

IS THE RAPIDLY EVOLVING LANDSCAPE FOR VEHICLE TECHNOLOGY ABOUT TO HIT REGULATORY AND LEGAL SPEEDBUMPS?

Date: 2 August 2016

Public Policy and Law Alert

By: Scott Aliferis, Darrell L. Conner, Cliff L. Rothenstein, Peter V. Nelson, Stephen A. Martinko, Stephen A. Martinko, Russell S. Abrams

In a nation with over 250 million vehicles, accidents occur daily, and many of those result in injuries and fatalities. Rarely do they receive national attention. Yet, an incident involving a vehicle in early May has captivated the attention of the American public and resulted in a total of three Federal agency investigations. What these investigations uncover could set the stage for new legal precedents, additional regulations, and Congressional action, with far-reaching implications for the transportation and technology sectors, as well as the next generation of motor vehicles.

THE FATAL INCIDENT

On May 7, 2016, a Tesla Model S with its "Autopilot" feature activated and in operation was involved in a fatal crash in Florida. The company is now facing a formal investigation from the National Highway Traffic Safety Administration (NHTSA), the National Transportation Safety Board (NTSB), and the Securities and Exchange Commission (SEC).

On July 8, NHTSA's Office of Defects Investigation sent a civil investigative demand letter seeking information from Tesla to determine whether its collision warning or automatic emergency braking systems — elements of the "Autopilot" feature — did not perform as designed. The company must comply with the agency's request or face civil penalties. The results or findings of the investigation may create calls for enhanced oversight of new vehicle technologies or for new regulatory and enforcement authority from Congress.

The NTSB is conducting a separate review and recently sent a team of five investigators to the site of the crash in Florida. The NTSB is taking a comprehensive look at whether the crash reveals any systemic issues with driverless-car technology. Although the NTSB does not have regulatory authority, the recommendations stemming from its investigation could have a profound impact on a burgeoning industry. Its findings could change the course of development and testing of driverless technology and its application across the motor vehicle fleet, driving the public debate on the integration of autonomous and semi-autonomous technology in vehicles.

Most interestingly is the investigation by the SEC. In this case, the SEC will determine if the company should have disclosed the May accident to investors as a "material" event or as a development that a reasonable investor would consider important. The SEC's inquiry has just begun, but any enforcement action will be closely reviewed by the automotive industry, investors, and others to see if the ruling could extend beyond Tesla.

PROSPECT OF NEW LEGAL PRECEDENTS ON VEHICLE TECHNOLOGY

These investigations are a reminder that the Federal government plays a significant role in the adoption of advanced motor vehicle technology and that its decisions could determine the winners and losers in the automotive sector. The fact that the incident could also create new legal precedents on liabilities for automotive technology providers and vehicle manufacturers bear close watching. Moreover, in a world where vehicle software is becoming as important as miles per gallon or anti-lock brakes, Congress and Federal agencies will be scrutinizing new vehicle technology and considering what regulations, guidance, and legislation may be needed in a rapidly evolving marketplace where 17.5 million new vehicles were sold just last year.

This accident is not the first to involve advanced motor vehicle technologies. It is, however, the first fatal accident involving software that included an autopilot feature capable of allowing its vehicle "to steer within a lane, change lanes with the simple tap of a turn signal, and manage speed by using active, traffic-aware cruise control." Autopilot was introduced in October 2015 by Tesla when it announced a software update to its Model S that it said included a feature that "functions like the systems that airplane pilots use when conditions are clear." The company also stated in its announcement that "the driver is still responsible for, and ultimately in control of, the car."

The Autopilot feature for use on the highway was the first of its kind to be introduced to consumers. Some autonomous features, like automatic parallel parking, were already being offered by other car companies, but Tesla's self-steering software update was a significant jump in autonomy available to the consumer.

The fatal accident is likely to trigger questions of fault with the Autopilot feature, even if it is determined that the other vehicle in this crash is at least partly at fault. There have been other incidents involving the Autopilot feature, which is enabled on approximately 70,000 vehicles. Legal liability of incidents involving Autopilot will depend in part on the local law applicable where a crash happens, as negligence and product liability are primarily subjects of state laws.

The Autopilot situation could result in the first major case involving semi-autonomous technology in motor vehicles, leading to the establishment of new legal precedents for autonomous and semi-autonomous technology in automobiles. In addition, Federal regulatory action has the potential to disrupt areas of the law traditionally left to the states, such as warranty requirements, traffic laws, and the regulation of motor vehicle dealers.

As we witness the transition to advanced driver assistance systems (ADAS) technology, "old technology" vehicles will remain the vast majority of vehicles on the road, and the interface between new and old will create substantial issues, such as auto insurance coverage for new technologies. Indeed, very little of what the industry and public experience today related to the legal structure surrounding the operation of motor vehicles may remain unaffected by Federal and state responses to these new technologies.

PROCESS JUST BEGINNING

The regulatory and policy foundation is being established now with the new technology structure to be added in the years ahead. If the past is any indication, we can expect to see an increase in regulatory oversight over new technologies and ADAS in the years ahead. Regulators also are likely to adopt definitions so that manufacturers know exactly which products will need to meet regulatory standards and which ones will not.

Additionally, product liability claims connected to ADAS or other autonomous driving technologies have not yet been at the center of a major court ruling or Congressional legislation. As a result, the implications for technology suppliers, auto companies, and other industry players are unknown and uncertain.

"Disruption" and new ways of doing business are impacting every industry. Cars and computers are at the front of this disruption. To wit: should vehicles even have steering wheels or pedals? Those who are active in the industry and offer promising technologies stand a greater chance for success by engaging with Federal officials and shaping the rules and regulations to govern the vehicles and transportation network of the future. Those who do not engage may be left on the entrance ramp.

KEY CONTACTS



SCOTT A. ALIFERIS
GOVERNMENT AFFAIRS ADVISOR
WASHINGTON DC
+1.202.661.3865
SCOTT.ALIFERIS@KLGATES.COM



DARRELL L. CONNER
GOVERNMENT AFFAIRS COUNSELOR
WASHINGTON DC
+1.202.661.6220
DARRELL.CONNER@KLGATES.COM



CLIFF L. ROTHENSTEIN
GOVERNMENT AFFAIRS ADVISOR
WASHINGTON DC
+1.202.778.9381
CLIFF.ROTHENSTEIN@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.