

Mass. 'Right To Repair' Law Could Put Car Cos. In A Jam

By **Geoffrey Wyatt and Benjamin Halperin** (December 17, 2020, 4:25 PM EST)

On Nov. 3, Massachusetts voters approved a "right to repair" ballot initiative by a vote of 75% to 25%.^[1] The new law will provide vehicle owners and independent repair shops "with expanded access to mechanical data related to vehicle maintenance and repair," and correspondingly restrict manufacturers from limiting private access to these data.^[2]

Although Massachusetts has led the way in approving right-to-repair initiatives and passing related legislation,^[3] a fierce national debate has arisen regarding the right-to-repair movement, which has targeted numerous industries, including automakers, makers of industrial farm equipment and consumer tech companies.^[4]

This debate has only intensified with the proposal and approval of the new initiative in Massachusetts. A coalition of automakers recently filed a lawsuit challenging the new law as preempted and unconstitutional, whereas supporters of the law have already begun to push for national legislation.^[5]

As discussed below, right-to-repair laws have the potential to significantly increase manufacturers' product liability exposure. Automakers selling vehicles in Massachusetts and others potentially subject to these laws should consider both legal and practical ways to protect themselves from lawsuits that may arise when inexperienced or untrained repair persons make mistakes leading to personal injury.

Proponents of right-to-repair laws principally argue that increased competition will lower repair costs for consumers.^[6] Opponents argue, among other things, that such laws inhibit freedom of contract and innovation, while also threatening consumer safety, cybersecurity and the environment.^[7]

Setting aside the merits of these arguments, as a practical matter right-to-repair laws may put manufacturers of vehicles and other sophisticated machines in a difficult position with respect to product liability, by forcing them to choose between violating the laws, or allowing independent shops — and even individual consumers — to repair increasingly complicated, software-based technology.

In the case of the 2020 Massachusetts initiative, the former course could subject automakers to "civil penalties of the greater of treble damages or \$10,000 per violation," and even injunctions against selling vehicles in the state.^[8] The latter course, however, is fraught with litigation risk, as repair errors can have harmful or even deadly consequences when large and sophisticated machines are at issue, potentially expanding manufacturers' exposure to claims sounding in product liability.

In practice, negligent repair might be a strong defense for manufacturers in product liability suits when there is evidence that an injury was more likely caused by a problem with repair than a design or manufacturing defect. For example, *Biehl v. B.E.T. Ltd.*, a 2018 case, concerned an Ohio man who died in an accident following aftermarket repair and installation of a tractor flywheel, with his estate then suing the manufacturer and designer of the flywheel.^[9]



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The defendants prevailed before the trial court and on appeal to the U.S. Court of Appeals for the Sixth Circuit, because the plaintiff "failed to eliminate the possibility that the flywheel exploded due to improper installation." [10] But the litigation lasted over three years, and included claims for punitive damages, illustrating that defending even unmeritorious lawsuits can be time-consuming, expensive and risky.

Indeed, there always is a chance that jurors will side with a plaintiff and allocate at least some liability to a manufacturer, even when there is compelling evidence of negligent repair — especially if the choice is between a solvent manufacturer and an asset-strapped local repair shop. Further, the possibility of negligent repair may not always strategically benefit manufacturers in litigation, since plaintiffs would presumably be aware of viable negligent-repair claims and name local repair shops in lawsuits, defeating diversity and keeping at least some otherwise removable actions in relatively plaintiff-friendly state courts. [11]

Finally, even when manufacturers do ultimately prevail in these suits by successfully pointing to negligent repair by others, they and their brands may nevertheless suffer reputational damage, since "consumers are likely to curse the company whose nameplate is on the front of the [product]." [12] As the U.S. Court of Appeals for the Federal Circuit has explained, a manufacturer has "a plausible legitimate interest in not having strangers modify its products," because "lower quality of remanufactured [products] could harm [the manufacturer's] reputation." [13]

It is unclear what mechanisms, if any, manufacturers have at their disposal to mitigate their liability exposure from right-to-repair laws. For example, can a manufacturer insist that a customer or repair shop complete some amount of training or otherwise display a minimum level of competency with the technology at issue before gaining access? The new Massachusetts law, at least, appears to bar the imposition of such requirements, stating that "access to vehicle on-board diagnostic systems shall be standardized and not require any authorization by the manufacturer." [14]

Can manufacturers protect themselves through the use of waivers or indemnification provisions as a condition for providing access? The new Massachusetts law does not speak directly to this question, although some will likely argue that the same provision would bar such agreements as tantamount to requiring authorization from the manufacturer.

In any event, waivers and indemnification provisions must generally be carefully worded to withstand attacks on grounds of public policy, and therefore tend to invite the very kind of litigation and attendant expenses that they are intended to forestall. Automakers also could potentially provide that independent repair voids their vehicles' warranties — but this may provide little practical protection against personal injury claims, which can be asserted on theories that do not depend on the existence of a valid warranty.

Accordingly, manufacturers — or at least automakers selling vehicles in Massachusetts, for now — might need to think creatively about ways to foster independent repair quality control. This perhaps could include offering training to the independent repair shops in Massachusetts that have expressed interest in providing service. Even in cases where the training is declined, the offer could be useful in later litigation to show good faith and reasonable conduct.

Such training offerings could also help manufacturers identify and stay ahead of repair issues that customers indicate they are having difficulty with, offering opportunities for the manufacturer to intervene, provide guidance and hopefully prevent repair mishaps and potential injuries. Along the same lines, in providing the newly required open-access platforms to vehicle telematics systems, automakers might explore ways to incorporate warnings, manuals or training modules that must be completed or expressly declined with an acknowledgment of the risks.

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[1] E.g., Allison Grande, "Mass. Broadens Vehicle Data Access Despite Privacy Worries," Law360, Nov. 5, 2020.

[2] Secretary of Commonwealth William Francis Galvin, Massachusetts Information for Voters: 2020 Ballot Questions ("MA 2020 Ballot Pamphlet") at 4, 2020. Specifically, starting with model year 2022, vehicles sold in Massachusetts that use telematics systems (which collect and transmit mechanical data) must be equipped with "an inter-operable, standardized and open access platform" which "shall be directly accessible by the owner of the vehicle through a mobile-based application," and which owners can make available to repair shops. *Id.* at 5-6.

[3] The recent Massachusetts initiative in fact updates an existing Massachusetts right-to-repair law (passed in 2012) by attempting to close what proponents considered a "loophole to restrict access to data needed to diagnose problems, make repairs, and perform maintenance." *Id.* at 5. The 2012 Massachusetts law effectively gained national force when many automakers followed its enactment with a memorandum of understanding establishing similar national requirements. Tufts Center for State Policy Analysis, "A Guide to Massachusetts Question 1: Expanding the Right to Repair Law," at 6, Oct. 2020.

[4] See, e.g., Jason Koebler, "Authorized Service Provider' Programs Undermine Our Right to Repair Electronics," *Vice*, Aug. 30, 2016.

[5] See John Huetter, "Mass. 'Right to Repair': Trade groups plan 'REPAIR Act'; OEMs turn to courts; CCC analyzes," *Repairer Driven News*, Dec. 1, 2020; see also *Compl., Alliance for Auto. Innovation v. Healy*, No. 1:20-cv-12090 (D. Mass. filed Nov. 20, 2020).

[6] See, e.g., MA 2020 Ballot Pamphlet at 5.

[7] See, e.g., Mathew Gault, "Newly Passed Right-to-Repair Law Will Fundamentally Change Tesla Repair," *Vice*, Nov. 10, 2020 (discussing automaker argument that the data sharing will increase vulnerability to cyberattacks); *Mem. in Supp. of Pls.' Mot. for Prelim. Injunction* at 3, *Alliance for Auto. Innovation v. Healy*, No. 1:20-cv-12090 (D. Mass. filed Dec. 1, 2020) (summarizing safety and environmental arguments).

[8] *Id.* at 9; MA 2020 Ballot Pamphlet at 6 (additionally allowing for "any remedy authorized by chapter 93A" of the Massachusetts General Laws).

[9] See *Biehl v. B.E.T. Ltd.* , No. 18-3201, 2018 WL 7502930, at *1 (6th Cir. Oct. 17, 2018).

[10] See *id.* at *3.

[11] See *Sabicer v. Ford Motor Co.* , 362 F. Supp. 3d 837, 841-422 (C.D. Cal. 2019) (granting plaintiffs' motion to remand action to state court, rejecting automaker's argument that a local repair shop had been fraudulently joined because the claims against it were barred by the economic loss rule).

[12] Brief of Amicus Curiae Qualcomm Inc. in Supp. of Resp. at 13, *Impression Products. Inc. v. Lexmark Intern. Inc.*, 2017 WL 818304 (U.S. filed Feb. 23, 2017).

[13] *Lexmark Intern. Inc. v. Impression Products Inc.* , 816 F.3d 721, 752 (Fed. Cir. 2016), rev'd and remanded, 137 S. Ct. 1523 (2017).

[14] See MA 2020 Ballot Pamphlet at 5.