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ISSUE 1 | APRIL 07, 2017



SPOTLIGHT

Shook Attorneys Discuss Legal Challenges of Emerging Technologies

Emerging technologies are changing the way we live, travel and buy goods and services. While new technology may improve our lives, it also brings new risks. Shook, Hardy & Bacon Partners [Cary Silverman](#) and [Phil Goldberg](#), with Of Counsel [Jonathan Wilson](#), have authored a report, *[Torts of the Future: Addressing the Liability and Regulatory Implications of Emerging Technologies](#)*. This report addresses the challenges of promoting innovation and economic growth while protecting consumer safety and privacy.

The report, published for the U.S. Chamber Institute for Legal Reform, focuses on five of the main areas of new technology:

- autonomous vehicles;
- the commercial use of drones;
- private space exploration;
- the “sharing economy,” which allows people to generate income from underused assets such as cars and housing; and
- “The Internet of Things,” involving products connected to collect and share data.

The authors examine current technological developments, provide an overview of existing regulatory and liability frameworks, consider current and anticipated litigation, and conclude with proposals for guiding principles to address liability and regulatory implications of emerging technologies. The U.S. Chamber Technology Engagement Center and the Institute for Legal Reform featured the report at its “Emerging Technologies and Torts of the Future” event in Silicon Valley.

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At the forefront of defending automotive companies, Shook understands our clients' products, their businesses and the industry as a whole, as well as the legal and regulatory landscape, including emerging technology and liability theories.

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INTERNATIONAL DEVELOPMENTS

UK Pole Position?

The U.K. government continues to push for pole position in the autonomous vehicle race. The government has made firm commitments in terms of policy and funding, but industry still harbors reservations that legal regimes may be unable to deal effectively with new and innovative technology. At the recent Society of Motor Manufacturers and Traders Connected conference, the motor industry voiced concerns that regulation might not keep pace with innovation. BMW's Ian Robertson commented, "I think technology will be robust enough within a period of five years, but I also think that the legislation and government involvement is going to take a longer period."

Recognizing the need to remain agile in this dynamic environment, the U.K. government is not rushing into any immediate regulatory changes. The preferred course of action is a step-by-step approach to regulation in what the government calls a "rolling programme of regulatory reform." Concerned that introducing new regulation too soon may be ineffective and delay the arrival of innovative products onto the market, many within the government have acknowledged the difficulty in predicting with any certainty what new technologies may develop and how they will function. The aim, therefore, is to learn from the use of increasingly automated technology and legislate accordingly.

The U.K.'s step-by-step approach to regulation will develop alongside current product liability laws in the U.K. and Europe. At present, the government does not plan to revise the product liability regime in the U.K., but it will change existing motor insurance laws (by way of a new Modern Transport Bill) to account for the use of autonomous vehicles on U.K. roads. At the European level, the review of the Product Liability Directive (85/374/EEC) is underway, including an assessment of whether the Directive is still fit-for-purpose in light of new technologies such as the Internet of Things and autonomous systems. With the U.K. exiting from the European Union, it can draw from—but not be slowed by—these European-level considerations.



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FTC and NHTSA Open Comment for Data Privacy Guidelines

The Federal Trade Commission (FTC) and National Highway Traffic Safety Administration (NHTSA) are seeking public comment through April 20, 2017, on autonomous vehicle technology privacy and security issues. In October 2016, NHTSA issued guidelines outlining best practices to address cybersecurity issues related to autonomous and connected technology in vehicles. The guidelines establish an Information Sharing and Analysis Center for the auto industry and encourage OEMs to take seriously threats of malicious attacks resulting in unauthorized manipulation of a vehicle. To maintain high capability across the board, NHTSA encourages the sharing of difficult or leading-edge scenarios to keep security technology and practices current. Following the open comment period, FTC and NHTSA will co-host a workshop on June 28, 2017, to discuss data security and privacy issues with the aim of understanding current manufacturers' practices, the type of information transmitted and the role of the federal government in regulating this area.

California Proposes Autonomous Vehicle Regulations and Legislation

On March 10, 2017, the California Department of Motor Vehicles (DMV) proposed new autonomous vehicle regulations. The DMV initially adopted regulations for the testing of driver-tested autonomous vehicles in 2014. The new proposed regulations set a framework for both driverless vehicle testing permits and the eventual deployment of autonomous vehicles for operation by the public. The proposed regulations track similar laws passed in Michigan in December 2016. As host to the highest number of manufacturers testing autonomous vehicles in the country, California is determined to maintain its position at the forefront of autonomous vehicle regulation. State officials expect the new proposed regulations to be finalized and published by the end of 2017.

In addition to the DMV, legislators in California are also weighing in on the regulation of autonomous technology. State Senator Nancy Skinner (D-Berkeley) has introduced legislation that would make an SAE level 4 or 5 autonomous vehicle "eligible for initial registration, or renewal or transfer of registration" by the DMV "only if the vehicle is a zero-emission vehicle." The proposed regulation is in line with Governor Jerry Brown's 2012 executive order declaring that California will have 1.5 million zero-emission vehicles by 2025. However, according to the Alliance of

Automobile Manufacturers, sales of zero-emission vehicles to the general public in California have stalled at about three percent of market share. Critics of the proposed legislation say a hardline rule like this would increase cost, limit the driving range and ultimately slow the development of autonomous vehicles.

LITIGATION

Advertising “Autonomous” Technology under California’s Proposed DMV Regulations

Proposed regulations from the California Department of Motor Vehicles (DMV) may cause an increase in lawsuits against manufacturers allegedly misleading consumers by advertising a vehicle’s autonomous capabilities. In March 2017, the DMV released a set of proposed regulations addressing numerous aspects of the testing and eventual deployment of autonomous vehicles, and Section 228.30 of the regulations governs “Statements About Autonomous Technology.” Specifically, the regulation states manufacturers and their agents cannot use terms in their advertisements that would “likely induce a reasonably prudent person to believe a vehicle is autonomous” and defines “autonomous” as a vehicle that meets SAE level 3 or above.

If passed, this regulation may open the door to litigation. Not only would manufacturers be potentially exposed to liability for “misleading” claims of a vehicle’s autonomous technology, but manufacturers could also now be liable for simply using the term autonomous in their advertising. This regulation could have far-reaching implications; for example, today’s fairly common vehicle advertisement displaying a company’s progress in the autonomous space in conjunction with the sale of a non-autonomous vehicle would potentially violate this proposed regulation.

Liability for Failing to Provide All Vehicle Models with State-of-the-Art Driver-Assist Technology

As with past litigation involving seat belts, air bags and virtually any development related to occupant protection, plaintiffs in vehicle-accident cases in recent years have begun to file claims against auto manufacturers for allegedly failing to provide

collision avoidance technology in every model of vehicle sold rather than only premium models. Generally, vehicle manufacturers owe a duty to use reasonable care in the design of their vehicles. However, the National Highway Traffic Safety Administration's (NHTSA's) proposed Automated Vehicles Policy goes a step further by encouraging entities to "develop and incorporate new occupant protection systems that use information from the advanced sensing technologies needed for highly automated vehicle operation to provide enhanced protection to occupants for all ages and sizes." The preemption effect of this proposal is unclear, and it remains to be seen whether the federal government will make that determination before the technology becomes available to the general driving public—possibly by issuing express preemption language—or whether Congress will defer to the courts' interpretations under implied preemption or other doctrines. This question may also depend on any upcoming Supreme Court nominations.

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