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FTC Gets Serious About Consumers' Right to Repair Their Products

The Federal Trade Commission (FTC) is following through on its promise to crack down on violations of consumers' right to repair the products they buy. Back in July 2021, the FTC announced that it would ramp up enforcement against companies who unfairly prevented customers from fixing products themselves or choosing their own repair shops. In July 2022, it announced actions accusing Harley-Davidson and MWE Investments, LLC (a manufacturer of Westinghouse outdoor power equipment) of doing just that. Both companies entered into consent orders to resolve the issues. These two enforcement actions provide important insights to manufacturers and distributors of consumer products.

The FTC brought the Harley-Davidson action and the Westinghouse action under the anti-tying rule of the Magnuson-Moss Warranty Act (MMWA). This rule prohibits consumer product manufacturers from tying warranty coverage to the use of specific part brands or service providers unless the parts and labor are provided for free. According to the FTC's complaint, Harley-Davidson's 2021 warranty broke this rule with statements like "[i]nsist that your authorized Harley-Davidson dealer uses only genuine Harley-Davidson replacement parts and accessories to keep your Harley-Davidson motorcycle and its limited warranty intact," and "the use of parts and service procedures other than Harley-Davidson approved parts and service procedures may void the limited warranty." With its Westinghouse complaint, the FTC targeted provisions that said that the warranty excluded from coverage "portable generators that utilize non-MWE Investments, LLC replacement parts" and "products that are altered or modified in a manner not authorized in writing by MWE Investments, LLC."

The complaints flagged this language for suggesting the warranties would be voided if consumers did not use an authorized brand of replacement parts or repair services from only authorized providers. Because the companies were not offering the repair parts and services for free (and did not seek a waiver), the agency alleged that they violated the MMWA. The FTC alleged that Harley-Davidson's warranty also violated the MMWA by failing to provide all warranty terms in one document.

In both Harley-Davidson's consent order and Westinghouse's consent order, the companies did not admit to violations, but agreed to cease using such terms and

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to add language informing customers that using third-party replacement parts and repair services would not void their warranties. If Harley-Davidson and Westinghouse do not comply, the FTC may seek penalties of up to $46,517 per violation.

The FTC signaled that these actions are just the beginning. In a statement, the FTC's Bureau of Consumer Protection director said that the orders required Harley-Davidson and Westinghouse to "come clean with consumers" and that "[o]ther companies that squelch consumers' right to repair should take notice."

The FTC warns suppliers not to wrongly suggest that warranties will be void if the buyer fails to use particular brands of repair parts or authorized repair personnel. Additional "right to repair" legislation has been introduced in Congress and is being considered and implemented in dozens of states. As the right to repair movement gains momentum, it may cover a broader range of practices (see *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, pp. 18-24), including designing products that only the manufacturer can repair, making products difficult to open or replace parts, limiting availability of replacement parts and manuals, and asserting overly broad intellectual property rights.

What this means for consumers is that they may have more rights than those suggested by some overly restrictive warranties. For product manufacturers, it may be time to take a fresh look at old warranty language and make sure it is up-to-date, clear and effective without being overly restrictive.

Reinhart's Commercial and Competition Law Team can answer questions about warranty and right to repair laws and help draft or improve written warranties and your communications about them. Please feel free to call with any questions about repair restrictions, the MMWA or how these ongoing developments might affect your business.

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