

DISTRACTED DRIVING

UNDERSTANDING YOUR BUSINESS RISK
AND LIABILITY



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ABSTRACT

This paper examines the deadly practice of driving while using a mobile device and the impact such behavior can have on business liability.

Part I of the paper provides a brief overview of the current research and statistics available on the dangers of using a cell phone while driving.

Part II tracks recent legislative and administrative developments concerning regulation of drivers' usage of mobile devices while driving.

Part III considers how the principles of tort law interact to make business employers liable for the distracted driving of their employees, and highlights numerous distracted driving cases resulting in enormous employer liability.

Part IV examines traditional steps taken by companies to manage distracted driving risks and explains why such measures can be insufficient to minimize liability.

Finally, Part V identifies a solution to the problem and explains how innovative software is helping corporations to enforce written policies and minimize liability stemming from distracted driving.

I. RESEARCH AND STATISTICS

The U.S. Department of Transportation estimates that at any given moment in our country, 812,000 vehicles are being driven by someone using a hand-held cell phone.¹ Given that statistic, one might expect cell phone usage while driving would be a major cause of car crashes. The actual numbers, though, are truly staggering:

- Each year, cell phone distractions cause 600,000 crashes, 330,000 injuries, and 3,000 deaths. This works out to more than 1,643 crashes, 904 injuries, and 8 deaths *per day*.²
- By the end of 2008, 110.4 *billion* text messages were sent in the United States *every month*, more than ten times the number just three years before.³
- As many as 25% of automobile crashes are caused by driver distraction due to mobile phone usage.⁴
- Drivers dialing phone are 2.8 to 5.9 times more likely to crash/near miss; drivers texting are 23 times more likely to crash/near miss.⁵
- A study published in the *New England Journal of Medicine* determined that the risk of accident caused by cell phone use is equal to the risk caused by legal intoxication.⁶ Other studies show that the number of distracted driving fatalities now far surpasses the number of fatalities caused by drunk driving.⁷
- In 2008 alone, crashes caused by distracted driving cost over \$40 *billion*.⁸
- On-the-job crashes cost employers over \$24,500 per crash, \$150,000 per injury, and \$3.6 million per fatality.⁹

These numbers provide a taste of the truly lethal threat posed by irresponsible use of cell phones while driving, and they indicate a trend that is showing no signs of slowing. In light of these statistics, it is little wonder that Ray LaHood, U.S. Secretary of Transportation, recently declared that “distracted driving has gone from a dangerous practice to a deadly epidemic.”¹⁰

¹ U.S. Dep’t of Transportation, “D!STRACTION.GOV,” <http://www.distraction.gov>.

² Harvard Center for Risk Analysis.

³ Insurance Information Institute (citing a study conducted by CTIA – The Wireless Association), available at <http://www.iii.org/media/hottopics/insurance/cellphones>.

⁴ National Highway Traffic Safety Administration (NHTSA) and Virginia Tech Transportation Institute (VTTI).

⁵ Virginia Tech Transportation Institute (VTTI), 2009.

⁶ Donald A. Redelmeier & Robert J. Tribshirani, *Association Between Cellular-Telephone Calls and Motor Vehicle Collisions*, 336 *New Eng. J. Med.* 453, 456 (1997).

⁷ Car & Driver Magazine & American Beverage Institute.

⁸ Network of Employers for Traffic Safety (NETS).

⁹ National Highway Traffic Safety Administration (NHTSA) & Federal Motor Carrier Safety Administration (FMCSA).

¹⁰ Ray LaHood, U.S. Secretary of Transportation, *Driven with Distraction*, *Washington Post*, Nov. 28, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/27/AR2009112702320.html>.

II. LEGAL AND REGULATORY FRAMEWORK

As the issue of distracted driving has risen to prominence on the national agenda, lawmakers, Cabinet-level executive officers, corporate decision-makers, and industry leaders have all recognized the danger of taking one's "eyes off the road" and "hands off the wheel" to use a cell phone while driving.

In January 2010 alone, three more states (New Hampshire, Oregon, and Illinois) effectuated laws that ban texting and emailing while driving, bringing to 21 the total number of states and territories that currently prohibit the practice.¹¹ Additionally, states such as California, New York, Washington, New Jersey, and others have banned talking on a cell phone altogether unless a hands-free device is used.¹² The extreme danger posed by texting and emailing while driving has also spurred the federal government into action. Last month, the House of Representatives adopted an order prohibiting 8,000 House staff members from texting and emailing while driving.¹³ And in October, President Obama issued Executive Order 13513, set to take effect this week, which bans all federal employees from typing on a mobile phone while driving.¹⁴ Interestingly, other countries around the world have long prohibited the use of cell phones when driving: Great Britain made it a criminal offense to use a cell phone while driving in 2003,¹⁵ and Japan outlawed use of a cell phone while driving in 2002 (and made it punishable by up to three months imprisonment).¹⁶

According to policy analysts, as more and more research comes to light concerning the dangers of distracted driving, laws targeting the usage of cell phones and other mobile devices while driving will only continue to grow in 2010. Across the country, state lawmakers on both sides of the aisle have already proposed over 200 new bills to combat distracted driving.¹⁷ For example, Kansas lawmakers have proposed outlawing texting while driving, New Jersey will consider banning drivers from manipulating a navigation system in a moving vehicle, and South Carolina is set to debate a proposal to ban drivers from using cell phones altogether.¹⁸ Additionally, four federal bills currently pending in Congress seek to curb various

¹¹ States and territories currently banning texting while driving are as follows: Alaska, Arkansas, California, Colorado, Connecticut, District of Columbia, Guam, Illinois, Louisiana, Maryland, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, Tennessee, Utah, Virginia, and Washington.

¹² States and territories currently banning use of a phone without a hands-free device while driving are as follows: California, Connecticut, District of Columbia, New Jersey, New York, Oregon, Virgin Islands, and Washington.

¹³ Matt Richtel, *Bills to Curb Distracted Driving Gaining Momentum*, N.Y. Times, Jan. 1, 2010, available at <http://www.nytimes.com/2010/01/02/technology/02distracted.html>.

¹⁴ Exec. Order No. 13,513, *Federal Leadership on Reducing Text Messaging While Driving*, 74 Fed. Reg. 51,225 (October 1, 2009).

¹⁵ Jessica Croze, *How Hands-On Will Regulation of Hands-Free Be? An Analysis of SB 1613 and the Effectiveness of Its Proposed Regulation*, 31 *Hastings Comm. & Ent. L.J.* 463, 467 (2009).

¹⁶ Paul K. Hentzen, *The Trouble with Telematics: The Uneasy Marriage of Wireless Technology and Automobiles*, 69 *UMKC L. Rev.* 845, 861 (2001).

¹⁷ Richtel, *supra* note 13.

¹⁸ *Id.*

types of cell phone and mobile device use by drivers, and policy experts foresee “dozens more [new bills] in the coming months.”¹⁹

This wave of legislative and regulatory efforts aimed at reducing the dangers of distracted driving appears to be gaining even more momentum. This week, the U.S. Department of Transportation unveiled a brand new website, www.distraction.gov, aimed entirely at educating business leaders and the general public about the dangers of distracted driving.²⁰ Simultaneously, the Department of Transportation launched a television ad campaign imploring motorists to exercise “the common sense not to talk and text when you drive.”²¹ Additionally, legislative aides report that proposals aimed at reducing distracted driving are “being met with less resistance than in years past from legislators.”²² Given the results of a recent poll conducted by CBS News and the New York Times, in which 90 percent of Americans favored outlawing texting and driving,²³ this receptiveness is unsurprising. Yet perhaps most importantly of all, proposals to limit cell phone usage while driving are for the first time garnering widespread industry support, as “cellphone and auto companies have joined lobbying efforts for legislation to ban texting while driving.”²⁴ With industry support, near-unanimous public opinion, and a broad consensus across the political spectrum, laws regulating the use of mobile devices while driving seem destined for further development.

III. BUSINESS LIABILITY ARISING FROM USE OF MOBILE DEVICES WHILE DRIVING

Thus far, this paper has established that:

- (1) Using a cell phone or other mobile device while driving is incredibly dangerous; and
- (2) Lawmakers and other governmental officers have recognized this danger and have enacted laws and regulations to curb the use of cell phones while driving.

While this information creates an important basis for understanding the danger caused by cell phone use when driving, it provides only the backdrop for the ominous problem looming large over any company’s risk management plan: the potentially massive liability faced by businesses whose employees use cell phones while driving.

Under the legal theory of *respondeat superior*, commonly referred to as vicarious responsibility, an employer is liable for the actions of an employee if the employee was acting

¹⁹ Id.

²⁰ U.S. Dep’t of Transportation, “D!STRACTION.GOV,” <http://www.distraction.gov>.

²¹ U.S. Dep’t of Transportation, “Calling Plan,” *available at* <http://www.youtube.com/watch?v=Su3xvFlfZPE>.

²² Richtel, *supra* note 13.

²³ CBS News, *Poll: 90 Percent Say Ban Texting in Cars*, Sept. 27, 2009, *available at* <http://www.cbsnews.com/stories/2009/09/27/national/main5345307.shtml>.

²⁴ Id.

within the scope of his or her employment at the time of the accident. Thus, if an employee acting within the scope of employment causes some injury through negligent conduct, the victim is entitled to sue the employer directly for damages. More specifically, if an employee operates a vehicle negligently as a result of using a cell phone and injures another motorist or pedestrian, that victim may sue the employer directly.

Tort law is very unforgiving to employers in these situations in three ways:

- (1) It is very difficult to convince a jury that an employee who was using a cell phone at the time of an accident was not negligent;
- (2) Tort principles define scope of employment very broadly; and
- (3) Even if an employer is not subject to vicarious liability, it can also be sued directly in its own capacity for failing to take adequate steps to prevent distracted driving.

As a result of the interplay between these three principles, businesses are frequently left with little choice but to attempt to settle the case prior to trial, often for millions or tens of millions of dollars.

DIFFICULTY IN DISPROVING

When an employee is involved in an accident while using a cell phone or other mobile device, it is nearly impossible for either the driver or his/her employer to argue that the driver was not negligent. First, the existence of detailed cell phone records often provides plaintiffs' attorneys with smoking-gun evidence that a driver was using a cell phone at the time of an accident,²⁵ and courts have held that plaintiffs are entitled to obtain the cell phone records of a defendant driver through discovery.²⁶ Moreover, in the many states that have already banned cell phone use while driving, an employee who causes an accident while using a cell phone will automatically be considered negligent under the legal doctrine of *negligence per se*,²⁷ which provides that any act which violates a safety statute will be considered negligent so long as the resulting harm was of the type the statute was designed to prevent.²⁸ Simply put, because cell phone bans are designed to ensure the safety of other passengers on the road, the mere act of using a cell phone while driving in violation of state law automatically makes the driver negligently liable for any injuries he or she may cause. Given the proliferation of laws banning specific types of cell phone use while driving, discussed above, the financial

²⁵ B. Mitchell Simpson III, Don't Curse'Em, Sue 'Em: Cell Phone Use While Driving as Evidence of Negligence, 57 R.I. Bar J. 17, 17 (2009); see also Gray v. Prince George's County of Maryland, discussed in further detail below.

²⁶ See *Morano v. Slattery Skanska, Inc.*, 846 N.Y.S.2d 881 (N.Y. Sup. Ct. 2007).

²⁷ In some jurisdictions, the doctrine of negligence per se gives rise only to a rebuttable presumption of negligence when a statute is violated. Yet even in these jurisdictions, the presumption of negligence is often difficult to rebut.

²⁸ Restatement (Second) of Torts § 286.

impact of the negligence per se doctrine upon employers will only continue to grow in coming years.

But even in the states that have yet to implement bans on cell phone use while driving, both case law and recent legal scholarship indicate that courts are likely to allow plaintiffs to introduce the fact that a defendant driver was using a cell phone at the time of an accident as evidence of the defendant's negligence.²⁹ The mere fact that these states permit a plaintiff, especially one who has been seriously injured and is likely to be viewed sympathetically, to introduce evidence that an employee of a corporate defendant was distracted by a phone while driving is an incredibly powerful tool in a jury trial. For example, Florida does not prohibit talking on a phone while driving, and yet a 2002 case in that state resulted in a \$21 million jury award against a corporate defendant after the plaintiff proved that the corporation's employee was distracted by the phone at the time of the accident.³⁰

SCOPE OF EMPLOYMENT DEFINED BROADLY

In addition to the difficulty in disproving negligence, an employer also will have a tough time persuading a court or a jury that its employee was outside the scope of employment. Under traditional tort principles, an employee is considered to be within the scope of employment whenever the employee's action, at least in part, provides a benefit to the employer.³¹ Given this broad definition, courts have consistently found that employees conducting employer business via a mobile phone while driving are within the scope of employment, thus making the employer liable under a theory of vicarious responsibility.³² Even in cases where an employee was using a mobile phone while driving outside of normal business hours³³ or en route to a non-business event,³⁴ courts have nevertheless held that the employees were within the scope of employment and have permitted claims against employers to move forward under a theory of vicarious responsibility. And plaintiffs' lawyers, always on the look-out for the "deep pocket" defendant, have utilized the broad definition of scope of employment with stunning success.

Yoon v. Wagner, a case from Virginia serves as an excellent cautionary tale in this regard.³⁵ In *Yoon*, a pedestrian was struck and killed by a car driven by an attorney working for the law firm Cooley Godward. At the time of the accident, the attorney was talking on her cell phone with another lawyer. Even though the phone call occurred well outside of the

²⁹ See *Hiscott v. Peters*, 754 N.E.2d 839, 849 (Ill. App. 2001); *McCormick v. Allstate Ins. Co.*, 870 So. 2d 547, 551 (La. App. 2004); see also Simpson, *supra* note 25, at 17, 21.

³⁰ *Bustos v. Leiva & Dyke Industries*. Following the verdict, the case was subsequently settled for \$16.2 million.

³¹ W. Page Keeton et al., *Prosser & Keeton on the Law of Torts*, 500-01 (5th ed. 1984).

³² See, e.g., *Tiburvi v. Holmes Transp. Inc.*, No. 4:08 CV 1151, 2009 U.S. Dist. LEXIS 73720 (E.D. Mo. Aug. 20, 2009); see also *Bustos v. Leiva & Dyke Indus.*, *infra* note 40 and accompanying text; *Smith v. Beers Skanska, Inc.*, *infra* notes 43-44 and accompanying text.

³³ See *Yoon v. Wagner*, *infra* notes 33-35 and accompanying text.

³⁴ See *Solomon Smith Barney*, *infra* notes 36-38 and accompanying text.

³⁵ See Ed Poll, Cell phones – Great New Technology or Latest Per Se Negligence?, American Bar Association, Nov. 2005, available at <http://www.abanet.org/lpm/lpt/articles/mtt01051.html>.

normal time and space of the attorney's employment (the accident occurred at 10:30 pm), the court nevertheless held that the lawyer was *within* the scope of employment, thus subjecting Cooley Godward to vicarious liability. Despite the late hour of the accident, the court pointed out that part of the lawyer's job was to log billable hours through phone calls and that this particular call had been designed to benefit the attorney's firm.³⁶ In the end, the lawyer was ordered to pay the plaintiffs \$2 million out of her own pocket, and Cooley Godward settled with the plaintiffs for an additional undisclosed sum.³⁷

DIRECT LIABILITY FOR EMPLOYERS

Even if an employee is outside the scope of employment at the time of an accident, an employer might still be directly liable under a negligence theory of liability (as opposed to a vicariously liable under *respondeat superior*) if the business provided the employee with the cell phone or expected/permitted the employee to make use of the cell phone while driving.³⁸ A recent case from Pennsylvania is illustrative in this regard. In that case, a stockbroker employed by Salomon Smith Barney was driving to a non-business event when he struck and killed a 24-year-old motorcyclist. At the time of the accident, the stockbroker was on personal time, but he admitted that he had been making "cold calls," a common practice amongst Salomon Smith Barney's stockbrokers, in an effort to contact some of his clients.³⁹ The plaintiff (the surviving spouse of the motorcyclist) alleged that Salomon Smith Barney was liable both vicariously under principles of *respondeat superior* and directly under a negligence theory. Even though Salomon Smith Barney believed it could prove that the employee was outside the scope of employment at the time of the accident (thus defeating the vicarious liability claim), and even though the employee had used a personal cell phone while on personal time to make the calls, the company nevertheless agreed to a half-million dollar settlement.⁴⁰ Essentially, the company recognized that because it permitted and expected its employees to make cold calls while driving, the company policy itself might be deemed negligent, and so it settled rather than face the possibility of paying out a large jury verdict after trial.

ADDITIONAL CASES

Against this legal backdrop, businesses are faced with a harsh reality: if one of their employees causes an accident while distracted by the use of a mobile phone, it is the business that will have to pay. And this is hardly a hypothetical risk, as numerous plaintiffs have filed and won multi-million dollar actions against businesses for injuries arising from the

³⁶ Laura Parker, *Cell Phone Suits Targeting Firms*, USA Today, Dec. 25, 2002, available at http://www.usatoday.com/news/nation/2002-12-25-cellphone-usat_x.htm.

³⁷ Matt Sundeen, *Cell Phones and Highway Safety*, National Conference of State Legislatures: 2006 State Legislative Update, at 11 (2007), available at <http://www.ncsl.org/print/transportation/2006cellphone.pdf>.

³⁸ Jordan Michael, *Liability for Accidents from Use and Abuse of Cell Phones: When Are Employers and Cell Phone Manufacturers Liable?*, 79 N. Dak. L. Rev. 299, 305-06 (2003).

³⁹ *Id.*

⁴⁰ *Id.* at 306.

negligent driving of an employee who was distracted by use of a mobile phone. In addition to the cases discussed above, the following cases provide further evidence of this trend:

- **Tiburzi v. Holmes Transport, Inc.**⁴¹ – \$18 million verdict (2009): In this case, the plaintiff sustained serious brain injuries which have left him in a permanent vegetative state after being struck by an 18-wheel truck being driven by an employee of the defendant. At trial, a federal judge found that at the time of the accident, the truck driver had flipped open his cell phone and was checking it for text messages. Holmes Transport was found to be liable under a theory of vicarious responsibility. Three other people were killed in the accident, and their suits against Holmes are still pending. A previous case brought against Holmes arising from the same accident resulted in a jury award of \$700,000 to a plaintiff who sustained a broken leg and concussion in the accident.⁴²
- **Ford v. McGrogan & International Paper** – \$5.2 million settlement⁴³ (2008): Here an employee of International Paper rear-ended another car while distracted by use of a mobile phone. The plaintiff, whose arm had to be amputated as a result of the crash, sued International Paper under a theory of vicarious responsibility. Even though International Paper had previously adopted a policy banning employees from using a cell phone while driving, it nevertheless agreed to settle the case for \$5.2 million. This case, and its implications for businesses looking to manage risk, is further discussed below.
- **Bustos v. Leiva & Dyke Industries** – \$21 million verdict⁴⁴ (2001): This record-setting award arose from an accident in which an elderly woman was seriously injured after being struck by a truck driven by an employee of lumber giant Dyke Industries. Although the employee initially denied being distracted at the time of the accident, his cell phone records proved that he had been using his phone at the time the crash occurred. Because the employee was in a company truck and on-duty at the time of the accident, Dyke Industries was held liable under a theory of vicarious responsibility. The case was subsequently settled for \$16.2 million.
- **Gray v. Prince George's County of Maryland** - \$4 million verdict⁴⁵ (2009): In this case, a college student was killed when his car was struck by an off-duty police officer. At the time of the accident, the officer was speeding, and cell phone records showed that he had either sent or received a text message in the moments prior to the

⁴¹ *Tiburzi v. Holmes Transp., Inc.*, No. 4:08 CV 1151, 2009 U.S. Dist. LEXIS 73720 (E.D. Mo. Aug. 20, 2009).

⁴² Angela Riley, *Federal Judge Awards \$18M to Man who Suffered Brain Injury in Crash*, All Business, Aug. 20, 2009, available at <http://www.allbusiness.com/legal/trial-procedure-judges/12709994-1.html>.

⁴³ Matt Richtel, *At 60 M.P.H., Office Work Is High Risk*, N.Y. Times, Sept. 30, 2009, available at <http://www.nytimes.com/2009/10/01/technology/01distracted.html>.

⁴⁴ Paul Prentiss, *Commentary: Employers Should Protect Themselves Against Liability*, Daily Reporter, Feb. 24, 2003, available at http://findarticles.com/p/articles/mi_qn5302/is_20030224/ai_n24421545/.

⁴⁵ Ruben Castaneda, *Coporal Either Sent or Got Text, Witness Says*, Washington Post, Sept. 16, 2009.

collision.⁴⁶ The county was held liable under a theory of vicarious responsibility because the officer was driving his police cruiser at the time of the accident.

- **Smith v. Beers Skanska, Inc.** - \$5 million settlement⁴⁷ (2005): Here the plaintiff was injured when his car was struck by a truck being driven by an employee of Beers Skanska, Inc., an international construction company. At the time of the accident, the employee had taken his eyes off the road to dial his phone and check voicemail.⁴⁸ Because the employee was on-duty and using a work-issued cell phone, Beers Skanska was held to be vicariously liable. Although the case initially went to trial, Beers Skanska agreed to a \$5 million settlement four days into the trial.
- **State of Hawaii** - \$1.5 million verdict⁴⁹ (1996): The plaintiff in this case was struck and killed by a car driven by a public school teacher as he crossed the street. The teacher was distracted by her cell phone at the time of the accident.⁵⁰ Because the teacher was determined to be within the scope of employment, her employer (the state) was held to be vicariously liable for \$1.5 million of the total \$7.5 million in damages awarded to the plaintiff.

While these cases are representative of the type of liability faced by businesses whose employees mix driving and mobile phone usage, countless other companies have been forced into settlements in which the details are confidential. In 2007, for example, the driver of a Coca-Cola delivery truck took his eyes off the road to look at a mobile device in his passenger seat. Seconds later his truck slammed into a car being driven by Samantha Earnest, killing Ms. Earnest's seven-year-old son, Jason, on impact.⁵¹ Coca-Cola eventually reached a settlement with the Earnest family, and though the terms of the settlement are confidential,⁵² the cases discussed above provide observers with an idea of the type of cost likely involved.

IV. DIFFICULTIES OF MANAGING RISK AND LIMITING LIABILITY

The enormity of the risk caused by cell phone usage while driving has not been lost on corporate executives, but how might a company best protect itself from such crippling liability? Recognizing that businesses must do something to manage their potentially massive liability, hundreds of companies have instituted various types of safe driving policies that ban certain

⁴⁶ Id.

⁴⁷ Mike Tierney, *Hang Up and Drive: Firms Take a Look at Liability*, Atlanta Journal-Constitution, Feb. 28, 2005.

⁴⁸ Id.

⁴⁹ Sundeen, *supra* note 37, at 11.

⁵⁰ Id.

⁵¹ Richtel, *supra* note 43.

⁵² Id.

types of employee cell phone use while driving.⁵³ Johnson & Johnson, DuPont, and the New York City Taxi and Limousine Commission are just a few of the companies who recognized early on the need to prohibit cell phone use while driving.⁵⁴ Similarly, Exxon Mobil banned all employees and contractors from using a cell phone while driving in 2004.⁵⁵ Soon thereafter, companies like Shell Oil and AMEC, an international engineering and project management firm, followed suit.⁵⁶ Following this trend, the California Association of Employers recommends that *all* businesses implement a policy requiring employees to pull off the road before conducting any business by cell phone.⁵⁷

But is a company policy prohibiting employees from using cell phones while driving without a hands-free device sufficient to insulate a company from liability? Recent case law has answered this question with a resounding, “No.”

In addition to Johnson & Johnson, DuPont, and Exxon, another company which instituted a ban on employee cell phone use while driving was International Paper. However, as discussed above, just last year International Paper was forced into a \$5.2 million settlement after one of its employees caused an accident while distracted by use of a cell phone.⁵⁸ In that case, the employee who caused the accident had momentarily ignored International Paper’s ban on using a cell phone while driving. Despite having implemented a paper policy against cell phone use, International Paper recognized that it likely still would be held vicariously responsible for its employee’s actions, and it was forced to take a multimillion dollar hit in the form of a settlement. In an interview with the *New York Times*, Katherine McArthur, the plaintiff’s attorney in the International Paper case, warned that “companies should expect more such lawsuits” in the future.⁵⁹

The misfortune of International Paper should serve as a clear reminder to businesses around the country that the mere presence of a paper policy will not insulate an employer from liability arising from employees who drive while distracted by cell phones. For although adopting a policy against employee cell phone use is a good first step, the problem with stopping at this point, as International Paper learned the hard way, is that a paper policy depends entirely on employee self-enforcement. The words of one risk management consultant are particularly revealing in this regard: “[O]ne way to protect your business is with a strong company policy prohibiting distracted driving. . . . *You might still have a rogue employee who ignores it and multi-tasks behind the wheel while driving anyway . . . [but] it’s better than nothing.*”⁶⁰ Implicit in this statement is a hard truth that businesses must face: if

⁵³ Id.

⁵⁴ Michael, *supra* note 38, at 301-02.

⁵⁵ Richtel, *supra* note 43.

⁵⁶ Id.

⁵⁷ Insurance Information Institute, *available at* <http://www.iii.org/media/hottopics/insurance/cellphones>.

⁵⁸ Richtel, *supra* note 43.

⁵⁹ Id.

⁶⁰ Hanna Hasl-Kelchner, *Distracted driving and business legal liability*, All Business, July 2, 2009 (emphasis added), *available at* <http://www.allbusiness.com/media-telecommunications/telecommunications/12378777-1.html>.

they want to reduce crashes and minimize liability, they must go further than merely adopting a paper policy.

V. SIMPLE AND EFFECTIVE SOLUTION

In short, employers must find a simple, direct, and reliable way of helping their employees avoid distractions on the roadway. Although such a panacea may not have been available to businesses in years past, technological developments now make possible this type of simple and effective risk management. ZoomSafer, a company at the forefront of these exciting new technologies, offers businesses software that can be easily installed on an employee's smart phone to help prevent distracted driving. ZoomSafer software can be activated manually by the employee at the time he/she starts to drive. Alternatively, ZoomSafer can activate itself by using GPS signals to automatically detect when the employee is driving. Additionally, the program manages inbound calls, texts and emails according to preference and can automatically notify others when the owner of the cell phone is driving.

Additionally, ZoomSafer includes an optional "passenger exit" function to be used when the user of a mobile device is traveling as a passenger (e.g. in a taxi, train, bus, etc.) Essentially, this function "snoozes" the software for a period of time, allowing the mobile device to be used in "full fidelity" mode. Of course, there remains the possibility that a user could "lie" to the interface and choose the "passenger exit" option even though they are driving. However, ZoomSafer permits employers to manage the controls on an individual device level, and each employer can make its own determination about whether an employee or class of employees should be able to utilize the passenger exit function. If the employees are trained properly and adequate enforcement systems are put into place, then "passenger exit" should be included in the policy that is applied. If, however, an employer has concerns about the willingness of an employee to comply with the company policy against using cell phones while driving, then the employer has the option of eliminating the "passenger exit" function from the policy.⁶¹

Thus, the primary advantage of ZoomSafer's product is that instead of depending on individual employee compliance with a company's cell phone policy, it enables the employer to directly manage an employee's ability to access a cell phone while driving. Companies like Exxon, DuPont, International Paper, and hundreds of others have already recognized the desirability of prohibiting employees from using cell phones while driving – both as a matter of safety and risk management – but they have thus far lacked the ability to reliably enforce these policies. ZoomSafer fills this void by providing businesses with a cost effective tool that enables corporations to actively enforce paper-based safe driving policies. Thus, in the event

⁶¹ Additionally, ZoomSafer provides employers with feedback in the form of data about the usage of each mobile device. Among other things, this data will flag users who are abusing the "passenger exit" function and allow the employer to target these employees for remedial training on safe driving conduct, adjust the policy applied to their mobile devices, and, if necessary, terminate repeat offenders.

of an employee-caused car accident, this additional layer of control can be critical in insulating an employer from vicarious liability.

Consider the following two situations.

- **Company A**, having recognized the danger posed by usage of a mobile device while driving, adopts a policy banning employees from using cell phones while driving. Company A has not availed itself of the ZoomSafer software, and so it relies on individual employee compliance with its policy. One of its employees violates company policy, uses his phone while driving, and is involved in a car accident causing serious injuries to others. Company A gets sued by the victims of the crash for millions of dollars under a theory of vicarious responsibility. The attorneys for Company A recognize that even though Company A banned employees from using cell phones, the fact that it took no steps to enforce this policy will make it difficult to argue at trial that the company should be absolved of vicarious responsibility. Thus, despite the company policy, the attorneys recommend that Company A settle the suit for \$5 million instead of going to trial and risking a \$15 million verdict. This is what happened in the International Paper case, discussed above.⁶²
- **Company B**, also recognizing the senseless risk inherent in using a mobile device while driving, institutes a company policy banning employees from using cell phones while driving. In order to effectuate this policy, Company B installs ZoomSafer software on the mobile devices of its employees. Company B elects to include the “passenger exit” mode on the devices of its employees, but it requires employees to attend mandatory training sessions in which it emphasizes that the “passenger exit” mode must not be misused and that employees are not to ever use their cell phones while driving. The vast majority of Company B’s employees follow the rules and exhibit safer driving behavior as a result, greatly minimizing Company B’s tort liability risk. Yet one employee misuses the “passenger exit” function, uses his phone while driving, and is involved in a car accident causing serious injuries to others. Company B gets sued by the victims of the crash for millions of dollars under a theory of vicarious responsibility. In responding to the suit, Company B’s attorneys realize that they are in a position of strength. First, they can convincingly argue that Company B should not be held vicariously liable because it not only adopted a policy against cell phone usage while driving, but it also took concrete steps to enforce the policy. Second, Company B can argue that as soon as the employee “lied” to the software in order to utilize “passenger exit” mode, thereby acting against the express direction of his employer, he ceased to act as an agent of the company and therefore was outside the scope of employment at the time of the accident. In either case, Company B is in a much stronger position to defend against the suit that was Company A in the first example. As a result, Company B can push for either a small settlement (possibly one not

⁶² See *supra* note 43 and accompanying text.

exceeding its insurance policy limit) or forge ahead to trial with two cogent exculpatory arguments.

In short, by installing the ZoomSafer software, companies can avoid the “International Paper problem” of employees who choose not to adhere to a written policy, and they can effectively manage their risk by avoiding the massive liability commonly associated with distracted driving.

VI. ABOUT THE AUTHORS

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