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Admissibility of Subsequent Remedial Measures as Evidence in Texas.

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COMMENTS

Admissibility of Subsequent Remedial Measures as Evidence in Texas

Wendy Hunkele

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I. INTRODUCTION

On October 23, 1979, two electricians, David Woodend and Kenneth Morris, responded to a service call from a retailer who was experiencing a lighting problem in his store.[1] They determined the cause of the dim and blinking lights to be a defective phase in a switch manufactured by Federal

1. Federal Pac. Elec. Co. v. Woodend, 735 S.W.2d 887, 889 (Tex. App.—Fort Worth 1987, no writ). The example given in the introduction summarizes the facts of the *Woodend* case. *See id.* at 889-91.

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Pacific Electric Company.[2] Having obtained a replacement switch from the manufacturer, Woodend returned the next day and attempted to remove the old faulty switch, whereby an explosion occurred severely burning him.[3] Woodend sued Federal Pacific Electric Company in a Texas court under both negligence and strict product liability theories.[4] The parties strongly disputed the cause of the explosion.[5] At trial, the plaintiff, demonstrating his theory of the source of the explosion, attempted to introduce into evidence a switch containing improved safety features developed by the defendant manufacturer in 1979 or 1980.[6] Federal Pacific Electric Company objected to the admission of the evidence, claiming that the later-designed switch was a "subsequent remedial measure."[7] Both the trial court and the court of appeals allowed the evidence to be admitted.[8]

II. DEFINITIONAL REQUIREMENTS FOR SUBSEQUENT REMEDIAL MEASURES

A subsequent remedial measure is defined as an action which, if taken prior to an accident, would have decreased the probability of its occurrence.[9] In order to qualify under the definition, the remedial action must meet three

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2. *Id.*

3. *Id.* at 889-90. Woodend returned without the supervision of Morris, the senior electrician, because it was Saturday. Woodend had never worked on the type of equipment installed at Six Flags Mall. *Id.* at 889. The hot gases which burned Woodend were caused by metal parts melting and vaporizing. *Id.* at 890.

4. *Id.* at 889. Cases involving subsequent remedial evidence are often brought under both negligence and strict product liability theories. *See, e.g.*, Middleton v. Harris Press and Shear, Inc., 796 F.2d 747, 749 (5th Cir. 1986)(suit by widow whose husband was killed in industrial baling machine accident based on negligence and product liability); Cann v. Ford, 658 F.2d 54, 56 (2d Cir. 1981)(suit for damages for injuries sustained when transmission jumped gear under negligence and product liability theories); Werner v. Upjohn Co., 628 F.2d 848, 851 (4th Cir. 1980)(suit based on negligence and strict liability theories to recover for injuries caused by defective drug), *cert. denied*, 449 U.S. 1080 (1981). *See generally* Comment, *Subsequently Remedying Strict Products Liability*: Cann v. Ford, 14 CONN. L. REV. 759, 771 (1982)(discussing effectiveness of limiting instructions where both negligence and product liability theories used.)

5. *Woodend*, 735 S.W.2d at 890-91. The manufacturer argued that Woodend caused the explosion by improper handling of a screwdriver. *Id.* at 891. Woodend contended that the negligent or defective design of the switch caused his injury. *Id.*

6. *Id.* at 891-92. The new switch incorporated three new features: 1) a warning to deenergize prior to working on switch, 2) additional insulation barriers to prevent transfer of electricity between phases on switch, and 3) additional barrier on back of switch. *Id.* at 891. The court's opinion contained a diagram of the new switch. *Id.* at 897.

7. *Id.* at 891.

8. *Id.*

9. *See* FED. R. EVID. 407 (defining subsequent remedial measures as "[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur . . ."); *see also* TEX. R. EVID. 407 (adopting same definition as federal rule). *See gener-*

requirements.[10] First, the measure must have been taken subsequent to the accident.[11] In the *Woodend* case, the manufacturer's attorneys stated that the new design was not available until 1979 or 1980.[12] To satisfy this first requirement the new switch must have been unavailable until after October 24, 1979, the date of the accident.[13] The second requirement under the definition is that the action must have been taken in response to the accident.[14] In the *Woodend* example, the court must have concluded that the change was in response to the accident due to the brief time lag between the explosion and the implementation of the new switch design.[15] The final definitional requirement is that the measure must have been taken by a party to the suit.[16] Since the defendant manufacturer, Federal Pacific Electric Company, developed the change in the switch in the *Woodend* case, this requirement was met.[17]

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ally INTRODUCTION TO LAW OF EVIDENCE § 5.17 (2d ed. 1987)(defining subsequent remedial measures as new safety measures which could have prevented injuries and giving examples).

10. *See* Sales, *Product Liability Law in Texas*, 23 HOUS. L. REV. 1, 176-78 (1986)(in-depth analysis of requirements action must meet to be considered subsequent remedial measure under federal rule 407).

11. *See* FED. R. EVID. 407 (measures taken *after* event fall under definition); TEX. R. EVID. 407 (requiring measure to be after accident); *see also* Rozier v. Ford Motor Co., 573 F.2d 1332, 1343 (5th Cir. 1978)(report written by Ford prior to accident admissible). *See generally* Sales, *Product Liability Law in Texas*, 23 HOUS. L. REV. 1, 176-77 (1986)(explaining Fifth Circuit's holding in *Rozier*).

12. *Federal Pac. Elec. Co. v. Woodend*, 735 S.W.2d 887, 892 (Tex. App.—Fort Worth 1987, no writ).

13. *Id.* at 889; *see also* FED. R. EVID. 407 (measure must be taken after accident).

14. *See* Arceneaux v. Texaco, Inc., 623 F.2d 924, 928 (5th Cir. 1980)(change in gas tank location admissible since made in response to federal regulations not accident); *see also* McCants v. Salameh, 608 S.W.2d 304, 308 (Tex. App.—Waco 1980, writ ref'd n.r.e.)(emphasizes importance of responsive nature of change by excluding evidence of product change occurring twenty years after accident). *See generally* Sales, *Product Liability Law in Texas*, 23 HOUS. L. REV. 1, 177 (1986)(explaining responsiveness requirement).

15. *Woodend*, 735 S.W.2d at 889-92. The accident occurred in October, 1979, and the switch was available in 1979 or 1980. *Id.*

16. *See, e.g.*, Koonce v. Quaker Safety Prod. & Mfg., 798 F.2d 700, 719-20 (5th Cir. 1986)(memo concerning subsequent repairs admissible since written by non-party); Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 889 (5th Cir. 1983)(evidence of non-party alteration in design admissible against party manufacturer); Farner v. Paccar, Inc., 562 F.2d 518, 528 & n.20 (8th Cir. 1977)(evidence of modifications made by trucking firm not excludable in case against manufacturer of metal clips); Louisville & Nashville R.R. Co. v. Williams, 370 F.2d 839, 843-44 (5th Cir. 1966)(repairs made by State Highway Department admissible in case against railroad). *See generally* Introduction to Law of Evidence § 5.17 (2d ed. 1987)(tendency to admit evidence when repairs made by third parties).

17. *Woodend*, 735 S.W.2d at 891.

III. Admissibility of Subsequent Remedial Measures in Negligence Cases

In 1892, the United States Supreme Court, following the trend in state court decisions, held that evidence of machinery changes made after an accident was inadmissible to prove negligent conduct.[18] This pattern of inadmissibility continued in twentieth century case law,[19] and in 1975, Congress codified the exclusion into Federal Rule of Evidence 407, the wording of which has been almost universally adopted by the states.[20] Although subsequent remedial measures are inadmissible to prove negligent conduct, rule 407 provides that such measures are admissible for other purposes, including impeachment or proof of "ownership, control or feasibility of precautionary measures, if controverted . . . ."[21] In the *Woodend* case, evidence of the

18. *See* Columbia and Puget Sound R.R. v. Hawthorne, 144 U.S. 202, 208 (1892)(evidence of machinery changes after accident inadmissible in negligence action); *see also* Terre Haute & Indiana R.R. v. Clem, 23 N.E. 965, 965-66 (Ind. 1890)(error to admit evidence of changes and repairs to crossing in action for negligent construction); Morse v. Minneapolis & St. Louis Ry., 16 N.W. 358, 359 (Minn. 1883)(excluded evidence of repairs to switch). *See generally* Comment, *Federal Rule of Evidence 407 and Strict Products Liability — The Rule Against Subsequent Repairs Lives On*, 48 J. AIR L. & COM. 887, 893 (1983)(analyzing admissibility of post accident repairs in early case law).

19. *See, e.g.*, Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1184 (5th Cir. 1971)(error in relying on subsequent safety devices as evidence of negligence); Limbeck v. Interstate Power Co., 69 F.2d 249, 251 (8th Cir. 1934)(exclusion of evidence of construction changes proper); Southern Ry. v. Simpson, 131 F. 705, 711 (6th Cir. 1904)(evidence of initiation of custom of blowing whistle at crossing after accident inadmissible). *See generally* Recent Cases, *Evidence of Subsequent Remedial Measures and Products Liability:* Herndon v. Seven Bar Flying Serv. Inc., 33 DE PAUL L. REV. 857, 860 & n.17 (1984)(discussing states which rely on case law rule).

20. *See* FED. R. EVID. 407. The rule states:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event.

Id.; *see also* 3 & 4 JOSEPH, SALTZBURG, & THE TRIAL EVIDENCE COMMITTEE OF THE AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987)(collecting pamphlets from thirty-one states containing separate text of each state's rules). Maine Rule of Evidence 407 rejects the universal rule by generally admitting evidence of subsequent remedial measures. MAINE R. EVID. 407. *See generally* Comment, *The Admissibility of Subsequent Remedial Measures in Strict Liability Actions: Some Suggestions Regarding Federal Rule of Evidence 407*, 39 WASH. & LEE L. REV. 1413, 1415-16 & n.2 (1982)(discussing treatment of rule codifications in various states).

21. *See* FED. R. EVID. 407. The rule states:

> This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id. These exceptions have been recognized in the Fifth Circuit. *See, e.g.*, Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 888-89 (5th Cir. 1983)(noting feasibility exception requires contravention); Woolard v. Mobil Pipe Line Co., 479 F.2d 557, 563 (5th

newly designed switch was inadmissible under the negligence theory, since it was not introduced for any of the admissible purposes.[22] However, controversy arises as to whether the later-designed switch would be admissible under the plaintiff's second theory-strict product liability.[23] This comment will focus upon the conflicting rules of admissibility faced by attorneys attempting to introduce evidence of subsequent remedial measures in Texas product liability cases.

IV. SUBSEQUENT REMEDIAL MEASURES IN TEXAS PRODUCT LIABILITY CASES

A. *Introduction of Strict Product Liability in Texas*

In 1942, the Texas Supreme Court signaled its adoption of a strict product liability theory by holding a manufacturer liable based on public policy considerations in *Jacob E. Decker & Sons, Inc. v. Capps*.[24] The *Decker* case involved the liability of a manufacturer for the production of contaminated sausage which caused serious illness to a consumer.[25] The court focused on rules applicable to food producers, implying that the public policy basis for liability was limited to manufacturers of food.[26] In 1967, Texas expressly adopted Section 402A of the Restatement (Second) of Law of Torts[27] as the product liability theory applicable in cases involving "defective products

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Cir.)(evidence to be admitted under control exception), *cert. denied*, 414 U.S. 1025 (1973); American Airlines v. United States, 418 F.2d 180, 196 (5th Cir. 1969)(evidence allowed for impeachment purposes). The Texas courts have also recognized these areas as exceptions to inadmissibility. *See, e.g.*, Howard v. Faberge Inc., 679 S.W.2d 644, 647 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.)(noting various cases supporting exceptions and allowing evidence for impeachment purposes); Caterpillar Tractor Co. v. Boyett, 675 S.W.2d 782, 790 (Tex. App.—Corpus Christi 1984, no writ)(evidence allowed to show feasibility of alternatives).

22. Federal Pac. Elec. Co. v. Woodend, 735 S.W.2d 887, 892 (Tex. App.—Fort Worth 1987, no writ)(noting proof of negligence as inadmissible purpose for evidence).

23. *See* Henderson, *Product Liability and Admissibility of Subsequent Remedial Measures: Resolving the Conflict by Recognizing the Difference Between Negligence and Strict Tort Liability*, 64 NEB. L. REV. 1, 3 (1985)(listing numerous commentaries discussing controversy); *see also* Note, *The Admissibility of Subsequent Remedial Measures in Strict Liability Actions: Some Suggestions Regarding Federal Rule of Evidence 407*, 39 WASH. & LEE L. REV. 1415, 1416 n.10 (1982)(commenting on courts' disagreements on applicability).

24. 139 Tex. 609, 610, 164 S.W.2d 828, 829 (1942). The manufacturer's liability was not deemed to be based on negligence or breach of the usual implied warranties but on public policy protection of "human health and life." *Id. See generally* Sales, *Product Liability Law in Texas*, 32 HOUS. L. REV. 1, 4 (1986)(discussing *Decker* placement in development of product liability theory in Texas).

25. *Decker*, 139 Tex. at 610, 164 S.W.2d at 828.

26. *Id.* at 611-22, 164 S.W.2d at 829-34. The court cited the Texas Penal Code which prohibited the manufacture of impure foods. *Id.* at 622, 164 S.W.2d at 834.

27. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A states:

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which cause physical harm to persons."[28] In *McKisson v. Sales Affiliates, Inc.*,[29] a suit was brought to recover damages for burns and loss of hair resulting from the use of a permanent wave solution distributed by Sales Affiliates.[30] The court held that since "no sound distinction" existed between food products causing illness and other types of products causing physical harm, the rule in *Decker* should be extended beyond food products.[31] Certain justifications for the different approaches to the admission of subsequent remedial evidence rely on the policies underlying the adoption of a strict product liability theory for support. Therefore, these policies are important in analyzing the strength of the justifications for the different views.

The first policy advanced in support of a strict liability theory is that manufacturers are better able to absorb and distribute losses than consumers, and therefore they should bear the burden.[32] Since the risk of harm to consumers from defective products is constant and general, it is said that the protection against potential harm should also be constant and general.[33] The manufacturer is able to provide this general protection by obtaining insur-

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> 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 user or consumer without substantial change in the condition in which it is sold.

Id.

28. McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967); *see also* Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 782 (Tex. 1967)(decided same day as *McKisson* using strict liability theory). *See generally* Note, *Texas Adopts a System of Pure Comparative Apportionment for Strict Product Liability Cases*: Duncan v. Cessna Aircraft Co., 15 TEX. TECH. L. REV. 479, 480-81 (1984)(commenting on impact of cases on product liability theory in Texas).

29. 416 S.W.2d 787 (Tex. 1967).

30. *McKisson*, 416 S.W.2d at 790.

31. *Id.* at 789. The court referred to other courts which have also pointed out the lack of a sound distinction. *See, e.g.*, Putnam v. Erie City Mfg. Co., 338 F.2d 911, 914-15 (5th Cir. 1964)(no distinction between wheelchair with weak axle causing broken leg and fly in coke causing upset stomach); *McKisson*, 408 S.W.2d at 128 (Northcutt, J., concurring)(eye wash solution impairing vision not distinct from foodstuff causing illness).

32. *See, e.g.*, Lewis v. Timco, Inc., 697 F.2d 1252, 1255 (5th Cir. 1983)(burden on manufacturer based on ability to distribute as production cost and insure against); Challoner v. Day and Zimmerman, Inc., 512 F.2d 77, 84 (5th Cir.)(costs borne by manufacturer who produces risk and able to insure against it), *vacated*, 423 U.S. 3 (1975); Greenman v. Yuba Power Prods. Inc., 377 P.2d 897, 901 (Cal. 1962)(costs placed on manufacturer who creates risk). *See generally* Sales, *Product Liability Law in Texas*, 23 HOUS. L. REV. 1, 7-8 (1986)(discussing "deep-pocket" theory).

33. Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1945)(Traynor, J., concurring)(protection should be general and constant).

ance and spreading its cost to the general public by increasing prices.[34] Secondly, by imposing strict liability, the plaintiff's burden of proof is lessened, thereby providing a better means of compensation for the injured party.[35] In *Decker*, the Texas Supreme Court reasoned that since it would be impossible for a consumer to prove the circumstances surrounding the manufacture of a defective product, requiring such proof would effectively deny recovery.[36] To avoid this result, the court rejected the application of a negligence standard in defective product cases.[37] The final policy underlying a strict product liability theory is that by placing the burden of loss on the manufacturer, accident prevention would be encouraged, thereby increasing consumer safety.[38] Since products are generally used by consumers without inspection and the manufacturer is usually a better judge of quality and condition, the manufacturer is better able to prevent the accident.[39] Protection of public health and life is envisioned by the Texas Supreme Court as the ultimate goal of a strict product liability theory.[40]

B. *Two Conflicting Views on Admissibility of Subsequent Remedial Measures*

In *Grenada Steel Industries v. Alabama Oxygen Company*,[41] the Fifth Circuit initially addressed the issue of admissibility of subsequent remedial measures in product liability cases.[42] In *Grenada Steel*, a leaky valve attached to a cylinder of acetylene gas caused an explosion at a plant.[43] The

34. *Id.*

35. *See* Phipps v. General Motors Corp., 363 A.2d 955, 963 (Md. 1976)(since no proof of negligence or willful conduct required burden of proof eased allowing better compensation of innocent consumer). *See generally* Henderson, *Products Liability and Admissibility of Subsequent Remedial Measures: Resolving The Conflict By Recognizing the Difference Between Negligence and Strict Tort Liability*, 64 NEB. L. REV. 1, 7 (1983)(listing ease of burden of proof as one justification for strict liability).

36. Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 621, 164 S.W.2d 828, 834 (1942).

37. *Id.*

38. *See, e.g.*, Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944)(Traynor, J., concurring)(public interest in fixing responsibility to best reduce hazards to consumers); Stewart v. Budget Rent-A-Car Corp., 470 P.2d 240, 243 (Haw. 1970)(human safety important policy reason for adoption of theory); Perfection Paint & Color Co. v. Konduris, 258 N.E.2d 681, 686 (Ind. App. 1970)(protection of consuming public special societal concern). *See generally* Recent Cases, *Evidence of Subsequent Remedial Measures and Products Liability*: Herndon v. Seven Bar Flying Serv. Inc., 33 DE PAUL L. REV. 857, 868-69 (1984)(asserting importance of consumer safety policy).

39. *Decker*, 139 Tex. at 612-13, 164 S.W.2d at 829-30.

40. *Id.* at 611, 164 S.W.2d at 829.

41. 695 F.2d 883 (5th Cir. 1983)

42. *Id.* at 886.

43. *Id.* at 885.

plaintiff proffered evidence of a subsequent change that the manufacturer had made in the valve design.[44] The Fifth Circuit held that Federal Rule of Evidence 407 applied in determining the admissibility of the design change.[45] Following the majority view, the Fifth Circuit interpreted the rule as requiring the exclusion of subsequent remedial evidence in product liability cases and refused to allow the evidence to be admitted.[46]

However, the rule applied by Texas courts differs from the federal rule.[47] Texas Rule of Evidence 407 follows the minority position which allows the subsequent remedial evidence to be admitted.[48] The leading case for the

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44. *Id.* One year after the sale of the cylinder to Grenada Steel in 1974 the manufacturer stopped producing the valve, and in 1977, the valve was not being marketed. *Id.*

45. *Id.* The court analyzed the applicability of state or federal rules and concluded that the federal rules apply since admissibility of evidence is a procedural matter. *Id.* In later cases the court applied the federal rule without comment. *See* Middleton v. Harris Press & Shear Inc., 796 F.2d 747, 751 (5th Cir. 1986)(applying federal rule 407 to determine admissibility of post-accident changes without discussion). However, the Tenth Circuit held that, when state law interprets rule 407, the state policy governs the admissibility of subsequent remedial evidence in diversity actions. *See* Moe v. Avions Marcel Dassault-Brequet Aviation, 727 F.2d 917, 932-33 (10th Cir.), *cert. denied*, 469 U.S. 853 (1984). *See generally* Note, *Admissibility of Subsequent Remedial Measures Evidence in Diversity Actions Based on Strict Products Liability*, 53 FORDHAM L. REV. 1485, 1501-1502 (1985)(analyzes diversity principles and concludes state law applies); Note, *Federal Rule of Evidence 407: New Controversy Besets the Admissibility of Subsequent Remedial Measures*, 30 VILL. L. REV. 1611, 1627-1647 (1985)(comparing two approaches in light of diversity principles and concluding that the federal rule should apply).

46. *See Grenada Steel*, 695 F.2d at 888. Most circuits agree with the Fifth Circuit and exclude the evidence. *See, e.g.*, Joseph v. Harris Corp., 677 F.2d 985, 990-91 (3d Cir. 1982)(reiterating that federal rule 407 applies in products liability actions); Hall v. American Steamship Co., 688 F.2d 1061, 1066 (6th Cir. 1982)(evaluating admissibility of evidence under federal rule 407); Werner v. Upjohn Co., 628 F.2d 848, 856-58 (4th Cir. 1980)(stating common law policy for federal rule dictates exclusion in product liability cases), *cert. denied*, 449 U.S. 1080 (1981); Oberst v. Int'l Harvester Co., 620 F.2d 862, 866-67 (7th Cir. 1980)(rejecting contention that federal rule 407 does not apply to products liability actions); Roy v. Star Chopper Co., 584 F.2d 1124, 1134 (1st Cir.)(no error in holding evidence inadmissible in products liability cases under federal rule 407), *cert. denied*, 440 U.S. 916 (1978). *See generally* Recent Cases, *Evidence of Subsequent Remedial Measures and Products Liability*: Herndon v. Seven Bar Flying Serv. Inc., 33 DE PAUL L. REV. 857, 862 (1984)(citing Fifth Circuit's opinion in *Grenada Steel* as illustrative of majority view).

47. *See* TEX. R. EVID. 407. The Texas rule adds an additional sentence: "[n]othing in this rule shall preclude admissibility in products liability cases based on strict liability." *Id.* The Texas rules apply to "all judicial proceedings commencing after [September 1, 1983], regardless of when the cause of action accrued." 46 TEX. B.J. 117 (1983).

48. *See* Ault v. International Harvester Co., 528 P.2d 1148, 1150-53 (Cal. 1975)(setting forth the minority position). The *Ault* case is frequently cited as precedent for the minority view. *See, e.g.*, Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 794 (Ala. 1981)(citing *Ault* as lead case for admission of evidence); Shaffer v. Honeywell Inc., 249 N.W.2d 251, 257 n.7 (S.D. 1976)(citing *Ault* as authority for admission of evidence); *see also* Herndon v. Seven Bar Flying Serv. Inc., 716 F.2d 1332, 1331 (10th Cir. 1983)(following minority position holding evidence

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minority position is *Ault v. International Harvester Co.*[49] In *Ault,* the plaintiff was seriously injured when the vehicle in which he was a passenger plunged five hundred feet to a canyon bottom.[50] The plaintiff contended that the accident was caused by a defective gear box.[51] Plaintiff's witnesses testified that the gear box was constructed with Aluminum 380, an unsuitable material.[52] At trial, plaintiff proffered evidence that the manufacturer had replaced the Aluminum 380 with malleable iron, a more suitable material, in gear boxes manufactured subsequent to the accident.[53] The California Supreme Court allowed admission of the evidence, holding that rule 407's exclusions did not apply in strict liability cases.[54] Therefore, whereas Texas courts would allow evidence of subsequent remedial evidence to be admitted, the Fifth Circuit would exclude the same type of evidence.

C. *Justifications for the Opposing Positions*

The first justification advanced in support of the Fifth Circuit's exclusion of subsequent remedial measures is that such evidence has low probative value as an admission of product defects.[55] Proponents of the Fifth Circuit view contend that there are many reasons why manufacturers might make subsequent product changes, including ordinary improvement and marketing tactics.[56] As Justice Clark asserted in his dissenting opinion in *Ault,*

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to be admissible). *See generally* Henderson, *Product Liability and Admissibility of Subsequent Remedial Measures: Resolving the Conflict by Recognizing the Difference Between Negligence and Strict Tort Liability,* 64 NEB. L. REV. 1, 16 & n.59 (1985)(commenting on adoption by states of *Ault* reasoning and listing additional states which follow); Note, *Federal Rule of Evidence 407: New Controversy Besets the Admissibility of Subsequent Remedial Measures.* 30 VILL. L. REV. 1611, 1617-18 & n.40 (1985)(noting only Tenth and Seventh Circuits follow minority view).

49. 528 P.2d 1148 (Cal. 1975).

50. *Id.* at 1150.

51. *Id.* The defendant contended that the driver's negligence or the roadway collapsing caused the accident and the gear box merely broke on impact. *Id.*

52. *Id.* Aluminum 380 was allegedly too weak a metal and susceptible to metal fatigue. *Id.*

53. *Id.* The manufacturer had made the change three years after the accident. *Id.*

54. *Id.* at 1152.

55. Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 887-88 (5th Cir. 1983). *See generally* INTRODUCTION TO LAW OF EVIDENCE § 5.17 (2d ed. 1987)(explaining relevancy rationale for excluding evidence).

56. *See Grenada Steel,* 695 F.2d at 887-88 (changes made due to better way to manufacture discovered or implement new idea or plan); *see also* Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980)(product change possible without previous defect), *cert. denied,* 449 U.S. 1080 (1981); *accord* Haysom v. Coleman Lantern Co., 573 P.2d 785, 791 (Wash. 1978)(change may be implemented for reasons other than defect); Ault v. International Harvester Co., 528 P.2d 1148, 1156 (Cal. 1975)(Clark, J., dissenting)(change to lower production costs, increase marketability or efficiency).

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when car manufacturers introduce new models each year, the industry's purpose for doing so is not to replace the previous year's defective models.[57] Given the numerous possible reasons for making subsequent product changes, the Fifth Circuit concludes that evidence of a subsequent change "has little relevance" to the issue of whether a product was defective.[58] However, both the Texas and the Federal rules define relevancy as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[59] Opponents of the majority view assert that since juries may infer from the subsequent change that the product was defective, the evidence would be logically relevant.[60] The fallacy of the Fifth Circuit's position arises from a misinterpretation of the relevance standard.[61] Although an item of evidence may have many competing inferences, the probative value of the evidence in relation to each of the inferred facts is merely reduced, not negated. Therefore, since a jury may infer from evidence of a product change that the product was defective, low probative value is a weak rationale for the exclusion of the evidence.[62]

A second rationale in support of the Fifth Circuit position maintaining that subsequent remedial evidence is inadmissible is that strict liability is a form of culpability,[63] and rule 407 expressly prohibits evidence of subsequent change to prove culpable conduct.[64] The defendant manufacturer is

57. *Ault*, 528 P.2d at 1156 (Clark, J., dissenting).

58. *Grenada Steel*, 695 F.2d at 887-88. The Fifth Circuit used the low relevancy rationale as its main justification for exclusion. *Id.* at 887. The court asserted that judgments based on the reasons manufacturers make changes in their products are impossible to formulate without evidentiary proof by the manufacturer. *Id.* at 887-88. The court concluded that admission of evidence on reasons for subsequent changes will detract from the real issue whether the product defect existed when it was sold. *Id.* at 888.

59. TEX. R. EVID. 401; *accord* FED. R. EVID. 401.

60. *See, e.g.*, Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 794 (Ala. 1981)(subsequent modification highly probative of product character); Sutkowski v. Universal Marion Corp., 281 N.E.2d 749, 753 (Ill. App. 1972)(subsequent change relevant to design alternative feasibility); Capara v. Chrysler Corp., 417 N.E.2d 545, 551 (N.Y. 1981)(probability of product defect increased by evidence of change, thereby logically relevant).

61. *See* Herndon v. Seven Bar Flying Serv. Inc., 716 F.2d 1322, 1328 (10th Cir. 1983)(stating Fifth Circuit's low probative value rationale unconvincing). The court generally defined relevancy and implied that the Fifth Circuit misinterpreted the relevancy definition. *Id.* at 1328-1329.

62. *See* TEX. R. EVID. 401. The evidence of subsequent change would tend to make the likelihood of a product defect more probable. *Id.*; *accord* FED. R. EVID. 401.

63. Werner v. Upjohn Co., 628 F.2d 848, 856-57 (4th Cir. 1980)(rule 407 applies to strict liability), *cert. denied*, 449 U.S. 1080 (1981). The Fourth Circuit asserts that strict liability is less blameworthy than culpable conduct or negligence; therefore, if the rule protects these more blameworthy levels of conduct, it should also apply to strict liability. *Id.*

64. *See* FED. R. EVID. 407 (stating subsequent remedial evidence not admissible as proof of negligence or culpability).

liable or "culpable" even though not technically blameworthy in the sense of being willful or negligent.[65] However, Texas courts, opposing the Fifth Circuit view, assert that the existence of culpable conduct or fault is not at issue, but rather the product is the focus in strict tort liability.[66] While the Texas view is technically correct given the general definition of strict product liability,[67] subscribers to the Fifth Circuit position respond that the suit is styled "Consumer X v. Manufacturer" not "Consumer X v. Product."[68] Furthermore, since the jury may imply from the evidence of the change that the product was defective and the manufacturer is liable for defective products, evidence of the change indirectly suggests that the change was an admission of fault, which is the suggested inference that the rule was designed to reject.[69]

A third justification which the Fifth Circuit uses to uphold the exclusion of the subsequent remedial evidence is the encouragement of subsequent repairs.[70] The Fifth Circuit reasons that if the evidence is admissible, manufacturers will choose not to make the changes to avoid generating the evidence, thereby defeating one purpose for a product liability theory — increased consumer safety.[71] However, the *Ault* court led the rejection of this

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

66. *See* Sutkowski v. Universal Marion Corp., 281 N.E.2d 749, 753 (Ill. App. 1972)(holding emphasis on character of product). The *Ault* court maintains that strict liability existed when the rule was established; thus, if the drafters had intended to exclude the evidence in products liability cases, they would have so provided. Ault v. International Harvester Co., 528 P.2d 1148, 1150-51 (Cal. 1975). *See generally* Henderson, *Product Liability and Admissibility of Subsequent Remedial Measures: Resolving the Conflict by Recognizing the Difference Between Negligence and Strict Tort Liability*, 64 NEB. L. REV. 1, 11-16 (1985)(discussing distinction between strict liability and negligence).

67. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965)(no proof of culpability required). Liability under strict product liability theory is imposed "although the seller has exercised all possible care in the preparation and sale of his product." *Id.*

68. *See* Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980)(suit against manufacturer not product), *cert. denied*, 449 U.S. 1080 (1981). The manufacturer pays regardless of the emphasis. Cann v. Ford, 658 F.2d 54, 60 (2d Cir. 1981).

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

70. *See* Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 887 (5th Cir. 1983)(voluntary repair may be discouraged by allowing evidence). The Advisory Committee Notes emphasize encouragement of repairs as a primary justification. FED. R. EVID. 407 advisory committee's note. *See generally* INTRODUCTION TO LAW OF EVIDENCE § 5.17 (2d ed. 1987).

71. *See, e.g.*, Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 233 (6th Cir. 1980)(risk of increasing liability by repairing may dissuade improvements); *Werner*, 628 F.2d at 857 (admission of evidence inhibits repairs whether allowed under negligence or strict liability theory), *cert. denied*, 449 U.S. 1080 (1981); Smyth v. Upjohn Co., 529 F.2d 803, 805 (2d Cir. 1975)(some manufacturers avoid repairs since risk of increasing liability outweighs risk of maintaining status quo). *See generally* Sales, *Product Liability in Texas*, 23 HOUS. L. REV. 1, 174 (1986)(detailing public policy behind rule's effect on subsequent repairs).

rationale by holding that manufacturers would make improvements regardless of the admissibility of the evidence to avoid the damaging impact which would result from inaction.[72] As other courts opposing the Fifth Circuit's position have asserted, economic reality dictates that manufacturers make the improvements even if the evidence of the changes may be used against them.[73] Furthermore, opponents claim that by excluding the evidence, the plaintiff's case is more difficult to prove, thereby undermining the decreased burden of proof justification for adopting a strict product liability theory.[74] In response to the opponents' arguments, subscribers to the Fifth Circuit position reason that the manufacturer's actions will depend upon a balancing of the potential for increased liability from future accidents against the impact the admission of the repairs will have on their present cases.[75] Perhaps in the future an empirical study will be undertaken to determine the practical effect of this rule on the actions of manufacturers, but currently this rationale is indefinite support for either position since both views have persuasive arguments.

The final reason for the Fifth Circuit's holding that evidence of subsequent remedial measures is inadmissible is the questionable effectiveness of a limiting instruction.[76] As previously noted, suits for injuries resulting from allegedly defective products are often brought under both strict product liability

72. Ault v. International Harvester Co., 528 P.2d 1148, 1151-52 (Cal. 1975). The court reasoned that, given the "tens of thousands of units of goods" produced by the average manufacturing defendant, to presume the manufacturer would forego repairs and risk greater total liability and adverse publicity is unrealistic. *Id.* at 1152.

73. *See, e.g.*, Herndon v. Seven Bar Flying Serv. Inc., 716 F.2d 1322, 1327-28 (10th Cir. 1983)(manufacturer would not risk punitive damages imposed by juries or government agencies or cancellation of insurance); Shaffer v. Honeywell, Inc., 259 N.W.2d 251, 257 n.7 (S.D. 1976)(economic realities dictate repair to avoid massive liability); Chart v. General Motors, 258 N.W.2d 680, 684 (Wis. 1977)(course set by economic realities). *See generally* Note, *The Admissibility of Subsequent Remedial Measures in Strict Liability Actions: Some Suggestions Regarding Federal Rule of Evidence 407*, 39 WASH. & LEE L. REV. 1415, 1427-28 (1982)(commenting on economic self-interest of manufacturers in repairing products).

74. *See* Phipps v. General Motors, 363 A.2d 955, 963 (Md. 1976)(burden of proof eased to allow better compensation of innocent consumer); *see also* Henderson, *Products Liability and Admissibility of Subsequent Remedial Measures: Resolving the Conflict by Recognizing the Difference Between Negligence and Strict Tort Liability*, 64 NEB. L. REV. 1, 7 (1985)(listing difficult burden of proof as one justification for adopting a strict liability theory). *See generally* Recent Cases, *Evidence of Subsequent Remedial Measures and Products Liability*: Herndon v. Seven Bar Flying Serv. Inc., 33 DE PAUL L. REV. 857, 868-69 (1984)(stating rule thwarts strict liability's easing of burden of proof).

75. Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984). The court stated that "accidents are low-probability events." *Id.* The court concluded that the probability of a future accident may be lower than the probability of the victim suing and making devastating use of subsequent remedial measures as evidence. *Id.*

76. *See* Werner v. Upjohn Co., 628 F.2d 848, 858 (4th Cir. 1980)(admission under products liability theory subverts policy behind excluding for negligence), *cert. denied*, 449 U.S.

and negligence theories.[77] Subsequent remedial measures are almost universally held to be inadmissible in negligence cases to prove negligent or culpable conduct.[78] If a subsequent remedial measure is held to be admissible under strict product liability theory, the jury would be instructed that the evidence may not be used to prove negligent or culpable conduct, but may be only be considered for purposes of determining whether a product defect existed at the time of manufacture.[79] However, common sense and many commentators respond that such distinctions are virtually impossible for a jury to make.[80]

While these justifications may persuade legislatures or courts which have not adopted a rule, they will probably not aid an attorney presenting a case where a rule has already been adopted. Since both the Fifth Circuit and the Texas courts have already established rules, an attorney who argues in favor of a rule change will likely be ineffective in obtaining that change, since the court will likely follow previous precedent on the issue. Therefore, it is more important for an attorney practicing in Texas to be able to work within the confines of the applicable rules to achieve the result desired.

V. OVERCOMING THE RULE BARRIERS

A. *Fifth Circuit*

Under the Fifth Circuit view on the admissibility of subsequent remedial

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1080 (1981); *see also* Capara v. Chrysler Corp., 417 N.E.2d 545, 556 (N.Y. 1981)(evidence will be improperly used by jury in determining negligence issue).

77. *See, e.g.*, Middleton v. Harris Press and Shear Inc., 796 F.2d 747, 749 (5th Cir. 1986)(suit under negligence and product liability); Cann v. Ford, 658 F.2d 54, 56 (2d Cir. 1981)(action using negligence and strict liability theories); *Werner*, 628 F.2d at 851 (suit based on product liability and negligence).

78. *See* 3 & 4 JOSEPH, SALTZBURG, & THE TRIAL EVIDENCE COMMITTEE OF THE AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987)(citing rules from thirty states which exclude evidence in two-volume appendix). *See generally* Note, *The Admissibility of Subsequent Remedial Measures in Strict Liability Actions: Some Suggestions Regarding Federal Rule of Evidence 407*, 39 WASH. & LEE L. REV. 1415, 1415-16 & n.2 (1982)(explaining state treatment of rule).

79. *See* Federal Pac. Elec. Co. v. Woodend, 735 S.W.2d 887, 892 (Tex. App.—Fort Worth 1987, no writ)(commenting on need for limiting instruction); *see also* Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 233 (6th Cir. 1980)(holding reversible error not to issue limiting instruction).

80. *See generally* Comment, *Federal Rule of Evidence 407 and Strict Products Liability — The Rule Against Subsequent Repair Lives On*, 48 J. AIR L. & COM. 887, 916 (1983)(warning ineffective to prevent jury misuse); Note, *Admissibility of Change of Condition or Repair After Injury as Evidence of Negligence*, 15 S.D.L. REV. 287, 299 (1970)(citing study which reveals that jury does not understand limiting instruction); Note, *The Admissibility of Subsequent Remedial Measures in Strict Liability Actions: Some Suggestions Regarding Federal Rule of Evidence 407*, 39 WASH. & LEE L. REV. 1415, 1432-33 (1982)(detailing problem with limiting instruction).

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evidence in product liability cases, rule 407 stands as a barrier to the injured plaintiff's case since evidence of the change from which the jury may infer a product defect is excluded. Therefore, the plaintiff's attorney must use an exception to the rule which would allow admission of the evidence.[81] Federal Rule of Evidence 407 provides several exceptions to the general rule of exclusion.[82] Where evidence of change was proffered under one of these exceptions, the Fifth Circuit has repeatedly allowed the evidence to be admitted for that restricted purpose.[83]

Assuming that the evidence of the change is proffered under one of the permissible exceptions to exclusion, the attorney faces an additional obstacle to admissibility from Federal Rule of Evidence 403.[84] If the judge determines that the prejudicial effect of the evidence outweighs its probative value, the evidence may nevertheless be excluded regardless of the applicable exception.[85] Given the traditional justification of the Fifth Circuit for exclusion that such evidence is low in probative value, the plaintiff's attorney has a difficult burden to overcome.[86] To meet this burden, the plaintiff's attorney should rely on the cases opposing the Fifth Circuit view which hold that subsequent remedial evidence is highly probative of product defects.[87] How-

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81. FED. R. EVID. 407. Rule 407 excludes the evidence. *Id.*

82. *See id.* The rule states:

> 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.

83. *See, e.g.*, Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 888-89 (5th Cir. 1983)(noting feasibility exception requires contravention); Woolard v. Mobil Pipe Line Co., 479 F.2d 557, 563 (5th Cir.)(evidence to be admitted under control exception), *cert. denied*, 414 U.S. 1025 (1973); American Airlines v. United States, 418 F.2d 180, 196 (5th Cir. 1969)(evidence allowed for impeachment purposes). *See generally* Comment, *Federal Rule of Evidence 407 and Strict Products Liability — The Rule Against Subsequent Repairs Lives On*, 48 J. AIR L. & COM. 887, 900-906 (1983)(discussing various exceptions in detail).

84. FED. R. EVID. 403. The rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Id. See generally Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 219 (1983)(stating rule 403 might cause exclusion of subsequent remedial evidence under strict liability theory).

85. *See* FED. R. EVID. 403 advisory committee's note (explaining how evidence unquestionably relevant may be excluded if great prejudicial effect would result).

86. *See* Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 887-88 (5th Cir. 1983)(using low relevancy as main justification for exclusion); *see also* Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980)(low probative value since other reasons for change), *cert. denied*, 449 U.S. 1080 (1981).

87. *See, e.g.*, Herndon v. Seven Bar Flying Serv. Inc., 716 F.2d 1322, 1328 (10th Cir.

ever, this will not likely be effective since the Fifth Circuit has repeatedly held that the prejudicial effect of evidence of subsequent changes outweighs its probative value thereby excluding the evidence.[88]

B. *Texas Courts*

Under the Texas view, which allows evidence of subsequent repair to be admitted in strict liability cases, the defendant manufacturer must overcome the damaging evidence the rule admits. The defendant's attorney should first consider removal to federal court if possible since the Fifth Circuit excludes the evidence.[89] In *Muzyka v. Remington Arms Co.*,[90] the attorney for Remington utilized this option and removed the case to federal court.[91] In *Muzyka*, a woman was injured when her stepfather accidentally fired a rifle he was attempting to unload.[92] In order to unload the rifle, the safety had to be placed in fire position.[93] A few months after the accident, Remington adopted a new design which allowed the gun to be unloaded with the safety in place.[94] Remington would have been able to prevent the admission of the evidence of the design change under the Fifth Circuit view of rule 407 if Remington had restricted questioning of the expert witness.[95] Since Rem-

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1983)(holding Fifth Circuit's low probative rationale unconvincing); Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 794 (Ala. 1981)(subsequent modifications highly probative of product character); Sutkowski v. Universal Marion Corp., 281 N.E.2d 749, 753 (Ill. App. 1972)(subsequent change relevant to design alternative feasibility); Capara v. Chrysler Corp., 417 N.E.2d 545, 551 (N.Y. 1981)(probability of product defect increased by evidence of change).

88. *See, e.g.*, Koonce v. Quaker Safety Prods. & Mfg. Co., 798 F.2d 700, 719-20 (5th Cir. 1986)(excluding evidence of subsequent change due to prejudicial effect); Middleton v. Harris Press & Shear Inc., 796 F.2d 747, 751-52 (5th Cir. 1986)(evidence of third party changes subsequent to accident still inadmissible under 403); Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221, 1229-30 (5th Cir. 1984)(excluding evidence due to prejudicial effect where feasibility not in issue). Both the *Koonce* case and the *Middleton* case separate the arguments under 403 from the assertions that the evidence is admissible as an exception to the rule. *Compare Koonce*, 798 F.2d at 720 (discussing prejudicial effect separate from control exception), *with Middleton*, 796 F.2d at 752 (discussing effect of rule 403 separate from feasibility exception). *But see* Reese v. Mercury Marine Div. of Brunswick Corp., 793 F.2d 1416, 1429 (5th Cir. 1986)(court unpersuaded by 403 argument).

89. *See* Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 885 (5th Cir. 1983)(analyzing applicability of state or federal rules in diversity action and concluding federal rules apply excluding evidence); *see also Middleton*, 796 F.2d at 751 (applying federal rule which holds evidence of post-accident repairs to be inadmissible).

90. 774 F.2d 1309 (5th Cir. 1985).

91. *Muzyka*, 774 F.2d at 1313.

92. *Id.* at 1310.

93. *Id.*

94. *Id.*

95. *Id.* at 1313. The original exclusion of the evidence under a motion in limine was held to be proper. *Id.* However, due to the tone of the argument, the evidence should have been allowed for impeachment purposes. *Id.*

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ington's witness claimed on direct examination that the rifle design at the time of the accident could not be improved and was the best ever devised, the court of appeals held that the trial court erred in not admitting evidence of the improved design for impeachment purposes.[96] Since the evidence would have been admitted under the Texas rule, although excluded under the federal rule, removal would have been a well-employed strategical tactic.

Assuming there is no possibility of removal, the manufacturer's attorney should argue that the evidence is inadmissible under rule 403.[97] The defense attorney should first assert that low probative value is a traditional justification for exclusion.[98] By revealing the numerous possible reasons why a manufacturer might change its product, the attorney may be able to reduce the strength of the inference that the change was made to correct defects, thereby decreasing its probative value on the issue of the defect.[99] If the suit has been brought under both strict product liability and negligence theories, the attorney should argue that the admission of the evidence would adversely affect the negligence theory, since the jury may misuse the evidence by applying it to prove negligent or culpable conduct.[100] Furthermore, in attempting to establish the rule 403 barrier to admission, the attorney should draw on the precedent from the Fifth Circuit excluding subsequent remedial evidence on 403 grounds.[101] The Fifth Circuit's rationale for excluding subsequent remedial evidence on 403 grounds is explained in *Gre-*

96. *Id.* at 1311-13.

97. *See* TEX. R. EVID. 403 (excluding evidence where prejudicial effect outweighs probative value).

98. *See, e.g.*, Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 887-88 (5th Cir. 1983)(low relevancy main reason for exclusion); Ault v. International Harvester Co., 528 P.2d 1148, 1156 (Cal. 1975)(Clark, J., dissenting)(change to lower production costs, increase marketability and efficiency not due to product defect); Haysom v. Coleman Lantern Co., 573 P.2d 785, 791 (Wash. 1978)(probative value of product defect low since other reasons for change). *See generally* INTRODUCTION TO LAW OF EVIDENCE § 5.17 (2d ed. 1987)(explaining relevancy rationale for excluding evidence).

99. *See Ault*, 528 P.2d at 1156 (Clark, J., dissenting)(possible reasons for change include increased marketability of efficiency and lower production costs).

100. *See* Werner v. Upjohn Co., 628 F.2d 848, 858 (4th Cir. 1980)(admitting evidence under strict liability allows use by jury in determining negligence), *cert. denied*, 449 U.S. 1080 (1981); *see also* Capara v. Chrysler Corp., 417 N.E.2d 545, 556 (N.Y. 1981)(potential for jury misuse). *See generally* Note, *Admissibility of Change of Condition or Repair After Injury as Evidence of Negligence*, 15 S.D.L. REV. 287, 299 (1970)(study analyzing effect of limiting instruction on jury conduct).

101. *See, e.g.*, Koonce v. Quaker Safety Prods. & Mfg. Co., 798 F.2d 700, 720 (5th Cir. 1986)(stating prejudicial effect mandates exclusion); Middleton v. Harris Press & Shear Inc., 796 F.2d 747, 750 (5th Cir. 1986)(post-accident change by third party still inadmissible due to prejudicial effect); Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 889 (5th Cir. 1983)(upholding exclusion of subsequent change evidence due to confusion and misleading dangers).

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nada Steel Industries v. Alabama Oxygen Company.[102] In considering the exclusion of evidence of design changes, the court held that the evidence was inadmissible due to "dangers of confusion and misleading the jury."[103] The court explained that the jury's attention would be diverted from the time of manufacture to an irrelevant later date, creating confusion in the jurors' minds.[104] One Texas court has already indicated its receptivity to the 403 argument by holding that evidence of subsequent remedial measures is "not automatically admissible" in product liability cases.[105] The court asserted that "other rules of evidence may apply to bar the admission of such evidence."[106] Rule 403 is likely to be one of the "other rules of evidence" which applies.

VI. Conclusion

In product liability cases, subsequent remedial measures are inadmissible as evidence in the Fifth Circuit, but Texas courts allow the evidence to be admitted due to differences between the Federal and Texas rules and the courts' interpretations of those rules. Attorneys must be able to work within the confines of the rules and interpretations applicable to their cases to achieve the result they desire. The plaintiff's attorney should draw on exceptions to inadmissibility and argue that subsequent remedial evidence is highly probative to try to overcome the Fifth Circuit's exclusionary position. The defendant manufacturer's attorney should try to remove the case to federal court or argue that rule 403 applies to persuade the Texas courts that the subsequent remedial measures should be inadmissible as evidence in a product liability area.

102. *Grenada Steel*, 695 F.2d at 888.

103. *Id.*

104. *Id.*

105. Federal Pac. Elec. Co. v. Woodend, 735 S.W.2d 887, 892 (Tex. App.—Fort Worth 1987, no writ). The court held that while Texas rule 407 does not automatically prevent admissibility of such evidence, it does not "automatically render such evidence admissible." *Id.*

106. *Id.*