IADC COMMITTEE NEWSLETTER

PRODUCT LIABILITY

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IN THIS ISSUE

In this article, the authors explore the ways in which advances in collision mitigation technology in motor vehicles have resulted in a rise in litigation. They provide strategies to defend against the various types of claims which have emerged in such cases.

Collision Mitigation Systems – With Innovation, Comes Litigation

ABOUT THE AUTHORS

Harry Byrne is a partner in the Trial Practice Group at Duane Morris LLP. He represents transportation, medical device, and pharmaceutical clients nationally in the defense of products liability and mass tort litigation. Harry also has experience representing clients in commercial and business tort disputes, with an emphasis on non-compete, trade secret, and unfair competition litigation. He can be reached at HMByrne@duanemorris.com.

Sharon Caffrey is co-chair of Duane Morris' Trial Practice Group and a member of the Firm's Executive Committee. Ms. Caffrey concentrates her practice in the areas of mass tort, products liability, and toxic tort litigation. Ms. Caffrey's experience ranges from serving as counsel for a medical device and pharmaceutical manufacturer, to serving as national trial counsel for an automobile manufacturer in asbestos litigation and representing a railroad against chemical exposure and injury claims. Ms. Caffrey is a member of the International Association of Defense Counsel and currently serves as Vice Chair of Programs for the Products Liability Committee. She can be reached at SLCaffrey@duanemorris.com.

Ryan Monahan is an associate in Duane Morris' Trial Practice Group, and concentrates his practice on commercial litigation and appeals. He represents clients across many industries, including transportation and healthcare. Mr. Monahan also has experience in representing clients in contract disputes and bankruptcy litigation. He can be reached at RFMonahan@duanemorris.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

Scott Wilkov
Vice Chair of Newsletters
Tucker Ellis LLP
scott.wilkov@tuckerellis.com

"Collision Mitigation Systems," "Advanced Driver Assistance Technology," and other similar terminologies all define a class of technology that is intended to help a driver of a vehicle avoid an accident or mitigate the severity of a collision. This class of technology includes: lane departure systems that make an audible sound or a vibration of the steering wheel when a tire hits a road-line; advanced braking systems, which apply the brakes before a human may have time to respond to an imminent crash; and eye monitoring systems, which alert the driver if their eyes veer away from the road towards a distraction.

These technologies, by all accounts, are an innovative development in automotive technology. But there is still much research to be done by the federal government and private sector. The National Highway Traffic Safety Administration (NHTSA) is "aggressively pursuing research related to technologies that, in addition to warning drivers of a collision threat, can take active control of the vehicle to help mitigate or avoid the crash (if warnings are not heeded by the driver, or the driver's reaction is insufficient to avoid the crash)."[1] The private sector is also innovating on this front, and incorporating these technologies into their latest vehicle models. But despite the ongoing development of this technology, it is often portrayed by the plaintiffs' bar as a fail-safe option that would have entirely prevented, or at least significantly mitigated, a serious accident. These reptile-type claims – whether for alleged defects in the system or ordinary negligence for failure to select a given system – are brought to target the company and portray a corporate actor as an entity indifferent to public safety.

For example, plaintiffs have brought lawsuits arising from a defect in the technology. Such claims reflect a standard product liability action applied to the new technology. In *Jauregui v. Daimler Truck North America, LLC*,[2] for example, Plaintiff drove a truck manufactured by Paccar Inc. that was equipped with "a collision avoidance and mitigation system designed and manufactured by Bendix."[3] Plaintiff alleged that "[d]espite being equipped with the Bendix collision avoidance and mitigation system, the . . . truck did not provide any audible or visual alerts of the danger ahead. Nor did it slow down or utilize its adaptive cruise control capabilities."[4] Plaintiff asserted both design and manufacturing defect claims arising from the technology's failure to prevent the accident. Manufacturers should therefore be prepared to defend against claims that the system did not work as intended.

Plaintiffs have also brought lawsuits arising from the *failure to equip* the technology, which present a twist on the standard product liability action. In such a case, plaintiffs allege that collision mitigation and avoidance technologies do, in fact, make our roadways safer. Plaintiffs argue that the technology is so great that manufacturers should be held liable when they fail to equip their vehicles with such technology, even though federal law does not require it. Manufacturers are not the only class of

[1] NHTSA, *Advanced Technologies: Crash Warning*, https://www.nhtsa.gov/crash-avoidance/advanced-technologies (last accessed November 17, 2023).

[2] 2023 WL 5179503 (D. Ariz. Aug. 11, 2023)

[3] *Id.* at *3.

[4] *Id.*

defendant subject to this claim. Vehicle purchasers have also been sued under this theory when the manufacturer offered them a list of options to include in the vehicle, but the purchaser declined to select such avoidance technologies. This type of claim affords plaintiffs the opportunity to put the "company on trial" by claiming that the company is slow to adopt the latest-and-greatest technology, and that the company does not have the best interest of the public in mind when it decides against adding collision mitigation systems to its newest fleet.

The two types of lawsuits create a lose-lose situation for manufacturers, designers, and purchasers of the vehicle: either you are sued for equipping the vehicle with the technology and are forced to defend its state-of-the-art features *or* you are forced to defend your reasons for not equipping the same technology on the vehicle, although the technology is not federally mandated. Fortunately, there are defenses to both claims. While the defense to the first type of claim tracks the defense to a typical product liability claim, we have offered below five unique defenses to a "failure-to-equip" claim.

First, defendants have argued in failure-to-equip cases that plaintiffs' claims are preempted by federal law. The viability of a preemption defense likely turns on whether the federal governments' decision to *not* regulate or require particular collision avoidance technology reflects a "regulatory objective" to promote innovation and "manufacturer choice." For instance, in *Geier v. Am. Honda Motor Co.*,[5] the United States Supreme Court held that a Department of Transportation standard requiring manufacturers to place drivers' side airbags in some but not all 1987 automobiles preempted a state law cause of action sounding in negligence. The Court reasoned that the state law tort action conflicted with the federal standard because DOT had implemented the standard not as a minimum, but rather as an affirmative measure to provide manufacturers with a choice of different passive restraint systems that would gradually be introduced into the market.[6] Unfortunately, *Geier* represented the high-watermark for this argument, and two Supreme Court decisions since *Geier* have significantly weakened the argument that the federal government can preempt state action through the absence of regulation.[7]

Second, manufacturers may seek to shift the blame to the purchasers by arguing that the purchaser was offered a full array of optional equipment features and chose to not equip the vehicle with collision mitigation technology. This "optional equipment doctrine" puts the duty on the buyer when "(1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of use of the

[5] 529 U.S. 861, 881 (2000)
[6] *Id.* at 881-82.
[7] *See Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 338 (2011) (Sotomayor, J., concurring) (explaining that the "mere fact" a regulation permits an option to manufacturers does not mean that this option is a preemptive "regulatory objective").

product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product."[8] Sophisticated purchasers, lessors, or renters of vehicles should therefore be aware of the risks of being offered certain "optional" features, but declining to implement them. If they choose to decline the optional features, they must be prepared to defend their decision. The best way to present such a defense is through a deliberative process internally that shows your company carefully considered the relative pros and cons of an option.

Third, certain states recognize a "state-of-the-art" defense that a defendant is not under a duty to equip the most cutting-edge technology in a vehicle. Texas law, for example, does not require "a manufacturer or supplier of equipment [to] supply only state-of-the-art items to avoid later liability under products liability theories."[9] Some states have even codified this "state-of-the-art" defense.[10] Defendants should therefore be mindful that different states may make available different defenses to such a claim.

Fourth, some courts have rightfully rejected this claim because it treats collision mitigation technology as a necessary feature to make a vehicle safe, rather than an add-on that makes an already-safe vehicle even safer. One court succinctly described the flaw in Plaintiff's argument: "[E]ven assuming the collision mitigation systems would have added to the safety of the [vehicle] . . . these systems are merely aids, not substitutes for safe driving. Plaintiffs do not allege the absence of [the] technology rendered the [vehicle] incapable of being operated by an attentive driver, of being operated at a proper speed and at a safe distance from other vehicles, or of being slowed or stopped with air brakes engaged by the driver."[11] Defendants should emphasize the burden is on the plaintiff to demonstrate that the absence of the particular collision mitigation technology was the cause-in-fact of the accident, as opposed to driver negligence."

Fifth, defendants should be mindful that the plaintiffs' bar will attempt to paint the company as a "bad actor" that engaged in "cost-saving" measures by failing to equip these safety features. Plaintiffs will argue

[8] *Scarangella v. Thomas Built Buses, Inc.*, 93 N.Y.2d 655, 660 (N.Y. 1999); *see also Cook v. Caterpillar, Inc.*, 849 S.W.2d 434, 440 (Tex. 1999) (recognizing buyer duty to request optional safety features if known); *Anderson v. P.A. Radocy & Sons*, 865 F.Supp. 522, 531 (N.D. Ind. 1994) (finding manufacturer cannot be held liable for not equipping safety feature when purchaser "did not opt to do so").

[9] *Bennett v. PRC Pub. Sector, Inc.*, 931 F. Supp. 484, 501 (S.D. Tex. 1996).

[10] Fla. Stat. Ann. § 768.1257 ("In an action based upon defective design, brought against the manufacturer of a product, the finder of fact shall consider the state of the art of scientific and technical knowledge and other circumstances that existed at the time of manufacture, not at the time of loss or injury."); *see also* Tex. Civ. Prac. & Rem. Code § 82.009 (curtailing a renter or lessor's duty to "retrofit" a vehicle with parts that were not required by federal motor vehicle standards at the time of manufacture); N. J. S. A. § 2A:58C-3.

[11] *Butler v. Daimler Trucks North America, LLC*, 2022 WL 2191755, at *12 (D. Kan. June 16, 2022); *see also Youngberg v. General Motors LLC*, 2022 WL 3925272, at *3 (E.D. Okla. Aug. 24, 2022) ("It is undoubtedly true that drivers could underestimate the reaction time or stopping distance required to safely avoid a frontal collision, particularly at highway speeds, but the same could be said of virtually any motor vehicle.").

that the company is indifferent to the potential harm its decision could cause to its customers. Through discovery, defendants can counteract this narrative by producing evidence that highlights the thoughtfulness of the company's decisions, and the team of experts the company relied upon to reach the decision to include or exclude an optional feature. A company can point to evidence that tends to show the technology was considered, but ultimately rejected because it is still an unproven technology, with uncertain risks and benefits.

Even with these defenses, the "failure to equip" claim is unlikely to go away any time soon. As innovation continues, and the implementation of the technology becomes more wide-spread, plaintiffs will have a stronger argument that vehicle manufacturers could have and should have implemented collision avoidance or mitigation technologies into their vehicles. Moreover, as the technology becomes even more prevalent, and more reliable, plaintiffs may argue that the equipment should not be "optional," and a company's decision to allow its customers to turn off the safety feature is a defect in and of itself. Manufacturers, designers, and purchasers should therefore be prepared to defend their decision to equip or not equip a vehicle with the latest-and-greatest collision mitigation system.

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