THE FALL OF THE KODAK AFTERMARKET
DOCTRINE: DYING A SLOW DEATH
IN THE LOWER COURTS

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I. INTRODUCTION

The Supreme Court’s 1992 decision in Eastman Kodak Co. v. Image Technical Services, Inc. (Kodak)1 is now slightly more than a decade old. It has generated hundreds of law review articles and no doubt hundreds of millions of dollars in litigation costs. In antitrust iconography, Kodak has come to stand for the proposition that summary judgment is generally inappropriate in antitrust aftermarket cases because competition in the primary market, as a matter of law, does not necessarily preclude the possibility of market power (and anticompetitive conduct) in the aftermarkets for parts and service. In Kodak itself, it was the possibility of such market imperfections as switching and information costs and lock-in effects—which prevented consumers from switching to substitute products in the primary market—that ultimately led to the Supreme Court’s reversal of summary judgment.

After thoroughly surveying the subsequent case law, we have found few cases in which the plaintiff has survived summary judgment involving Kodak-style lock-in claims. But Kodak was supposed to result in fewer, not more, summary judgments for antitrust defendants. What happened? The reality in the trenches is that federal district courts and federal courts of appeal have bent over backwards to construe Kodak as narrowly as possible. In our view, it can fairly be said that the Supreme Court decision in Kodak has been narrowed to the point where it is simply no longer an effective weapon for antitrust plaintiffs.

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This article proceeds as follows: Part II offers a brief overview of the Supreme Court’s Kodak decision. Part III then examines Kodak lock-in theory. Part IV provides a comprehensive survey of lower courts’ treatment of Kodak in the eleven years following the Supreme Court’s decision. This survey reveals that because courts have strictly construed Kodak, defendants have prevailed on summary judgment in almost every single case in which a plaintiff has asserted a Kodak-style lock-in claim.

II. THE SUPREME COURT’S DECISION IN KODAK

A. BACKGROUND OF THE CASE

Eastman Kodak Company manufactured, sold, and serviced high-volume photocopiers and micrographic equipment. Kodak’s photocopier and micrographic products faced direct competition from various companies. Kodak also sold and installed replacement parts for its photocopiers and micrographic equipment through annual or multi-year service contracts that it entered into with its customers. Because its parts were unique and not interchangeable with other manufacturers’ products, Kodak did not compete with the other manufacturers to service Kodak machinery; instead, Kodak competed only with independent service organizations (ISOs). Kodak dominated the service market for its own products at least until the early 1980s, repairing at least 80 percent of the machines it manufactured.

In the early 1980s, ISOs began servicing Kodak equipment and selling reconditioned Kodak equipment. Although the ISOs were apparently able to purchase some parts on a limited basis from Kodak, most of the parts used by the ISOs were purchased from other sources, primarily the firms that produced parts that Kodak did not produce itself. Because the entering ISOs soon established the ability to provide cheaper, and often better, service than Kodak, they threatened Kodak with genuine competition in the service market. In response, Kodak changed its policy and refused to sell its photocopier and micrographic parts to ISOs. Kodak announced that it would sell replacement parts only to equipment owners that bought repair service from it or provided their own service. Kodak took additional steps to prevent ISOs from acquiring parts from other sources, such as manufacturers that made and supplied the parts to Kodak.

In response, the ISOs sued Kodak, claiming that its restrictive parts policy violated Sections 1 and 2 of the Sherman Act. The district court granted summary judgment for Kodak. The Ninth Circuit reversed and remanded the case to the district court for further proceedings, and the Supreme Court affirmed.
B. Holding and Rationale

As the Supreme Court explained, Kodak was theoretically able to charge monopoly aftermarket prices for replacement parts because customers that had already purchased Kodak photocopiers were “locked in” to their machines and thus could avoid purchasing Kodak’s aftermarket parts only by enduring the high “switching costs” of changing to a different brand of photocopier.\(^2\) Even if customers obtained information about long-term costs of ownership, including subsequent repair costs, Kodak might have changed its pricing policies subsequent to their purchase.\(^3\) In an imperfectly competitive market, Kodak would not lose all sales in response to an aftermarket price increase. Rather, it would sell fewer new photocopiers, and would have to trade the loss of new sales (from customers that refused to purchase after considering the higher repairs costs) from the gains resulting from higher priced parts and service sold to the installed base of customers.\(^4\) Because the question of whether this tradeoff would be profitable was a matter of fact, the Supreme Court agreed with the Ninth Circuit that the district court had erred by entering summary judgment for Kodak.\(^5\)

In the Supreme Court, Kodak argued that it could not charge monopolistic prices in the aftermarket for parts and service because consumers would factor the higher aftermarket prices over the life of the photocopier into their purchasing decisions. The Court rejected this argument, observing that lack of information could prevent “unsophisticated” consumers from factoring the higher aftermarket prices into their original purchasing decisions.\(^6\) Purchasers that did not anticipate high-priced service and parts would have to pay such prices because their investment would prevent easy switching—giving Kodak market power in the aftermarket for service and parts.\(^7\)

Alternatively, Kodak argued that many of its customers were large, corporate, “sophisticated purchasers” that could undertake comparative studies and demand competitive life-cycle prices. Sophisticated consumers, Kodak claimed, would not buy original equipment at supracompetitive life-cycle prices. Further, Kodak argued that the behavior of sophisticated consumers would bring unduly high aftermarket costs to the attention of unsophisticated consumers. In the end, none of this

\(^2\) Id. at 476.
\(^3\) Id. at 474–75.
\(^4\) Id. at 475–76.
\(^5\) Id. at 477.
\(^6\) Id. at 475–76.
\(^7\) Id. at 477.
was convincing to the Supreme Court. Although the high court accepted the idea that well-informed consumers did not need antitrust protection from information-driven market imperfections, it concluded that Kodak might be able to overcharge “unsophisticated” consumers, thereby still reaping monopoly profits in the aftermarket. The Court also suggested that Kodak might forgo sales to sophisticated buyers to soak unsophisticated buyers. The Supreme Court particularly emphasized that this was entirely possible because Kodak had changed its approach to parts distribution only after consumers had purchased Kodak equipment and were locked in.

III. UNDERSTANDING KODAK LOCK-IN THEORY

A “lock-in,” as described in Kodak, is also known as “installed based opportunism”—the ability of primary market competitors to charge supracompetitive prices for their aftermarket parts or services. Antitrust concerns arise in this context because consumers become “locked in” to paying higher than competitive prices for aftermarket goods or services by virtue of their original investment in the primary market. Consumers who are unable to switch to other primary competitors are generally forced to pay higher aftermarket prices because of their sunk investment in the primary market. In addition to facing high “switching costs,” locked-in consumers (the installed base) are typically confronted with information asymmetries when initially purchasing in the primary market. If consumers are unable accurately to assess the life-cycle cost of owning the primary good, then the ability of the manufacturer to charge supracompetitive prices is significantly enhanced. Conversely, well-informed consumers will consider the aftermarket cost of ownership and thus the manufacturer will be unable to realize aftermarket monopoly prices. Customers that face a sunk investment in the primary market (switching costs) and are sufficiently uninformed (prior to the primary purchase) to engage in life-cycle pricing (information costs) create an

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8 Id.
9 Id.
10 Id.
11 Id. at 476–77.
installed base of consumers that is susceptible to opportunistic aftermarket conduct by the manufacturer.\textsuperscript{13}

For antitrust liability to arise, it is not enough merely to establish that an installed base of consumers is burdened by significant switching and information costs. By definition, installed-base opportunism requires the manufacturer to exploit locked-in consumers by employing some type of opportunistic conduct. Once the consumer base is installed, manufacturers must capitalize on these market imperfections and exploit consumers by, for example, raising aftermarket prices. If there is no subsequent opportunistic conduct, then manufacturers are not unlawfully exploiting aftermarket consumers because of the lock-in. Most lower federal courts have deemed such post-lock-in change in behavior an essential element of a \textit{Kodak}-style lock-in claim.

After reviewing lower court decisions applying and interpreting \textit{Kodak} and its lock-in theory, it is clear that a defendant manufacturer can be found to have sufficient market power in an aftermarket only if the following conditions are established: (1) consumers face high switching costs; (2) consumers lack the necessary information before sale to engage in life-cycle pricing to determine the total cost of owning the primary good; and (3) once plaintiffs are locked in, the manufacturer undertakes a post-sale change in policy or other form of opportunistic conduct to exploit the installed base of consumers. In short, if the plaintiff cannot create a genuine factual issue on each of these three conditions, summary judgment dismissing the claim is the almost inevitable result.

\textbf{A. Switching Costs}

Switching costs are the additional costs over market price that consumers incur if they elect to abandon their investment and switch to another product. The costs of switching increase when consumers are unable to recover the useful life of their investment in a product if they choose to shift to another brand. That is, the more a consumer’s investment in a product is realized, the fewer switching costs there are to lock the consumer in. In \textit{Kodak}, the Supreme Court observed that “if the cost of switching is high, consumers who already have purchased the equipment, and are thus locked in will tolerate some level of . . . price increases [in

\textsuperscript{13} See 10 Phillip E. Areeda & Herbert Hovenkamp, \textit{Antitrust Law: An Analysis of Antitrust Principles and their Application} ¶ 1740(a) (2002 ed.) (”market imperfections in the form of information and switching costs create the lock-in”); Grimes, \textit{supra} note 12, at 250 (”The equipment buyer’s difficulty in computing a life cycle price in combination with the substantial switching costs associated with abandoning an installed-base product leave the buyer vulnerable to opportunistic pricing for aftermarket parts that are manufactured or controlled by the seller.”).
the aftermarket] before changing equipment brands." As a result, "a seller profitably could maintain supracompetitive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers was high relative to the number of new purchasers." Consumers facing high switching costs are vulnerable to aftermarket exploitation because they are unwilling and unable to shift to another brand to avoid supracompetitive aftermarket prices. When switching costs are insubstantial or insignificant, consumers are able to shift to competing brands and there remains no installed base of consumers for the manufacturer to exploit.

B. Information Costs

Information costs are costs that prevent consumers from obtaining relevant information about the benefits and burdens of owning a product at the time of purchase. Well-informed customers do not face substantial information costs because they are able accurately to assess the life-cycle cost of owning the primary good. In doing so, sophisticated customers are insulated from aftermarket exploitation because they engage in life-cycle pricing. No installed-base opportunism is possible when consumers life-cycle price because well-informed consumers are sophisticated enough to account for the total cost of ownership (both the primary and aftermarket investment) at the time of purchase. In short, knowledgeable consumers cannot be exploited by high aftermarket prices because they understand the consequences of owning the primary product and are aware of the costs of aftermarket ownership before they enter the primary market.

Antitrust concerns arise, however, when a substantial number of consumers are unable to engage in life-cycle pricing and thus are unable to determine the total cost of ownership at the time of purchase. In *Kodak*, the Supreme Court observed that many consumers face substantial information costs because information about, for example, a product’s quality, longevity, performance, and maintenance is prohibitively costly to obtain. When the cost of obtaining the relevant information is prohibitive, consumers cannot engage in life-cycle pricing. In the absence of life-cycle pricing, consumers are vulnerable to aftermarket exploitation because they are unable to determine the total cost of ownership.

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14 *Kodak*, 504 U.S. at 476.
15 Id.
16 Life-cycle pricing is the ability of sophisticated consumers to "inform themselves of the total cost of the 'package'—equipment, service, and parts—at the time of purchase." Id. at 473.
17 See 10 Areeda & Hovenkamp, *supra* note 13, ¶ 1740(d).
18 With respect to the costs of information, the Court stated:

Life-cycle pricing of complex, durable equipment is difficult and costly. In order to arrive at an accurate price, a consumer must acquire a substantial amount of information about the product’s performance, maintenance, and service costs. In the absence of such information, consumers are vulnerable to aftermarket exploitation because they are unable to determine the total cost of ownership at the time of purchase. The costs of information are prohibitive for many consumers, and the resulting imperfect information prevents consumers from engaging in life-cycle pricing. In short, knowledgeable consumers cannot be exploited by high aftermarket prices because they understand the consequences of owning the primary product and are aware of the costs of aftermarket ownership before they enter the primary market. Antitrust concerns arise, however, when a substantial number of consumers are unable to engage in life-cycle pricing and thus are unable to determine the total cost of ownership at the time of purchase. In *Kodak*, the Supreme Court observed that many consumers face substantial information costs because information about, for example, a product’s quality, longevity, performance, and maintenance is prohibitively costly to obtain. When the cost of obtaining the relevant information is prohibitive, consumers cannot engage in life-cycle pricing. In the absence of life-cycle pricing, consumers are vulnerable to aftermarket exploitation because they are unable to determine the total cost of ownership.
accurate life-cycle pricing is high, locked-in consumers are more vulnerable to opportunistic behavior. The lack of information precludes consumers from anticipating the risk of exploitation and, consequently, uninformed consumers are unable to protect themselves at the time of purchase when negotiating price with the manufacturer. When these information asymmetries arise, coupled with substantial information costs, the installed base of consumers is sufficiently locked in to be exploited by aftermarket opportunism.

A recent district court decision, *ID Security Systems Canada v. Checkpoint Systems*,\(^\text{19}\) illustrates the point. The defendant manufactured electronic surveillance systems used by stores to track items by attaching tags to the merchandise. The plaintiffs, which competed in the aftermarket for tags to be used in defendant’s surveillance system, alleged, *inter alia*, that the defendant had attempted to monopolize the aftermarket for surveillance tags by interfering with the plaintiffs’ transactions.\(^\text{20}\) The district court concluded that although consumers of the defendant’s surveillance systems faced substantial switching costs, these costs were “significantly counterbalanced by information costs so low as to be almost nonexistent.”\(^\text{21}\) The court reached that conclusion because purchasers had knowledge before sale of the extent of their future costs and commitment in the aftermarket for surveillance tags, as well as about the incompatibility of the defendant’s tags with the competing manufacturer.\(^\text{22}\) This availability of information at the time of purchase, coupled with the sophistication of most surveillance system purchasers, led the court to conclude that consumers were not locked in to the defendant’s aftermarket for surveillance tags, thereby precluding a finding of liability under the antitrust laws.\(^\text{23}\)

of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade, or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of “downtime,” and losses incurred from downtime. Much of this information is difficult—some of it impossible—to acquire at the time of purchase. During the life of a product, companies may change the service and parts prices, and develop products with more advanced features, a decreased need for repair, or new warranties. In addition, the information is likely to be customer-specific; lifecycle costs will vary from customer to customer with the type of equipment, degrees of equipment use, and costs of downtime.

\(^{19}\) See *id.* at 622 (E.D. Pa. 2003).
\(^{20}\) See *id.* at 632–33.
\(^{21}\) Id. at 643.
\(^{22}\) See *id.* at 643–44.
\(^{23}\) See *id.* at 650.
C. Post-Sale Opportunistic Behavior

After consumers have been locked in as a result of substantial switching and information costs, and can thus be exploited, manufacturers will be liable under a *Kodak*-style lock-in theory only if the plaintiff establishes that the defendant has employed some form of opportunistic behavior to the detriment of the installed base of consumers. Although the majority in *Kodak* did not definitively state whether Kodak’s post-lock-in change in policy of tying the parts for its copiers to its maintenance service was dispositive in establishing a lock-in claim, subsequent circuit courts applying *Kodak* have required a change in policy post-lock-in. This interpretation of *Kodak* is consistent with principles that underlie antitrust law’s concern over installed-base opportunism. The theory of installed-based opportunism is that consumers can be exploited when they are forced to remain in (are locked into) an installed base because of market imperfections. But antitrust concerns do not arise until the manufacturer takes advantage of the installed base—that is, when the manufacturer exploits vulnerable owners by engaging in opportunistic conduct. Even though consumers may be locked in, they are no worse off because of the manufacturer’s market power as long as the manufacturer does not choose to exploit them by exercising it.

Installed-base opportunistic conduct exists in different forms. A post-lock-in change in policy, as seen in *Kodak*, is the more common type of opportunism. For example, a manufacturer that suddenly raises aftermarket prices to supracompetitive levels is engaging in opportunistic behavior in the form of a change in pricing policy. Eastman Kodak did not directly increase price; instead, it adopted a post-lock-in policy of tying replacement parts to maintenance services in order to suppress aftermarket competition. This non-price change in policy is equally opportunistic.

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24 See, e.g., SMS Sys. Maintenance Servs. Inc. v. Digital Equip. Corp., 188 F.3d 11 (1st Cir. 1999); Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772 (5th Cir. 1999); Queen City Pizza, Inc. v. Domino’s Pizza, Inc., 124 F.3d 430 (3d Cir. 1997); PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811 (6th Cir. 1997); Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756 (7th Cir. 1996); Lee v. Life Ins. Co. of N. Am., 23 F.3d 14 (1st Cir. 1994).

25 See 10 Areeda & Hovenkamp, supra note 13, ¶ 1740(a) (discussing how market imperfections in the form of information and switching costs create an installed base of consumers). Professors Areeda and Hovenkamp argue that market imperfections are necessary but insufficient conditions to establish a lock-in claim, and conclude that “courts should not infer substantial market power simply from information imperfections that are common in the world’s numerous product-differentiated markets.” Id.

26 See Herbert Hovenkamp et al., IP and Antitrust § 21.4 (2002) (“[I]n the absence of evidence of . . . a rationale for a change in aftermarket pricing policy, there is no basis for a general conclusion that a producer of a durable good has significant market power over sales of its aftermarket parts or services.”).
Another example of installed-base opportunism is the use of price discrimination between sophisticated consumers that can engage in life-cycle pricing and those that are less informed and unable to protect themselves at the time of purchase.\(^{27}\) The Court in *Kodak* recognized exploitation in which “[a] seller could easily price discriminate by varying the equipment/parts/service package, developing different warranties, or offering price discounts on different components.”\(^{28}\) Thus, manufacturers can exploit uninformed consumers by charging them higher prices while maintaining lower prices for those informed consumers that are able to account for differences in prices. In this respect, price discrimination allows the manufacturer to capitalize on unknowledgeable consumers while not losing any business from informed consumers that would be sensitive to such exploitation because of their ability to engage in life-cycle pricing. As far as we can tell, despite the Supreme Court’s observation in *Kodak* about price discrimination as opportunistic conduct, there has yet to be a lower court case in which the plaintiff has survived summary judgment with a lock-in claim based on a price discrimination theory.

D. Additional Considerations

Even when all three lock-in conditions discussed above are established, courts may still enter summary judgment for the defendant based on one or more of the additional considerations discussed below.

1. Non-Interchangeability of Aftermarket Products

   If the aftermarket goods are interchangeable with other aftermarket substitutes, then the plaintiff is not locked in. Because the availability of aftermarket substitutes creates competition that precludes aftermarket exploitation of installed consumers. Conversely, if aftermarket products are unique and non-interchangeable, the potential for installed-base opportunism remains. But although the non-interchangeability of aftermarket products is necessary for a lock-in to occur, it is not dispositive in determining whether the consumers were locked in. That is to say, uniqueness of a manufacturer’s aftermarket goods does not necessarily confer market power in the aftermarket.\(^{29}\) If uniqueness alone were sufficient, then every producer of non-interchangeable aftermarket goods would have “monopoly” power in the aftermarket.

\(^{27}\) See 10 Areeda & Hovenkamp, *supra* note 13, ¶ 1740(e) (“If the defendant can charge locked-in customers more for parts or service than new knowledgeable buyers... [the manufacturer] can exploit the former without repelling the latter.”).

\(^{28}\) *Kodak*, 504 U.S. at 475.

\(^{29}\) See Hovenkamp et al., *supra* note 26, ¶ 21.4.
Tarrant Service Agency v. American Standard is illustrative.30 The plaintiff, Tarrant, sold genuine and duplicator parts for the service and repair of the defendant’s commercial HVAC equipment. Tarrant claimed that the defendant monopolized the distribution of parts for repair of the defendant’s equipment in violation of Section 2 of the Sherman Act by refusing to sell genuine parts to Tarrant. The Sixth Circuit determined that the plaintiff failed to establish a lock-in claim under Kodak because of the existence of aftermarket substitutes for the defendant’s parts. The court of appeals emphasized that duplicator and generic parts were available alternatives to the defendant’s products. Accordingly, the Sixth Circuit concluded that the defendant manufacturer was unable to control aftermarket prices.31

2. Independence of Primary and Aftermarket Decisions

Consumers are locked in because a prior choice in the primary market eliminates later options of the consumer in the aftermarket.32 Kodak’s lock-in theory is applicable when consumers make the decision to purchase in the primary market independent and apart from their aftermarket decision. If consumers purchase in the primary market at the same time as the aftermarket, no lock-in results because consumers are not forced to pay high aftermarket prices due to their prior decision to purchase in the primary market.33 In these instances, the primary and aftermarket obligations arise concurrently. A consumer cannot be locked in when both the primary and aftermarket goods are purchased simultaneously because the consumer already has sufficient information about its obligations in the aftermarket at the time of purchase. Such availability of information precludes recovery under a lock-in theory.

This situation is especially relevant when the primary and aftermarket goods are integrated into the same contract.34 For example, franchise

30 12 F.3d 609 (6th Cir. 1993).
31 See id. at 615.
32 See 10 Areeda & Hovenkamp, supra note 13, ¶ 1740(c).
33 See E. Thomas Sullivan & Herbert Hovenkamp, Antitrust Law, Policy and Procedure 37–38 (Supp. 1997). “Even if the basic ‘lock-in’ thesis is plausible, it applies only to situations where the consumer buys the original product at time T1, and then is caught by surprise when required to pay a high price for a repair part or aftermarket component at time T2. It has no application whatsoever when both products are purchased at the same time.” (emphasis added).
34 For a more detailed discussion of contract power and lock-in, as well as lock-in as applied to franchise arrangements, see 2A Areeda & Hovenkamp, supra note 13, ¶ 519; see also Roger B. Blair & Jill B. Herndon, The Misapplication of Kodak in Franchise Tying Suits, 14 J. Bus. Venturing 397 (1999); Benjamin Klein, Market Power in Franchise Cases in the Wake of Kodak: Applying Post-Contract Hold-Up Analysis to Vertical Relationships, 67
and dealership arrangements generally do not give rise to lock-in because the primary and aftermarket obligations are accepted simultaneously. Franchisee or dealership plaintiffs frequently attempt to utilize the lock-in argument to nullify their subsequent contract obligations. But this use of lock-in is misplaced. If a franchisee does not like the aftermarket terms of a franchise agreement, the franchisee is free to reject the contract and is not forced to fulfill undesired contractual obligations. In this respect, the franchisee has information available to him at the time of contracting, which defeats a Kodak-style lock-in claim. To put it another way, the fact that in contract claims the decision to enter the aftermarket is made simultaneously with the primary market decision undermines any lock-in claim because the plaintiff is on notice of the extent of its aftermarket obligations at the time of contracting. A lock-in claim cannot succeed if the plaintiff was aware of what the obligations were and then agreed to them.

The Third Circuit reached this exact conclusion in Queen City Pizza, Inc. v. Domino’s Pizza, Inc. In Queen City, a group of independent franchisees brought suit against Domino’s Pizza because the franchise agreement required franchisees to purchase pizza dough from Domino’s. The plaintiffs claimed that they were locked in due to the terms of the franchise agreement with Domino’s that limited their ability to purchase cheaper dough of similar quality. The Third Circuit affirmed the dismissal of the plaintiffs’ lock-in theory because the Domino’s franchisees were able to assess the costs of having to purchase pizza supplies directly from Domino’s at the time they signed the franchise agreement. The court distinguished its facts from Kodak and concluded that franchisees “must purchase products from Domino’s Pizza not because of Domino’s market power over a unique product, but because they are bound by contract to do so. If Domino’s Pizza acted unreasonably when, under the franchise agreement, it restricted plaintiffs’ ability to purchase supplies from other sources, plaintiffs’ remedy, if any, is in contract, not under the antitrust laws.”

35 124 F.3d 430 (3d Cir. 1997).
36 See id. at 440.
37 Id. at 441.
unfavorable obligations agreed to in a contractual setting are not the type of “lock-in” the antitrust laws are designed to protect against. 39

IV. KODAK IN THE LOWER COURTS

After the Supreme Court decided Kodak, some in the antitrust community predicted that Kodak would result in far fewer summary judgments for defendants on a wide array of lock-in inspired antitrust claims. But that has not turned out to be the case. In fact, just the opposite is true. Summary judgment has been awarded to the defendant in almost every single Kodak-style lock-in case. We have surveyed the decisions by the lower federal courts interpreting and applying Kodak’s lock-in theory. We have included in our survey any case in which the plaintiff explicitly utilized Kodak to assert a lock-in claim against the defendant. 40

Circuit-by-circuit analysis of how lower courts have approached and resolved Kodak-style lock-in claims demonstrates that, on the whole, federal courts have severely limited Kodak’s scope so that it is no longer a viable weapon for antitrust plaintiffs. 41 We will discuss the circuit case law in detail below.

Courts essentially have limited Kodak in two ways. First, most courts have limited Kodak to the situation in which the manufacturer has changed a policy, causing injury because customers are locked in. One of the plaintiff’s complaints in Kodak was that Kodak had changed its policy concerning the availability of spare parts. Courts subsequently have concluded that, as long as the manufacturer keeps its policy constant, purchasers are able rationally to calculate life-cycle prices for durable goods. As the Seventh Circuit observed in Digital Equipment Corp. v. Uniq Digital Technologies, Inc.:

39 See Hovenkamp et al., supra note 26, § 21.4(c) (“To turn [franchise contracts] into an antitrust problem is basically to invite antitrust into all situations where people negotiate unfavorable contracts that result in payment of excessive prices . . . . [T]he negotiation of a contract whose terms measured ex post turn out to be disadvantageous to one party is not a problem of monopoly.”).

40 The survey of cases we examined totaled 33 circuit and district court opinions in which the plaintiffs expressly asserted a Kodak lock-in theory of antitrust liability.

41 The circuits not discussed in this section either did not meaningfully treat lock-in theory or factually distinguished Kodak’s holding and rejected the plaintiff’s claims. See, e.g., Hack v. President & Fellows of Yale College, 237 F.3d 81 (2d Cir. 2000) (declining to extend Kodak to undergraduate education); Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494 (3d Cir. 1998) (adopting a broad market definition and rejecting plaintiff’s claim that the aftermarket is a relevant market for antitrust purposes); United Farmers Agents Ass’n v. Farmers Ins. Exch., 89 F.3d 233 (5th Cir. 1996) (same); see also Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207 (11th Cir. 2002) (distinguishing contract power from market power in the distributor context).
The [Supreme] Court did not doubt in Kodak that if spare parts had been bundled with Kodak’s copiers from the outset, or Kodak had informed customers about its policies before they had bought machines, purchasers could have shopped around for competitive life-cycle prices. The material dispute that called for trial was whether the change in policy enabled Kodak to extract supra-competitive prices from customers who had already purchased its machines.42

In other words, these courts have restricted Kodak to situations where the manufacturer originally dealt with independents and later cut them off. Those courts hold that only a surprise change in policy after some customers have already been locked in can justify finding separate aftermarkets that can be monopolized when the primary market is competitive. Under this narrow reading, the Kodak majority did not reject Kodak’s general theory that competition in the interbrand primary market can protect customers from exploitation in the aftermarket. The theory was rejected only where the change in policy is unanticipated by purchasers who now are locked in by the high costs of switching to another brand. Only the surprise restriction of competition from independent servicers kept those customers from accurately calculating the life-cycle costs of the equipment when making the initial purchase.

The second way that lower courts have restricted Kodak is reflected in those decisions focusing on relevant market definition. The First Circuit’s decision in SMS Systems Maintenance Services, Inc. v. Digital Equipment Corp. illustrates the point.43 In SMS, the plaintiff brought a Kodak-type claim asserting that the defendant’s inclusion of a three-year warranty on its computer systems violated Section 2 of the Sherman Act. In upholding the district court’s grant of summary judgment for the defendant, the First Circuit concluded that the relevant market was the competitive foremarket—the market for computer systems—and not the aftermarket—the market for service of that equipment. The First Circuit stated:

[A] litigant who envisions the aftermarket as the relevant market must advance hard evidence dissociating the competitive situation in the aftermarket from activities occurring in the primary market. . . . Put another way, a court may conclude that the aftermarket is the relevant market for antitrust analysis only if the evidence supports an inference of monopoly power in the aftermarket that competition in the primary market appears unable to check.

We summarize succinctly. In any market with some degree of product differentiation, goods of a single brand will enjoy a certain degree of uniqueness. . . . While that uniqueness may account for a manufacturer having a large market share in the services aftermarket for its own

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42 73 F.3d 756, 763 (7th Cir. 1996).
43 188 F.3d 11 (1st Cir. 1999).
brand, that fact, without more, does not suffice to establish that the manufacturer enjoys monopoly power in that market. Unless the evidence shows the manufacturer can exert raw power in the aftermarket without regard for commercial consequences in the foremarket, the aftermarket is not the relevant market.44

The First Circuit in SMS concluded that the plaintiff had failed to introduce such evidence and, on that basis, entered summary judgment for the defendant.45

A. Kodak in the First, Fifth, Sixth, and Seventh Circuits

To state a Kodak-style lock-in claim, the First, Fifth, Sixth, and Seventh Circuits require plaintiffs to establish that the defendant implemented a post-sale change in policy in order to exploit the installed base of consumers. In these four circuits, merely proving that consumers are confronted with substantial switching and information costs is insufficient.46 To date, no plaintiff has produced evidence sufficient to prevail under a Kodak-like lock-in theory.47

The Seventh Circuit’s decision in Digital Equipment v. Uniq Digital Technologies illustrates the approach in these circuits.48 In rejecting the plaintiff-distributor’s claim that consumers were locked in to using the defendant’s equipment under Kodak’s theory, the court of appeals observed that post-lock-in opportunistic conduct is critical:

44 Id. at 17.
45 Id. at 18.
47 A district court case in the First Circuit—George Lussier Enters. v. Subaru of New England, Inc., 1999 U.S. Dist. LEXIS 19769 (D.N.H. 1999), denied summary judgment based on a lock-in theory. But this case is distinguishable because it arose in the contract setting and inappropriately applied Kodak. As we argue below, Kodak-like lock-in claims can never exist in the franchise and dealership context for two reasons. First, there cannot be a lock-in to the aftermarket when the decision to enter the aftermarket is made concurrently with the consumer’s decision to enter the primary market. Second, parties who are protected by contract have sufficient information at the time of bargaining to inquire into the total cost of owning the primary good and consequently are not constrained by substantial information costs.
48 73 F.3d 756 (7th Cir. 1996).
The [Supreme] Court did not doubt in Kodak that if spare parts had been bundled with Kodak’s copiers from the outset, or Kodak had informed customers about its policies before they bought its machines, purchasers could have shopped around for competitive life-cycle prices. The material dispute that called for a trial was whether the change in policy enabled Kodak to extract supra-competitive prices from customers who had already purchased its machines.49

In the end, the Seventh Circuit granted summary judgment for the defendant because consumers were aware of the defendant’s policy of including an operating system with its computers at the time of purchase. Thus, plaintiffs failed to establish a post-lock-in change in policy.50

Another example is PSI Repair Services Inc. v. Honeywell Inc.51 Honeywell manufactured industrial control equipment used in various refineries and factories.52 A vital component of the functioning of Honeywell’s equipment was printed circuit boards, which would periodically malfunction, causing the industrial equipment to fail. Honeywell replaced defective components with refurbished boards so long as purchasers of their industrial equipment returned the defective board.53 Although most of the parts used to manufacture the boards were readily available, Honeywell maintained restrictive agreements with manufacturers of a few of the board components under which the manufacturers agreed not to sell select parts to Honeywell equipment purchasers or independent circuit board service providers.54 PSI Repair was one such competing service provider that offered circuit board repair services for purchasers of industrial equipment, including Honeywell equipment.55 Because PSI Repair could not obtain the necessary parts to service defective Honeywell circuit boards, it effectively could not compete in the market for repairing Honeywell industrial equipment.

PSI Repair asserted an illegal tying claim under Section 1 and a monopolization claim under Section 2 of the Sherman Act. In particular, PSI contended that Honeywell illegally tied circuit board parts to its circuit board repair services through its restrictive parts policy.56 The district court granted summary judgment for Honeywell. The Sixth Circuit affirmed. In doing so, the Sixth Circuit emphasized that a post-sale

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49 Id. at 763.
50 See id.
51 104 F.3d 811 (6th Cir. 1997).
52 See id. at 813.
53 See id.
54 See id.
55 See id.
56 See id. at 814–15.
change in policy was the “crucial factor” in the Supreme Court’s decision in *Kodak* because an unanticipated change in policy creates information asymmetries for consumers who are already locked in.57 The Sixth Circuit concluded that because Honeywell did not change its parts policy after purchase and also engaged in informative discussion with purchasers before sale, summary judgment was appropriate. The court stated that “an antitrust plaintiff cannot succeed on a *Kodak*-type theory when the defendant has not changed its policy after locking in some of its customers, and the defendant has been otherwise forthcoming about its pricing structure and service policies.”58

*PSI Repair* and *Digital Equipment* are good examples of how a majority of the circuits have interpreted *Kodak* to require a post-sale change in policy in order for a plaintiff’s lock-in theory to prevail.

**B. Kodak in the Third Circuit**

For tying and monopolization claims brought under Sections 1 and 2 of the Sherman Act, plaintiffs must establish, at a minimum, that the defendant maintained market power in a relevant market.59 As explained above, most lower courts presented with lock-in claims after *Kodak* have entered summary judgment for the defendant on the grounds that the defendant lacks market power in the derivative aftermarket. The Third Circuit, however, has taken a slightly different approach, awarding summary judgment on the grounds that the aftermarket simply is not a relevant market for antitrust purposes. Under this approach, a court need not even reach the issue of market power.

Illustrative of the Third Circuit’s approach is *Brokerage Concepts, Inc. v. U.S. Healthcare.*60 The plaintiffs brought a tying claim against defendant U.S. Healthcare under Section 1 of the Sherman Act. The Third Circuit affirmed the district court’s summary judgment for U.S. Healthcare on the tying claim, concluding that the plaintiffs had failed to establish that the derivative aftermarket was a relevant market. In so doing, the court of appeals cautioned that all that “*Kodak* establishes [is] that a single brand market may be considered the relevant market where a legitimate class of consumers is locked in to purchasing a non-interchangeable tying product in a derivative market due to high switching costs in the

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57 See id. at 820.
58 Id.
59 See, e.g., *Kodak*, 504 U.S. at 462 (tying arrangement); id. at 481 (monopolization); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 556 (1993) (attempted monopolization).
60 140 F.3d 494 (3d Cir. 1998).
primary market.”61 But where there is no such evidence, then, in the view of the Third Circuit as expressed in Brokerage Concepts, the plaintiff cannot establish that the aftermarket is a relevant market and the case should be dismissed.62

Another example is the Third Circuit’s decision in Queen City Pizza, Inc. v. Domino’s Pizza, Inc.63 In that case, the Third Circuit affirmed the district court’s 12(b)(6) dismissal of plaintiff’s tying and attempted monopolization claims. The Third Circuit concluded that plaintiffs could not establish as a matter of law that the derivative aftermarket constituted a relevant market:

Plaintiffs contend that they face information and switching costs that “lock them in” to their position as Domino’s franchisees, making it economically impracticable for them to abandon the Domino’s system and enter a different line of business. They argue that under Kodak, the fact that they are “locked in” supports their claim that an “aftermarket” for Domino’s-approved supplies is a relevant market for antitrust purposes. We believe plaintiffs misread Kodak . . . .

Kodak, we believe, held that a plaintiff’s proposed relevant market in a unique and non-interchangeable derivative product or service cannot be defeated on summary judgment by a defendant’s assertion that the proposed derivative market is cross-elastic with the primary market, if there is a reasonable possibility that the defendant’s assertion about cross-elasticity is factually incorrect. But Kodak does not hold that the existence of information and switching costs alone, such as those faced by the Domino’s franchisees, renders an otherwise invalid relevant market valid. In Kodak, the repair parts and service were unique and there was a question of fact about cross-elasticity. Judgment as a matter of law was therefore inappropriate. Here, it is uncontroverted that Domino’s approved supplies and ingredients are fully interchangeable in all relevant respects with other pizza supplies outside the proposed relevant

61 Id. at 515.
62 In reaching its conclusion that the plaintiffs in Brokerage Concepts had not proven that the aftermarket was a relevant market, the Third Circuit observed:

On appeal, [the plaintiffs] argue that U.S. Healthcare members are “locked in” to U.S. Healthcare and, by extension, to the pharmacies in its provider network. We doubt that this argument is factually correct, for we find no evidence suggesting that U.S. Healthcare members who wish to switch HMOs face switching costs significant enough to constitute a lock in. But even if it is, the argument is misplaced since Kodak is concerned with the situation where the victims of the alleged tie—in that case, the purchasers of Kodak copiers—are faced with high switching costs and thus are “locked in” to the market for the tying product. Under [plaintiffs’] theory of the case, Gary’s is the purchaser of the tying product which is U.S. Healthcare members who purchase prescription drugs. Thus in order to fall within Kodak’s concept of lock in, BCI needed to, at a minimum, provide evidence that Gary’s—not U.S. Healthcare members—was locked into the U.S. Healthcare network. That it did not do.

Id.
63 124 F.3d 430 (3d Cir. 1997).
market. For this reason, dismissal of the plaintiffs’ claim as a matter of law is appropriate. 64

In any event, no matter how courts characterize the lock-in argument, either as an issue of relevant market or market power, the analysis should essentially be the same. In fact, the Supreme Court’s decision in Kodak made this clear. The Court stated:

Because market power is often inferred from market share, market definition generally determines the result of the case. Kodak chose to focus on market power directly rather than arguing that the relationship between equipment and service and parts is such that the three should be included in the same market definition. Whether considered in the conceptual category of “market definition” or “market power,” the ultimate inquiry is the same—whether competition in the equipment market will significantly restrain power in the service and parts markets. 65

For consumers to be locked in, they must face substantial information and switching costs. If the lock-in issue is characterized as one of relevant market, a single-brand aftermarket becomes distinct from the primary market when switching and information costs are sufficiently high to expose a number of consumers to exploitation. In that event, the aftermarket is the relevant market for the antitrust inquiry. Similarly, under a market power characterization, market power cannot be inferred unless a manufacturer exploits an installed base of consumers that face significant switching and information costs. In the end, these two modes of analysis focus on the same antitrust inquiry: whether there is a significant number of locked-in consumers that a manufacturer can exploit as a result of their prior decisions to purchase in the primary market.

C. Kodak in the Ninth Circuit

The Ninth Circuit offers by far the most favorable jurisdiction for plaintiffs bringing Kodak-style lock-in claims. In fact, the Ninth Circuit has strongly suggested that the plaintiff need not prove a post-sale change in policy so long as the plaintiff has shown switching and information costs. One district court in the Ninth Circuit has expressly held that a post-sale change in policy is not required for surviving summary judgment under a Kodak-style lock-in theory. 66 For now, at least, antitrust plaintiffs bringing Kodak lock-in claims may look to the Ninth Circuit as their last and only refuge.

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64 Id. at 525.
65 Kodak, 504 U.S. at 470 n.15 (emphasis added).
Consider the Ninth Circuit’s decision in *Virtual Maintenance, Inc. v. Prime Computer, Inc.* In that case, Ford Motor Company created its own software design program to be used in designing automobiles. Ford often modified the program and required the automotive design companies with which it did business to use the most recent version of Ford’s design software. Ford licensed the defendant, Prime, both to distribute the program and to provide software support for those doing business with Ford. Prime decided to offer this software support as part of a package that included hardware services on its own computers, which were one of only a few computer systems that were able to run the Ford design software.

Virtual Maintenance, a hardware service provider for Prime computers, sued Prime alleging that Prime unlawfully tied the hardware service for its computers to the software support services for Ford’s design program. Virtual argued that Ford and its suppliers were unable to switch to another software service provider because they were “locked in” to Prime’s services.

The district court entered summary judgment for Prime. The Ninth Circuit reversed and remanded Virtual’s tying claim to the district court. In the Ninth Circuit’s view, there was sufficient evidence that Prime might enjoy market power in the aftermarket for the servicing of Ford’s design software because of Ford’s license to Prime and the need for Ford’s business partners to use the most recent version of Ford’s software. The Ninth Circuit also found evidence in the record that Ford and its software customers were locked in to Prime because of expert testimony that suggested “Prime could substantially raise its maintenance prices before customers would abandon their investment.”

*Virtual Maintenance* is important for one major reason. By not requiring the plaintiffs to prove that Prime made a post-sale change in policy once consumers were locked in to the software aftermarket, the Ninth Circuit’s decision goes against the overwhelming weight of authority from the other circuits discussed above, all of which require a post-sale change in policy for a plaintiff to survive summary judgment.

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67 11 F.3d 660 (9th Cir. 1994).
68 See id. at 662.
69 See id.
70 Id. at 667.
71 Note that the outcome in *Virtual Maintenance* is consistent with the consideration that if the aftermarket product is unique and non-interchangeable, there is an increased potential for installed base opportunistic conduct. See supra Part II.D.1.
A California district court’s decision in *Red Lion Medical Safety, Inc. v. Ohmeda, Inc.* also is noteworthy because it expressly held what the Ninth Circuit in *Virtual Maintenance* implied, namely that no post-sale change in policy is required to state a Kodak-style lock-in claim. In *Red Lion*, Ohmeda manufactured medical anesthesia equipment for hospitals. Ohmeda maintained a restrictive parts policy under which it would sell replacement parts for its equipment only if the consumer had in-house Ohmeda-trained services, or if the consumer signed a waiver letter discharging Ohmeda from any liabilities arising out of subsequent equipment use that was not repaired by the manufacturer. The plaintiffs were a group of independent service organizations that provided maintenance services for anesthesia equipment. They sued Ohmeda, alleging that the manufacturer had unlawfully monopolized the market for service on Ohmeda equipment in violation of Section 2 of the Sherman Act.

Ohmeda responded by arguing, as Eastman Kodak did in the *Kodak* case, that it was unable to charge supracompetitive prices in the aftermarket for parts and services because any gain would be offset by reduced consumption in the primary market for equipment. Rejecting Ohmeda’s argument, the district court in *Red Lion* unequivocally stated that the Supreme Court’s decision in *Kodak* required no such post-sale change in policy for consumers to be locked in. The *Red Lion* court explained:

> The policy change [in *Kodak*] did not create the lock-in; instead, the existence of lock-in—high switching costs—made it both possible and economically desirable for Kodak to change its policy and exploit aftermarket consumers. Thus, the policy change did not create monopoly power; it was merely persuasive evidence that Kodak had market power in parts and engaged in monopolistic conduct in the aftermarket despite competition in the equipment market. To insist on a showing of a policy change confuses a symptom of market power and a lack of cross elasticity with the underlying condition itself.

The court concluded that because the plaintiffs offered sufficient evidence of significant switching costs and an inability to engage in lifecycle pricing to assess the long-term ownership costs, summary judgment was inappropriate, even without a post-sale change in policy.

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Red Lion is the only case to date that has expressly rejected the interpretation of Kodak requiring a post-sale change in policy. When Red Lion is read in conjunction with the rationale offered in Virtual Maintenance, the Ninth Circuit offers hope for plaintiffs asserting Kodak-style lock-in claims. It may only be a matter of time, however, before the Ninth Circuit is brought into line with the rest of the circuits that require a post-sale change in policy.

D. Kodak in the Eleventh Circuit

Besides the Ninth Circuit case law discussed above, the only other reported case in which a plaintiff has survived summary judgment on a Kodak-style lock-in claim is Telecomm Technical Services, Inc. v. Siemens Rolm Communications, Inc.\(^79\) To date, the Florida district court’s decision in Telecomm is the only case law in the Eleventh Circuit addressing the viability of Kodak-style lock-in claims.

In Telecomm, the defendant Rolm manufactured PBX switches that enabled businesses with multiple phone lines to send and receive phone calls.\(^80\) Although many firms competed in the switch market, each product required unique parts and software that typically were protected by intellectual property rights, including Rolm’s.\(^81\) As a result, Rolm also provided maintenance and software services to its customers. The plaintiffs were independent service organizations that serviced Rolm switches and brought suit against Rolm under Section 1 and 2 of the Sherman Act for utilizing its control over its parts and software to monopolize the switch service market.\(^82\)

Rolm defended on the ground that it was unable to charge supracOMPetitive prices for maintenance and software services because there was significant competition in the primary market for switches and that consumers would take into account any increases in maintenance costs when considering from which switch manufacturer they should buy.\(^83\) Rolm further argued that “unless a plaintiff presents evidence that information costs and switching costs are high and that the consumers became ‘locked-in’ to their purchases of a durable good, summary judgment is appropriate in a case brought by ISOs against a manufacturer that faces competition in the sale of its goods.”\(^84\) In rejecting Rolm’s interpretation

\(^80\) See id. at 1310.
\(^81\) See id.
\(^82\) See id. at 1311.
\(^83\) See id. at 1317.
\(^84\) Id.
of *Kodak* and denying summary judgment, the district court stated that information and switching costs were not the only “factors that should be considered in evaluating” a lock-in claim. Instead, the court opted for a more holistic approach and examined the “commercial realities faced by consumers.” The district court concluded that the plaintiffs had produced sufficient evidence that Rolm’s aftermarket prices were 30–60 percent higher than the plaintiffs’ prices and that Rolm employed strategies designed to undercut plaintiffs’ ability to compete.

Although the plaintiffs in *Telecomm* initially survived summary judgment, the district court’s decision might well be used by defendants to win summary judgment in future cases. In its discussion of information and switching costs, buried in a footnote, the court observed that Rolm had formerly sold parts to ISOs but later stopped doing so. The court then remarked that this evidence demonstrated that issues of material fact remained about whether the consumers were locked in. All of this may allow defendants in the Eleventh Circuit to argue successfully that the district court in *Telecomm* considered the defendant’s post-sale change in policy to be a requirement of the plaintiffs’ *Kodak*-style lock-in claim. Viewed in this light, the *Telecomm* Court followed the overwhelming majority of other courts that require the plaintiff to demonstrate a post-sale change in policy to survive summary judgment.

V. CONCLUSION

In a recent law review article, Professor Hovenkamp urged the Supreme Court to overrule its *Kodak* decision. His “central conclusion is that the Supreme Court’s controversial *Kodak* decision has done more harm than good and should be overruled.” In our view, however, there is no need for the Supreme Court to take this drastic step. Because the lower courts have so narrowly interpreted *Kodak*, resulting in an almost

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85 Id. at 1318.
86 See id. at 1317–18.
87 After initially denying summary judgment, the district court granted summary judgment to Rolm because the parts Rolm refused to sell were protected by patents. See Telecomm Tech. Servs., Inc. v. Siemens Rolm Communications, Inc., 150 F. Supp. 2d at 1365 (N.D. Ga. 2000).
88 See Telecomm, 66 F. Supp. 2d at 1317 n.11.
89 See id.
91 Id. at 282.
unbroken string of summary judgments for the defendant, there is no true need for the Supreme Court to act. The lower courts, in effect, have overruled Kodak by pulling its teeth.92

92 On remand from the Supreme Court in Kodak, the case was retried in California district court. The main issue at trial was entirely different from the issue before the Supreme Court in Kodak. In the Ninth Circuit’s decision on remand, Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997) (Kodak II) the issue was Kodak’s refusal to sell patented replacement parts to the ISOs. Kodak argued that a refusal to license or sell patented goods was not an antitrust violation, and sought a jury instruction to that effect. The district court refused to give that instruction, and the jury on remand entered a trebled damage award of $71 million against Kodak. The Ninth Circuit affirmed. Id.

The Ninth Circuit in Kodak II reasoned that, although the district court erred by refusing to give the jury instruction requested by Kodak, it was harmless error under the specific circumstances of that case. In so doing, the Ninth Circuit in Kodak II stated the rule that there is a “rebuttable presumption” that a desire to protect one’s intellectual property rights is a legitimate business justification. Id. at 1218. The Ninth Circuit explained that this presumption can be rebutted by demonstrating that the defendant’s asserted intellectual property justification is pretextual. Id. Applying this rebuttable presumption standard, the court rejected Kodak’s argument that its refusal to deal was based upon a desire to protect its intellectual property rights. Instead, the Ninth Circuit concluded that it was more probable than not that the jury would have found Kodak’s proffered business justification pretextual. Id.

In contrast with the Ninth Circuit’s decision in Kodak II, the Federal Circuit, in In re Independent Service Organizations Antitrust Litigation v. Xerox Corp., 203 F.3d 1322 (Fed. Cir. 2000), held that a patent holder’s mere unilateral refusal to license a valid, enforceable, and lawfully obtained patent, or to sell items covered by such a patent, is not actionable under the antitrust laws, regardless of the patent owner’s reason or motivation for the refusal. The Federal Circuit noted that absent “illegal tying, fraud . . . or sham litigation, the patent holder may enforce the statutory right to exclude . . . free from liability under the antitrust laws.” Id. at 1324. The Federal Circuit expressly rejected the Ninth Circuit’s adoption of a “pretext” standard, set out in Kodak II, which permits inquiry into the intellectual property holder’s subjective intent in refusing to deal with a competitor seeking intellectual property or products embodying it. Id. at 1328.