



Warranty and Recall

Tim Hefferon, Deputy General Counsel,
ThyssenKrupp Budd



Warranty and Recall Warranty

Key Considerations

- What is warranted?
- For how long?
- What remedies?
- Scope of Seller's input



Warranty and Recall Warranty

What is Warranted?

- Free from Defects in Material and Workmanship
- Conforms to Specifications, Drawings, etc.
- Good title
- Free from Defects in Design
- Fit for Intended Purpose
- Merchantable



Warranty and Recall Warranty

OEM positions on what is warranted

- A comprehensive warranty is required by each of the OEMs - similar in scope.
- Key differences exist concerning WHEN the supplier warrants fitness for intended purpose and no design defects.
- Suppliers prefer to warrant fitness for intended purpose and no design defects ONLY when the Supplier has design responsibility.



Warranty and Recall Warranty

Example: DCX

“...all goods not designed by DaimlerChrysler will be fit and sufficient for the purpose intended.”

Example: Toyota

“ If Toyota . . . does not provide the design . . . , Supplier expressly warrants that the design of the Items shall be free from defects. Supplier expressly warrants that all Items will be fit and sufficient for the purposes intended by Toyota”



Warranty and Recall Warranty

OESA Model Terms and Conditions

- Seller warrants freedom from defects in material and workmanship and conformance to specifications, drawings, etc. as well as good title.
- Model Terms specifically exclude other warranties such as fitness for a particular purpose and design warranties unless the purchase order specifies otherwise. This is to encourage parties to specifically address the issue of responsibility for design and integration and assign warranty obligations accordingly.



Warranty and Recall Warranty

Conclusion

- Warranties of fitness for intended purpose and absence of design defects should be excluded unless the Supplier is truly responsible for design and/or integration.



Warranty and Recall Warranty

OEM Positions on Warranty Period

- Most OEMs require a warranty that lasts until the OEM warranty offered to consumers expires.
- Only Toyota provides that the warranty period is determined by the OEM warranty to consumers in effect at the time the parts in question are manufactured, BUT Toyota reserves the right to extend the warranty period to apply prospectively



Warranty and Recall Warranty Period

OESA Model Terms and Conditions

- The Model Terms state that the warranty period is as specified in the purchase order.
- This promotes a tailored approach and precludes unilateral changes in the warranty period.



Warranty and Recall Warranty Period

Conclusion

- Warranty periods should be negotiated case-by-case and reflect the nature of the product and the economics of the contract.
- OEM terms are generally “one-size-fits-all”; Toyota approach is not substantially different in effect from other OEM provisions.



Warranty and Recall

Warranty - Remedies

- OEM terms do not limit the Buyer's remedies for breach of warranty; Supplier's may be liable for a broad array of costs and damages attributable to the breach.
- Some OEM terms are specific in describing the types of remedies available; others rely on more general language.
- OESA Model Terms limit Buyer's remedies, unless the contract specifies otherwise to (a) rejection of goods, (b) repair or replacement of goods and/or (c) in some cases, Seller implementation of containment, inspection, sorting and other quality assurance procedures.



Warranty and Recall Recall

Key Considerations

- What type of “defect” can trigger liability?
- Timing and nature of notice
- Scope of Supplier’s Input
- Remedies



Warranty and Recall Recall

OEM Positions

- Some OEM terms (DCX, Honda) do not specifically address recall.
- Most OEM terms make Supplier broadly liable for costs and damages related to recalls to the extent caused by the Supplier.



Warranty and Recall

Recall

What type of “defect” triggers liability?

- Under some OEM terms, recall must simply relate to the Supplier’s part (ie, BMW) to trigger liability.
- Under other terms, Supplier’s liability is triggered only if its warranty was breached (ie, GM, OESA Model Terms).
- Other OEM terms trigger liability for “defects”, “deficiencies” or noncompliance with laws, etc. (ie, Hyundai).



Warranty and Recall

Recall

Notice and Supplier's Input

- Ford, VW and Toyota terms expressly provide for notice and negotiation concerning Supplier's liability.
- In general, the OEM reserves the right to determine the Supplier's degree of fault (ie, Nissan: "at its sole discretion").
- Ford reserves the right to set-off up to 50% of the actual parts and labor costs of a recall if it determines that Supplier is "likely to be liable."



Warranty and Recall Recall

OESA Model Terms and Conditions

- Recall liability triggered only by breach of warranty during the warranty period.
- Buyer must provide Supplier notice, information, and the opportunity to participate in decisions.
- Extent of Supplier's liability must be negotiated in good faith based on a variety of factors.



Warranty and Recall

Recall

Conclusion

- Recall liability issues are generally complex and require notice, information sharing and negotiation.
- Recall a good example of an issue where a fair dispute resolution mechanism makes sense.
- In general, OEM terms leave most issues, including Supplier liability, to the unilateral discretion of the OEM.