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Defending Distracted Driving, Fatigue, and Sleep Apnea Claims

I. DISTRACTED DRIVING – TEXTING AND MOBILE DEVICES

Based upon research commissioned by the FMCSA, it is extremely risky for a commercial motor vehicle driver to take their eyes off of the road. It is six times more likely for a safety critical event to occur (like a crash, near-crash or unintentional lane deviation) for commercial motor vehicle drivers that dial a mobile phone while driving, compared to drivers who do not. These drivers took their eyes off of the roadway for an average of 3.8 seconds. At 55 mph (80.7 feet per second), this equals a distance of 306 feet without looking in front of the tractor, which is approximately the length of a football field.

There is an absolute prohibition for commercial motor vehicle drivers to text while driving. The definition of texting is very broad and includes entering alphanumeric texts into, or reading from, an electronic device. This also includes emailing, instant messaging, or pressing more than a single button to initiate or terminate a voice communication while using a mobile phone. Drivers can use mobile phones and still obey the rule by operating a hands-free phone located in close proximity, utilizing an ear piece or the speaker phone function while using voice-actuated or one-button touch features to initiate, answer, or terminate a call.

The rule imposes significant sanctions for offenses, including civil penalties up to \$2,750 and driver disqualification for multiple offenses. Motor carriers are prohibited from requiring or allowing their drivers to text or use a hand-held mobile device while driving and may be subject to civil penalties up to \$11,000. These violations will also impact SMS results. Texting and calling on a hand-held phone carry the maximum type of severity rating in SMS.

In terms of dispatching devices like Qualcomm, the FMCSA states that texting on a dispatching device is the same as texting on any other device and, therefore, is prohibited. Many companies have different versions of dispatching devices. Many are available with combined GPS systems that will not function while the truck is driving. The prohibition on using hand-held devices includes being stopped at a traffic light or traffic delay, but drivers are allowed to use them if they are safely pulled over to the side of the road. There are also state laws on distracted driving that need to be considered.

II. DISTRACTED DRIVING – SOCIAL MEDIA

In a distracted driving study regarding drivers using social media, drivers are no longer just texting and talking on their cell phones. They are using social media and taking selfies. <http://washington.cbslocal.com/2015/05/20/study-distracted-drivers-using-social-media/>.

This study references an AT&T study polling more than 2,000 people who use Smartphones and drive at least once a day. This study shows that nearly 4 in 10 tap into social media while driving. Almost 3 in 10 surf the net and 1 in 10 video-chat. The study shows that 7 in 10 people engage in Smartphone activity while driving with texting and emailing still the most common. Facebook tops the list for social media and about 1 in 7 said they are on Twitter while driving. Smartphone activities include texting (61%); email (33%); surfing the net (28%); Facebook (27%); taking a selfie or photo (17%); Twitter (14%); Instagram (14%); and shooting a video (12%). Interestingly, this study also found that 62% of the individuals keep their Smartphones within easy reach while driving; of the 30% who post to Twitter while driving state they “do it all the time”; the 22% who access social networks while driving cite addiction is the reason; and of those who shoot video while behind the wheel, 27% said they can do it safely while driving.

III. EMERGENCY RESPONSE CONSIDERATIONS FOR THE DEFENSE

Distracted driving can occur in various ways. It cannot be overemphasized that the science or key to a plaintiff's distracted claim is that the commercial motor vehicle driver carelessly took his eyes off of the road in front of him, leading to the accident. As part of the interview of the driver immediately after the accident, potential distracted driving considerations must be addressed. It must be determined exactly what the driver was doing in the minutes and seconds leading up to the accident. It should be noted that in some accidents, particularly where the driver is also injured, they may not recall or only be able to give vague responses in terms of their actions as well as time and distance measurements.

A checklist can be utilized to interview the driver. It is important to determine how many mobile phones the driver had in the tractor, as some have both company issued as well as personal phones. The driver should be questioned if he complied with Federal Regulations prohibiting texting. The driver should also be asked if he was on a mobile phone at the time of the accident. If so, did he comply with the hands-free and voice actuation/one touch calling procedures. It is crucial to determine if the mobile phone was located physically close to the driver and if the phone had been dropped. If so, did the driver look down at the floor to retrieve it, taking his eyes off the road immediately before the accident.

Commercial Motor Vehicle drivers must be asked whether they were looking at GPS or a map, to determine if they were looking for directions or lost, right before the accident. Similar questions should be asked about positioning and messaging devices, Facebook and all other types of social media. Defense counsel, the trucking company, and insurance carrier must emphasize to the driver that is absolutely crucial to identify all “bad” or aggravating facts of a case up front in the litigation process. It is extremely difficult to change a trial theme midstream and the defense may want to admit liability and move in limine to keep out the “bad” or aggravating facts at trial. This trial strategy may preclude the Plaintiff's use of the Reptile Theory to prove that this Defendant violated safety rules and needlessly endangered the public. It may also be an excellent trial tactic to keep punitive damages out of the case.

IV. AFFIRMATIVE USE OF DISTRACTING DRIVING AGAINST PLAINTIFFS

In an emergency response, one should consider sending a preservation letter to the tow truck yard to preserve Plaintiff's vehicle, including all cell phones, tablets and cameras. A preservation letter should also be sent to Plaintiff's attorney for these items as well as cell phone records. Careful consideration should be given before a preservation letter is sent directly to an injured claimant if they

are not represented by counsel, based on a risk-reward analysis. This tactic could have the unintended consequence of the claimant filing a lawsuit when one was not contemplated. If these items are destroyed, lost and not preserved, the defense can use spoliation of evidence affirmatively against the tow yard and/or Plaintiff. State law should also be considered on this point. As of the submission of this paper, there was a recent a November 8, 2017 proposed “Distracted Walking” ordinance in Chicago. This ordinance would allow for pedestrian to be fined up to \$500 for negligently crossing the street with their eyes fixed on a cell phone screen.

In terms of social media, the defense or independent adjuster should consider checking to determine if the plaintiff’s Facebook page is public. If so, it can be determined if there were any postings at, or near, the time of the accident and a screen shot, with a digital time stamp, can be taken to evidence the posting. The same should be considered for a co-defendant which might have liability exposure. The retention of a forensic mobile phone expert should be considered when a distracting driving theory is involved in a case.

V. HOURS-OF-SERVICE and DRIVER FATIGUE ISSUES:

A. Electronic Logging Devices (“ELDs”)

i. ELD History

On December 16, 2015, the Federal Motor Carrier Safety Administration (“FMCSA”) adopted the regulations mandating the use of ELDs to track truck drivers’ hours-of-service. The ELD mandate requires that all drivers of commercial motor vehicles who are required to prepare hours-of-service (“HOS”) records of duty status must now use ELDs. The ELD mandate went into effect on December 18, 2017, but the FMCSA has given drivers and motor carriers a grace period until April 1, 2018, for full compliance. During this time, drivers can be issued citations for non-compliance with the ELD mandate, but even if a citation is issued, those vehicles will not be taken out of service solely for non-compliance.

Though the ELD mandate is now in effect, the FMCSA recognizes two exceptions: (1) if the driver was using an automatic onboard recording device (“AOBRD”) prior to December 18, 2017, s/he may continue to use that AOBRD until December 16, 2019; or (2) the driver may use paper logs if the driver is required to keep RODs for eight or less days out of any thirty-day period; or the vehicle driven is the commodity being delivered; or the vehicle was manufactured prior to the year 2000.¹

The Trump Administration has been clear that it would not repeal or delay the enforcement of the ELD mandate.² The only delay was given to agriculture and livestock haulers, which have an additional ninety (90) days, or until March 18, 2018, to come into compliance with the mandate.³

ii. ELD Regulations and Compliance

The FMCSA requires motor carrier and drivers to keep RODS for each twenty-four hour period of time if they are subject to the HOS regulations.⁴ With the implementation of the ELD mandate, the

¹ Pursuant to 49 C.F.R. 395.1(e)-(f), the short-haul exceptions still apply and do not require the use of an EDL – the 100 air-mile radius exception and the operation of a commercial motor vehicle not requiring a CDL.

² See <https://www.supplychaindive.com/news/Trump-FMCSA-nominee-plans-FMCSA-ELD/509938>.

³ See <http://www.overdriveonline.com/fmcsa-delays-eld-compliance-for-ag-haulers-for-90-days>.

⁴ 49 C.F.R. 395.8.

motor carrier is required to: (1) manage ELD accounts; (2) assign unique ELD usernames to each user account; (3) ensure a valid driver's license corresponds to the driver using the ELD account; (4) ensure the accuracy of new account information; and (5) retain a back-up copy of ELD records on a separate device for up to six months in a way that protects a driver's privacy.⁵

In addition to the management of ELD users, accounts, and data, the motor carrier must also provide the following in-vehicle information: (1) a user's manual for operating the ELD; (2) an instruction sheet for creating and transferring records by the ELD; (3) an instruction sheet for malfunctions, reporting, and recordkeeping; and (4) a minimum of eight days' blank paper logs.⁶

Drivers who are subject to the ELD mandate must still use the same RODS identifiers – *i.e.*, “off duty,” “sleeper berth,” “driving,” or “on-duty not driving.”⁷ Drivers also must input or verify the following information on the ELD: (1) annotations; (2) location description; (3) output file comment; (4) power unit number; (5) trailer number(s); and (6) shipping document number(s).⁸ Before submitting their RODS to the motor carrier through the ELD, drivers are required to review, edit, correct inaccuracies, and certify their ELD records.⁹

Once a driver submits certified RODS, the motor carrier must review it and can make requests for edits.¹⁰ If a driver makes changes, or the motor carrier proposes changes, the driver must annotate each change and then recertify and resubmit the record.¹¹ Edits requested by the motor carrier may be electronically accepted or rejected by the driver.¹² Regardless whether a driver accepts or rejects a motor carrier's requested edits, “[a] motor carrier may not coerce a driver to make a false certification of the driver's data entries or record of duty status.”¹³

The FMCSA now requires motor carriers to retain up to eight supporting documents for every 24-hour period that a driver is on-duty. There are five categories of supporting documents: (1) bill(s) of lading, itineraries, or schedules; (2) dispatch records or trip records; (3) expense receipts related to any on-duty not driving time; (4) electronic mobile communications records from fleet any fleet management system; and (5) payroll records or settlement sheets.¹⁴ The supporting documents must identify: (1) the driver's name, PIN, or unit number; (2) the date; (3) the location; and (4) the time.¹⁵

B. 34-Hour Restart Provision

⁵ 49 C.F.R. 395.22(b)(2) & (h)(4)(i).

⁶ 49 C.F.R. 395.22(h).

⁷ 49 C.F.R. 395.24(b).

⁸ 49 C.F.R. 395.24(c)(1)-(2).

⁹ 49 C.F.R. 395.8(a)(2); 49 C.F.R. 395.30(b).

¹⁰ 49 C.F.R. 395.30(d)(1)-(2).

¹¹ 49 C.F.R. 395.30(c).

¹² 49 C.F.R. 395.30(d)(3).

¹³ 49 C.F.R. 395.30(e).

¹⁴ 49 C.F.R. 395.11

¹⁵ 49 C.F.R. 395.11(e)(2)(i).

The Federal Motor Carrier Safety Regulations (“FMCSR”) require that a driver does not driver after 60/70 hours on duty in 7/8 consecutive days.¹⁶ A driver may restart a 7/8 consecutive day period only after taking a 34 or more consecutive hours off-duty – *i.e.*, a driver must have a 34-hour restart.¹⁷

In 2013, the FMCSA issued HOS regulations that included two controversial provisions surrounding the driver’s 34-hour restart: (1) it must include two 1:00 a.m. to 5:00 a.m. periods, even if the 34-hours had already been met; and (2) it was limited to once per week – *i.e.*, once per each 168-hour period of time.¹⁸ As part of the Consolidated and Further Continuing Appropriations Act of 2015, Congress suspended those two provisions and directed the FMCSA to conduct a study of the operational, safety, health, and fatigue impacts of these rules.¹⁹

The FMCSA then conducted a study for more than 5 months, which included 235 drivers, over 3,000 duty cycles captured via ELDs, over 75,000 driver alertness tests, and more than 22,000 days of driver sleep data.²⁰ On March 2, 2017, DOT Inspector General, Calvin L. Scovel III, informed Transportation Secretary Elaine Chao that the results of the FMCSA study resulted in no evidence that the 2013 34-hour restart provisions promoted any substantial improvement in transportation safety.²¹ The research “did not explicitly identify a net benefit from the use of the two suspended provisions of the restart rule on driver operations, safety, fatigue and health.”²²

Though the regulations were suspended in December of 2014 so the FMCSA could conduct the study, they were officially removed the rule and drivers now have the ability to use the 34-hour restart without the weekly limit and without the requirement that it be taken with consecutive breaks from 1:00 a.m. to 5:00 a.m.

C. Sleep Apnea Monitoring

Obstructive sleep apnea (“OSA”) is a respiratory disorder characterized by a reduction or cessation of breathing during sleep.²³ These pauses in breathing can last several seconds and can occur up to 400 times per night.²⁴ Drivers with OSA can become fatigued, and they have difficulty staying awake and concentrating, focusing his/her eyes, and adversely affects a driver’s reaction time to changing circumstances on the roadway.²⁵ The risk factors for sleep apnea include: (1) a BMI over 33%; (2) neck size – males 17” or larger; females 16” or larger; (3) age 42-years or older; (4) high blood pressure / hypertension; (5) loud snoring / small airway; (6) gender – male or post-menopausal female;

¹⁶ 49 C.F.R. 395.3(a) & (b).

¹⁷ *Id.*

¹⁸ See <http://www.truckinginfo.com/channel/safety-compliance/news/story/2017/03/no-net-benefit-found-in-controversial-34-hour-restart-provisions.aspx>.

¹⁹ See <http://www.overdriveonline.com/restart-rules-to-be-suspended-congress-clears-legislation-to-roll-back-2013-provisions>; see also U.S. DOT Memorandum to begin study, available at: <https://www.oig.dot.gov/sites/default/files/FMCSA%20Hours%20of%20Service%20Announcement%20Letter%5E2-10-15.pdf>.

²⁰ See <http://www.truckinginfo.com/channel/safety-compliance/news/story/2017/03/no-net-benefit-found-in-controversial-34-hour-restart-provisions.aspx>.

²¹ See <http://www.mhlnews.com/transportation-distribution/republican-regulatory-reform-agenda-advances-under-radar>.

²² See Inspector General Scovel’s Letter to Congress, available at: <https://www.oig.dot.gov/sites/default/files/OIG%20Correspondence%20on%20HOS%20Restart%20Study%5E3-2-17.pdf>.

²³ See <https://www.mayoclinic.org/diseases-conditions/obstructive-sleep-apnea/symptoms-causes/syc-20352090>.

²⁴ See https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Driving-Sleep-Apnea_508CLN.pdf.

²⁵ *Id.*

(7) type 2 diabetes; (8) medical history – stroke, coronary artery disease, or irregular heartbeat; (9) ethnicity; or (10) smoking or alcohol use.

On March 10, 2016, the FMCSA issued an advance notice of proposed rulemaking concerning the prevalence of moderate-to-severe OSA among individuals occupying safety sensitive positions in highway transportation and its potential consequences for the safety of highway transportation.²⁶ Under the proposed rule, drivers would have been screened to consider the OSA risk-factors to determine if a driver should be referred to in-lab sleep apnea testing and/or a treatment protocol.²⁷

On August 4, 2017, as a result of the Trump administration’s aim to deregulate the trucking industry, the FMCSA officially published a notice in the Federal Register that it was withdrawing the advance notice of proposed rulemaking on OSA.²⁸ The FMCSA stated it “believes the current safety programs . . . and rulemaking addressing fatigue risk management are the appropriate avenues to address OSA.”²⁹

Pursuant to the FMCSR, the physical qualifications for drivers relative to sleep apnea related issues simply require that the driver “[h]as no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his/her ability to control and drive a commercial motor vehicle safely.”³⁰ Medical examiners are responsible for ensuring that a driver is medically fit to drive a commercial vehicle.³¹ As such, if a medical examiner detects a respiratory dysfunction that in any way is likely to interfere with the driver’s ability to safely control and drive a commercial motor vehicle, then the driver must be referred to a specialist for further evaluation and therapy.³²

D. Impact on Claims and the Future of HOS Regulations

The effect of the ELD mandate will likely impact the way trucking claims and litigation are handled. It is important for adjusters, risk managers, and defense attorneys to know what the FMCSR require to ensure drivers and the motor carriers are in compliance with the ELD mandate. ELDs will make hours-of-service information and documents more easily accessible for purposes of claims investigation and for production in response to discovery requests. Since motor carriers must now accumulate and retain a large amount of information concerning their drivers and vehicles, more issues concerning HOS spoliation could arise. You should expect to receive pre-suit spoliation letters since the ELD mandate requires the retention of these records. It is also anticipated that additional litigation issues regarding the discovery of electronically stored information (“ESI”) could arise since these records will be saved electronically. Policies and procedures need to be enacted and enforced at the level of the motor carrier to ensure that RODS and supporting documents under the ELD mandate are, in fact, adequately preserved.

Further, knowing how to analyze and evaluate ELD information at the claims-level and in litigation is critical for defending against claims that rely upon FMCSR violations to support causes of

²⁶ See Federal Register Notice: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-16451.pdf>.

²⁷ *Id.*

²⁸ See <https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-16451.pdf>.

²⁹ *Id.*

³⁰ 49 C.F.R. 391.41(e)(5).

³¹ 49 C.F.R. 391.41(a)(1)(i).

³² 49 C.F.R. 391.41(b)(5).

action for negligent training, retention, and supervision.³³ You first need to know if your driver is subject to the ELD mandate. If so, then you must then know whether the driver and motor carrier have complied with the requirements that the FMCSR place on each of them relative to creating, certifying, submitting, editing, and preserving RODS.³⁴ Since this information is created, transmitted, and stored electronically, access should be readily-available so that you can retrieve, review, and evaluate it for potential hours-of-service issues.

Knowing whether there has been a violation or multiple violations will enable to you to consider and evaluate if that increases the potential risk exposure. You will only be able know if a driver and/or a motor carrier has been compliant with the ELD mandate by being well-acquainted with the FMCSR. Now that most commercial motor vehicles have ELDs, you should obtain these records from your motor carriers to evaluate whether there are any aggravating factors – *i.e.*, HOS issues – that could trigger the need for a reserve increase or add a premium to a settlement or verdict.

Though the two controversial subparts to the 34-hour restart provision and the proposed rulemaking for OSA have been withdrawn, these two issues will still impact your claims handling and litigation management. You will likely see claims appealing to “general community safety,” “minimum standards,” and “best practices” to suggest that your drivers and/or motor carriers could have or should have done something more to ensure safety on the roadway. And, that there was a failure to go beyond the minimum requirements of the FMCSR, the driver and/or motor carrier were more concerned about making money than the safety of the motoring public. These generally are weak arguments, but you should be able to refute them by citing to the specific regulations where your drivers and/or motor carriers were, in fact, compliant with the FMCSRs – nothing requires a driver or motor carrier to go beyond the regulations.

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³³ Claims professionals and your trucking defense attorneys should be well-versed and familiar with how opposing counsel use violations of the FMCSR to make “reptile theory” arguments seeking punitive damages.

³⁴ See generally 49 C.F.R. 395.22; 395.24; 395.30.