

# No Driver, No Liability?

Congress pressed to address a key concern about autonomous vehicles

By **HERB JACKSON**

**F**or decades, federal and state governments have written the rules of the road jointly.

Washington sets the requirements for cars to be roadworthy, mandating seat belts and air bags, for example. States decide who could drive them and how, issuing licenses, setting speed limits and funding the courts where lawsuits determine liability after accidents.

As the United States races with China, Germany, the United Kingdom and other countries to develop cars and trucks that drive themselves, questions about who will set the rules in the future derailed legislation in the last Congress. And lobbyists and interest groups say divisions could be exacerbated this year, with the House and Senate controlled by different parties.

“Traditionally, the federal government is dominant on design and the states are dominant on operation,” says University of South Carolina assistant law professor Bryant Walker Smith, who has written extensively about autonomous vehicles. “When the vehicle itself becomes the driver, that line blurs.”

Bills in the last Congress designed to speed development and testing of new technology by pre-empting some state regulation got bogged down over arguments about the impact on state powers and, significantly, attempts by lobbyists for trial lawyers to protect accident victims’ rights to sue in state courts.

“The language as written was very broad and not everyone agreed on how it would be

interpreted,” Smith says, describing a bill approved in October 2017 by the Senate Commerce, Science and Transportation Committee. “I think a very reasonable interpretation would have barred states from applying state tort law to claims against automakers or automated driving developers. That was not the intent, but it was the clear impact.”

Negotiations over replacing that language became more difficult after highly publicized accidents, especially one in March 2018 in which an Uber test vehicle in driverless mode struck and killed a pedestrian in Arizona.

“Some of the senators did not necessarily trust the technologies, did not trust the developers of the technologies and did not even trust the regulators of those developers,” Smith says. “That made consensus difficult.”

Arguments about future liability come as safety is one of the main selling points in taking the power to drive away from humans who get tired, aggressive, distracted or drunk.

“Imagine a world with no car crashes,” General Motors writes at the start of a “voluntary safety self-assessment” submitted to the National Highway Traffic Safety Administration. “Our self-driving vehicles aim to eliminate human driver error — the primary cause of 94 percent of crashes.”

According to NHTSA, deaths from motor vehicle crashes declined 1.8 percent in 2017, but still totaled 37,133, or more than 100 a day.

If driverless cars sharply cut that fatality rate because they don’t exceed speed limits, run red lights or weave in and out of traffic, their makers expect to receive public credit.



## No Guarantees

But such promises could prompt a public backlash when accidents do occur.

“A phenomenon called ‘betrayal aversion’ finds that people often have a strong emotional reaction against a safety innovation that actually causes harm,” Arizona State University law professor Gary E. Merchant and research director Rachel A. Lindor wrote in a 2012 issue of the Santa Clara Law Review.

They cited an \$18.5 million verdict in a case over a defective airbag that did not deploy in a crash with an 18-wheeler, and a series of lawsuits in the 1990s over a line of pickup trucks built with the gas tank on the side, outside the vehicle frame. GM, the manufacturer, showed the change led to fewer fire deaths in



crashes overall, but jurors punished them for increasing the risk from side-impact crashes.

“The jury verdict ... involving an award of over \$100 million in punitive damages, suggests that juries are prone to outrage against a high-tech manufacturer because of the increased risk created by one type of accident,” Merchant and Lindor wrote.

Whether cases against driverless cars actually end up in front of juries remains to be seen.

Through its regulatory powers, NHTSA could issue standards and say that companies that comply with them are protected from state liability suits. That process would need data from tests and could take up to eight years, however. And even then, such protec-

tion does not always hold up in court, as pharmaceutical companies learned when they tried to argue that approval by the Food and Drug Administration protected them from liability.

The economics of driving could also alter the liability landscape.

Technology that would allow cars to drive themselves — including cameras, radar, remote-sensing systems known as LIDAR, and redundant computers and communications systems — is expected to make them too expensive for most people to own, so travelers will rely on shared services to hail rides. Developers tout this as a benefit that will improve mobility for those who cannot drive such as the elderly and disabled, and ease

congestion in cities by opening up more travel lanes as fewer cars are parked at the curb waiting for their owners.

### Arbitration or Trial?

The American Association for Justice, the lobbying arm for plaintiffs’ attorneys, wants Congress to ensure that future passengers are not compelled to sign away rights to sue in order to get a ride.

“We’ll all be using apps on our phones to call them, and it is certain that almost all of those companies will utilize forced arbitration,” says AAJ lobbyist Julia Duncan.

“Most Americans would not assume that if a loved one was injured or killed in a car crash because driverless car technology was faulty,

that the case would be forced into private arbitration. But if we don't have language in there preventing that, that will be the default. Uber uses forced arbitration. Lyft uses forced arbitration. Waymo, Tesla use forced arbitration," Duncan says.

Sarah Rooney, another trial attorney lobbyist, says there was room to negotiate on the issue last year, but because legislation had cleared the House on a voice vote and had unanimous support in a Senate committee, "the industry did not want to take any changes."

Some advocates for carmakers countered that trial attorneys saw a future with fewer auto deaths and were worried about their ability to make money from lawsuits.

And in a Feb. 14 letter urging Congress to continue efforts to craft a bill to "prevent a patchwork of regulations that could hurt American competitiveness," the Auto Alliance, a coalition of 12 manufacturers, urged Congress to keep its focus on the near horizon and recognize that every issue does not have to be solved in one bill.

"We witnessed an effort by some stakeholder groups in the last Congress to expand the scope of any possible [autonomous vehicle] legislation to include ancillary issues or

attempts to resolve prospective but unknown issues related to AV technology," the Alliance wrote. "Accepting the status quo only slows down the real or consequential progress that can be made in AV technology that will help reduce the accidents attributable to human choice or error."

Driverless cars are still in the testing stage, with some working on closed tracks and others with human operators behind the wheel who take over if the systems get confused. Some of the technology they will use is already in high-end models and lines of cars being sold to the public, including features that keep cars within the traffic lane, see dangers in blind spots and decelerate cruise control when a slower or stopped vehicle is detected ahead.

Eleven companies, including Apple, Ford, General Motors, Mercedes-Benz and Google sibling Waymo, have filed voluntary self-assessments with NHTSA about vehicles they are testing. One report by Mercedes-Benz to NHTSA describes efforts happening around the world, including test drives in Los Angeles and Las Vegas.

"In the process, it became familiar with the special characteristics of U.S. road traffic," such as high-occupancy vehicle lanes and a

stopped school bus with its lights flashing, the report says.

"U.S. speed limit signs are also absolutely unique," the report says. "They have completely different shapes and sizes than the speed limit signs in Europe, Australia, Asia and Canada."

### New Defendants

While trial lawyers battle manufacturers to sway Congress, the insurance industry and law firms that represent them are also closely monitoring the debate, knowing that taking drivers out of the liability equation could bring in new potential defendants and raise issues that go beyond physical injuries and property damage.

"Liability is going to look different," says Greta M. Schultz, a Los Angeles attorney with Tyson & Mendez whose clients include companies that run ride-sharing services and are testing autonomous vehicles.

"With AV, it's going to fall not just on the manufacturer of the physical parts, but also on the people who are providing the software," Schultz says. "There's going to be an extra level of due diligence on their part in trying to protect people, not just from hacking but also privacy issues."

The software will have to know traffic laws that can vary from state to state and even street to street, such as whether right turns on red lights are allowed, says James Whittle, associate general counsel of the American Property Casualty Insurance Association.

Some have predicted insurers would suffer if hundreds of millions of people no longer need to buy coverage for their own liability. Whittle says companies will have to figure out how to price the risk to manufacturers of putting the cars on the road and recognize that there will also likely be human drivers on the road with them.

"These automated vehicles are going to be insured as a piece of property, and they'll interact with a lot of vehicles that aren't automated, which means drivers, which means human error," Whittle says.

"There's also still a very great potential, and we'll certainly see this because we're seeing it now, of failures in these systems," he says. "We want to understand these vehicles more. We want to make sure they're operating safely because we're the ones insuring 300 million legacy vehicles now." ■

