

Next Batter Up: Trucking Litigants and the Impact of Electronically Stored Information

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Computers and electronically stored information (ESI) have permeated nearly every aspect of our lives. Our perception of whether this is good or bad is dictated by the consequences of the captured act. While other industries have battled ESI disputes for many years, the trucking industry has only recently been called from the sidelines. What traditionally started with requests for paper logs and other supporting documents for tracking hours for safety purposes, has expanded into plaintiff's requesting electronic control modules (ECM), e-mails, phone/text message records, documents (both written and native electronic formats), metadata, on-board cameras (both forward facing and inward-facing), and telematics information, just to name a few. Without question, requests for ESI will continuously expand as additional safety systems, such as advanced driver-assistance systems and autonomous semi-trucks, are implemented.

Before discussing the negative impacts these systems have on litigation, it is important to recognize the positive impacts that are often overshadowed. First, the implementation of these systems has reduced the number of severe accidents, and in turn, reduced claims. Second, cost savings and motor carrier safety ratings may increase by preventing hours-of-service and other violations of the Federal Motor Carrier Safety Regulations. Last, but not least, ESI may corroborate the testimony of the driver, thus eliminating the proverbial "he said, she said." That said, the collection of voluminous amounts of data is fraught with additional cost, inherent risks, and potentially significant consequences in litigation.

Increased Discovery and New Types of Discoverable Material

With increased computer use and the creation of ESI, trucking companies now face increased discovery requests. These requests not only seek traditional discoverable material (i.e., driver logs, DQ files, maintenance records, handbooks, policies, and procedures), but also include new types of discoverable information, commonly referred to as electronic discovery (e-discovery). Simply put, e-discovery seeks information in its unaltered native electronic form. For example, if someone requested this article in its native format, producing it in a paper copy or PDF would be insufficient. Instead, an unaltered copy of it in an electronic Microsoft Word format would need to be produced, including all of the associated metadata, which would show when it was created, when it was modified, when it was accessed, who created it, the file size, and the number of versions.

In most litigation settings, e-discovery normally seeks the following: emails, phone/text message records, and Microsoft Word, Excel, and PowerPoint documents. In trucking litigation, however, litigants not only seek the aforementioned, but also request telematics information, ELDs, ECM data, on-board cameras (both forward facing and inward-facing), cell phones (both company issued and the driver's personal phone), and current and prior generations or versions of handbooks, policies, and procedures, in their original electronic form, including the associated metadata. While the impact of each document request differs, the plaintiff's goal remains the same, to highlight a pattern of negligence and/or indifference, especially on the institutional side, in order to increase damages.



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Emails, Text Messages, and Electronic Versions of Corporate Documents

The increased use of email and text message can play a significant role in assessing liability and damages. While email and text messages are convenient, their increased use can create nightmares for litigants, especially if the author is careless or short-tempered. Not only can they be used to question the credibility of a witness, but depending on the issue, can also establish a history of safety practices and a company's knowledge of a particular issue sufficient to justify a claim for punitive damages.

Emails can also be a treasure trove of information. For example, if several emails are circulated with attached revisions to a particular policy, not only is the email retrievable, but each revised copy of the policy is retrievable. While this may seem innocuous, the different versions may not only illustrate the company's thought process and knowledge of a particular issue, but they reduce a witness's flexibility when testifying.

Consequently, it is no surprise that plaintiffs are increasingly requesting these types of materials. As a result, it is critical for motor carriers to ensure employees are properly trained on email and text message use.

Telematics, Cameras, ELDs, and ECMs

The use of telematics, on-board cameras, ELDs, and ECMs creates a unique opportunity for all parties, and their importance cannot be overlooked. On one hand, this information can completely exonerate the innocent, and on the other hand, can illustrate the severity of an accident and culpability of the respective parties. In terms of ESI, however, the identification, collection, preservation, and production can be a minefield.

Turning first to identification, the challenge is not usually focused on what type of equipment the subject tractor-trailer may have, but more importantly, the location of the data, scope of data in existence, the owner and/or custodian of the data, who has access to the data, and has the data ever been accessed in the past. Some of these may seem obvious, such as the event data on the ECM, which simply needs to be downloaded. The same cannot necessarily be said for ELDs, telematics systems, or videos. There are several questions to ask when trying to identify all the data involved:

What kind of data is involved? While ELDs are mandatory, the use of dash cam video and telematics are not. Consequently, the amount and type of data in each case may vary.

Where is the data located? Some data can or must be accessed locally on the truck, while other data will also exist on computers or servers owned by the company or the "cloud" depending on the fleet management software or the use of third-party vendors.

How can the data be accessed and who owns the data? Depending on the relationship between the company and the driver, and the type of data involved, this may be a relatively simple question. However, if a third-party fleet management vendor is hired, the answer may not be as clear, especially if it is in the cloud and accessible to the company, but not located on their servers. The answer may further depend on the fleet management contract and state law.

How long is the data saved and/or accessible? Again, this will depend on the owner of the equipment, location of the data, and the type of data involved. For example, FMCSA regulations require ELD data be preserved for six months, while there is no requirement for dash cam video. Accordingly, dash cam video could vary significantly depending on the size of the memory card and looped (approx. 6-10 hours) or if it is retained and accessible through a fleet management vendor (could be accessible to company for as long as 90 days).

Once the data has been identified, the next step is to collect and preserve it. The first thing to do is disable any auto-deletion features. By way of example, some fleet management vendors may only save crash video for 100 hours. Depending on the severity of the incident, however, preservation steps may be necessary to avoid a spoliation claim in the future.

Another area ripe for ESI discovery disputes is data that was unknowingly created. As technology companies advance and try to anticipate the needs of the trucking industry by offering new products, those technologies are likely going to create and collect new ESI data unbeknownst to the motor carrier. The question becomes whether that additional ESI is discoverable even though the motor carrier did not subscribe to or utilize those options. For example, while ELDs are not yet required to track and document a driver's speed, hard brakes, or exact location through GPS tracking, there is other electronic software that can provide this data. This information can then be integrated with other useful fleet management tools such as analytics software designed to identify changes in driving patterns, provide real-time alerts, and recommend ways to address possible safety concerns. By creating and collecting data beyond the scope of regulations, motor carriers risk being exposed to broad discovery requests seeking information they would not otherwise normally possess. This was precisely the case in one Georgia State Court case where, even though the Georgia Civil Practice Act did not require parties to generate

documents that did not previously exist, the court compelled the non-party provider to produce the reports that the defendant did not subscribe to.

Increased Costs and Importance of Proportionality

The 800 pound gorilla of ESI, and electronic discovery (e-discovery) in general, is cost. For this reason, under the Federal Rules, costs must be proportional to the needs of the case. This often includes considering whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues. That said, the failure to produce ESI due to the proportional needs of the case is difficult to establish and courts typically require its production so long as it is relevant. This is particularly true where it is the injured plaintiff submitting the request to the defendant trucking company.

While the proportional needs vary case to case, so do the costs. These costs can include, but are not limited to, attorney's fees, ESI vendor's fees, other expert fees (i.e., forensic analysts or engineers), storage fees, and expenses related to the production itself. Because the costs can vary greatly, it is important to identify early the type of ESI present and retain the appropriate experts to collect and preserve the information. This brings us to another unintended consequence of ESI — the increased use of ESI vendors.

Increased Use of ESI Vendors

While the use of ESI vendors in e-discovery is undoubtedly associated with additional costs, in reality, their retention also increases efficiency. An ESI vendor not only possesses the knowledge and expertise to ensure proper collection and preservation of ESI, but also affords litigants the ability to quickly cull through large amounts of data and quickly eliminate duplicate or irrelevant documents. This is particularly important for certain types of ESI such as email and shared documents, which as discussed later, are becoming increasingly important in trucking litigation. For example, imagine the costs saved after the de-duplication process reduces the number of emails and documents needing review from 30,000 to only 15,000 by simply clicking a button. Likewise, searches can be performed which allow hundreds of emails or documents of a similar nature to be reviewed and categorized with the click of a few buttons. The truth is that none of these economical features are available in traditional paper based discovery. Consequently, while it is true that ESI adds costs, those costs can be minimized through the use of third-party vendors.

Increased Importance of Document Retention and Preservation

Vast amounts of ESI will also impact retention and preservation policies for motor carriers. As the volume of ESI increases, the risk of spoliation also increases because there is a greater chance of oversight. As a result, it is imperative for motor carriers to know what systems exist, what ESI is being generated, and have policies and procedures to ensure that all ESI is correctly identified, collected, and preserved.

Not only will there be more information to identify, collect, retain, and preserve, but as suspected, costs of doing so can add up over time. This is particularly true with respect to video from on-board cameras, which can be expensive to store. This in turn raises additional questions regarding retention policies and the length of time information will be retained. In short, every motor carrier should have a retention policy detailing the length of time that ESI will be retained and ensure compliance with the policy.

Conclusion

While the goal of using technology in the trucking industry is to improve safety, the fact remains that its use will also have significant, unintended consequences in litigation. This will be particularly true for handling suits against smaller fleets who may not initially have the resources or be as well positioned to handle these issues as their larger counterparts. Fortunately, as the entire industry is transformed, it is likely that third-party vendors will continue to expand their services by offering new devices and data storage to ensure compliance with regulations. While ESI will impact how attorneys litigate claims, if fleets (big and small), are adequately prepared and understand the importance of ESI, being called into the e-discovery game should not be as daunting of a task.

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