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Potential Changes Coming to Design Patent Validity

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The Federal Circuit recently granted *en banc* rehearing in the case of *LKQ Corp. v. GM Global Technology Operations LLC*. The court's order granting rehearing shows that the case has the potential to result in significant changes to the law governing the validity of design patents.

In assessing obviousness of a design patent, the Federal Circuit's case law currently requires the patent challenger to first identify a prior art design that is "basically the same as the claimed design." This is the so-called *Rosen/Durling* requirement because it was established in the case of *In re Rosen*, 673 F.2d 388 (CCPA 1982) and reaffirmed by the Federal Circuit in *Durling v. Spectrum Furniture Co*., 101 F.3d 100 (Fed. Cir. 1996). The Federal Circuit's order granting rehearing in *LKQ* shows that the court is considering eliminating or modifying that requirement. This would be a significant change in the law governing the validity of design patents.

On August 14, LKG filed its opening brief, and amicus briefs in support of LKG or in support of neither party are due on August 28. GM's brief is due on September 28, with amicus briefs in its support due on October 12. Oral argument will be scheduled later. Stay tuned for the results of this case.