rule in *Columbia & Puget Sound Railroad v. Hawthorne*.[24] The Court's rationale relied upon the reasoning provided by the Supreme Court of Minnesota in *Morse v. Minneapolis & St. Louis Railway Co.*[25] The *Morse* court had asserted that evidence of subsequent remedial mea-

19. *See infra* notes 22-39 and accompanying text.
20. *See* discussion *infra* Part II.A.3.
21. *See* discussion *infra* Part II.B.
22. Michael W. Blanton, Comment, *Application of Federal Rule of Evidence 407 in Strict Products Liability Cases: The Evidence Weighs Against Automatic Exclusion*, 65 UMKC L. REV. 49, 53-55 (1996) (discussing the common law doctrine of excluding evidence of subsequent remedial measures in negligence actions).
23. *Id.* at 53 (noting that "[t]he common law doctrine excluding evidence of subsequent remedial measures is of 'relatively recent origin'").(check quote to see where it ends).
24. 144 U.S. 202 (1892). In *Columbia*, the plaintiff alleged that the defendant sawmill owner negligently provided him with a defective machine that caused his injuries. *Id.* at 202. At trial, the plaintiff introduced evidence that after his accident, the defendant made alterations in the sawmill machinery. *Id.* at 206.
25. 16 N.W. 358 (Minn. 1883) (holding that evidence of defendant's post-accident repair of an allegedly defective railroad switch is inadmissible to prove the defendant's negligence). In *Morse*, plaintiff alleged that plaintiff's intestate was fatally wounded due to defendant's alleged failure to maintain its railroad track. *Id.* at 358. The defects of the track, including an imperfect switch, allegedly caused the engine to be thrown off the track, thereby killing the plaintiff, who was on board the engine. *Id.* At trial, plaintiff introduced evidence that subsequent to the fatal accident, defendant repaired the allegedly defective switch. *Id.* at 359. On appeal, the Supreme Court of Minnesota held that admission of such evidence was error. *Id.*

sures "afford[s] no legitimate basis for construing such an act as an admission of previous neglect of duty."[26]

The *Morse* court also noted that a person who abides by the law in exercising necessary care may adopt extra safeguards after an accident occurs in order to prevent future accidents.[27] The court opined that it would be unjust to then punish that person by construing those additional safeguards as admissions of prior negligence.[28] Both the *Morse* court and the United States Supreme Court in *Columbia* emphasized the rule's application to negligence actions.[29]

2. Codification of the Federal Rule

Rule 308 of the Model Code of Evidence provided initial recognition, outside of common law, of the inadmissibility of evidence of remedial measures.[30] Soon thereafter, the Uniform Rule of Evidence 51 expressed another version of the remedial measures rule.[31] This version, however, added that evidence of subsequent remedial conduct was inadmissible only when offered "to prove negligence or *culpable conduct.*"[32]

In 1969, a preliminary draft of the Federal Rules of Evidence included Rule 407.[33] This version, based upon both Uniform Rule 51

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26. *Id.* at 359.
27. Morse v. Minneapolis & St. Louis Ry. Co., 16 N.W. 358, 359 (Minn. 1883).
28. *Id.* (stating "[t]he more careful a person is, the more regard he has for the lives of others, the more likely he would be to [take remedial measures], and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence").
29. *See Columbia*, 144 U.S. at 207; *Morse*, 16 N.W. at 359.
30. Blanton, *supra* note 22, at 55. The Model Code was an "official catalog of the common law rules of evidence," composed in the 1940s by the American Law Institute. Marcie J. Freeman, Comment, *Spanning the Spectrum: Proposed Amendments to Federal Rule of Evidence 407*, 28 TEX. TECH L. REV. 1175, 1179 (1997). Model Code Rule 308 states:
> Evidence of the taking of a precaution by a person to prevent the repetition of a previous harm or the occurrence of a similar harm or evidence of the adoption of a plan requiring that such a precaution be taken is inadmissible as tending to prove that his failure to take such a precaution to prevent the previous harm was negligent.

MODEL CODE OF EVID. R. 308 (1942).
31. *See* Freeman, *supra* note 30, at 1179. The Uniform Rules were a collaboration between the American Bar Association and the Commissioners on Uniform State Laws. *Id.* Uniform Rule 51 reads:
> "*Subsequent Remedial Conduct.* When 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 not admissible to prove negligence or culpable conduct in connection with the event."

BURR W. JONES, THE LAW OF EVIDENCE CIVIL AND CRIMINAL app. 4, at 1933 (5th ed. 1958) (quoting UNIF. R. EVID. 51).
32. Jones, *supra* note 31, app. 4, at 1933 (emphasis added).
33. Blanton, *supra* note 22, at 56.

and a section of the proposed Missouri Evidence Code,[34] added exceptions to the exclusionary rule.[35] These exceptions allowed admission of remedial conduct evidence when offered for purposes such as proving control, ownership, or feasibility of controverted precautionary measures, and impeachment.[36] After slight changes to the draft were made, the United States Supreme Court and Congress enacted Rule 407 in 1975.[37] Thus, prior to the addition of the 1997 strict liability amendment,[38] Rule 407 provided:

> 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.[39]

3. Rationale Behind the Rule

There are three main aspects to the rationale behind the rule generally excluding evidence of subsequent remedial measures.[40] First, the probative value of such evidence is low with regard to negligence or culpability.[41] Second, policy reasons of encouraging people to take subsequent remedial measures support applying the exclusionary rule.[42] Finally, the exclusionary rule helps eliminate the likelihood of jury confusion and unfair prejudice that may arise with the admission of such evidence.[43]

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34. *Id.* at 55-56 (discussing the evolution of Rule 407).
35. Preliminary Draft of Proposed Rules of Evid. for the U.S. District Courts and Magistrates, Rule 407, 46 F.R.D. 161, 236 (1969).
36. *Id.*
37. Blanton, *supra* note 22, at 56.
38. *See infra* Part III.C.
39. Rules of Evid. for the United States Courts and Magistrates, Rule 407, 56 F.R.D. 183, 225 (1973). One scholar noted three significant differences in the statutory codification and its common law heritage. Blanton, *supra* note 22, at 56-57. First, Rule 407 broadened the definition of evidence that the rule would affect. *Id.* at 56-57. Rule 407 simply referred to "measures," while the common law had specified "repairs," and Uniform Rule 51 had designated "precautionary or remedial measures" to be affected by the rule. *Id.* at 56-57. Second, Rule 407 broadened the scope of the earlier rule to include culpable conduct. *Id.* at 57. Earlier versions had solely referred to negligence. *Id.* Finally, Rule 407 included a second sentence, which identified various exceptions to the rule. *Id.* at 58.
40. McLAIN, *supra* note 10, § 2.407.5(a); *see also infra* notes 41-43 and accompanying text.
41. McLAIN, *supra* note 10, § 2.407.5(a); *see also infra* Part II.A.3.a.
42. McLAIN, *supra* note 10, § 2.407.5(a); *see also infra* Part II.A.3.b.
43. McLAIN, *supra* note 10, § 2.407.5(a); *see also infra* Part II.A.3.c.

a. Low Probative Value

Evidence that a defendant in a negligence action engaged in remedial measures after an injury occurred has low probative value with respect to that defendant's negligence or culpability.[44] A simple example is that of a restaurant owner repairing a step leading up to the front door of his restaurant a few days after someone was injured on the step.[45] The mere fact that the owner made repairs after an accident is not probative of prior wrongdoing.[46]

Taking remedial measures subsequent to an accident is unreliable evidence of liability because the measures may be unrelated to any negligence or culpability.[47] For instance, the remedial measures taken by the defendant may be more than the standard of care required by law before the defendant knew of the accident. Properly assessing negligence requires an examination of "'what the defendant knew or should have known prior to the accident, not what he knew as a result of the accident.'"[48] Thus, changes made after an accident are not probative of how reasonable a defendant's conduct was prior to the accident.[49]

b. Policy Reasons

Admitting evidence of subsequent remedial measures may have the negative effect of discouraging people from making corrective repairs to prevent future accidents.[50] Banning subsequent conduct evidence best advances public safety and welfare interests.[51] As one court stated, admitting evidence of remedial measures "punishes a prudent

44. MCLAIN, *supra* note 10, § 2.407.5(a) (stating the reasons supporting Rule 5-407, including low probative value).
45. *See* Brooks v. Elders, Inc., 896 S.W.2d 744, 745 (Mo. Ct. App. 1995).
46. Another example of a subsequent remedial measure is a city repairing a depression in the sidewalk after a pedestrian allegedly fell into the hole and was injured. City of Miami Beach v. Wolfe, 83 So. 2d 774, 776 (Fla. 1955). The *Wolfe* court held that such evidence of post-accident repairs was inadmissible to prove negligence. *Id.* at 776.
47. Freeman, *supra* note 30, at 1183.
48. *Id.* (quoting STEPHEN A. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 483 (6th ed. 1994)). Notably, "the wrongfulness . . . of a person's conduct must be evaluated in the light of the risks apparent to him at the time, and not by looking backward 'with the wisdom born of the event.'" Aleshire v. State, 225 Md. 355, 367, 170 A.2d 758, 764 (1961) (quoting Cardozo, C.J., in Greene v. Sibley, Lindsay & Curr Co., 177 N.E. 416, 417 (1931)).
49. Hall v. Burns, 569 A.2d 10, 19 (Conn. 1990) (discussing the relevancy grounds for Rule 407).
50. *See* MCLAIN, *supra* note 10, § 2.407.5(a) (stating that "people should be encouraged to take subsequent remedial measures, even if the steps taken are more than the law requires of them").
51. Freeman, *supra* note 30, at 1185 (noting that the general public benefits if evidence of subsequent remedial measures is excluded because potential defendants will take extra safety measures to ensure production of safer and more reliable products).

and well-meaning defendant who guards against the recurrence of an accident he had no reason to anticipate, or who out of a considerate regard for the safety of others exercises a higher degree of care than the law requires."[52] The rule excluding such evidence encourages people to take remedial measures, allowing them to do so without fearing the consequences of liability.[53]

c. Jury Confusion and Unfair Prejudice

The final rationale behind Rule 407 is that evidence of subsequent remedial measures in a negligence action may confuse and mislead the jury and create unfair prejudice.[54] The jury may perceive the defendant's remedial conduct as an admission of liability, or at least a concession that the defendant had earlier failed to meet the standard of due care.[55] This is especially unfair in situations where the defendant was exercising due care by law prior to taking subsequent remedial measures. Thus, evidence that has minimal probative value may be given undue emphasis by a jury.[56]

B. Negligence and Products Liability Actions Compared

In order to determine whether Rule 407 was intended to apply to products liability actions, one must understand the similarities and differences between actions based in negligence and actions based in strict products liability.[57] Similarities in the two support the theory that the rule applies to both causes of action.[58] The absence of simi-

52. Baron v. Reading Iron Co., 51 A. 979, 980 (Pa. 1902); *see also* Royals v. Ga. Peace Officer Standards and Training Council, 474 S.E.2d 220, 222 (Ga. App. 1996) (stating that allowing evidence of post-accident repairs to be admitted in negligence actions would conflict "with the public policy of encouraging safety through remedial action").

53. *See Royals*, 474 S.E.2d at 222.

54. MCLAIN, *supra* note 10, § 2.407.5(a). Presenting the jury with evidence of subsequent remedial measures may also serve as a distraction from the ultimate issues. *Id.*

55. *Id.*

56. *Id.* For instance, the Florida Supreme Court has held that a trial court improperly admitted evidence that, subsequent to the plaintiff's injury in a railway car caused by her tripping over exposed pipes, the defendant covered the pipes with a shield. Seaboard Air Line Ry. Co. v. Parks, 104 So. 587, 588 (Fla. 1925). The court based its holding in part on inevitable jury confusion and prejudice. *Id.* at 589. The court stated that the jury likely drew the "natural inference in their minds unlearned in the law," that the defendant's subsequent repairs constituted an admission that the pipes were placed improperly and were unsafe. *Id.*; *see also* Tuer v. McDonald, 347 Md. 507, 523 n.8, 701 A.2d 1101, 1109 n.8 (1997).

57. *See infra* Part II.B.1-2.

58. *See* Werner v. Upjohn Co., Inc., 628 F.2d 848, 858 (4th Cir. 1980) (holding that the close similarity of negligence and strict liability supports its conclusion that Rule 407 apply to products liability actions); *see also* Flaminio v. Honda Motor Co., 733 F.2d 463, 467 (7th Cir. 1984) (stating that the simi-

larities, on the other hand, tends to support the theory that the rule does not pertain to products liability actions.[59]

1. Negligence Actions

Negligence is defined in Maryland as the failure to exercise "such care as the average prudent and careful [person] would exercise under similar circumstances."[60] A prima facie case of negligence consists of four basic elements: duty, breach, causation, and damages.[61] The plaintiff must establish "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty."[62] Hence, negligence focuses on the defendant's conduct.[63]

2. Products Liability Actions

Under Restatement (Second) of Torts section 402A, consumers may sue product manufacturers under a strict liability theory for injuries resulting from the use of defective products.[64] In order to recover under a products liability theory, the plaintiff must establish that:

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larities of the cost and risk factors in both negligence and products liability claims warrants application of the exclusionary rule to both actions).

59. *See generally* Ault v. Int'l Harvester Co., 528 P.2d 1148, 1150 (Cal. 1974) (focusing on the difference in the elements between negligence and products liability as a reason for applying the exclusionary rule solely in negligence cases).

60. M.A. Long Co. v. State Accident Fund, 156 Md. 639, 650, 144 A. 775, 780 (1929); *see* Heinz v. Balt. & Ohio R.R. Co., 113 Md. 582, 589, 77 A. 980, 983 (1910); *see also* Adams v. NVR Homes, Inc., 135 F. Supp. 2d 675, 715 (D. Md. 2001) (applying Maryland law, the court held an engineer to the negligence standard).

61. Cramer v. Hous. Opportunities Comm'n of Montgomery County, 304 Md. 705, 712, 501 A.2d 35, 39 (1985); Peroti v. Williams, 258 Md. 663, 669, 267 A.2d 114, 118 (1970); Stickley v. Chisholm, 136 Md. App. 305, 314, 765 A.2d 662, 668 (2001) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 30, at 164-65 (5th ed. 1984)); Hurt v. Chavis, 128 Md. App. 626, 636, 739 A.2d 924, 930 (1999).

62. Rosenblatt v. Exxon Co., 335 Md. 58, 76, 642 A.2d 180, 188 (1994).

63. *See Rule 407: Subsequent Remedial Measures*, 12 TOURO L. REV. 425, 428 (1996). On the contrary, products liability actions focus on the product and whether it was defective. *See id.*; *see also infra* note 64 and accompanying text; *Flaminio*, 733 F.2d at 469 (stating that the defendant's conduct is the focus of a negligence action, while the "dangerousness of the product regardless of the defendant's conduct" is the focus of strict liability).

64. Restatement (Second) of Torts § 402A (1965); *see also* Phipps v. Gen. Motors Corp., 278 Md. 337, 341-42, 363 A.2d 955, 957 (1976). Maryland adopted section 402A of the Restatement in 1976. *Id.* at 353, 363 A.2d at 963. If Maryland chooses to adopt section 1 of the *Restatement (Third) of Torts: Products Liability*, the commercial seller or distributor of a defective product will still be liable under a strict products liability theory, although

> (1) The product was in a *defective condition* at the time that it left the possession or control of the seller, (2) that it was *unreasonably dangerous* to the user or consumer, (3) that the *defect was a cause* of the injuries, and (4) that the product was expected to and did reach the consumer *without substantial change in its condition.*[65]

A product has a "defective condition" when it suffers from a manufacturing defect, a design defect, or is accompanied by inadequate warnings.[66] As in negligence actions, Maryland rejects hindsight liability, and measures liability at the time of product distribution.[67] A product is not subject to strict liability simply because the product, viewed in hindsight with knowledge and information unavailable at the time of product distribution, was certain to be defective or dangerous.[68] Imposition of hindsight liability in Maryland would result in forcing a manufacturer to "'becom[e] an insurer for every injury that may result from its product.'"[69]

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the American Law Institute declined to use that term. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. a (1998).

65. Nissan Motor Co. v. Nave, 129 Md. App. 90, 118, 740 A.2d 102, 117 (1998). The Restatement (Third) also categorizes the three classes of product defects as (1) manufacturing defect, (2) design defect, and (3) inadequate instructions or warnings. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (providing thorough definitions for the three types of defects).
66. *Nissan Motor Co.*, 129 Md. App. at 118, 740 A.2d at 117. A manufacturing defect exists when, at the time of sale, there was a flaw in the product that made it more dangerous than intended. *Id.* On the contrary, a design defect is present when, although the product is manufactured exactly as intended, the design itself is flawed. *Phipps*, 278 Md. at 344-45, 363 A.2d at 959. A warning is deemed inadequate when, as a result of the deficient warning, the product is unreasonably dangerous. Werner v. Upjohn Co., Inc., 628 F.2d 848, 858 (4th Cir. 1980). More specifically, a product has inadequate warnings when the manufacturer fails to warn of "defects or propensities that make a product hazardous." Kennedy v. Mobay Corp., 84 Md. App. 397, 412, 579 A.2d 1191, 1199 (1990).
67. *See supra* text accompanying note 65. Hindsight liability refers to holding a manufacturer responsible for knowledge available at the time of trial. Randolph L. Burns, Comment, *Subsequent Remedial Measures and Strict Products Liability: A New—Relevant—Answer to an Old Problem*, 81 VA. L. REV. 1141, 1161 (1995). This knowledge, unknown at the time of product distribution, is obtained through hindsight. *Id.* Maryland rejects this method of determining liability, and imposes liability based upon knowledge of the product at the time of distribution. Halliday v. Sturm, Ruger & Co., 138 Md. App. 136, 170, 770 A.2d 1072, 1092 (2001).
68. Miles Labs., Inc. Cutter Labs. Div. v. Doe, 315 Md. 704, 735, 556 A.2d 1107, 1122 (1989); *see also Halliday*, 138 Md. App. at 170, 770 A.2d at 1092 (opining that "with the benefit of hindsight, any accident could be foreseeable").
69. *Halliday*, 138 Md. App. at 170, 770 A.2d at 1092 (quoting Simpson v. Standard Container Co., 72 Md. App. 199, 206, 527 A.2d 1337, 1341 (1987)).

III. APPLICATION OF RULE 407 TO PRODUCTS LIABILITY ACTIONS

Prior to the passage of the 1997 amendment, the absence of any reference to products liability in Federal Rule 407 caused courts to divide over the admissibility of evidence related to subsequent remedial measures in those cases.[70] Two contrary schools of thought existed on the matter.[71] Courts within the first school of thought held that unamended Rule 407 applied, so that evidence of subsequent remedial measures was inadmissible to prove culpable conduct in strict liability actions.[72] On the contrary, courts supporting the other school of thought held that application of unamended Rule 407 was limited to negligence and culpable conduct, so that remedial conduct evidence was admissible in products liability actions.[73]

A. Arguments Barring Admission

Courts refusing to admit evidence of subsequent remedial measures in products liability actions conclude that a defendant's actions resulting in strict liability are "culpable conduct" under Rule 407.[74] They argue that, because culpable conduct indicates "blameworthiness," and strict liability implies blameworthiness for placing the product into the stream of commerce, there should be no policy distinction between the two.[75] Thus, although strict liability does not embrace blameworthiness in a negligence sense, proponents of applying Rule 407 to products liability actions assert that because a manufacturer is deemed blameworthy for placing a defective product on the market, such blameworthiness embraces the culpable conduct referred to in Rule 407.[76]

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70. *See supra* note 6; *see also* Burns, *supra* note 67, at 1141-42 nn.5 & 8. The majority of courts applied the exclusionary rule to products liability actions. *Id.*; *see also* Flaminio v. Honda Motor Co., 733 F.2d 463, 468-69 (1984) (discussing the split in courts on the applicability of Rule 407 to strict liability cases).
71. Troja v. Black & Decker Mfg. Co., 62 Md. App. 101, 113, 488 A.2d 516, 521-22 (1985); *see also* discussion *supra* Part IV.A-B.
72. *Troja*, 62 Md. App. at 113, 488 A.2d at 522; *see also* discussion *supra* Part IV.A.
73. *Troja*, 62 Md. App. at 113, 488 A.2d at 522; *see also* discussion *supra* Part IV.B.
74. *See, e.g.*, Werner v. Upjohn Co., 628 F.2d 848, 856-57 (4th Cir. 1980) (stating that, while strict liability involves conduct that is "technically less blameworthy than simple negligence" and culpable conduct is more blameworthy than simple negligence, subsequent remedial measures should be inadmissible to either one).
75. *Flaminio*, 733 F.2d at 469 (opining that, under Wisconsin law, a "defendant's blameworthiness" is applicable because it is compared with the "plaintiff's blameworthiness" in strict liability cases to determine comparative negligence).
76. *See id.*

Courts excluding evidence of subsequent remedial measures also claim that the policy of encouraging repairs applies as equally to products liability cases as it does to negligence cases.[77] These courts argue that because accidents are low-probability events, a rule admitting evidence of subsequent conduct may cause manufacturers involved in pending products liability suits to decide against taking possible safety precautions if "the cost of a possible loss in litigation outweighs the cost of taking the precaution."[78]

Courts that bar evidence of subsequent repairs also question the probative value of such evidence.[79] Some argue that subsequent repair evidence has even less probative value when offered in products liability cases.[80] Manufacturers often change products for reasons unrelated to remedial measures, such as attempting to decrease production costs or to increase efficiency.[81] Remedial evidence possesses little probative value and may be outweighed by the risk of jury confusion and unfair prejudice.[82] The fear is that juries will conclude that a product change indicates an admission that the modification was made to remedy a defect,[83] and that juries may "give great and decisive weight to the perceived admission."[84]

B. Arguments Favoring Admissibility

Courts favoring admissibility of subsequent remedial conduct evidence typically conclude that the policy rationale for the exclusionary rule is inapplicable in strict liability cases.[85] They argue that allowing

77. *Werner*, 628 F.2d at 857.
78. *Flaminio*, 733 F.2d at 469 (opining that, although seemingly immoral, economic analysis may hinder a manufacturer from taking remedial measures if such measures may be admissible as evidence in future litigation).
79. *See* MCLAIN, *supra* note 10, § 2.407.5 (noting that, to some extent, Rule 5-407 is merely a "specific application of the general principles enunciated in Rule 5-403"). Maryland Rule 5-403 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, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MD. R. EVID. 5-403.
80. Ault v. Int'l Harvester Co., 528 P.2d 1148, 1156 (1974) (Clark, J., dissenting). In his dissent, Judge Clark argued that many product alterations have no relation to the change's remedial nature. *Id.*
81. *Ault*, 528 P.2d at 1156. Judge Clark used the example of the automobile industry, where, on a annual basis, hundreds of changes are made in a new model. *Id.* He notes that it would be absurd to insinuate that each change was meant to remedy a defect. *Id.*
82. *See* Freeman, *supra* note 30, at 1195.
83. *See id.*
84. *Ault*, 528 P.2d at 1156.
85. Burns, *supra* note 67, at 1151. *E.g.*, Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1327 (10th Cir. 1983) (stating that "it is unrealistic to think a tort feasor would risk innumerable additional lawsuits by foregoing necessary design changes simply to avoid the possible use of those modifications as evidence by persons who have already been injured") (superceded by

such evidence does not hinder manufacturers from making repairs that could avert lawsuits and safeguard their public image.[86] One court noted that no evidence exists to prove that manufacturers are even aware of the exclusionary rule or would modify their behavior if they knew it existed.[87]

Moreover, these courts assert that products liability cases do not require a showing of negligence or culpable conduct, and therefore the general exclusionary rule does not apply.[88] They stress that negligence and products liability are based upon two different theories: negligence liability stemming from the manufacturer's conduct and products liability focusing on the defectiveness of the product.[89]

C. 1997 Amendment

December 1, 1997 marked the official enactment of amended Federal Rule of Evidence 407, which now explicitly excludes evidence of subsequent repairs in a strict products liability cause of action.[90] Federal Rule 407 adopts the majority view and expressly excludes the use of subsequent remedial measures to prove a defect in a product or in a product's design.[91] However, Rule 407 strictly limits inadmissibility to evidence of remedial measures taken by the defendant occurring after the "damages giving rise to the action."[92] Therefore, evidence of actions taken by the defendant prior to the injury-producing event will not be excluded under Rule 407, even if they happened after the product was manufactured or designed.[93]

Federal Rule of Evidence 407); Forma Scientific, Inc. v. Biosera, Inc., 960 P.2d 108, 115-16 (Colo. 1998) (opining that "market forces generally operate to compel manufacturers to improve their products," not evidentiary rules); *Ault*, 528 P.2d at 1152 (stating that mass producers of goods will not likely forego improving a product at the risk of countless additional lawsuits).

86. Burns, *supra* note 67, at 1151 (discussing the arguments in favor of admitting evidence of subsequent remedial measures).

87. *Herndon*, 716 F.2d at 1328 (stating "there is no evidence which shows that manufacturers even know about the evidentiary rule or change their behavior because of it").

88. *Ault*, 528 P.2d at 1150. The court stated that the history of the rule and its purpose suggest that it should be applied only to negligence cases because the legislature could have selected "an expression less related to and consistent with affirmative fault than 'culpable conduct.'" *Id.* at 1151; *see also Biosera*, 960 P.2d at 115.

89. Burns, *supra* note 67, at 1142-43.

90. Daniel Ogburn, Comment, *Subsequent Remedial Measures and the Application of California Law in a Diversity Action*, 39 SANTA CLARA L. REV. 615, 626 (1999).

91. FED. R. EVID. 407.

92. FED. R. EVID. 407 advisory committee's note.

93. *Id.*; *see also* Ogburn, *supra* note 90, at 628.

IV. RULE 407 IN MARYLAND

A. *Codification of the Maryland Rule*

Maryland initially followed the common law with regard to the admissibility of evidence of subsequent remedial measures.[94] In 1906, in *Ziehn v. United Electric Light & Power Co. of Baltimore*,[95] the Court of Appeals of Maryland first recognized and applied the United States Supreme Court's decision not to admit evidence of subsequent remedial measures in *Columbia*.[96] Maryland later began narrowing the application of the general exclusionary rule, prohibiting the introduction of evidence of subsequent remedial measures "only when offered as an *admission* of liability or negligence on the part of the defendant but allowing it as independent, direct, or circumstantial evidence of negligence."[97] Thus, Maryland common law created an exception to the basic exclusionary rule, admitting evidence of subsequent conduct to circumstantially prove failure to meet the applicable standard of care.[98]

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94. Tuer v. McDonald, 347 Md. 507, 516, 701 A.2d 1101, 1105 (1997). In *Tuer*, the estate of a patient who died after cardiac surgery brought a medical malpractice action against Mr. Tuer's cardiac surgeons. *Id.* at 508-09, 701 A.2d at 1101. The plaintiff asserted that the physicians were negligent in failing to restart anticoagulant treatment after the postponement of the surgery. *Id.* at 511, 701 A.2d at 1103. The plaintiff sought to introduce evidence that after Mr. Tuer's death, the defendants changed hospital protocol so that the drug Heparin is now administered to patients prior to coronary artery bypass surgery. *Id.* at 510, 701 A.2d at 1102. The court held that, not only did the general rule exclude admission of such measures, but also the evidence would not be admitted under the impeachment and feasibility exceptions. *Id.* at 529, 531, 701 A.2d at 1112-13. In so holding, Judge Wilner provided an extensive discussion of the evolution of Maryland Rule 5-407. *Id.* at 516-23, 701 A.2d at 1105-09.

95. 104 Md. 48, 64 A. 61 (1906). In *Ziehn*, a telephone lineman brought a negligence action against an electric utility company for injuries sustained when he came in contact with an uninsulated wire while repairing a telephone line. *Id.* at 59-60, 64 A. at 62. The trial court refused to admit plaintiff's evidence that the utility company had moved the wires after the accident. *Id.* at 61, 64 A. at 63. Plaintiff appealed, primarily disputing the trial court's finding of contributory negligence as a matter of law, but also arguing that the electric company's subsequent remedial measures should have been admitted. *Id.* at 60, 61, 64 A. at 62, 63. The court held that "[t]he change of the location of the wires after the accident, could not affect the responsibility of the appellee, at the date of the accident." *Id.* at 61, 64 A. at 63.

96. *Id.*; *see also supra* note 24 (explaining the facts of the *Columbia* decision).

97. *Tuer*, 347 Md. at 518, 701 A.2d at 1106 (citing Am. Paving & Contracting Co. v. Davis, 127 Md. 477, 96 A. 623 (1916), Blanco v. J.C. Penney, 251 Md. 707, 710, 248 A.2d 645, 647 (1968), and Wilson v. Morris, 317 Md. 284, 296, 563 A.2d 392, 397 (1989)).

98. *See id.* at 520-21, 701 A.2d at 1107-08.

B. *Troja v. Black & Decker Manufacturing Co.*

In *Troja v. Black & Decker Manufacturing Co.*,[99] when a Maryland court was first faced with deciding which school of thought to support,[100] the court looked to the leading cases representing both sides of the argument.[101] The plaintiff in *Troja* brought negligence and products liability actions against the defendant, Black & Decker Manufacturing Company, for injuries sustained while operating a Black & Decker radial arm saw.[102] In support of his claim that the product warning was inadequate, the plaintiff sought to admit evidence that Black & Decker later included a stronger warning on the model that it manufactured five years after his accident.[103]

The Court of Special Appeals of Maryland held that the trial court was correct in barring the plaintiff from introducing the evidence, because "in a strict liability case evidence of subsequent remedial measures is not admissible to prove culpable conduct."[104] The court asserted that holding otherwise might deter defendants from taking remedial measures.[105] The court also stated that even if the evidence had been relevant, the potential of jury confusion would render it inadmissible.[106]

C. *The Maryland Rules Committee's Proposal Regarding Acceptance of the General Exclusionary Rule*

In 1988, the Court of Appeals of Maryland's Standing Committee on Rules of Practice and Procedure ("Rules Committee") received the task of proposing a comprehensive code of the rules of evidence.[107] An Evidence Subcommittee was appointed to examine the Federal Rules, rules of other states, and the current Maryland law.[108] At that time, Maryland case law held that, while inadmissible as an admission of negligence or culpable conduct, evidence of prior remedial measures had relevance in regard to the standard of care issue.[109] Specifically, the court stated that the evidence was admissible as circumstantial proof that, at the time of the accident, a party had

99. 62 Md. App. 101, 488 A.2d 516 (1985).
100. *See supra* Part III.A-B.
101. *Troja*, 62 Md. App. at 113-14, 488 A.2d at 522.
102. *Id.* at 105, 488 A.2d at 517-18.
103. *Id.* at 112, 488 A.2d at 521.
104. *Id.* at 114, 488 A.2d at 522.
105. *Id.* at 113-14, 488 A.2d at 522 (quoting Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980)); *see supra* note 58 (discussing the *Werner* holding).
106. *Troja*, 62 Md. App. at 113-14, 488 A.2d at 522.
107. MCLAIN, *supra* note 10, § 1.3(c). In 1977, the Court of Appeals of Maryland had considered proceeding with the evidence rules project, but decided to postpone the project. *Id.* § 1.3(b).
108. *Id.* § 1.3(d)(2).
109. *Wilson*, 317 Md. at 298, 563 A.2d at 398.

failed to achieve the applicable standard of care.[110] The Rules Committee criticized the case law stating that a "standard of care" exception created ambiguity and served to "swallow the Rule."[111]

Refusing to recognize the "standard of care" exception, the Rules Committee proposed a rule that adopted the substance of Federal Rule 407.[112] The proposed rule also incorporated a subsection explicitly referring to products liability actions.[113]

The Court of Appeals of Maryland adopted the negligence and culpable conduct portion of the rule, as well as the exceptions to the rule. First, the state rule was divided into two sections with separate subheadings.[114] Second, clarifying the time frame to which the rule pertains, the Rules Committee replaced the phrase "if taken previously" with the words "if in effect at the time of the event."[115]

D. The Maryland Rules Committee's Proposal Regarding Products Liability

The Maryland Rules Committee's proposal to the Court of Appeals of Maryland indicated its belief that Rule 5-407 should be extended to incorporate products liability actions.[116] The proposal created a separate subsection from the negligence exclusionary rule that addressed products liability actions.[117] The products liability subsection stated:

> (b) Products Liability. In any action for injury or damage arising from an alleged defect in the design or manufacture of a product or the failure to warn of a dangerous propensity of the product, if, after the product is placed into the stream of commerce, measures are taken which, if in effect when the product was placed into the stream of commerce, would

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110. *Id.*
111. MARYLAND RULES COMMITTEE DRAFT § 5-407, 67 (July 1993) [hereinafter "COMMITTEE DRAFT"]. Permitting the inclusion of remedial evidence to define the scope of a defendant's duty would ignore the rationale behind the exclusionary rule (low probative value, public policy, and probability of unfair prejudice). *Id.*
112. *See* MCLAIN, *supra* note 10, § 2.407.2.
113. *See infra* text accompanying note 118.
114. *See infra* text accompanying note 118. Section a's "In General" subheading referred to the basic exclusionary rule. *See* MD. R. EVID. 5-407(a). Section b's subheading "Admissibility for Other Purposes" pertained to the exceptions to the exclusionary rule. *See* MD. R. EVID. 5-407(b).
115. MCLAIN, *supra* note 10, § 2.407.3. *See supra* note 9 for the text of the rule.
116. COMMITTEE DRAFT, *supra* note 111, at 66. The Rules Committee drafted a products liability subsection intended to clarify the rule's applicability to products liability actions. *Id.* Acknowledging the split in state and federal authority as to whether "culpable conduct" encompasses products liability actions, the Rules Committee stated that its proposal was consistent with *Troja v. Black & Decker Manufacturing Co.*, 62 Md. App. 101, *cert. denied*, 303 Md. 471 (1985). *Id.* However, the Rules Committee left to case law other types of strict liability actions, including ones involving wild animals or dangerous instrumentalities. *Id.*
117. *See id.* at 65.

> have made the injury or damage less likely to occur, evidence of the subsequent measures is not admissible to prove a defect in the product or the warning.[118]

The proposal, which came four years before the federal rule was amended,[119] acknowledged the divided state and federal authority as to whether the rule should apply to products liability.[120] However, the Rules Committee concluded that the rule should explicitly apply to products liability actions, to be consistent with the holding in *Troja*.[121] The Court of Appeals of Maryland refused to adopt the subsection explicitly applying to products liability actions, leaving further development to case law.

V. PROPOSED AMENDMENT TO RULE 5-407

An amendment to Rule 5-407 is necessary in order to clarify the rule's application to products liability actions. The *Troja* court's indication that the rule is applicable to products liability actions[122] is simply not enough. An amendment would resolve remaining questions regarding the specifics of applying the exclusionary rule to products liability actions.

A. *The Language of the Amendment*

The Court of Appeals of Maryland should amend Maryland Rule 5-407 to add a subsection (b), so that the rule reads:

> Products Liability. Where injury or damage results from an alleged product design or manufacture defect or a need for a warning or instruction, evidence that, after the product is placed into the stream of commerce, measures are taken which, if taken previously, would have made the injury or damage less likely to occur is not admissible to prove a defect in the product or the need for a warning or instruction.[123]

The suggested amendment clearly specifies that the exclusionary rule applies to any action claiming one of the three possible defective conditions.

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118. *Id.*
119. *See supra* note 4 and accompanying text.
120. COMMITTEE DRAFT, *supra* note 111, at 66.
121. *Id.*; *see supra* notes 104-06 and accompanying text.
122. *See supra* notes 104-06 and accompanying text.
123. The substance of this proposed rule does not differ from that proposed by the Rules Committee. *See supra* text accompanying note 118. Changes are made solely for clarity purposes.

B. Defining "Event" in a Products Liability Action

The proposed amendment also expressly identifies the "event" as placing the product into the stream of commerce.[124] Traditionally, the exclusionary rule has conferred a privilege to remedial measures taken after an accident or injury.[125] Because Maryland applies Rule 5-407 to products liability cases, and the traditional rule did not, a determination must be made as to which event the rule applies.

There is only one possible relevant event in a negligence action: the injury to a person.[126] If a person has been negligent and takes action before the accident occurs to remedy this negligence, the person presumably has thwarted the occurrence of a negligent act.[127] Thus, the issue of the event in a negligence action is irrelevant.[128]

However, in a products liability action, the question arises as to whether the event is the injury to a person or the placing of the product into the stream of commerce.[129] The problem with identifying "event" is clear when applying it to the previous seatbelt hypothetical.[130] Suppose Manufacturer A begins selling the seat belt to car manufacturers in January 2001. In February 2001, Consumer B purchases a car with this particular seat belt. Later that same month, Manufacturer A redesigns the seat belt. Then, in March 2001, Consumer B is injured in a car accident and sues Manufacturer A, claiming the seat belt was defective.

If Maryland were to rely on the current version of Rule 5-407, there would be confusion as to whether the measures are admissible. Manufacturer A would argue evidence of his subsequent conduct is inadmissible, as he made the changes *after* the event of placing the seat belt into the stream of commerce. Consumer B would argue that the evi-

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124. *See* COMMITTEE DRAFT, *supra* note 111, at 66. The Reporter's Note indicates that "[s]ection (b) is intended to give guidance as to the 'time line,' since in products cases the 'subsequent' measures may take place before the injury does." *Id.*

125. Freeman, *supra* note 30, at 1196. Freeman notes that not only did Professor Wigmore construe both sections of the rule as referring to "'past or future harm' and 'injury,'" the ALI Model Code similarly concluded that "the taking of a precaution by a person to prevent the repetition of a previous harm or the occurrence of a similar harm" is privileged. *Id.*

126. Eric L. Vinson, Note, *Applying Federal Rule of Evidence 407 in Strict Liability: A Discussion of Changes to the Rule*, 16 REV. LITIG. 773, 777 (1997).

127. *Id.* For example, assume that A, a Maryland restaurant owner, negligently maintains the stairs leading up to his restaurant. Assume that B, a patron, is injured on the steps. After B's accident, A takes measures to repair the steps. Evidence of such measures would be inadmissible under Rule 5-407. However, if A had repaired the stairs *before* B's injury, A never would have faced a lawsuit because B would have not been injured due to A's negligence. Thus, in negligence actions, any inquiry as to the definition of "event" in Rule 5-407 is mooted. *See id.*

128. *Id.*

129. *Id.*

130. *See supra* text accompanying notes 1-2.

dence is admissible, because the changes were made *before* the event of injury. Thus, maintaining the current rule is not a favorable option because the confusion surrounding the definition of "event" will remain.

In order to recover under a products liability theory, one of the elements that a plaintiff must prove is that the product was defective "at the time that it left the possession or control of the seller."[131] Because Maryland does not employ hindsight liability,[132] the fact finder is limited to product knowledge and information accessible to the manufacturer at the time of distribution.[133] However, if the jury hears evidence of post-distribution remedial measures, it may inappropriately assume that the manufacturer had knowledge of a defect prior to the accident. Although such knowledge is irrelevant under Maryland's products liability law, a jury will likely "have difficulty limiting the use of the evidence to only that part of the defectiveness formula of which it is probative."[134] Thus, allowing in evidence of remedial measures taken post-distribution may disturb Maryland's products liability scheme, as manufacturers may be held liable for product knowledge available only through hindsight.[135]

Furthermore, to best serve the purposes of the rule, the "event" in question should refer to placing the product into the stream of commerce.[136] First, the probative value of evidence of conduct taken after the sale is no more probative than evidence of measures taken after the plaintiff's accident.[137] Evidence of subsequent remedial measures taken after either event will serve only to mislead, unduly prejudice, and confuse the jury. Additionally, defining "event" as placing the product into the stream of commerce assists "the policy goal of encouraging . . . manufacturers to" place the safest possible products on the market.[138] Defining event as placing the product into the stream of commerce will allow manufacturers to engage in an aggressive pur-

131. Phipps v. Gen. Motors Corp., 278 Md. 337, 344, 363 A.2d 955, 958 (1976); *see also supra* note 65 and accompanying text (discussing necessary elements to prove in order to recover in a products liability action).

132. *See supra* notes 67-69 and accompanying text (discussing hindsight liability).

133. Burns, *supra* note 67, at 1178 (emphasizing that evidence subsequent to distribution is irrelevant in non-hindsight jurisdictions).

134. *Id.*

135. *See id.* (asserting that "[a]llowing the use of subsequent repairs to prove defect when the strict liability scheme designates the time of distribution as the point at which liability attaches effectively holds the manufacturer responsible for product knowledge outside the scope of the state's law").

136. *See infra* notes 137-39 and accompanying text.

137. *See* Vinson, *supra* note 126, at 787 (stating "[t]he notion that a remedial measure, such as a warning, taken the day before a plaintiff's accident is more probative than a remedial measure taken the day after is not supported by logic or equity concerns").

138. *Id.*

suit to produce the safest product without fear of punishment by a rule of evidence.[139]

VI. CONCLUSION

Maryland Rule 5-407 should be amended to explicitly apply to products liability actions. An amendment would be consistent with the rationale behind Rule 5-407, including excluding evidence that lacks probative value,[140] preserving the policy of encouraging people to make repairs,[141] and preventing the jury from being misled and confused.[142] The current rule is insufficient to handle all of the issues that may arise when a products liability plaintiff seeks to admit evidence of the defendant's subsequent conduct.[143] An amendment will remove any lingering doubt in Maryland regarding admissibility of subsequent remedial measures in products liability actions. Moreover, an amendment will clarify the definition of "event," so as to resolve any questions regarding the time frame to which the rule applies.[144] Failure to do so may erroneously expand the scope of Maryland's products liability scheme.[145]

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139. *Id.* at 788 (noting that defining event as the time of sale allows manufacturers to improve product safety "without fear of providing ammunition to a potential plaintiff's case").
140. *See supra* Part II.A.3.a.
141. *See supra* Part II.A.3.b.
142. *See supra* Part II.A.3.c.
143. *See supra* Part V.B.
144. *See supra* Part V.B.
145. *See supra* Part V.B.