

Joint Statement of the American Insurance Association, National Association of Mutual Insurance Companies, and Property Casualty Insurers Association of America

United States Patent and Trademark Office
Town Hall Meeting

June 16, 2008

Thank you for this opportunity to present the views of auto insurers regarding the impact of design patent protection on the auto repair process. The American Insurance Association (AIA), National Association of Mutual Insurance Companies (NAMIC), and Property Casualty Insurers Association of America (PCI) are the three national property and casualty insurance company trade associations and we represent the vast majority of auto insurers in the United States. While, as trade associations, we advocate for pro-competitive laws, regulations and judicial outcomes, we do not recommend particular repair policies, including the use or non-use of OEM and non-OEM parts.

We are pleased and encouraged that the USPTO is examining the policy issues and implications relative to design patent protection for individual replacement auto parts because we are concerned that ongoing legal proceedings involving a novel application of design patent rights would harm our members' policyholders by increasing auto repair costs, which would necessitate higher insurance costs. We believe these legal proceedings could establish precedent that could virtually eliminate competitive aftermarket repair parts from the marketplace.

Consumers Have Benefitted From the Availability of Competitive Repair Parts

American consumers have benefited greatly from lower repair costs, and consequently lower insurance costs, as a result of the availability of competitive repair parts. The parts at issue are sheet metal or plastic exterior body parts which are also referred to as aftermarket parts, crash parts or generic parts. Prior to the development of a competitive repair parts market in the 1970s and 1980s, auto manufacturers had no competition for crash parts. Consumers who needed to repair their automobiles had to obtain replacement parts from original equipment manufacturers (OEMs). They could not choose to purchase lower-priced parts, and the price of the OEM parts they had to purchase did not reflect competition. The availability of competitive repair parts has resulted in lower-cost options, customer choice, and lower prices for OEM parts.

Original equipment manufacturers and others have tried a number of methods over the years to prohibit or limit the use of competitive parts. Critical claims regarding fit,

quality and safety have been found to be largely unfounded, and assurances are provided through certification. Significantly, state legislators, having had the benefit of vigorous debate on the merits of competitive repair parts, have in several instances recognized the benefits that accrue to consumers as a result of their availability by specifically authorizing or even requiring their use in certain circumstances. Likewise, Congress rejected an attempt by original equipment manufacturers to obtain stronger patent protection through the legislative process rather than litigation. Insurers' use of competitive repair parts was also threatened by a class-action lawsuit initiated in Illinois in 1997 that also failed.

Design Patent Protection is the Latest Attack on Competitive Parts

The novel application of design patent protection to individual auto repair parts in the case of *Ford v. Keystone* now pending in the United States Court of Appeals for the Federal Circuit is the latest attempt by original equipment manufacturers to eliminate competition in repair parts. If Ford is successful in asserting design patent rights to prohibit the manufacture, sale, or importation of repair parts for one of its vehicles, presumably it may repeat the process for other vehicles (in fact it has already initiated such proceedings), and other manufacturers may follow suit. Given the term of patent protection in light of the typical life of an automobile, it is reasonable to expect that successful assertion of design patent rights in this manner will effectively eliminate the market for competitive replacement parts.

Due to our concern that this litigation may result in the elimination of competitive repair parts from the marketplace, forcing insurance policyholders and others to pay higher repair costs, we have joined with consumer groups and other organizations in filing briefs with both the International Trade Commission and the Federal Circuit Court. In those filings, we assert, as we do here, that the development of a non-OEM market for repair parts has benefited the public, and that consumers would be adversely affected if non-OEM parts were no longer available. In the Federal Circuit brief, we also argue a point that we would urge the USPTO to consider closely, that the parts at issue are not the proper subject matter for design patent protection. Because the Federal Circuit has, in the past, found exterior automobile component parts to be functional rather than ornamental, it is our view that these parts are not design patentable subject matter.

If these arguments are unavailing in the courts and administrative agencies, and if Congress does not act to establish a right to repair exception to design patent protection, competition for these parts could disappear. If this happens, the detrimental impact on consumers will be significant.

The Effects of Eliminating Competition

As repeatedly documented by the Insurance Institute for Highway Safety, even very low speed crashes can result in thousands of dollars of damage, including the replacement of crash parts. Eliminating competition for auto body repair parts would increase repair costs, and consequently insurance costs, in several ways. It would eliminate a low-cost

option and necessitate that all repairs utilize more expensive OEM parts. It has been estimated that competitive aftermarket parts are currently priced 34 percent to 83 percent lower than the comparable OEM parts.

This comparison does not tell the whole story, though, because current OEM prices are tempered by competition from the availability of aftermarket parts. The impact of eliminating such competition can be demonstrated by considering the pricing of individual parts before and after the availability of competitive parts. For instance, the price of a part for a 1983 Chevy Camaro produced by GM dropped 31 percent from \$325 to \$225 after generic parts became available, and the price of a Toyota-manufactured fender for a 1992 Camry that was initially priced at \$253 fell 43 percent to \$143.88.

Therefore, without the availability of competitive aftermarket repair parts, consumers would have no choice but to purchase higher-priced OEM parts, and the prices for those parts would be higher due to an elimination of competitive pressures that exist today because of the option of purchasing aftermarket parts.

By increasing the overall costs of repairs, the lack of availability of competitive repair parts could affect not only the cost of parts but also the decision of whether to repair or replace a damaged car. Higher parts costs result in higher repair estimates, and if a repair estimate exceeds the value of the vehicle, it is considered a total loss which is not worth repairing. In this way, by eliminating competitive repair parts from the marketplace, manufacturers would benefit not only from increased unit sales and higher prices for parts when repairs are made, but also increased sales of new cars when consumers find that higher repair costs force them to purchase rather than repair. Consumers would be harmed therefore both by having to pay higher repair costs and by having to purchase a replacement vehicle rather than being able to have their own vehicles repaired in a cost effective manner.

Eliminating the availability of aftermarket parts would also mean that consumers would have no options when they face delays in getting parts from original equipment manufacturers when needed for repair. Original equipment manufacturers would be able to control the supply of parts and length of time in which supply is replenished for a given vehicle. This would result in higher costs as well as inconvenience for consumers.

Examining the Balance of Interests

We recognize that patent law balances the interests of rights holders with other interests in order to promote and reward innovation. In the case of aftermarket auto body repair parts, we believe that the design patent protection for individual parts being asserted in *Ford v. Keystone* would strike an improper balance between the ability of manufacturers to reap rewards for their investment in design and the interests of consumers in benefiting from competition and having lower-cost options for repairs.

The notice issued for this meeting states that the automotive industry “invests millions of dollars creating unique and distinctive designs for motor vehicles.” It must be noted that

this investment has taken place for decades without design patent protection for individual auto body parts. As a result, it is hard to see how the policy reasons for design patent protection which eliminates competition would be advanced by such protection.

It is likewise essential to point out that auto manufacturers are rewarded for creative and innovative design at the point of sale of the vehicle. A creative and innovative design presumably will make an automobile more desirable to consumers, increasing demand which can lead to higher unit sales at higher prices.

But once the sale is made, the manufacturer's reward for creativity should end. The manufacturer should not be able to reap additional benefit at the consumer's expense due to the fortuitous event of an accident that requires repair. When a repair is necessary, the creative or innovative design of an individual part is not an operative factor. The consumer is no longer making a choice based on creativity or innovation. The consumer's only objective at that point is restoring the vehicle to its pre-accident condition.

The fundamental issue at hand, in other words, is not whether design patent protection should be available for a distinctively designed entire product, i.e., an automobile, but whether it should be applied to an individual part. We believe that in the case of auto body repair parts, it should not.

In sum, we believe that a comprehensive consideration of policy issues and objectives shows that the potential harm to consumers that would occur from the elimination of competitive repair parts greatly exceeds any societal benefits that would be gained from the application of design patent protection to individual parts. Vehicle owners, our members' auto insurance policyholders, should continue to be allowed to choose to have their autos repaired with lower-priced aftermarket parts, and they should continue to benefit from competition that minimizes repair costs.