STATE OF CALIFORNIA
Dave Jones, *Insurance Commissioner*

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October 8, 2018

David McClune, Executive Director
California Autobody Association
2200 L Street
Sacramento, CA 95816

Re: Insurer Designations Involving Original Equipment Manufacturer (OEM) Parts

Dear Mr. McClune:

The California Department of Insurance (Department) received your request for a legal opinion regarding the issues set forth below. The following legal opinion is issued pursuant to California Insurance Code section 12921.9.[1]

You informed us that the California Autobody Association (CAA) received information indicating that certain insurers are engaged in activities that may constitute unfair insurance claims settlement practices, including but not limited to the following activities:

- Using misleading and erroneous crash parts descriptions
- Forcing auto body and collision repair shops to purchase parts from insurer-specified vendors
- Engaging in consumer price discrimination

The CAA believes that each of the above-referenced activities constitute unfair trade practices under the Insurance Code and the California Code of Regulations because the use of non-standard replacement parts terminology and descriptions on their auto body or collision repair estimates and appraisals does not comply with the requirements of the California Business & Professions Code or the California Bureau of Automotive Repair (BAR) regulations and such terms are untrue, deceptive or misleading.

[1] All references herein to the Insurance Code shall mean the California Insurance Code.

Misleading and Erroneous Parts Descriptions

You informed us that certain insurers use non-standard replacement crash part terminology and descriptions such as "Alt-OEM", "Opt-OEM", and "Surplus-OEM" or other similar terms on their claims settlement estimates and appraisals. You also informed us that these replacement crash parts may be over-production OEM parts, blemished or damaged OEM parts and that such parts may not carry the same new OEM part warranty. Additionally, we understand that different categories of crash parts are frequently combined by insurers on repair appraisals and estimates and called "Opt-OEM", "Alt-OEM" and other similar variations. For example, you informed us that various insurers list parts from an auto-dismantling vendor as "Used" when those parts are actually new OEM parts.

No work for compensation may be commenced by an auto body repair shop and no charges may accrue without specific authorization from the customer. 16 CCR § 3353. Each auto body repair shop is required to give to each customer a written estimated price for parts and labor for a specific job. 16 CCR § 3353(a). Parts and labor must be described separately and each part must be listed in the estimate. Each part listed in the estimate must be new unless specifically identified as a used, rebuilt, or reconditioned part. 16 CCR § 3353(b). The estimate must also describe replacement crash parts as OEM crash parts or non-OEM aftermarket crash parts and each new replacement crash part listed in the estimate must be an OEM part unless specifically identified as a non-OEM aftermarket crash part. Cal. Bus. & Prof. Code 9884.9(c).

The language in 19 CCR 3353(b) requiring that parts listed in a repair estimate be new unless specifically identified as a used, rebuilt, or reconditioned part creates a presumption that a new crash part listed on a repair estimate is an OEM part if it is not specifically identified as a non-OEM aftermarket crash part. This language is intended to discourage the use of potentially misleading or confusing terms for new aftermarket crash parts such as "ALT-OEM", or "OPT-OEM" that may cause customers to believe that they are receiving new OEM crash parts when they are actually receiving a non-OEM aftermarket crash part. *Bureau of Automobile Repairs, Final Statement of Reasons, Electronic Documentation and Authorization Regulations made effective September 13, 2018.* The presumption created is, however, limited to new crash parts because used crash parts may sometimes be difficult to identify as OEM or aftermarket due to manufacturer's markings being painted over, covered with body filler or wearing off. Id.

California Business & Professions Code section 9884.9(c) requires that each written estimate of the cost of the auto body or collision repairs indicate whether each crash part is either an OEM part or a non-original OEM aftermarket crash part and whether each replacement part is new, used, rebuilt, or reconditioned. 19 CCR 3353(b); Cal. Bus. & Prof. Code § 9884.9(c). No other description of replacement crash parts is permissible under the Business & Professions Code. Accordingly, because no other name or designation for replacement parts is permissible under the Business & Professions Code, the use of any terms other than original OEM or non-original OEM in a repair estimate, such as "Optional OEM," "Alternate OEM," or "Surplus OEM" is not permitted.

Furthermore, if a partial loss is settled on the basis of a written estimate prepared by or for the insurer by an auto repair shop, the insurer is required to provide the claimant with a copy of the estimate prepared by the auto repair shop upon which the settlement is based. The estimate prepared by or for the insurer by the auto repair shop must be in accordance with the standards of automotive repair required of auto body repair shops as described in the Business & Professions Code and associated regulations, including but not limited to, Section 3365 of Title 16 of the California Code of Regulations. 10 CCR 2695.8(f).

All invoices for service and repair work performed, and parts supplied must separately list, describe and identify, among other things, each part supplied, in such a manner that the customer can understand what was purchased, and the price for each described part. The description of each part must state whether the part was new, used, reconditioned, rebuilt, an OEM crash part, or a non-OEM aftermarket crash part. 16 CCR 3356(a)(2)(B). Accordingly, because insurers are required to follow the same standards as auto body collision repair shops in connection with repair estimates, insurers are also prohibited from using any description of any replacement part other than new, used, reconditioned, rebuilt, an OEM crash part, or a non-OEM aftermarket crash part.

Unfair Insurance Claims Practices

The California Fair Claims Settlement Practices Regulations provide in relevant part that "[n]o insurer shall require the use of non-original equipment manufacturer crash parts in the repair of an automobile unless, among other things, "the use of non-original equipment manufacturer replacement parts is disclosed in accordance with section 9875.1 of the California Business & Professions Code." 10 CCR 2695.8(g)

California Business & Professions Code section 9875.1 provides in relevant part that "[n]o insurer shall require the use of nonoriginal equipment manufacturer aftermarket crash parts in the repair of an insured's motor vehicle unless the consumer is advised in a written estimate of the use of nonoriginal equipment manufacturer aftermarket crash parts before repairs are made."

In all instances where nonoriginal equipment manufacturer aftermarket parts are intended for use by an insurer, the written estimate must clearly identify each part with the name of its nonoriginal manufacturer or distributor and a disclosure document containing the following in 10-point type must be attached to the insured's copy of the estimate: "This estimate has been prepared based on the use of crash parts supplied by a source other than the manufacturer of our motor vehicle. Any warranties applicable to these replacement parts are provide by the manufacturer or distributer of the parts, rather than the original manufacturer of your vehicle."

Any insurer that makes or disseminates in any manner any statement containing any assertion, representation, or statement with respect to the business of insurance which is untrue, deceptive, or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue, deceptive, or misleading has engaged in an unfair method of

competition and unfair and deceptive acts or practices in the business of insurance. Cal. Ins. Code §790.03(b).

Based on the foregoing, because terms such as "Optional OEM", "Alternative OEM", or "Surplus OEM" do not have generally accepted meanings or definitions and may not be used by any insurer in any auto or body repair estimates, arguably the use of such terms by an insurer is deceptive or misleading and a violation of the California Unfair Practices Act. Moreover, because the use of terms such as "Optional OEM", "Alternative OEM", or "Surplus OEM" in an auto body or collision repair estimate by an insurer arguably implies incorrectly that used, blemished, or returned OEM parts or non-OEM parts are new OEM parts, the use of such terms by an insurer in an auto or body repair estimate is also arguably untrue because these parts are not, in fact, new OEM parts. As a result, if an insurer uses any designation or describes any replacement part as anything other than OEM or non-OEM, such as "Optional OEM," "Alternate OEM" or "Surplus OEM", the use of such terms would constitute a violation of the California Unfair Practices Act.

Requiring Specific Vendors for OEM Parts Purchases

You informed us that certain insurers are requiring auto repair shops to use parts from certain vendors that are priced less than MSRP. You also informed us that although insurers deny that they are requiring auto repair shops to buy replacement parts from their preferred vendors, they also inform the auto repair shops they will not pay a price for a replacement part that is higher than the price quoted by their preferred replacement crash parts providers. That is, the CAA contends that if an insurer limits the price it is willing to pay for a part to a price that is available from only select vendors, the insurer is essentially requiring the shop to purchase replacement parts from such vendors.

No insurer may require that an automobile be repaired at a specific automobile repair shop. Cal. Ins. Code §758.5(a). If the claimant elects to have the vehicle repaired at the shop of his or his choice, the insurer may not limit or discount the reasonable repair costs based on charges that would have been incurred had the vehicle been repaired by the insurer's preferred shop. Cal. Ins. Code §758.5(d). As a result, by refusing to pay any reasonable price for a replacement part that is higher than the price quoted by the insurer's preferred parts vendors, the insurer is limiting or discounting the reasonable repair costs based on the charges that would have been incurred had the vehicle been repaired by the insurer's chosen repair shop thereby preventing customers from using the repair shop of their choice and preventing the policyholder from using any shop other than those shops that purchase their replacement crash parts from the preferred parts vendors of the insurer.

Limiting or discounting the reasonable repair costs based on the charges that would have been incurred had the vehicle been repaired by the insurer's chosen repair shop is a violation of Insurance Code section §758.5(b) (3) and would constitute a violation of the Unfair Insurance Practices Act. Cal. Ins. Code §758.5(f). That is, if an insurer limits or discounts the reasonable repair costs based upon the replacement part prices available from a certain parts vendors, the

insurer would effectively prevent a customer from using the automobile repair shop of his or her choice in violation of Insurance Code section 758.5(b)(3). An insurer would, however, be permitted to reasonably adjust a collision repair shop's written parts price estimate for any part, including new OEM crash parts, if the insurer demonstrates that the price charged by the repair shop for the replacement part is "unreasonable." 10 CCR §2695.8(f).

Consumer Price Discrimination

You informed us that certain auto body repair shops charge a lower price on parts to different consumers based solely on the arrangement the consumer's insurer may have with certain parts providers. You indicated that such part price differentials may be a violation of the Robinson-Patman Act.

The Robinson-Patman Act is a federal law overseen and enforced by the Federal Trade Commission. As such, whether the price differentials you describe in your letter constitute a violation of the Robinsion-Patman Act is beyond the jurisdiction and expertise of the Department. As a result, the Department takes no position regarding whether the replacement part price differentials you describe constitute a violation of the Robinson-Patman Act.

Conclusion

The Department appreciates you bringing these important concerns to our attention. We encourage any of your members or their customers with specific examples of insurers impermissibly describing, pricing, or requiring the use of replacement parts from specific vendors, to contact the Department to permit us to investigate and resolve those specific disputes. These complaints may be forwarded to the Department's Consumer Services Division at:

California Department of Insurance
Claims Services Bureau
300 S. Spring Street, South Tower
Los Angeles, CA 90013
Consumer Hotline at 800-927-4357 (HELP)
Online at: www.insurance.ca.gov

Very truly yours,

Kenneth B. Schnoll
General Counsel & Deputy Commissioner