

5 Key Numbers: US Antitrust Insights for Manufacturers About Right-to-Repair Enforcement

Private plaintiffs and government enforcers are aggressively attempting to revive antitrust theories challenging manufacturers' policies that impact consumers' "right to repair."

Manufacturers' policies that impact how consumers repair their products are drawing renewed scrutiny from private plaintiffs and antitrust enforcers. Under a so-called "right to repair" theory of harm, plaintiffs and enforcers have targeted companies that make products of all types — from tractors to grills to video game consoles — for policies and practices that allegedly influence how consumers can repair those goods. Decades ago, the antitrust plaintiffs' bar regularly targeted repair restrictions (sometimes called "aftermarket restraints"). Now, after a nearly 30-year lull, antitrust plaintiffs and enforcers are again aggressively challenging these policies.

How Enforcement Priorities Are Changing

This renewed interest in right-to-repair theories of harm represents a dramatic shift in practice. For the last 30 years, following a seminal Supreme Court decision,¹ US courts have "narrowed the scope of liability for market restraints," per the Department of Justice (DOJ).² Correspondingly, the Federal Trade Commission (FTC) has acknowledged that "unlawful repair restrictions have generally not been an enforcement priority."³ Now, however, antitrust regulators and private plaintiffs are seeking to reverse that policy and revive enforcement against repair restrictions.

The FTC recently explained its dramatic shift in a policy statement. According to the FTC, manufacturers' use of aftermarket restraints may "substantially increase the total cost of repairs, generate harmful electronic waste, and unnecessarily increase wait times for repairs."⁴ After receiving comments from a public workshop, the FTC concluded that "there is scant evidence to support manufacturers' justifications for repair restrictions."⁵ As a result, the FTC determined to "prioritize investigations into unlawful repair restrictions" and to "devote more enforcement resources to combat these practices."⁶

President Biden indicated his support for this increased enforcement in a July 9, 2021, Executive Order on Promoting Competition in the American Economy, which specifically encouraged cracking down on repair restrictions.⁷ The DOJ, state legislatures, and private plaintiffs have taken up the banner against these practices as well.

Manufacturers with policies that impact how customers service or repair their products should stay abreast of these changing enforcement dynamics and consider how these changes may influence their business strategies going forward. Five key numbers illustrate how important such consideration is.

5 Key Numbers: What Manufacturers of Repairable Goods Should Know About Right-to-Repair Antitrust Enforcement

- **THREE:** The number of lawsuits that the FTC has filed in the last 12 months against manufacturers for allegedly attempting to restrict independent product repairs. The FTC alleged that makers of grills, motorcycles, and outdoor generators purported to void their product warranties if customers used third-party parts or independent repairers. Each complaint asserted claims that conditioning warranty coverage on the use of manufacturer-approved repairs violated the tying prohibition of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, and constituted unfair or deceptive conduct in violation of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). Three lawsuits in one year is a dramatic increase over the FTC's prior record of filing only one lawsuit against aftermarket restrictions in at least the last 10 years.⁸
- **FIVE:** The number of FTC Commissioners — three Democrats, two Republicans — who unanimously voted in July 2021 to “ramp up law enforcement against repair restrictions.”⁹ The declaration that the FTC “will scrutinize repair restrictions for violations of the antitrust laws” and also assess whether they “constitute unfair acts or practices”¹⁰ represented a relatively rare moment of common ground among the FTC Commissioners and reflects a shared enforcement priority across both political parties.
- **EIGHT:** The number of practices that the FTC has identified in its recent policy statement as potentially “restricting competition for repair services” “without reasonable justification.” Those practices include:
 - imposing physical restrictions on repairs, such as adhesives or proprietary screws that prevent product disassembly;
 - limiting access to parts, manuals, diagnostic software, and tools to only manufacturers' authorized repair networks;
 - designing products to make independent repairs less safe;
 - limiting the availability of telematics information, which is information that a vehicle collects about its operation and transmits to a central location;
 - asserting intellectual property rights in an “unlawful, overbroad manner”;
 - disparaging aftermarket or third-party parts and independent repair;
 - using “unjustified” software locks, digital rights management, and technical protection measures; and
 - imposing “restrictive” end user license agreements.¹¹
- **TWENTY-ONE:** The number of class action repair-restriction lawsuits that private plaintiffs have filed against makers of motorcycles, electric vehicles, and tractors after the FTC announced its right-to-repair agenda in July 2021. Two new class action lawsuits were filed against an electric vehicle manufacturer in a single week in March 2023 alone. These private plaintiffs seem to be drawing motivation from the FTC's recent enforcement blitz, as nearly all the private complaints quote directly from the FTC's recent statements about aftermarket restrictions or specifically target a practice that

the FTC has challenged. The DOJ has lent support to these plaintiffs as well by filing a statement of interest in favor of plaintiffs' lawsuits against a tractor manufacturer's alleged practice of denying certain repair software and tools to farmers and independent repair shops.

- **THREE HUNDRED PERCENT**: Also known as treble damages, the amount a private plaintiff can recover in monetary damages from a defendant found to have violated the Sherman Act, such as by engaging in illegal agreements in restraint of trade or illegal monopolization. Plaintiffs in most of the class actions discussed above have included claims of both Section 1 (illegal tying agreement) and Section 2 (illegal aftermarket monopolization), which may entitle them to treble damages if a claim under either section succeeds at trial.

Takeaways for Manufacturers

As the above numbers confirm, government and private antitrust plaintiffs are interested in pursuing claims challenging manufacturers' policies and practices that impact who can repair their products, or how those repairs are performed. Manufacturers with repair and service policies should assess:

- their practices against the current enforcement environment, including the business justifications for any repair restrictions;
- how they communicate those restrictions to customers;
- customers' understanding of a product's lifecycle costs; and
- how (if at all) the repair restriction relates to the product's warranty coverage.

Manufacturers should also be aware of increased legislative oversight at the state level. For example, in December 2022, New York enacted the Digital Fair Repair Act, which imposes repair-access requirements on digital electronics makers. New York claims to be "the first state in the nation to guarantee the right-to-repair" through this legislation,¹² but other states are considering similar laws.¹³

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Endnotes

- ¹ See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).
- ² Note from the United States, Competition Issues In Aftermarkets, Organisation for Economic Co-operation and Development (May 26, 2017), available at <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/aftermarkets.pdf>.
- ³ Federal Trade Commission, Policy Statement of the Federal Trade Commission On Repair Restrictions Imposed By Manufacturers And Sellers (July 21, 2021), at 1 (“FTC Policy”), available at https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf.
- ⁴ FTC Policy, *supra* n.3, at 1.
- ⁵ Federal Trade Commission, Nixing The Fix: An FTC Report To Congress On Repair Restrictions (May 2021), at 6, available at https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.
- ⁶ FTC Policy, *supra* n.3, at 2.
- ⁷ The White House, Fact Sheet: Executive Order On Promoting Competition In The American Economy (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.
- ⁸ FTC Policy, *supra* n.3, at 2.
- ⁹ Federal Trade Commission, Press Release, FTC To Ramp Up Law Enforcement Against Illegal Repair Restrictions (July 21, 2021), available at <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-ramp-law-enforcement-against-illegal-repair-restrictions>.
- ¹⁰ FTC Policy, *supra* n.3, at 2 n.4.
- ¹¹ FTC Policy, *supra* n.3, at 1.
- ¹² New York Governor Kathy Hochul, Press Release, Governor Hochul Signs The Digital Fair Repair Act Into Law (Dec. 29, 2022), available at <https://www.governor.ny.gov/news/governor-hochul-signs-digital-fair-repair-act-law>.
- ¹³ The following states have introduced bills in 2023 addressing the right-to-repair, however many of these bills relate to specific products, such as wheelchairs, agricultural equipment, or consumer electronics: California (SB 244, 241); Colorado (HB 23-1011); Connecticut (HB 6702, 6083, 6512, 5755); Delaware (HB 41); Florida (HB 533, SB 422); Hawaii (HB 53, 1287, 645, SB 1172, 1105); Illinois (HB 3602, 3593, 3601, 3061); Iowa (HF 587); Maine (Ballot Initiative); Maryland (HB 712, 1193); Massachusetts (H360, H290, S142); Minnesota (HF 1337); Missouri (HB 698, 217); Montana (HB 195); New Hampshire (HB 73); New Mexico (SB 50); Ohio (SB 73); Oklahoma (SB 869); Oregon (SB 542); South Carolina (HB 4847, pending from 2022); South Dakota (SB 194); Tennessee (HB 0414, SB 0077); Texas (HB 1606, SB 1654); Vermont (H79, H81, S46); Virginia (HB 1094, pending from 2022); Washington (HB 1392, SB 5464); West Virginia (HB 3384, SB 738).