

Testimony of the
Property Casualty Insurers Association of America
House Judiciary Committee
Hearing
“Design Patents and Auto Replacement Parts”

March 22, 2010

Introduction:

Chairman Conyers, Ranking Member Smith, and other esteemed members of the Committee, my name is Robert Passmore, and I am Senior Director of Personal Lines Policy with the Property Casualty Insurers Association of America (PCI). PCI is comprised of more than 1,000 member companies, who together write 44 percent of the automobile insurance in the United States representing more than \$84 billion in premium. I would like to commend you for holding this important hearing and thank you and your staff for this opportunity to present our views on the impact of design patent enforcement on automotive collision repair parts and express our support of HR 3059, the “Access to Repair Parts Act,” introduced by Congresswoman Lofgren and cosponsored by Congressman Boucher, Congressman Cohen, Congressman Delahunt, and Congresswoman Jackson-Lee, among others.¹

PCI strongly supports Congresswoman Lofgren’s legislation, and we commend her, and the other original sponsors, for leading the effort to ensure that 14-year design patents cannot be used to eliminate competition and consumer choice with respect to automotive collision repair parts. Recent design patent enforcement activity by one car company, and the recent, dramatic increase in the number of design patents on collision parts obtained by many of the major car companies makes this legislation and hearing particularly timely and critical.

To be clear, the collision repair parts to which I am referring are the cosmetic, exterior parts of an automobile that typically get damaged in an auto accident or fender bender. Examples include fenders, quarter panels, bumper covers, grilles, and other similar parts. Generally

¹ Senator Sheldon Whitehouse of Rhode Island has introduced identical legislation as well.

speaking, these are not structural or safety-related parts designed to be part of a vehicle's collision management system, like reinforcement bars or bumper brackets. In fact, the Insurance Institute for Highway Safety ("Institute"), through crash testing and crashworthiness evaluations, consistently has found that, generally speaking, cosmetic, exterior parts "serve no safety or structural function . . . [t]hey merely cover a car like a skin."² Moreover, the Institute has found that whether a cosmetic collision repair part is a car company part or an alternatively supplied part "is irrelevant to crashworthiness."³

All that said, it is the car companies' enforcement of design patents on cosmetic, exterior parts which brings us here today.

Background and Benefits of Competition in the Automotive Collision Repair Parts Market:

By way of background, for decades, consumers involved in car accidents or fender benders typically have had a competitive choice between a car company or an alternatively supplied collision repair part. As explained above, these are the cosmetic, exterior parts of an automobile that typically get damaged in an auto accident or fender bender.

It is worth noting that the car companies already have captured about 73 percent of the market for collision repair, while alternative suppliers only have about 12 percent.⁴ However, despite the alternative suppliers' relatively small market share, the competition and choice they provide consumers are still very important. That's because alternatively-supplied collision repair parts typically are 26% to 50% less expensive than the car company parts, and the mere existence of competition for a given part results in the car companies lowering their

² "Status Report," Insurance Institute for Highway Safety, Vol. 35, No. 2, Feb. 19, 2000. *See also*, Insurance Institute of Highway Safety, *Statement Before the Property-Casualty Insurance Committee of the National Conference of State Legislators*, "Institute Research on Cosmetic Crash Parts," July 7, 2005.

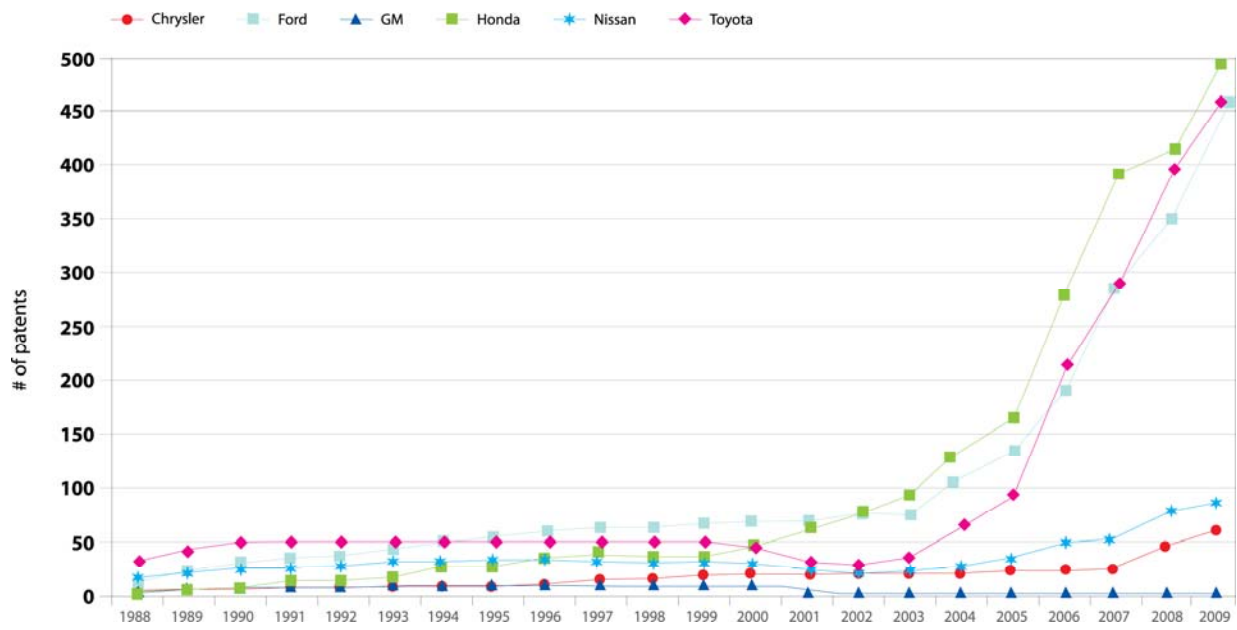
³ *Id.*

⁴ Recycled parts comprise the remaining 15 percent of the market.

corresponding part's price by 8%.⁵ The estimated total benefit to consumers from the availability of competitive alternatives is approximately \$1.5 billion a year.⁶

Design Patents Are Being Used to Eliminate Competition and Consumer Choice:

Despite all of the demonstrated benefits of consumer choice and competition from alternative suppliers of collision repair parts, the car companies appear to have formulated a new business strategy to eliminate competition by obtaining and enforcing design patents on their collision parts against alternative suppliers of such collision repair parts. More specifically, around 2003 and 2004, many of the car companies began to dramatically increase the number of design patents they were obtaining on individual component collision parts of the automobiles they manufacture. Obtaining design patents on these individual parts is a significant departure from the car companies' past behavior, when they may have obtained design patents on the overall design of their cars, but did not place much, if any, emphasis on the component collision parts. Below is a chart on the cumulative number of crash part design patents owned by the major car companies.



⁵ Consumer Benefits from a Competitive Aftermarket for Crash Parts., R.W. Boulten, MiCRA Consulting & Research Associates, Inc., 2008.

⁶ *Id.*

The car companies have lobbied Congress for decades in an effort to amend federal copyright law to enable auto manufacturers to obtain protection of their designs for individual crash parts through a design registration scheme.⁷ Consumer groups and others oppose such efforts because of concerns about the anti consumer effects on repair parts, and Congress has rebuffed the car companies efforts in this regard.

Then, in December 2005, Ford Global Technologies (Ford) took the *unprecedented* action of filing a Section 337 case at the International Trade Commission (ITC) against companies in the alternative parts industry for allegedly infringing design patents held by Ford on various exterior parts for the Ford F-150 (model years 2004-2007). On December 4, 2006, the Administrative Law Judge held that seven of the design patents were valid and infringed and issued an exclusion order on those parts.⁸ The exclusion order went into place on August 6, 2007, banning the importation of those parts and, until a legal settlement was reached in April of 2009, competitive choice was effectively eliminated in the United States for those seven Ford F-150 exterior collision repair parts. Therefore, for almost 2 years, the car company was the one and only source for the purchase of these seven collision repair parts for their trucks.

I would point out that there is no room for innovation by alternative suppliers of these collision repair parts so as not to be accused of infringing on the car companies' design patents. Their purpose is only to restore the vehicle's original appearance and function. They have no other use. In fact, many state laws require that alternatively supplied collision repair parts be of "like kind and quality" in "fit, finish and performance" to car company parts. Consumers demand "must match" parts to restore their cars to their original appearance after an accident, but after Ford's unprecedented actions at the ITC, alternative suppliers are in the untenable position of complying with state law and consumer demand while, simultaneously, facing allegations of design patent infringement by the car companies. Design patents, when applied to these parts in

⁷ See, e.g., Hearings before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice on H.R. 902, the "Industrial Innovation and Technology Act of 1987, H.R. 3017, the "Industrial Design Anti-Piracy Act of 1989, and H.R. 3499, the "Design Protection Act of 1989; Testimony of Greg P. Brown, Ford Global Technologies, before the Senate Finance Committee, March 13, 2008.

⁸ Lower bumper valance (2WD), lower bumper valance (4WD), side view mirror (LH/RH), honey comb grille, head lamp (LH/RH), tail lamp styleside (LH/RH), and tail lamp flareside (LH/RH).

the aftermarket, serve only to restrict or eliminate competition and facilitate a monopoly on replacement parts.

In addition, on May 2, 2008, Ford filed yet another Section 337 complaint at the ITC, alleging design patent infringement for eight parts for the Ford Mustang (model year 2005). Not insignificantly, the legal defense costs in both the F-150 and Mustang cases were enormous and mounting. While the ITC's decision in the Ford F-150 case was pending on appeal at the Federal Circuit, and the ITC ALJ hearings were about to commence in the Ford Mustang case, Ford reached a settlement with one alternative supplier.

While many of the settlement's details remain confidential, publicly available information suggests that the settlement is very limited in nature. It's only between Ford and one alternative parts distributor, and it only lasts until Sept. 2011. As such, nothing in the settlement prevents any of the other car companies from filing a complaint at the ITC today and continuing to eliminate competition. Nothing in the settlement prevents Ford from marching right back to the ITC as soon as the settlement expires in 2011 and continuing its effort to eliminate competition.

Moreover, the settlement reportedly requires the alternative supplier to now pay a royalty and licensing fee to Ford. And while the alternative parts are still less expensive than Ford parts, the royalty and licensing fee likely will result in increased repair costs for consumers.

Therefore, despite the temporary settlement between Ford and one alternative supplier, we cannot sit and simply cross our fingers that the car companies will simply ignore future opportunities to exploit their design patents and wipe out competition. Congress should act now, before it's too late.

The Effects of Eliminating Competition on Collision Repair Parts:

If competition is eliminated, PCI estimates that \$3 billion would be added to insurers' costs, which would be passed on to consumers in the form of higher insurance premiums.⁹ The effect of eliminating competition on collision repair parts would not be limited to consumers' auto insurance costs. Consumers that pay for their own repairs out of pocket would bear these costs directly, or might choose to forgo repairs, leading to more rapid deterioration and depreciation of their vehicles. Higher repair costs also means that there is an increased likelihood of a vehicle being declared a total loss, compelling consumers to replace the vehicle, pay off a loan that may exceed the value of the vehicle, and seek financing for the purchase of a replacement vehicle, all of which depletes savings. In tough economic times like these, these kinds of added costs hurt consumers that much more. The impact of all of these factors would be much greater on low income or fixed income consumers who can least afford it.

The Access to Repair Parts Act:

In June 29, 2009, Congresswoman Lofgren introduced the "Access to Repair Parts Act"¹⁰ in order to address the clear and present danger posed by car companies' use of design patents to eliminate competitive choice in the aftermarket for collision repair parts. Congresswoman Lofgren's approach, known as a "repair clause," is substantially similar to how Europe¹¹ and Australia have confronted identical intellectual property concerns regarding collision repair parts.

⁹ *Analysis of the Impact of Banning Aftermarket Parts*, Property and Casualty Insurers Association of America, January 19, 2010.

¹⁰ The "Access to Repair Parts Act" is substantially similar to legislation that Rep. Lofgren introduced in the 110th Congress, H.R. 5638. On June 29, 2010, Senator Sheldon Whitehouse (D-RI) introduced legislation identical to H.R. 3059.

¹¹ Nine European countries (Italy, Belgium, Hungary, Ireland, Latvia, the Netherlands, Poland, Spain, and the UK) have enacted laws which specify that the making and use of a matching exterior auto part to repair an automobile is not an act of infringement. In addition, on December 12, 2007, the European Parliament approved a similar law which would apply to the entire European Union, and ratification by the Council of Ministers presently is pending.

PCI believes the legislation provides a very limited exception to the design patent law, and that this exception would help ensure that alternative suppliers will be able to continue supplying consumers a choice of collision repair parts — when “the sole purpose of the ... part is for the repair...to restore its original appearance.” While protecting competition in the market for collision parts, this legislation would still permit car companies to obtain design patents on their collision parts and enforce them against other competing car companies to prevent them from copying one another’s vehicle designs in the primary market. Therefore, the incentive of the car companies to innovate will be preserved as they design their cars to compete against other car companies for sales.

We recognize that the design of a vehicle represents a substantial investment in its development by the manufacturer that can and should be protected. The design of the overall vehicle may play an important role in consumers’ original choice of such vehicle when it is purchased. PCI respects the investment made by the auto companies in intellectual property when designing their cars, but we join the consumer groups in believing that when a consumer buys a car for \$35,000 in the showroom, puts the title in his pocket, and drives it off the lot, he has compensated the auto company for his share of the intellectual property. American consumers should not be forced to pay a monopoly price on a part such as a fender or a quarter panel whenever it has been damaged in an accident and needs repair. Yet Americans will find themselves in this situation as car companies enforce their design patents on collision repair parts against competitive suppliers – unless Congress enacts the “Access to Repair Parts Act.”

The cost of car ownership already is significant, gas prices continue to fluctuate and Americans are increasingly dollar conscious. We believe it is in the public interest to ensure that U.S. patent law does not eliminate a place in the market for less-expensive, alternative collision repair parts. The “Access to Repair Part Act” does not mandate the use of alternative collision repair parts, nor does it have the government facilitating new entry in the marketplace. Rather, the legislation would simply preserve the traditional place in the market for competition in the sale of collision repair parts. Consumers have come to expect that competition, and they deserve it.

Conclusion:

We are not here today to advocate for the use of one type of part over another, but we are here in support of a measure that we believe would clearly benefit consumers. At its core, this is a consumer issue; the costs of auto body repair are borne by consumers, either reflected in their insurance costs, or directly when they pay for repairs themselves.

We believe that the “Access to Repair Parts Act” will preserve competition in the market for replacement “crash” parts and benefit consumers. We want to thank you again for holding this important hearing and thank Congresswoman Lofgren, and the other original sponsors, for their continued leadership on the “Access to Repair Parts Act.”