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Autonomous Vehicles: The New Technology Driving the Litigation Conversation

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Abstract: *So far, Congress has not been able to pass regulations governing the emergence of self-driving or autonomous vehicles. Twenty-one states and the United Kingdom are leading the way. As more of these vehicles take to the highway implications will emerge for the insurance industry. Auto insurance policies will have to determine how to insure against losses caused by nonhuman operators, commercial general liability policies will be affected when technology developers and car makers are sued for bodily injury and property damage arising from malfunctioning technology, and cyber policies could be implicated in the event of hacks or data breaches. The authors review these subjects and share their insights into what autonomous vehicle producers should consider when it comes to mitigating their risk.*

Introduction

As autonomous vehicle technology has developed, so too have novel accompanying legal issues. Although federal regulation of autonomous vehicles has stalled, many individual states have enacted laws governing this new space. Lack of federal legislative guidance has left determination of legal issues related to autonomous vehicle technology largely with the states and the courts. In 2018, the United Kingdom passed nationwide legislation governing this emerging technology, which may provide guidance for what future U.S. law could look like. In the meantime, several cases pending in U.S. courts can shed light on how courts view legal challenges and issues related to this new technology.

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U.S. Legislation

In 2017, Senator John Thune (R-SD) introduced the American Vision for Safer Transportation through Advancement of Revolutionary Technologies Act (the AV START Act), but it failed to pass the 115th Congress. The bill sought to mitigate cybersecurity risks, increase public awareness of the use of private data in vehicles utilizing autonomous technology, and establish federal oversight of autonomous vehicle safety. The AV START Act would have required manufacturers to send safety evaluation reports to the Secretary of Transportation before road testing autonomous vehicles. Additionally, the AV START Act would have established a committee under the Department of Transportation's control to make recommendations regarding autonomous vehicle safety standards. Under the AV START Act, the federal government would provide oversight, but autonomous vehicles still would be regulated largely by state and local traffic laws.

The AV START Act recognized cybersecurity concerns inherent in a new technology like autonomous vehicles, and would have required manufacturers to implement a written plan to mitigate such risks. A valid plan would have included processes for recovery from cybersecurity breaches, detecting and responding to incidents, and risk-based, prioritized identification and protection of critical vehicle control systems. Additionally, the AV START Act would have established a new database to both monitor personal information collected by autonomous vehicles and track how that information would be used.

In January 2020, the U.S. Department of Transportation and the National Highway Traffic Safety Administration (NHTSA) issued voluntary autonomous vehicle guidance designed to encourage the development of legislation by states. The guidance includes the U.S. government's recommendations concerning safety, provides research data, and highlights important issues concerning the evolving nature of autonomous technology. It also states that autonomous vehicle companies are eligible for a federal income tax credit of up to 20% of the eligible spending for research and developmental activities.

Absent federal legislation, numerous states have enacted their own laws regulating autonomous vehicles. Currently, 29 states and Washington, D.C., have enacted laws regulating autonomous vehicle technology.[1] Twenty-one states have authorized deployment of some form of autonomous vehicle technology on public roads, while others restrict operations to testing.[2] Depending on the level of vehicle automation, many of these states do not require an operator to be in the vehicle.[3] Only two states with autonomous vehicle laws—Colorado and Virginia—do not require that the owner have liability insurance.[4] Many states require policy limits on liability insurance to be at least $1 million, with some states requiring as much as $5 million.[5]

Developments in the United Kingdom

On July 19, 2018, Parliament passed the Automated and Electric Vehicles Act (the AEV Act). The AEV Act requires that vehicles designed or adapted to be capable of self-driving must be insured to cover liability for damages caused to person or property, extending the prior mandate issued to individual, human drivers. This requirement applies whether the vehicle is controlled manually or autonomously.

The AEV Act requires a policyholder's insurance company to cover third-party damage caused by a self-driving automated vehicle. A policy may not exclude such damages, except for damages suffered as a direct result of software alterations made without the policyholder's knowledge, or failure to install safety-critical software updates. Generally, for the second exclusion to apply, the policyholder must be reasonably expected to know that the update is safety-critical, and that the absence of the update would render the vehicle unsafe.

The UK's legislation contemplates future liability risks, which will arise as autonomous vehicles become more widespread. While the AEV Act governs insurance concerns nationwide in the United Kingdom, insurance law in the United States generally falls within the purview of state law. But as federal legislators show an increasing willingness to wade into insurance law, perhaps future federal legislation will follow the UK's example of a federal insurance mandate.

Litigation Involving Autonomous Vehicles

Litigation regarding autonomous vehicle technology remains sparse. However, an analysis of several representative cases displays the range of causes of action that parties injured by autonomous vehicles may pursue.

In March 2018, Walter Huang's Tesla Model X veered out of control while allegedly using the "Autopilot" feature, crashing into a highway median and killing Huang. In April 2019, Huang's estate filed suit in the Superior Court of California, County of Santa Clara, alleging causes of action against both Tesla and the state of California.[6] Relevant to autonomous vehicle technology, the Estate alleged negligence and wrongful death against Tesla for carelessly selling the Model X without a properly functioning automatic braking system or a properly designed system for crash avoidance. The Estate also alleged design defect against Tesla due to the lack of an effective automatic braking system, as well as the vehicle's tendency toward unwanted acceleration and lack of adequate sensors to prevent the vehicle from veering from its lane. The third cause of action stated negligence post-sale, alleging that Tesla knew of the defects in the Model X and failed to issue a recall or adequately warn consumers. The Huang action is still pending, so the outcome of the Estate's allegations against Tesla and the state of California is unsettled. However, as discussed below, information revealed during discovery may create liability issues for Tesla that could impact not only the Huang case but potentially others as well.

On April 29, 2018, Yoshihiro Umeda was allegedly struck and killed by a Tesla Model X. At the time of the crash, the Autopilot system allegedly was engaged. The victim's estate filed a lawsuit in the United States District Court for the Northern District of California seeking damages—including punitive damages—from Tesla under theories of strict products liability and negligence.[7] In September 2020 the court dismissed the case, granting Tesla's motion based on jurisdictional grounds, and the case was moved to a Japanese court. The case remains pending in Japan.

In 2019, Benjamin Maldonado was driving his 15-year-old son home from soccer practice when they were struck by a Tesla Model 3 after Maldonado switched lanes. Maldonado's son was ejected from the car and killed as a result of the crash.[8] Two years after the crash, Maldonado brought a wrongful death action against the driver of the Tesla and Tesla Inc. The complaint alleged that the Tesla's Autopilot system is defective and failed to react to traffic conditions. The case is currently pending in Superior Court of California, Alameda County.

These representative cases set forth a noncomprehensive list of causes of action that a company like Tesla may face when autonomous vehicle technology falters. Manufacturers face potential liability related to personal injury, wrongful death, negligence, property damage, and products liability. Of course, these are just direct actions. Insurance implications could ultimately be more far-reaching.

Insurance Implications for Autonomous Vehicles

As autonomous vehicle technology grows, several implications will emerge for the insurance industry—including for policyholders seeking insurance coverage. Most obviously, auto insurance policies will have to determine how to insure against losses caused by nonhuman operators. Additionally, commercial general liability policies will be affected where, as in the cases above, the technology developers and car manufacturers are forced to defend against bodily injury and property damage claims arising from malfunctioning technology.[9] And, as the AV START Act implied, cyber policies could be implicated in the event of a hack or data breach. Companies providing services in the autonomous vehicle market would be wise to review their insurance programs to plan for and guard against the possibility of future losses.

The growing number of lawsuits involving autonomous vehicles undoubtedly will uncover new information concerning the safety of self-driving technologies. For example, in October 2022 the Department of Justice revealed that it was launching a criminal investigation into Tesla's self-driving claims.[10] As lawsuits and investigations progress, heightened scrutiny of operations at companies like Tesla likely will raise questions concerning leadership practices and decisions on safety or design.

Recent reporting illuminates the potential liability that autonomous vehicle companies may face with respect to representations of self-driving technology to the public. On January 18, 2023, Reuters reported that Tesla released a staged video demonstrating the self-driving capabilities of its vehicles in 2016.[11] This information surfaced after Ashok Elluswamy, the company's director of Autopilot software, testified during a deposition taken as part of the lawsuit filed by the Estate of Walter Huang discussed above. According to this testimony, Elluswamy revealed that drivers in the video intervened to take control during test runs and that "[w]hen trying to show the Model X could park itself with no driver, a test car crashed into a fence in Tesla's parking lot."[12] The 2016 video had previously been the focus of a 2021 *New York Times* article, which reported that Tesla engineers created the video to promote its "Autopilot" feature but failed to disclose that the route the car took in the video was planned in advance or that a car had crashed during the course of the video's filming. Details regarding the possible knowledge and involvement of Tesla leadership remain uncertain but could trigger a future insurance coverage dispute. Tesla's officers and directors could face legal liability as a result of the representations the company made to the public regarding the safety of its self-driving technology. Moreover, the decisions surrounding the production of the video and its release may raise liability for senior leadership depending on their level of involvement.

The new information concerning Tesla's 2016 video uncovered during the Huang action sheds light on the evolving nature of liability that the autonomous vehicle industry faces. As technology giants like Tesla, Google, and Uber enter and cultivate the autonomous vehicle technology industry, insurance analysis will be a critical concern to protect both manufacturers and consumers.

Conclusion

As autonomous vehicle technology continues to grow, so too will the legal issues that it engenders. While we await federal law legislating this new industry, and as state law continues to develop, courts already are being tasked with adjudicating claims arising from the use of autonomous vehicles. Although difficult to tell where exactly this new technology will lead, corporations and individuals aligning themselves with this new space would be wise to begin evaluating risks, and developing strategies to mitigate those risks, right now.

Notes

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1. Center for Insurance Policy and Research, Autonomous Vehicles, https://content.naic.org/cipr-topics/autonomous-vehicles.

2. Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Iowa, Kansas, Louisiana, Michigan, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Tennessee, Texas, Utah, and West Virginia. *See* https://www.iihs.org/topics/advanced-driver-assistance/autonomous-vehicle-laws.

3. *Id.*

4. *Id.*

5. *Id.*

6. SZ Huang et al. v. Tesla Inc., et al., No. 19-346663, Calif. Super., Santa Clara Co.

7. *Umeda v. Tesla Inc.*, No. 20-CV-02926-SVK, 2020 WL 5653496 (N.D. Cal. Sept. 23, 2020), *aff'd*, No. 21-15286, 2022 WL 18980 (9th Cir. Jan. 3, 2022).

8. *See* Benjamin Maldonado ESCUDERO and Adriana Garcia Maldonado, Plaintiffs, v. TESLA, INC., a Delaware Corporation, dba

Tesla Motors, Inc; Romeo Lagman Yalung; Vilma Yalung; and Does 1 through 100, inclusive, Defendants., 2021 WL 2772434.

9. *See* Irina Ivanova, *Tesla Engineer Says Company Faked "Full Autopilot" Video: Report*, CBS News (Jan. 17, 2023), https://www.cbsnews.com/news/tesla-autopilot-staged-engineer-says-company-faked-full-autopilot/

10. Mike Spector and Dan Levine, Exclusive: Tesla Faces U.S. Criminal Probe Over Self-Driving Claims, Reuters (Oct. 27, 2022), https://www.reuters.com/legal/exclusive-tesla-faces-us-criminal-probe-over-self-driving-claims-sources-2022-10-26/

11. Hyunjoo Jin, *Tesla Video Promoting Self-Driving Was Staged, Engineer Testifies*, Reuters (Jan. 18, 2023), https://www.reuters.com/technology/tesla-video-promoting-self-driving-was-staged-engineer-testifies-2023-01-17/.

12. *Id.*