

The Transportation Brief®



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Smartphones Spawn Thorny Issues in the Accident Setting

Federal regulations, state laws and internal motor carrier policies generally place limits on or prohibit mobile phone use in two ways: calling and texting. Similarly, post-accident investigation and later lawsuit discovery have traditionally focused on calling and texting records to prove or disprove whether drivers were engaged in distracted driving at the time of the accident.

Distracted driving may be caused by more than calls and texts on smartphones.

Drivers may use smartphones to message through Facebook, watch a YouTube video or check a game score moments before a crash. These activities do not appear on call or text records. Understanding this, police investigators, prosecutors and attorneys in civil litigation have been expanding their inspections and discovery requests to include downloading smartphone data. Software can detect open applications, the times of the day and amount of time spent on the applications, and the exact messages exchanged.

A June 2014 U.S. Supreme Court decision now limits a police agency's unfettered ability to download a smartphone without the owner's consent or a search warrant.

Motor carriers should consider the following smartphone issues:

- Is a company's mobile phone limitation or prohibition policy broad enough to encompass smartphone applications and other mobile electronic device use?
- Is there a risk of a spoliation claim if drivers fail to preserve smartphone data?
- How should a company balance its post-accident investigation duties with its driver's privacy rights in deciding whether to seek custody of the driver's smartphone for downloading purposes?
- Should an expert be retained in serious accidents to download the driver's smartphone data to preserve the data and evaluate claim exposure?
- Should a criminal defense attorney be retained to advise about the lawful scope of police downloading a driver's smartphone?

*Michael B. Langford
Indianapolis*

Briefly...

Protection of Employees' Social Media Activities on the Rise

Social media posts by applicants and employees provide a wealth of information to transportation industry employers about fitness for employment and/or comments that may impact the Company's public image. Consequently, at least 16 states have passed social media privacy laws precluding employers from requesting user names and passwords. Employers should use caution in attempting to compel access to non-public portions of applicants' and employees' social media accounts.

Even when access is available, employers should be careful when taking action based on an employee's social media activities. The NLRB remains active in protecting an employee's right to discuss terms and conditions of employment through social media. Thus, social media policies have been struck down by the NLRB as overly broad even for prohibiting employees from conduct such as disclosing non-public information, posting inaccurate information, and making offensive or demeaning remarks. Developing and following sound policies tailored to the transportation industry is crucial.

Jack Finklea,
Indianapolis

Donald J. Vogel,
Chicago

Telematics – Efficiency or Control?

The rapidly expanding use of IT-rich accessories within the logistics industry provides an abundance of information that a

motor carrier may use to maximize efficiency. A concern is whether the use of this information by carriers utilizing owner-operators may inadvertently undermine the independent contractor status of these drivers. For example, a drive camera can provide a wealth of information to permit an owner-operator to maximize revenue and efficiency, but a carrier must ensure that information collected by these devices does not impermissibly control the details of an owner-operator's work. The bottom line: a carrier should be wary of collecting information that is difficult to use without controlling an owner-operator. Moreover, the motor carrier's possession of such information coupled with communications to the owner-operator on operational details could aid an adversary in mischaracterizing a telematic tool as a mechanism of improper control by the carrier over the owner-operator.

Gregory M. Feary
Shannon M. Cohen,
Indianapolis

HOS Amendment Stalled; ELD Mandate on the Horizon

This summer, the U.S. Senate considered an amendment to the 2013 Federal HOS rules limiting drivers to one 34-hour restart per week, including two consecutive periods between 1 a.m. and 5 a.m. Industry groups such as ATA have criticized the 2013 rules as "unjustified" and detrimental to highway safety. The recent push for an amendment has stalled for now, but interest groups on both sides continue to weigh in publicly. On a related note, the comment period for the FMCSA's proposed rule regarding ELDs recently expired. Over 1600 comments were received,

with many larger carriers and associations supporting the mandated use of ELDs. A final rule on ELDs is expected sometime later this year or early 2015, with an implementation date two years thereafter.

Timothy W. Wiseman
Paul D. Root,
Indianapolis

Proposed rule eliminates distinction between paper and electronic documents

In a Notice of Proposed Rulemaking dated April 28, 2014, the FMCSA proposed amendments to several regulations to eliminate the distinction between paper and electronic documents. Most notably, the proposed amendments (1) remove outdated language in the Federal Truth-in-Leasing Regulations requiring equipment receipts to be transmitted by mail, telegraph, or similar means, leaving the parties to choose their own medium of communication; (2) add language to record preservation provisions protecting against data corruption and destruction for electronically-stored documents; (3) remove the requirement that drivers' records of duty status ("RODS") be kept in the drivers' own handwriting; (4) allow drivers to transmit their RODS to carriers electronically; and (5) permit persons or entities subject to document retention requirements to keep copies in lieu of originals. The comment period is now closed, and the amendments will likely take effect in the near future.

Angela S. Cash
Brandon K. Wiseman,
Indianapolis



Mileposts

Technological advances spark new legal concerns for motor carriers

Earlier this year, *Forbes* ran a story titled “How Big Data is Changing Long-Haul Trucking,” exploring technological advances that have contributed to greater operational efficiency, higher earnings, and improved safety performance for some of the nation’s largest motor carriers.

While it is true that “big data” holds great potential for the trucking industry, it is also creating some unique legal challenges that warrant careful attention. In this issue of the *Transportation Brief*, we explore many of these new challenges and the technology that is driving them.

In the cover article, for example, Scopelitis partner Mike Langford discusses how the proliferation of smartphone use among drivers is changing post-accident investigation procedures, and what carriers can do to protect themselves in anticipation of litigation. Langford regularly defends carriers in accident litigation matters and speaks on related issues such as those discussed in the cover article.

Technological advances are also affecting carriers’ regulatory obligations. Nowhere is this more apparent than the FMCSA’s ELD mandate, which is discussed on page two of this issue. Tim Wiseman, who heads the Scopelitis Firm’s regulatory compliance group, routinely works with carriers of all sizes to ensure their operations satisfy the sometimes onerous safety regulations to which they are subject. Wiseman has assisted large coalitions of motor carriers draft and submit comments in response to some of the more contentious rules proposed by the FMCSA, including those pertaining to ELDs.

The sheer amount of data produced by the industry’s new technology can be overwhelming to say the least. This can be particularly problematic in class-action litigation, where carriers are sometimes forced at significant expense to produce hundreds of thousands of pages of data, including driver logs, settlement sheets, and phone records.

The Scopelitis Firm is uniquely equipped to manage the intake and review of its clients’ “big data,” thanks to its in-house litigation support team. This resource translates directly to cost savings for our clients and helps to preserve the attorney-client privilege as well. The firm’s class action defense team includes Indianapolis partners Jim Hanson, Bob Browning and Angela Cash and Chicago partner Adam Smedstad, among a number of other attorneys firmwide.

On the Road

John Dimitry will attend the National Association of Foreign-Trade Zones’ (NAFTZ) Annual Conference, September 14 -17, in **Fort Worth**.

Mike Langford will speak on the topic of traumatic brain injury at the Arkansas Trucking Seminar, September 17-18, in **Rogers, Arkansas**.

Tim Wiseman will speak on the issue of driver shortage at the International Expo, September 22, in **Long Beach, California**.

Mike Langford will conduct a mock trial at the American Trucking Associations’ Technology and Maintenance Council Meeting, September 25, in **Orlando**.

Fritz Damm will attend the Canadian Transportation Lawyers Association’s Annual Conference, September 24-27, in **Halifax, Nova Scotia**.

John Dimitry will attend the International Quality and Productivity Center (IQPC) Cold Chain Global Forum, September 29 – October 2, in **Boston**.

Kevin Phillips will teach the International Warehouse Logistics Essentials Course at University of Maryland, October 10, in **College Park, Maryland**.

Gregory Feary will present an update on independent contractor legislative initiatives at the American Trucking Associations’ Management Conference & Exhibition, October 4-7, in **San Diego**. Annette Sandberg will also attend.

Jim Golden will be part of a panel titled “After the Dust Settles – Engaging in Catastrophic Claims After First Attempts at Early Resolution Fail” at the Transportation Industry Defense Association’s 22nd Annual Industry Seminar, October 22-24, in **Las Vegas**. Mike Langford, Jim Ellman and Jay Starrett will also attend.

Fritz Damm will attend the Defense Research Institute Trucking Law Committee meeting, October 23, in **San Francisco**.

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Dispatches

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

According to Braden Core, **the D.C. Circuit Court of Appeals rejected a challenge to the CSA program** filed by the Alliance for Safe, Efficient, and Competitive Truck Transportation (ASECTT) and several of its members. The Court held that the lawsuit was filed too late.

Braden Core reports that the FMCSA recently published a notice stating its intent to expand the permissible uses of electronic signatures and documents, and on July 10th it updated related guidance to **allow drivers to use computer, tablets, and smartphones to sign record-of-duty status reports.**

John Dimitry reports that the Bureau of Industry and Security (BIS) has issued a Notice of Proposed Rulemaking to resolve the confusion behind the different uses of the term “routed export transaction” in the Foreign Trade Regulations (FTR) and the Export Administration Regulations (EAR). **The BIS intends to discontinue using the phrase “routed export transaction” under the EAR and replace it with the term “Foreign Principal Party Controlled Export Transaction.”** This proposed change will not affect the use of the term by the U.S. Census Bureau when it comes to FTR compliance in filing Electronic Export Information (EEI) into the Automated Export System (AES).

On July 19, 2014, Illinois Governor Pat Quinn signed the Job Opportunities for Qualified Applicants Act (effective January 1, 2015) which would **bar Illinois employers from inquiring into or requiring disclosure of a job applicant’s criminal record or criminal history before the candidate has been notified that he or she has been selected for a job interview or has been offered a conditional offer of employment.** Don Vogel advises employers in Illinois to review job applications to determine if modifications are necessary.