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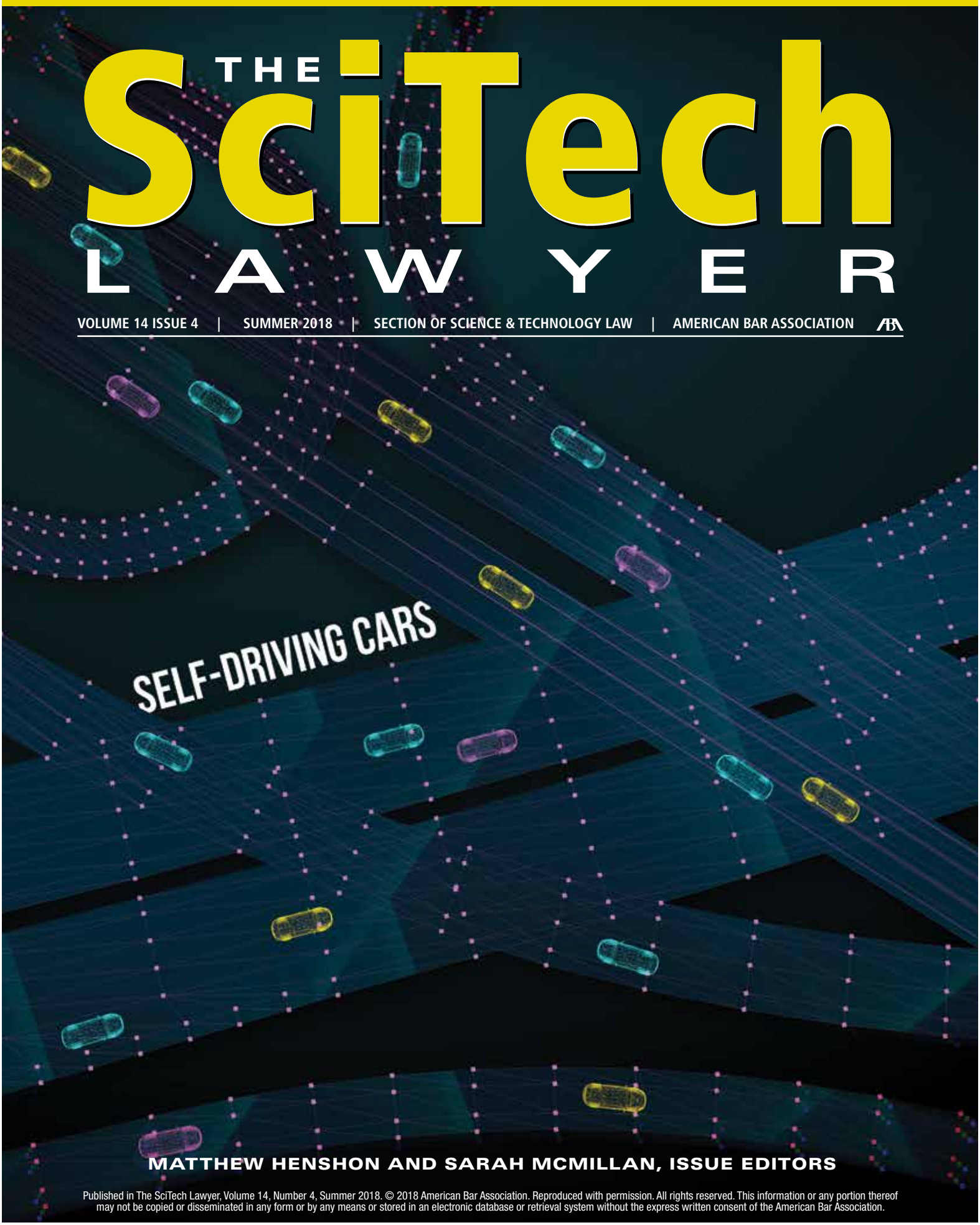


MATTHEW HENSHON AND SARAH MCMILLAN, ISSUE EDITORS

# UNFAIR AND DECEPTIVE TRADE PRACTICE CLAIMS AGAINST MANUFACTURERS OF AUTOMATED VEHICLES

BY STEPHEN S. WU

On March 18, 2018, an Uber test car driving in autonomous mode, with a safety driver in the vehicle, struck and killed a woman walking a bicycle across a street in Tempe, Arizona. Volvo and Uber worked together on the autonomous driving system controlling the car. After an accident like that, we can reasonably anticipate that the estate of the pedestrian could bring a product suit against Uber, Volvo, or both.

Perhaps the most famous automobile product liability case in history was the Ford Pinto exploding gas tank case titled *Grimshaw v. Ford Motor Co.*,[1] tried in Orange County, California's Superior Court. The appellate decision in the case reports that the plaintiff tried the case to the jury based on theories of strict liability and negligence.[2] It was common in the 1970s and 1980s to see product liability cases based on accidents that alleged strict liability, negligence, breach of warranty, and common law claims such as fraud.

These claims still appear in accident cases. A recent example is the class action for bodily injury alleging that Toyota cars suddenly accelerated without warning and the drivers could not stop them.[3] One of the accident actions, *Spisto v. Toyota Motor North America, Inc.*,[4] alleged negligence, strict liability based on design defect, a failure to warn strict liability claim, breach of the implied warranty of merchantability, and fraudulent concealment. To avoid these kinds of suits, manufacturers have focused on safe designs, quality control, and sufficient instructions and warnings provided to consumers. Manufacturers of automated vehicles (AVs) will likely focus on the same kinds of controls in order to avoid these kinds of claims.

More recently, however, plaintiffs are filing complaints on behalf of consumers that never had an accident. How is that possible? At first blush, it might appear that owners that remained safe from accidents have no case against the manufacturer. After all, they experienced no accident, sustained no bodily injury, and were not affected by any damage to their property.

The plaintiffs filing these actions seek the recovery of economic losses only. They contend that they sustained losses because the cars they bought were not worth what they paid for them. The defects and problems they identify, despite not causing an accident, diminish the market value of their cars—what a buyer would be willing to pay for the car. In some cases, they allege they sold their allegedly defective cars to get rid of them at a lower price than if their cars did not have the alleged defects. The economic loss claimed is the alleged defect's diminution in value to the car.

Plaintiffs alleging purely economic loss assert a different set of claims against a manufacturer: claims based on violations of consumer protection laws barring unfair and deceptive trade practices. Manufacturers of modern cars driven by humans, and in the future manufacturers of AVs, must not only manage the risks of product liability claims, but also unfair and deceptive trade practice claims. In terms of economic effect, each case is different. Nonetheless, manufacturers should be just as worried about unfair and deceptive trade practice claims as they are product liability claims.

## Unfair and Deceptive Trade Practice Laws

Manufacturers face liability under both federal and state laws that prohibit unfair and deceptive trade practices. At the federal level, the Federal Trade Commission (FTC) has authority under Section 5 of the Federal Trade Commission Act[5] to stop unfair and deceptive trade practices. Under Section 5, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[6] The FTC Act states that the FTC "is hereby empowered and directed to prevent persons . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[7]

With the FTC Act, the risk for a manufacturer is based on a possible governmental investigation or action, rather than a private plaintiff action. Nonetheless, a manufacturer faces legal risk from violating Section 5. Section 5 gives the FTC two kinds of authority: deception

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authority and unfairness authority. The authority to strike at deceptive conduct permits the FTC to seek to stop material misstatements about a product or fraudulently concealing information from buyers. In many cases, the FTC can easily prove that a manufacturer of a product promises one thing in public statements but sells products that are inconsistent with those promises.[8]

The FTC's authority to strike at unfair conduct is potentially more difficult to prove. The FTC must prove that an act or practice causes consumer injury that is "(1) substantial, (2) without offsetting benefits, and (3) one that consumers cannot reasonably avoid."[9] Unfairness claims require the determination of consumer injury based on an investigation and balancing consumer harms against benefits, which is harder than simply finding discrepancies in public statements about a product.[10]

In addition, states have enacted counterparts to the FTC Act, sometimes called "Little FTC Acts." One of the most prominent examples is California's Unfair Competition Law (UCL) codified at Business & Professions Code Section 17200 et seq. Under Section 17200, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."[11] A plaintiff that has suffered injury and lost money or property as a result of a violation may allege a UCL claim[12] under one or more of the three prongs of the UCL: the "unlawful" prong, the "unfair" prong, or the "fraud" prong.

Under the "unlawful" prong, a plaintiff can point to conduct of the defendant that violates other law. The UCL creates a private right of action for a violation of other law, even if that other law does not have its own private right of action. Similar to the FTC Act, the "unfairness" prong calls for an analysis of harm to consumers balanced against the motives and justification for a business practice. Immoral conduct, unethical conduct, and conduct that violates public policy, or conduct that causes substantial consumer injury are actionable. Finally, to assert a UCL claim under the "fraud" prong, the plaintiff must allege and prove that the defendant made false statements on which the plaintiff relied.

In California, the False Advertising Law (FAL) supplements the UCL, stating:

> It is unlawful for any person . . . with intent . . . to dispose of real or personal property or to perform services . . . to make . . ., including over the Internet, any statement, concerning that real or personal property or those services . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. . . .[13]

In addition to the UCL and FAL, California enacted the California Consumers Legal Remedies Act (CLRA),[14] which identifies certain forms of "unfair methods of competition" and "deceptive acts or practices" in the sale or lease of consumer goods or services.[15] One of the sections of CLRA prohibits "[r]epresenting that goods or services have . . . characteristics . . . , uses, benefits, or quantities that they do not have."[16] Other CLRA sections may apply in a given case.

## Unfair and Deceptive Trade Practice Claims in the Automated Vehicle Context

The concern about unfair and deceptive trade practice claims for AV manufacturers is not theoretical. We already have a real-life example of a case of this kind—*Sheikh v. Tesla, Inc.*[17]

*Sheikh* is pending in the U.S. District Court for the Northern District of California. The suit followed a May 2016 accident in which a Canton, Ohio, Tesla driver named Joshua Brown died in a crash in his Tesla, which was under control of the driver assistance system, when the Tesla failed to brake for a truck turning left in front of his car. Brown also failed to intervene to stop the car.

The backstory of the case begins with Tesla's advertising campaign of its "Autopilot" driver assistance system. The name "Autopilot" itself suggests that the car is driving itself without the need for human monitoring. Moreover, Tesla showed a video on its website of how the Autopilot system works, which is no longer on the Tesla website but has been reposted on YouTube.[18] The video shows a vehicle occupant entering his Tesla car and driving to an office setting. The throbbing beat of the Rolling Stones song "Paint It, Black" plays throughout the video. The camera is behind the driver looking forward towards his hands, which are away from the steering wheel but close by. At the end of the video, the driver leaves the car, and without an occupant, it finds a parking spot and parks itself.

The Tesla video begins with the following introductory text:

> THE PERSON IN THE DRIVER'S SEAT IS ONLY THERE FOR LEGAL REASONS.
>
> HE IS NOT DOING ANYTHING.
>
> THE CAR IS DRIVING ITSELF.

According to the purchasers who later filed suit against Tesla, they paid $5,000 for the enhanced Autopilot system of the kind depicted in the video, but Tesla failed to deliver the Autopilot features in the timeframe Tesla promised. Moreover, they say the Autopilot system that these owners received was unusable and dangerous.[19] As a result of these claims, a number of named plaintiffs filed the *Sheikh v. Tesla, Inc.* suit on behalf of themselves and others similarly situated.

The *Sheikh* plaintiffs allege violations of the California UCL, FAL, and CLRA, as well as fraud by concealment. They also allege similar violations of consumer protection laws under Colorado, Florida, and New Jersey laws. The plaintiffs' theory of recovery is that they paid many thousands of dollars for a product they didn't receive; they say they didn't receive the benefit of their bargain.[20] To bolster their claims, the plaintiffs quote a sentence that allegedly appeared on the Tesla website saying, "All Tesla vehicles produced in our factory, including Model 3, have the hardware needed for full self-driving capability at a safety

level substantially greater than that of a human driver . . . ."[21] In addition, they quote the language appearing in the video image appearing above: consumers "first would be invited to see a video lasting over two minutes, in which the initial frames shouted: 'THE PERSON IN THE DRIVER'S SEAT IS ONLY THERE FOR LEGAL REASONS. HE IS NOT DOING ANYTHING. THE CAR IS DRIVING ITSELF.'"[22] In discussing the named plaintiff from New Jersey, a Mr. Tom Milone, the plaintiffs say, "Tom understood the video to explain that a driver was just in the vehicle for legal purposes and that this vehicle could drive anyone from point A to B and even let the occupants out and go park itself."[23]

Tesla's statements imply that Autopilot is a fully automated system, while in fact it only constitutes a driver assistance system, requiring the driver to monitor all driving tasks at all times.[24] It is possible to draw a line directly from Tesla's statements to the factual allegations of the suit and the causes of action alleged. The plaintiffs used Tesla's own words against it to show that the company allegedly oversold the capabilities of the Autopilot system.

## How AV Manufacturers Can Mitigate Risk

What can AV manufacturers do to mitigate its legal risks of unfair and deceptive trade practice actions? First, in the design phase of an AV, or any product for that matter, manufacturers should analyze what capabilities their products have and what capabilities are beyond the company's current technology. A well-repeated phrase is probably the best guidance to follow: Only promise what you can deliver, and deliver what you promise. It is the discrepancies between promises and what is delivered that create the most legal risk.

Second, AV manufacturers should implement a process to guide development and advertising about the product. Cross-functional teams with representatives from engineering, marketing, sales, finance, legal, and data protection can meet on a regular basis to track the progress of a product through development. If all major groups within the organization know what the product can and can't do from an engineering perspective, marketing and sales groups are less likely to misunderstand, or worse misrepresent, the capabilities of the product.

Finally, AV manufacturers should include product counsel in decisions about design and marketing. It is probably unrealistic to have product counsel approve every advertisement a manufacturer puts out. Nonetheless, if product counsel works with sales and marketing on some advertising, providing guidance on what statements could create legal risk for the company, sales and marketing can internalize product counsel's guidance on things marketing collateral can say and what would create risk. Regular training sessions and refresher discussions would provide additional guidance.

AV manufacturers can manage their legal risks of unfair and deceptive trade practice claims. To do so, they must take steps and create procedures and infrastructure to support sound legal judgment about product design and marketing campaigns. Implementing these steps would go a long way towards reducing legal risk. ◆

## Endnotes

1. 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

2. *Id.* at 778, 174 Cal. Rptr. at 363.

3. There is still some debate or uncertainty about the sudden acceleration phenomenon and whether floor mats or human error might have caused these accidents.

4. No. CV11-04479 CBM (RZx) (C.D. Cal. Complaint filed May 24, 2011).

5. 15 U.S.C. § 45.

6. *Id.* § 45(a)(1).

7. *Id.* § 45(a)(2).

8. Some claims or promises may constitute "puffery"—"exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely." Southland Sod Farms v. Sower Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997). I am not referring to avoiding puffery, which may have its place in advertising. A company may refer to its product as "the best in the land." No consumer would take such a slogan seriously, and therefore no consumer could be misled by it. What I am referring to is statements that are objective, verifiable, or measurable. If an AV manufacturer says its cars have a firewall to protect against cyber attack and the cars, in fact, don't have a firewall, then an investigation easily could show that the advertised firewall is missing.

9. J. Howard Beales, Former Dir., Bureau of Consumer Prot., The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection, Address at Marketing & Public Policy Convention (May 30, 2003), *available at* https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection.

10. For a thorough discussion of how the FTC could enforce consumer protection norms using Section 5 of the FTC Act, see Professor Woodrow Hartzog's article on this topic. Woodrow Hartzog, *Unfair and Deceptive Robots*, 74 Md. L. Rev. 785 (2015).

11. Cal. Bus. & Prof. Code § 17200.

12. *Id.* § 17204.

13. *Id.* § 17500.

14. Cal. Civ. Code §§ 1750–1784.

15. *Id.* § 1770(a).

16. *Id.* § 1770(a)(5).

17. No. 5:17-cv-02193 BLF (N.D. Cal. Complaint filed Apr. 19, 2017).

18. Tesla, *Tesla Autopilot 2.0*, YouTube (Oct. 20, 2016), https://www.youtube.com/watch?v=C3DbrYx-SN4 (reposted by Daniel as *Tesla Autopilot 2.0 – Level 5 Autonomy. Full Self-Driving Hardware*).

19. Second Am. Class Action Compl. ¶ 1, at 1, Sheikh v. Tesla, Inc., No. 5:17-cv-02193 BLF (N.D. Cal. Complaint filed Apr. 19, 2017).

20. *Id.* ¶ 4, at 2.

21. *Id.* ¶ 38, at 10–11.

22. *Id.* ¶ 38, at 11.

23. *Id.* ¶ 77, at 21.

24. The National Transportation Safety Board called Tesla's Autopilot system an SAE International "Level 2 automated vehicle system." NTSB, Collision between a Car Operating with Automated Vehicle Control Systems and a Tractor-Semitrailer Truck Near Williston, Florida, May 7, 2016, § 1.3.3, at 9 (Sept. 12, 2017). SAE Level 2 means that the human driver is responsible for continuously monitoring the driving environment and is prepared to take over driving at any time. Another Tesla fatality occurred in late March 2018, which appeared to involve the Autopilot system as well. Tom Krishler, *Tesla: Crash Was Worsened by Missing Freeway Barrier Shield*, Wash. Post (Mar. 31, 2018), https://www.washingtonpost.com/business/technology/tesla-crash-was-worsened-by-missing-freeway-barrier-shield/2018/03/28/55fa6fe8-3290-11e8-b6bd-0084a1666987_story.html?utm_term=.9489d373b9b6.