美國產品責任保險之
法律與保險思路與脈絡

徐當仁

20190925

核保學會

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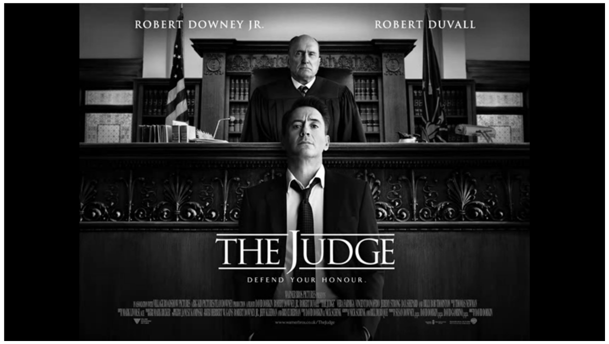
- 學歷：
  - 台灣師大附中241班畢業
  - 臺灣大學法律系畢業
  - 臺灣海洋大學海洋法律研究所畢業（海難救助，共同海損與海上保險之研究）
- 經歷
  - 台灣海洋大學航管系兼任講師（“海上保險”，“海上保險條款導讀“，“貨損理賠”，“海商法案例研究”， “海上保險英文條款導讀與理賠實務” ）
  - 臺灣淡江大學保險系兼任講師（“保險法”，“財產保險案例分析”，“責任保險” ）
  - 臺灣實踐大學閩保班兼任講師（“兩岸保險法律制度之比較”）
  - 臺灣蘇黎世保險公司（1978 - 2003）
    - 企劃部經理
    - 商業保險行銷部經理
    - 理賠部經理（商業保險理賠）
    - 協理
  - 蘇黎世保險集團瑞士總公司（1998 - 2003）
    - Team Leader (Asia/Pacific), Group Home Office Claims
    - Compliance Facilitator and Officer (Asia), Corporate Responsibility and Compliance
  - 美國ACE保險集團（2003 - 2007）
    - ACE保險公司 中國區理賠負責人
    - 中國華泰保險公司 首席核賠官（兼管個人保險理賠與商業保險理賠）
  - 台灣保險發展中心，核保人學會，產物保險公會，工程保險協進會等講座；台灣港務公司英國ICS考試輔導課程講師。
  - 臺灣保險發展中心兩岸英漢保險辭典產險組召集人
- 現任：
  - 臺灣兆豐產物保險公司顧問
  - 美國芝加哥CREMER, SPINA, SHAUGHNESSY, JANSEN + SIEGERT, LLC律師事務所 臺灣聯絡人
  - 臺灣強制汽車責任保險精算及研究發展工作小組法制工作分組委員
  - 臺灣港務公司英國ICS考試輔導課程講師
- 寫作中：
  - 初學者海上保險自學筆記，初學者責任保險自學筆記，圖解產險契約法與相關民法自學筆記，理賠管理（臺灣產險公會“保險大道”），產品責任保險相關美國法律知識簡介。

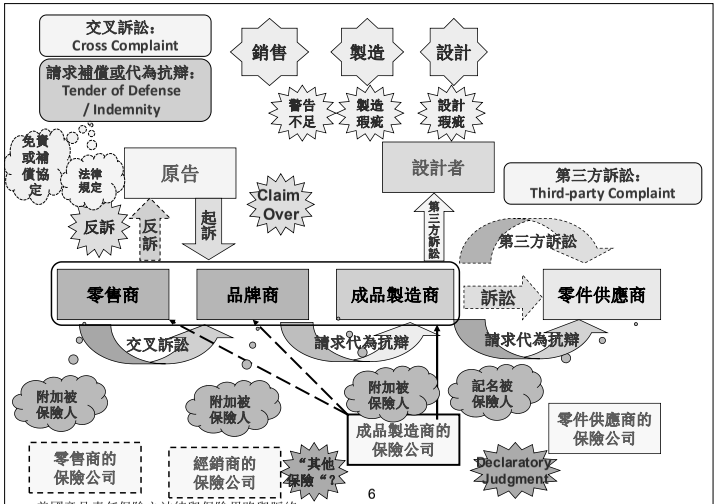
相關講題

1. 20120802 責任保險之法律基礎（進階）
2. 20160323 輕鬆聽懂產品責任案件美國訴訟重點觀念
3. 20161221 2013版CGL簡介與在產品責任保險運用上之探討
4. 20170504 笑談美國產品責任保險理賠管理二三事
5. 20190925 美國產品責任保險之法律與保險思路與脈絡



虛擬案例（案情純屬虛構，如有雷同，純屬巧合）

- 被保險人是零件製造商（A），將其所生產的零件供下游廠商（B）製造成品，並以品牌商（C）的品牌出售。第三人（E）使用該成品受傷，向成品製造商（B），品牌商（C）以及零售商（D）分別提出訴訟。假設原告（E）對成品製造商（B）品牌商（C）與零售商（D）在2016保險期間起訴；因B通知A處理，而A未積極處理，因而E對零件製造商（A）在2017保險期間又起訴。
  - 若成品製造商（B）是零件製造商（A）保險單的附加被保險人（additional insured）；
  - 若成品製造商（B）不是零件製造商（A）保險單的附加被保險人，但兩者之間還訂有免責協議（hold harmless agreement），零件製造商（A）同意為成品製造商（B）承擔一切法律責任；
  - 若零售商（D）不是零件製造商（A）的保險單的附加被保險人，但法律（Distributor Statute）規定,製造商（A或B）要為零售商（C）抗辯與補償。（如果零售商沒有更改產品的話）
- 如果您是保險承辦人員，請問您要如何處理以下的問題？
  - 成品製造商（B）要求零件製造商（A）代為抗辯(tender of defense)；
  - 零售商（D）要求零件製造商（A）代為抗辯。
  - 零件製造商（A）與成品製造商（B）希望共用同一律師事務所擔任抗辯律師；
  - 由於原告所受之傷害頗重，理賠金額恐怕會超過保險單的保險金額，
    - 原告（C）律師要求零件製造商（A）與成品製造商（B）提供全額的保險金額賠付。
    - 成品製造商（B）要求零件製造商（A）提供全額的保險金額賠付，並共同支付抗辯費用；



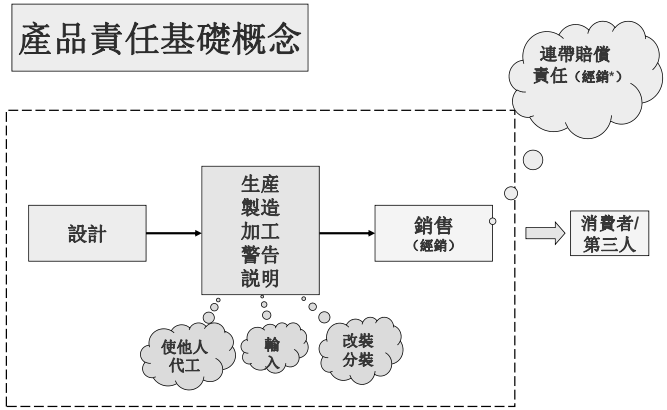
廠商的法律風險

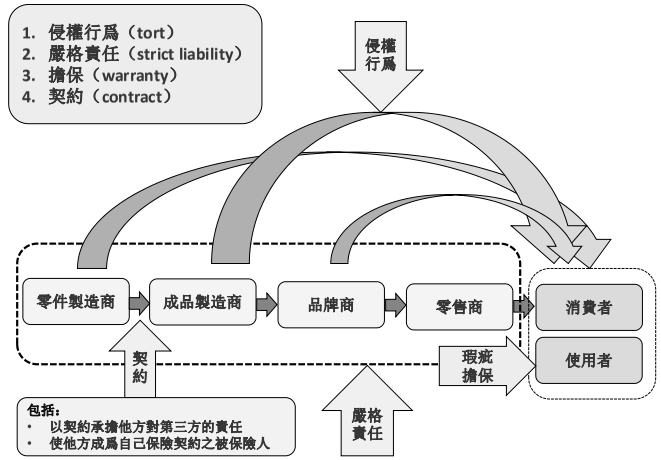
- 侵權行爲責任性質
  - 侵權行爲（tort）
  - 嚴格責任（strict liability）
- 履行契約責任性質
  - 法定擔保責任（warranty）
  - 履行契約（breach of contract）
  - 以契約承擔他人的責任
    - Indemnity Agreement
    - Hold Harmless Agreement

起訴原因（Cause of Actions）

- 原告的訴因（Cause of Action，起訴原因/訴訟理由）
  - Negligence in Tort（侵權行為法之過失）
    - Design（設計）
    - Manufacture（製造）
  - Strict Liability（嚴格責任）
    - Design defect（設計的瑕疵）
    - Manufacture defect（製造的瑕疵）
    - Warning or instructions defect（警告或指示的瑕疵）
  - Breach of Warranty（違反“擔保”）
    - Express written warranty（明示擔保）
    - Implied warranty （默示擔保）
  - Breach of Contract（違反契約）

產品責任基礎概念





Strict Liability （IRMI）

https://www.irmi.com/term/insurance-definitions/strict-liability

- **A legal doctrine under which liability is imposed with respect to injury or damage arising from certain types of hazardous activities.**
- **For example, under strict liability standards, the manufacturer or distributor of a dangerous product is liable to a person who is injured by the product, regardless of the degree of care exercised by the manufacturer or distributor in the production or sale of the product.**

- **Strict liability不是absolute liability。後者更嚴格。**

市場上常見的批單條款（3-1）

EFFICACY CLAUSE	INEFFICACY EXCLUSION CLAUSE
• The Policy does not cover any legal liability arising out of or in any way connected with the failure of any Product to fulfil a particular purpose or intended function or meet a particular level of performance, where the Insured has expressly or impliedly warranted or represented that the Product will fulfil such purpose or function (including purposes such as curing, alleviating, preventing, monitoring, detecting, eliminating or retarding Bodily Injury or Property Damage) or meet such level of performance.	• The indemnity provided by Company excludes liability arising from the failure of a Product (or any part thereof) to fulfill the purpose for which it was designed or to perform as specified, warranted, or guaranteed.

市場上常見的批單條款（3-2）

EFFICACY CLAUSE

- The Policy does not cover any legal liability arising out of or in any way connected with the failure of any Product to fulfil a particular purpose or intended function or meet a particular level of performance, where the Insured has expressly or impliedly warranted or represented that the Product will fulfil such purpose or function (including purposes such as curing, alleviating, preventing, monitoring, detecting, eliminating or retarding Bodily Injury or Property Damage) or meet such level of performance.

General Liability Insurance - Efficacy Exclusion

- Under Exclusions, the following provision is added. *Exclusions Products Efficacy*
- This insurance does not apply to any damages, loss, cost or expense arising out of the failure of the named insured's product to perform the function or serve the purpose intended by the named insured if such failure is due to a mistake or deficiency in any design, formula, plan, specification, advertising material or printed instructions prepared or developed by the named insured; but this exclusion does not apply to claims resulting from the active malfunctioning of such products.
- All other terms and conditions remain unchanged.

Warranty and Representation

Warranty

- Warranty – a guarantee or promise which provides assurance by one party to another party that certain facts or conditions are true or will happen.
- A warranty may be express or implied. A breach of warranty claim is enforced the same way as a breach of contract claim.

Representation

- Representation – a statement which is false or made with intentional, reckless, or negligent disregard for the truth.
- A misrepresentation claim is enforced the same way as a tort claim.

Coverage A

2. Exclusions （Damage To Impaired Property Or Property Not Physically Injured）（等於是failure to perform）

- This insurance does not apply to:
  - m. "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
    - (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
    - (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
  - This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

兩種不同的warranty

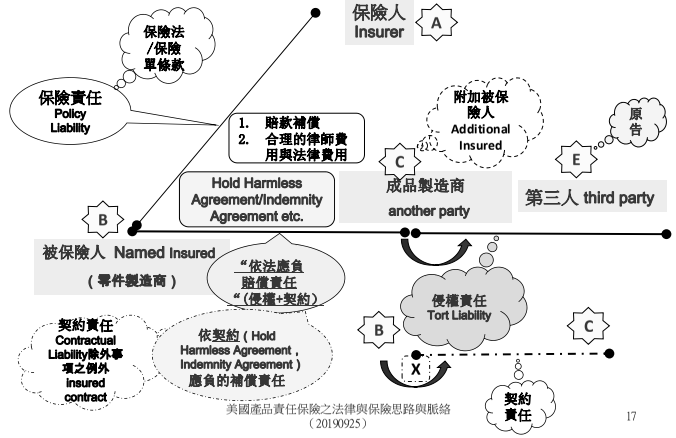
買賣契約的Warranty

- 違反的話，是損害賠償的問題。

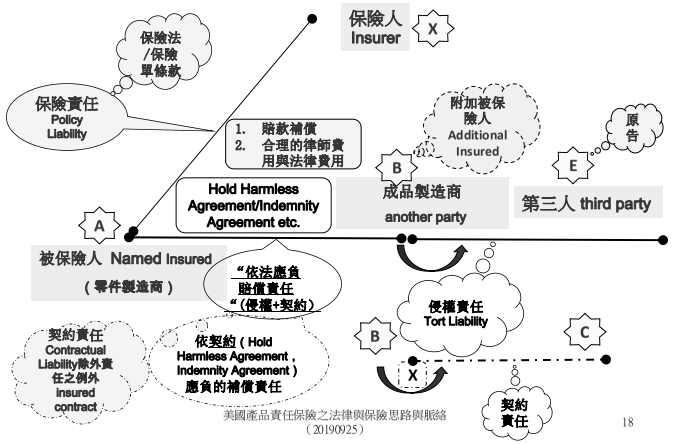
保險契約的Warranty

- 違反的話，會影響契約之效力。

法律責任的各關係人



契約責任的各關係人



法律問題與保險問題

- 法律問題與保險問題是兩個不同的領域。
  - 法律問題是被保險人與第三人之間的損害賠償問題。
    - 在案情未確定為保險單不負賠償責任事項之前，保險人都有代為抗辯的義務。（Duty to Defend）
  - 保險問題是保險人對被保險人是否賠付的問題。
    - 在案情確定為保險單應賠付事項之前，保險人才負賠償義務。（Duty to Indemnify）
- 法律問題與保險問題應同步進行。
  - 調查事實列為第一優先。
    - 須特別注意附加被保險人是否有"獨立責任"（independent liability）的問題。
  - 法律問題由defense counsel處理，但請注意：defense counsel的基本法律義務是保護被保險人對第三人的權益。
  - 對保險問題進行推演，如果對保險單規定有疑問的話，要找coverage counsel解決。
  - Defense Counsel原則上最多只能做到Tender of Defense（法律上/保險上），否則可能會有利益衝突的情形，但如果保險責任確定無問題的話，則還可以再繼續擔任抗辯任務。

1. Insuring Agreement（1）
（保險公司的權利與義務）

Indemnity

- a. We will pay those sums that the insured becomes legally obligated to pay（依法）as damages（損害賠償）because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty（權利與義務）to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
  - (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
  - (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

Defense

- No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.
- 為被保險人抗辯是保險人的權利與義務，但對保險單不承保的事故無抗辯義務，當保險金額用盡時無抗辯義務。
- 保險人有調查事故與決定是否和解的權利。

1. Insuring Agreement（2）

- b. This insurance applies to "bodily injury" and "property damage" only if:
  - (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;（事故要發生承保區域內）
  - (2) The “bodily injury” or “property damage” did not occur before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and（要發生在追溯日之後，保險期間終止前）
  - (3) A claim for damages because of the “bodily injury” or “property damage” is first made against any insured, in accordance with Paragraph c. below, during the policy period or any Extended Reporting Period we provide under Section V – Extended Reporting Periods.（對“任一被保險人”的索賠要在保險期間或延長報案期間之內提出）
- c. A claim by a person or organization seeking damages will be deemed to have been made at the earlier of the following times:
  - (1) When notice of such claim is received and recorded by any insured or by us, whichever comes first; or（任一被保險人收到並記錄索賠通知，就算是被索賠）
  - (2) When we make settlement in accordance with Paragraph a. above.

保險人的補償與抗辯義務 vs. 保險人的抗辯決策權

- 保險人的補償義務（Indemnity）
  - We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies
- 保險人的抗辯義務（Defense）
  - We will have the right and duty to defend the insured against any “suit” seeking those damages（損害賠償）
  - 保險人無抗辯義務：
    - we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply
    - Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments（判決）or settlements（和解）under Coverages A or B or medical expenses under Coverage C.
- 保險人的抗辯決策權利
  - We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result

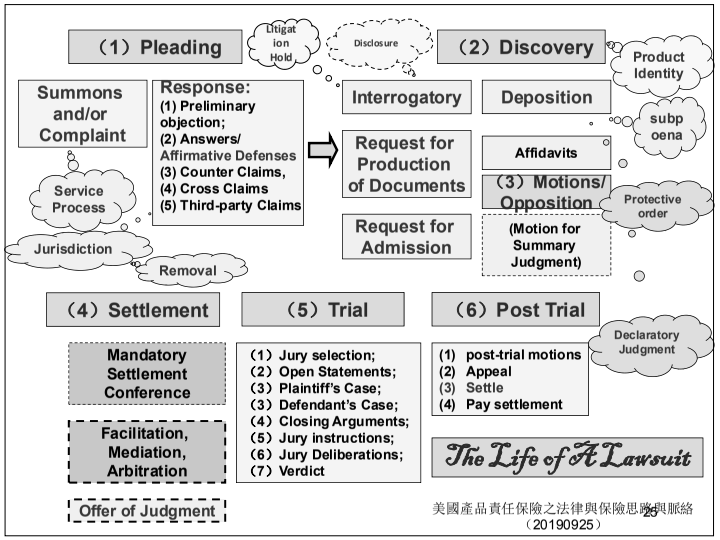
保險人的抗辯義務與補償義務（duty to defend vs. duty to indemnify）

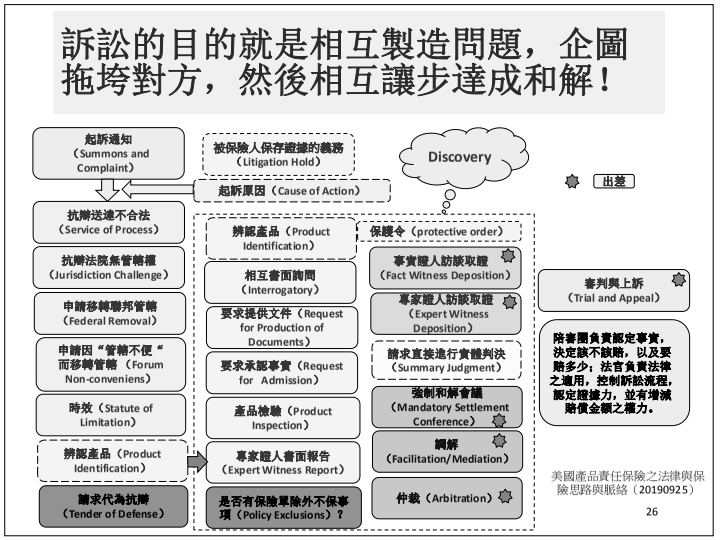
- 保險人的抗辯義務（duty to defend）
  - 保險人的抗辯義務是來自第三人對被保險人的指控與保險單的承保範圍而定。
  - 縱使第三人的指控是不實的，或僅其指控的事實之一可能是在承保範圍之內，保險人仍然要為被保險人抗辯。
  - 如果就第三人所指控的事實是否在在承保範圍之內有疑慮，則保險人可以以發保留權利聲明書（reservation of rights letter），告訴被保險人在事實明朗後面保險人可以撤回代為抗辯。此時保險人可以選擇自己的律師（panel counsel）。
  - 如果保險人覺得和被保險人有利益衝突的情形，則需要告知被保險人，並另外付費讓被保險人請律師為被保險人抗辯。但美國每一個州的情況不同，需要視個案而定。
- 保險人的補償義務（duty to indemnify）
  - 保險人的補償義務則要等被保險人與第三人達成和解或法院判決之後才發生。
  - 保險人的補償義務要等案情逐漸明朗的時候才能決定的。

SECTION VI - DEFINITIONS

18."Suit"

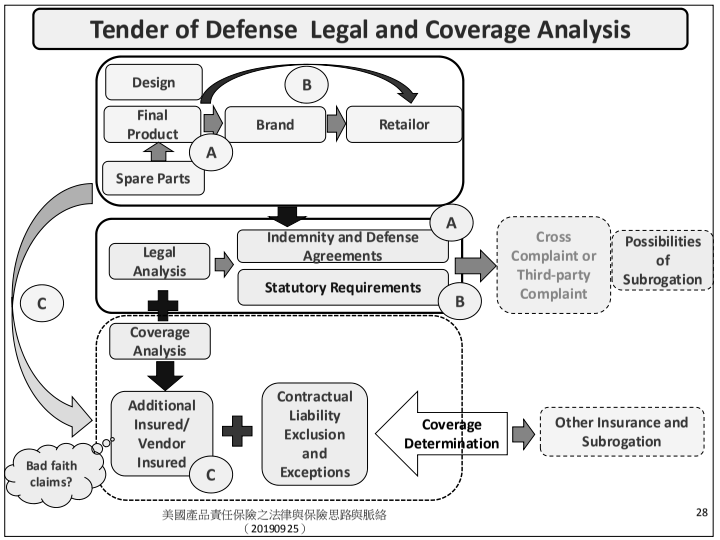
- “Suit” means a civil proceeding（民事訴訟）in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged.
- "Suit" includes:
  - a. An arbitration proceeding（仲裁）in which such damages are claimed and to which the insured must submit or does submit with our consent; or
  - b. Any other alternative dispute resolution proceeding（其他解決爭端之選擇-ADR，如調解，和解等）in which such damages are claimed and to which the insured submits with our consent.



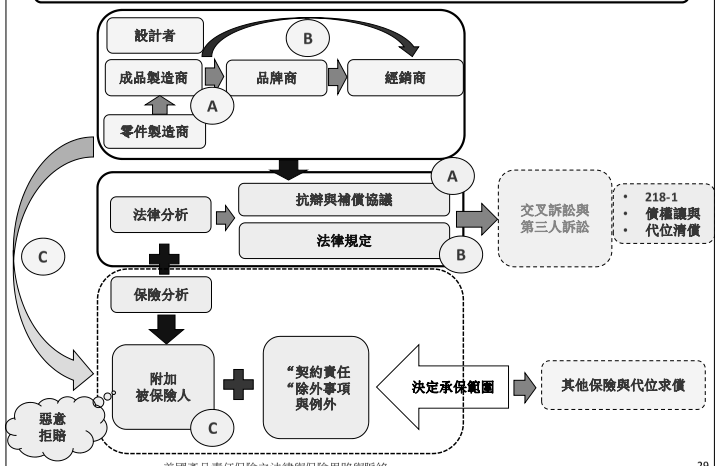


虛擬場景與被保險人對策

- 初步抗辯
  - 訴訟開始：原告律師將美國起訴通知（summons）與起訴狀（complaint）送達；
  - 保險公司或被保險人對抗辯律師是否有選擇權（selection of counsel）；
  - 抗辯律師建議對送達不合法提出抗辯（challenging service）；
  - 抗辯律師建議要採取避免湮滅證據措施（litigation hold）；
  - 成品製造商，品牌商或經銷商要求被保險人代為抗辯（tender of defense）；
  - 抗辯律師建議對管轄權提出抗辯（challenging jurisdiction）；
  - 原告律師要求被告提供銷售至美國各州的紀錄；
- 審前互換資料（Discovery）
  - 確認產品（product identification）：不知道產品是不是被告所製造；
  - 審前互換書面資料（written discovery）：原告律師要求被告提供產品設計，製造，警示的紀錄；
  - 訪談取證（deposition）：如原告律師要求被告派公司代表到美國出庭作證 etc.；
  - 檢驗產品（product inspection）：檢驗產品的事前協議（protocol）
  - 證人作證（witness）：專家證人認為產品可能有/沒有瑕疵，以及其他證人；
  - 保險公司認為依調查結果，損失原因可能不在承保範圍之內？！
- 審判，上訴與強制執行
  - 要戰？要和？



“請求代爲抗辯”的法律與保險分析



Tender of Defense （請求代爲抗辯）的雙重意義

https://www.irmi.com/term/insurance-definitions/tender-of-defense （IRMI）

- The act in which one party places its defense and all costs associated with said defense with another due to a contract or other agreement. This transfers the obligation of the defense and possible indemnification to the party to which the tender was made.

legal

https://definitions.uslegal.com/t/tender-of-defense/

- It is an act by which one party places its defense, and all costs associated with said defense, on another person or organization. There is usually a contract or other agreement in place requiring that person or organization to take on the defense. This transfers the obligation of the defense and possible indemnification to the party on whom tender was made.
- This term is usually insurance related. A request by an insured to be defended by the insurer is referred to as a tender of defense. Some cases require a tender of defense to invoke the insurer's duty to defend a claim.

Insurance

Tender of Defense的雙重意義

法律上的tender of defense

A 成品製造商根據補償契約（如hold harmless agreement/indemnity agreement）請求零件製造商代爲抗辯與補償；或，經銷商根據補償契約向製造商請求代爲抗辯與補償；

- 有時承諾內容之廣泛超乎想像，建議需要由專業律師檢視
- 同時須仔細檢視保險單之規定

B 經銷商根據法律的規定（statutory requirement，如Distributor Statute）向製造商請求代爲抗辯與補償。

保險上的tender of defense

C 被保險人（附加被保險人，additional insured）根據保險契約的規定，直接向保險人請求代爲抗辯。

代為抗辯之法律義務來源

A Indemnity Agreement（例）

- “To the fullest extent permitted by law, A agrees to indemnity and hold B harmless from and against any and all suits, claims, costs or expenses (including reasonable attorney’s fees) arising from (1). Any and all third party claims for personal injury and property damage alleging a defective materials or workmanship relating to XXX sold to B by A pursuant to this Agreement or (2). Any breach of this Agreement by A.”

Statutory Requirement（例）B

- “A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.”
- 所謂的“innocent seller”原則。

Tender of Defense and Indemnity
（請求代為抗辯與補償的對策）

記名被保險人法律義務的來源

A
- 在買賣契約或其他相關文件中由一方（A）向他（B）方承諾由A代B為訴訟上的抗辯（defense）與損害賠償的補償（indemnity）。
- 被保險人於侵權行為責任之外，因契約或協議所承擔的額外責任
  - 保險人根據Contractual liability Exclusion的Exceptions，即Insured Contract與Tort的規定決定代爲抗辯。

B
- 美國若干州的法律規定製造商必須為零售商代為抗辯與補償。
  - 保險契約沒有列爲除外事項，保險人按we have the right and duty to defend.....；legally obligated to pay等規定辦理。

保險單義務的來源

C
- 在買賣契約或其他相關文件中由一方（A）向他（B）方承諾由A將B列為A保險單的附加被保險人（additional insured），而保險公司確實也將B列為附加被保險人。
- 此時附加被保險人也是被保險人之一，因此可以直接向保險人主張權利（要求抗辯與補償）。但其權利要受保險單條款的限制。如：
  - 共用同一保險金額。
  - 保險單可能不承保B的獨立責任（independent liability，如安裝責任），但同時須仔細檢視保險單之規定，如是否保Insured Contract，才能做最後的判斷。

Tender of Defense and Indemnity
（請求代為抗辯與補償）

接受 tender

- 無條件接受，或
- 附條件接受（Reservation of Rights）。
  - 如果有利益衝突的情形，保險人可能需要另行負擔費用為他方（B）請律師。但美國每一個州的情況不同，需要視個案而定。
- 雙方是否有利益衝突的情形？是否適合由同一律師事務所提供抗辯？
- 他方可能有“其他保險”（other insurance）的問題。

不接受 tender

- 可能成為交叉訴訟（cross complaint）或第三方訴訟（third-party complaint）的被告。
- 他方（B）可能自行訴訟之後，再依原買賣契約或協議向受請求方（A）要求補償（賠款與訴訟費用）。
  - 可否置之不理？
  - Default Judgment（缺席判決）
- 他方之保險公司於賠償之後進行代位求償（subrogation）

接受代為抗辯（Tender of Defense）的一般原則

- 如果零售商/品牌商/成品製造商是（零件）製造商保險單的附加被保險人
- 如果零售商/經銷商/成品製造商不是（零件）製造商保險單的附加被保險人
  - （零件）製造商與成品製造商/品牌商之間有代為抗辯的契約/協議，則（零件）製造商與成品製造商/品牌商之間的契約/協議屬於“契約責任”（contractual liability）的性質，為一般CGL保險單的除外不保事項，保險人僅承保（零件）製造商的“侵權行為”責任。即有例外，即（1）僅承保緣無該契約/協議存在（in the absence of such contract），零件製造商亦需要負責的部分；（2）”Insured Contract”。
  - 目前市場上的vendor endorsement，都只限於distribution or sales，可能還無法符合被保險人真正的需要。
  - 事實尚未調查清楚之前，代為抗辯要附“Reservation of Rights”
  - 法律規定製造商要為零售商/經銷商抗辯（Distributor Statute）
- 附加被保險人是不是越多越好？
  - Certificate of Insurance Holder是不是等於Additional Insured?
  - “Certificate Holder is the Additional Insured”的聲明？
- 抗辯（Defense）與補償（Indemnity）義務的區別
- 考慮好接或不接Tender的可能影響。

Reservation of Rights （IRMI）

https://www.irmi.com/term/insurance-definitions/reservation-of-rights

- An insurer's notification to an insured that coverage for a claim may not apply. Such notification allows an insurer to investigate (or even defend) a claim to determine whether coverage applies (in whole or in part) without waiving its right to later deny coverage based on information revealed by the investigation.
- Insurers use a reservation of rights letter because in many claim situations, all the insurer has at the inception of the claim are various unsubstantiated allegations and, at best, a few confirmed facts. In reserving its rights to later deny coverage, the insurer is merely telling the insured of its concerns that the claim, in whole or in part, may not be covered under the policy, pending further investigation.
- Although a reservation of rights protects an insurer's interests, it also alerts an insured to the fact that some elements of a claim may not be covered, thereby allowing the insured to take necessary steps to protect its potentially uninsured interests.

Coverage A
2. Exclusions

A

- This insurance does not apply to:
  - b. Contractual Liability
    - "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
      - (1) That the insured would have in the absence of the contract or agreement; or （指的是侵權行為）
      - (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.
      - Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
        - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
        - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

Contractual Liability Exclusion Clause

- Notwithstanding any provision to the contrary within this insurance or any endorsement thereto, this policy shall not cover any loss for any liability under a contract, commitment, promise, guarantee, or any kind of hold harmless agreement, unless the liability of the losses would have also existed in the absence of the contract or agreement.

Coverage A
2. Exclusions

A

- This insurance does not apply to:
  - b. Contractual Liability
    - "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
      - (1) That the insured would have in the absence of the contract or agreement; or （指的是侵權行為）
      - (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.
      - Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
        - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
        - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

SECTION VI - DEFINITIONS
9. “insured contract"

A

- "Insured contract" means:
  - f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
    - Paragraph f. does not include that part of any contract or agreement:
      - (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;

SECTION VI - DEFINITIONS

9. “insured contract"

A

- "Insured contract" means:

- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
  - Paragraph f. does not include that part of any contract or agreement:
    - (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;

Insured Contract f. 的適用

A

- f. That part of any other contract or agreement pertaining to your business under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization.

- Scenario:
  - There is an policy liability between A and B;（B向A投保）
  - There is a hold harmless agreement (contractual liability) between B and C。（B與C之間有免責協議）
  - There is a tort liability between C and D;（C對D有侵權行為責任）
  - Then, if B assumes C’s tort liability to D, then this “contractual liability” is covered by the policy as “insured contract”, as long as the contractual liability between B and C relates to B’s business.（B因與C之間有免責協議，承擔C對D的侵權行為責任，則只要B與C之間的協議與B所經營的業務有關，則此協議即為insured contract，屬於保險單的承保範圍。）

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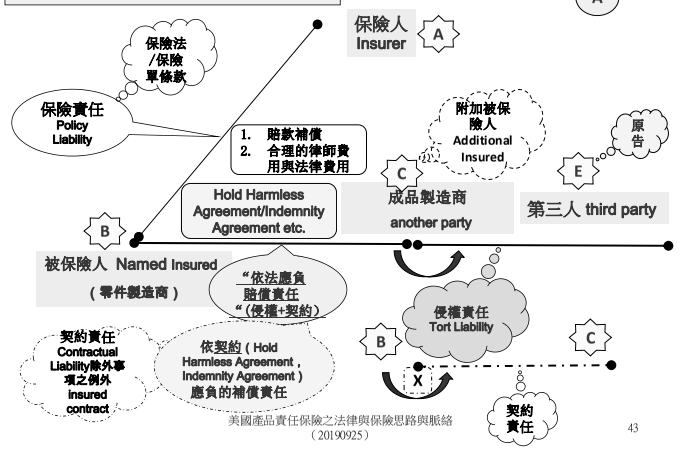
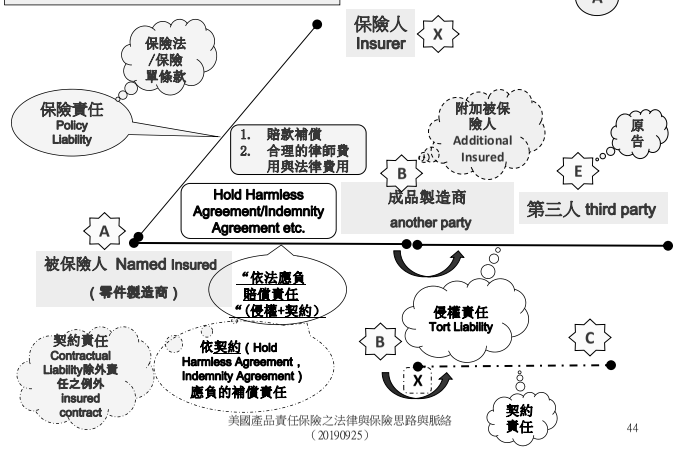
法律責任的各關係人

A



契約責任的各關係人

A



責任製造商之代爲抗辯義務與保險單責任

B

被保險人爲什麼應該代爲抗辯

- "A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable."
- 即製造商對經銷商的independent liability則沒有代爲抗辯的責任。

保險單爲什麼應該代爲抗辯

- 保險單有代爲抗辯的義務。
- 保險單沒有將（記名）被保險人的代爲抗辯義務列爲除外不保事項。
- 即使經銷商不是附加被保險人也是如此。

additional insured endorsement （IRMI）

C

- Policy endorsement used to add coverage for additional insureds by name — for example, mortgage holders or lessors.
- There are a number of different forms intended to address various situations, some of which afford very restrictive coverage to additional insureds. (Rather than naming each additional insured, a blanket additional insured endorsement sometimes is available.) See also Additional insured; Contractual risk transfer; Named insured.

additional insured （IRMI）（1）

C

- A person or organization not automatically included as an insured under an insurance policy who is included or added as an insured under the policy at the request of the named insured.
- A named insured's impetus for providing additional insured status to others may be a desire to protect the other party because of a close relationship with that party (e.g., wanting to protect church members performing services for the insured church) or to comply with a contractual agreement requiring the named insured to do so (e.g., project owners, customers, or owners of property leased by the named insured).
- In liability insurance, additional insured status is commonly used in conjunction with an indemnity agreement between the named insured (the indemnitor) and the party requesting additional insured status (the indemnitee).

additional insured （IRMI）（2）

C

- Having the rights of an insured under its indemnitor's commercial general liability (CGL) policy is viewed by most indemnitees as a way of backing up the promise of indemnification.
- If the indemnity agreement proves unenforceable for some reason, the indemnitee may still be able to obtain coverage for its liability by making a claim directly as an additional insured under the indemnitor's CGL policy.
- In property insurance, additional insured status is most often used in conjunction with a premises lease agreement between the named insured as the lessee and the owner of the leased building, in which the insured tenant is required to purchase insurance on the leased building and name the building owner as an additional insured on the insurance policy with respect to the leased building.
- See also Additional insured endorsement; Additional named insured; Contractual risk transfer; Loss payee; Named insured.

vendors coverage （IRMI）

C

- Additional insured coverage, usually under a manufacturer's general liability policy, for specified vendors with respect to their distribution or sale of the manufacturer's products designated in the schedule on the endorsement.
- This endorsement gives products liability coverage to the vendors distributing or selling the named insured's product and eliminates the need for the vendor to purchase separate products liability coverage.

ADDITIONAL INSURED – VENDORS (1)

C

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

- Section II – Who Is An Insured is amended to include as an additional insured any person(s) or organization(s) (referred to throughout this endorsement as vendor) shown in the Schedule, but only with respect to "bodily injury" or "property damage" arising out of "your products" shown in the Schedule which are distributed or sold in the regular course of the vendor's business.

No independent liability

- However:
  - 1. The insurance afforded to such vendor only applies to the extent permitted by law; and
  - 2. If coverage provided to the vendor is required by a contract or agreement, the insurance afforded to such vendor will not be broader than that which you are required by the contract or agreement to provide for such vendor.

ADDITIONAL INSURED – VENDORS (2)

C

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

- B With respect to the insurance afforded to these vendors, the following additional exclusions apply:
  - 1. The insurance afforded the vendor does not apply to:
    - a. "Bodily injury" or "property damage" for which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement.
      - This exclusion does not apply to liability for damages that the vendor would have in the absence of the contract or agreement;
    - b. Any express warranty unauthorized by you;
    - c. Any physical or chemical change in the product made intentionally by the vendor;
    - d. Repackaging,
      - except when unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from the manufacturer, and then repackaged in the original container;
    - e. Any failure to make such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;

ADDITIONAL INSURED – VENDORS (3)

C

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

- f. Demonstration, installation, servicing or repair operations,
  - except such operations performed at the vendor's premises in connection with the sale of the product;
- g. Products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor; or
- h. "Bodily injury" or "property damage" arising out of the sole negligence of the vendor for its own acts or omissions or those of its employees or anyone else acting on its behalf. However, this exclusion does not apply to:
  - (1) The exceptions contained in Subparagraphs d. or f.; or
  - (2) Such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products.
- 2. This insurance does not apply to any insured person or organization, from whom you have acquired such products, or any ingredient, part or container, entering into, accompanying or containing such products.

ADDITIONAL INSURED – VENDORS (4)

C

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

- C. With respect to the insurance afforded to these vendors, the following is added to Section III – Limits Of Insurance:
  - If coverage provided to the vendor is required by a contract or agreement, the most we will pay on behalf of the vendor is the amount of insurance:
    - 1. Required by the contract or agreement; or
    - 2. Available under the applicable Limits of Insurance shown in the Declarations;
  - whichever is less.
- This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

C

7. Separation Of Insureds

- Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
  - a. As if each Named Insured were the only Named Insured; and
  - b. Separately to each insured against whom claim is made or "suit" is brought.

- 如果原告在2015對additional insured起訴，additional insured對named insured提出tender of defense，但named insured並未積極處理，
- 原告對named insured又於兩年之後（2017）提告，則是否可以主張separation of insureds條款之適用？

SECTION III – LIMITS OF INSURANCE (1)

C

- 1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
  - a. Insureds;
  - b. Claims made or "suits" brought; or
  - c. Persons or organizations making claims or bringing "suits".

市場上常見的批單條款（1-1）

ADDITIONAL INSURED (VENDORS BROAD FORM) - Amendment

- This endorsement modifies insurance provided under the following:
- COMMERCIAL GENERAL LIABILITY
- SCHEDULE
- Name of Person or Organization (Vendor):
- Product: As per the Schedule of the Policy.
- (If no entry appears above, information required to complete this endorsement will be shown in the Schedule of the Policy as applicable to this endorsement.)
- The definition of 2.1 Insured is amended to include, as an Insured, any person or organization (referred to below as vendor) shown in the Schedule, but only with respect to Bodily Injury or Property Damage arising out of Product shown in the Schedule which are distributed or sold in the regular course of the vendor's business, subject to the following additional exclusions:

市場上常見的批單條款（1-1）

ADDITIONAL INSURED (VENDORS BROAD FORM) - Amendment

- **1. The insurance afforded the vendor does not apply to:**
  - **(a) Bodily Injury or Property Damage for which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the vendor would have in the absence of the contract or agreement;**
  - **(b) Any express warranty unauthorized by the Named Insured;**
  - **(c) Any physical or chemical change in the Product made intentionally by the vendor;**
  - **(d) Repackaging, unless unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from the manufacturer, and then repackaged in the original container;**
  - **(e) Any failure to make such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the Product;**
  - **(f) Demonstration, installation, servicing or repair operations, except such operations performed at the vendors' premises in connection with the sale of the Product;**
  - **(g) The defect in Product which gives rise to Bodily Injury or Property Damage is caused by the label, relabel or any other work performed by the vendor.**
- **2. This insurance does not apply to any insured person or organization, from whom the Named Insured have acquired such Product, or any ingredient, part or container, entering into, accompanying or containing such Product.**

市場上常見的批單條款（1-2）

Additional Insured Vendors (Broad Form)

- **This clause modifies insurance provided under the following:**
- **"Section Ⅱ-Who is an Insured " provision is amended to include any person or organization designated below (herein referred to as "vendor"), as an additional Insured, but only with respect to "bodily injury" or "property damage" caused by the insured products which are distributed or sold in the regular course of the vendor's business"**
  - **1.The insurance with respect to the "Vendor" does not apply under this endorsement to:**
    - **a) any representation, warranty, advertisement or user manual, either express or implied, unauthorized by the Named Insured;**
    - **b) any physical or chemical change in the form of the product made intentionally by the "Vendor".**
    - **c) repacking, unless unpacked solely for the purpose of inspection, demonstration, testing or the substitution of parts under instruction from the manufacturer and then repacked in the original container;**
    - **d) any failure to make such inspections, adjustments, test or servicing as the "Vendor" has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;**

市場上常見的批單條款（1-2）

Additional Insured Vendors (Broad Form)

- **e) demonstration, installation, servicing or repair operation;**
- **f) products which after distribution or sale by the Named Insured have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the "Vendor", regardless of whether there is nexus or connection between the Vendor 's labeling, relabeling or use and the "bodily injury" or :property damage";**
- **g) any failure to maintain the product in merchantable condition;**
- **h) the negligence or fault of the "Vendor" for its own acts or omissions or those of Vendor's employees or anyone else acting on the Vendor's behalf including product assembly, regardless of whether there is a nexus or connection between the Vendor's conduct and the "bodily injury" or "property damage"**
- **i) any acts made by the Vendor which inhibited the Named Insured or us to investigate the products;**
- **j) any alleged or actual defects inherent in any component part furnished, supplied, sold or otherwise transferred to or obtained by the Named Insured for use in manufactured of the product.**
- **k) arising from claims or circumstances which is known by the "Vendor" prior to the inception date of the policy and/or this endorsement**

市場上常見的批單條款（1-2）

Additional Insured Vendors (Broad Form)

- **2. The insurance does not apply to any person or organization, as "Insured", from whom the Name Insured has acquired such products or any ingredient, part or container, entering into, accompanying or containing such products.**
- **3. The insurance does not apply to the "vendor" has knowledge the "claim" prior to the date of issuing the certificate of insurance.**

- **"Vendor" means solely the distributor or seller of an insured product and includes anyone who distributes or sells the insured products in the regular course of the vendor's business.**
- **The definition of "vendor" does not include those who provide services, including design, re-design, repair, installation, service, or assembly, or assembly, or a product manufacturer.**
- **The definition of "Vendor" also does not include those who have altered/modified the insured product prior to distribution or sale of the insured product, including servicing, repair, assembly, even if any such servicing, repair, or assembly is performed with materials furnished by the Named insured, and regardless of whether there is a nexus or connection between the vendor's conduct and the "bodily injury' or "property damage."**

朋友的意見（僅供參考）（1）

- 1b. physical or chemical change to product: if you change a setting, or mix a product into a solution, or paint it - any physical or chemical change voids coverage.
- 1e. demonstration, installation, etc.: if AI demonstrates a product (eg., sets up treadmill and invites consumers to try it), installs a product into something (battery in car or watch), repairs or services a product, coverage is void
  1f..label or relabel or use as container or part: this probably applies to your situation. Sometimes manufacturers will take a product that they already make but put someone else's name on it.
  - For example, Sears refrigerators are made by White-Westinghouse but carry the Kenmore label - no coverage for that. If you make boxes, and AI uses boxes to make packages of its products - no coverage. If NI's product is used as part of something else, no coverage. This is even if the alleged injury or damage arises from something other than the change or use that the AI put the product to.

朋友的意見（僅供參考）（2）

- 1h. negligence in assembly. If the fork was installed incorrectly - the bolt was not secure - if there is a possibility that improper assembly or use of the wrong part or anything within control of AI caused injury, no coverage.
  1j. if the problem arises from something that the NI obtained from someone else to make its product that was sold to AI, not covered. So if Supplier bought steel from Ironworks to make the fork, and the steel was defective, no coverage.
- The Vendor' Endorsement really provides only limited coverage, and is not a very good choice for products liability coverage. Also note that the definition of vendor excludes product manufacturer. This specifically takes this endorsement out of play, although if your underwriters are representing that this provides standard products liability coverage, you have an underwriting intent problem. I would strongly urge that the companies reassess the use of this endorsement to provide PL coverage.

朋友的建議（僅供參考）

- My experience has been that when a buyer wants products liability coverage for parts bought from a supplier, they will have an AI endorsement that covers any suits or claims arising out of product supplied by Supplier. Or they rely on contractual liability. The vendors endorsements are used when products are passed through - the buyer sells the products as they are, rather than using them in the manufacture of something else.

所謂的“Bad Faith Claim”問題

- 所謂的Bad Faith Claim不是損害賠償的法律責任問題，而是保險責任的問題。
  - 因此，如果有管轄權的州或國家之保險法沒有Bad Faith Claim的話，基本上不會有這個問題。
  - 有些州不叫做Bad Faith Claim，而稱爲Breach of Good Faith and Fair Dealing。
  - Bad Faith Claim的本質是“侵權行爲”，其成立與否，要看保險人所做的決定是否“合理”（Reasonable）。
  - 在沒有Bad Faith Claim制度的國家，也要考慮是否有“債務不履行“的問題。
  - 如果有了Bad Faith Claim的情形，被保險人可以請求的金額能超過保險單的責任限額。
- 第三人原則上不能對保險人提出Bad Faith Claim
  - 除非該州法律規定第三人可以直接對保險人提出請求（Direct Actions）
  - 除非該州法律規定被保險人將他的權利轉讓給第三人（Assignment of Rights）
- 附加被保險人可以對保險人提出Bad Faith Claim。
  - “萬一”在美國的附加被保險人真的對保險人提起“bad faith claims”的時候要如何處理？
- 所以，保險契約內應規定中華民國管轄權（jurisdiction）與以中華民國法為準據法（applicable law/choice of law）。
  - 美國保險公司臺灣分公司與中華民國公司是否有區別？

Insurance Bad Faith

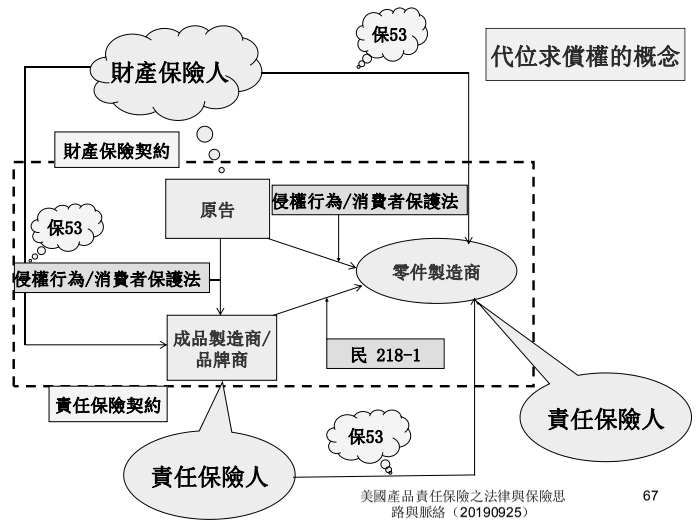
（https://en.wikipedia.org/wiki/Insurance_bad_faith）

- Insurance bad faith is a legal term of art unique to the law of the United States (but with parallels elsewhere, particularly Canada) that describes a tort claim that an insured person may have against an insurance company for its bad acts.
- Under the law of most jurisdictions in the United States, insurance companies owe a duty of good faith and fair dealing to the persons they insure. This duty is often referred to as the "implied covenant of good faith and fair dealing" which automatically exists by operation of law in every insurance contract.
- If an insurance company violates that covenant, the insured person (or "policyholder") may sue the company on a tort claim in addition to a standard breach of contract claim.
- The contract-tort distinction is significant because as a matter of public policy, punitive or exemplary damages are unavailable for contract claims, but are available for tort claims. In addition, consequential damages for breach of contract are traditionally subject to certain constraints not applicable to tort actions (see *Hadley v. Baxendale*).
- The result is that a plaintiff in an insurance bad faith case may be able to recover an amount *larger* than the original face value of the policy, if the insurance company's conduct was particularly egregious.

bad faith （IRMI）

https://www.irmi.com/online/insurance-glossary/terms/b/bad-faith.aspx

- A term describing blatantly unfair conduct that exceeds mere negligence by an insurance company.
  - For example, a bad faith claim may arise if an auto liability insurer arbitrarily refuses to settle a claim within policy limits, where an insured's liability is incontrovertible.
- Bad faith damages, also known as extra-contractual damages, are often substantial.
  - They frequently exceed the limits of the insurance policy that is the subject of the claim. See also Extracontractual damages.



民218-1 （賠償義務人之權利讓與請求權）

- 關於物或權利之喪失或損害，負賠償責任之人，得向損害賠償請求權人，請求讓與
  - 基於其物之所有權或
  - 基於其權利
  - 對於第三人之請求權。
- 第二百六十四條之規定，於前項情形准用之。

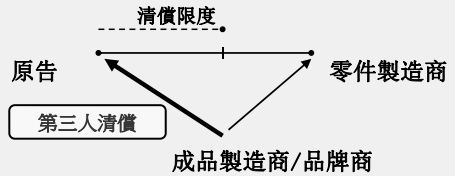
民294 （債權之讓與性）

- 債權人得將債權讓與於第三人。但左列債權，不在此限：
  一、依債權之性質，不得讓與者。
  二、依當事人之特約，不得讓與者。
  三、債權禁止扣押者。
- 前項第二款不得讓與之特約，不得以之對抗善意第三人。

- 債權人：原告；
- 債務人：零件製造商；
- 第三人： 成品製造商/品牌商

民312 （第三人清償/代位清償之權利）

- 就債之履行有利害關係之第三人為清償者，於其清償之限度內承受債權人之權利，
  - 但不得有害於債權人之利益。



美國訴訟程序之特色

1. 分為“聯邦”法院與“州”法院兩套制度。
2. 聯邦法院與州法院的法官有不同的選拔方式。
3. 原告可以選擇在對其有利的法院起訴。
4. 原告或被告都可以申請由陪審團審判。
5. 一次性開庭審判辯論。
6. 起訴時不需要附所有證據與正式索賠金額，而是在Discovery過程中取得。
7. 取得證據完全採取當事人進行主義。但隱瞞或湮滅證據會受到嚴厲的處罰。

美國的州法院與聯邦法院

- 州法院有
  - 州初級法院（trial courts），
  - 州中級上訴法院（mid-level appellate courts）（ intermediate appellate courts ）
  - 州最高法院（state supreme courts）。
- 聯邦法院有
  - 聯邦地區法院（federal district courts），
  - 巡迴上訴法院（circuit courts，又稱為聯邦中級上訴法院，federal mid-level appellate courts）
  - 聯邦最高法院（The Supreme Court of the United States）。

- 聯邦法院審理時還是使用該州的“實體法”。

- 比較保守的州
  - 對被告公司 比較有利。
  - 通常是農業地區。
- 比較自由的州
  - 對原告比較有利。
  - 通常是都會地區。
- 但“州”只是一個大概的說法，因為初審法院是以“郡”（county）為單位，而不是以“州”為單位。
  - 因此，即使在同一州裡，類似的事實在不同的郡仍然會有不同結果的判決。因而，每次有新案件就要重新研究當地類似的判決。
  - Local counsel也要做research!

法官與陪審團

法官處理法律問題

- 法官在審判過程之中扮演重要的角色，包括 解釋法律，評估雙方所提出的證據，以及控制審判要如何進行。
- 在審判前也扮演重要的角色。
- 理論上應該要保持中立的地位，但州法院的法官比較會受到外在的影響。

陪審團處理事實問題

- 在審判中扮演重要的角色：在法官的指導之下，針對所提出的證據 做成判決。
- 陪審團人員組成的結構（Jury pool demographics）大不相同，因此會影響到審判的結果。
- 在必須無記名投票方式產生判決的州，通常對被告比較有利。
- 在選擇陪審團團員的時候，可以無理由地反對（ Peremptory challenges ），這是一種重要的工具。

訴訟並不僅是被告律師的工作

外部因素

- 被告律師的工作量很大部分取決於原告律師的攻擊策略。
- 原告聯盟的運作。
- 被告的强力反擊，也是一種防禦策略。
- 不戰而降，和解條件總是不會太好。
- “軟柿子“的標籤可能如影隨形。

內部因素

- 是否能勝訴，或取得有利的和解，最重要的是保險人/被保險人的參與意願。
- 是不是真的有“best economic terms”？
  - 錢給原告 vs. 錢給抗辯律師的反思。

原/被告律師的聯盟

原告律師聯盟

- National Trial Lawyers:
  - http://www.thenationaltriallawyers.org/
- The American Association For Justice (“AAJ”) (formerly known as Association of Trial Lawyers of America (“ATLA”)):
  - https://www.justice.org/
- AAJ的技巧。
  - 對政治獻金和游說團體有特定的接觸管道。
  - 花了很多時間阻止聯邦侵襲行爲改革法案。
- 交換資訊
  - 訴訟包（Litigation packets）
  - 研究服務（Research services）
  - 綫上文件，訪談探證以及資料庫（Online document, deposition, and article databases ）

被告律師聯盟

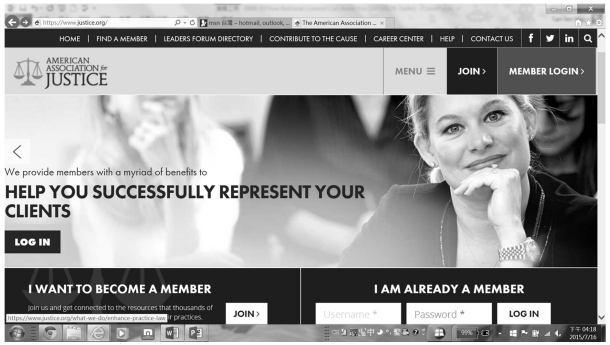
- Federation of Defense & Corporate Counsel（FDCC）
  - http://www.thefederation.org/process.cfm?PageID=1

The National Trial Lawyers

http://www.thenationaltriallawyers.org/

American Association of Justice

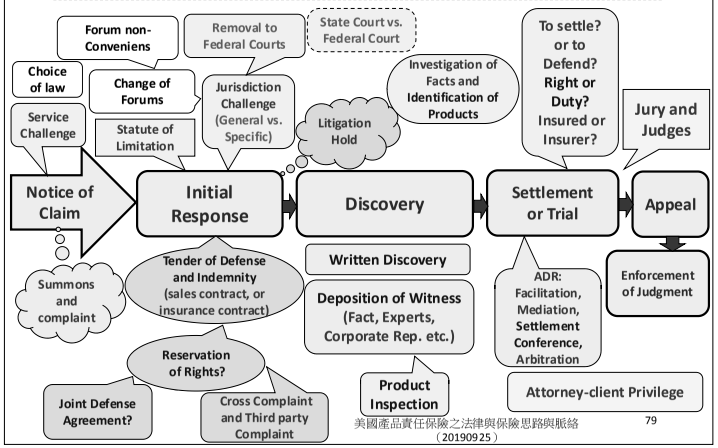
https://www.justice.org/



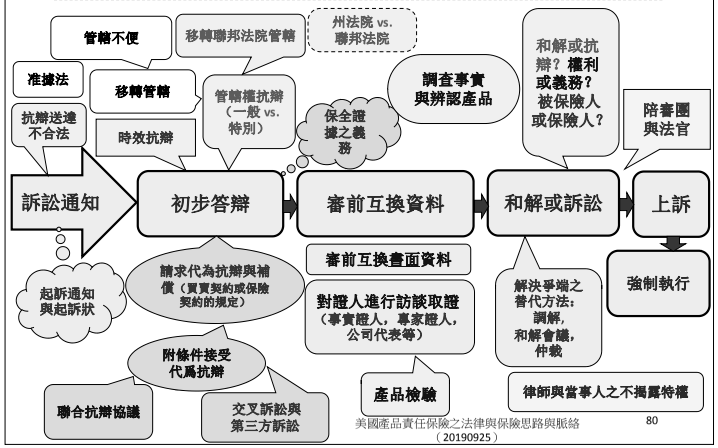
Federation of Defense & Corporate Counsel

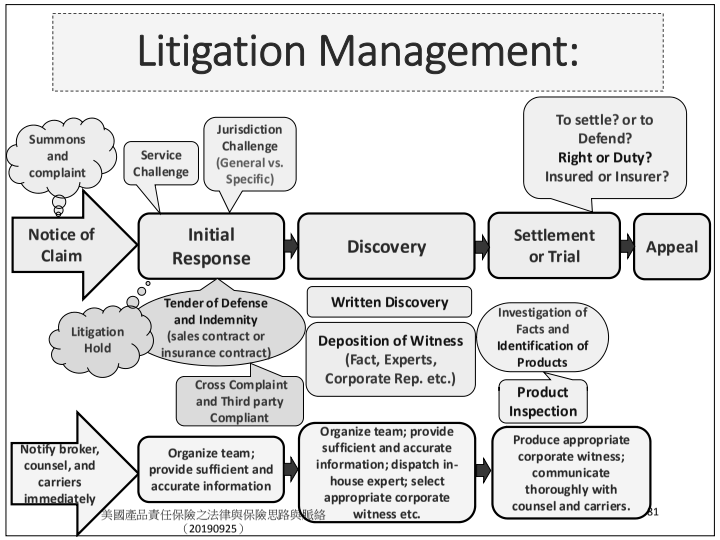
http://www.thefederation.org/process.cfm?PageID=1

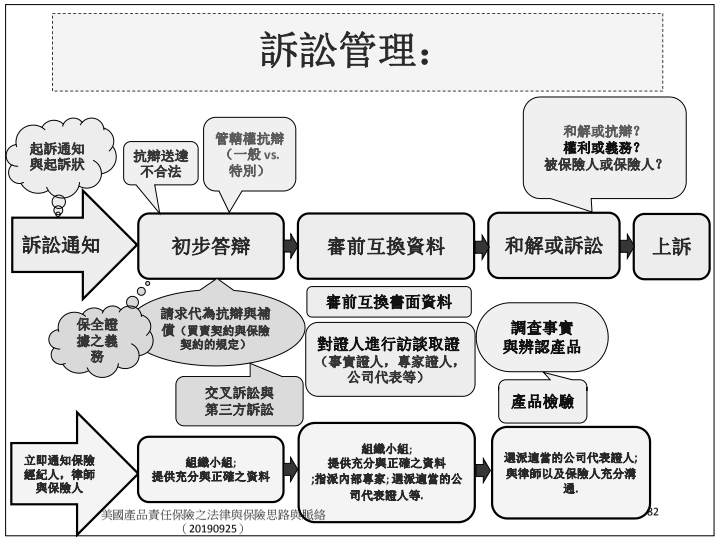
Litigation Flow



訴訟流程







SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- **a. You must see to it that we are notified as soon as practicable of an "occurrence" or offense which may result in a claim. To the extent possible, notice should include:**
  - **(1) How, when and where the "occurrence" or offense took place;**
  - **(2) The names and addresses of any injured persons and witnesses; and**
  - **(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.**
- **Notice of an "occurrence" or offense is not notice of a claim.**
- **b. If a claim is received by any insured, you must:**
  - **(1) Immediately record the specifics of the claim and the date received; and**
  - **(2) Notify us as soon as practicable.**
  - **You must see to it that we receive written notice of the claim as soon as practicable.**

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- **c. You and any other involved insured must:**
  - **(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or a "suit";**
  - **(2) Authorize us to obtain records and other information;**
  - **(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and**
  - **(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.**
- **d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.**

Before and After Service of Process
（收受送達之前與之後）

之前

- 每個公司都必須要建立一套在收到通知與起訴狀之後應有的程序。
- 在公司內所有的員工都應該要知道這些程序，同時要知道應如何與重要的負責人聯絡。

之後

- 當被保險人收到經由郵寄（by mail）或者是由專人（by personal service）送達的通知與起訴狀時 ，要立即通知保險經紀人，保險人與律師。
- 同時，被保險人要在受送達日第二個工作天提供所收受的文件影本給前述的公司。
- 提出抗辯與形成策略都有時效的限制，因此，這些抗辯必須在時效完成前予以檢視，並完成。

管轄權抗辯
（Jurisdiction Challenge）

- General Jurisdiction vs. Specific Jurisdiction
- 該不該抗辯法院無管轄權?
  - 會不會多花錢?
  - 會不會讓法官或陪審團產生不良印象?
  - 會不會白忙一場?
  - 原告會不會在別的州再行起訴?
- 對美國來的起訴狀是否可以置之不理?
  - “反正我在美國沒有財產！”
  - “有本領到台灣來告我！”
  - 中華民國法院是否可以執行美國法院的判決?

Personal Jurisdiction - Minimum Contacts (General Jurisdiction) 一般管轄權檢查表（與人有關）

要決定是否有與一般管轄權有關的最低程度聯繫，法院通常會檢視是否有下列因素

- Being registered to do business in the state（在該州登錄從事業務）
- Having offices, plants, facilities, or inventory in the state（在該州有辦公室，工廠，設備或存貨）
- Paying taxes in the state（在該州繳稅）
- Having bank accounts in the state （在該州有銀行帳戶）
- Having employees who work in the state （雇用員工在該州工作）
- Employees that travel to the state for the purpose of transacting business in the state, attending trade shows, and/or conferences （公司員工前往該州從事業務行為，參加展覽會或研討會）
- Advertising or marketing products directly in to the state（在該州廣告或行銷產品）
- Manufacturing products in the state（在該州製造產品）

Personal Jurisdiction - Minimum Contacts (General Jurisdiction) 一般管轄權檢查表（與人有關）

要決定是否有最低程度的聯繫，法院通常會檢視是否有下列類型的聯繫

- Maintaining an interactive website from which the insured's products can be purchased in the state（使用互動的網站，可以讓他人在該州購買產品）
- Execution of contracts in the state 是否在該州履行契約
- Subsidiary companies working on behalf of the parent in the state 在該州是否有子公司在該州代表母公司
  - 當一個國外的公司有子公司或關係企業在美國營運，因此會被認為是母公司的分身或傀儡（ “alter-ego” or “instrumentality” ）。
  - 如果單純地擁有子公司，則不見得可以使母公司要受到該州管轄。
  - 如果只是單純的授權關係，則不見得會使得授權人或被授權人所在之州的管轄。
- Having a registered agent in the state for service of process（在該州登記送達代收人）
- Maintaining a business listing or telephone number in the state（在該州商業名冊有登錄或電話號碼）
- Whether the defendant purposefully availed itself of the benefits and protections of the laws of the state 特別是被告有意地使得他收到該州法律的保護，或因而獲益。

Personal Jurisdiction - Minimum Contacts (Specific Jurisdiction) 特別管轄權檢查表（與產品有關）

- **Contacts that tend to show "specific jurisdiction"（特別管轄權）:**
  - If the plaintiff's cause of action arose out of the sale of a specific product; or （原告的訴因是否因被告在該州所銷售的特定產品而起）
  - If the defendant's contact was causally related to the plaintiff's cause of action. （被告的聯繫是否與原告的訴因有關。譬如說，就特定的產品做廣告，就特定的產品說明使用方法，而failure to warn）
  - Shipment of products into the state （是否將產品運送至該州）
    - Stream of Commerce vs. Stream of Commerce Plus

Stream Of Commerce Test （USLegal）

https://civilprocedure.uslegal.com/jurisdiction/personal-jurisdiction/tests-for-personal-jurisdiction/stream-of-commerce-test

- If a corporation delivers its products into the stream of commerce with the expectation that its products will be purchased by consumers in the forum state, courts in the forum state may have adequate personal jurisdiction over the corporation in product liability cases. However, the actions of the defendant must be "voluntary and purposefully directed" towards the forum state.
- In *Asahi Metal Industry Co.Ltd v. Superior Court*[1], four of the eight justices were of the opinion that if a corporation is aware that its final product is being marketed in the forum state, there is a possibility of a lawsuit in the state. The other four justices opined that there must be an "intent or purpose to serve the market in the forum state, when a product is placed into the stream of commerce in the forum state."
- The Supreme Court held in another significant case *Worldwide Volkswagen Corporation v. Woodson*[2] that the contact with the state cannot be considered "voluntary or purposefully directed" if the product came to be in the forum state only because the consumer/plaintiff brought it there.

- [1] Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (U.S. 1987)
- [2]World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (U.S. 1980)

Stream of Commerce vs. Stream of Commerce Plus

https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2018/07/oklahoma-high-court-rejects-stream-of-commerce/07272018isaac_legalpulse.pdf

Stream of Commerce	Stream of Commerce Plus
• The "stream of commerce" doctrine rests on the idea that a corporation may be subject to specific jurisdiction if it "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and the plaintiff's claims arise out of use of the product in the forum	• Under Justice O'Connor's "stream of commerce plus" test, "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State," and "[a]dditional conduct of the defendant" is required to "indicate an intent or purpose to serve the market in the forum State

IMPORTANCE OF CHALLENGING PERSONAL JURISDICTION
提出（個人）管轄權抗辯的重要性

- 在接到案件之初，就要立即分析是否可以提出管轄權的抗辯，如果可以的話，則要做積極的抗辯。
- 如果沒有提出管轄權的抗辯，而就直接做實體法抗辯的話，則會造成被告放棄管轄權抗辯的後果。
- 原則上放棄在country的管轄權抗辯之後，以後就不能再該state就他案再進行管轄權抗辯。
  - 但有時候也是有例外的。
- 如果管轄權抗辯成功的話
  - 則被告公司就可以脫離訴訟，而不需要再由法院或陪審團決定其是否有責任。
  - 被告公司一般來說不需要再繼續參與實體法的審前互換資料。
  - 對保險公司或自保的公司來說，能節省相當多的費用。
  - 即使管轄權抗辯沒有成功，也不代表法院會對被告公司有不好的印象。
- 如果記名被保險人與附加被保險人在同案均為被告的話，是否有必要僅為其中之一進行管轄權抗辯？

是否要提起第三方訴訟（third party complaint）

- 是否要提出第三方訴訟要看個案的情形而定。
- 被保險人所聘請的律師可以協助提供周詳的評估，以便決定是否值得向其他方提出第三人訴訟，如果需要的話，也要決定一個適合的時機。
- 如果第三方訴訟中的原告與被告內鬥的話，則會使原告得利，因此，就一個被告而言，最好不要再另外再把沒有受訴的第三方告進來，因為如果這麼做的話會讓原告得利。
- 在某些州 ，陪審團會受指示考慮非當事人的過失，因此，第三方訴訟不一定是需要的。
- 共同被告之間也可以考慮訂立聯合抗辯協議（joint defense agreement）。

審前互換資料（Discovery）
（Discovery可能會走兩次）

Jurisdiction discovery

- 重點在被告公司的營業
  - General jurisdiction
  - Specific jurisdiction
- 原告要求被告提供的多是與營運和銷售有關的資料。
- 目的是看承審法院是否有管轄權。
- 一般多是由公司業務主管擔任公司代表。
- 由法官決定法院是否有管轄權。

Merits Discovery

- 重點在被告公司的設計，製造。
- 原告要求被告提供的多是與設計，製造，包裝警告說明有關的資料。
- 目的是看被告是否應負賠償責任，以及應賠償的數額。
- 一般多是由公司研發與製造主管擔任公司代表。
- 由陪審團決定被告是否應負賠償責任，以及應賠償多少。

Discovery（審前互換資料）

Written Discovery
（互換書面資料）

- 相互書面詢問（ interrogatories ）
- 要求提供文件（ request for document production ）
- 要求承認（request for admission）

Deposition
（訪談取證）

- 對事實證人進行訪談取證（fact witness depositions）；
- 要求專家證人提供資料或進行訪談取證（expert witness disclosures and depositions）
- 對公司代表進行訪談取證 （corporate representative deposition）

Discovery（審前互換資料）需要被保險人共同配合

抗辯律師

- 抗辯律師需要與原告律師協商所提供文件的範圍和安排訪談取證各種事宜，必要時還要向法院提出抗告（appeal，同“上訴”）。
- 抗辯律師需要事先檢查所有送出的文件。
- 公司代表接受訪談之前，抗辯律師會與公司代表先進行準備會議
  - 律師不能告訴公司代表就問題應回答的答案，
  - 但可以告訴公司代表對方律師可能會問什麼問題，以及不同的答案所代表的意義。

被保險人

- 及時提供真實與正確的資料，一般來說，主要是：
  - 銷售資料，適用於管轄權抗辯（程序抗辯）；
  - 設計，製造與產品警示資料，適用於實體法抗辯（substantive defense），如被告是否應賠償責任。
- 選擇最適合（most knowledgeable）的公司代表。
  - 但總經理不見得合適。

聯邦法院案件初步揭露（Initial Disclosure）

Federal Court Disclosure Requirements & Timing

- Litigating in federal court requires adherence to the Federal Rules of Civil Procedure. One noteworthy rule is Rule 26 (a)(1), which requires:
  - (i) The name, address, and telephone number of all individuals at the insured company likely to have discoverable information that the disclosing party may use to support its claims or defenses
  - (ii) A copy of all documents, electronically stored information, and tangible things that the disclosing party（陳報方）has in its possession, custody, or control and may use to support its claims or defenses
  - (iii) A computation of each category of damages（損害賠償）claimed by the disclosing party; and
  - (iv) Any insurance agreement under which an insurance carrier may be liable to satisfy all or part of a possible judgment

專家證人與內部專家

Expert Witness

- 最好透過律師聘請專家證人，可以受到attorney and client privilege（律師與當事人之不揭露特權）的保護。
- 專家證人最大的功能在評估風險，而不在於僅做對本方有利的證詞。
- 做產品檢測（product inspection）的時候，律師最好也能在場
  - 專家證人不具法律或訴訟背景，在場發言稍有不慎，影響深遠。
  - 抗辯律師可以與原告律師或同案其他被告律師在現場交流，省時省事。

In-house expert

- 公司內部專家雖不能作證，但可以提供對產品最真實的意見，同時可以協助外部專家證人做正確的評估。
- 因此，必須妥善運用公司內部資源。

專家證人（Expert Witness）

評估損失原因專家（liability expert）

- 工程師，教授。但聘請專家證人的目的並不是只在證明產品沒有問題，而是在對我方的責任做正確的評估。即Testify and consult原則。
- 專家意見要如何合理詳細披露，聯邦法和各州法各有規定。

評估損害賠償責任專家（damages expert）

- 醫師（medical doctors）
- 職業/複健/安置工作專家（vocational/rehabilitation job replacement specialist）
- 經濟學家（economists）
- 醫療護理規劃師（medical life care planners）

Deposition Preparation

key deposition preparation points（訪談取證答問要點）

訪談取證整備會議

- 對公司代表進行訪談取證是最重要的。公司代表在訪談取證時的表現對個案的未來發展有重大的影響。
- 訪談取證準備會議的重要性：
  - 訪談取證的準備會議非常重要，因此證人要盡可能準備妥當，以便在作證時有最好的表現。
  - 在準備會議時，律師和預備作證的公司代表要討論原告律師所可能提出的問題與檔。

訪談取證答問要點

- 永遠不要猜測。
- 只回答被問到的特定問題
- 答案必須簡單與精確。
- 永遠不要回答不懂或有疑惑的問題。
- 仔細聽我方律師所提出的異議。
- 如果問題是與特定的檔有關，則必須在回答之前仔細看過整個檔。
- 需不需要請翻譯？當然要！
  - 不是證人英文好不好的問題！

解決爭端之替代方法
（Alternative Dispute Resolution）

- **調解**（Mediation）
  - 調解人（mediators）由有經驗的律師或退休的法官擔任。
  - 調解目的是希望當事人順利解決紛爭。
- **仲裁**（Arbitration）
  - 仲裁人（arbitrators）由有經驗的律師或退休的法官擔任。
  - 仲裁判斷書（award）
  - 仲裁可以有拘束力或無拘束力（binding or non-binding）。產品責任爭議比較少用拘束力的仲裁。
  - 可以對仲裁提起上訴，但要撤銷也很困難。
- **Facilitation**（協調/和解）
  - 一般人可以擔任，僅就協調就金額達成和解。

- **Mock Trial/Focus Group**（自行模擬審判/焦點團體）

和解/調解/仲裁
（Settlement Conference/Mediation/Arbitration）

- 在審前互換資料的程序結束前或結束後，雙方通常會透過和解的方式來解決紛爭。
- 固然和解可以在任何階段進行（甚至包括審判時與審判後），但在比較複雜的案件中，比較有意義的和解通常是在雙方有機會看到對方專家證人的意見，同時在審前互換資料的過程之中可以衡量可能的責任之後再進行。
- 進行和解的方式可以透過雙方律師以電話的方式討論，或舉行私人的調解服務，或在法院以強制和解會議（Mandatory Settlement Conference）等方式進行。

強制和解會議
（Mandatory Settlement Conference）

Settlement Conference

- 強制和解會議並不是必經的法定程序，但在實務上相當普遍，由法院要求當事人雙方必須進行。
- 通常由法院的承辦法官之一（one of the judges）或獨立的法官（magistrate judge）主持。
- 主持法官“穿梭”於分處兩室的原/被告與其所聘的律師之間，分析雙方主張的優勢與劣勢，儘量減少分歧，以促成和解。

Mediation

- 調解並不是法定的程式，但法官常常會要求當事人雙方進入非官方的調解程式。
- 調解程序通常由調解人（mediator）主持。

誰決定要戰要和？

- 保險人與被保險人的權利與義務
- 理賠人員與客戶的溝通
  - “只要在保險金額範圍之內，你趕緊賠！”
  - “為了保護商譽，我不要賠！”
  - “自負額”什麼時候交？
    - Deductible vs. SIR
- 什麼案件要和？什麼案件要戰？
  - Nuisance value case
  - 同保險單各案件之間的聯動性
- 什麼時候是和解的較好時機？
  - 原告律師收費的風險承擔制（contingent basis）
    - 案件是原告律師的“投資案”！
  - 原告和原告律師在想什麼？
    - 原告律師“見好就收，先落袋為安”的考慮
  - Discovery期間
    - 當事實逐漸浮現時！
  - 調解（mediation/facilitation）或法院強制和解（mandatory settlement conference）期間。

是戰是和
（When to Defend vs. When to Settle）

- 一般來說，在決定是否和解的時候，有很多重要的因素要考慮，如：
  - Proof of fault （是否能證明過失）
  - Verdict potential（判決的可能性）
  - Whether the plaintiff has jury appeal （原告是否能打動陪審團）
  - Whether other parties to the suit have comparative fault or liability （訴訟的他方當事人是否也有相對的過失與責任）
  - Amount in controversy （訴訟金額）
  - Expenses of ongoing litigation （繼續訴訟所要花費的費用）
  - Potential bad press to the company and other business considerations （對公司形象是否會造成負面的影響，以及其他商業上的考慮）
  - Who is the judge assigned to the case（案件的承辦法官）
  - Identity and track record of counsel （律師的個性與過往的紀錄）
  - Where the case is venued（案件的審判地）
- 保險公司或被保險人最好不要被貼上軟柿子的標籤。

在臺灣執行美國判決
（Enforceability of U.S. Judgments in Taiwan）

如果符合下列條件，外國法院的判決可以在臺灣被承認：

1. 臺灣法律認爲外國法院就該訴訟具有管轄權。
2. 該判決并沒有違反臺灣的法律或公共政策。
3. 該判決已經確定而無法再上訴。
4. 臺灣的被告受到合法送達。
5. 臺灣法院的判決也可以在對方國家互惠執行。

處理產品責任保險賠案常見的問題

- 被保險人到了“被訴”的時候才想要處理。
- （記名）被保險人報案之後，（沒有）經過保險人同意即自行處理。保險人也沒有及時追蹤賠案，導致案件更爲複雜。請特別注意附加被保險人的問題。
- 管轄權 （Jurisdiction） 與送達 （Service） 問題。
  - 認爲打管轄權是浪費金錢。
- 無法辨識是否為被保險人的產品 （Identification of Products）。
  - 但原告要證明是被告的產品。
- 被保險人無法提供與產品有關的（設計,製造與銷售）記錄及資料。
- 被保險人無法及時提供訴訟資料。
- 被保險人或其員工有意或無意的不合作。
- 對美國複雜的法律制度缺乏較全面性的瞭解。
- 輕忽產品檢驗事前協議和事實查證過程。
- 律師/保險公司/公證公司/保險經紀人/被保險人之間的（語言）溝通障礙。
- 保險公司過度急於和解結案，過於考慮所謂的“費用”，不重視準備金管理。
- 很少看到有人做策略性思考。

謝謝，請多指教！

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