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MEMORANDUM IN SUPPORT OF CLARIFYING AND AMENDING PREEMPTION LANGUAGE IN AV VEHICLE BILL

New Bill Must Better Ensure Preservation of State Lawsuits

Introduction

As Congress is preparing to again take up legislation on autonomous vehicles (AVs), it is imperative that Congress revisit one of the issues that slowed down the legislation during the last Congress. That issue is federal preemption of state-based remedies for people killed or injured by AV vehicles.

Last year, the House approved the SELF DRIVE Act. In the Senate, the AV START Act (S.1885), stalled for 14 months after clearing the Commerce Committee and ultimately died.¹ One of the biggest concerns with the Senate bill was its added preemption language, which was not included in the House bill. This new language could actually result in the opposite of what Congress intends and could block state tort remedies altogether. This memo explains why it is important for overall safety that lawsuits be preserved, why that language was problematic, and how the new bill could be improved.

Summary

AV technology has great potential, but it is also complex and dangerous. While we recognize the need for strong safety regulation, accidents involving AVs will occur even under the strictest regulatory scheme.² Undoubtedly, while AV technology may ultimately save lives, it will also lead to crashes triggering a gamut of new questions, particularly as new vehicles begin populating our roads. Questions such as who or what controlled the vehicle, what caused the accident, and whose is responsible if an operating system is so complex that a defect cannot be easily traced to its origin.³ Answers to these questions must evolve under state-based products

¹ SELF DRIVE Act, H.R. 3388, 115th Cong. (2017); AV START Act, S. 1885, 115th Cong. (2017); *See, e.g.*, <http://library.cqpress.com/cqresearcher/document.php?id=cgresre2019020100>.

² American Association for Justice, "Driven to Safety: Robot Cars and the Future of Liability," (February 2010), <https://www.justice.org/sites/default/files/Driven%20to%20Safety%202017%20Online.pdf>.

³ *Id.*, *See also*, https://www.consumerwatchdog.org/sites/default/files/2017-10/self_driving_consumer_threat_report.pdf.

liability law as they always have for automobiles with design or manufacturing defects. Lawsuits will not only provide remedies for those who are hurt, but they will help shine a light on otherwise unaddressed defects, and create incentives for manufacturers to avoid them in the future.⁴ In light of Congress' intent for the federal government to occupy the area when it comes to regulation of AV vehicles, civil remedies can only be preserved with a strong and well-drafted savings clause – stronger than what the Senate had previously proposed.⁵

Why are products liability important?

While federal safety regulations can help achieve safer AV vehicles, they alone are not sufficient to protect the public. Since the 1960s, products liability litigation has complemented federal regulations of non-autonomous vehicles and made American roads safer.⁶ Countless auto safety innovations have come about specifically because of litigation.⁷ History shows that litigation also fosters transparency and can expose previously concealed defects and regulatory weaknesses.

For example, in 2000, after 35 people died and 130 people were injured in Ford Explorer/Firestone Tire crashes, the National Highway Traffic and Safety Administration (NHTSA) began an investigation in response to public concern following media reports. This information was based, in part, on evidence uncovered in civil lawsuits. As Northwestern University Law School Professor Steven Lubet wrote in the *Chicago Tribune*, “[H]ow did the story finally come out, with Ford and Firestone in deep denial and the NHTSA overwhelmed and short-staffed? The answer is that a group of personal-injury lawyers began filing lawsuits – and eventually succeeded in bringing the problem tires to public attention.”⁸

Lawsuits provide accountability, particularly when companies cut safety corners and try to evade responsibility for their design and manufacturing defects.⁹ The recent GM ignition switch scandal illustrates this trend. GM concealed a lethal ignition switch defect and misled the public about it for years until the defect was uncovered in a civil lawsuit.¹⁰

⁴ Jill Villasenor, “Products Liability and Driverless Cars: Issues and Guiding Principles for Legislation,” The Brookings Institution (April 2014), <https://www.brookings.edu/research/products-liability-and-driverless-cars-issues-and-guiding-principles-for-legislation/>.

⁵ Preemption of state remedies must be distinguished from regulatory preemption. Tort remedies give citizens a remedy for an actual injury; federal regulations simply displace their state counterparts when preempted. William Funk et al., “The Truth about Torts: Regulatory Preemption at the National Highway Traffic Safety Administration,” Center for Progressive Reform (July 2008), http://www.progressivereform.org/articles/NHTSA_Preemption_804.pdf.

⁶ William Funk et al., “The Truth about Torts: Regulatory Preemption at the National Highway Traffic Safety Administration,” Center for Progressive Reform (July 2008), http://www.progressivereform.org/articles/NHTSA_Preemption_804.pdf.

⁷ See, e.g., American Association for Justice, “Driven to Safety: How Litigation Spurred Auto Safety Innovations,” (April 2010), https://www.justice.org/sites/default/files/file-uploads/Driven_to_Safety.pdf

⁸ Steven Lubet, “After The Firestone Debacle, Ya Gotta Love Lawyers,” *Chicago Tribune*, October 6, 2000, http://articles.chicagotribune.com/2000-10-06/news/0010060362_1_mountaineer-suvs-ford-and-firestone-firestone-tires

⁹ American Association for Justice, “Driven to Safety: Robot Cars and the Future of Liability,” (February 2010), <https://www.justice.org/sites/default/files/Driven%20to%20Safety%202017%20Online.pdf>.

¹⁰ See, e.g., <https://www.consumerreports.org/consumerist/supreme-court-general-motors-cant-use-bankruptcy-to-avoid-lawsuits-over-deadly-ignition-defect/>.

There is no reason to believe that companies involved in AV technology will operate any differently than the auto industry has always operated.¹¹ Therefore, to ensure safety and accountability, it is crucial that civil remedies continue to coexist alongside federal regulations as AVs make their way onto the American roads.

Problems with the Prior Senate Bill

In the last Congress, both the House and Senate AV bills preserved language found in current law:

“(1) Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.”¹²

However, the Senate bill added the following:

“(2) Subject to subsection (b)(3)(A), nothing in subsection (b)(3) shall exempt a person from liability at common law or under a State statute authorizing a civil remedy for damages or other monetary relief.”¹³

While we support adding language “under a State statute” to the language “at common law,” we strongly oppose adding the very problematic qualifier: “[s]ubject to subsection (b)(3)(A).” This language places a qualification, or exception, to the savings clause that essentially guts it.

Subsection (b)(3)(A) says that a state cannot “adopt, maintain, or enforce any law, rule, or standard regulating the design, construction, or performance of a highly automated vehicle or automated driving system.” It may seem clear that with this language, Congress intends to preempt only positive law and regulations and not state tort remedies. However, there is strong reason to believe that courts may not agree with that interpretation based on U.S. Supreme Court precedent.

Specifically, if someone died or was hurt as a result of a crash caused by a problem falling within this very broad “(b)(3)(A)” language, a court could interpret the state tort cause of action – a violation of a law, rule or standard - as preempted, saying Congress did not want states establishing their own complementary laws or rules via jury verdicts or court cases. In 2000, the U.S. Supreme Court used that precise reasoning to throw about another auto defect case, saying that “while the statute’s express preemption provision only preempts state positive law and regulation, the savings clause ensures the continued viability of state common law claims only to the extent that they do not conflict with a particular federal standard” and that this “lawsuit

¹¹ <https://www.consumeraffairs.com/news/despite-pedestrian-death-self-driving-car-industry-lobbies-for-fast-expansion-of-testing-032918.html>. Notably, Uber’s former autonomous vehicle head, Anthony Levandowski, said in a series of 2016 texts: “I just see this as a race and we need to win, second place is first loser,” and “We do need to think through the strategy to take all the shortcuts we can find.”

<http://www.consumerwatchdog.org/sites/default/files/2018-03/NHTSAcomments032018.pdf>

¹² 49 U.S.C. Sec. 30103. Relationship to other laws.

¹³ AV START Act, S. 1885, 115th Cong. (2017)

would conflict” with the federal standard.¹⁴ Without more clarity, the same reasoning could very well be applied in future AV crash cases, and may end up blocking them entirely.

Our Proposal

We support a very simple fix to the bill: remove the language “[s]ubject to subsection (b)(3)(A).” We would also support simply applying the savings clause to the entire bill. In other words, apply it to “The Act” instead of a specific section of the bill.

Support

Many consumer and auto safety groups were on record in the last Congress expressing concern about the preemption language. Most weighed-in on the breadth of the positive law and regulation preemption. However, as tort remedies are a closely related issue, we can expect their support on this preemption issue, as well. These groups include; Advocates for Highway and Auto Safety;¹⁵ Center for Auto Safety;¹⁶ Consumers for Auto Reliability and Safety (C.A.R.S.);¹⁷ Consumer Watchdog;¹⁸ National Safety Council;¹⁹ and Public Citizen.²⁰

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¹⁴ *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000); William Funk et al., “The Truth about Torts: Regulatory Preemption at the National Highway Traffic Safety Administration,” Center for Progressive Reform (July 2008), http://www.progressivereform.org/articles/NHTSA_Preemption_804.pdf

¹⁵ See, <https://saferoads.org/2018/01/24/advocates-statement-on-autonomous-vehicles-to-the-senate-commerce-committee/>.

¹⁶ See, <https://www.autosafety.org/?s=av+start>.

¹⁷ See, https://www.carconsumers.org/pdf/Autonomous_CA-Senate-Transportation-Committee_RS-Testimony_2-20-18.pdf.

¹⁸ See, <https://www.consumerwatchdog.org/search/node?keys=av+start>.

¹⁹ See, <https://www.nsc.org/company/speeches-testimony/testimony-the-automated-self-driving-vehicle-revolution>.

²⁰ See, https://action.citizen.org/p/dia/action4/common/public/index.sjs?action_KEY=13869.

APPENDIX – VICTIM STORIES

NON-AUTONOMOUS VEHICLE CASES

GM Ignition Switch Defect – Brooke Melton

Brooke Melton was a 29-year old nurse from Cobb County, Georgia who died en route to her own birthday celebration when the faulty ignition switch in her 2005 Chevy Cobalt failed and abruptly shut off the engine. Brooke's car hydroplaned across the highway, was struck by another vehicle, and eventually rolled off into a creek. Because of the defect, the airbags in Brooke's car never deployed. For many years, GM had covered up this ignition switch defect, resulting in hundreds of deaths and injuries. It was not until the civil lawsuit brought by Brooke's parents and the persistence of her attorney who hired his own engineers to study the car, that this lethal defect finally came to light, resulting in the recall of millions of vehicles.²¹

Mazda Seatbelt Defect – Thanh Williamson

Thanh Williamson was a 39-year old Utah mother who was killed in a crash by a defectively designed lap-only seatbelt in her family's 1993 Mazda minivan. When the crash occurred, Thanh's body jackknifed around the belt leading to fatal abdominal injuries and internal bleeding. Thanh's husband and daughter sued Mazda for failing to equip its vehicles with lap-and-shoulder belts that would have prevented severe injuries like Thanh's. Mazda, however, claimed that the lawsuit was preempted by virtue of a federal safety regulation that provided car companies with a choice of installing lap-only or lap-and-shoulder seatbelts. According to Mazda, requiring car companies to install the safer lap-and-shoulder belts frustrated the purposes and objectives of the regulation. The United States Supreme Court disagreed (distinguishing the *Geier* decision).²² Today, the safety regulation is no longer in effect and all seating positions in passenger vehicles must be equipped with lap and shoulder seatbelts. Thanh's case, therefore, shows that federal regulations can never strong enough and that civil lawsuits play a crucial role in exposing regulatory weaknesses.

AUTONOMOUS VEHICLE CASE

Arizona Uber Crash – Elaine Herzberg

Elaine Herzberg was a 49-year-old Arizona woman who was struck and killed by a Volvo SUV outfitted with an Uber self-driving system. At the time of the accident, Elaine was walking a bicycle across a dark section of a street. The SUV was traveling at about 40 mph, had a human operator behind the wheel, but was in computer control mode at the time of the crash. An investigation revealed that Uber deliberately deactivated the emergency braking system because it would have made the ride jerky and Uber was in a rush to start its self-driving taxi service. Elaine's case helped raise awareness that autonomous vehicles can be very unsafe, and companies should be responsible when someone is killed or injured. Uber quietly settled with Elaine's family members.²³

²¹ <https://www.atlantamagazine.com/great-reads/no-accident-inside-gms-deadly-ignition-switch-scandal/>

²² https://www.washingtonpost.com/national/court-says-mazda-can-be-sued-over-seat-belt-death/2011/02/23/ABqJbZQ_story.html?utm_term=.8ac8fb7056fe

²³ <https://usa.streetsblog.org/2019/03/08/uber-got-off-the-hook-for-killing-a-pedestrian-with-its-self-driving-car/>

