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The Incongruous Relationsihp Between Federal Rule of Evidence 407 and the Restatement (Third) of Torts Products Liability Elements of Proof

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THE INCONGRUOUS RELATIONSHIP BETWEEN FEDERAL RULE OF EVIDENCE 407 AND THE RESTATEMENT (THIRD) OF TORTS PRODUCTS LIABILITY ELEMENTS OF PROOF

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This essay explores an important issue in product-liability design-defect cases: proof of a feasible alternative design. The Restatement (Third) of Torts[1] requires a plaintiff to prove the existence of a feasible alternative design, which is a more demanding requirement than many states now impose. But it recommends this requirement without considering the well-known evidence rule that limits evidence of subsequent remedial measures. Because a defendant manufacturer's own adoption of a new and safer design (a subsequent remedial measure) would be the most accessible and most persuasive evidence of a feasible alternative design, jurisdictions considering adoption of the Restatement (Third) requirement ought to evaluate how it relates to the evidence rule about subsequent remedial measures. This essay offers a concise overview of the problem, briefly reviews proposed solutions, and suggests an additional legal tool to balance the parties' interests.

Section 2 of the Restatement (Third) requires a plaintiff to prove the existence of a feasible alternative design to establish a prima facie case in most design defect cases.[2] Although the comments to § 2 state that proof of a feasible alternative design is not mandatory in every design defect case, the requirement is waived only in rare circumstances, such as when "the product design is manifestly unreasonable."[3] By requiring proof that was not required in other products-liability standards, the Restatement (Third) shifts the balance in products liability towards defendant manufacturers. This favorable shift towards defendant manufacturers will be tempered some when a plaintiff can meet the requirement by showing evidence of subsequent remedial measures (if the defendant has implemented any).

1. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).
2. *Id.* § 2(b) ("A product: . . . (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by *the adoption of a reasonable alternative design* by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.") (emphasis added).
3. *Id.* § 2 cmt. b.

Federal Rule of Evidence 407 (Rule 407) categorically bans evidence of subsequent remedial measures to prove a design defect.[4] Such evidence is banned on the theory that (1) behavior subsequent to an injury has low probative value about conditions prior to the injury, and (2) allowing subsequent-remedial-measure evidence would discourage manufacturers from improving designs after injuries.[5] The rule allows use of subsequent remedial measures for impeachment and to prove the feasibility of precautionary measures if that is disputed,[6] but courts commonly construe these circumstances narrowly or find that evidence admissible under the rule is still barred by Federal Rule of Evidence 403.[7] Where a state bans subsequent-remedial-measure evidence and permits (but does not require) evidence of a feasible alternative design as a factor for whether a design was defective, plaintiffs are disadvantaged by being deprived a strong factor, but less-so than had they been required to show a feasible alternative design.

A state that were to adopt the Restatement (Third) § 2 while continuing to apply Rule 407 might shift the balance toward the defendants significantly more than the state might intend. Evidence of a defendant's subsequent remedial measures is likely the strongest proof that an alternative design is feasible. It allows an expert's testimony to be concrete instead of hypothetical, and it can save a plaintiff the large expense of constructing a working model to illustrate a safer design. To prove a feasible alternative design without evidence of subsequent remedial measures, the plaintiff, who is at a severe resource disadvantage, would be forced to engage in an expensive battle of experts. This would involve either devising a different alternative design or introducing awkward testimony that describes the defendant's subsequent design but somehow avoids stating that the defendant designed and produced it. The following chart illustrates the interplay between excluding and allowing evidence of subsequent remedial measures and requiring feasible alternative designs.

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4. FED. R. EVID. 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove . . . a defect in a product or its design.").

5. FED. R. EVID. 407 advisory committee notes.

6. *Id.* ("But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.").

7. Dan M. Kahan, *The Economics—Conventional, Behavioral, and Political—of 'Subsequent Remedial Measures' Evidence*, 110 COLUM. L. REV. 1616, 1627–28 (2010) (describing "two strategies for plugging this forbidden-purpose loophole").

	EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES ALLOWED	EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES EXCLUDED
FEASIBLE ALTERNATIVE DESIGN PERMITTED	Strongly Pro-Plaintiff	Moderately Pro-Defendant
FEASIBLE ALTERNATIVE DESIGN REQUIRED	Moderately Pro-Defendant	Strongly Pro-Defendant

A state may subject some plaintiffs to the harshest of these combinations by just adopting the feasible alternative design requirement, even if it refuses to adopt the Rule 407 subsequent-remedial-measure ban, in circumstances where a suit is brought in or removed to federal court. Federal courts sitting in diversity apply state substantive law and federal procedural law. Although Congress described the substantive goal of encouraging repairs as the "more-impressive" basis of Rule 407,[8] the majority of federal circuits to consider the issue have found that Rule 407 is a procedural rule.[9] Therefore, most product-liability cases removed to

8. FED. R. EVID. 407 advisory committee notes.

9. Hottle v. Beech Aircraft Corp., 47 F.3d 106, 109 (4th Cir. 1995) ("[T]he Federal Rules of Evidence, as validly enacted procedural rules, govern in diversity cases."); Wood v. Morbark Indus., Inc., 70 F.3d 1201, 1207 (11th Cir. 1995) ("[F]ederal rules apply to procedural matters, including the admissibility of evidence."); Kelly v. Crown Equip. Co., 970 F.2d 1273, 1278 (3d Cir. 1992) (noting that Rule 407 is "arguably procedural" so it pre-empts conflicting state law); Flaminio v. Honda Motor Co., 733 F.2d 463, 471 (7th Cir. 1984) (explaining that Rule 407 governs because substantive aspects of the rule are intertwined with procedural concerns); Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 885 (5th Cir. 1983) (applying Rule 407 because "[i]n matters of procedure, however, such as the admissibility of evidence, federal rules apply."); Rioux v. Daniel Int'l Corp., 582 F. Supp 620, 624 (D. Me. 1984) (explaining that to apply the state rule rather than Rule 407, it would have "to hold that the Federal Rule exceeds the power of Congress to promulgate it because it cannot 'rationally' be classified as procedural," while noting that "no federal rule of procedure or evidence has ever been struck down as exceeding Congress' constitutional power"); *see also* Rosa v. Taser Int'l, Inc., 684 F.3d 941, 948 (9th Cir. 2012) (citing *Flaminio* with approval); Legg v. Chopra, 286 F.3d 286, 289 (6th Cir. 2002) ("[T]he Federal Rules of Evidence, rather than state evidentiary laws, are held to apply in federal diversity proceedings."); McInnis v. A.M.F., Inc., 765 F.2d 240, 246 n.8 (1st Cir. 1985) (stating Congress intended the evidence rules to apply in diversity but noting "the 407 type rule arguably reflects a substantive policy to encourage remedial measures"). *But see* Monger v. Cessna Aircraft Co., 812 F.2d 402, 408 n.8 (8th Cir. 1987) (unclear whether federal or state law should govern the admissibility of subsequent remedial measures).

federal court from a state with the feasible alternative design requirement will subject plaintiffs to this quandary.

Commentators have suggested several solutions to the problem. One proposes maintaining the ban for negligence actions but allowing subsequent remedial measures for product-liability suits, based on the theory from *Ault*[10] that product manufacturers will make repairs out of economic self-interest regardless of the trial consequences.[11] Another proposes that the outlying approach of categorically *allowing* substantive remedial measures even in the context of negligence (adopted in Rhode Island) could be preferable, expanding on *Ault*'s theory because of the increasingly blurred line between products liability and negligence.[12] After a comprehensive policy analysis, Professor Dan Kahan proposes "selective exclusion" of subsequent-remedial-measure evidence, allowing it only in otherwise close cases where its probative value is highest.[13]

Striking the proper policy balance might be aided in some situations by allowing subsequent remedial measures *in a redacted form* as proof of a feasible alternative design. The plaintiff could be allowed to prove that an unidentified manufacturer has actually developed an alternative design and has actually marketed it. Instead of an academic expert's theoretical alternative, the jury would learn that a real company has developed such a design and that a real company has placed it into the market.[14]

States considering modifications of either their evidentiary approach to subsequent remedial measures or their products liability law should be conscious of the interplay between the two. They would do well to remember the role of the Federal Rules of Evidence in diversity suits. At stake is the risk of inadvertently intensifying the somewhat pro-defendant aspects of the Restatement (Third) by adopting the Restatement's demanding position on proof of a feasible alternative design but failing to consider how evidence rules may impair use of the clearest and most readily available evidence on that point.

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10. Ault v. International Harvester Co., 528 P.2d 1148, 1151–52 (Cal. 1974) (In "the modern products liability field, . . . the 'public policy' assumptions justifying [Rule 407] are no longer valid.").

11. *See* Laura B. Grubbs, Note, *Something's Gotta Give: The Conflict Between Evidence Rule 407 and the Feasible Alternative Design Requirement*, 45 BRANDEIS L.J. 781 (2007).

12. *See* Brian Fielding, Note, *Rhode Island's 407 Subsequent Remedial Measure Exception: Why It Informs What Goes Around Comes Around in Restatements (Second) & (Third) of Torts, and a Modest Proposal*, 14 ROGER WILLIAMS U. L. REV. 298 (2009).

13. *See* Kahan, *supra* note 7, at 1638–39. Kahan's article discusses Rule 407 but not the Restatement (Third), yet his proposal would mitigate the problem of their interplay.

14. Redaction might not always be feasible. For instance, a product may be too recognizable for its source to be effectively concealed.