
Warranty and Recall - Preparing for the Future of Claims to Protect Your Bottom Line

The automotive industry forecast projects that there will be an increase in warranty and recall claims in the near future due to the evolution of vehicles. As vehicles become more and more technologically advanced and undergo design changes, issues are sure to arise, especially in the autonomous world. Undoubtedly, OEMs will attempt to transfer these costs to suppliers. Accordingly, suppliers should be preparing for this now and seek to position themselves for the best possible outcome in a warranty or recall situation.

First, it is important to understand warranties and disclaimers available under the law. Most products come with an express warranty from the manufacturer. Express warranties will be enforced as written, unless the warranty fails to serve its essential purpose. Express warranties should be narrowly tailored and realistic, meaning the manufacturer will be able to satisfy the terms of warranty.

Also, the Uniform Commercial Code (“UCC”) provides a safety net by way of implied warranties to protect consumers. The two types of implied warranties under the UCC are 1) merchantability – the goods as sold are of industry standard quality, MCL 440.2314; and 2) fitness – the goods are fit for the intended purpose of the purchaser. MCL 400.2315. However, implied warranties may and should be disclaimed by manufacturers to eliminate potential avenues of liability for breach of warranty claims.

To disclaim an implied warranty of merchantability, the disclaimer must mention “merchantability” and be conspicuously written. MCL 440.2316(2). To disclaim an implied warranty of fitness for a particular purpose, the disclaimer must be conspicuous as well. The UCC states that language to exclude implied warranties of fitness is sufficient if it states that “there are no warranties which extend beyond the description on the face hereof.” MCL 440.2316(2).

The Michigan Court of Appeals has recognized four factors to determine whether a warranty disclaimer is conspicuously written: (1) contrasting color or particular emphasis

on any portion of the asserted disclaimer, (2) noticeable location, (3) stands out compared to other writings, and (4) consideration of other writings suggesting warranties are included. See, *Mallory v Conida Warehouses, Inc.*, 134 Mich App 28, 31; 350 NW2d 825 (1984). In other words, the disclaimer will not be effective if it is hidden on the product.

In practice, suppliers of products must protect themselves during the contracting phase with other suppliers or OEMs. When a warranty or recall claim occurs, it triggers a domino effect in the stream of production where each party involved will attempt to place blame to recoup costs and avoid liability. Effective contracting is imperative to prepare for these situations. Agreements between suppliers or between suppliers and OEMs should contain precise design specifications for the product, product testing criteria, warranty disclaimers, and specifically address warranty and recall protocols. Also, the agreements should consider provisions addressing insurance, indemnification, liquidated damages, alternative dispute forum options, choice of law and forum selection, and attorney fees.

For some suppliers, it is a common practice to work off of hand-shakes and purchase orders. This is a recipe for chaos in a warranty or recall situation that involves multiple players in the production chain and will leave your company exposed to greater risk and liability.

In addition to being proactive in the contracting phase, suppliers should implement internal systems and procedures to quickly and efficiently investigate warranty and recall claims. It is crucial for suppliers to understand dealer recall codes that may implicate the supplier's product. Also, suppliers should seek to examine the product as quickly as possible to determine the cause and origin of the issue; and suppliers should obtain all relevant documentation from the OEMs and upper tier suppliers' investigations for review.

Warranty and recall claims directly affect OEM and supplier bottom lines and supplier agreements are often lopsided in favor of the upper tier. Having systems in place to handle warranty and recall issues will substantially benefit your company's operations. Although litigation sometimes cannot be avoided, proper contracting and implementing efficient warranty and recall protocols will lower the likelihood of being forced to litigate when issues arise, or at the very least, put your company in the best possible position for success.

