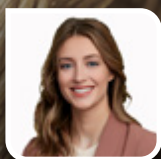


# ALL TIED UP? THE EVOLVING CONSUMER PROTECTION FOCUS ON REPAIR RESTRICTIONS



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## ALL TIED UP? THE EVOLVING CONSUMER PROTECTION FOCUS ON REPAIR RESTRICTIONS

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As competition policy evolves with an increased emphasis on fairness, there has been a renewed focus on aftermarket repair restrictions—particularly the alleged tying of aftermarket parts or services. While rooted in antitrust principles, consumer protection theories have been a primary driver of legislation and enforcement. Since 1975, the focus has been on defining unfair warranty restrictions under the Magnuson-Moss Warranty Act. While the FTC and private plaintiffs have recently signaled increased enforcement, critics have highlighted practical limitations to enforcement. In response, more recent legislative proposals have sought to impose ex ante regulations with affirmative obligations on manufacturers to supply parts, tools, and instructions required to conduct repairs on fair and reasonable terms (subject to evolving carve-outs to protect manufacturers). The authors discuss the evolving consumer protection theories underpinning these efforts.

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The recent focus on the so-called “right-to-repair” comes as there is a renewed emphasis on concepts of fairness in a broader debate on the legacy of current competition policy. While largely a misnomer in current enforcement, the underlying “right” is based on concepts of fairness rooted in both consumer protection and antitrust law. However, these concepts take different and evolving forms with significant implications for enforcement.

The tension here comes across most clearly in the concept of tying, which focuses on situations where the sale of a product may be conditioned on use of the manufacturer’s approved aftermarket parts or services. The consumer protection approach currently focuses on whether manufacturers use unfair or deceptive warranty restrictions as the hook for this conduct. Since the 1970s, the Magnuson-Moss Warranty Act (“MMWA”) has prohibited as unfair any manufacturer of certain consumer goods from conditioning the validity of a product’s warranty on the purchase of branded goods (subject to some important limitations). Section 5 of the Federal Trade Commission Act (“FTC Act”) has been interpreted to further extend the MMWA to include deceptive conduct aimed at consumers that may imply such conditions in a warranty. This enforcement approach is distinct from more traditional antitrust precedent on tying. While antitrust laws have potentially broader application, antitrust standards require a broader effect on competition.

Despite renewed enforcement and litigation efforts, policymakers have called out perceived limitations in the current enforcement standards. As a result, right-to-repair advocates have been lobbying for new legal frameworks that introduce broader policy concepts of fairness with a greater focus on competitors. As a result, recent legislative initiatives have sought to introduce more *ex ante* rules based on affirmative obligations to support third party repair services on fair and reasonable terms. These statutes are rooted in competition policy, but attempt to take a more regulatory approach to establishing access rights for competitors (again subject to certain limitations).

This article focuses primarily on the developing consumer protection precedent in the United States and how it is reflected in the recent legislative initiatives. First, we outline the policy approach to repair restrictions with a focus on tying. We then outline the current enforcement framework under consumer protection law and how it differs from traditional antitrust theories. We finally consider how this has translated into new proposals for *ex ante* regulation, with a focus on recently adopted legislation in New York, Colorado, Minnesota, and California.

## I. REPAIR RESTRICTIONS: FOCUS ON TYING

The practice of tying traditionally involves conditioning the sale of one product or service on the purchase of another economically distinct product or service from the seller. In the repair context, the focus is typically on requiring repairs to be conducted by designated repair services or using designated replacement parts. Similar issues may also arise in the context of consumables used in a product, such ink cartridges used in a printer.<sup>2</sup> Critics argue that design restrictions unfairly restrict what consumers can do with the products they purchase and reduce competition for aftermarket parts and services, increasing overall costs for consumers.

Conditions can take many forms and be enforced through different measures. In the consumer protection context, the focus has been primarily on warranties that exclude coverage when a consumer uses unauthorized goods or services.<sup>3</sup> In the antitrust context, some have suggested that the analysis should extend more broadly to include technical design restrictions on the use of third-party consumables, parts, or repair services.

Manufacturers point out that these restrictions may be necessary for many reasons. First and foremost, there are physical safety and quality control considerations to guard against improper repairs or faulty parts. There is also a fairness consideration in protecting manufacturers from liability and reputational harm associated with products that are damaged through improper use, negligence repair, or poor quality replacement parts, particularly in the context of a warranty. To ensure continued innovation, it may also be necessary to allow appropriate restrictions to preserve validly obtained intellectual property.<sup>4</sup> Further, measures designed to reduce repair restrictions should not interfere with design considerations that allow companies to meet consumer demand.

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2 FED. TRADE COMM’N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS 5 (2021), [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](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) (“Nixing the Fix”).

3 *Id.* at 24.

4 *Id.*

## II. THE MMWA'S FOCUS ON UNFAIR AND DECEPTIVE WARRANTY RESTRICTIONS

The MMWA is the key consumer protection law in the U.S. for a broad set of warranty considerations, including targeting what it deems to be unfair restrictions in consumer warranties.<sup>5</sup> The so-called “anti-tying” provision of Section 102(c) on its face categorically prohibits warranty terms that “condition” covered warranties “on the consumer’s using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name.”<sup>6</sup> The Federal Trade Commission (“FTC”) has issued several rules and related guidance to help clarify the scope of the MMWA provision.<sup>7</sup>

Despite this categorical language, there are several policy-driven limitations to the scope of Article 102(c) to protect the reasonable interests of manufacturers. The language also includes limitations where such products or services are provided free to consumers. Importantly, the FTC has explained that the MMWA does “not preclude a warrantor from expressly excluding liability for defects or damage *caused by* ‘unauthorized’ articles or service.”<sup>8</sup> The FTC has also carved out situations where the use of such products or services is necessary to support the safe functioning of the product, subject to certain requirements and limitations.<sup>9</sup>

There are also certain inherent limitations on the scope of this provision. Since the focus is on warranty coverage, the MMWA does not extend further to capture design features that have the technical or practical effect of limiting choice outside of the warranty.<sup>10</sup> The MMWA equally does not require any affirmative obligations to support independent repair firms or parts manufacturers. Since enforcement is tied to the warranty coverage, the MMWA also only covers conduct over the duration of the warranty period.

The MMWA has also been interpreted to further overlap with Section 5 of the FTC Act in giving the FTC authority to challenge “deceptive” conduct in warranties.<sup>11</sup> The FTC has issued guidance indicating that both statutes cover deceptive conduct that “implies” that a warranty includes conditions that violate Section 102(c).<sup>12</sup> Consistent with the limitations on Article 102(c), the FTC guidance explains that “this does not preclude a warrantor from expressly excluding liability for defects or damage caused by ‘unauthorized’ articles or service; nor does it preclude the warrantor from denying liability where the warrantor can demonstrate that the defect or damage was so caused.”<sup>13</sup> However, the scope, interpretation, and private enforcement rights associated with these deceptive warranty provisions have not been clearly defined or tested in court.

## III. RENEWED LEGISLATIVE AND ENFORCEMENT FOCUS ON MMWA

While the MMWA has been in effect for nearly half a century, it has gained renewed enforcement focus with an emphasis on fairness in antitrust and consumer protection theories in recent years.<sup>14</sup> In July 2020, Congress directed the FTC to produce a report on repair markets.<sup>15</sup> After soliciting wide-ranging comments and conducting a public workshop,<sup>16</sup> the FTC released its findings in 2021 in a lengthy report entitled “Nixing

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<sup>5</sup> 15 U.S.C. 2302(c).

<sup>6</sup> *Id.*

<sup>7</sup> 15 U.S.C. § 2302(b)(1)(B).

<sup>8</sup> 16. CFR 700.10 (2015) (emphasis added).

<sup>9</sup> 15 U.S.C. § 2302(c).

<sup>10</sup> *Shaughnessy v. Nespresso USA, Inc.*, No. 22 Civ. 6815, 2023 U.S. Dist. Lexis 163962, at \*11 (S.D.N.Y. Sept. 15, 2023) (dismissing claims relying on an argument that consumers should be permitted under a warranty to modify the design of a product to be compatible with third party products).

<sup>11</sup> 15 U.S.C. § 2310(d); *Skelton v. Gen. Motors Corp.*, 500 F. Supp. 1181, 1194-95 (E.D. Ill. 1980) (standing for enforcement of deceptive warranty provisions under the MMWA is limited to the FTC).

<sup>12</sup> 16 C.F.R. § 700.10(c).

<sup>13</sup> *Id.*

<sup>14</sup> *An Antitrust “Renaissance”? FTC Issues Ambitious Policy Statement for Unfair Methods of Competition*, LINKINGCOMPETITION BLOG (Nov. 22, 2022), [https://www.linklaters.com/en-us/insights/blogs/linkingcompetition/2022/november/an-antitrust-renaissance\\_ftc-issues-ambitious-policy-statement-for-unfair-methods-of-competition](https://www.linklaters.com/en-us/insights/blogs/linkingcompetition/2022/november/an-antitrust-renaissance_ftc-issues-ambitious-policy-statement-for-unfair-methods-of-competition).

<sup>15</sup> H.R. Rep. No. 116-456, at 67 (2020).

<sup>16</sup> For an overview and links to the supporting submissions, see Fed. Trade Comm’n, *Nixing the Fix: A Workshop on Repair Restrictions*, <https://www.ftc.gov/news-events/events/2019/07/nixing-fix-workshop-repair-restrictions>.

the Fix: An FTC Report to Congress on Repair Restrictions.” The report outlines the legal and policy positions on a range of topics related to consumer protection and antitrust laws applicable to aftermarket, including an assessment of the limitations of the MMWA and underenforcement of existing laws.<sup>17</sup> Following the release of this report, the FTC issued a policy statement expressing its commitment to enforce repair restrictions under the MMWA and to “devote more enforcement resources to combat” repair restrictions more generally.<sup>18</sup> President Biden further issued an executive order in 2021 encouraging the FTC to “limit powerful equipment manufacturers from restricting people’s ability to use independent repair shops or do DIY repairs.”<sup>19</sup>

The FTC followed up shortly with enforcement actions settling claims against Harley-Davidson, Westinghouse, and Weber pursuant to Section 102(c) of the MMWA and Section 5 of the FTC Act in August 2022.<sup>20</sup> The FTC alleged that these companies violated the MMWA by including restrictive terms that expressly or impliedly voided the entire warranty if customers used independent dealers for parts or repairs.<sup>21</sup> Without the authority to seek monetary penalties, the FTC sought commitments from these companies to refrain from engaging in the challenged conduct by removing the challenged terms and to take certain corrective measures such as adding affirmative language to their warranties. The FTC also required these companies to expressly acknowledge in their warranties and in affirmative notices to customers that using a third-party repair shop or parts would not void the warranty. Since these were negotiated settlements, however, they have provided limited guidance on the application of key carve-outs and the application of the deceptive warranty standards.

## IV. EVOLVING LIMITATIONS ON PRIVATE ENFORCEMENT UNDER THE MMWA

Following the FTC’s renewed enforcement interest in the MMWA, some consumer plaintiffs have sought to bring private class action challenges to warranty terms. These plaintiffs have sought to recover directly for alleged violations of 102(c) under the MMWA, which gives a private right of action to consumers who are “damaged” by a manufacturer’s failure to comply with a provision of the MMWA.<sup>22</sup> They have also sought to rely on some state consumer protection statutes, which have been interpreted to import standards for unfair and deceptive practices from Section 5 of the FTC Act.<sup>23</sup>

However, these cases have met legal and practical hurdles. First, plaintiffs bringing claims on behalf of all purchasers based on the warranty face challenges in showing damages sufficient to establish standing to bring a suit.<sup>24</sup> Second, a growing number of courts have found that plaintiffs cannot pursue a nationwide class action under the MMWA without filing on behalf of at least 100 named plaintiffs who have been damaged.

## V. DISTINGUISHING THE ANTITRUST FOCUS ON COMPETITIVE FORECLOSURE

Where the MMWA does not apply, challenges must be brought under the traditional antitrust laws. The antitrust laws generally do not focus on the fairness of consumer offerings but protect against unreasonable restraints on competition from third party parts suppliers or repair services.<sup>25</sup> Unlike the MMWA, antitrust claims are highly factual due to their consideration of the effects of the challenged conduct on com-

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17 *What’s the fix? A Wave of ‘Right to Repair’ Initiatives Sweeps the US and Europe*, LINKINGCOMPETITION BLOG (Nov. 21, 2021), <https://www.linklaters.com/en-us/insights/blogs/linkingcompetition/2021/november/whats-the-fix-a-wave-of-right-to-repair-initiatives-sweeps-the-us-and-europe>.

18 See Fed. Trade Comm’n, Policy Statement on Repairs Restrictions Imposed by Manufacturers and Sellers (July 21, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1592330/p194400repairrestrictionspolicystatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf).

19 See Exec. Order No. 14036, 86 Fed. Reg. 132 (July 14, 2021).

20 Press Release, Federal Trade Commission, FTC Approves Final Orders in Right-to-Repair Cases Against Harley-Davidson, MWE, Investments, and Weber (Oct. 27, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-approves-final-orders-right-repair-cases-against-harley-davidson-mwe-investments-weber>.

21 *The Road Ahead: Is the US Revving Up ‘Right to Repair’ Initiatives?*, LINKINGCOMPETITION BLOG (Aug. 4, 2022), [https://www.linklaters.com/en/insights/blogs/linkingcompetition/2022/august/the-road-ahead\\_is-the-us-revving-up-right-to-repair-initiatives](https://www.linklaters.com/en/insights/blogs/linkingcompetition/2022/august/the-road-ahead_is-the-us-revving-up-right-to-repair-initiatives).

22 15 U.S.C. § 2310(d)(3).

23 E.g. N.Y. GEN. BUS. LAW § 349.

24 *Ghaznavi v. De Longhi Am. Inc.*, No. 22-cv-1871 (KPF), 2023 WL 4931610 (S.D.N.Y. Aug. 2, 2023) (dismissing for lack of standing); *Shaughnessy v. Nespresso USA, Inc.*, No. 22 Civ. 6815, 2023 U.S. Dist. Lexis 163962, at \*20 (S.D.N.Y. Sept. 15, 2023) (same). But see *Schaer v. Newell Brands Inc.*, No. 22-cv-30004(MGM), 2023 WL 2033765 (D. Mass. Feb. 16, 2023).

25 15 U.S.C. § 1.

petition. For example, courts must generally conduct a fact-based assessment of the relevant market definition to determine whether (i) the aftermarket products and/or services are economically distinct, and (ii) the extent to which other brands should be included within the relevant market, which can have a significant impact on the assessment of market or monopoly power.<sup>26</sup> Furthermore, a manufacturer's justifications for any restrictions may carry meaningful weight under the rule of reason analysis.<sup>27</sup> For these reasons, as the FTC itself has acknowledged, repair restrictions in many instances "may reduce consumers' options for obtaining spare parts and repair services in the aftermarket without running afoul of antitrust law."<sup>28</sup>

## VI. A SHIFTING LEGISLATIVE FOCUS?

The FTC's "Nixing the Fix" report describes a few options for filling perceived gaps in the existing enforcement framework, including (1) additional FTC-rulemaking, (2) industry self-regulation, and (3) right-to-repair legislation.<sup>29</sup> This regulatory approach would move away from enforcement against unfair, deceptive, or anticompetitive conduct towards bespoke, *ex ante* rules on specific obligations to support third-party repairers.

Both federal and state legislative bodies across the country have considered right-to-repair legislation. Like the MMWA, proposed legislation has generally focused on consumer goods (particularly consumer electronics). However, the terms go beyond consumer protection considerations and require manufacturers to allow for third-party repair services to affirmatively promote competition.

In June 2021, the federal Fair Repair Act was introduced in the House of Representatives. Although the bill was stalled, it would have required original digital electronic equipment manufacturers to make diagnostic, maintenance, and repair equipment available to independent repairers.<sup>30</sup> Some states have developed this legislation further. The National Conference of State Legislatures estimates that 45 out of 50 state legislatures considered some form of right-to-repair legislation in 2023.<sup>31</sup> Since 2022, four states (namely California, Colorado, New York, and Minnesota) have passed right-to-repair legislation as of drafting.

In December 2022, New York became the first state to pass comprehensive right-to-repair legislation<sup>32</sup> with respect to consumer electronics when Governor Hochul signed the Digital Fair Repair Act into law. In the following year, Colorado,<sup>33</sup> Minnesota,<sup>34</sup> and California,<sup>35</sup> all passed additional right-to-repair legislation. The New York, Minnesota, and California laws each apply specifically to digital electronics, while the Colorado Consumer Repair Bill of Rights applies mainly to agricultural equipment. Each of these laws requires manufacturers to make available documentation, tools, and parts (or assemblies of parts) to owners or independent repair providers on fair and reasonable terms, as well as parts needed to access and reset electronic security lock functions. Each of these laws varies in the definition of fair and reasonable terms, either based on absolute terms (e.g. no charge or actual cost) or relative terms (e.g. no less favorable than the terms on which they are offered to authorized repair firms). Further, each of these laws is directly positioned within the context of consumer protection enforcement, with the Minnesota and Colorado statutes tying violations to the state consumer protection statutes.

Legislators say that they have sought to strike a balance in protecting manufacturers against the legal and safety risks associated with these restrictions. In past years, manufacturers have cited concerns that proposed legislation could jeopardize their intellectual property rights, compromise safe repairs, expose consumers to cybersecurity risks, lead to liability and reputational harm, and/or reduce the quality of service if the repairs are not done correctly.<sup>36</sup> Many of these themes have been addressed in clear exemptions to the legislation to date. Apple's

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26 E.g. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

27 E.g. *Town Sound & Custom Tops, Inc. v. Chrysler Motors*, 959 F.2d. 468, 477 (3d Cir. 1992); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26 (1984).

28 Nixing the Fix, *supra* note 2, at 16.

29 Nixing the Fix, *supra* note 2, at 45.

30 H.R. 4006, 117th Cong. (2021).

31 NATIONAL CONFERENCE OF STATE LEGISLATORS, RIGHT TO REPAIR LEGISLATION, RIGHT TO REPAIR 2023 LEGISLATION (2023), <https://www.ncsl.org/technology-and-communication/right-to-repair-2023-legislation>.

32 S.B. 1320, 2023-2024 Gen. Assemb., Reg. Sess. (N.Y. 2023).

33 H.B. 23-1011, 74th Gen. Assemb., Reg. Sess. (Colo. 2023).

34 S.F. 2744 93rd Leg. (Minn. 2023).

35 S.B. 244 2023-2024 Reg. Sess. (Cal. 2023).

36 Nixing the Fix, *supra* note 2, at 24-38.

support for California’s new legislation reportedly turned on “requirements that protect individual users’ safety and security, as well as product manufacturers’ intellectual property.”<sup>37</sup> Like the FTC’s carve-outs to the MMWA, this legislation has generally included waivers of liability for companies based on negligent repair by an owner or third-party service provider. While these statutes on their face apply clear obligations, they will undoubtedly be subject to interpretation on the commercial terms under which these materials must be provided and the scope of potential exemptions.

	New York	Colorado	Minnesota	California
Equipment covered	Hardware manufactured, used, or sold on or after July 1, 2023	A powered wheelchair or agricultural equipment	Hardware products sold on or after July 1, 2021	Products manufactured, used, or sold on or after July 1, 2021
Applies to both consumer sales and business sales under contract	No, only to consumer sales	Not specified	Not specified	Yes
Obligation to provide anything more than “documentation” containing repair instructions, even if provided to authorized service providers	No	No	No	No
Obligation to divulge trade secrets	No	No	No	No
Obligation to provide parts, tools, or documentation that would disable or override anti-theft security measures set by the owner of equipment without the owner’s authorization	No	Not specified	No	No
Liability for damage or injury caused as a result of the repair, diagnosis, maintenance, or modification performed by an independent repair provider or owner	No	No	No	No
Obligation to provide parts, tools, or documentation for anything inconsistent with or in violation of any federal law	No	No	Not specified	Not specified

## VII. CONCLUDING REMARKS

As the focus of competition policy evolves with a focus on fairness, there has been a renewed consumer protection and antitrust focus on aftermarket repair restrictions – particularly alleged tying of aftermarket parts or services. While the result has been signs of increased enforcement and litigation under the anti-tying provisions of the MMWA, critics have cited several important carve-outs that limit the overall scope of the provision. While antitrust theories may capture a broader scope of conduct, challengers must show a harm to competition beyond just considerations of fairness to consumers or competitors. The result has been proposed legislation in a number of states purporting to impose *ex ante* obligations to supply parts and repair materials on fair and reasonable terms, again subject to clear carve-outs.

<sup>37</sup> Rohan Goswami, Apple Backs California Right-to-Repair Bill in Major Policy Shift, CNBC (Aug. 24, 2023), <https://www.cnbc.com/2023/08/24/apple-backs-california-right-to-repair-bill-in-major-policy-shift.html>.



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