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Aftermarket Parts and Their Consequences In Litigation

By Brett A. Emison

According to the Automotive Aftermarket Industry Association, aftermarket products represent a $257 billion market in the United States. The automotive aftermarket is the segment of that industry that focuses on the manufacturing, remanufacturing, distribution, retailing, and installation of all vehicle parts, tools, equipment and accessories for vehicles, after the sale of the automobile by the original equipment manufacturer to the consumer.

As published in the Motor Vehicle Industry Overview Series by the Internal Revenue Service, aftermarket products comprise a large part of the automotive industry. (available at www.irs.gov/businesses/article/0,,id=175582,00.html) Whether an aftermarket alteration is made by a dealer, a fleet owner or automobile lessor who then sells or leases an altered vehicle — all these individuals can be held responsible for defects in the modification.

This article addresses the potential areas of liability for a lessor of automobiles in cases where an aftermarket alteration has been made, particularly if that lessor is the party who executed or authorized the change. Those who make modifications to vehicles or design and sell aftermarket parts are really manufacturers or, at a minimum, co-manufacturers with the original product manufacturer, and thus may be liable in cases of product defect.

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Aftermarket Component Parts

There are two primary areas of concern when discussing aftermarket parts:

1) The aftermarket component itself. It is common for dealerships to do repairs and bodywork on automobiles that have been in crashes. Often these repairs are subsidized by insurance companies that are incentivized to repair a consumer's vehicle for the lowest possible cost. Original Equipment Manufacturer ("OEM") parts are often passed over in these situations, losing out in favor of aftermarket or salvage parts, in order to cut costs where possible.

2) Aftermarket vehicle modifications using non-OEM parts. Even greater problems result when vehicles are modified from their original configuration. There are thousands of vehicles on the road that have been modified before being put into use. Examples of modified vehicles include conversion vans, recreational vehicles (RVs), ambulances, limousines, handicapped accessible or mobility vehicles, off-road vehicles, mobile lifts, or mobile cranes. Unlike the OEM manufacturers, aftermarket vehicle manufacturers may not be required to comply with the Federal Motor Vehicle Safety Standards ("FMVSS").

In the author's opinion, aftermarket product defects are common, and the resulting injuries are often catastrophic. However, many times these claims are not identified and these cases not pursued. Victims should investigate whether an aftermarket component or aftermarket modification contributed to cause their injury.

Insurance companies routinely claim that recycled, reused and/or aftermarket parts are "like-kind and quality" to OEM parts. In fact, many insurers try to require such parts (when state law permits) when making repairs. However, most car makers warn that using aftermarket or salvaged parts may put vehicle owners at risk in an accident or collision.

For example, on Nov. 30, 2010, Toyota announced that it recommend against the use of alternative parts for the repair of Toyota vehicles. "Toyota's recommendation is to use only OEM parts due to the lack of testing and potential safety and performance risk of alternative parts," according to Toyota's press release. (available at http://abrn.search-autoparts.com/abrn/data/articlestandard//abrn/502010/699466/article.pdf)

Ford Motor Company issued its own press release regarding non-OEM parts just a day earlier. Ford's aftermarket parts warning included the results of tests performed by Ford's Material Composition and Computer Aided Engineering department comparing OEM bumper beams, bumper isolators, bumper brackets, and radiator supports to their aftermarket equivalents.

The Ford tests found major differences between genuine Ford original equipment replacement parts and aftermarket copies. Ford found that non-OEM parts performed differently in crash tests because the aftermarket parts were not of like kind and quality as Ford's original equipment and certified replacement parts.

Paul Massie, the powertrain and collision product marketing manager at Ford, said the tests "highlight the dangers of being penny-wise and pound-foolish, as less-expensive copy parts could lead to much higher repair costs down the road. All drivers should be aware that copy parts can compromise both the safety performance and the long-term repair costs of your vehicle." (http://ohsonline.com/articles/2010/11/30/ford-questions-safety-of-aftermarket-parts.aspx)

Ford's release stated that "(r)epair estimates show aftermarket copy bumper beams can more than double the repair costs after even a low-speed accident compared to a genuine Ford replacement bumper beam. Aftermarket copy parts are parts unauthorized by the vehicle manufacturer, often

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constructed with substandard materials in order to be marketed as a cheaper alternative to authorized replacement parts. Ford replacement crash parts, including all structural parts, are identical to those used in new vehicle production and operate seamlessly with the vehicle's safety system."

Representatives of aftermarket product manufacturers quickly responded to the statements by Ford and Toyota. The Automotive Body Parts Association quickly released its own response. Eileen Sottile, co-chair of the ABPA's Legislation & Regulation Committee, said: "Ford's findings were devoid of any qualitative or quantitative information related to occupant injury or variances in the timing of airbags depending on the use of aftermarket or OEM parts. This should be an eye opener for all consumers. The car companies will shamelessly attack the aftermarket industry and utilize scare tactics to turn consumers away from non-OEM replacement parts. All drivers should be aware that aftermarket parts are often produced by the same manufacturers that supply the car companies and that their safety performance rivals and can even exceed those of OEM parts." (ABPA press release available at: www.prnewswire.com/news-releases/abpa-ford-fails-to-make-case-against-aftermarket-parts-after-releasing-critique-devoid-of-data-to-support-its-assertions-111604774.html)

Transparency and Disclosure

According to a 2009 report filed with Connecticut's General Assembly, at least 35 states have enacted statutes or regulations concerning non-OEM aftermarket or reconditioned parts used in vehicle repairs. Legal requirements governing reconditioned and aftermarket components vary by state, but most are a variation of a National Association of Insurance Commissioners ("NAIC") model regulation on the subject, according to the report. Of the 35 states identified:

- 31, including Connecticut, require a disclosure statement with the repair estimate concerning the use of non-OEM parts;
- 20 require the manufacturer of the non-OEM aftermarket part to be identified;
- 13 require the non-OEM parts to be of "like kind and quality" to OEM parts; and
- six require a customer's consent before using or requiring the use of non-OEM parts.

In light of this data, the first step for anyone altering a car with aftermarket parts should be to be upfront and clear with customers. Many of us have been in repair shops (the good ones) where the proprietor will explain to the consumer what an aftermarket part is, and what the cost differential is upfront (and will do so before making the repair).

Aftermarket Parts and Causation

A 2003 trial in Maverick County, TX (west of San Antonio), against Stoneridge, Inc., may serve as a good example of what is at stake. In this case, the jury awarded a total of $45 million in damages due to defective design, defective marketing and negligence. The plaintiffs, whose son had died in a Ford F-150 crash in 2000 (but was conscious and suffering pain for three minutes after the truck burst into flames), alleged that Stoneridge was negligent in marketing an aftermarket valve without warning against installing the valve on a vehicle equipped with plastic fuel lines. *Raul Mata & Nelda Mata v. Stoneridge, Inc. and Ford Motor Co., Tex. Dist.*, No. 01-11-17707.

In *Mata*, the plaintiffs' truck's quick connect fittings would not attach to the Stoneridge aftermarket valve, and the only way to install the valve and connect it to the existing fuel lines was by cutting the plastic lines and adding a rubber hose. However, even that configuration would result in a poor and unsafe connection that would be prone to leaking. The plaintiffs argued that Stoneridge was negligent in marketing the aftermarket valve without warning against installing it on a vehicle equipped with plastic lines.

The subject vehicle had two fuel tanks, and at the time of the incident the driver noticed that the fuel was low in one tank, so she flipped a switch to convert to the second tank. A few minutes later, the truck caught on fire. The victim's family sued Ford Motor Co. (which settled prior to trial) and Stoneridge Inc., based in Warren, OH. The plaintiffs alleged that the fire was fuel-fed and originated in the immediate vicinity of the fuel tank selector valve, and that the fire was caused by a defective aftermarket valve used to switch lines between the fuel tanks on the truck.

Instructions provided by the manufacturer specifically directed installers to cut the existing fuel line and use properly tightened clamps and a fuel-approved flexible hose to connect the valve to the fuel system. Evidence pointed to the aftermarket valve being marketed as a universal replacement valve (for $30, compared to a $130 replacement valve at Ford dealerships), that it was sold after 1985 at auto parts stores and that it was installed in the manner in which Stoneridge instructed on its installation sheet.

Stoneridge denied the allegations, and argued that the aftermarket valve was manufactured for use with rubber fuel lines, mainly in specialty vehicles such as ambulances, fire trucks and school buses. Stoneridge maintained that it never marketed the aftermarket valve as a replacement valve for the F-150, contrary to the plaintiffs' argument. It also argued that it could not be held liable for failing to warn the plaintiffs because the aftermarket valve could have been purchased from a salvage or junkyard, or it could have been manufactured before the 1985 F-150 was designed. Stoneridge also argued that it was impossible to determine the exact cause or origin of the fire. However, the jury found Stoneridge and its aftermarket part to have caused the fire.

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Aftermarket Products and Quality

In addition to causation is the question of quality — an aftermarket product or alteration doesn't need to result in an accident to become the subject of a lawsuit. In a 2007 class action in Jackson County, MO, a jury found that American Family Insurance breached its policy contract with class members and awarded them $17,385,000 in damages. The problem: Each insured class member's vehicle had been repaired with aftermarket parts, which were deemed inferior to OEM parts. *Nicholas Smith, Amy Johnson and Bryce Johnson, individually and on behalf of others similarly situated v. American Family Insurance Co.*; Mo. Cir., No. 00-CV-211554.

The class members (approximately 30,000 Missouri residents insured by American Family Insurance Co. who had automobile property damage claims between May 11, 1990, and Dec. 1, 2004) sought $17,385,000 in parts and omitted repair damages. The value differential in this case was arrived at by evaluating the costs of repairs that the insurance company failed to pay in OEM parts versus the amounts it did pay in aftermarket parts, on each class member's vehicle.

The insureds claimed that the insurance company paid for inferior aftermarket parts to be used to make repairs to their damaged vehicles and systematically failed to pay for repairs that were essential to properly repair their vehicles. The class successfully sued American Family Insurance for breach of contract.

The plaintiffs' primary argument was the inferiority of the aftermarket products. Plaintiffs' reverse-engineering expert testified that the process employed by the aftermarket manufacturers wouldn't yield aftermarket parts "of like kind and quality" to OEM parts.

The defendant denied the allegations and unsuccessfully argued that the aftermarket parts were not systematically inferior. The defense mechanical engineer expert and defense mechanical engineer both testified about the inspection of both the aftermarket and OEM parts, and that they were both equal in quality — but the jury's conclusion was that they were not equal. The award of nearly $17.4 million illustrates the risks inherent in the utilization of aftermarket parts.

A 2009 Oklahoma case involved a young man who burned to death in a Ford van modified for handicapped accessibility. In that case, the victim's family alleged that an aftermarket throttle control system malfunctioned, causing the vehicle to run out of control. *Duane Boeckman and Bernadette Province v. Ford Motor Co., John Vance Auto Group, LLC, John Vance Motors, Inc. d/b/a Newby-Vance Mobility and Newby Mobility, LLC.*, Okla. Dist., No. CJ-2007-161.

Compounding the problem, the aftermarket vehicle modifier moved the fuel tank to accommodate a dropped floor without consulting an engineer or reviewing the vehicle's design documents. Instead, the aftermarket modifier simply cut the vehicle in half, relocated the tank, and routed an aftermarket fuel filler pipe more than five feet through the van's rear wheel well. In deposition, the person most knowledgeable at the aftermarket modifier testified he did not know how to relocate a fuel tank and had never even heard of Federal Motor Vehicle Safety Standard ("FMVSS") 301, governing fuel system performance.

Plaintiffs alleged that, after the vehicle accelerated out of control, it crashed and the aftermarket fuel filler pipe was severed, permitting gasoline to pour out from the fuel system. The fuel caught fire, burning the young man alive as he was trapped inside the vehicle.

In the author's opinion, many aftermarket modified vehicles are not robust or "crashworthy," meaning they will not provide adequate protection in an accident or collision. In some cases, the modifications may actually cause a collision or make otherwise minor injuries worse during a crash.

Aftermarket vehicles may be literally cut apart and put back together again without any blueprints, drawings, testing or safety analysis. Most owners and occupants have no idea the vehicles are not tested for safety.

As in the Oklahoma case, it is the author's opinion that many modifiers of vehicles with aftermarket parts fail to observe even basic engineering practices. Such conduct, such as failure to have an engineer on staff, failure to consult an engineer when designing the modifications, failure to implement quality or process controls, and failure to test the modifications can have devastating effects on those using the aftermarket and/or modified products.

It's Not Just Cars

Aftermarket components are not limited to vehicles and are used in a wide variety of goods and industry sectors. Those parties too have been on the losing side of a dispute over their product. Aftermarket products can be found in a wide variety of products. For example, in January 2007 a 15-year-old girl was awarded $529,941 for a permanent scar on her thigh that measured approximately four-inches-by-six-inches. The third-degree burn was due to an aftermarket cellular telephone battery exploding in her pocket. *Demetrius Carter v. Nokia, Inc., Platinum Cellular Corp., City Beepers of Tampa, Inc., and Leader Wireless, Inc.*, Fla. Cir., No. 04-10497.

All defendants had settled for confidential amounts prior to trial, with the exception of Leader Wireless — which was responsible for the aftermarket battery. Even an aftermarket product as small as a cellular telephone battery can play a significant role in altering someone's life for which a jury can find the manufacturer of that product liable.

Conclusion

Entities involved in the leasing of equipment should be cognizant of how an aftermarket vehicle affects the nature of the piece of machinery that they're leasing. Since insurance companies and product manufacturers continue to cut corners by incorporating aftermarket components

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rather than original equipment or certified OEM parts, this is at the very least an industry trend that bears watching.

In the author's opinion, aftermarket components and modified products are often inferior in design, quality and performance to original equipment. However, despite these deficiencies, design defects in aftermarket and/or modified products are rarely identified as the source of injury or death.

Product manufacturers must be aware of the limitations of such products and the devastating effects aftermarket products can have on the users of their products. Attorneys should be aware of these products and their inherent deficiencies when investigating death and catastrophic injury claims.

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Data Eradication

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data-eradication results at the end of use. A growing number of third-party service providers are offering a variety of data security services, including software overwriting, data removal and destruction, and resetting options, either at the client's facility or upon receipt of the equipment at the service provider's depot center.

The ultimate data eradication method for any data storage device is removal and total destruction of the device. Destruction can be performed in a variety of ways, but it usually involves shredding, drilling, or incinerating the storage device. Full data eradication involves replacement of the data storage device and a separate certification and reporting process for the completion of the eradication. Only a few service providers can offer this level of data eradication as a viable solution.

Storage drive removal and degaussing is another method of total data eradication. Degaussing uses a machine that produces a strong electromagnetic field to destroy the magnetically recorded data on the hard drive. While this process is proven to be a reliable data eradication option, it does present some drawbacks. First, degaussing usually renders the storage drive unusable, so a new drive would need to be installed and reinitialized. Secondly, hard drives that have been degaussed exhibit no change in their physical appearance, so verification that the process has been completed can be difficult. Finally, no reporting or certification process is created as a result of degaussing — or any of the other data eradication techniques, for that matter. A separate certification and reporting step would need to be created and recorded each time degaussing or any of the other data eradication techniques are used.

Since copiers employ many of the same data-storage technologies used in modern computers, software and hardware designed to erase computer hard drives can frequently be employed in eradicating data stored within copiers and MFPs. In nearly every such case, the storage device will need to be removed from the copy machine or MFP and placed into a computer or separate hardware device for processing. The storage device is then erased by writing a series of data to each section of the drive, in many cases performing this task multiple times to ensure that none of the original data can be retrieved. The resulting level of security obtained is determined by the number of passes that are performed. While one pass may be sufficient, the industry standard is usually three passes. It is best to use a software application that can provide a certification document listing all the technical specifications of the overwriting process.

This software-based solution provides several advantages. First, the hard drive remains physically intact and can be reused and reinstalled into the digital device after it has been cleaned of data. The hard drive can usually be reinitialized through an OEM routine built into most devices. The capability to reuse the hard drive usually adds to the residual or remarketing value of the equipment. Secondly, software-based solutions should provide detailed reporting of the overwriting process that can be linked to the original digital device and thereby verify that its data had been eradicated. Finally, one of the most compelling reasons to consider a software-based data-eradication solution is the ability to perform this process in-house, thereby eliminating the risk of the unit being stolen or lost in transit.

Regardless of the data-eradication method used, it is important to track the entire chain-of-custody of the data storage device in any copier or MFP. Frequently, data stored within a copier or MFP can get lost or stolen when its storage device is removed and subsequently lost or misplaced while in the data destruction process.

The National Institute of Standards and Technology ("NIST") is responsible for defining data security standards for the U.S. government and industry. NIST has published *Guidelines for Media Sanitization* (*NIST Special Publication 800-88*), which outlines the data eradication methods that should be used based on the type of device and security needs of the organization. This publication is extremely important to organizations that work with government agencies or with information from government agencies. NIST 800-88 supersedes the older data security standard published by the Department of Defense (DoD 5220.22-M) and covers a much larger range of data storage devices, including copiers and fax machines.

SOLUTIONS

Regardless of the volume of digital devices used by an organization, a clear, thorough data-eradication process needs to be in place. Whether

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