Playing Catch-Up:
The Intersection of Technology and Law

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3PL XTEND HYBRID XPERIENCE

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JW MARRIOTT RESORT, SAN ANTONIO

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AGENDA

- Mobile "App" Liability Considerations
- Electronic Bills of Lading / Touchless Delivery Best Practices
- Track & Trace / Telematics
- Data Privacy & Security Provisions
- Contracting Best Practices
- Telematics and Safety
- Liability Risks

Mobile "App" Liability Considerations

- **Driver Coercion**
  - Risk: Are you communicating directly with driver?
  - Solution: Eliminating messaging; communicate with dispatcher; training

- **Vicarious Liability**
  - Risk: Are you communicating directly with the driver, requiring ongoing updates, giving driver specific directions, etc.?
  - Solution: Eliminating messaging; bar messaging while vehicle in motion; qualifying "for informational purposes only"; training

Mobile "App" Liability Considerations

- **Joint Employment**
  - Risk: Similar to vicarious liability -- are you "controlling" the driver in some fashion?
  - Solution: Eliminating messaging; bar messaging while vehicle in motion; qualifying "for informational purposes only"; training

- **Broker as Carrier**
  - Risk: Are you assigning load directly to a particular driver?
  - Solution: Disclaimers; Training; IC v. employees

Mobile "App" Liability Considerations

- **Negligence**
  - Risk: Are you distracting the driver (alerts, push notifications, etc.)?
    - Solution: Eliminating messaging; bar messaging while vehicle in motion altogether; have a "passenger" mode; rely on 49 CFR 392.80 and 392.82
  - Risk: Are you failing to evaluate and take action based upon extensive data being collected by the "app"?
    - Solution: Only collect data that you actually intend to use
  - Risk: Does driver understand limited use of app?
  - Solution: EULA

- **Privacy**
  - Risk: Misuse of personal data
  - Solution: EULA (consents)

Electronic Bills of Lading

- No federal statutory or regulatory prohibition
  - Federal E-SIGN Act (2000)
  - Uniform Electronic Transactions Act (47 states have adopted UETA)
  - States have adopted the revised UCC Article 7

- Many (if not most) large carriers have adopted the technology

- FMCSA even made clear during the electronic logging device rulemaking process that "supporting documents" may be presented in any form (including electronic) with the exception of hazmat

- FMCSA Field Administrator guidance

Electronic Bills of Lading

- The BOL should be transmittable, printable, and recordable (saved) by all parties

- The BOL should be available to both shipper and carrier at origin and destination (and, for the carrier, during a roadside inspection)

- The BOL should be editable by shipper and carrier at origin and by carrier and consignee at destination (to note damage or other exceptions)

- The BOL should not be easily manipulated and should contain an audit trail

- Broker-generated BOL - Risks

Touchless Deliveries

- **Social Distancing**. Placement of BOL

- **Agreed Protocols (But Be Aware of Efforts to Amend Liability Provisions)**: "Any freight claims filed regarding shortage or damage will only be reviewed based upon the notation(s) made at time of delivery. Any claim filed for non-delivery or with additional notation(s) added after the fact will not be honored by Carrier."

- **"Delivery Confirmation" E-mails/Tech Solution**.
    - Familiar to parcel carriers
    - Customer service element

- **Contemporaneous Records**. If no protocol, each party should develop the best records that they can reasonably create at the time of pick up or delivery so that they have some evidence beyond the unsigned bill of lading (photos, videos, logs, etc.)

Track & Trace / Telematics

- How Telematics Can Provide Competitive Advantage for 3PLs
  - Track & Trace provides visibility for customers
  - Telematics also used for monitoring refrigerated loads and trailer availability

- When Too Much Data Creates Liability Exposure for 3PLs
  - If integrated with ELD, then access to HOS and other safety data
  - Risk: Sufficient to build safety profile/metrics from data and held to higher standard?
  - Solution: Do no collect data beyond scope of a broker

Data Privacy & Security Provisions

- Technology as a driver of change; Legal frameworks struggling to keep up

- Increased (and varied!) data protection frameworks

- Requires effective interdepartmental communication

- Practical result: More legal requirements, more user-facing content

- Remembering enforceability (be mindful of user experience (UX))

Contracting Best Practices

- Data-related provisions:
  - Data privacy vs. data security
  - Data protection obligations
  - DPAs (data processing/protection addenda/agreements)
  - International and non-U.S. considerations
  - Indemnification obligations
  - Managing liability and allocating risk

- Generally:
  - Communication between subject matter experts and legal counsel
  - Objective: Clearly define the rights and obligations of the parties

Contracting Best Practices

- 3PLs as technology providers and licensors
  - Use of and pass-through of third-party IP

- Multiple parties; Many moving pieces; Labeling (possibly misleading)

- User Experience; Driver experience in the totality; Driver as consumer

- Consent/agreement phrasing and location in process (e.g., check box, button placement, in-app notices, and workflow)

- Best practices vs. legal requirements

Telematics and Safety

The industry has evolved using telematics:

- **Up-to-the-minute insights about productivity and safety** in almost every area of management like freight visibility to safety scores to evidence-based accounting

- **Machine learning or AI that predicts potential issues** to help make impactful decisions

- **A system of checks and balances** to prevent human error

- **Automated software systems tracking and recording a carrier's history** that can create a centralized place for brokers to reference this data

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Telematics and Safety

- A dedication to safety is a large selling point in partnerships

- For example, in December 2020, Nationwide published market research that identified key themes for business owners with fleet vehicles. Two of those themes were:

  - Business owners are ready and willing to invest in telematics

  - Safety and operational benefits are top of mind for fleet owners

How to Avoid Becoming a "Helicopter" 3PL

- The key is to use telematics wisely and to not hover

- The right use of telematics can result in the highest level of quality control

- However, telematics can significantly increase potential liability if not implemented thoughtfully or if 3PL providers step over the line to become too controlling

- **The ultimate goal: to build a systematic culture of safety**

Liability Risks

Legal trends

- 3PLs are increasingly being named as defendants in negligent selection and vicarious liability lawsuits

- Telematic evidence represents to courts a new form of evidence that can ascertain facts of a case

- More instances of plaintiffs appealing to a jury's "reptilian brain" (the part that prioritizes safety and survival) by arguing that corporate defendants need to achieve perfect safety performance

A List of Don'ts: To Avoid Hovering

× Don't overly rely on telematics to select, evaluate, or engage with carriers

× Don't partner with carriers with proven history of unsafe practices

× Don't collect or hold evidence on behalf of the carrier

× Don't wait to take action when necessary

× Don't excessively interfere or control the carrier's operations!!!

A List of Dos: To Improve Safety and Reduce Exposure

- ✓ Prioritize safety by having procedures in place to facilitate proper selection and vetting, <u>and</u> following them

- ✓ Clearly define and communicate the specific metrics that you want to track (there is a thing as too much data!)

- ✓ Implement certain telematic parameters for carriers without controlling or monitoring them
  - E.g. automated systems that restrict the assignment of a load when certain criteria are not met by the carrier

- ✓ Recognize that a culture of safety does not start or end with technology, but with people