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Say Cheese: With the "Right to Repair" Debate Simmering, the Supreme Court's Aging Kodak Decision Is Ready for Its Close-Up

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While dissenting from the Supreme Court's 1992 decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, Justice Scalia warned that the opinion "threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good to enforcement of the antitrust laws and to genuine competition." After all, the decision — which recognized that a firm might lack economic power in a primary market (like copy machines) but still have such power in a secondary market (like replacement *parts* for the machines) that cannot be leveraged to substantially reduce competition in a third market (servicing the machines) — theoretically applied to all manufacturers using bespoke parts. Accordingly, the antitrust commentariat (at no loss for words, as usual) churned out article after article pronouncing a new, pro-plaintiff inclination to antitrust jurisprudence that would significantly infringe on the ability of successful manufacturers to package their goods and services efficiently and compete effectively in ancillary markets.

As with many Chicken Little warnings that follow high-profile cases, the concerns were overstated. *Kodak*'s impact on antitrust jurisprudence has been less than sweeping. The Supreme Court has cited it eight times in 27 years, but never for its substance. *Kodak*'s most quoted sentence, "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law," could apply to any antitrust case. Manufacturers have continued to compete in secondary markets, and the sky has not fallen.

But the issue has come to a head thanks to the growing "right to repair" movement. The movement is somewhat misnamed because we all generally have the "right" to repair our own goods, but the *ability* to do so can be influenced, if not completely controlled, by the product's original equipment manufacturer (OEM). The OEM is often the exclusive source of replacement parts, manuals, and other physical and electronic tools that make a repair feasible. A refusal to make such materials available, or a limit on distribution, can allow the OEM to choose its own service market competitors. Similarly, a manufacturer's policy to void the product's warranty if it is even opened up by an independent service firm dampens the incentives to enter the service market, or employ an independent service firm. The movement's poster child is Apple, which will generally deal only with its authorized service providers for the repair of Apple equipment, most notably iPhones. Recognizing the ubiquity of the issue, the Federal Trade Commission recently held a workshop titled "Nixing the Fix: A Workshop on Repair Restrictions," geared toward understanding the prevalence, impact, and justifications for the various practices and policies employed by manufacturers in repair markets. At the state level, legislatures and attorneys general are deploying legislative and litigation initiatives targeted at banning popular restrictions, requiring affirmative conduct (like the publishing of manuals) and recovering losses for foreclosed competitors. Groups seeking change include coalitions of farmers demanding the "right" (or the ability) to fix their own John Deere tractors rather than bring them, often over long distances, to a John Deere outlet for parts and service. And in a significant victory for the movement, a jury in 2017 awarded $43.8 million (trebled automatically to $131.4 million under the antitrust laws) to repair groups seeking to service General Electric's anesthesia machines. After post-trial briefing, the court ordered a retrial on damages, and the case settled just a few weeks ago.

In *Kodak,* a group of independent service providers (ISPs) challenged Kodak's policy of refusing to sell original machine parts to unaffiliated copier repair services, hamstringing the ISPs from competing with Kodak's own service personnel for such work. The ISPs claimed that Kodak's tying of its sales of parts and service together violated both Section 1 of the Sherman Act (which bars "unreasonable" restraints of trade) and Section 2 of the Act (which bars monopolization and attempts to monopolize) on the theory that by leveraging its "monopoly" over its replacement parts, Kodak foreclosed competition, reduced consumer choice, raised prices, and obtained a monopoly share of the repair services market. Kodak, in turn, argued that the competition it faced in the *copier* market — one that Xerox and then Ricoh and others, but *not* Kodak, had long dominated — precluded it from exploiting customers in "aftermarkets" for parts and service. Kodak's theory was that if customers did not approve of Kodak's tie-in of parts and services, they could defect to one of Kodak's powerful competitors, like Xerox. In more typical antitrust terms, according to Kodak, *interbrand* competition (Kodak v. Xerox) would discipline and cabin the impact of any predation targeted at Kodak's *intrabrand* (Kodak v. ISP) competitors. Kodak also asserted that Section 2 of the Act was not designed to target a firm's "monopoly" over its own inventory. Otherwise, the argument went, all manufacturers with unique parts, services, or processes were "monopolists" subject to the strictures of Section 2.

The Court, however, rejected the argument regarding the competitiveness of the primary copier market. It applied its classic tying test, which dictates that if a plaintiff proves that (1) the defendant has "market power" (often inferred from a high market share) in the "tying" market (here, parts); and (2) the tie-in impacts a substantial volume of commerce in the "tied" market (here, service), then the practice is per se illegal, meaning courts will not consider the benefits or justifications for the arrangement (or the competitiveness of the primary market) before condemning it. On the summary judgment record before the Court, it held that a jury could find that Kodak had market power in the aftermarket for parts and that Kodak leveraged that power to foreclose competitors from a large portion of the service market. Kodak's economic theory was undone by a lack of supporting facts and the nature of the market, in which copier customers can become "locked in" following the purchase of a large, bulky, and expensive machine. Kodak's contention that a single brand of a product or service could never be a relevant market for antitrust purposes, the Court found, was at war with precedent and the Court's tests for defining relevant markets, which look to the reasonably available choices a customer faces. On summary judgment, the Court could not conclude that copier owners or ISPs seeking Kodak parts could reasonably turn to firms other than Kodak for supply if Kodak raised its prices. This determination was the product of another settled test, this one for defining markets, not of a flawed or arbitrary standard.

On the surface, the facts of *Kodak* are nearly indistinguishable from the complaints lodged by Apple and John Deere customers and service providers today. Apple's share of the U.S. smart phone market is estimated at 40 percent to 45 percent. John Deere's share of farm equipment is around 30 percent. Both figures are too low in most, if not all, federal circuits to trigger scrutiny under Section 2 of the Sherman Act, the anti-monopoly provision, and only Apple's share is likely enough to trigger scrutiny under Section 1 of the Act, its anti-restraint of trade provision. But *Kodak* explains that the competitiveness of the primary market is not controlling. The focus instead is on the manufacturers' share of the aftermarket for parts, documentation, know-how, etc. (which is likely to be overwhelming) and, once established, upon the magnitude of the practice's impact.

While it is finally *Kodak*'s moment in the sun, its ultimate vitality is unclear. *Kodak*'s dissent was written by Justice Scalia, one of antitrust law's most influential justices, and was joined by Justice Thomas, the lone remaining justice from the *Kodak* court, and by Justice O'Connor. Today's Supreme Court is dominated by Scalia acolytes. Justice Blackmun, *Kodak*'s author, otherwise had limited influence on antitrust jurisprudence. Justice Stevens, Blackmun's longtime colleague, a significant antitrust figure, and Scalia's frequent foil, retired and recently passed away. The most antitrust-savvy justice on today's Court is Justice Breyer, who authored two highly influential antitrust decisions — *Barry Wright Corp. v. ITT Grinnell Corp.* and *Town of Concord v. Boston Edison Co.* — even before he joined the Court while on the First Circuit Court of Appeals. Unlike Stevens, who typically came down in favor of antitrust intervention, and the other more liberal justices on the Court today, Breyer's opinions and votes are more balanced between antitrust plaintiffs and defendants. And, overall,

antitrust has trended away from per se rules and the protection of intrabrand competition, core aspects of *Kodak.*

Offering customers “one-stop shopping” for goods and services is almost always pro-competitive and lawful. Almost. Similarly, dictating the terms according to which a firm will, or will not, deal with its customers is nearly always immune from antitrust scrutiny. But not always. As we enter a period in which such arrangements are likely to invite heightened scrutiny as the right-to-repair drumbeat grows louder, manufacturers should review their policies and practices and consult with their antitrust counsel as appropriate. Carlton Fields attorneys can help firms tailor their offerings to their risk tolerance. Contact one of the attorneys noted here to discuss.

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