



The Electronic Logging Device Mandate and Its Effect on Future Trucking Litigation - Episode #133

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Guest Attorneys: Jennifer Parrott and Melody Kiella of [Drew Eckl & Farnham, LLP](#)

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John Czuba: Welcome to the *Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Recommended Insurance Attorneys*.

We're pleased to have with us today attorneys Jennifer Parrott and Melody Kiella from the law firm of [Drew, Eckl, and Farnham](#) with offices in Atlanta and Brunswick, Georgia.

Jennifer Parrott focuses her practice in civil litigation and represents individuals, corporations, and insurance companies in state and federal courts. Her practice includes an emphasis on general liability and insurance litigation, transportation and trucking law, personal injury, products liability, and commercial litigation.

She has extensive experience in managing files, interviewing witnesses, preparing discovery, writing and responding to motions and appeals, and taking depositions.

In 2017, the American Bar Association, Tort Trial, and Insurance Section appointed Jennifer to vice chair for both Cybersecurity Data Privacy General Committee and a Commercial Transportation Litigation General Committee as well as a member of the Outreach to Young Lawyers Standing Committee.

Melody Kiella specializes in all aspects of complex civil litigation and represents clients in connection with a broad spectrum of legal matters including transportation and trucking law, personal injury, premises liability, catastrophic injuries, construction litigation, commercial litigation, breach of contract, and general liability.

She has extensive experience in managing files from the pre litigation stages through trial which includes negotiations, in depth legal research and analysis, drafting motions, briefs, and other pleadings, oral arguments, depositions, facilitating discovery, settlement discussions, and coordinating with and using experts.

Melody serves on the firm's diversity committee, the DRI Trucking Law Steering Committee, and also serves as the DRI for Life-*The Voice*, editor.

We're very pleased to have you both with us today. Today we'll be discussing the ELD mandate and the effect on future trucking litigation. We'll be starting our questions today with Jennifer Parrott. Jennifer, can you briefly define the ELD mandate and how will the ELD mandate affect discovery in trucking cases?

Jennifer Parrott: Absolutely, John. In 2012, Congress passed the Commercial Motor Vehicle Safety Enhancement Act which requires commercial motor vehicles to be equipped with electronic logging devices. The purpose of this was to improve compliance with the hours of service regulations.

If you're a commercial motor carrier and insure motor carriers or a lawyer who handles trucking claims, you've been hearing about this mandate for a long time now. The mandate continues to be surrounded by some amount of controversy with some legal challenges being filed, even a fairly recent bill in Congress trying to delay implementation of the ELD mandate.

But today Melody and I are not going to talk about the bones of the mandate or the specific challenges to it. Instead, we're focused on how the use of these electronic logging devices across the trucking industry could change the landscape of trucking claims and trucking litigation.

These electronic logging devices are managed by service providers who will collect voluminous amounts of electronic data. Primarily that'll be driver's logs, but it includes other types of data too. With voluminous electronic data comes the ability to generate analytics that savvy claimant's attorneys are most certainly going to try to get their hands on.

While electronic logging devices have been used by the largest of the motor carriers for some time, now we're going to see carriers of all sizes required to use these systems. As claims professionals and lawyers know, some companies do a better job than others with regard to compliance. The ELD mandate is no different.

Exactly how much of this information is discoverable in the context of a trucking claim and how that data's going to be used is something professionals and lawyers alike really should be thinking about now.

John: Jennifer, other than driver's logs, what type of electronic data will ELDs gather that could get pulled ultimately into litigation?

Jennifer: These electronic logging devices offer a lot of options beyond just the driver's logs that are subscription based. We could see things like forward facing cameras that face out to the road ahead, driver facing cameras. Some of those even can provide alerts if a driver seems tired or distracted.

Additionally, things like notifications and alerts via email and text of potentially dangerous actions by a driver, dangerous actions like quick lane changes or fast stops or even pre notifications of an impending hours of service violation.

The receipt and use of all that data is going to be an issue that gets explored in the discovery process. As I mentioned previously, how well motor carriers handle all this information is a really open ended question. As most of us know, in today's day and age, keeping up with information overload is a problem we all face. These notifications and alerts could certainly fall into the information overload category.

Particularly troublesome is the issue about the data that these devices collect but that a motor carrier doesn't subscribe to. Just because these optional features aren't being subscribed to by a motor carrier doesn't mean that that data isn't being recorded or preserved by a vendor.

An example of how that might play out, here in Georgia, we saw a trial court order a non-party vendor who had a GPS tracking device that they managed on a fleet of vehicles. They ordered that vendor to produce information that the defendant didn't subscribe to or utilize. The court's reasoning was the data existed, and it was able to be easily provided with the push of a button by the non-party vendor.

This is obviously concerning in the context of litigation because you now have data that was easy to obtain but it wasn't something that the defendant had or utilized at the time of the incident at issue in that case.

Now, this particular Georgia case I mention, it's not binding precedent, so I'm not going to quote it by name. But it's an example of how these additional subscription based services that will exist on ELD devices could be problematic in discovery going forward.

John: Jennifer, how can lawyers and adjusters help their clients handle issues concerning ELDs and electronic stored information?

Jennifer: Now I can give you a bit of good news. The good news here is that it all comes down to compliance with the motor carrier regulations and evidence preservation. Neither of those are new issues to either claims adjusters or to lawyers.

Following notice of the claim, lawyers and claims professionals need to do what they've always done and remind their trucking company clients to immediately preserve evidence. With ELDs, that's going to include contacting the vendor they use and seeking to preserve the data that vendor collects and particularly to preserve electronic copies of that data.

We've seen cases that suggest that simply printing out electronic data and saving that maybe isn't good enough. You need to have an electronic version of the data itself.

Of course, this is in addition to the usual preservation efforts that trucking companies do like driver qualification files, other documents. For example, if the ELD system isn't operational and the driver uses a paper log for a period of time, that would be preserved as well.

I would add that in addition to all of the usual preservation efforts, we're going to start needing to pay attention to these logging devices and try to gain an understanding about what other data may have been recorded regardless of whether that data was provided to the motor carrier.

John: Jennifer, thank you very much.

Jennifer: Thank you.

John: Now we'll be addressing some questions to Melody. Melody, I understand that the reptile theory may come into play with ELDs. Can you explain what the reptile theory is to our audience?

Melody Kiella: Yes, John. The idea of using the reptile theory really came into play in the context of civil litigation around 2009 when David Ball and Don Kennan, who are plaintiff lawyers, released their book entitled, *Reptile, The 2009 Manual of the Plaintiff's Revolution*.

In their book and in their subsequent videos and now in their training seminars, Ball and Keenan advise plaintiff lawyers across the nation to appeal to the juror's primal survival instinct. In short, the reptile theory is based on the idea that jurors are community oriented individuals who want to protect their community from dangers.

What plaintiff's lawyers do is they utilize the reptile theory by presenting evidence and arguments in their pleadings throughout their discovery and also at trial in an effort to convince the jury that the defendant's conduct is a threat to the safety of the jurors and to their community.

According to the reptile theory, a juror's perception that they or their community are in danger triggers their primitive reptilian brain which in turn ignites the fight or flight instinct which overtakes the juror's ability to logic and reason. The hope is that the jurors will become fearful for their safety or the safety of their community and will in turn act based on that fear rather than acting based on logic and reason.

John: Melody, how will the ELD mandate assist those lawyers utilizing the reptile theory?

Melody: Implementation of the ELD mandate won't necessarily change the way that lawyers have been utilizing the reptile theory, but it will certainly make it easier for lawyers who want to utilize that theory in discovery and at trial.

For example, as Jennifer talked about, the ELD mandate will ensure that voluminous amounts of data are easily available.

Plaintiff's lawyers, if they want to get information about a carrier's safety policies or safety practices or prior accidents, prior violations of the federal regulations or if they want to get information about the driver involved in the collision including his prior hours of service violations, they'll be able to get that with the push of a button.

Whereas before, that process was time consuming, it cost money, and it potentially resulted in zero data. With the implementation of the ELD mandate will come voluminous amounts of data that once were unavailable.

A lot of the trucking cases that I handle involve smaller motor carriers that have never utilized any type of electronic logging device and also either lack a document retention policy or don't enforce that policy.

In a lot of my cases right now, I don't even have driver's logs a lot of times by the time a litigation is filed let alone evidence of hard brakes or speed data, GPS location, communications between a dispatcher and a driver. That's information I don't have access to.

Having access to this information and this data that was once unavailable will make it much easier for plaintiff's lawyers to spot violations of the federal regulations and will also make it easier to pinpoint pre and post notification of violations that are sent through the ELD provider to the motor carrier and the driver.

An example of a way that this can be used, a plaintiff's lawyer can pinpoint an hours of service violation, provide it by the ELD provider. They can also pinpoint the pre and post notification received by the motor carrier and the driver. They can take that information to the safety director's deposition.

They can ask the safety director, "Did you receive this notice of pre violation?" "Yes." "Did you receive this notice post violation?" "Yes." "Did you do anything to the driver with regard to reprimanding him or punishing him or requiring additional training after receipt of these violations?"

If the answer to that is no, then you've trapped the safety director into agreeing that, notwithstanding notice of these violations, the motor carrier didn't do anything to reprimand or better train the driver regarding the violation.

In short, the ELD mandate will allow plaintiff lawyers to more easily take the focus away from the accident and away from the plaintiff's injuries, and turn the focus on the alleged safety issue that they are focusing on in the litigation. Also focus on the danger that's allegedly caused by the defendant's conduct.

This in turn will appeal to the juror's reptilian brains and will possibly cause an increase in the value of trucking claims going forward.

John: Then what can lawyers and adjusters do to prepare trucking companies and their safety directors and drivers from succumbing to reptile tactics after the implementation of the ELD mandate?

Melody: The reptile theory is not anything that's new to defense lawyers. Many defense lawyers and safety directors and drivers have been dealing with this for years.

As we've discussed, after December 2017, many motor carriers will be incorporating electronic logging and that technology into their business for the first time. It will be very important for these motor carriers to develop a policy on how to address the pre and post notifications that they received of a driver's violation and to also document any reprimands given to the driver and additional training provided.

That information, the reprimands or the additional training, is not going to be maintained by the ELD providers. It's going to be important to combat the reptile tactics of the plaintiff's attorney to have that information on file.

It's also going to be important to fully understand the capabilities of the motor carrier's ELD provider. As Jennifer talked about, there's going to be providers that provide more than what's required by the federal regulations or even the ELD mandate.

Understanding how your provider maintains that information and what information is maintained is very important, especially for your lawyer, after an incident. That way, your lawyer knows what kind of information is potentially available and discoverable.

It's also important as it always is regardless of the ELD mandate that the motor carrier immediately contact their insurer after the accident and that the insurer request all of this ELD information so that they make sure that it's maintained in a file in the event that the ELD provider does not hold onto it. It's also recommended that defense counsel be hired and look at this information.

There's probably going to be voluminous amounts of information, but it's going to be very important to narrow down and identify the potential issues for litigation and possibly be able to negotiate in pre litigation settlements and negotiations in the event of cases with extensive violations of the federal regulations.

As all defense attorneys know, having bad facts is never fun, but knowing these bad facts ahead of time is much easier than being blindsided by them.

John: Thank you both for joining us today.

Jennifer: Thank you, John.

Melody: Thank you.

John: That was attorneys Jennifer Parrott and Melody Kiella from the law firm of [Drew, Eckl, and Farnham](#) with offices in Atlanta and Brunswick, Georgia.

Special thanks to today's producer, Frank Vowinkle.

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