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AUTOMOTIVE NEWSLETTER SUMMER 2014



Autonomous Vehicles Speed Ahead While Regulation Lags Behind

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Google announced in April that its fleet of autonomous vehicles is now capable of maneuvering through city streets. Google has been testing a fleet of cars on highways

and more recently, city streets, in California and claims that it has logged 700,000 miles while its cars were in self-driving mode and has caused no accidents thus far.

At the same time that Google announced its progress, Volvo officials said the company's "Drive Me" project to test autonomous vehicles on streets in Sweden

is also moving forward. Volvo will test its fleet of 100 self-driving cars on city streets in Gothenburg, Sweden.

And in May, GM, Ford, Toyota and the University of Michigan announced plans to establish a testing site for driverless cars, called the Michigan Mobility Transformation Center. This 32-acre

...Autonomous Vehicles Speed Ahead

testing site in Ann Arbor is scheduled to be completed in the fall of 2014.

Perhaps optimistically, Volvo claims it intends to sell up to 100 driverless cars to customers in 2017. Similarly, Google has also announced plans to make its technology available to the public sometime between 2017 and 2020.

Although driverless car technology is moving forward, legislation allowing testing and eventually, use, of automated vehicles is sparse. Only a few states have passed laws allowing testing of autonomous vehicles, including California, Nevada, Michigan and Florida. Those states generally permit testing under certain conditions, such as requiring a human operator to be present in the vehicle, technology that allows a driver to quickly take

manual control in an emergency, a visual indicator that signals when the vehicle is operating in autonomous mode, and a specialized license.

Washington, D.C. has passed a law that would allow operation, not just testing, of autonomous vehicles. In accordance with a law passed in 2012, the District of Columbia Department of Motor Vehicles proposed rules in April 2014 that would allow such use.

One provision in the District of Columbia's rules, however, requires that drivers obtain a specialized license to drive autonomous vehicles. Part of that license requires a certification by the driver that he or she "was trained by a vehicle manufacturer or a vehicle dealer in the operation of

an autonomous vehicle and has received instruction concerning the capabilities and limitations of an autonomous vehicle." It would seem that for the foreseeable future only testers of driverless cars will be able to obtain such certification, as the technology is not yet available to the public.

Many states that have passed or are considering legislation defer to any future rules promulgated by the National Highway Traffic Safety Administration (NHTSA), which is responsible for developing motor vehicle safety standards and regulations. NHTSA, however, has not yet issued regulations regarding automated vehicles. In fact, NHTSA has cautioned states against detailed state regulations regarding the safety of self-driving vehicles, stating that the



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OF THE MODE OF OPERATION.



technology is in the early stages and detailed regulation is not feasible at this stage.

NHTSA has recommended that states not permit, at this time, operation of self-driving vehicles other than for testing, cautioning that a number of technological issues and human performance issues must be addressed first.

Besides regulation of automated vehicles, there are other concerns that are not yet addressed in legislation either enacted or proposed by states. Although automated vehicle technology offers the potential to vastly reduce the number of vehicle crashes, accidents will still occur. And the laws that have been passed or are in consideration generally do not address liability issues.

Proposed and enacted laws generally provide that the occupant of the vehicle will be deemed the "driver"

of an autonomous vehicle regardless of the mode of operation. And certain states have proposed or enacted legislation that exempts original vehicle manufacturers from liability when the vehicle has been converted to a driverless vehicle by a third party.

Still, these laws do not address who is liable when an accident does occur.

If a pedestrian is hit while a car is driving in "autonomous" mode, the driver may be liable under current tort laws. But the pedestrian could also conceivably sue the vehicle manufacturer (or provider of driverless technology), or the driver could seek indemnification from the manufacturer, because of a claimed defect or malfunction in the vehicle technology.

Other concerns, such as how often vehicle software must be updated to anticipate known road perils, have not been addressed.

Although driverless car technology is moving forward legislation allowing testing and eventually use of automated vehicles is sparse.

Until such concerns are addressed, vehicle manufacturers may be hesitant to offer fully automated vehicle technology.

Accordingly, even if automated technology becomes available in the near future, legislation or regulations will be needed that both permit driving of automated vehicles and address numerous concerns regarding liability and safety. It remains to be seen whether the lawmakers and regulators can catch up and keep pace with the technology. 

Read the Fine Print: The Devil and Defense for Product Liability or Warranty Claims Often Lurk in Contracting Documents

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Producing automotive parts means dealing with numerous documents, from quotes and purchase orders to SOWs, DVP&Rs and PPAPs and all of the attachments, deviations and signoffs they may include. Those documents contain seemingly endless minutiae about where, when, how and under what conditions parts will be produced, but critical supplier liability considerations are often hidden among those details.

Think about the now-notorious Chevrolet Cobalt ignition switch or other situations where it is clear that, in addition to possible driver error, someone connected to the design and development of the vehicle made a mistake that may have contributed to the loss of life. Who on the vehicle-side of such a situation is ultimately liable?

Setting bankruptcy protections aside in the current GM fiasco, how do you know if liability for injury or death lies with the

OEM, the supplier of an assembly, or the supplier of an allegedly defective part? The answers are often found in contracts or design, validation and production documents.

Under Michigan law, a component manufacturer is liable for harm caused by the product into which the component is integrated in two situations: (1) when the component itself is defective and causes harm; or (2) when the component seller substantially participates in the integration of the component

into the design of the product, the integration of the component causes the product to be defective, and the resulting defect causes the harm.

It is common sense that a supplier could be liable for producing a defective component. The trickier situation arises

when parties try to determine post-hoc whether the component seller “substantially participated in the integration.”

Fortunately, there is an answer. Suppliers must demand clear language in all of the relevant design and production agreements. That language must state that the supplier is not substantially participating in the integration of its component parts into the end product, and that the supplier is not responsible for system integration.

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In our experience, some OEMs have been willing to agree to those terms if pressed.

Of course, simply pasting that language into an agreement does not create an impenetrable barrier to liability. Reality must align with the agreement.

Suppliers need the right language in their agreements and then they must not actually participate in the integration. One way to limit that participation is to require detailed

specifications from the OEM and then design and validate the product to those specifications. The more decisions the OEM makes, the less the supplier substantially participates.

For some suppliers, participation in design integration is inevitable. For those regularly participating in integration, it is critical to document every design proposal the supplier made or agreed to, along with every specification or change the OEM mandated, was informed of, and ruled out or countered.

Suppliers must demand clear language in all of the relevant design and production agreements.

Any deviation from the agreed-upon plan can result in exposure to liability, so paper the file with every communication dealing with specifications and validation obligations.

In all of these situations, the key is to execute detailed agreements that clearly delimit responsibility for design, integration, validation and production standards.

Contact one of our experienced Automotive Industry Group attorneys if you have questions about possible exposure to product liability. 



Non-Disclosure Agreements – More Complicated Than You Might Think

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“Confidential information” is only confidential if it is actually treated as confidential. Pretty confusing, right? Actually, it is a straightforward lesson that we are reminded of by the recent decision in *nClosures Inc. v. Block and Company, Inc.*

In that case, a federal court in Illinois found that, despite having entered into a confidentiality and non-disclosure agreement with the defendant Block, nClosures was not protected when Block allegedly began using nClosures’ designs to produce a competing product. After discussing a potential partnership to produce tablet enclosures, the parties signed a confidentiality and non-disclosure agreement. nClosures then shared its proprietary and confidential information regarding its tablet enclosures with Block, including its designs, market information, manufacturing processes, models, and drawings.

When the proposed partnership fell through, Block began manufacturing its own competing tablet enclosures. nClosures sued Block claiming,

among other things, that Block had misappropriated nClosures’ trade secrets and breached the agreement by using nClosures’ confidential information to produce a similar product.

Ultimately, the court ruled in favor of Block, finding that nClosures was unable, as a matter of law, to prove that Block had stolen any of its trade secrets. Specifically, the court found that the designs that nClosures claimed were trade secrets were not, in fact, trade secrets because nClosures had not taken “reasonable efforts” to keep the information secret or confidential, as it was required to do under state law.

You might be scratching your head asking what else nClosures could have done beyond entering into the confidentiality and non-disclosure agreement before disclosing its designs to Block. The problem, however, was not the actions nClosures took with respect to Block. Rather, nClosures’ trade secret misappropriation claim against Block was defeated because of what nClosures failed to do with *other parties*.

Even though nClosures had entered into the confidentiality and non-disclosure agreement with Block, it failed to

enter into a similar agreement with its own product designer or manufacturer, which proved fatal to its misappropriation claim.

The court found nClosures’ contention that it operated based on its manufacturer’s policy and “industry practice that its confidential information would be maintained in confidence” and that it had never disclosed its design files “without the understanding that the files are to be maintained in confidence” unconvincing and insufficient to prove that the design files were the subject of reasonable efforts to protect it. Because the design files were not trade secrets, there was nothing for Block to misappropriate, and nClosures’ misappropriation claim failed.

Similarly, the court found that Block did not breach the confidentiality and non-disclosure agreement when it purportedly used nClosures’ designs, again relying on nClosures’ free disclosure of the design files to its designer and manufacturer without reasonable efforts to keep the information confidential.

The court explained that a confidentiality and non-disclosure

agreement will not be enforced if the information intended to be protected is not actually confidential and not the subject of reasonable efforts to maintain its confidentiality. While the information need not be kept “under lock and key,” a party’s failure to expend enough effort to prevent its information from being misappropriated, the court explained, is evidence that it is not particularly valuable.

The nClosures case serves as a valuable reminder that in today’s automotive industry, where innovation and the intellectual property that comes with it are critical to supplier success and often a supplier’s greatest asset, suppliers must be absolutely vigilant in protecting their confidential information.

So, while you may believe that having a potential business partner sign a non-

disclosure agreement before sharing your valuable and purportedly confidential information is adequate to protect your information and your business, if you have not been equally diligent in protecting this same information from disclosure by other parties, you may find that your non-disclosure agreement is worth little more than the paper on which it is written. 

Patrick Gunton contributed to this article.

News Brief:



ITS World Congress Is Coming to Detroit in September

The Intelligent Transportation Society of America is hosting the 2014 World Congress on Intelligent Transport Systems Sept. 7-11 in Detroit, Mi. The event is expected to draw more than 10,000 of the world’s leading transportation professionals, researchers and policymakers. It will be held at Cobo Hall and other venues in the Motor City. The event, which is being held in Detroit for the first time, allows automakers to showcase the latest developments in automated vehicle and connected transportation technology. Among the highlights: demonstrations of autonomous vehicles on Belle Isle, including

passenger, commercial and military vehicles. The theme for the conference is “Reinventing Transportation in our Connected World.” It will feature industry leaders, public officials and academics tackling some of the challenges concerning connected and automated vehicles while offering their vision for the future of intelligent transportation. Thomas Manganello, who co-chairs Warner Norcross & Judd’s Automotive Industry Group, has been chosen to participate in a panel discussion at the conference. Watch for updates and live coverage of the conference on Warner’s automotive supplier blog, Ahead of the Curve (aheadofthecurve.wnj.com), and on our Twitter feed, @WNJLLP. 

New Tailpipe Sulfur Standard Will Challenge Industry, Costs Motorists

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The federal government's plan to reduce sulfur content in gasoline by 66 percent will lead to higher fuel prices at the pump and could cause hardships for the petroleum industry.

The U.S. Environmental Protection Agency's sulfur reduction mandate for light duty vehicles was contained in the agency's "Tier III rule," also known as *Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards*. The

new rule will allow federal standards to align with standards already adopted by California.

While the federal Clean Air Act generally precludes states or localities from adopting emission standards for motor vehicles, the Act has long had a provision, the "California waiver," allowing California to adopt unique emission standards for motor vehicles in recognition of the air quality problems in California that can be attributed to motor vehicles emissions. Once California is allowed under the Act to adopt such standards through grant of an EPA "waiver," then other states become authorized to adopt those standards. Thus California, with an approving EPA, can

drive the regulatory agenda nationwide for vehicle emissions.

The new regulation strengthens the light-duty vehicle tailpipe emission standards for ozone precursors, such as organics and NOx, beginning with model year 2017 and supplants the so-called "Tier II" standards promulgated in 2000. Full implementation of the rule will occur between the 2017 and 2025 model years.

The EPA's Tier III rule lowers the sulfur content standard for gasoline from the current 30 parts per million standard established under the Tier II rule to a new 10 ppm standard. The agency believes revising the gasoline sulfur standard is warranted on several fronts. First, the EPA recognizes that achieving and sustaining vehicle



THE NAAQS ARE HEALTH-BASED STANDARDS FOR VARIOUS POLLUTANTS AND REGULATORY MECHANISMS DESIGNED TO ASSURE THAT AREAS OF THE COUNTRY REMAIN OR MAKE PROGRESS TOWARD ATTAINMENT.

emission performance is dependent upon catalytic technology, which can be “poisoned” by fuel sulfur. Second, the fuel sulfur standard is achievable by the petroleum industry and is consistent with standards already adopted in California, Europe and Japan.

Vehicle manufacturers appear to be relieved that the EPA has now federalized emission standards such that separate vehicle fleets will not have to be manufactured and sold in California and other states following the California standards. But the petroleum industry is clearly concerned about the timeline afforded to meeting the revised sulfur standard, the amount of flexibility provided for satisfying the

standard, and the cost both in capital expenditures and the price at the pump.

The EPA and the American Petroleum Institute (API) have widely varying views on this issue. EPA officials believe the cost of meeting the new sulfur standard may be as small as .01 cents per gallon of gasoline. API thinks the cost may be as high as 6-to-9 cents per gallon in some markets. Whether the petroleum industry will challenge the EPA’s rulemaking remains to be seen. 

Many urbanized areas of the United States have been and remain non-compliant with the ozone NAAQS. This problem will only worsen when the EPA, as expected, promulgates a more stringent air quality standard for ozone within the next few years.



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Ding Dong, the Union's Dead . . . or is it?

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Voting for union representation of Volkswagen's plant in Chattanooga, Tenn. ended on Feb. 14. The United Auto Workers thought they would be getting a nice Valentine's Day gift from VW's employees. After all, VW largely remained neutral in the union campaign that preceded the election. In fact, the company gave the union unprecedented access to its facilities and to its employees.

According to *The New York Times*, a VW official stated: "We know from many discussions with our colleagues in Chattanooga that there is great interest on the part of workers to establish worker representation inside the plant."

So, of course, the UAW thought they were going to win. You see, Cupid was on their side and a match between the UAW and VW on Valentine's Day was inevitable. How sweet. And then something unexpected happened. Cupid fired his little arrow and Cupid missed. The UAW lost the election by a final vote of 712 to 626. Close, but still a loss.

And, of course, the prognosticators pounced.

Surely, finally, this is the death of organized labor in the United States. Union membership in the private sector is at its lowest point since, well, since ever. Private sector unionization is running right around 6 percent of the workforce now, down from somewhere around 35 percent in the heyday of unionism. And the UAW lost an election at a plant where management, if they didn't actively invite the union in, certainly remained as neutral as any management in known memory. You can almost envision little men in furry hats dancing around the melted puddle of the UAW singing, "Ding Dong, the Union's Dead." And if that doesn't date me, nothing does.

But before we start shoveling dirt over the union movement in the U.S., let's take a look at what happened in Tennessee.

First of all, politicians and other "outsiders" got involved in this union campaign very early on, in a big way and with big money.

According to *USA TODAY*, a prominent anti-tax lobbyist and a group called "Center for Worker Freedom" rented dozens of billboards "trumpeting anti-union messages. . . . One shows an image of the long-abandoned Packard Plant ruins with the message: 'Detroit: Brought to You by the UAW.'"

State Senator Bo Watson, a Republican from Chattanooga, said in a statement, "Should the workers choose to be represented by the United Auto Workers, then I believe additional incentives for expansion will have a very tough time passing the Tennessee Senate."

According to Reuters, "U.S. Senator Bob Corker of Tennessee said he has been 'assured' that if workers at the Volkswagen AG plant in his hometown of Chattanooga reject United Auto Worker representation, the company will reward the plant with a new product to build."

Now, if VW management had said either of these things, it would have been an unfair labor practice.

So, there was some pretty heavy duty anti-union campaigning, that's not all that unusual. Anything else? Funny you should ask; yes, there is something else. The union was the UAW. You have to admit that the UAW does not have the best reputation right now.

I'll bet there are a bunch of people who do blame the UAW for the state of the auto industry and don't give them any credit for the comeback we are currently seeing. And others point to the loss of jobs in the industry over the past decade or so and wonder what

value they are getting for their buck. Maybe that is why the UAW dropped its objections to the election.

So, is unionism dead in the United States? Can we ignore this stuff now? Do we need to worry about being organized? I don't know if I would say we have to worry, but I sure wouldn't ignore threats or rumors of unionization, thinking they will just go away.

What you should do is what we have always advised you to do: Treat your employees with respect and be open and honest with them. You don't

necessarily have to give them more money or better benefits. What you do need to do is make sure they feel like they have a voice. That they can talk to you about what bothers them. That they make a difference. And you need to train your supervisors to know this.

I have written about this before and it is important enough that I will say it again. A supervisor's job is not to make more bumpers, or brake pads, or cars, for that matter. A supervisor's job is to motivate and inspire people to do a better job and make sure he or she has happy people who are satisfied with their work so that they



in turn can be more productive and make better bumpers, or brake pads, or cars in a more cost-effective manner to contribute to the bottom line. You can read the whole article here: [http://wnj.com/Publications/Human-Resources-Alert-\(13\)](http://wnj.com/Publications/Human-Resources-Alert-(13)).

That leaves the question: Are unions dead? I don't think so. They may just be dying. The problem is, it won't take too many missteps to bring them back to life. 

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