

COMMITTEE NEWS

Products Liability

A Blockbuster Summer: Automatic Emergency Braking, Barbie and Oppenheimer

I. Introduction

Just as Hollywood had a blockbuster summer with the releases of Barbie and Oppenheimer, Automatic Emergency Braking (AEB) saw a blockbuster summer with the release of two Notices of Proposed Rulemaking from the National Highway Traffic Safety Administration. In this article, we delve into the world of Automatic Emergency Braking and the legal complexities inherent to this emerging technology.

At the end of the film Oppenheimer, the great physicist Albert Einstein said, “Now it’s your turn to deal with the consequences of your achievement.” This statement resonates in the realm of automotive emerging technologies where advancements like AEB have revolutionized automotive safety. AEB is an impressive technological achievement. In concept, the AEB system detects an imminent crash and applies the vehicle brakes when the driver fails to take sufficient action. Yet, like other emerging technologies before it, AEB presents unique legal questions when litigation arises following a real world accident. An increasing number of lawsuits

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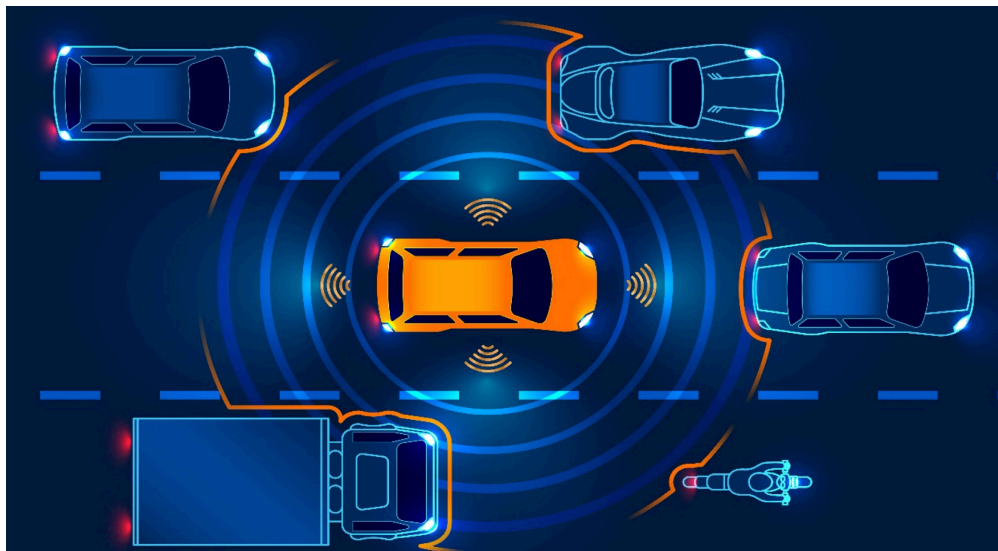
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now include product liability allegations against vehicle manufacturers for the failure to equip vehicles with AEB, or algorithmic design defects and system malfunctions for those vehicles equipped with the technology. Navigating the consequences of this achievement become complicated when litigation arises.

For example, consider a hypothetical accident involving a speeding driver who falls asleep and rear-ends a plaintiff in stationary vehicle. Conventional wisdom suggests the hypothetical plaintiff would sue the negligent driver for falling asleep and failing to apply the brakes. Yet, despite the overt negligence of the sleeping driver, it is increasingly common for the hypothetical plaintiff, or even the sleeping driver, to allege product liability claims against the vehicle manufacturer for the failure to equip the striking vehicle with AEB or system defects for those vehicles equipped with the technology. One can easily envision more egregious conduct, such as distracted drivers or impaired drivers, who could attempt to deflect responsibility and distort questions of liability. Just as in the movie *Barbie*, when confronted with her own personal shortcomings, Barbie responded by saying, “Don’t blame me. Blame Mattel.”

As AEB technology evolves and gains prominence, failure to equip vehicles with AEB systems could become a recurring theme in product liability cases. If a vehicle does not come equipped with AEB despite the technology being widely available and proven to enhance safety, it might be considered a failure on the part of the vehicle manufacturer to meet industry standards and prioritize consumer safety. The recently proposed rulemaking provide clarity for the industry and practitioners alike.

II. Regulatory Landscape

On May 31, 2023, The Department of Transportation and NHTSA released a notice of proposed rulemaking that requires manufacturers to include AEB, including nighttime pedestrian AEB (PAEB), on all light vehicles.¹ Proposed as a new Federal Motor Vehicle Safety Standard, the new rule will require all vehicles that weigh less than 10,000 pounds to have AEB systems.² Specifically, the rule mandates that all cars must be able to avoid contact with a vehicle in front of them at speeds up to 62 MPH.³ Manufacturers will have three years to come into compliance after the rule is formally published.⁴

¹ 49 C.F.R. § 571 & 596, No. NHTSA-2023-0021; See also <https://www.nhtsa.gov/press-releases/automatic-emergency-braking-proposed-rule>

² 49 C.F.R. § 571 & 596, No. NHTSA-2023-0021

³ *Id.*

⁴ *Id.*



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NHTSA, in conjunction with FMCSA, followed the light-vehicle proposal with a similar proposal for heavy-vehicles, released on June 22, 2023.⁵ This proposal requires heavy vehicles (those greater than 10,000 pounds) to equip AEB that works at speeds up to 50 MPH.⁶ Additionally, nearly all heavy vehicles are required to have an electronic stability control system that meets the standards set by FMVSS No. 136 (requiring that most vehicles above 26,000 pounds be equipped with systems designed to mitigate loss-of-control crashes caused by yaw instability).⁷ NHTSA has proposed a two-tiered implementation schedule—vehicles currently subject to FMVSS No. 136 would be required to meet the AEB requirements three years after final publication, whereas vehicles not currently subject to FMVSS No. 136 would have four years.

The proposed rules are the result of a recent push by the federal government to improve roadway safety. In 2017, NHTSA had refused to adopt formal AEB standards, doing so because they had created a voluntary agreement with top manufacturers in 2016 that incentivized AEB installation, while also granting manufacturers the freedom to innovate and advance the technology.⁸ The bipartisan Infrastructure Act, however, directed the Department to promulgate a rule that requires all passenger vehicles to contain AEB systems.⁹ NHTSA responded to the Infrastructure Act with the National Roadway Safety Strategy (NRSS). A key objective of the NRSS is “expand[ing] the availability of vehicle systems and features that help to prevent crashes and minimize the impact of crashes on both occupants and non-occupants.”¹⁰ NHTSA’s proposed rules flow directly from that stated objective.

The Department’s proposed rules reflect their increased confidence in the reliability of AEB. The 2017 refusal stemmed from the Department’s belief that manufacturers should be given regulatory flexibility and room to research, develop, and improve AEB technology. The agency was of the opinion that manufacturers would create safer technologies if they were not held to strict regulatory standards. Now, however, “NHTSA believes that mandating AEB systems that can address both lead vehicle and pedestrian crashes is necessary to better assess the safety need.”¹¹

In a letter attached to the NRSS, Secretary Buttigieg stated, “[h]umans make mistakes, and as good stewards of the transportation system, we should have in place the safeguards to prevent those mistakes from being fatal.”¹² While the

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⁵ 49 C.F.R. § 571 & 596, No. NHTSA-2023-0023; <https://www.nhtsa.gov/press-releases/heavy-vehicles-automatic-emergency-braking-proposed-rule>

⁶ *Id.*

⁷ *Id.*

⁸ 49 C.F.R. § 571 & 596, No. NHTSA-2017-0005

⁹ 49 C.F.R. § 571 & 596, No. NHTSA-2023-0023

¹⁰ U.S. Dept. of Transp., National Roadway Safety Strategy, 11.

¹¹ 49 C.F.R. § 571 & 596, No. NHTSA-2023-0021

¹² National Roadway Safety Strategy, p. ii.



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government recognizes that safe driving behavior is key to their overall strategy, tonally the government seems to be placing the onus on manufacturers to account for and mitigate human error. The NRSS notes that “people will inevitably make mistakes and decisions that can lead or contribute to crashes, but the transportation system can be designed and operated to accommodate certain types and levels of human mistakes.”¹³

As the proposed rules include a four year phase in period, additional proposals are to be expected. For example, the NRSS directs NHTSA to initiate rulemaking updating the Monroney consumer label to include crash avoidance information, and to create a public database of information wherein manufacturers would be required to notify consumers of crashes involving systems like AEB.¹⁴

III. Recent Case Law

An increasing number of lawsuits against manufacturers have surfaced following the increased adoption of AEB or ADAS technology. Common themes include allegations that certain vehicles equipped with AEB technology experience sudden and unintended brake activation.¹⁵ Others include alleged failure to equip AEB as standard features and the failure to warn of known safety concerns.¹⁶ Defenses include driver over-reliance on automated systems, such as instances of distracted driving or delayed reactions.¹⁷¹⁸ Most recently, the Tenth Circuit affirmed the district court finding a manufacturer did not have a duty to warn drivers of the risks associated with failing to equip a commercial truck with AEB technology.¹⁹ The Tenth Circuit reasoned the alleged danger alleviated by the technology was apparent, the technology was merely an aid, and the driver opted not to purchase it.²⁰²¹ Likewise, in 2022, summary judgment was granted in favor of a manufacturer finding the failure to include AEB did not render the subject vehicle unreasonably dangerous.²²

Although the defense of preemption had some initial success in certain trial courts, this defense was eventually overturned by the Arizona Supreme Court in 2022.²³

¹³ *Id.* at 6.

¹⁴ National Roadway Safety Strategy, 24-25.

¹⁵ *In re Nissan North America Inc. Litigation*, 2023 WL 2749161 at *1 (M.D. Tenn. 2023).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Ali v. Trans Lines, Inc., et al.*, 2022 WL 1316357 at *2 (E.D. Mo., May 3, 2022); see also *Butler v. Daimler Trucks N. Am., LLC*, No. 19-cv-2377-JAR, 2022 WL 2191755, at *1 (D. Kan. June 16, 2022).

¹⁹ *Butler v. Daimler Trucks N. Am., LLC*, No. 22-3134, 2023 WL 4676967, at *8 (10th Cir. July 21, 2023)

²⁰ *Id.* at *31.

²¹ *Id.*

²² *Youngberg v. General Motors, LLC*, 2022 WL 3925272 (E.D. Okla. August 24, 2022).

²³ *Dashi v. Nissan*, 247 Ariz. 56 (Ct. App. 2019) *Varela v. FCA*, 505 P.3d 244 (2022)



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Preemption may have another bite at the apple following the completion of the final rule making process.

IV. Conclusion

Practitioners can expect litigation regarding AEB technology to gain prominence as the regulatory landscape progresses. Allegations regarding the failure to equip vehicles with AEB systems will remain a recurring and more common theme in automotive product liability litigation. For those vehicles equipped with AEB, practitioners can anticipate disputes regarding sensor responsiveness and algorithmic determinations. Like other emerging technologies before it which became the subject of a regulatory standard, such as electronic stability control or rearview camera monitoring systems, the strength of available defenses in each case depends on the vintage of the vehicle at issue, the phase-in of the ultimate regulatory standard, and the knowledge, expectations and choices of the individual consumer. Understanding the manufacturer's rationale behind the decision not to equip certain vehicles with AEB becomes essential in building a compelling argument in AEB-related product liability cases. Prudent product liability lawyers should continue to monitor regulatory and case law developments in handling any AEB-related litigation. ➤

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