

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALLIANCE FOR AUTOMOTIVE
INNOVATION,

Plaintiff,

v.

MAURA HEALEY, ATTORNEY GENERAL
OF THE COMMONWEALTH OF
MASSACHUSETTS in her official capacity,

Defendant.

No. 1:20-cv-12090-DPW

**BRIEF OF MASSACHUSETTS RIGHT TO REPAIR COMMITTEE
AS AMICUS CURIAE IN SUPPORT OF DEFENDANT**

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INTEREST OF AMICUS CURIAE

The Massachusetts Right to Repair Committee (“Committee”) is the proponent of the Massachusetts Right to Repair Act of 2020 (“Act”) at issue in this lawsuit. The Committee was responsible for drafting the initiative petition, obtaining signatures of over 90,000 registered voters sufficient to obtain certification and to place the proposed law before the voters, and coordinating the campaign that led voters to approve the law by more than a 3 to 1 margin. The Committee represents independent repair shops, consumers, Massachusetts auto parts stores, tire and service businesses, auto recyclers, and oil change providers throughout the Commonwealth. The Committee remains actively involved in monitoring the course of this litigation, advising independent repair shops and consumers of the status of the Act, and preparing for the next stage of the ongoing effort to ensure that Massachusetts consumers and independent repair shops have a robust and meaningful right to repair their vehicles.

INTRODUCTION

By this brief, the Committee seeks to bring to the Court’s attention the urgency of resolving the questions presented in this lawsuit in light of the increasing threats to consumers and independent repair shops caused by auto manufacturers’ growing domination of the repair and aftermarket industries, through the restriction of access to vehicle maintenance and repair information. At the outset of this litigation, the Court indicated that this case should be resolved promptly, and implemented an expedited discovery and trial schedule. The Committee appreciated that approach and was pleased that the trial was able to be conducted in June of last year. At this juncture, in light of the passing of nearly one year since the trial of this matter, and one and a half years since the Act was approved by the voters, this brief is offered for the

purpose of presenting considerations regarding the effect of further delaying the enforcement of the Act's provisions. Undoubtedly, delays are an inevitable part of litigation, but delay has also been an integral part of auto manufacturers' strategy in frustrating the ongoing efforts of consumers and independent repair shops to obtain fair and equitable access to vehicle diagnostic data needed to maintain and repair vehicles. Thus, the Committee submits this brief to request a prompt decision on this matter. As detailed below, a resolution of this matter is imperative in light of current industry trends and developments, as well as the historical tendency on the part of auto manufacturers to employ delay tactics in order to avoid and prevent the implementation of right to repair laws.

ARGUMENT

I. History of Right to Repair Law and Committee's Involvement

As previously set forth in the Affidavit of Aaron Lowe, since the 1990's automobile manufacturers have employed various strategies to limit access to information and tools needed to repair vehicles, in order to obtain an economic advantage over independent repair shops (Defendant's Trial Affidavit of Aaron Lowe [doc. no. 161-1] ("Lowe Aff."), ¶¶ 10-14). For example, when manufacturers were required by law to install on-board diagnostic ("OBD") systems in their vehicles in connection with the Clean Air Act, the manufacturers vigorously opposed standardization of OBD access by raising objections that ultimately ended up being unwarranted (Id., ¶¶ 15-25). Similarly, manufacturers argued that anti-theft devices known as immobilizers could not be made accessible to independent repair shops due to security issues, preventing these shops from making repairs (Id., ¶¶ 26-27). When access became mandated by law, it turned out that a workable solution was feasible (Id., ¶¶ 27-29).

For the past several decades, the ability to diagnose, repair and maintain automobiles has increasingly depended on being able to access information stored in vehicle computers (and more recently, in the cloud). (Id., ¶¶ 30-34). Manufacturers discovered that limiting access to this data could afford them great leverage over independent repair shops, and they aggressively opposed legislation designed to address this imbalance (Id., ¶¶ 34-40). In 2012, a predecessor to the Committee supported a Massachusetts initiative petition for a right to repair law, which was approved by Massachusetts voters by an overwhelming 86-14 percent margin. That law required that vehicle manufacturers share, at a fair and reasonable price, the same service information, tools and software that they share with their franchised dealers.¹

Since the enactment of that law, however, manufacturers have begun collecting diagnostic and repair data through wireless technology that was not covered by the law. This has resulted in more and more vehicle mechanical data being placed under the control of the vehicle manufacturer and not the vehicle owner. After extensive efforts to address this situation consensually with manufacturers and through the Legislature, the Committee determined to pursue a further ballot initiative – the Right to Repair Act that is at issue in this lawsuit. Like the 2012 law, the Right to Repair Act was widely popular with Massachusetts voters, and passed by a margin of 75-25 percent. In essence, the Right to Repair Act does nothing more than update the existing law to take into account advances in technology, thus ensuring that consumers can continue to have their vehicle serviced wherever they want, whether it is an independent neighborhood shop or a franchised car dealer.

¹ In 2013 the Massachusetts Legislature enacted a new law reconciling the ballot initiative that was approved by Massachusetts voters with compromise legislation previously passed by the Legislature. See G.L. c. 93K.

II. Recent Developments in Telematics and Vehicle Diagnostics

The telematics provision of the Right to Repair Act applies to vehicles for model years 2022 and thereafter. At this point, model year 2022 vehicles have been on the roads for nearly one year, and model year 2023 vehicles are becoming available this spring. Because the Attorney General has agreed not to enforce the Act pending resolution of this lawsuit², many of the 2022 vehicles that are currently being driven are transmitting data to dealers through their telematics systems, but this information remains inaccessible to independent repair shops and car owners themselves. The Act also requires that manufacturers implement a standardized OBD port in their vehicles for all model years, due to some manufacturers inhibiting OBD access for independent repair shops. However, at the present moment, repair shops have been prevented from servicing certain makes of vehicles due to the OBD port access issues, requiring them to turn away their customers and instead direct them to their competitors – the dealerships or authorized repair facilities that are the only places with access to the requisite data. This situation is precisely what the Act was intended to address.

III. Importance of Prompt Resolution

The use of telematics in vehicles is not a hypothetical concept projected to occur in the future but is the current reality. The transition to using telematics systems to communicate vehicle data required for diagnosis and repair of automobiles has accelerated during the pendency of this case. Likewise, the OBD port access issues are presently impacting the aftermarket industry. Contrary to the clearly-expressed desires of the Massachusetts electorate, manufacturers are successfully controlling access to vehicle data, excluding independent repair shops and vehicle owners and limiting this crucial data to their own franchised dealers.

² The Act may still be enforced by way of a private action by any owner or independent repair facility authorized by an owner who has been denied access to mechanical data.

Carmakers are using this control of data not to benefit the consumer, but for their own economic advantage. The harm is felt not only by the independent repair and aftermarket industry, with its approximately 40,000 employees in Massachusetts³, but also by consumers. Indeed, a 2020 study of repair costs in Massachusetts demonstrated that dealers are 36.2% more expensive, on average, than independent repair shops. See *Vehicle Repair Cost Analysis (Cost of Parts and Labor), 2020 Study of Massachusetts Markets*.⁴

The Committee is dedicated to ensuring that a robust independent repair industry remains viable in Massachusetts. Unfortunately, the economic impacts of manufacturer's strategic utilization of telematics technology to freeze out independent repair shops are already being felt. The situation is becoming urgent, and the problems will only accelerate as vehicle owners are increasingly forced to turn to dealerships for repairs of their vehicles, doing irreparable damage to the rights of consumers and to the relationships between repair shops and their customers. Owners are being turned away by repair shops that simply cannot fix their cars. The result is that the viability of the independent repair market is already being significantly harmed, and this harm will only be exacerbated by the passage of time.

The Committee supports the position of the Massachusetts Attorney General that the Right to Repair Act should be upheld. Upholding the Right to Repair Act would level the playing field and give consumers the important rights and access to data that they overwhelmingly approved at the ballot. During this delay, the automobile manufacturers are unfairly benefiting, winning new customers for their franchised dealerships, and consumers are losing. A prompt ruling upholding the Act is necessary to remedy this situation, which is

³ See <https://www.autocare.org/government-relations/district-impact-data>

⁴ See <http://www.langmarketing.com/pdf/Lang-Marketing-MA-Repair-Cost-Report-10-20-2020.pdf>

contrary to the will of the voters. As long as the Act is on hold through litigation, other avenues such as further implementation of the Act, or further legislation or regulation, are also on hold. The maintenance of the status quo is unfairly benefiting automakers, and therefore a prompt decision on this matter is imperative.

CONCLUSION

The Right to Repair Act is a crucial piece of legislation that has implications not only in Massachusetts but nationwide. The issues at stake concern the ongoing viability of independent repair shops and the livelihoods of their employees, as well as the rights of consumers to access crucial data that they own and that is contained in their vehicles, and get their car repaired wherever they choose. A prompt decision in this matter is imperative to honor the will of the voters that the Right to Repair Act be implemented expeditiously, and so that consumers' right to repair their vehicles can be restored.

Respectfully submitted,

MASSACHUSETTS RIGHT TO REPAIR
COMMITTEE

By its counsel,

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