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## AFTERMARKET PARTING SORROWS

*Will Smith v. American Family Verdict Trash Avery?*

BY [MICHAEL R. NELSON AND MARK S. ROSENBERG](#)

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Nearly four years ago, the Illinois Supreme Court dealt what many perceived to be a fatal blow to a wave of putative class actions concerning automobile insurers' specification of non-original equipment manufacturer parts in the repair of motor vehicles. In *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), the Illinois Supreme Court overturned a verdict of more than \$1.1 billion in a national class action challenging State Farm's practice of specifying non-OEM parts that were purportedly "categorically inferior" to OEM parts. In vacating this verdict, the Illinois Supreme Court held that the mere specification of non-OEM parts in a repair estimate was insufficient to establish liability for breach of a contractual promise to use "like kind and quality" parts, absent evidence that non-OEM parts were actually used in the repair of the vehicle, and that such parts failed to restore the vehicle to its pre-loss condition. The court further noted that the determination of these issues would require an individual analysis of each vehicle, making class certification entirely impracticable.

At the time it was released, the *Avery* opinion was widely perceived to be an influential decision that would lead other courts to reject similar efforts to certify class actions pertaining to the use of non-OEM parts. However, a recent decision by a Missouri appellate court demonstrates that acceptance of *Avery* in other jurisdictions may not be as widespread as first thought.

### Case Review

In *Smith v. American Family Mut. Ins. Co.*, \_\_\_ S.W.3d \_\_\_, 2009 WL 1181490 (Mo. Ct. App. W.D. May 5, 2009), the Missouri Court of Appeals for the Western District reviewed a class action involving a similar challenge to an automobile insurer's practice of specifying non-OEM parts in the repair of vehicles, while also challenging the insurer's purported practice of failing to specify certain repair procedures in estimates. The plaintiffs initially sought to represent a multi-state class. Following an appeal of the trial court's order certifying the multi-state class, the Missouri Supreme Court narrowed the scope of the class to Missouri policyholders only, due a conflict in state insurance laws and regulations pertaining to the specification of non-OEM parts. *State ex rel. American Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 485 (Mo. 2003).

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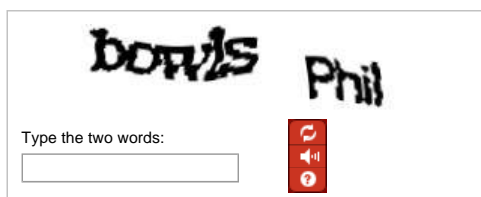
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