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STRENGTHENING FEDERAL AV CAR BILLS: LIABILITY, ARBITRATION, AND PREEMPTION

Autonomous vehicle (AV) technology has great potential but it is also complicated and dangerous. The U.S. House and Senate have taken steps to address this quickly-developing technology.[1] However, recent developments shed light on deficiencies in both bills, and concerns have been raised by U.S. Senators,[2] many safety organizations and other authorities in the field.[3]

More specifically, while the federal legislation purports to preserve state tort law and civil remedies, the actual language used, as well as their failure to ban the use of forced arbitration clauses, threaten to completely undermine Congress' intent.

Auto companies have a long history of cutting safety corners and weighing potential costs of liability to determine whether a dangerous vehicle should be redesigned or removed from the market, or an unsafe practice should be stopped.

- There are many historical examples of this behavior.[4]
- The recent GM ignition switch scandal – in which GM concealed information about a lethal defect for years until it was uncovered in a civil lawsuit, and misled the bankruptcy court about it – showed to what lengths car companies will go in order to avoid accountability and compensating customers injured or killed in crashes.[5]
- Companies involved in AV technology show no signs of operating any differently.[6]

Providing a civil remedy in the event of a car accident, injury or fatality is one of the most basic and traditional of state functions.

- State laws will continue to evolve as states decide what is best for their own drivers, roadways and general population.
- As the conservative House Liberty Caucus wrote last year in the context of another tort bill, this is "an essential power reserved to the states."[7]

While House and Senate bills intend to preserve state civil remedies for victims of AV crashes, the bills will fail to accomplish this laudable goal without certain changes.

- The House savings clause[8] must be clarified to reflect the Senate's more complete definition of protected state claims.[9] However, even with this critical language change, the legislation

will not fully accomplish Congress' intent to provide car crash victims with adequate remedies, as states currently provide them.

- **Forced arbitration.** Forced arbitration clauses will undermine this entire liability structure no matter how expressly the law attempts to preserve states' rights.

    - In forced arbitration, disputes are resolved in secretive, rigged proceedings that the company controls, which keeps information hidden from regulators and the public.[10]

    - Tech companies are currently using such clauses to keep many kinds of disputes out of court.[11] Often these clauses are extraordinarily broad.[12]

    - When Senators sought to determine if AV companies intend to use forced arbitration clauses to cover autonomous vehicle crashes,[13] major automobile trade associations responded by praising arbitration, touting their legality and incorrectly stating current law as to whether they could be forced onto "third-parties" who did not agree to them.[14] Indeed, some courts have already shown a willingness to force arbitration onto parties who never signed such contracts.[15]

    - **What Congress Should Do:** Senator Richard Blumenthal has proposed a critical amendment to the Senate AV bill that would ban forced (pre-dispute) arbitration clauses to resolve claims.[16]

- **Other preemption language.** In recent years, the U.S. Supreme Court has required more from Congress than a "savings clause" if it intends to preserve state remedies where legislation *also* expressly preempts state *regulation*.

    - A tort remedy is not equivalent to a state regulation. "Tort remedies are primarily invoked to give citizens a remedy for an actual injury, not to prevent some predicted harm."[17]

    - Nonetheless, in recent years, the U.S. Supreme Court has often conflated the two, preempting state lawsuits where Congress may have preempted state regulation yet said nothing about state remedies. The Court has preempted state lawsuits *even where a law's "saving clause" stated that a federal regulatory scheme should not impede state remedies*.[18]

    - In other words, "savings clauses" are not enough *especially* when they contain their own qualifying language, as in the AV legislation.[19]

    - In sum, while laudable, the "savings clauses" in both bills, which attempt to preserve state remedies, will open the door to allow courts to preempt civil remedies even though Congress did not intend such a result.

    - **What Congress Should Do:** Congress must strengthen the bills' language meant to preserve state lawsuits and remedies.

Notes

[1] On September 6, 2017, the House passed H.R. 3388, the SELF DRIVE Act. On November 28, 2017, the Senate Committee on Commerce, Science and Transportation reported out the AV START Act, S. 1885.
[2] *See*, *e.g.*, https://www.feinstein.senate.gov/public/_cache/files/f/1/f168c367-bec0-48cc-9220-6a13cbd9dd27/D00752809320841613B5F03BB8517FC2.03.14.2018-av-start-act-letter.pdf; https://www.blumenthal.senate.gov/newsroom/press/release/ten-senators-seek-information-from-autonomous-vehicle-manufacturers-on-their-use-of-forced-arbitration-clauses
[3] *See, e.g.*, http://saferoads.org/2018/03/05/letter-to-senate-leaders-on-driverless-car-bill/; http://www.consumerwatchdog.org/sites/default/files/2018-02/LtrSenate020918.pdf; https://www.autosafety.org/wp-content/uploads/2018/03/Consumer-group-letter-regarding-protection-from-forced-arbitration-in-sales-of-AVs.pdf; http://consumersunion.org/wp-content/uploads/2017/11/Letter-to-Senate-on-AV-bill-11-14-17-FINAL.pdf
[4] This "cost/benefit" process was first brought to public attention in the famous 1981 Ford Pinto exploding gas tank case, http://wadsworth.com/philosophy_d/templates/student_resources/0534605796_harris/cases/Cases/case67.htm. GM did something similar when it determined that paying liability claims for "burned deaths" caused by fuel tank design defects was cheaper than making their cars safe. http://www.cnn.com/US/9909/10/ivey.memo/
[5] https://apnews.com/111b3e8bae5945d09caf775781538234/appeals-court-opens-door-more-gm-ignition-switch-lawsuits
[6] As Uber's former autonomous vehicle head, Anthony Levandowski, put it in a series of 2016 texts to former Uber CEO Travis Kalanick: "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
[7] http://thehill.com/blogs/floor-action/house/339947-house-votes-to-limit-medical-malpractice-lawsuits; https://www.facebook.com/libertycaucus/photos/a.519545221443743.1073741825.241021382629463/1429927993738790/?type=3&permPage=1
[8] The House language reads, "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."
[9] The Senate language covers claims based on "common law or under a State statute authorizing a civil remedy for damages or other monetary relief."
[10] For more information, *see* https://centerjd.org/content/faq-vanishing-rights-and-remedies-under-forced-arbitration
[11] http://www.latimes.com/business/hiltzik/la-fi-hiltzik-uber-arbitration-20170821-story.html; https://www.epi.org/blog/uber-and-arbitration-a-lethal-combination/
[12] *See*, *e.g.*, Lyft's Terms of Service, https://www.lyft.com/terms#tos-dispute-resolution-and-arbitration-agreement
[13] https://www.blumenthal.senate.gov/newsroom/press/release/ten-senators-seek-information-from-autonomous-vehicle-manufacturers-on-their-use-of-forced-arbitration-clauses
[14] *See,* Letter from Dave Schwietert, Alliance of Automobile Manufacturers and Damon Porter, Association of Global Automakers to Senator Richard Blumenthal (April 5, 2018).
[15] For example, after customers attempted to sue Wells Fargo for fraudulently opening accounts in their name without their knowledge, "Judges in California and federal courts … ruled arbitration clauses signed by customers when they opened legitimate accounts prevent them from suing even over allegedly fraudulent accounts created without their knowledge." http://www.latimes.com/business/la-fi-wells-fargo-arbitration-20151205-story.html. This is similar to how a court might view a customer who simply downloaded an App with a broadly-worded clause.
[16] The amendment provides, "If a contract involving the manufacture, sale, lease, or use of a highly automated vehicle provides for the use of arbitration to resolve a dispute, arbitration may be used to resolve a dispute only if, after the controversy arises, both parties consent in writing to use arbitration to resolve the dispute."
[17] *See*, William Funk et al., "The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety," Center for Progressive Reform (September 2007), http://www.progressivereform.org/articles/Truth_Torts_704.pdf.
[18] *See, e.g., Geier v. Amer. Honda Motor Co.*, 529 U.S. 861 (2000).
[19] The Senate bill reads, "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." The qualifying language "subsection (b)(3)(A)" establishes preemption of "law, rule, or standard regulating the design, construction, or performance of a highly automated vehicle or automated driving system." This is the precise type of regulatory preemption language that has led the U.S. Supreme Court to deny the effect of a savings clause. *See, e.g., Geier v. Amer. Honda Motor Co.*, 529 U.S. 861 (2000).