

Rethinking Insurance Coverage for Autonomous Vehicles

2017 University of Michigan Law School Symposium

October 20, 2017

Ann Arbor, MI

[Walter J. Andrews](#), Hunton & Williams LLP

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Contributors:

[Walter J. Andrews](#), Hunton & Williams LLP

[Andrea DeField](#), Hunton & Williams LLP

[Paul T. Moura](#), Hunton & Williams LLP

[Jennifer E. White](#), Hunton & Williams LLP

ACCEC

American College of Coverage and
Extracontractual Counsel

Autonomous Vehicles – Significant Market Growth Is Predicted

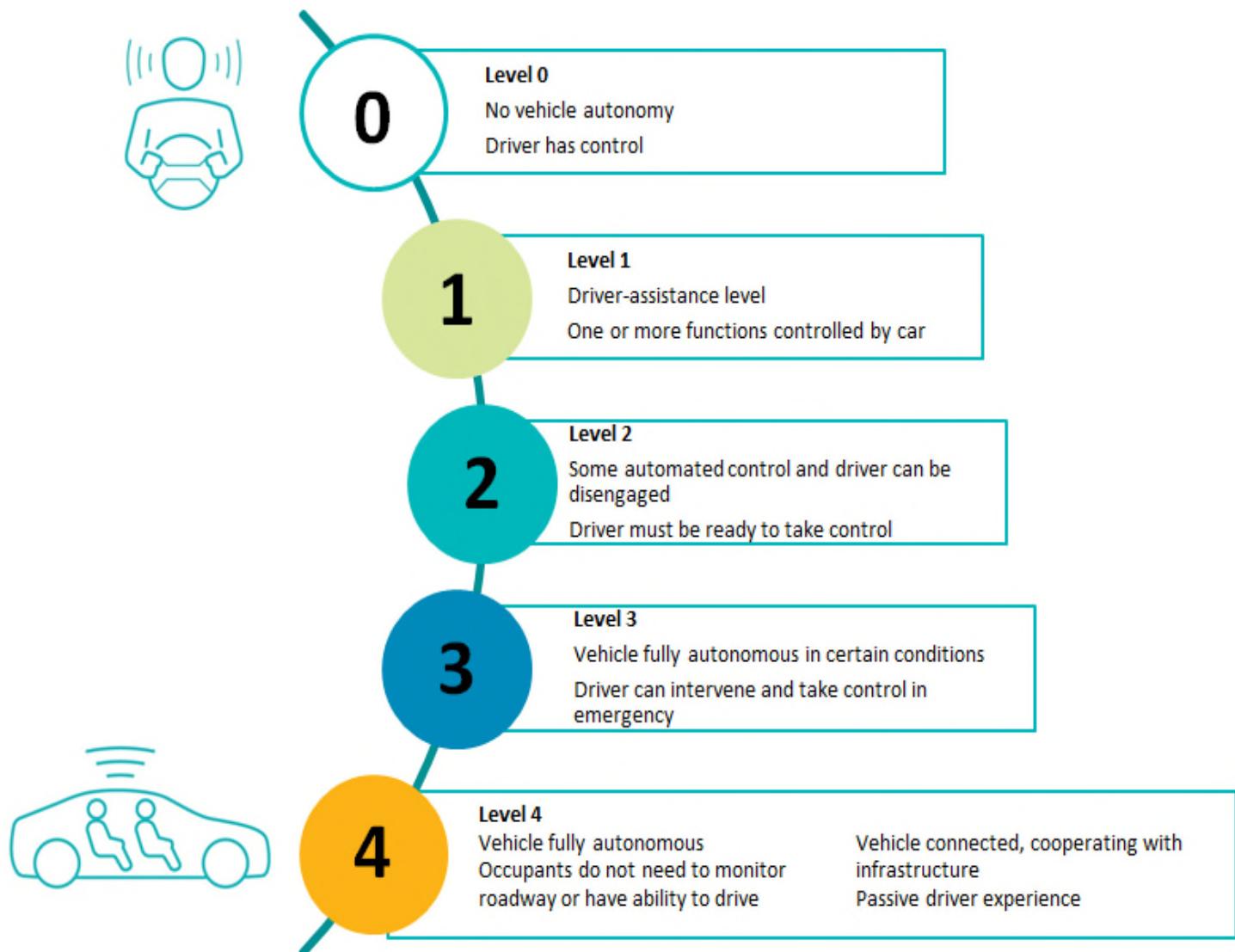
- Convenience for drivers.
- Save lives and costs by reducing frequency and severity of accidents.
 - In 2015, 35,092 fatalities resulted from vehicle accidents, with human error as the leading cause.
- Generate billions of dollars for automotive companies.
- New entrants in automobile industry.
 - Suppliers of new technologies, digital services, infrastructure development.

Autonomous Vehicles – Significant Market Growth Is Predicted

- Tesla’s “Master Plan, Part Deux.”
 - Self-driving electric cars on a Tesla “shared fleet.”
- GM’s automated “Bolt” hatchbacks with Lyft.
- IBM’s “Olli” 12-person autonomous bus.
- Ford acquired the expanding “Chariot” rideshare service and is working with Velodyne to produce laser-scanning tech used for fully autonomous cars.
- 2021–AVs approved for widespread consumer use.*
- 2031–AVs/EVs will make up 95% of passenger miles.*
- Average family will save \$5,600/yr using AVs/EVs.*

*Source: RethinkX, *Rethinking Transportation 2020-2030: The Disruption of Transportation and the Collapse of the Internal-Combustion Vehicle and Oil Industries* (May 2017)

Autonomous Vehicles – Levels of Autonomy



New Legal Risk Paradigm

- Traditional ownership models, auto dealers, and insurance companies face “total disruption”
- Traditional risks decreasing:
 - Liability, injury, vehicle damage; 90% decrease in accidents.
 - Theft nearly nonexistent due to vehicle tracking tech.
- Toward Level 4 Autonomy – New risks emerging:
 - Vehicle operating systems, rideshare platforms, and computing hardware all present data security risks.
 - Liabilities of manufacturers, tech developers, infrastructure developers increase; Individual drivers decrease.
 - Electric vehicle risks posed on the energy grid.

Source: RethinkX, *Rethinking Transportation 2020-2030: The Disruption of Transportation and the Collapse of the Internal-Combustion Vehicle and Oil Industries* (May 2017)

Autonomous Vehicles – Insurance and Risk-spreading

- Commercial Auto Insurance Overhaul
 - Weather-related policy exclusions.
 - Audio, visual, and data electronic equipment coverage exclusions.
 - Coverages may need to cover higher maintenance and repair costs.
 - Product liability and recall exposure coverage.
 - Coverage for AV-supported and IoT road infrastructure.
 - Business interruption and cyber liability coverage to cover data loss.
 - Coverage for reputational losses stemming from accidents, hacking.

Autonomous Vehicles – New Insurance Models

- Autonomous Vehicle Insurance
 - Tesla bundled QBE Policy
 - “Flux” Policy developed in 2016
 - First driverless car insurance policy.
 - Limited coverage for losses from hacking or attempted hacking of vehicle software.
 - Collision coverage.
 - Losses resulting from failure to install updates within certain time.
 - Satellite failures or other outages affecting navigation.
 - Policies tailored to vehicle owners, but not businesses providing or controlling the vehicles.

Autonomous Vehicles – Additional Risks for Electric Vehicles

- Grid Stability Issues

- EVs draw heavily from grid.
- Owners charge overnight when transformers need to cool.
- Transformers can “blow” and cause power outages.
- Risk of data loss and consequential damages.
- Risk higher in communities with older grid infrastructure, urban centers, sports arenas, concert venues.

- Business Interruption Coverages

- Re-negotiating utility interruption exclusions.
- Traditional “physical damage” requirement.

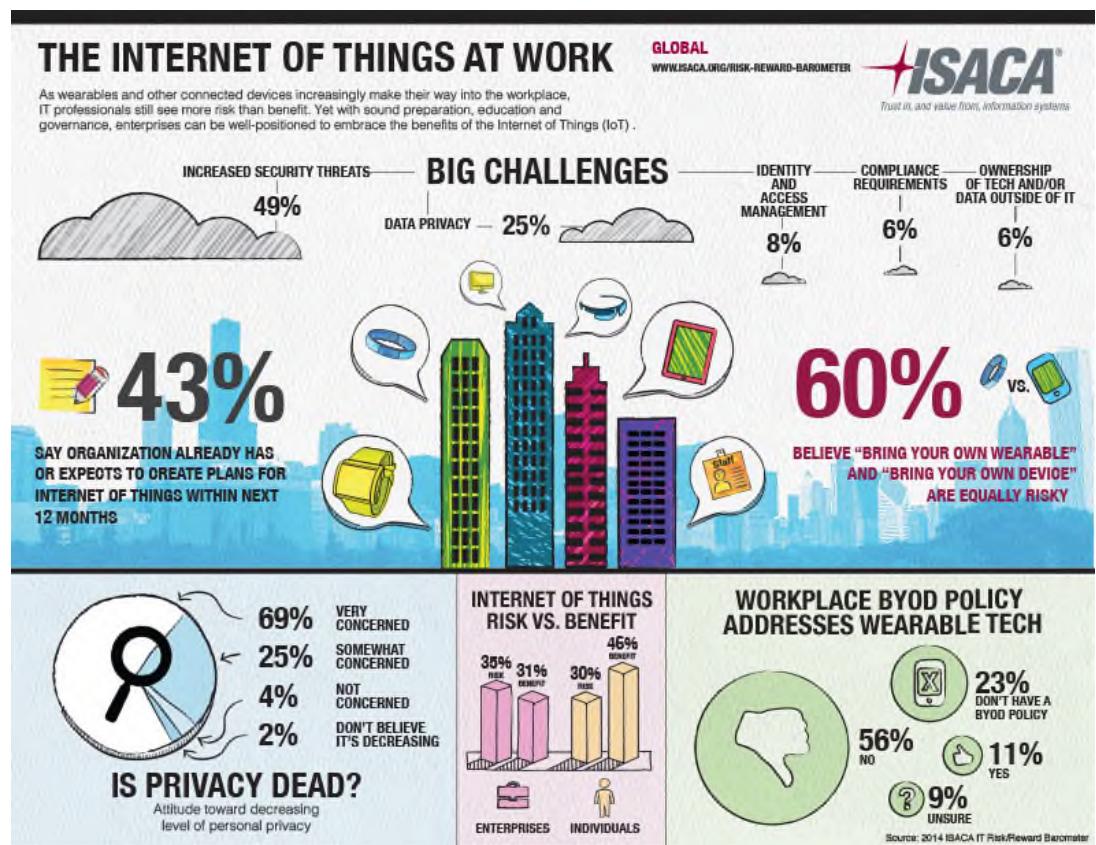
Autonomous Vehicles – Additional Risks for Internet of Things (IoT) Components

- What is it?

- The Internet of Things (IoT) is made up of all devices connected to the internet.

- The Risks:

- Devices that are “always on” the network pose new risks as they are a target for hacking



Graphic from the Information Systems Audit and Control Association (ISACA).
<https://www.isaca.org/Knowledge-Center/Research/ResearchDeliverables/Pages/internet-of-things-risk-and-value-considerations.aspx>

Risks in the “Sharing Economy”

- “The peer-to-peer based activity of obtaining, giving, or sharing access to good and services.”*
- Individual ownership ↓, Sharing platforms ↑.
- Pioneers: eBay, Airbnb, Lyft, Uber, Zipcar
- Freelance Work: TaskRabbit, Upwork
- Coworking Space: WeWork
- Fashion: Poshmark, threadUP, Le Tote, Rent the Runway
- Neighborhood Sharing Resources: Neighborgoods
- Food: AirDnd (“Drink ‘n Dine”)
- **Ridesharing:** Lyft, Uber, Autonomous Fleets?

*Source: Hamari, J., Sjöklint, M., & Ukkonen, A. (2015). The sharing economy: Why people participate in collaborative consumption. *Journal of the Association for Information Science and Technology*.

Autonomous Vehicles – Coverage Gaps in Legacy Policies

- Business Interruption Cases – “Physical Loss”
 - *American Guaranty & Liability Insurance Company v. Ingram Micro Inc.*, 2000 WL 726789 (D. Ariz. Apr. 19, 2000).
 - Policy insured against “[a]ll [r]isks of direct physical loss or damage from any cause.”
 - As a result of thirty-minute power outage, Ingram’s computer lost all programming information from its RAM. *Id.* at *2.
 - The insurer argued that there was no physical damage because the computer itself had not actually lost its ability to accept data and its functionality could be restored. *Id.*
 - The court disagreed, finding that the loss of use, access, and functionality of the computer system for a period of time constituted covered “physical damage.” *Id.*

Autonomous Vehicles – Coverage Gaps in Legacy Policies

- Business Interruption Cases – “Physical Loss”
 - *Vonage Holdings Corp. v. Hartford Fire Ins. Co.*, 2012 WL 1067694 (D.N.J. Mar. 29, 2012).
 - Vonage’s voice and messaging servers were hacked, causing calls to be momentarily re-routed in a manner that prevented Vonage from utilizing the full capacity of its servers, resulting in a loss of over one million dollars. *Id.* at *1.
 - The insurer denied coverage for the business losses, arguing that the corruption to the servers did not constitute any physical damage to “tangible property.” *Id.* at *2. The District Court denied the insurer’s motion for summary judgment, holding that the loss of use of the full capacity of its servers could qualify as a “loss” of property under the policy. *Id.* at *3.

Autonomous Vehicles – Coverage Gaps in Legacy Policies

- Business Interruption Cases – “Physical Loss”
 - *But see Ward General Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 550 (4th Dist. 2003).
 - Plaintiff was in the process of updating its Oracle computer database when the database system crashed, resulting in the loss of plaintiff's electronically stored data, as well as expenses incurred in restoring the data, and a loss of business income because of the disruption, all totaling over \$250,000.00.
 - The court held that “the loss of the database, with its consequent economic loss, but with no loss of or damage to tangible property, was not a ‘direct physical loss of or damage to’ covered property under the terms of the subject insurance policy, and, therefore, the loss is not covered.” *Id.* at 556-57.

Autonomous Vehicles – Coverage Gaps in Legacy Policies

- Privacy Violation Cases – “Publication”

- *Travelers Indem. Co. of America v. Portal Healthcare Solutions*, 644 Fed. Appx. 245 (4th Cir. 2016).
 - The underlying class action alleged that Portal Healthcare failed to protect confidential patient medical records by inadvertently posting those records on the Internet in a manner that could be publicly accessed.
 - Portal Healthcare sought coverage under a provision of its commercial general liability policy that covered “electronic publication of material” in certain circumstances.
 - The insurer argued that there had not been a “publication.”
 - The district court held that the conduct fit within the definition of publication, reasoning that: (1) “publication’ does not hinge on the would-be-publisher’s intent”, (2) “unintentional publication is still publication” and (3) “publication does not hinge on third-party access.” The Fourth Circuit affirmed.

Autonomous Vehicles – Coverage Gaps in Legacy Policies

- Privacy Violation Cases – “Publication”

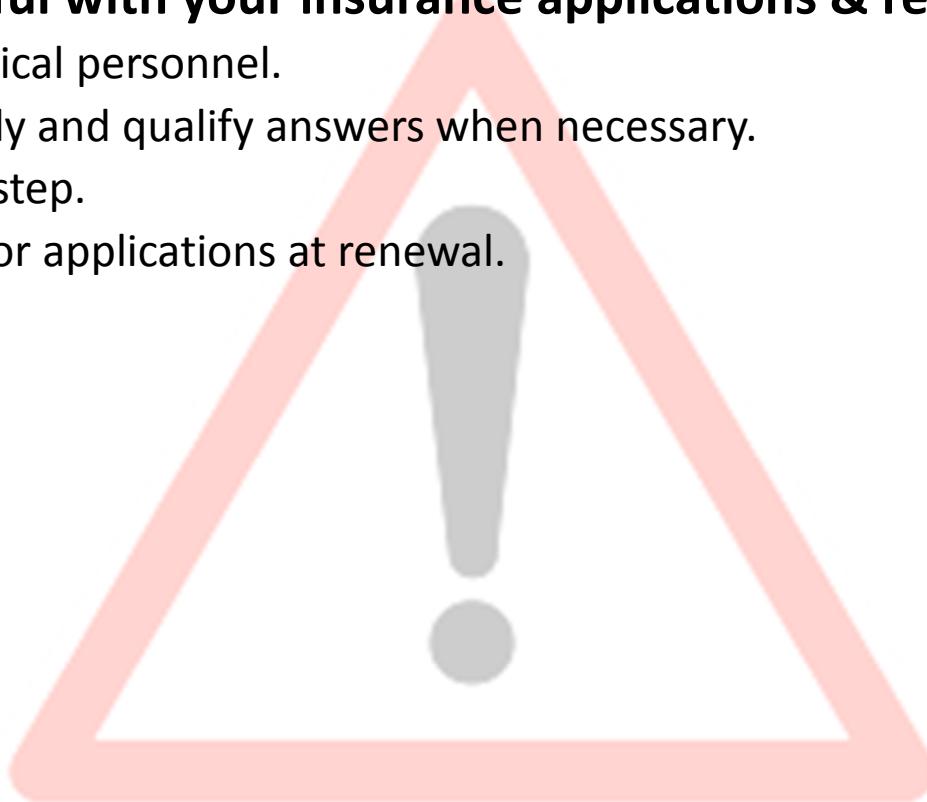
- *Cf. Yahoo! Inc. v. National Union Fire Ins. Co.*, No. 5:17-cv-00447-NC (N.D. Cal. June 2, 2017).
 - The underlying class actions alleged that Yahoo violated consumers' privacy by transmitting unsolicited text messages in violation of the Telephone Consumer Protection Act (“TCPA”).
 - Yahoo sought coverage under provision that covered “oral or written publication, in any manner, of material that violates a person's right of privacy.”
 - The court concluded that “publication” requires making content of text messages known to third parties in order to trigger coverage.

Consider Adding a Cyber-Specific Insurance Portfolio

- Information control systems are no longer isolated
- Use of smart-grid technology means that energy systems are connected to the Internet of Things (IoT), which welcome new security vulnerabilities (from webcam to turbine control to tank management)
- Increased regulatory attention (e.g., SEC, FTC, FERC)
- Vendor/business associate risk
- Insider threats
- Exclusions in standard coverages (e.g., CGL, D&O)
- Cyber-criminal ingenuity, perseverance, and greed

Cyber-Risk Insurance Best Practices

- **1. Be careful with your insurance applications & renewals.**
 - Involve critical personnel.
 - Answer fully and qualify answers when necessary.
 - Don't overstep.
 - Review prior applications at renewal.



Cyber-Risk Insurance Best Practices

- **1. Be careful with your insurance applications & renewals.**
 - Cyber Crime Cases – Rescission.
 - *Columbia Cas. Co. v. Cottage Health Sys.*, No. 2:16-cv-03759 (C.D. Cal. filed May 31, 2016); *Cottage Health v. Columbia Cas. Co.*, Case No. 16-cv-02310 (Sta. Barbara Sup. Ct. filed May 31, 2016).
 - Cottage Health System operates a network of hospitals that suffered a data breach in 2013, resulting in unauthorized access to patient records.
 - The patients filed a class action against Cottage Health, which was settled for \$4.125M.
 - Columbia seeks rescission of the cyber liability policy. It has argued that Cottage Health made misstatements in the “Risk Control Self Assessment” component of its cyber insurance application, including misstatements that it regularly maintained security patches on its systems.
 - Columbia has also argued that Cottage Health has triggered the exclusion for losses arising from an Insured’s failure “to continuously implement the procedures and risk controls identified in the Insured’s application.”

Cyber-Risk Insurance Best Practices

- **2. Aim for broad triggers and short waiting periods.**
 - Does first-party coverage require a wrongful act or an affirmative “failure”?
 - Does coverage trigger on “discovery” or “occurrence”?
 - Are you covered for “alleged” or “suspected” breaches?
 - Keep the waiting period SHORT!



Cyber-Risk Insurance Best Practices

- **3. Mind the gaps.**
 - Both legacy coverages (CGL, Property, Crime) and cyber-specific insurance products may not provide adequate coverage for risks involving the IoT, new technologies, and the Sharing Economy.



Cyber-Risk Insurance Best Practices

- **3. Mind the gaps.**
 - “Error, omission, or negligent act.”
 - *Travelers Prop. Cas. Co. of America et al. v. Federal Recovery Services et al.*, No. 2:14-cv-170-TS (D. Utah May 11, 2015).
 - FRS provided processing, storage, and handling of electronic data for Global Fitness.
 - Global Fitness sued FRS for conversion, tortious interference, and breach of contract, alleging that FRS held for ransom billing account data for members of its fitness centers.
 - Travelers disputed coverage for the lawsuit, asserting that the withholding of data was not an “error, omission, or negligent act” for which the cyber liability policy provided coverage.
 - The Court agreed with Travelers, holding that Global Fitness had alleged knowledge, willfulness, and malice, in the withholding of data.

Cyber-Risk Insurance Best Practices

- **4. Think outside of the box on endorsements.**
 - Potential Solutions to Coverage Gaps:
 - Cyber endorsements removing problematic language
 - Endorsements to legacy policies for damage caused by cyber event



Cyber-Risk Insurance Best Practices

- **5. Don't stop thinking about insurance after the policies are in place. Insurance may come up again ...**
 - Change in control.
 - Change in scope of services/work.
 - New risks.
 - New contracts.
 - Additional insured considerations.





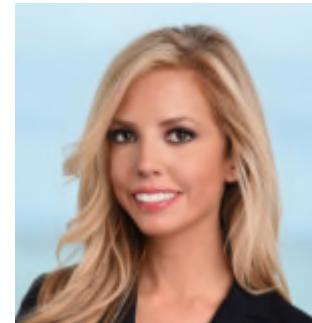
Walter Andrews

Hunton & Williams LLP

Miami, Florida
Washington, DC
(305) 810-6407

wandrews@hunton.com

Walter's practice focuses on complex insurance litigation, counseling and reinsurance arbitrations and expert witness testimony. He litigates insurance coverage and bad faith disputes around the nation, involving business interruption, product liability, construction defect, reinsurance matters, cyberinsurance and e-commerce issues, and claims involving emerging technologies.



Andrea DeField

Associate,
Miami, FL
(305) 810-2465
adefield@hunton.com



Paul Moura

Associate
Los Angeles, CA
New York, NY
(213) 532-2177
pmoura@hunton.com



Jennifer White

Associate
Washington, DC
(202) 955-1866
jewhite@hunton.com

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