Opening the Door to Right-to-Repair: *Deere Co.* and Its Implications

Kira Liu

I. OVERVIEW: THE RIGHT-TO-REPAIR MOVEMENT IS GAINING MOMENTUM

We own things; things break; and we have them repaired. For a long time, people have been able to freely choose how they have their things fixed—by themselves or by a technician of their choice.[1] However, as more modern essentials begin to involve advanced technologies, consumers find themselves increasingly tethered to the command of manufacturers.[2] By controlling whether and how repair-related tools and information are made accessible, manufacturers can easily make it impossible for consumers or independent repair shops to diagnose and fix problems on their own.[3]

The right-to-repair movement budded in recognition of people's wish to take control of their repairs.[4] Advocates of the movement have stated a wide range of objectives, most of which revolve around requiring manufacturers to share repair information, provide diagnostic tools, and supply service parts.[5] Despite its popular appeal, the movement faltered in the 2000s. Around that time, the U.S. antitrust agencies significantly slackened enforcement against aftermarket repair restrictions, which is read to be in alignment with the concurrent federal courts' jurisprudence of narrowing down the scope of market restraint liability.[6]

In recent years, however, the FTC has set out to reinvigorate enforcement against repair restrictions. Explaining how aftermarket restraints may "substantially increase the total cost of repairs, generate harmful electronic waste, and unnecessarily increase

---

[1] *See generally* Thorin Klosowski, *What You Should Know About Right to Repair*, N.Y. TIMES (July. 15, 2021), https://perma.cc/CG72-U8TZ.

[2] *See id.*

[3] *See* Joe Hernadez, *John Deere Vows to Open Up Its Tractor Tech, but Right-To-Repair Backers Have Doubts*, NPR (Jan. 10, 2023), https://perma.cc/U9D6-34MF.

[4] *See* Masayuki Hatta, *The Right to Repair, the Right to Tinker, and the Right to Innovate*, 19 ANNALS BUS. ADMIN. SCI. 143, 152 (2020).

[5] Luyu Yang, Chen Jin & Cungen Zhu, *Research: The Unintended Consequences of Right-to-Repair Laws*, HARV. BUS. REV. (Jan. 19, 2023), https://perma.cc/J3FE-F28Q.

[6] *See Competition Issues in Aftermarkets – Note from the United States*, OECD (May 26, 2017), https://perma.cc/V9B9-A7FQ.

wait time for repairs," the FTC announced that it would prioritize investigations and devote more resources into combating unlawful repair restrictions.[7]

On July 9, 2021, President Biden backed up the FTC's enforcement efforts with the Executive Order on Promoting Competition in the American Economy.[8] Specifically encouraging cracking down on repair restraints, the order has accorded right-to-repair legislation with substantial momentum.[9] In December 2022, New York became the first state to sign in to law a right-to-repair for electronics.[10] As of August 2023, at least 25 states are actively considering right-to-repair legislations.[11] Meanwhile, corporations have begun to announce their right-to-repair initiatives. For example, Apple has declared that it would honor California's new repair provisions and would be making available all the parts, tools, and information necessary for consumers and repair shops to fix the device maker's products nationwide.[12]

Happening concurrently with the executive, legislative, and business-initiated right-to-repair moves are the judicial ones. On November 27, 2023, the Northern District Court of Illinois issued *In re Deere & Co. Repair Service Antitrust Litigation*,[13] allowing the plaintiffs' right-to-repair claims to proceed. As alike cases continue to make their ways through the courts,[14] it is imperative to evaluate the *Deere & Co.* opinion and analyze in what way the court tackled the right-to-repair problem in the context of traditional antitrust law.

---

[7] Federal Trade Commission, Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed By Manufacturers And Sellers (July 21, 2021), at 1–2, https://perma.cc/MY2A-EUVL.

[8] The White House, Fact Sheet: Executive Order on Promoting Competition In The American Economy (July 9, 2021), https://perma.cc/35KJ-N2MS.

[9] *Id.* (stating that the order "[e]ncourages the FTC to limit powerful equipment manufacturers from restricting people's ability to use independent repair shops or do DIY repairs—such as when tractor companies block farmers from repairing their own tractors.").

[10] Digital Fair Repair Act, S.B. S4104A (codified as N.Y. GBL § 399-nn) (2022).

[11] Irene Calboli, *The Right to Repair: Recent Developments in the USA*, WIPO MAGAZINE (Aug. 2023), https://perma.cc/E4MZ-GLS6.

[12] Makena Kelly, *Apple Announces New Nationwide Right to Repair Commitment*, THE VERGE (Oct. 24, 2023), https://perma.cc/U2CC-RFN3.

[13] 2023 U.S. Dist. LEXIS 210516.

[14] *Right to Repair Movement Continues to Pick Up Steam*, REINHART (Feb. 24, 2023), https://perma.cc/G22Q-JBTS.

II. THE JUDICIAL PUSH: DEERE & CO. MUST FACE FARMERS' RIGHT-TO-REPAIR CLAIM

A. Facts

The *Deere & Co.* lawsuit centers on farmers' right to repair their Deere tractors.[15] According to the plaintiff-farmers, Deere—one of the biggest tractor manufacturers in the nation—has deliberately designed its tractors in a way such that both the diagnosis and repair frequently require software and tools exclusively in Deere and its dealerships' control.[16] For equipment as expensive as tractors, farmers cannot freely ditch their sizable investments to switch to other manufacturers and are therefore stuck with Deere's monopolized untimely and expensive repair services.[17] To fan the flames, Deere's main competitors generally impose similar repair restrictions, which deprive farmers of the last route to avoid Deere's supracompeittive repair prices by purchasing tractors from other manufacturers.[18]

The aggrieved farmers sued Deere under antitrust laws.[19] In response, Deere filed a motion to dismiss, asserting that (1) the plaintiffs lacked standing; (2) the plaintiffs failed to plausibly allege markets; and (3) the plaintiffs failed to plead individual counts under the *Twombly* standard.[20] Rebutting all of Deere's arguments, the federal district court gave its blessing to the seminal right-to-repair case to proceed. In the opinion, two lines of analyses are particularly worth highlighting: antitrust standing and market definition.

B. An Easy Standing: More *McCready* than *Illinois Brick*

In its Motion to Dismiss, Deere argued that the plaintiffs failed to allege antitrust standing either because they were barred by the direct purchaser rule under *Illinois Brick* to bring claims in the first place or, alternatively, because they failed to join the co-conspirator dealerships as defendants.[21]

In the landmark *Illinois Brick* case, purchasers of concrete blocks tried to sue the manufacturer directly even though they had purchased the blocks through contractors

---

[15] In re Deere & Co. Repair Serv. Antitrust Litig., 2023 U.S. Dist. LEXIS 210516, at *7.

[16] *Id.*

[17] *Id.*

[18] *Id.* at *13.

[19] *Id.* at *76 (three counts are based on § 1 of the Sherman Act, four are based on § 2 of the Sherman Act, and an unlabeled count under both § 1 and § 2).

[20] *See id.* at *15–16.

[21] In re Deere & Co. Repair Serv. Antitrust Litig., 2023 U.S. Dist. LEXIS 210516, at *20.

and other intermediate sellers.[22] By a 6-3 majority, the United States Supreme Court denied standing to indirect purchasers to sue antitrust violators.[23] The main legacy of *Illinois Brick* is the so-called "direct purchaser rule," which unequivocally denies downstream buyers antitrust standing to sue an antitrust violator if there are two or more intermediate purchasers.[24] This bright-line rule was motivated by policy reasons.[25] The Court's justifications were that allowing an indirect purchaser to sue may generate complex tracing problems,[26] reduce the effectiveness of treble damages as a tool to incentivize direct purchasers to bring suits,[27] and create serious risks of "multiple liability and 'open the door' to duplicative recoveries."[28]

In *Deere & Co.*, the facts seem quite like *Illinois Brick* at first glance: the plaintiffs purchased repair services from dealerships, who acquire or license repair tools and technologies from Deere.[29] However, the court easily distinguished *Deere & Co.* from *Illinois Brick*: Deere is not a manufacturer passing on price increases through its dealerships; rather, Deere and its dealerships are acting *in concert* to create an "ecosystem" that raised the price of repair services to the detriment of farmers.[30] In its reasoning, the court found the present case more in line with *Blue Shield of Virginia v. McCready*,[31] in which the Supreme Court recognized the plaintiff Ms. McCready as *effectively* a direct purchaser in the antitrust context despite her not being the immediate party who bought the product from the manufacturer.[32]

---

[22] Illinois Brick Co. v. Illinois, 431 U.S. 720, 726 (1977).

[23] *Id.*

[24] United States v. Apple Inc., 139 S. Ct. 1514, 1520 (2019) (". . . we have ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue.").

[25] *Illinois Brick Co.*, 431 U.S. at 736.

[26] *Id.*

[27] *Id.* at 745 (The increasing complexity of treble-damages concerned the court "for the reduction in the effectiveness of those suits if brought by indirect purchasers with a smaller stake in the outcome than of direct purchaser suing for the full amount of the overcharge . . . The combination of increasing the cost and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement.").

[28] *Id.* at 730–31.

[29] In re Deere & Co. Repair Serv. Antitrust Litig., 2023 U.S. Dist. LEXIS 210516, at *28.

[30] *Id.* at *28–29.

[31] 457 U.S. 465 (1982).

[32] Blue Shield of Va. v. McCready, 457 U.S. 465, 474–75 (1982) (according to the court, recognizing McCready as the direct purchaser generated no risk of duplicative recovery, which effectively undermined applying *Illinois Brick* to the case at hand).

Adopting the functional approach underlying *McCready*, the *Deere & Co.* court reasoned that, even if dealerships occupy an intermediate position between the plaintiffs and Deere, it is not dealerships but the plaintiff-farmers who are the first ones being shorthanded by Deere's repair policy.[33] Just like Ms. McCready, who was the first one hurt in the chain by an antitrust violation,[34] plaintiff-farmers here—as both "the *first and only* ones"[35] to have been hurt by Deere's supracompetitive repair price—occupy the best position to enforce antitrust law.[36]

Notably, after concluding that the case falls outside of *Illinois Brick*, the court went out of its way to emphasize that even if *Illinois Brick* applied, the co-conspirator exception would still save the plaintiffs' claim. The co-conspirator exception, as recognized by several Circuits,[37] gives plaintiffs who would otherwise be barred by the direct purchase rule the right to sue "so long as the plaintiff is a direct purchaser from at least one member of the conspiracy."[38] Applying the exception, the court found the pleaded conspiracy between dealerships and Deere effectively shielded the plaintiffs' case from being barred by the direct purchaser rule.[39]

Finally, the court discussed whether co-conspirators need to be joined. While several sister circuits have mandated that co-conspirators be joined as defendants,[40] the *Deere & Co.* court—after a prolonged discussion of parsing precedents and analyzing policy—announced otherwise, stating that co-conspirators do not have to be joined.[41] Justifying its ruling, the court cabined cases that require the joining of co-conspirators to all involving "claims in which a charge was being passed on."[42] Again, the court opted for the functional route: in the absence of a passing-on situation, there is little risk of double recovery. Therefore, the injury to dealerships would be cleanly separated from that to the plaintiffs, and the absence of dealerships would not

---

[33] *Deere & Co.*, 2023 U.S. Dist. LEXIS 210516, at *28.

[34] *McCready*, 457 U.S. at 475.

[35] *Deere & Co.*, 2023 U.S. Dist. LEXIS 210516, at *29 (emphasis added).

[36] *Id.* at *31.

[37] *See, e.g.*, Insulate SB, Inc. v. Advanced Finishing Sys., Inc., 797 F.3d 538, 542 (8th Cir. 2015); Lowell v. Am. Cyanamid Co., 177 F. 3d 1228, 1229 (11th Cir. 1999).

[38] *Deere & Co.*, 2023 U.S. Dist. LEXIS 210516, at *32 (quoting *Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co.*, 29 F.4th 337, 347 (7th Cir. 2022)).

[39] *Id.* at *34.

[40] *See, e.g.*, Howard Hess Dental Lab'ys Inc. v. Dentsply Int'l., 424 F.3d 363, 376–78 (3d Cir. 2005); Link v. Mercedes-Benz of N. Am., Inc., 788 F.2d 918, 931–32 (3d Cir. 1986); In re Beef Indus. Antitrust Litig., 600 F. 2d, 1148, 1163 (5th Cir. 1979).

[41] *See Deere & Co.*, 2023 U.S. Dist. LEXIS 210516, at *35–50.

[42] *Id.* at *49.

complicate damage calculation.[43] Fearing that the requirement of joining of all co-conspirators would "vastly increase costs" and lead to underenforcement of antitrust laws,[44] the court ventured in the opposite direction of sister circuits to allow the case to proceed despite the plaintiffs' failure to join co-conspirator dealerships.

C. Cut Through the Market Hurdle: Forgiving the Blurry Primary Market Definition and Reinvigorating *Kodak*

Deere's second antitrust claim was that the plaintiffs failed to adequately plead both a primary market and an aftermarket.[45]

First, the court found that the plaintiffs adequately alleged a primary market. In the pleadings, the plaintiffs defined the primary market as "the product market for agricultural equipment in the United States."[46] While the court agreed with Deere that the alleged primary market was too broad and indefinite, it nevertheless held that some "rough contours of a relevant market" that can provide defendants with "notice of the claim" is enough for a single-brand aftermarket claim.[47] Absent controlling law and persuasive authority,[48] the court chose to construe the pleading standard for primary market in a plaintiff-friendly way, emphasizing the importance of *notice* rather than insisting on seeing a precisely-defined market.

Second, the court found that the plaintiffs adequately alleged an aftermarket. To understand the court's reasoning, it is necessary to hold it against the backdrop of the groundbreaking aftermarket case *Eastman Kodak Co. v. Image Technical Servs., Inc.*.[49] In that case, defendant Kodak was a photocopier manufacturer who also sold services and parts of the equipment in the aftermarket.[50] Being sued under § 1 of the Sherman Act for tying its aftermarket services to the sale of its equipment, Kodak filed a motion for summary judgment on the basis that it could not charge monopolistic prices in the aftermarkets since it had no market power in the primary market of photocopiers.[51] The Court rejected this argument, holding that (1) the product of a single manufacturer can constitute a relevant product market and (2) the lack of market power in a primary

---

[43] *Id.*

[44] *Id.* at *50.

[45] *Id.*

[46] *Id.* at *52.

[47] In re Deere & Co. Repair Serv. Antitrust Litig., 2023 U.S. Dist. LEXIS 210516, at *53.

[48] *Id.*

[49] 504 U.S. 451 (1992).

[50] *Id.* at 456.

[51] *Id.* at 465–67.

market does not preclude the existence of market power in an aftermarket.[52] Strikingly, the Court chose to address market imperfections in the antitrust context, highlighting the harms to consumers resulting from high information cost and high switching cost: *the lack of information* could prevent consumers from factoring high aftermarket prices into their decision to purchase the original equipment, and that purchase of equipment would practically render them *locked-in* with parts and services.[53]

However, it is crucial to notice that federal courts have engaged in a collective effort to limit *Kodak*'s implications. Relying on the *Kodak* dissent,[54] courts have stuck to the general rule that there can be no aftermarket claim absent a change in policy from the manufacturer after it has successfully baited the customers.[55] In *Deere & Co.*, the court found policy-change-like behavior from the pleaded facts, which showed that Deere had made promises guaranteeing the general availability of repair tools but has yet to live up to up to its commitment.[56] The court interpreted this conduct as essentially a bait-and-switch, such that Deere first baited the customers using a seemingly enticing policy and then revealed the policy's ineffectiveness after customers had been locked in.[57]

What is remarkable about *Deere & Co.* is that the analysis does not stop at this step. Rather, the court goes on to state that even if the policy change theory fails, the plaintiffs' claim could still proceed based on their information cost theory,[58] which arguably marks a break from the existing jurisprudence after *Kodak*. Regarding the lack of information the plaintiffs allegedly faced when making their original purchasing decisions, the court ruled that manufacturers do not need to *affirmatively hide* the information to violate antitrust law.[59] Rather, the *existence* of the information gap on

---

[52] *See id.* at 471.

[53] *Id.* at 474–79.

[54] *Id.* at 491 (Scalia, J., dissenting) (stating that if Kodak had "consistently pursued an announced policy limiting parts sales in the manner alleged in this case," the customers would presumably have knowledge that aftermarket support could be obtained only from kodak, and the court should inquire no further than to ask whether Kodak has market power in the primary equipment market).

[55] Jonathan I. Gleklen, *The ISO Litigation Legacy of* Eastman Kodak Co. v. Image Technical Services: *Twenty Years and Not Much to Show for It*, 27 ANTITRUST 56, 58 (2012) (noting that cases filed against Digital Equipment, Alcatel, Honeywell, and others based on Kodak's aftermarket theory failed because—"looking to the Kodak dissent—the courts held there could be no aftermarket claim absent a manufacturer's change in policy after locking in consumers.").

[56] In re Deere & Co. Repair Serv. Antitrust Litig., 2023 U.S. Dist. LEXIS 210516, at *62.

[57] *Id.*

[58] *Id.* at *67–69.

[59] *Id.* at *67.

the farmers' side as to the repair restrictions, considered with the totality of facts in this case, was sufficient for the plaintiffs to proceed with a *Kodak*-like claim.[60]

III. A Big Win, Maybe: Conclusion and Considerations

A. Why is Deere & Co. Arguably a Big Win for Right-to-Repair Plaintiffs

The *Deere & Co.* opinion is a shot in the arm for the right-to-repair movement. Notably, earlier in 2023, Deere signed a memorandum of understanding (MOU) with the American Farm Bureau Federation (AFBF), in which Deere promised to allow farmers and independent repair shops to access the software and repair tools "on [f]air and [r]easonable terms."[61] However, as critics have pointed out, Deere's signing of the MOU may actually be a guise of the company's sneaky effort to quench the spark of right-to-repair legislation.[62] In the memorandum, the AFBF agreed with Deere to encourage state agencies to "*refrain* from introducing, promoting, or supporting federal or state 'Right to Repair' legislation that imposes obligations beyond the commitment in this MOU."[63] In this sense, the MOU reeks of a gag order to take the wind out of ongoing legislative efforts.

Corporations' understandable endeavor to stave off the legislative momentum makes judicial involvement imperative in pushing the right-to-repair movement forward. As the *Deere & Co.* court observed, claims based on single brand aftermarket restrictions are rare.[64] In this way, the *Deere & Co.* case may serve as a reference point for subsequent courts and, more importantly, for potential right-to-repair advocates in negotiations outside courts.

In its 89-page opinion, the *Deere & Co.* court provided several lines of reasoning that may help potential right-to-repair plaintiffs get around two obstacles in making a viable antitrust claim: the standing barrier as posed by *Illinois Brick* and the substantive barrier as posed by the general jurisprudence of limiting aftermarket claims since *Kodak*.

First, the opinion delineated a functional reasoning to get around the direct purchaser rule, holding that so long as the tentative plaintiffs are the first and only

---

[60] *Id.* at *69.

[61] Memorandum of Understanding, American Farm Bureau Federation & John Deere (Jan. 9, 2023), https://perma.cc/K2TM-YAKX.

[62] Joe Hernadez, *John Deere Vows to Open Up Its Tractor Tech, but Right-To-Repair Backers Have Doubts*, NPR (Jan. 10, 2023), https://perma.cc/U9D6-34MF.

[63] Memorandum of Understanding, American Farm Bureau Federation & John Deere (Jan. 9, 2023), https://perma.cc/K2TM-YAKX (emphasis added).

[64] In re Deere & Co. Repair Serv. Antitrust Litig., 2023 U.S. Dist. LEXIS 210516, at *50.

group to be harmed, they can have standing against a manufacturer despite not being the direct purchasers.[65] As a lot of right-to-repair plaintiffs do not purchase their repair services directly from the source manufacturer, this line of reasoning may potentially encourage more suits by undermining the standing barrier.

Second, *Deere & Co.* has reinvigorated court's receptivity to aftermarket claims, which has been strictly limited by the aftermarket claims jurisprudence over the past three decades. Since *Kodak*, courts have consistently denied analyzing aftermarkets independently from primary markets absent a compelling reason to do so, such as bait-and-switch conduct.[66] During that period, market imperfection theories, such as high switching costs or lack of information (absent policy change), were largely downplayed as normalities embedded in the economic structure that do not deserve special antitrust attention.[67] From this perspective, *Deere & Co.* departs from the trend by viewing an existing, non-exacerbated information gap that prevents farmers from pricing-in aftermarket prices as an important factor in allowing the case to proceed.[68]

B. Caveats

Although *Deere & Co.* is arguably a big win for right-to-repair advocates in making progress along the traditional antitrust framework, the extent to which the opinion will shape the antitrust landscape for future right-to-repair and other aftermarkets litigants will remain unclear until a few core uncertainties are resolved.

First, it is uncertain whether *Deere & Co.* is an affirmative departure from existing jurisprudence to reinvigorate aftermarket claims or is just another case relying on the traditional tying argument. In its market reasoning, the court repeatedly recognized that Deere has a significant market share in the primary market.[69] On one side, this line of analysis can be interpreted as categorizing *Deere & Co.* as a traditional tying case, in which a *per se* rule applies if the defendant has imposed restrictions in such a way as to use its market power in the primary market to gain monopoly in the aftermarket.[70] On the other side, the *Deere & Co.* court de-emphasized the importance of a clear

---

[65] *Deere & Co.*, 2023 U.S. Dist. LEXIS 210516, at *29

[66] *See, e.g.*, Alcatel USA, Inc. v. DGI Technologies, 166 F.3d 772 (5th Cir. 1999) (holding that if customers have engaged in lifecycle pricing and there is no policy change afterwards, no aftermarket claims can be made).

[67] *See, e.g.*, PSI Repair Servs. v. Honeywell, Inc., 104 F.3d 811, 820 (6th Cir. 1997) ("While we recognize that some information costs still exist even with full disclosure by a seller . . . these additional information costs stem from the fact that our economy is not one of perfect information, a factor that alone should not invoke antitrust condemnation." (citations omitted)).

[68] *Deere & Co.*, 2023 U.S. Dist. LEXIS 210516, at *67–69.

[69] *Id.* at *69–70.

[70] Jefferson Parish Hosp. Dist. No. 2. v. Hide, 466 U.S. 2, 17 (1984).

primary market definition, which seems unreasonable if the court intended to rely on Deere's market power in the primary market to make out a tying case.

Another ambiguity is whether *Deere & Co.*'s standing reasoning only applies to cases in which right-to-repair plaintiffs allege a *conspiracy* between the manufacturer and dealerships in charging a supercompetitive price. Consider: if—instead of engaging in a conspiracy—dealerships are also buyers/licensees of a manufacturer's repair services (or to say, dealerships must pay the manufacturer for each repair they have done), would consumers be barred by the direct purchaser rule? The answer ultimately boils down to what way courts will apply the direct purchaser rule going forward—formally or functionally. Formally, the only stated exception to the direct purchaser rule is the co-conspirator doctrine, which necessarily requires the existence of a conspiracy. In contrast, if subsequent courts pick up *Deere & Co.*'s functional analysis, it may allow them more leeway to grant antitrust standing to plaintiffs who are not the first purchasers in line but somehow occupy an optimal position to bring suit.

In all, the limits and the potential of *Deere & Co.* are difficult to spell out when the subject matter is as current and dynamic as the right-to-repair movement. Predictably, as more legislation regarding right-to-repair is enacted at the state level, the role of traditional antitrust law in pushing the movement forward may continue to decrease. Nevertheless, judicial reactions always are and will be relevant in shaping the trajectories of legislative and social movements. With *Deere & Co.*, the right-to-repair advocates have made a first stride under antitrust law, but how far they can go remains to be seen.