SUBSEQUENT REMEDIAL MEASURES IN THE EIGHTH CIRCUIT—THE CONFUSION CONTINUES

INTRODUCTION

Federal Rule of Evidence 4071 precludes the admission of evidence of subsequent remedial measures if offered to prove negligence or culpable conduct. The Rule allows admission of such evidence for other purposes "such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."2 These exceptions, however, were intended to be illustrative, not exhaustive.3 Thus, courts have allowed evidence of subsequent remedial measures for purposes other than those enumerated in Rule 407.4 In recent years, a controversy has arisen over whether these exceptions to the exclusionary rule should encompass actions based in strict liability.5

The view espoused by a majority of courts is that the exclusionary rule of 407 applies to strict liability as well as to negligence actions.6 These courts find the differences between products liability

1. FED. R. EVID. 407 provides:
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.

2. Id.


6. See, e.g., Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984) (strict liability and negligence actions too similar to separate for purposes of Rule 407); Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 889 (5th Cir. 1983) (Rule 407 applicable to cases brought in strict liability); Hall v. American S.S. Co., 688 F.2d 1062, 1066-67 (6th Cir. 1982) (negligence and strict liability indistinguishable for Rule 407 purposes); Cann v. Ford Motor Co., 638 F.2d 54, 60 (2d Cir. 1981) (Rule 407 applicable to strict liability); Werner v. Upjohn Co., 628 F.2d 848, 858 (4th Cir. 1980) (evidence of subsequent revised warning inadmissible in strict liability action), cert. denied, 449 U.S. 1080 (1981); Knight v. Otis Elevator Co., 596 F.2d 84, 91 (3d Cir. 1979) (evidence of
actions based in negligence and such actions based in strict liability to be insignificant.\textsuperscript{7}

The minority position, on the other hand, views strict liability and negligence as distinct theories.\textsuperscript{8} These courts find the policy reasons justifying the application of Rule 407 in negligence cases lacking in cases based in strict liability.\textsuperscript{9} Therefore, courts adopting this minority position allow the admission of subsequent remedial measures in strict liability actions.

In \textit{Robbins v. Farmers Union Grain Terminal Association},\textsuperscript{10} the Eighth Circuit adopted the minority position and allowed evidence of a subsequently improved warning to be admitted in a strict liability action.\textsuperscript{11} In \textit{DeLuryea v. Winthrop Laboratories},\textsuperscript{12} however, the Eighth Circuit created an exception to the rule it had adopted in \textit{Robbins}.\textsuperscript{13} The \textit{DeLuryea} court held that evidence of a change in the warning accompanying a prescription drug was inadmissible.\textsuperscript{14} The court reasoned that, in duty to warn cases involving unavoidably unsafe products such as drugs, the standards for liability under strict liability and negligence are essentially the same.\textsuperscript{15} Thus, \textit{DeLuryea} raised the question of the continuing vitality of the Eighth Circuit's rationale in \textit{Robbins} which differentiated negligence and strict liability theories for the exclusionary purposes of Rule 407.

The Eighth Circuit had the opportunity to clarify its position on subsequent remedial actions and strict liability in \textit{Kehm v. Procter & Gamble Manufacturing Co.}\textsuperscript{16} \textit{Kehm} involved a products liability ac-
tion against a tampon manufacturer.\textsuperscript{17} Despite citing \textit{DeLuryea} approvingly,\textsuperscript{18} the \textit{Kehm} court allowed evidence of the subsequent withdrawal of the product from the market.\textsuperscript{19} However, the court did not base its holding on the theoretical distinctions between strict liability and negligence. Rather, the court held that because the defendant had introduced the evidence, the issue was not whether such evidence was admissible but whether a limiting instruction should have been given.\textsuperscript{20} The court determined that such an instruction was unwarranted because the evidence was admissible for other purposes.\textsuperscript{21} Additionally, the court refused the limiting instruction because it found that the possibility of jury confusion outweighed any resulting prejudice.\textsuperscript{22} Thus, while approving of the \textit{DeLuryea} holding of barring evidence of subsequent warning in a strict liability action, the \textit{Kehm} court failed to base its holding on the unapplicability of Rule 407 to strict liability cases. As a result, \textit{Kehm} raises the issue of whether the Eighth Circuit has allowed for the possibility of adopting the majority rule of finding the theoretical distinctions between negligence and strict liability alone insufficient to warrant different treatment under Rule 407.

This Comment first considers the analytical distinctions between negligence and strict liability, especially in duty to warn cases. Next, it analyzes the relationship of these distinctions to Rule 407. Finally, this Comment looks at \textit{Kehm} and subsequent cases to determine whether the Eighth Circuit has reconsidered its position in \textit{Robbins} of adhering to the distinction between negligence and strict liability for the exclusionary purposes of Rule 407.

**FACTS AND HOLDING**

**Toxic Shock Syndrome**

Toxic shock syndrome (TSS) was first identified by Dr. James K. Todd of the University of Colorado in November, 1978.\textsuperscript{23} Although Dr. Todd had originally coined the term to describe a certain group of symptoms\textsuperscript{24} he had found in children, by 1980 several state health

\begin{itemize}
  \item \textsuperscript{17} \textit{Id.} at 616.
  \item \textsuperscript{18} \textit{Id.} at 621.
  \item \textsuperscript{19} \textit{Id.} at 622.
  \item \textsuperscript{20} \textit{Id.} See notes 55-58 and accompanying text infra.
  \item \textsuperscript{21} \textit{Id.} In most cases, the plaintiff is the one who seeks introduction of evidence of the subsequent remedial action. \textit{Kehm} is unusual in that the defendant was the party to first introduce the evidence. \textit{Id.} at n.6. See notes 159-161 infra. Procter & Gamble then sought a jury instruction limiting the use of the withdrawal evidence to "background information." \textit{Id.} at 621. See notes 159-161 and accompanying text infra.
  \item \textsuperscript{22} \textit{Id.}
  \item \textsuperscript{23} \textit{Id.} at 616.
  \item \textsuperscript{24} The symptoms of toxic shock syndrome include fever, rash, vomiting, and low
departments had reported cases of TSS in adult women.\textsuperscript{25}

At the time TSS was first identified, there was no connection drawn between the disease and menstruation or tampon use.\textsuperscript{26} However, in a May, 1980, report, the federal Center for Disease Control (CDC) indicated a possible correlation between TSS and menstruation,\textsuperscript{27} and a June, 1980, CDC report related the finding of a “significant association” between the two.\textsuperscript{28}

Procter & Gamble introduced Rely tampons in 1974.\textsuperscript{29} The Rely tampon consisted of polyester foam and a cellulose derivative, materials not found in other tampons.\textsuperscript{30} By the end of June, 1980, Rely had about twenty-four percent of the tampon market.\textsuperscript{31}

As of the June, 1980, CDC report, no definite correlation had been found between the use of Rely tampons specifically and the incidence of TSS.\textsuperscript{32} On August 8, 1980, however, Procter & Gamble received a “responsible report” that a Rely user had died of the disease.\textsuperscript{33} On August 21, Procter & Gamble received a Minnesota public health study which showed twice the incidence of TSS in Rely users than in the users of other tampon brands.\textsuperscript{34} This Minnesota report was confirmed by a report from the CDC on September 19, 1980.\textsuperscript{35} On September 22, 1980, Procter & Gamble removed Rely from the market.\textsuperscript{36}

The Kehm Case

Twenty-five year old Patricia Kehm first used Rely tampons on September 2, 1980.\textsuperscript{37} Mrs. Kehm began to feel ill the next day\textsuperscript{38} and

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  \item blood pressure. The disease is believed to be caused by the presence of the bacteria staphylococcus aureus. \textit{Id. at 617.}
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} Burdick, \textit{The Toxic Shock Syndrome}, 23 TRAUMA, June 1:5, 7 (1981).
  \item \textsuperscript{27} \textit{Kehm}, 724 F.2d at 617.
  \item \textsuperscript{28} \textit{Id.} Although at the time of the June, 1980, report, the CDC believed that the risk of TSS was too low to warrant a general warning against tampon use, it noted that women concerned about TSS could reduce such a risk by using tampons during only part of their period. \textit{Id.}
  \item \textsuperscript{29} \textit{Id. at 616.}
  \item \textsuperscript{30} \textit{Id.}
  \item \textsuperscript{31} Burdick, \textit{supra} note 26, at 12.
  \item \textsuperscript{32} \textit{Kehm}, 724 F.2d at 617.
  \item \textsuperscript{33} \textit{Id.}
  \item \textsuperscript{34} \textit{Id.}
  \item \textsuperscript{35} \textit{Id.} CDC investigators found that, of 50 women who had survived TSS, 70% used Rely tampons. In comparison, only 35% of the women in a control group of 150 used Rely. Burdick, \textit{supra} note 26, at 12.
  \item \textsuperscript{36} \textit{Kehm}, 724 F.2d at 617.
  \item \textsuperscript{37} \textit{Id.}
  \item \textsuperscript{38} \textit{Id.} Mrs. Kehm had received a routine pelvic examination on August 27, 1980, and was pronounced “in excellent condition.” \textit{Brief for Appellees at 1, Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983).}
went to the hospital for an examination on September 5 because the symptoms had worsened. The resident on duty diagnosed the symptoms as the flu, gave Mrs. Kehm antibiotics, and released her. Mrs. Kehm died September 6; the death certificate listed the cause of death as toxic shock syndrome.

Mrs. Kehm's husband and children brought a products liability action against Procter & Gamble, alleging that Rely tampons had proximately caused Mrs. Kehm's death and that the tampons were defective and unreasonably dangerous. Procter & Gamble argued that Mrs. Kehm did not die from TSS or alternatively, even if she did, her death was not caused by Rely tampons. Rather, Procter & Gamble contended, Mrs. Kehm's death resulted from her unique susceptibility to TSS.

Because punitive damages were at issue, Procter & Gamble attempted to demonstrate its "good faith" toward the consuming public by introducing evidence of the withdrawal of Rely from the market. Procter & Gamble then sought a jury instruction limiting the use of the withdrawal evidence for the sole purpose of background information. Procter & Gamble contended that Federal Rule of Evidence 407 prohibited the admission of the evidence for any other purpose. The trial court refused the instruction on the ground that Rule 407 is inapplicable in a strict liability action.

The case was submitted to the jury on the theory of strict liability in tort, with the plaintiffs alleging two types of product defectiveness: defective design and failure to warn. The jury returned a verdict of $300,000 compensatory damages for the Kehms and returned a verdict in favor of Procter & Gamble on the issue of puni-

39. Brief for Appellees at 2, Kehm.
40. Id. TSS was frequently misdiagnosed in 1980 because doctors generally did not know of the disease. Id.
41. Id. at 3; Kehm, 724 F.2d at 617.
43. Id.
44. Id. at 894.
45. Id. at 904.
46. Kehm, 724 F.2d at 622. In his opening statement, counsel for Procter & Gamble stated:

   [W]hen these statistics came in and continued to come in . . . this company, because of its years of honesty and concern for the consumer, elected to remove this product from the market until this problem could be isolated and resolved, unlike any of its competitors. . . . So as you can see, there is no evidence . . . that Procter & Gamble has done anything but acted admirably under these circumstances. Id. at n.6.
47. 580 F. Supp. at 905.
48. Id.
49. Id. (citing Farner v. Paccar, Inc., 562 F.2d 518, 528 (8th Cir. 1977)).
50. Id. at 894.
tive damages.\textsuperscript{51}

On appeal, Procter & Gamble alleged five principal prejudicial
errors, two of which are considered in this Comment: 1) that the
trial court had refused to instruct the jury that Mrs. Kehm had a
unique susceptibility to toxic shock syndrome; and 2) that the court
had refused to grant the limiting instruction that evidence of the
withdrawal of Rely tampons from the market serve solely as back-
ground information.\textsuperscript{52}

Judge Bright, writing for the Eighth Circuit Court of Appeals,
held that even if Mrs. Kehm had a unique susceptibility to TSS, it did
not absolve Procter & Gamble from liability because Procter & Gam-
ble still had a duty to warn.\textsuperscript{53} Additionally, the court stated that
"[r]ule 407 allows the admission of evidence of subsequent remedial
measures when offered for any purpose other than to show negli-
gence or culpable conduct."\textsuperscript{54} The court found the evidence of the
withdrawal admissible because it was offered by the defendant as evi-
dence of the defendant's own good faith.\textsuperscript{55} Additionally, the court de-
determined that it was not error to refuse the defendant’s requested
jury instruction which would have limited the withdrawal evidence
to background information because the court found the evidence ad-
missible for other purposes.\textsuperscript{56} The court determined that the plain-
tiffs could use the evidence as impeachment evidence and also as
evidence of the defendant’s possible duty to withdraw the product.\textsuperscript{57}
Additionally, the court stated that the “most important” reason a
limiting instruction should not have been given was because the
chance of a limiting instruction lessening prejudice was very small,
while the risk of such an instruction confusing the jury was very
great.\textsuperscript{58}

\textsuperscript{51} Id. at 893. The trial court subsequently denied Procter & Gamble’s motion for
judgment notwithstanding the verdict and its motion for a new trial. \textit{Id.} at 907.

\textsuperscript{52} \textit{Kehm}, 724 F.2d at 616. The other three alleged errors were that:
1) the court admitted certain reports prepared by the Center for Disease Control
and various health departments, which Procter & Gamble alleged were hearsay;
2) the court submitted to the jury evidence bearing on punitive damages, includ-
ing information concerning Procter & Gamble’s financial resources; and
3) the court permitted an in-court demonstration which was allegedly demon-
strative of the interaction between a Rely tampon and enzymes found in the vagina.
These alleged errors were subsequently disposed of by the court of appeals. \textit{Id.}

\textsuperscript{53} \textit{Id.} at 620.

\textsuperscript{54} \textit{Id.} at 621.

\textsuperscript{55} \textit{Id.} See note 159 \textit{infra.}

\textsuperscript{56} \textit{Id.} at 622.

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Id.}
BACKGROUND

Negligence v. Strict Liability

To understand the basis for the split of authority in the circuit courts on the issue of whether Rule 407 is applicable in strict liability cases, it is necessary to examine the analytical distinctions between strict liability and negligence. The basic distinction between the two theories is that negligence focuses on the reasonableness of the defendant's conduct, while strict liability focuses on the nature of the defendant's product.59

The requisite elements of a negligence cause of action consist of: a duty to conform to a certain standard of conduct which protects others from unreasonable risk; failure to conform to this standard; a causal connection between the defendant's conduct and the resulting injury; and actual damage to the plaintiff.60 In a negligence action, the plaintiff must prove that the defendant breached a reasonable standard of care in preparing the product.61

In a strict liability action, on the other hand, the defendant's culpable actions are not at issue.62 The elements of a strict liability action consist of: a defective product; the existence of a defect when the product left the defendant's hands; and a causal connection between the defect and the resulting injury.63 In a strict liability ac-


62. In order to focus on the product in a strict liability action, as opposed to the culpability of the defendant's conduct, courts impute knowledge of the risk to the manufacturer. Petty, 740 F.2d at 1441. Thus, the issue is whether the product "is so harmful to persons [or property] that a reasonable prudent manufacturer [or supplier] with this knowledge would not have placed it on the market." Phillips v. Kimwood Mach. Co., 269 Or. 845, —, 525 P.2d 1033, 1040-41 n.16 (1974). See also Petty, 470 F.2d at 441 (holding that a manufacturer's liability under strict liability is determined by assuming knowledge of the risk of side effects and then asking whether the manufacturer with this knowledge distributed an unreasonably dangerous product).

63. See W. KEETON, supra note 60, at § 103, at 713. The RESTATEMENT (SECOND) OF TORTS § 402A (1963) delineates the elements of strict liability as follows:

Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the
tion, the plaintiff need only prove that the product was legally
defective, or "unreasonably dangerous." 64

Despite these seemingly clear analytical distinctions, courts are
divided over whether the two theories remain distinct in applica-
tion. 65 Courts adopting the majority position fail to find significant
enough difference between the two theories to warrant different
treatment for the purposes of Rule 407. 66 A primary reason for this
position is that traditional negligence terminology is used to describe
the elements of strict liability. 67 The Restatement (Second) of Torts
section 402A employs the terms "unreasonably dangerous," "has rea-
son to anticipate," and "reasonable prudent manufacturers" to define
the elements of strict liability. 68 Courts espousing the minority posi-
tion, however, have maintained the distinctions between the two
to cause of action even though the language of strict liability "rings in
negligence." 69

The analytical distinctions between strict liability and negligence
become even less apparent in cases involving a duty to warn. 70 A
duty to warn case involves a product which imposes an unreasonable
risk because it has been marketed with inadequate instructions or a

64. RESTATEMENT (SECOND) OF TORTS § 402A comment i sets out the following
definition of "unreasonably dangerous": "The article sold must be dangerous to an ex-
ten beyond that which would be contemplated by the ordinary consumer who
purchases it, with the ordinary knowledge common to the community as to its charac-
teristics."

Other tests which may be used to determine whether a product is "unreasonably
dangerous" include: 1) whether a reasonable manufacturer would put the product on
the market if it knew of the dangerous condition; 2) whether the risk created by the
product outweighs its utility; and 3) whether the product's cost outweighs its benefits.
Wade, Strict Tort Liability for Products: Past, Present and Future, 13 CAP. U.L.

65. See Henderson, supra note 5, at 8 (stating that "[i]t would seem simple enough
to be able to distinguish between those two theories in product cases, but the legal
world has not been so blessed."). Cf. Powers, The Persistence of Fault in Products Li-
ability, 61 TEX. L. REV. 777 (1983) (stating that "[t]he concept of fault has clung tena-
ciously to the law of products liability.").

66. See notes 6-7 and accompanying text supra.

67. See Robbins, 552 F.2d at 795 n.15 (quoting Phillips, 269 Or. at —, 525 P.2d at
1039).

68. Id.

830, 834-36 (Iowa 1978)). See also cases cited at note 8 supra. These courts find the
policy reasons justifying exclusion of evidence of subsequent remedial measures in
negligence actions lacking in strict liability actions. See note 9 and accompanying text
supra.

70. There are basically three types of strict product liability cases: manufacturing
flaw cases, defective design cases, and improper warning cases. See Wade, supra note
64, at 345-46.
faulty warning. The majority view is that "true" strict liability does not extend to duty to warn cases because inevitably the manufacturer's conduct is considered to some degree in looking to the adequacy of the warning. Instead, the majority view is that failure to warn cases should be considered negligence actions.

There is authority, however, in support of the distinction between negligence and strict liability in duty to warn cases. These courts find that, in negligence actions, the focus is on the reasonable-ness of the manufacturer's actions in selling the product, while in strict liability the focus centers on the condition of the product which is sold without a warning or with an inadequate warning.

**Cases Involving Federal Rule of Evidence 407**

Federal Rule of Evidence 407 provides that evidence of subsequent remedial measures is inadmissible if offered to prove negligence or culpable conduct. There are two primary justifications for this rule. First, subsequent repair is not an admission of liability, and measures should be taken to ensure that it is not construed as such. The second and "more impressive" ground for exclusion arises from the strong social policy of encouraging, or at least not discouraging, steps in the furtherance of safety.

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71. Powers, supra note 65, at 782 (footnote omitted).
72. See Deluryea v. Winthrop Laboratories, 697 F.2d 222, 228-29 (1983). See also note 134 and accompanying text infra.
73. See Henderson, supra note 5, at 8-9 (stating that "the orthodox view" is that warning cases require a showing of fault); Powers, supra note 65, at 783 (stating that "warning defects have normally been judged explicitly by a negligence standard").
74. Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 785 n.15 (8th Cir. 1977) (quoting Phillips, 369 Or. at —, 528 P.2d at 1039). Restatement (Second) of Torts § 402A comment h provides that where a manufacturer "has reason to anticipate that danger may result from a particular use...he may be required to give adequate warning of the danger...and a product sold without such warning is in a defective condition."
75. FED. R. EVID. 407.
76. FED. R. EVID. 407 advisory committee note.
77. Id. This justification also bears on the issue of relevancy because it is not clear that a subsequent repair is substantially more likely in cases where there has been pre-accident negligence. At the same time, the potential for the evidence being misconstrued as evidence of the defendant's negligence is great. R. Lempert & S. Saltzburg, A Modern Approach to Evidence 187-89 (1977), quoted in S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 178 (3d ed. 1982).
78. FED. R. EVID. 407 advisory committee note. This justification is important because, under a liberal theory of relevancy, the first justification—low relevance versus the potential for the evidence being misconstrued—would be insufficient to keep out the evidence because "the inference [of negligence] is still a possible one." Id. See 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 407[02], at 407-8-9 (1982).
79. A third justification for the exclusionary effect of Rule 407, which is not usually verbalized by the courts, is that people who perform subsequent remedial measures are acting as good citizens, and the relevancy of the evidence is too low to justify
The courts following the majority view extend these justifications to encompass actions in strict liability. The leading case for this position is *Werner v. Upjohn Co.* In *Werner*, the plaintiff brought an action against the manufacturer of a prescribed drug for injuries received as a result of the plaintiff's taking the drug. The plaintiff alleged counts in strict liability and negligence. The court determined it to be reversible error to have admitted evidence of a revision in the drug's warning pamphlet subsequent to the occurrence of the plaintiff's injury.

The court gave several reasons for determining that Rule 407 was applicable to strict liability actions. First, the court cited the "paramount" social policy of encouraging defendants to repair or improve their products without the fear that such evidence may be used against them. Second, the court posited that Rule 407 concerns "negligence" or "culpable conduct," terms which imply "blameworthy" conduct. The court noted that since "[s]trict liability on the other hand involves conduct which is technically less blameworthy than simple negligence," it follows that if the rule expressly excludes subsequent repair evidence to prove culpable conduct, it should exclude the same evidence when offered to prove the less blameworthy strict liability. Finally, the *Werner* court held that in duty to warn cases, the elements of strict liability and negligence are nearly identical. Thus, to admit evidence of subsequent remedial measures in a duty to warn case involving an unavoidably unsafe product would be

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80. See note 6 and accompanying text *supra*.
82. *Id.* at 851.
83. *Id.*
84. *Id.* at 853.
85. *Id.* at 855.
86. *Id.* at 856-57.
87. *Id.* at 857. A criticism of this argument is that it is not on solid ground because in strict liability the defendant's conduct is not at issue. *See Note, Admissibility of Evidence of Subsequent Remedial Measures, 38 Wash. & Lee L. Rev. 671, 678 n.47 (1981).*
88. 628 F.2d at 858. The court stated:

The elements of both [negligence and strict liability] are the same with the exception that in negligence plaintiff must show a breach of a duty of due care by defendant while in strict liability plaintiff must show the product was unreasonably dangerous. The distinction between the two lessens considerably in failure to warn cases since it is clear that strict liability adds little in warning cases. Under a negligence theory the issue is whether the defendant exercised due care in formulating and updating the warning, while under a strict liability theory, the issue is whether the lack of a proper warning made the product unreasonably dangerous. Though phrased differently, the issue under either theory is essentially the same: was the warning adequate?

*Id.* (citations omitted).
to "promote substance over form and subvert the policy behind excluding evidence of subsequent remedial measures."89

The first case to make a distinction between negligence and strict liability for the exclusionary purposes of Rule 407 was Ault v. International Harvester Co.90 Although Ault was not a circuit court case but was from the California Supreme Court, it is particularly relevant because the applicable rule of evidence, Section 1151 of the California Evidence Code, is nearly identical to Federal Rule of Evidence 407.91 In Ault, the plaintiff was injured when the automobile in which he was a passenger went out of control and plunged into a canyon.92 The plaintiff sued the vehicle's manufacturer, alleging under theories of strict liability, breach of warranty, and negligence93 that the vehicle's gearbox was defective. The court admitted evidence of the defendant's subsequent change in the gearbox construction, finding subsequent remedial measures admissible in strict liability actions.94

The court based its holding on several grounds. First, the court noted that the very language of the exclusionary rule limited its application to cases involving "negligence" or "culpable conduct."95 The court reasoned that since negligence is not an element of strict liability, the exclusionary rule does not encompass such actions.96 Further, the court stated that if the legislature had intended the rule to apply to strict liability, it would have employed an expression "less

89. Id.

Not every defendant will be aware of the possibility that subsequent remedial measures might constitute an admission. Of those who would know of the rule, any responsible insured defendant will not be likely to refrain deliberately from taking action to prevent the recurrence of subsequent serious injuries. In any subsequent case, evidence of the earlier accident would be admissible to show that defendant knew of a dangerous condition. . . . Even if the defendant is as cold-blooded as the rule suggests, his awareness of the many exceptions to the general exclusionary rule would make it risky to refrain from making the needed repairs.

Id. (footnote omitted); R. Lempert & S. Saltzburg, supra note 77, at 187-89, quoted in S. Saltzburg & K. Redden, supra note 77, at 179 (argument that manufacturer would be discouraged from repairs is "dubious at best"); Note, supra note 87, at 678. Few manufacturers are so callous as to avoid subsequent repairs for the reason that such actions may be used as evidence.


91. CAL. EVID. CODE § 1151 (West 1966) provides: "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 inadmissible to prove negligence or culpable conduct in connection with the event." See FED. R. EVID. 407 advisory committee note (referring to § 1151).

92. 13 Cal. 3d at 117, 528 P.2d at 1150, 117 Cal. Rptr. at 814.

93. Id. at 116, 528 P.2d at 1149, 117 Cal. Rptr. at 813.

94. Id. at 117-18, 528 P.2d at 1150, 117 Cal. Rptr. at 814.

95. Id. at 118, 528 P.2d at 1150, 117 Cal. Rptr. at 814.

96. Id.
related to and consistent with affirmative fault than [the term] 'culpable conduct.' 97

Next, the Ault court determined that the public policy reason of encouraging subsequent repairs 98 is not applicable in strict liability cases. 99 The court stated that it is "manifestly unrealistic" that a manufacturer would forego making improvements or repairs and "risk innumerable additional lawsuits and the attendant adverse effect upon its public image" simply to avoid the admission of such repairs in one lawsuit. 100 Additionally, application of the exclusionary rule would be contrary to the public policy of encouraging mass producers to manufacture safer goods. 101

Finally, the court took notice of the legislative silence on the issue, stating that the legislature could not have been "oblivious" to the likely evidentiary uses of subsequent remedial measures in strict liability cases. 102 The legislature's inaction in extending the rule to include strict liability "must be deemed deliberate and significant." 103

The Eighth Circuit

In Robbins v. Farmers Union Grain Terminal Association, 104 the Eighth Circuit Court of Appeals first held Rule 407 inapplicable to strict liability actions. The Robbins plaintiff sued the manufacturer of a feed supplement for damages to plaintiff's cattle allegedly caused by feed sold by the defendant. 105 Robbins was a duty to warn case, as "the thrust of the plaintiff's case [was] that the [the defendant] failed to give adequate warnings for the safe and effective use of its product." 106 The trial court found the defendants liable under alternative theories of negligence, breach of warranty, and strict liability. 107 On appeal, the Eighth Circuit Court of Appeals affirmed the trial court's admission into evidence of a warning letter sent out by the defendant

97. Id. at 118, 528 P.2d at 1151, 117 Cal. Rptr. at 815.
98. See notes 78-79 and accompanying text supra.
99. 13 Cal. 3d at 120, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16.
100. Id. at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816. This is perhaps the argument most often given in support of the inapplicability of Rule 407 to strict liability actions. See, e.g., 2 J. Weinstein & M. Berger, supra note 78, at ¶ 407[02], at 407-10. "The assertion that a manufacturer will not take remedial action is 'absurd' because: self-interest will prompt most manufacturers to make subsequent repairs, whether or not the manufacturer loses a judgment in the interim." (footnote omitted).
102. Id. at 121, 528 P.2d at 1153, 117 Cal. Rptr. at 817.
103. Id.
104. 552 F.2d 788 (8th Cir. 1977).
105. Id. at 789.
106. Id. at 790 (footnote omitted).
107. Id.
Subsequent to the injuries to plaintiff's cattle, the court determined that such evidence was admissible for strict liability purposes.

The Robbins court offered three grounds for its holding. First, the court stated that the anti-deterrent function of Rule 407 in a negligence action plays no comparable role in strict products liability since a mass producer would rather make repairs than risk innumerable additional lawsuits. Second, the court stated that Rule 407 is, by its terms, limited to cases involving negligence or culpable conduct while "the doctrine of strict liability by its very nature, does not include these elements." Additionally, the court considered the issue of relevancy and the evidentiary value of subsequent remedial measures in strict liability. The court found that since knowledge of the risk is imputed to the defendant in strict liability, evidence of a subsequent modification goes to show that a different instruction or warning would have prevented the harm and that failure to provide such an instruction or warning created an unreasonably dangerous product. Thus, the evidence of the subsequent remedial action was properly admitted.

In subsequent cases, the Eighth Circuit has reaffirmed the position taken in Robbins. In Farner v. Paccar, Inc., the court allowed evidence of a subsequent recall letter in a suit seeking damages resulting from a highway accident. The court held that Rule 407 is inapplicable to strict liability cases because it "serves no deterrent function." In Unterburger v. Snow Co., the court upheld the admission of evidence of a subsequent design modification in the machinery in which the plaintiff's arm had been entangled, stating simply that Rule 407 does not apply to strict liability actions.

108. Id. at 792.
109. See note 90 supra.
110. 552 F.2d at 793.
111. Id. See note 100 and accompanying text supra.
112. Id. (citing Ault, 13 Cal. 3d at 120, 528 P.2d at 1151, 117 Cal. Rptr. at 815).
113. See notes 77-78 and accompanying text supra.
114. 552 F.2d at 794, 795 n.15.
115. Id. at 795.
116. 562 F.2d 518 (8th Cir. 1977).
117. Id. at 527.
118. Id. (citing Robbins, 552 F.2d at 793).
119. 630 F.2d 599 (8th Cir. 1980).
120. Id. at 603. See also Haynes v. American Motors Corp., 691 F.2d 1268, 1273 n.5 (8th Cir. 1982) (recognizing the previous rule that evidence of subsequent remedial measures is admissible under strict liability, but finding it unnecessary to apply the rule because the plaintiffs were only seeking to use the evidence to prove negligence); Randall v. Warnaco, Inc., 677 F.2d 1266, 1230-31 (8th Cir. 1982) (holding that strict liability and negligence are distinct claims, such that a verdict for the plaintiff on a negli-
However, in *DeLuryea v. Winthrop Laboratories*, the Eighth Circuit created an exception to the rule it had delineated in *Robbins*. The *DeLuryea* plaintiff brought a strict liability action seeking damages allegedly caused by a drug made by the defendant drug manufacturer. The trial court admitted evidence offered by DeLuryea of a change in the warning accompanying the drug, a change made subsequent to the time the plaintiff incurred her injuries. On appeal, the Eighth Circuit determined such evidence to be inadmissible.

First, the *DeLuryea* court acknowledged the Eighth Circuit rule concerning the inapplicability of Rule 407 to strict liability actions. However, the court distinguished this action from prior Eighth Circuit cases because none of them had "addressed the issue in a prescription drug case." The court held that because the product in question was an "unavoidably unsafe" drug, the rationale of *Werner*, not *Robbins*, was applicable. Thus, the court determined that the theories of strict liability and negligence merge for Rule 407 purposes in prescription drug cases so that admission of evidence of subsequent remedial measures must be barred.

In support of this holding, the court cited the following strict liability instruction the district court had given the jury: "A drug may be supplied in a defective condition which renders it unreasonably dangerous when it is distributed by the manufacturer without reasonable and adequate warnings of dangers inherent or reasonably foreseeable in its use for a purpose and in a manner which the manufacturer should reasonably foresee." The court stated that the emphasized portion was nearly identical to the language of the negligence instruction the trial court had given. This language

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121. 697 F.2d 222 (8th Cir. 1983).
122. Id. at 223. The plaintiff had been involved in an industrial accident and was prescribed a pain killer manufactured by the defendant. The plaintiff became dependent on the drug and, as a result of repeated injections of the drug, developed skin ulcerations and tissue damage. Id. at 223-24.
123. Id. at 227. The warning made specific reference to the risk of the same injuries incurred by DeLuryea. Id. at 227-28.
124. Id. at 229. However, such a conclusion was dictum. The court stated that "[b]ecause we reverse on other grounds, we need not examine the prejudicial effect of the admission of this evidence." Id.
125. Id. at 228.
126. Id. (citing *Robbins*, 552 F.2d at 789 (cattle feed); *Farmer*, 562 F.2d at 521-22 (tractor-trailer); and *Unterburger*, 630 F.2d at 601 (grain auger)).
127. See notes 81-89 and accompanying text supra.
128. 697 F.2d at 226-29.
129. Id. at 229.
130. Id. at 228.
131. Id. at 228-29.
makes foreseeability, "an inherent consideration in determining negligence," an equally important consideration when determining strict liability. The court also adopted the Werner contention that in failure to warn cases, the theories of negligence and strict liability are essentially the same. Thus, the court concluded that the issue was the defendant's conduct in giving the warning. As such, the Robbins rationale that strict liability does not include negligence or culpable conduct was inapplicable, and evidence of the subsequent warning was inadmissible.

**ANALYSIS**

The court in *Kehm v. Procter & Gamble Manufacturing Co.* was faced with apparent inconsistencies in the Eighth Circuit's position on the applicability of Rule 407 to strict liability cases. On the one hand, Robbins had established the Eighth Circuit as following the minority position that Rule 407 was inapplicable in strict liability cases. DeLuryea, on the other hand, had carved an exception to this position and had adopted the majority position of applying Rule 407 to strict liability cases involving unavoidably unsafe drugs. Instead of reconciling these apparent inconsistencies, the *Kehm* court

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132. Id. at 229.
133. Id. (citing Werner, 628 F.2d at 858). See note 88 supra.
134. Id. at 229. The court cited RESTATEMENT (SECOND) OF TORTS § 402A comment k, which provides:

The seller of such products [e.g., unavoidably unsafe drugs] again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending to their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Cf. RESTATEMENT (SECOND) OF TORTS § 402A comment h, supra note 74.
135. See note 112 and accompanying text supra.
136. 697 F.2d at 229.
137. 724 F.2d 613 (8th Cir. 1983).
138. See notes 104-115 and accompanying text supra.
139. 697 F.2d at 229.
140. Two inconsistencies are immediately apparent. First, Robbins held that in strict liability, knowledge of the danger is imputed to the defendant. Thus, evidence of the subsequent remedial measure is relevant to show that a different warning would have prevented the injury and that it was technologically feasible to give a more adequate instruction before the product was marketed. 552 F.2d at 795 n.15. See note 114 and accompanying text supra. DeLuryea, however, held that foreseeability is an "inherent consideration" in determining duty to warn under strict liability. 697 F.2d at 229. See note 132 and accompanying text supra. Second, in Robbins the court determined that knowledge and culpable conduct were not elements of strict liability and that it was error to assert that negligence and strict liability had the same elements of proof. 552 F.2d at 794 n.15. See note 112 and accompanying text supra. DeLuryea, on the other hand, held that in duty to warn cases, the elements of negligence and strict liability are essentially the same. 697 F.2d at 229. See note 139 and accompanying text supra.
avoided ruling on the application of Rule 407 in strict liability actions by allowing evidence of the withdrawal of Rely from the market on other grounds.\textsuperscript{141}

**Unique Susceptibility**

Procter & Gamble contended at trial that Mrs. Kehm’s unique susceptibility\textsuperscript{142} to toxic shock syndrome had caused her death.\textsuperscript{143} It argued that the trial court should have given a jury instruction that if Mrs. Kehm was uniquely susceptible, Procter & Gamble would be absolved from liability because a manufacturer cannot be held liable for an injury which it could not reasonably have foreseen.\textsuperscript{144} Procter & Gamble based its contention\textsuperscript{145} on the decision in *Bonowski v. Revlon, Inc.*\textsuperscript{146} In *Bonowski*, the Iowa Supreme Court held that a manufacturer of suntan lotion was not negligent in failing to foreseen a user’s idiosyncratic reaction to its product.\textsuperscript{147}

The *Kehm* court firmly dismissed *Bonowski* as inapplicable because it was not until eleven years after *Bonowski* that Iowa adopted the rule of strict liability.\textsuperscript{148} Since neither negligence nor foreseeability is an element of strict liability, the court held that the unique susceptibility defense of *Bonowski* did not apply.\textsuperscript{149} Thus, the court explicitly established that it was deciding *Kehm* not under a negligence theory but under the theory of strict liability.

**Duty to Warn**

Finding the unique susceptibility defense inapplicable, the court then looked to Procter & Gamble’s duty to warn users of Rely of the risk of TSS.\textsuperscript{150} The court reaffirmed that its analysis was under the theory of strict liability when it stated that “[i]n failure-to-warn cases, as in strict liability generally, liability does not turn on whether the risk of harm runs to a substantial number of persons.”\textsuperscript{151} However, the court then used an analysis which sounded in

\begin{itemize}
\item \textsuperscript{141} 724 F.2d at 621-22. However, the trial court had found the withdrawal evidence was admissible for the simple reason that Rule 407 is inapplicable in strict liability actions. 580 F. Supp. at 905.
\item \textsuperscript{142} Toxic shock syndrome is a rare disease, occurring in three per 100,000 menstruating women per year. Brief for Appellant at 6, Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983).
\item \textsuperscript{143} 724 F.2d at 617.
\item \textsuperscript{144} *Id.* at 620.
\item \textsuperscript{145} *Id.*
\item \textsuperscript{146} 251 Iowa 141, 100 N.W.2d 5 (1959).
\item \textsuperscript{147} *Id.* at 149, 100 N.W.2d at 9.
\item \textsuperscript{148} 724 F.2d at 620.
\item \textsuperscript{149} *Id.*
\item \textsuperscript{150} *Id.*
\item \textsuperscript{151} *Id.* (emphasis added).
\end{itemize}
negligence. It stated that the test was whether the manufacturer knew that even relatively few persons could not use the product without injury and whether a proper warning would have prevented the harm. The court noted the existence of evidence that Procter & Gamble had reason to know of the risk of TSS before Mrs. Kehm used Rely. As such, the jury could have concluded that a proper warning may have put Mrs. Kehm on notice so that she could have discontinued use and prevented the harm. Thus, the Kehm court ignored the strict liability analysis set out in Robbins.

Under Robbins, knowledge of danger would have been imputed to Procter & Gamble. The court would have looked to whether a reasonable manufacturer would have marketed the product despite such knowledge and not to whether the defendant had knowledge of the risk. Therefore, although the Kehm court claimed to be using a strict liability approach, it was analyzing the case in negligence terms. This analysis was contrary to the rule it had set out in Robbins:

Since knowledge and culpable fault are not elements in the proof of strict liability in product cases, it is somewhat anomalous to confuse negligence and strict liability by suggesting the same elements of proof. Conceptually, when dealing with a product made unreasonably dangerous by reason of inadequate instructions, to require proof that the manufacturer knew or should have known of the danger ("foreseeable dangers") is a misapplication of the principles underlying strict liability.

Despite Robbins, the Kehm court employed an analysis "ringing in negligence" to determine that the jury could reasonably have found a duty to warn under strict liability.

Withdrawal of Rely From the Market

The court next turned to the admissibility and allowable uses of the withdrawal evidence. Procter & Gamble contended that a jury instruction should have been given limiting the use of evidence of the withdrawal of Rely from the market solely to background information. The court upheld the refusal to give such an instruction on

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152. Id. (emphasis added).
153. See notes 33-35 and accompanying text supra.
154. 724 F.2d at 620.
155. See note 114 and accompanying text supra.
156. See note 62 and accompanying text supra.
157. 552 F.2d at 794 n.15.
158. 724 F.2d at 620.
159. Id. at 621. Procter & Gamble had unsuccessfully requested the following jury instruction:
three grounds. First, the trial judge did not abuse his discretion denying the instruction because Procter & Gamble itself introduced the evidence.\textsuperscript{160} Second, the evidence was correctly brought in by the plaintiff to be used for other purposes, namely to impeach Procter & Gamble's "voluntary" withdrawal of Rely and possibly to show the existence of a duty to withdraw the product.\textsuperscript{161} Finally, the court stated that the possibility of prejudice in the absence of such an instruction was very small and such an instruction would only serve to confuse the issues.\textsuperscript{162}

The court began its analysis by considering the admissibility of the withdrawal evidence under Rule 407.\textsuperscript{163} The court noted that previous Eighth Circuit cases had "indicated that the rationale of Rule 407 does not apply in strict liability cases, where by definition negligence is not an issue."\textsuperscript{164} The trial court in Kehm had admitted evidence of the withdrawal and had refused the limiting instruction for the sole reason that Rule 407 does not apply to strict liability.\textsuperscript{165} Since the trial court's decision, however, the Eighth Circuit had "redefined and qualified" its position through its holdings in DeLuryea.\textsuperscript{166} On appeal, the Kehm court reiterated the DeLuryea rationale that, although normally negligence focuses on the defendant's conduct while strict liability focuses on the safety of the product, where the product is inherently unavoidably unsafe, liability hinges on the adequacy of the warning.\textsuperscript{167} Hence, in both strict liability and negligence cases involving such products, the issue focuses on the "reasonableness of the defendant's responses to foreseeable dangers."\textsuperscript{168} Thus, the court concluded that "the rationale of Rule 407

\begin{footnotesize}
\begin{enumerate}
\item Evidence has been submitted showing that the Defendant withdrew Rely tampons from the market on September 22, 1980. You may only consider that evidence was submitted only for the purpose of background information for you. You should consider it only for that purpose, and for no other purpose. You may not consider this fact as evidence that Defendant [was] negligent. You may not consider this fact as evidence that the Rely tampon was defective, that the Defendant breached either implied or expressed warranties, or that there is a causal relationship between the usage of Rely tampons in menstruating women and the development of Toxic Shock syndrome. As stated before, you may only consider this evidence as background information.
\item 580 F. Supp. at 905.
\item Id. See note 46 supra.
\item 724 F.2d at 622. See notes 181-185 and accompanying text infra.
\item Id. See notes 186-187 and accompanying text infra.
\item Id. at 621.
\item Id. (citing Farmer, 562 F.2d at 528; Robbins, 552 F.2d at 792-93) (emphasis added).
\item 580 F. Supp. at 905.
\item Id. See note 697 F.2d at 228-29.
\end{enumerate}
\end{footnotesize}
The *Kehm* court distinguished *DeLuryea* on the following basis:

Though we agree with and will in appropriate cases follow the *DeLuryea* reasoning, we do not believe it requires us to reverse the trial court in this case. For this case presents a slightly different issue than *DeLuryea*. Unlike the *DeLuryea* defendant, Procter & Gamble did not argue that the trial court should altogether exclude evidence of its withdrawal of Rely from the market; instead, it introduced the evidence on its own and requested that the jury be instructed to consider the evidence only for a specific limited purpose. Thus the issue before us is not whether the trial court erroneously admitted the evidence, but whether it abused its discretion in refusing to give a limiting instruction. We think it did not.\(^{170}\)

Thus, the *Kehm* court approved of the *DeLuryea* holding but distinguished it from the *Kehm* case on the basis of which party offered the subsequent remedial evidence.\(^{171}\) In his concurring opinion, Chief Judge Lay noted that affirmation of the trial court's determination of admissibility of the evidence did not require approval of *DeLuryea*.\(^{172}\) Instead, the *Kehm* court should have recognized the discussion of strict liability and negligence in *DeLuryea* as dictum and dismissed it as such.\(^{173}\) Chief Judge Lay stated that adoption of the *DeLuryea* rationale was in direct contrast to the Eighth Circuit's previous decision in *Robbins*.\(^{174}\) He noted that “[t]he attempt in *DeLuryea* to distinguish *Robbins* [was] accomplished without a supporting rationale.”\(^{175}\) Thus, the distinction created by *DeLuryea* for

\(^{169}\) *Id.* (citing *DeLuryea*, 697 F.2d at 229).

\(^{170}\) *Id.* Query: Is this too say that if Procter & Gamble had not offered the evidence itself, the *Kehm* court would have been bound by the holding of *DeLuryea* and the evidence would have been inadmissible under Rule 407?

\(^{171}\) *Id.*

\(^{172}\) *Id.* at 628 (Lay, C.J., concurring).

\(^{173}\) *Id.* at 629 (Lay, C.J., concurring) (stating that “*DeLuryea* should be limited to the facts of that case and its dicta should not become the controlling law within the circuit.”). There are two other grounds on which the *Kehm* court could have distinguished *DeLuryea* without approving its rationale. First, the *DeLuryea* decision was specifically limited to unavoidably unsafe drugs. See notes 126-128 and accompanying text supra. *Kehm* did not involve such a product. Second, *Kehm* could have been distinguished on the basis of applicable state law. *DeLuryea* arose under Arkansas law while *Kehm* involved Iowa law. See 724 F.2d at 622 n.7. Although noting factors which “counsel respect for the state rule,” the *Kehm* court left unresolved the issue of whether state or federal law applied. *Id.*

\(^{174}\) *Id.* at 628-29 (Lay, C.J., concurring) (citing *Robbins*, 552 F.2d at 794-95). Accord C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5285 (Supp. 1984) (stating that the reasoning of *DeLuryea* is so strained “it seems that court is in fact retreating from previous adoption of *Ault* rationale.”).

\(^{175}\) 724 F.2d at 629 (Lay, C.J., concurring).
drug cases is "without substance." As such, Chief Judge Lay concluded that, in Kehm, it was erroneous to approve of DeLuryea as "[i]t would be more appropriate to overrule Robbins than to generate variant applications of Rule 407 to issues that are identical."

Having distinguished DeLuryea and finding the evidence admissible, the Kehm court analyzed the refusal to give the requested limiting instruction. Ultimately, the court determined that it was correct to refuse such an instruction. However, the court did not base its holding on the fact that Rule 407 allows such evidence in a strict liability action. Rather, the Eighth Circuit found that the withdrawal evidence admissible for other purposes.

The first purpose for which the court found the evidence admissible was impeachment of the alleged voluntariness of Procter & Gamble's withdrawal of Rely. Procter & Gamble introduced the voluntary nature of the withdrawal in its opening statement. However, the plaintiffs "hotly contested" this issue. The Kehms offered evidence that Procter & Gamble had entered a consent agreement with the Food and Drug Administration in which the manufacturer agreed to withdraw Rely and to participate in public education programs on the facts of TSS. Additionally, besides being admissible for impeachment purposes, the court found such evidence available "perhaps also to show the existence or non-existence of a duty to withdraw the product."

Finally, and "most important[ly]," the court found that, in light of the substantial time and testimony at the trial devoted to the issue of the withdrawal of Rely, "the likelihood that a limiting instruction would have lessened the possibility of prejudice, or that absence of

176. Id. (Lay, C.J., concurring). Chief Judge Lay found the Werner rationale, as adopted by DeLuryea, "not historically or logically supported." Id. at 628 (footnote omitted).
177. Id. at 629 (Lay, C.J., concurring).
178. Id. at 621-22.
179. Id. at 621.
180. Id. at 621-22.
181. Id. at 622. Impeachment is explicitly recognized in Rule 407 as an exception to the exclusionary rule. See Fed. R. Evid. 407, supra note 1.
182. See note 46 supra.
183. 724 F.2d at 622; cf. Burdick, supra note 26, at 1:9 (referring to the withdrawal of Rely as "forced").
184. 724 F.2d at 622. The consent agreement further provided that Procter & Gamble could not market Rely again without prior FDA approval. Brief for Appellees at 33 n.24, Kehm. See C. Wright & K. Graham, Federal Practice and Procedure § 5284, at 114 (1980) (stating that where the subsequent measure is forced by a government agency, the exclusionary rule of 407 should not apply because admissibility of the evidence in no way influenced the defendant's conduct in making the withdrawal).
185. 724 F.2d at 622.
such an instruction would have generated prejudice, is very small."186
In fact, the court found that a limiting instruction would only confuse
the issues.187

Such a finding was warranted especially since the requested in-
struction provided that the jury was not to use the withdrawal as evi-
dence of negligence.188 As negligence was not an issue, the
instruction was inapplicable. The refusal to give the instruction was
also consistent with the rule generally espoused by the Eighth Cir-
cuit that it is not error to give an instruction which may only serve to
confuse the jury.189

Thus, the Eighth Circuit affirmed the trial court’s decision and
allowed evidence of subsequent remedial measures in a strict liability
action.190 However, instead of clarifying its stance on the applicabil-
ity of Rule 407 to strict liability cases after DeLuryea, the Eighth Cir-
cuit further clouded its position on the issue.

The court left unanswered which rule would apply in subsequent
duty to warn strict liability cases. In dictum, DeLuryea created an
exception to the Robbins rule of differentiating negligence and strict
liability for Rule 407 purposes.191 However, DeLuryea limited its
rule to unavoidably unsafe drug cases.192 Although approving of
DeLuryea,193 Kehm neither expanded nor relied on the DeLuryea
limitation in distinguishing the case. Instead, the court found
DeLuryea inapplicable on the basis of which party offered the evi-
dence.194 If the Kehm court had adhered to the Robbins precedents, it
would have found the subsequent remedial evidence admissible on
the simple basis that Rule 407 does not apply to strict liability.195 On
the other hand, the court could have explicitly stated that although
DeLuryea was the controlling rule in all duty to warn cases, the evi-
dence in Kehm was admissible for other purposes, and thus the
DeLuryea rule was inapplicable in this case. However, this would re-
quire Kehm to overrule Robbins because Robbins was also a duty to

186. Id.
187. Id.
188. See note 159 supra.
189. See, e.g., Farner v. Paccar, Inc. 562 F.2d 518, 528 (8th Cir. 1977) (not error to
fail to give limiting instruction). In fact, in many cases counsel have refused to request
a limiting instruction as such an instruction may confuse the jury. See, e.g., Roth v.
Black & Decker, 737 F.2d 779, 782 (8th Cir. 1984) (no instruction requested); Un-
terburger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980) (defendant refused limiting in-
struction on grounds it would only confuse the jury).
190. 724 F.2d at 628.
191. 697 F.2d at 228. See notes 125-128 and accompanying text supra.
192. Id.
193. 724 F.2d at 621. See note 170 and accompanying text supra.
194. Id.
195. See note 110 and accompanying text supra.
warn case. Because the court used a negligence analysis in a strict liability failure to warn case and because it approved of DeLuryea without limiting that holding to drug cases, it appears the Eighth Circuit adopted the majority view that in failure to warn cases, strict liability and negligence are indistinguishable. However, the court did not explicitly state this. Nor did it overrule Robbins. Thus, Kehm leaves unresolved which rule, DeLuryea or Robbins, the court will apply in subsequent strict liability duty to warn cases in which the plaintiff introduces the evidence.

Post-Kehm

The Eighth Circuit has decided three cases concerning the analytical distinction between strict liability and negligence since Kehm. In Roth v. Black & Decker, the plaintiff sued under strict liability for injuries received from an electric saw manufactured by the defendant. The plaintiff introduced evidence of a subsequent design modification in the guard which covered the saw blade. The court held that such evidence was admissible under Rule 407 because the rule is confined to actions involving negligence or culpable conduct. However, in a footnote, the court noted that the Eighth Circuit has recognized that Rule 407 does apply in strict liability actions involving a manufacturer's duty to warn, citing both Kehm and DeLuryea. The court distinguished Roth as not being a duty to warn case.

In Roth, the Eighth Circuit again passed up an opportunity to clarify its position on Rule 407 and strict liability. The Roth court cited Kehm and DeLuryea for the same proposition, namely that Rule 407 applies to strict liability cases involving a duty to warn. This is consistent with the theory that the court has adopted the majority view of barring evidence of subsequent repair in strict liability

196. 552 F.2d at 790. See note 106 and accompanying text supra. In his concurring opinion in Kehm, Chief Judge Lay noted that adoption of DeLuryea would warrant overruling Robbins. 724 F.2d at 629 (Lay, C.J., concurring). See notes 174-177 and accompanying text supra.

197. See notes 72-73 and accompanying text supra.

198. R.W. Murray, Co., v. Shatterproof Glass Corp., 758 F.2d 266 (8th Cir. 1985); Petty v. United States, 740 F.2d 1428 (8th Cir. 1984); Roth v. Black & Decker, 737 F.2d 779 (8th Cir. 1984).

199. 737 F.2d 779 (8th Cir. 1984).

200. Id. at 780.

201. Id. at 782.

202. Id. (citing Unterburger, 630 F.2d at 603; Robbins, 552 F.2d at 793).

203. Id. at 782 n.1.

204. Id.

205. Id.
duty to warn cases. However, the proposition is inconsistent with the court’s position in Robbins, also a failure to warn case. Roth cited Robbins approvingly. This could mean one of three things: 1) the court has taken contradictory positions in duty to warn cases; 2) the Roth court meant to limit DeLuryea and Kehm’s application to strict liability drug cases but inadvertently failed to do so; or 3) the court no longer cites Robbins as a duty to warn case. Without regard to this ambiguity, the holding of Roth indicates that the court still maintains the minority position of allowing subsequent remedial evidence in strict liability cases not involving a duty to warn.

The second relevant case after Kehm is Petty v. United States. Petty did not discuss Rule 407, but it did pertain to the analytical distinction between negligence and strict liability. In Petty, the defendant manufacturer was found liable under both negligence and strict liability theories for failure to provide adequate warning of the risks attendant a swine flu vaccine. The defendant unsuccessfully sought to employ DeLuryea for the proposition that in duty to warn cases, negligence and strict liability are essentially the same. Therefore, the defendant argued that in this strict liability action, the lack of foreseeability of the risk would arguably relieve the defendant from liability.

The court refused to make such a determination and, instead, applied the rationale of Robbins. The court distinguished DeLuryea on the ground it was based on Arkansas law. As such, the Petty court stated that the jury instruction in DeLuryea had “injected notions of foreseeability into the determination of strict liability.” In contrast, the court determined that Iowa law applied to Petty and Iowa “clearly recognizes the analytical distinction” between strict lia-

206. See notes 72-73 and accompanying text supra.
207. 552 F.2d at 790.
208. 737 F.2d at 782 n.1.
209. Since Kehm did not itself limit the DeLuryea rule to drug cases, this alternative appears the least likely. See note 173 supra.
210. Cf. Henderson, supra note 5, at 16-17 (stating that the “anomalous results” in the Eighth Circuit cases are due to the court not paying enough attention to whether the basis of liability in each case was negligence or strict liability. Professor Henderson asserts that DeLuryea and Robbins were actually both failure to warn cases based in negligence).
211. 737 F.2d at 782.
212. 740 F.2d 1428 (8th Cir. 1984).
213. Id. at 1431.
214. Id. at 1440.
215. Id.
216. Id. at 1440-41.
217. Id. at 1440.
218. Id.
bility and negligence in duty to warn cases. As such, the Petty court applied the Robbins analysis. First, the court imputed knowledge of the vaccine's risks to the defendant manufacturer. The court then looked to whether the manufacturer had distributed an unreasonably dangerous product. Finding the warning inadequate, the court determined that the product was unreasonably dangerous and, thus, found the defendant liable under strict liability.

It would seem that if the Petty court were to have followed precedent, it would have applied DeLuryea as requested by the defendant. DeLuryea set forth the applicable rule for strict liability duty to warn cases involving drugs. Petty was such a case. Under the DeLuryea rule, negligence and strict liability merge. However, the Petty court distinguished DeLuryea on the basis of the applicable state law.

The Petty court stated that DeLuryea was based on Arkansas law while Petty and Kehm were based on Iowa law. However, the DeLuryea court specifically stated that it was not deciding whether state law applied. Additionally, since Arkansas had not addressed the issue, the DeLuryea court could not have known what the state rule was on strict liability in duty to warn cases. DeLuryea distinguished itself from Robbins, Farner, and Unterburger for the single reason that DeLuryea involved an unavoidably unsafe drug. In effect, the Petty court rewrote the DeLuryea decision to stand on different grounds than the DeLuryea court itself had provided.

Likewise, the Petty court stated that Kehm was based on Iowa law. In that way, Petty likened itself to Kehm and distinguished Kehm from DeLuryea. However, like DeLuryea, the Kehm court had left unresolved the issue of whether state law applied.

220. Id. at 1441.
221. Id.
222. Id. See notes 62 and 74 and accompanying text supra.
223. See note 129 and accompanying text supra.
224. 740 F.2d at 1440. See note 217 and accompanying text supra.
225. The court stated: "It is not clear whether state or federal law applies to this issue in a diversity case. . . . Arkansas has not addressed the issue of the applicability of Rule 407 to strict liability actions, but follows the general rule that subsequent remedial measures are inadmissible to prove negligence." 697 F.2d at 228 n.4 (citations omitted).
226. Id.
227. Id. at 228. See note 126 and accompanying text supra.
228. 740 F.2d at 1440. See note 219 and accompanying text supra.
229. See id.
230. The Kehm court stated:
   In DeLuryea, we left unresolved the question whether state or federal law applies when determining the admissibility of subsequent remedial measures in
Finally, the rule established by *Petty* is unsatisfactory. The court held that the issue of whether strict liability and negligence were distinct theories in duty to warn cases would be resolved by applying state law. However, if state law is to control, the purpose behind a uniform federal rule of evidence becomes obsolete.\(^{231}\) Additionally, the court has provided no guidance for which rule to apply in future cases when the state has not addressed the issue.

At present, it is not clear what position the Eighth Circuit takes on the applicability of Rule 407 to strict liability cases. Since the court had never ruled on the basis of state law before despite having clear opportunities to do so and because such a rule is contrary to the dictate of Congress,\(^{232}\) concerning the applicability of Rule 407, it is plausible that *Petty* will be a lone case in the circuit. Without *Petty*, it is possible to see in prior cases the crystallization of a rule. First, the court adopted the minority position in *Robbins* that Rule 407 does not apply in strict liability actions.\(^{233}\) Next, the *DeLuryea* court adopted the majority view that in duty to warn cases, negligence and strict liability merge for the purposes of Rule 407.\(^{234}\) Although the court could have explicitly overruled *Robbins*, it failed to do so. *Kehm* furthered the rationale of *DeLuryea* for duty to warn cases but did not base its holding on the *DeLuryea* rule because the evidence in diversity cases. We noted, however, that Arkansas, the law of which applied there, had not specifically addressed the issue of the applicability of Rule 407 to strict liability actions. Iowa, however, has. Iowa Rule of Evidence 407 follows the federal rule, but adds, "This rule does not require the exclusion of evidence of subsequent measures when offered in connection with a claim based on strict liability in tort . . . ." Because we hold the evidence in question here admissible even under the federal rule, we need not decide whether, if the state and the federal rules led to different results, the state would control.

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\(^{231}\) See Comment, supra note 3, at 1416-17, which stated that

[without uniform court treatment of repair evidence in strict liability actions, producers and manufacturers defending strict liability claims find their products assessed differently from jurisdiction to jurisdiction. The disparate treatment of subsequent repair evidence is anomalous when a stated purpose of the Federal Rules of Evidence is fairness in the administration of evidence law, and the legislative intent is uniformity of evidence rules used by or in the federal circuits.](footnotes omitted) See also *Rioux v. Daniel Int'l Corp.*, 582 F. Supp. 620, 625 (D. Me. 1984) (holding that federal rule 407, not state law, is to apply because Congress specifically indicated the three rules (302, 501 and 601) which were to defer to state laws). But see *Moe v. Avions Marcel Dyssault-Breguet Aviation*, 727 F.2d 917, 932 (10th Cir. 1984) (stating that determination as to whether subsequent remedial measures should be excluded from evidence is a matter of state policy); 2 J. *Weinsteint & M. Berger*, supra note 78, at \(\dagger 407[2]\), at 407-12 ("Since an extrinsic policy is involved in Rule 407, state rules admitting evidence of subsequent remedial measures should be followed in cases resting on state substantive grounds."). (footnote omitted).


\(^{233}\) 552 F.2d at 793.

\(^{234}\) 697 F.2d at 229.
Kehm was admissible for other purposes. Since Roth was not a duty to warn case, but instead involved "true" strict liability, the court applied the Robbins rule.

CONCLUSION

At present the Eighth Circuit apparently takes an unclear position on the applicability of Rule 407 in strict liability cases. If it can be assumed the Robbins was meant to be overruled in failure to warn cases and that Petty will not be followed, a rule of sorts emerges. That is, the Eighth Circuit will follow the minority position of admitting subsequent remedial evidence in strict liability actions not involving a duty to warn. In duty to warn cases, the Eighth Circuit has adopted the majority position that the two theories merge for Rule 407 purposes. The ambiguity in the court's position results from the court's failure to state explicitly what rule it has adopted. On the face of the cases, the Eighth Circuit has done just what Chief Judge Lay warned of in Kehm: it has "generate[d] variant applications of Rule 407 to issues that are identical," so that there is no clear rule. The Eighth Circuit must set out an explicit, uniform rule so that the standards applicable in the use of Rule 407 are clear both to the courts and to potential defendants.

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235. 724 F.2d at 621.
236. 737 F.2d at 782. The most recent case on this issue is R.W. Murray Co. v. Shatterproof Glass Corp., 758 F.2d 266 (8th Cir. 1985). Murray was a breach of warranty case. The defendant sold the plaintiff certain windows for the plaintiff's building, but the windows were discovered to be defective. The court found the defendant liable for breach of warranty. At trial, the plaintiffs introduced evidence of a subsequent design change in the windows made by the defendant. The defendant did not object to the evidence but objected to a jury instruction that stated that such evidence could be used to determine whether the panels sold to the plaintiff were defective. The court held that such an instruction was acceptable because Rule 407 does not bar subsequent repair evidence in strict liability actions. The court cited Robbins, DeLuriea, Unterburger, and Farner. The court held that this warranty action was so similar to a strict liability action that the same rule applied. This holding is consistent with the theory that the Eighth Circuit still espouses the Robbins rule for strict liability cases not involving a duty to warn. Additionally, it enforces the proposition that Petty will not be followed because Murray made no reference to state law.
237. 724 F.2d at 629 (Lay, C.J., concurring).