

Both Hands on the Wheel

by Devala A. Janardan, Associate Counsel

A new research report released in July 2009 by the Virginia Tech Transportation Institute (VTTI) shows that drivers who are text-messaging had the highest risk, compared to other cell phone tasks, of being involved in a crash or near crash.[1] The study shows a 23-fold increase in the risk of a crash or near crash when texting compared to an individual who did not use a phone while driving.[2] Consider the VTTI study in light of the following figure, provided by a wireless communications industry trade group: 110 billion text messages were sent in the United States in the month of December 2008, an eleven-fold increase from the same period in 2005.[3] Statistics such as these have now grabbed the attention of all levels of government, and in July 2009, members of Congress introduced a bill that, if passed, will essentially ban drivers throughout the United States from texting while driving.

The bill is S.1536, the Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009 (ALERT).[4] The bill, introduced by U.S. Senators Charles Schumer (D-N.Y.), Robert Menendez (D-N.J.), Mary Landrieu (D-L.A.), and Kay Hagan (D-N.C.), requires the Secretary of Transportation to reduce Federal highway funding by 25% to any state that does not enact a law that prohibits, except in an emergency, "an individual from writing, sending, or reading text messages while operating a motor vehicle." A "motor vehicle" is defined as "a vehicle driven or drawn by mechanical power and manufactured primarily for use on public highways" and also includes any "railcar or other component of a fixed guideway system that is not subject to regulation by the Federal Railroad Administration." The inclusion of railcar-type vehicles in the definition of "motor vehicle" can be attributed to recent mass transit accidents, including a commuter train accident[5] in Los Angeles that killed 25, where the conductor was texting. A state would have roughly two years to enact such a law. While introducing the bill, Senator Schumer stated that "studies have shown over and over that texting while driving is dangerous and it's time to take action to prevent the tragic accidents that result from this activity. …We have seen too many lives ruined due to drivers recklessly using their cell phones. With this new legislation, drivers will finally be held responsible for dangerous behavior that puts the public at risk."[6]

Of course Congress is not the first out of the gate on this issue. According to the Insurance Institute for Highway Safety, text messaging is already banned for all drivers in 17 states and the District of Columbia. An additional nine states ban texting for drivers considered "novice" drivers, which can be defined as those with a learner's permit;[7] and/or individuals under 18,[8] 19,[9] or 21;[10] and/or those that have had a driver's license for less than one year.[11] Cities, including Chicago, Cleveland, Detroit, Santa Fe, and more have also passed similar laws.

The penalty for violating a texting law varies. S.1536 does not set a penalty but states that the Department of Transportation (DOT) Secretary will promulgate regulations that "specify a minimum penalty for a first offense" and "stipulate that penalties be graduated for repeated offenses."[12] It will be interesting to see how DOT sets the penalty for this offense. As a quick survey, Virginia has a $20 fine for the first offense; $50 for the second offense.[13] Illinois is $75 for the first offense.[14] The City of Cleveland is $100 for the first offense, $250 for the second offense, and a whopping $500 for a third offense.[15]

In addition to legislators at the federal, state, and local levels, federal agencies are also getting involved in the discussion. Department of Transportation Secretary Ray LaHood has announced a summit to address the dangers of text messaging that will take place around the release of this issue of *Municipal Lawyer*. Sec. LaHood states, "If it were up to me, I would ban drivers from texting, but unfortunately, laws aren't always enough…. We've learned from past safety awareness campaigns that it takes a coordinated strategy combining education and enforcement to get results. That's why this meeting with experienced officials, experts and law enforcement will be such a crucial first step in our efforts to put an end to distracted driving."[16] Looks like everyone wants to be in the driver's seat on this one.

IMLA will keep you updated via our upcoming Twitter feed, but please don't look it up while you make your morning commute.

Notes

1. Press Release, VTTI, *New Data From VTTI Provides Insight into Cell Phone Use and Driving Distraction* (July 27, 2009) (on file with author).
2. *Id.*
3. CTIA – The Wireless Association, *Wireless Quick Facts*, http://www.ctia.org/advocacy/research/index.cfm/AID/10323 (last visited Aug. 12, 2009).
4. Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009, S.1536, 111th Cong. (2009).
5. Joel Rubin et al., *Total Destruction: At Least 17 die in head-on Metrolink Crash*, L.A. Times, Sept 13, 2008, at http://www.latimes.com/news/local/la-me-traincrash13-2008sep13,0,2874450.story.
6. Press Release, Office of Senator Charles E. *Schumer, Schumer, Menendez, Landrieu and Hagan Unveil First-Ever Legislation to Ban All Drivers From Texting While Operating a Vehicle* (July 29, 2009) (on file with author).
7. Delaware, Kansas, Maine, Mississippi, Nebraska, West Virginia.

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25. *See, e.g.*, In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896, 908 (3d Cir. 1995).
26. Law Enforcement Labor Serv., Inc. v. County of Mower, 483 N.W. 2d 696, 701 (Minn. 1992).
27. Navlet v. Port of Seattle, 194 P.3d 221, 231 (Wash. 2008).
28. Jeannot v. N. H. Personnel Comm'n, 392 A.2d 1193, 1195 (N.H. 1978); Thorning v. Hollister Sch. Dist., 11 Cal. App. 4th 1598 (Cal. Ct. App. 1992); Opinion of the Justices, 303 N.E.2d 320 (Mass. 1973).
29. *See, e.g.*, *Navlet*, 194 P.3d at 238; City of Anchorage v. Gentile, 922 P.2d 248, 260 (Alaska 1996).
30. *See, e.g.*, Hous. and Redev. Auth. of Chisholm v. Norman, 696 N.W.2d 329 (Minn. 2005); Beggs v. City of Portales, 210 P.3d 798 (N.M. 2009).
31. Poole v. City of Waterbury, 831 A.2d 211, 234 (Conn. 2003).
32. *Id.* at 233-34.
33. *Id.* at 235.
34. 11 U.S.C. § 901, *et seq.* (West 2009).
35. 11 U.S.C. § 365 (West 2009). This, in general, provides that the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
36. U.S. CONST. art. 6, cl. 2.
37. In re City of Vallejo, 403 B.R. 72 (Bankr. E.D. Cal. 2009). ML

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8. Indiana, Nebraska, West Virginia.
9. Illinois.
10. Missouri.
11. Texas.
12. S.1536, §3.
13. Tara Morgan, *Since New Virginia Texting While Driving Law, Five People Ticketed*, NBC12News, July 31, 2009, at http://www.nbc12.com/Global/story.asp?S=10823369.
14. Theresa Gutierrez, *Quinn Signs Texting Ban Bill*, abc7chicago.com, Aug. 6, 2009, at http://abclocal.go.com/wls/story?section=news/local&id=6951218.
15. Kristyn Soltis, *Cleveland Bans Texting While Driving*, kentnewsnet.com, July 8, 2009, at http://media.www.kentnewsnet.com.
16. Press Release, Dept. of Transportation, *DOT Secretary Ray LaHood Announces Distracted Driving Summit* (Aug. 4, 2009) (on file with author). ML

SUPREME COURT

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of murder. The primary witness relied upon in bringing charges was a teenager who continuously changed his story and claimed he was pressured to implicate McGhee and H. (The witness later recanted and admitted he lied in hopes of getting a proffered reward and to avoid being personally charged with the murder.) In 2002, a court vacated or reversed the convictions, and both men brought civil rights actions against the County and the former prosecutors and officers involved in the initial investigation and prosecution, alleging they had used perjured and fabricated testimony and improperly withheld evidence. Richter, the County Attorney at the time, and Hrvol, an Assistant County Attorney, moved for and were denied qualified, absolute, and sovereign immunity. The Eighth Circuit held that "immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not 'a distinctly prosecutorial function.'" The question for the Supreme Court is whether a prosecutor can be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial. ML

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29. *Id.*
30. Foster v. United States, 922 F. Supp. 642 (D.D.C. 1996); Idylwoods Assocs. v. Mader Capital, Inc., 915 F. Supp. 1290 (W.D.N.Y. 1996).
31. EPA, *Questions and Answers Regarding Federal Brownfields Property Liability* 4 (Nov. 2003) (emphasis added), *available at* http://www.epa.gov/NE/brownfields/pdfs/qa6FINAL.pdf.
32. City of Toledo v. Beazer Materials & Servs. Inc., 923 F. Supp. 1013 (N.D. Ohio 1996).
33. *Id.* at 1020-21.
34. City of Emeryville v. Elementis Pigments, Inc., No. 99-03719, 2001 WL 964230 (N.D. Cal. Mar. 06, 2001).
35. *Id.* at *8.
36. 42 U.S.C. § 9607(r) (2002).
37. Pub. L. No. 107-118, 115 stat. 2356 (2002).
38. A BFPP is not liable under CERCLA for cleanup costs at a site. However, if the EPA has unrecovered response costs incurred in cleaning up that property and the EPA response action increases the fair market value of the property, the EPA may have a windfall lien on the property. *See* EPA & U.S. Department of Justice, *Interim Enforcement Discretion Policy Concerning "Windfall Liens" under Section 107(r) of CERCLA (2003), available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf.
39. Innocent Landowners, Standards for Conducting All Appropriate Inquiries, Final Rule: 40 C.F.R. Pt. 312.
40. 42 U.S.C. § 9607(r) (2002).
41. *See* EPA, *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability* (2003), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf. ML

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to department safety and efficiency was insufficient: "We have never held that a simple reference to government functioning automatically qualifies as speech on a matter of public concern." The plain language of the grievances catalogued a strained working relationship due to personality flaws, rather than incidents of incompetence or malfeasance. As a result, Desrochers and Lowes failed to meet their burden of demonstrating that their speech involved a matter of public concern. *Desrochers v. City of San Bernardino*, F. 3d (9th Cir. 2009). ML