

An Ounce of Prevention: Assessing and Controlling Product Liability Risk

VERIFICATION CODE

2025&

FOR CLE CREDIT:

1. Write down or take a photo of this Verification Code.

You **MUST** complete the evaluation to earn CLE Credit.

2. Either click the “Evaluation” button from the program on your **Meeting App** to enter the Verification Code and complete the Program Evaluation now.

OR

3. Save the code to take the evaluation later.

An Ounce of Prevention: Assessing & Controlling Product Liability Risk

SHARON L. CAFFREY
Duane Morris LLP



ANDREW GENDRON
Lewis Brisbois Bisgaard &
Smith LLP



KRISTEN HARRIS
BlueOval SK, LLC



JESSICA LAM
Blake, Cassels & Graydon
LLP



Indemnity: Extending Beyond 3rd-Party Claims



Supplier Indemnity

- Product-liability claims
- Breach of warranty or representation
- Violation of any statute or regulation
- Service campaigns, recalls, or corrective actions
- Infringement or misappropriation of IP
- Release or termination of a lien

Apportionment

How to deal with apportionment ...?

- Negotiation in good faith
- Good-faith dictated by OEM
- Other models?

Indemnity Without Fault

Indemnity

Is an allegation of fault or defect necessary?

One OEM requires indemnity for “any loss or cost ... arising” from supplier *performance*.

Source: OEM N. Am. Prod. P.O. Contract Terms and Conditions, Orig. Equip. Suppliers Ass’n, 2021

How 13 OEMs Handle Indemnity

- All: have supplier indemnify for p/i, p/l, and p/d
- 5 : control defense even if tender accepted
- 8 : limit supplier liability if OEM negligent
- 1: keeps right to determine supplier responsibility
- 11: silent on how apportionment determined

Source: OEM N. Am. Prod. P.O. Contract Terms and Conditions, Orig. Equip. Suppliers Ass'n, 2021

IP

If IP-related claim is likely to result in an injunction against use of the IP, OEM should retain discretion to compel supplier to:

- (a) secure a license
- (b) modify infringing component
- (c) replace infringing component

Subcontractors

- Consider requiring approval over subcontracting of any services or approval over any subcontractors
- If any service subcontracted, require that same reps/warranties apply to subcontractor
- Right to audit

Takeaways: Warranty Items

- Free of malware, viruses & other malicious codes
- No infringement of IP rights
- Free of liens, claims & encumbrances
- Obtain and maintain all necessary permits, licenses and approvals required
- Comply with all applicable laws, regulations, and guidelines of any governmental authority
- Warranty cost-sharing unrelated to supplier fault (e.g., for “no fault found” or “customer good will”)
- Express warranty of fitness for particular purpose
- Consider whether to exclude/disclaim any statutory implied warranties
- Warranties run to OEM’s parent(s)

Select U.S. Tariff Changes Since 1/20/2025, Pt. 1

- 2/1: 25% duty on products from Mexico
- 2/3: 25% duty on Canadian goods paused till 3/4
- 3/6: Tariffs on Canadian auto products “adjusted”
- 4/2: Additional 10% duty on all imports
- 4/2: Rates range from 11% (DRC; Cam.) to 50% (Lesotho)

Source: <https://ustr.gov/trade-topics/presidential-tariff-actions>

Select U.S. Tariff Changes Since 1/20/2025, Pt. 2

- 4/2: De minimis treatment to end, eff. 5/2
- 4/8: Rate on Chinese goods to incr., 34% to 84%, eff. 4/9
- 4/9: Rate to incr. again, 84% to 125%, eff. 4/10.
- 4/11: Some semiconductors, consumer elec. excluded
- 5/12: Agmt. announced for 90-day reduction
- 5/14: Rate drops, 125% to 10%, for 90 days

Source: https://www.congress.gov/crs_external_products/R/PDF/R48549/R48549.1.pdf

Government Disruptions & Supply Chains

- COVID-19, Ukraine war disrupted trade
- Tariffs raise costs, delay goods
- Can trigger force majeure clauses
- Contracts must adapt to risks
- Update terms, duties, and delivery
- Add flexibility for global change

U.S. Force Majeure Basics

- Force majeure: contractual, not statutory
- Excuses performance during extreme events
- Narrowly construed by U.S. courts
- Must name triggering events clearly
- Not an “opt-out” clause
- Applies only to listed events

Tariffs as Force Majeure Events

- Tariffs may disrupt performance duties
- Must be unforeseen and significant
- Courts assess language, foreseeability, effect
- “Acts of government” may qualify
- Clear drafting improves enforceability
- Cost increases alone rarely enough

Case Law Takeaways

- Courts need strong causal connection
- Foreseen tariffs weaken force majeure
- Economic hardship usually not sufficient
- Contract language must be specific
- Include trade barriers if relevant
- Risk allocation is critically important

Related Doctrines Overview

- UCC § 2-615: impracticability defense
- Applies to unforeseen severe burdens
- Impossibility must be objective, not difficult
- Cost alone rarely justifies excuse
- Frustration requires defeated core purpose
- Still narrow, fact-specific application

Drafting Best Practices

- Mention tariffs in contract clauses
- Set relief thresholds for costs
- Require prompt notice for fairness and flexibility
- Include mitigation obligations explicitly
- Allow termination after prolonged delay
- Add pricing adjustment for tariffs

Sample Force Majeure Clause

- Lists specific force majeure events
- Includes tariffs, embargoes, regulations
- Requires notice and mitigation steps
- Allows termination after sixty [60] days
- Optional add-on for economic impact
- Encourages good faith renegotiation

Final Takeaways

- Draft contracts for trade disruptions
- Courts value specific force majeure terms
- Avoid vague “commercial hardship” claims
- Tailor language to global risk
- Plan for legal and economic uncertainty
- Use sample clauses as templates

Questions?

An Ounce of Prevention: Assessing and Controlling Product Liability Risk

VERIFICATION CODE

2025&

FOR CLE CREDIT:

1. Write down or take a photo of this Verification Code.

You **MUST** complete the evaluation to earn CLE Credit.

2. Either click the “Evaluation” button from the program on your **Meeting App** to enter the Verification Code and complete the Program Evaluation now.

OR

3. Save the code to take the evaluation later.