

Aftermarket Parting Sorrows

Will Smith v. American Family Verdict Trash Avery?

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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).

After a three-week trial in 2007, a jury returned a verdict of more than \$17 million in damages. Based upon reasoning similar to that applied by the *Avery* court, the trial court in *Smith* granted the defendant insurer's motion for judgment notwithstanding the verdict, holding that the plaintiffs had failed to establish breach of contract or the existence of damages. The trial court specifically observed that "to show class-wide breach and damages," the plaintiffs were "required to compare the aftermarket parts to the pre-loss condition of parts that the aftermarket parts were replacing on the class vehicle," but that the evidence "failed to show that any aftermarket part was inferior to any part it actually replaced on any class vehicle or was inferior to any part on any class vehicle for which an aftermarket part was specified as part of the repair estimate."

The Missouri Difference

The Missouri Court of Appeals began its analysis by noting that a state insurance regulation required that “where insurers elect to pay for non-OEM replacement parts, the parts must be ‘at least like kind and quality in terms of fit, quality, and performance to the original manufacturer parts they are replacing.’” The court also noted that the Missouri Department of Insurance has interpreted this rule to create “a legal obligation that insurers pay the cost necessary to return a vehicle to its condition before the damage, that is, to its pre-loss condition.”

Applying this rule, the appeals court concluded that the trial court erred in concluding that the plaintiffs were required to compare the non-OEM parts used on each vehicle to the pre-loss condition of each part being replaced. The court observed that in its review of the class certification decision, the Missouri Supreme Court identified the predominate issue in the case as whether the defendant insurer “breached its contracts with each prospective class member when it made payment on policyholders’ claims based upon estimates ... specifying the use of non-OEM crash parts.” The court therefore opined that under the Supreme Court’s decision in *Clark*, “the question of pre-loss condition was not the predominate question but, rather, an issue of damages and defenses to be addressed after the jury rendered its verdict on the predominant question.”

The court subsequently noted that in order to “meet the burden of the predominant question,” plaintiffs were “required to establish that aftermarket parts were universally inferior to OEM parts; that [the defendant insurer] had a practice of basing estimates for cars older than three years on the cost of aftermarket parts; and that, in so doing, [the defendant insurer] breached its contract to pay to return the car to its pre-loss condition.” As the insurer did not contest that it based estimates on the cost of aftermarket parts and based the amount it paid to repair vehicles upon these estimates, the court observed that the sole relevant question to be addressed at trial was “whether plaintiffs established sufficient evidence that aftermarket crash parts are not of like kind and quality to OEM crash parts.”

The court determined that the plaintiffs were able to establish this point by presenting expert testimony of an engineering consultant and professor of mechanical engineering. Viewing the evidence in the light most favorable to the jury’s verdict, the court held that “such evidence established that, because of the nature of the engineering, production, and materials, aftermarket parts were inferior in fit and performance and, therefore, not of like kind and quality to OEM parts.”

The court opined that as “plaintiffs’ theory was one of universal inferiority, the trial court erred in finding that the plaintiffs were required to demonstrate that any particular aftermarket crash part was specifically inferior to the corresponding OEM part.” Rather, the court determined that the evidence presented at trial was sufficient “for a reasonable juror to conclude that aftermarket parts are not of like kind and quality to OEM parts and that American Family breached its contacts with its policyholders when it paid to return the damaged vehicle to pre-loss condition based on the nature and cost of aftermarket parts.” Accordingly, the court reversed the trial court’s holding that the plaintiffs had not proven breach of contract.

Apples to Apples?

The court next reviewed the trial court’s determination that the plaintiffs had failed to prove damages, as “[t]here could be no showing of actual damage ... unless the aftermarket part that was inferior to the existing part in its pre-loss condition was actually used to repair the vehicle’s damage.” The trial court’s determination was based upon the Illinois Supreme Court’s analysis of the same point in *Avery*.

The Court of Appeals opined that the present case was distinguishable from *Avery*, as “the breach [in *Smith*] occurred when [the insurer] cut a check to its policyholders based on an estimate specifying aftermarket parts, not upon the use of aftermarket parts, as in *Avery*.” The court observed that the defendant insurer “paid the insured a sum based on a repair estimate,” and that “[w]hether the vehicle was repaired at all, or, if repaired, what materials were used in the repair, was left up to the policyholder.” As the insurer’s contractual obligation was satisfied upon payment, the court concluded that damages to the class members were sustained “upon payment of an insufficient sum to return the vehicle to pre-loss condition.” Accordingly, it held that “[t]he trial court’s ruling asserting that plaintiffs could only show damages upon establishing whether an aftermarket part was actually used was in error.”

In addition to concluding that the trial court erred in granting judgment notwithstanding the verdict (JNOV) with regard to the specification of aftermarket parts, the court also held that the trial court erred in granting JNOV with regard to the jury’s determination that the insurer had omitted certain necessary repair procedures from the class members’ estimates. On this point, the trial court held that proof of these allegations “require[d] a showing that the omitted repair procedures were actually not done and that, as a result, the repair to all the class vehicles was not done completely satisfactory.”

The trial court concluded that the plaintiffs failed to present “evidence that the repairs were not actually done, only that some of the estimates did not contain an amount specifically designated for one or more of these repair procedures.” Similar to its analysis of the aftermarket parts claim, the court concluded that as “the breach occurred at the payment to the insured based on the estimate” and the omission of certain repairs “meant that the estimate did not include the labor and materials necessary to perform the repairs,” the question of “[w]hether the repairs were actually done is not relevant to whether [the insurer] breached their contract with the insureds by failing to include sufficient time and materials to pay for all necessary repairs to return the car to pre-loss condition.” It further observed that testimony by the insurer’s own witnesses was sufficient to support the inference that the repairs not specified on an estimate were not actually performed.

In addition to reversing the trial court’s decision to grant the defendant insurer’s JNOV, the court also rejected the insurer’s cross-appeal of numerous issues decided in the plaintiff’s favor, including the insurer’s denial of plaintiff’s motion to decertify. The insurer contended that decertification was warranted due to the need to “compare each individualized vehicle’s pre-loss condition to the vehicle’s post-loss condition to determine whether aftermarket parts were, in fact, used to repair the vehicle, and to determine whether the omitted repairs were actually performed.” Given its rejection of this theory of liability, the court held that the insurer’s arguments regarding class certification were without merit.

Final Comparisons

As noted above, the Missouri Court of Appeals held that *Smith* was distinguishable from *Avery* because *Avery* concerned the installation of aftermarket parts rather than the specification of such parts. In so doing, the *Smith* court failed to recognize that while the allegations set forth in the *Avery* complaints indeed focused upon the installation of aftermarket parts (and these allegations remained an element of plaintiffs’ case at trial), the *Avery* plaintiffs shifted their focus at trial to the specification of aftermarket parts by the insurer in an effort to make the case more amenable to class-wide proof. The Illinois Supreme Court rejected this theory of liability on the grounds that “any injury resulting from non-OEM parts would be inflicted, not by the mere *specification* of such parts in an estimate, but by the use of the parts in the repair of a vehicle.” *Avery*, 835 N.E.2d at 831.

Therefore, notwithstanding the Missouri Court of Appeals' assertions to the contrary, *Smith* cannot be viewed as anything less than a repudiation of the Avery court's conclusion that litigation pertaining to an automobile insurer's designation of aftermarket parts on repair estimates is not amenable to class certification. Given the amount of damages at issue, it is reasonable to assume that *Smith* will be appealed to the Missouri Supreme Court. If the court accepts review of the case, then its ultimate disposition of the matter may ultimately determine whether *Smith* has the potential to encourage a "second wave" of class-action litigation against automobile insurers pertaining to the repair of insured vehicles.

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