

Autonomous Vehicles: The Importance of Banning Forced Arbitration Clauses

Autonomous vehicle (AV) technology has great potential but it is also complicated and dangerous. Consumer and safety groups have expressed tremendous concern about this technology and have outlined what needs to happen from a regulatory standpoint to protect public safety moving forward.¹

Equally important is making sure that the AV industry is held accountable for harms they cause as AVs are not currently safe² and experts now believe improved safety is years away.³ Crashing into other cars, hitting pedestrians, privacy and hacking dangers – these are current problems and ongoing risks for which companies in charge of AV technology and manufacturing must be legally responsible or AVs will never be safe.

Repeatedly throughout history, traditional auto manufacturers have been held legally accountable for placing unsafe cars on the market.⁴ However, *because the public will access AVs differently than they do traditional cars*, AV manufacturers will be able to dodge their legal responsibility for safety. Congress' failure to change the law could have devastating consequences for both public safety and overall confidence in the technology moving forward.⁵

Under our system of laws, companies that make defective vehicles historically have been brought to court for causing harm and are liable to pay compensation to the people they recklessly hurt, saving lives.

- The financial risks of liability, as well as the publicity around court cases that allow regulators and the public learn about problems, are sometimes the only reason why unsafe cars have been redesigned or removed from the market, and certainly why cars are much safer today than they were decades ago.⁶
- During May 18, 2021, Congressional testimony, Jason Levine, Executive Director of the Center for Auto Safety, put it this way:⁷

Americans' access to courts has literally saved thousands if not tens of thousands of lives. ...[O]ne perfect example is the General Motors ignition switch defect which killed over 174 people and injured many more, [which] was only brought to light because of a civil action that someone brought after there was a death. That's what uncovered it and led to the recall, that's what led to the fix. ... Going forward, those same issues remain vitally important. If we have a circumstance

where Americans are interacting with autonomous vehicles [and] they lose their right to bring an action should something go wrong, that not only injures that person financially but their injury may not be able to open up what might be a problem and help everyone else.

- Court cases also allow injured victims to be compensated, ensuring that wrongdoers pay for injuries they cause instead of shifting costs onto taxpayers and preserving a free-market approach to holding negligent companies accountable for the deaths and injuries they cause.

AVs will be offered to the public in such a way that companies will be able to use forced arbitration clauses to undermine this effective, centuries-old liability and accountability structure.

- Unlike traditional cars, AVs will be offered to the public most often as an automated mobility-as-a-service platform, similar to an Uber model, or they will be sold directly to the public as Tesla cars are sold today.⁸
- To access an AV, the public will have to agree to a company's broad take-it-or-leave-it contract, much like they must do for any app or online agreement for any other kind of service today including vehicle-for-hire services like Uber and Lyft.⁹ Often these clauses are extraordinarily broad and anti-consumer.¹⁰
- ***These contracts include broad forced arbitration clauses***, which mandate that disputes be resolved in secretive, rigged proceedings that the company controls, and which keep information hidden from regulators and the public.¹¹ In the context of AVs, forced arbitration clauses mean injured consumers “are unlikely to be able to seek justice, unlikely to hold the manufacturer accountable and perhaps most importantly, whatever they do determine will be done in secret so the rest of the public won't learn what happened.”¹²
- Moreover, courts have already shown a willingness to ***force arbitration onto parties who never signed such contracts***.¹³ That means AV companies may be able to block court access for not only AV occupants, but also ***people in traditional cars that AVs crash into, and even pedestrians who are hit***. As the Center for Auto Safety's Jason Levine put it in Congressional testimony, forced arbitration clauses pose a “real threat” to pedestrians.¹⁴
- When U.S. senators sought to determine if AV companies intend to use forced arbitration clauses to cover AV crashes,¹⁵ major automobile trade associations responded by praising arbitration and touting their legality.¹⁶ Without a prohibition from Congress, AV companies will have free rein to use these clauses.

Notes

¹ Advocates for Highway & Auto Safety, *Autonomous Vehicle (AV) Tenets*, November 30, 2020, <https://saferoads.org/wp-content/uploads/2020/11/AV-Tenets-11-24-20-1.pdf>

² See, e.g., Thomas Brewster, “Watch A Tesla Have Its Doors Hacked Open By A Drone,” *Forbes*, April 29, 2021, <https://www.forbes.com/sites/thomasbrewster/2021/04/29/watch-a-tesla-have-its-doors-hacked-open-by-a-drone/>; Letter from National Transportation Safety Board to National Highway Traffic Safety Administration, February 1, 2021, https://downloads.regulations.gov/NHTSA-2020-0106-0617/attachment_1.pdf

³ Cade Metz, “The Costly Pursuit of Self-Driving Cars Continues On. And On. And On.” *New York Times*, May 24, 2021, <https://www.nytimes.com/2021/05/24/technology/self-driving-cars-wait.html>; Alex Eule, “Are We There Yet? Autonomous Driving Has a Long Road Ahead.” *Barron's*, May 3, 2021, <https://www.barrons.com/articles/self-driving-keeps-getting-delayed-why-autonomous-vehicles-are-still-a-ways-off-51619822210>; Congressional Research Service, *Issues in Autonomous Vehicle Testing and Deployment*, April 23, 2021, <https://fas.org/sgp/crs/misc/R45985.pdf>

⁴ Numerous examples can be found in the *Lifesavers 2021: CJ&D's Guide to Lawsuits that Protect Us All*, Center for Justice & Democracy, January 2021, <http://centerjd.org/content/lifesavers-2021> and *Products and Practices Made Safer As a Result of Lawsuits*, Spotlight on Justice, Center for Justice & Democracy, July 2019, <https://centerjd.org/content/spotlight-products-and-practices-made-safer-result-lawsuits>. See also, Testimony of Jason Levine, Executive Director, Center for Auto Safety, Hearing on “Promises and Perils: The Potential of Automobile Technologies” before U.S. House Consumer Protection and Commerce Subcommittee, Energy and Commerce Committee, Tuesday May 18, 2021, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-promises-and-perils-the-potential-of-automobile-technologies>

⁵ Press release, “AAA: Today’s Vehicle Technology Must Walk So Self-Driving Cars Can Run,” February 25, 2021, <https://newsroom.aaa.com/2021/02/aaa-todays-vehicle-technology-must-walk-so-self-driving-cars-can-run/>; Ira Boudway, “Americans Still Don’t Trust Self-Driving Cars, Poll Shows,” *Bloomberg*, May 19, 2020, <https://www.bloomberg.com/news/articles/2020-05-19/americans-still-don-t-trust-self-driving-cars-poll-shows>;

Advocates for Highway & Auto Safety, “Public Opinion Polls Show Deep Skepticism About Autonomous Vehicles,” July 22, 2019, <https://saferoads.org/wp-content/uploads/2020/01/AV-Public-Opinion-Polls-7-22-19.pdf>

⁶ See, e.g., Tom Krisher, “Court ruling opens GM to billions in death, injury claims,” *Associated Press*, July 13, 2016, <https://apnews.com/article/111b3e8bae5945d09caf775781538234>; Andrew Pollack, “Paper Trail Haunts G.M. After It Loses Injury Suit,” *New York Times*, July 12, 1999, <https://www.nytimes.com/1999/07/12/us/paper-trail-haunts-gm-after-it-loses-injury-suit.html>. See also, *Lifesavers 2021: CJ&D's Guide to Lawsuits that Protect Us All*, Center for Justice & Democracy, January 2021, <http://centerjd.org/content/lifesavers-2021> and *Products and Practices Made Safer As a Result of Lawsuits*, Spotlight on Justice, Center for Justice & Democracy, July 2019, <https://centerjd.org/content/spotlight-products-and-practices-made-safer-result-lawsuits>.

⁷ Testimony of Jason Levine, Executive Director, Center for Auto Safety, Hearing on “Promises and Perils: The Potential of Automobile Technologies” before U.S. House Consumer Protection and Commerce Subcommittee, Energy and Commerce Committee, Tuesday May 18, 2021, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-promises-and-perils-the-potential-of-automobile-technologies>

⁸ Coalition Letter to U.S. House of Representatives on AVs and Forced Arbitration, May 18, 2021, <http://centerjd.org/content/coalition-letter-house-avs-and-forced-arbitration>

⁹ See, e.g., Linda Chiem, “DC Lyft Driver Must Arbitrate COVID-19 Sick Leave Suit,” *Law360*, April 23, 2021, <https://www.law360.com/articles/1378253>; Reuven Blau, “Uber Tries to Drive Back Legal Rights on Brooklyn Woman Who Sued After Accident,” *The City*, April 23, 2021, <https://www.thecity.nyc/2021/4/23/22400325/uber-tries-to-drive-back-legal-rights-on-brooklyn-woman-who-sued>; David Dayen, “Tech Companies’ Big Reveal: Hardly Anyone Files Arbitration Claims,” *American Prospect*, November 26, 2019, <https://prospect.org/power/tech-companies-hardly-anyone-files-arbitration-claims/>

¹⁰ See, e.g., Uber U.S. Terms of Use, <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en> (updated April 14, 2021); Lyft’s Terms of Service, <https://www.lyft.com/terms#tos-dispute-resolution-and-arbitration-agreement> (updated April 1, 2021).

¹¹ For more information, see Center for Justice & Democracy, “FAQ: Vanishing Rights and Remedies Under Forced Arbitration,” March 26, 2013, <https://centerjd.org/content/faq-vanishing-rights-and-remedies-under-forced-arbitration>

¹² Testimony of Jason Levine, Executive Director, Center for Auto Safety, Hearing on “Promises and Perils: The Potential of Automobile Technologies” before U.S. House Consumer Protection and Commerce Subcommittee, Energy and Commerce Committee, Tuesday May 18, 2021, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-promises-and-perils-the-potential-of-automobile-technologies>

¹³ 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.” James Rufus Coren, “Even in fraud cases, Wells Fargo customers are locked into arbitration,” *Los Angeles Times*, December 5, 2015, <http://www.latimes.com/business/la-fi-wells-fargo-arbitration-20151205-story.html>. This is similar to how a court could view a customer who simply downloaded an app with a broadly-worded clause.

¹⁴ Levine explained, “[I]f you are a pedestrian who has entered into an agreement unknowingly when you downloaded an app to order a pizza maybe and you get hit by a pizza delivery vehicle and you said well I’m going to do everything from a legal standpoint, through binding arbitration you have now lost your ability to go to court. It sounds outlandish but it’s not actually that far from where we are in terms of binding arbitration removing our ability to hold manufacturers accountable. And so, that’s something we don’t want to see in an AV context.” Hearing on “Promises and Perils: The Potential of Automobile Technologies” before U.S. House Consumer Protection and Commerce Subcommittee, Energy and Commerce Committee, Tuesday May 18, 2021, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-promises-and-perils-the-potential-of-automobile-technologies>

¹⁵ U.S. Senator Richard Blumenthal press release, “Ten Senators Seek Information from Autonomous Vehicle Manufacturers on Their Use of Forced Arbitration Clauses,” March 23, 2018, <https://www.blumenthal.senate.gov/newsroom/press/release/ten-senators-seek-information-from-autonomous-vehicle-manufacturers-on-their-use-of-forced-arbitration-clauses>

¹⁶ See Letter from Dave Schwieter, Alliance of Automobile Manufacturers and Damon Porter, Association of Global Automakers to Senator Richard Blumenthal, April 5, 2018.