



**FOLEY**  
FOLEY & LARDNER LLP

30<sup>TH</sup> ANNUAL LAW OF PRODUCT  
DISTRIBUTION & FRANCHISE SEMINAR

**Repairing Weak  
Links in the Global  
Supply Chain**

FOLEY.COM



**FOLEY**  
FOLEY & LARDNER LLP

**Is It Broke?: The “Right  
to Repair”— Implications  
for Product Distribution  
and the Supply Chain**



Mike Lockerby  
Partner  
Washington, DC  
[mlockerby@foley.com](mailto:mlockerby@foley.com)  
(202) 945-6079

FOLEY.COM

## “Right to repair” laws



■ Active Right to Repair Bill - 2021  
 ■ Right to Repair Bill Introduced Historical  
 ■ No Right to Repair



**FOLEY**  
 FOLEY & LARDNER LLP

Mike Lockerby

- Many state franchise and dealer laws reflect an “us versus them” view of franchise, distribution, and supply chain relationships
- “Right to repair” laws reflect a different political dynamic
- Many proposals have focused on the equipment industry, which has presented a united front—in opposition
- What is the current status of these proposals and what are their potential implications?

## “Right to repair” laws



**FOLEY**  
 FOLEY & LARDNER LLP

Mike Lockerby

- What is their stated rationale?
- State equipment dealer statutes often reflect MVDL (motor vehicle dealer law) “creep,” *i.e.*, MVDL changes often end up in equipment dealer laws
- Is the Massachusetts Data Law, applicable to the auto industry, the shape of things to come?
- What are the implications of the July 9, 2021 Executive Order?

## The Stated Rationale for Right to Repair



☒ Active Right to Repair Bill - 2021  
☒ Right to Repair Bill Introduced Historically  
☐ No Right to Repair



Source: The Repair Association

**FOLEY**  
 FOLEY & LARDNER LLP

Mike Lockerby

- Requiring repairs to be made by OEMs and their authorized dealers increases costs for consumers and is anti-competitive
- The concerns raised by manufacturers that unauthorized repairs can result in liability to them and harm their reputations are not documented and are exaggerated
- Third party access to electronic data about consumers, their equipment, and their whereabouts does not expose consumers to hacking or threaten their privacy
- Third party access to embedded software and data does not threaten manufacturers' copyrights, trade secrets, and other IP

## The Equipment Industry Response



- Joint statement by AEM and EDA regarding risks of "overly broad" right to repair laws:
  - **Safety:** Allowing access to source code would risk allowing a user to override safety features required as part of modern farm equipment.
  - **Sustainability:** Farm equipment must comply with environmental and emissions standards, which could be jeopardized by granting access to source code.
  - **Innovation:** Manufacturers and dealers invest considerable resources in developing cutting-edge technology to help create better farming equipment; granting access to source code would jeopardize manufacturers' intellectual property and stifle innovation.

**FOLEY**  
 FOLEY & LARDNER LLP

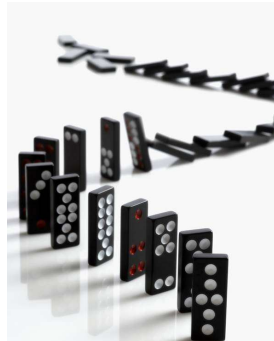
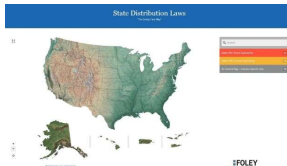
Mike Lockerby

## Manufacturers' Concerns



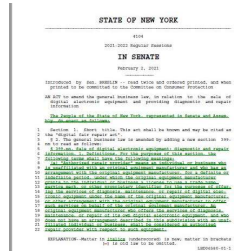
- Manufacturers stand behind their products with warranties based on the assumption that repairs will be performed by trained, authorized repair centers using genuine OEM parts
- Manufacturers face potential liability and injury to reputation for repair work done by service providers that are not trained or controlled by the company and may not use genuine parts
- These concerns are heightened when parts are electronic or contain imbedded software—in which case third party access may jeopardize copyright, trade secret, and other IP rights
- Controlling the quality of parts and service is essential to protecting the manufacturer's brand

## State Equipment Dealer Statutes



- Historically focused on “relationship” issues (termination, non-renewal, amendment, “substantial change in competitive circumstances,” inventory repurchase)
- Warranty reimbursement has become an increasing focus of dealer statutes
- At least 33 states have been considering “right to repair” legislation in various industries, including agricultural equipment
- Proposed New York legislation did not pass
- Massachusetts “Data Law” aimed at automotive industry passed on ballot initiative but implementation enjoined pending trade association and manufacturer court challenge

## New York “Digital Fair Repair Act”



**FOLEY**  
FOLEY & LARDNER LLP

- “No man's life, liberty or property are safe while the [New York] legislature is in session”
  - *Final accounting in the Estate of A.B.* (1866) (Gideon J. Tucker)
- Passed the New York Senate in June 2021 but not enacted this legislative session
- Would require OEMs to make diagnostic and repair information for digital electronic parts and equipment (including updates to information and embedded software) available to independent repair providers & consumers
- Would not require disclosure of trade secrets or alter OEM contracts with authorized repair providers (including warranty and recall work)
- Excludes motor vehicles and medical devices

Mike Lockerby

## MVDL Creep – New Hampshire S.B. 326

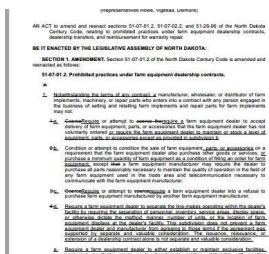


**FOLEY**  
FOLEY & LARDNER LLP

- Repealed pre-existing equipment dealer statute, amended MVDL
- “Motor vehicles” defined to include equipment
  - Tractors and farm implements
  - Construction, industrial, and forestry equipment
  - Lawn and garden equipment
- “Motor vehicles” need not have a motor
  - Do wheelbarrows, fertilizer spreaders, and edgers qualify?

Mike Lockerby

## MVDL Creep – North Dakota S.B. 289

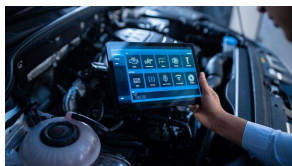


**FOLEY**  
FOLEY & LARDNER LLP

- Triggered by amended form of dealership agreement to which North Dakota Implement Dealers Association (“NDIDA”) objected
- NDIDA's President and CEO also President and CEO of Automobile Dealers Association
- Statute drafted by law firm that specializes in representing motor vehicle dealers nationwide
- Purpose, according to sponsors, to give a “level playing field to our implement dealers”
- Association of Equipment Manufacturers and four manufacturers of agricultural equipment obtained summary judgment on claim that retroactive application of amendments (including warranty reimbursement provisions) violated Contract Clause of U.S. Constitution

Mike Lockerby

## Massachusetts SD645 (“Data Law”)



- Applies to any “Telematic System,” defined as “any system in a vehicle that collects and stores information generated by the operation of the vehicle utilizing wireless communications to transfer that information electronically,” including “motor vehicle remote diagnostics, automatic airbag deployment and crash notification, navigation, stolen vehicle location, remote door unlock, transmitting emergency and vehicle location information to public safety answering points and any other service integrating vehicle location technology and wireless communications”
- Requires “open access” to vehicle on-board diagnostic systems and telematics systems

**FOLEY**  
FOLEY & LARDNER LLP

Mike Lockerby

## Industry Challenge to Data Law



CASE 1:20-cv-00000 Document 1 Filed 03/08/21 Page 1 of 16

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

ALLIANCE FOR AUTOMOTIVE  
INNOVATION

Plaintiff,

vs.

MASSACHUSETTS ATTORNEY  
GENERAL, OF THE  
COMMONWEALTH OF  
MASSACHUSETTS, in her official  
capacity.

Defendant.

C.A. No. \_\_\_\_\_

### COMPLAINT

Plaintiff Alliance for Automotive Innovation ("Alliance") hereby brings this complaint for declaratory and injunctive relief, and alleges as follows:

### INTRODUCTION

1. This action challenges Massachusetts REGM (REGM) (the "Law"), passed by state senators and now codified as Chapter 90B of the Massachusetts General Laws.

2. The nation's leading car and light truck manufacturers—the members of the Alliance—rely on their right to sell their vehicles to the general public. The Law requires that every car and light truck sold in the state be equipped with a system that allows the state to access, read, modify, and write new data to manufacturers' vehicle systems, seriously impacting manufacturers' attempts to bring vehicle data and vehicle systems into the 21st century.



Mike Lockerby

- Trade association lawsuit in federal court in Boston claims that Massachusetts SD645 is:
  - Preempted by federal law: NHTSA motor vehicle safety standards, Clean Air Act (emissions control systems), Copyright Act, Defend Trade Secrets Act, Computer Fraud and Abuse Act, Digital Millennium Copyright Act
  - Unconstitutional under the Takings Clause because it requires manufacturers to abandon access controls on on-board diagnostic systems and develop "open access" platforms to read, modify, and write new data to manufacturers' vehicle systems
- Enforcement of statute delayed enjoined pending outcome of litigation, which went to trial this summer and is awaiting a decision by the district court judge who heard the case
- Regardless of the timing and substance of the decision, it will undoubtedly be appealed

## July 9, 2021 Executive Order

### Executive Order on Promoting Competition in the American Economy

JOE BIDEN

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote the interests of American workers, businesses, and consumers, it is hereby ordered as follows:

#### Section 1. Policy

A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability and the welfare of workers, farmers, small businesses, startups, and consumers.

The American promise of a broad and sustained prosperity depends on an open and competitive economy. For workers, a competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage. For small businesses and farmers, it creates more choices among suppliers and major buyers, leading to more income, which they can reinvest in their enterprises. For entrepreneurs, it provides space to experiment, innovate and pursue the new ideas that have for centuries powered the American economy and improved our quality of life. And for consumers, it means more choices, better services, and lower prices.

Robust competition is critical to preserving America's role as the world's leading economy.



Mike Lockerby

- Fact sheet stated intention to "[m]ake it easier and cheaper to repair items you own by limiting manufacturers from barring self-repairs or third-party repairs of their products" and called out "[p]owerful equipment manufacturers" that "use proprietary repair tools, software, and diagnostics to prevent third-parties from performing repairs"
- Executive Order directs FTC Chair to exercise rulemaking authority under FTC Act Section 5 to remedy "unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment"

## FTC May 2021 Report to Congress



- “Scant evidence to support manufacturers’ justifications for repair restrictions”
- Dismissed manufacturers’ concerns about copyright, trade secret, patent rights:
  - “A full discussion of the interplay between intellectual property and repair is beyond the scope of this notice”
- Rejected as lacking specific evidence manufacturers’ concerns about safety and security risks of certain consumer repairs, especially in case of embedded software
- FTC noted that it asked for data and research to support manufacturers’ argument that unauthorized repairs may result in liability and reputational harm but received none

## Federal Trade Commission



- Assuming that the FTC declares repair restrictions to be an “unfair method of competition” and/or an “unfair or deceptive act or practice” in violation of FTC Act Section 5, the consequences of violation can include:
  - “Cease and desist” orders, injunctions
  - Contracts rescinded or reformed
  - Refunds, damages, public notices
  - Civil penalties
- No private right of action but state “little FTC Acts” may allow compensatory, punitive, or treble damages plus costs and attorneys’ fees for conduct that violates FTC Act Section 5

## Implications for Manufacturers



- Dealer agreements and repair policies need to emphasize the value of the manufacturer's brand and the importance of using genuine OEM parts and trained service personnel
- Agreements with end-users and authorized dealers need to emphasize the fact that the equipment contain embedded software and other technology in which the company owns copyrights, trade secrets, patents, other IP
- Dealer agreements and repair policies need to emphasize the privacy, safety, and other issues raised by third party access
- The company should be active in industry comments to the FTC and state legislatures

# Thank You

ATTORNEY ADVERTISEMENT. The contents of this document, current at the date of publication, are for reference purposes only and do not constitute legal advice. Where previous cases are included, prior results do not guarantee a similar outcome. Images of people may not be Foley personnel. | © 2021 Foley & Lardner LLP