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NEW LAWSUITS AND INTEREST GROUP CONCERNS KEEP CSA CONTROVERSIES BREWING

Back in February I wrote a comprehensive review of Compliance, Safety, Accountability (“CSA”)¹, the safety compliance monitoring program administered by the Federal Motor Carrier Safety Administration (“FMCSA”). The article included a summary of how the program started, where it stood then and where it might be headed in the future. SEE, “CSA and Motor Carrier Safety Ratings: The Past, Present and Future” published in *JD Supra* (February 9, 2012)². I wrote my first update on CSA entitled “CSA Update – The Continuing Struggle to Get Things Right” published in *JD Supra*, in April of 2012³. My most recent CSA update was published in the July, 2012 edition of *The Transportation Lawyer*, a quarterly legal journal by the Transportation Lawyers of America, entitled “Recent Developments Show CSA Continues to be a Work in Progress”⁴. At the conclusion of that latest article I said, that “[t]he implementation of CSA will be ongoing for the near future ... The process has already been much slower than many would like, has not been without controversy and will likely generate new controversy. Stay tuned!” **It did not take long before the filing of two major lawsuits and other developments called for yet another update article. CSA continues to be a controversial work in progress.**

THE NEW LAWSUITS

Two lawsuits were recently filed in the Federal Courts by groups challenging the validity of, proper use of and interpretation of data generated under CSA and the related Pre-Employment Screening Program. On July 19, 2012 a coalition of shippers, small trucking companies and brokers led by **ASECTT** sued the FMCSA over the "guidance" the agency provided in May on the use of CSA data. In addition, on July 25, 2012 **OIDA** filed a lawsuit challenging the accuracy of data in the driver violations database maintained by the FMCSA under the Pre-Employment Screening Program.

The ASECTT Lawsuit

The ASECTT lawsuit was filed before the U.S. Court of Appeals for the District of Columbia by a group of small carriers and brokers, as well as individual companies, who are members of the Alliance for Safe, Efficient and Competitive Truck Transportation (**ASECTT**). The suit challenges the agency’s issuance in May of a Factsheet entitled “FMCSA Data — Information for Shippers, Brokers, and Insurers” and a subsequent Power Point presentation entitled “Shipper and Insurer Briefing Addendum” intended to supplement the previously issued Factsheet, both of which can be accessed on the agency’s “New Resources Page.”⁵ Shippers, Brokers and Insurers are encouraged to use these resources pursuant to a notice posted by the FMCSA of “New Resources Available for Shippers, Brokers and Insurers,” on May 16, 2012.⁶

In the first document, the Factsheet entitled “FMCSA Data — Information for Shippers, Brokers, and Insurers,” the FMCSA generally describes the motor carrier safety data contained on the SAFER website:

The SAFER Website provides a **motor carrier’s official safety rating**, which can be Satisfactory, Conditional, or Unsatisfactory, based on the carrier’s most recent Onsite Investigation (emphasis mine).

The FMCSA then encourages shippers, brokers and insurers to utilize all available FMCSA data in making decisions on carriers to use (and not just on the Safety Fitness Determination rating found in SAFER) :

FMCSA believes that SAFER, L&I, and SMS provide users with an informed, current, and comprehensive picture of a motor carrier’s safety and compliance standing with FMCSA. The agency encourages the use of its publicly available information where and when that information can aid in making sound business decisions.

The lawsuit was filed after the Power Point Addendum presentation was issued. Through the Addendum Power Point slides and notes, the FMCSA discourages shippers and brokers attempting to select a safe carrier from relying solely upon a Safety Fitness Determination classification that a carrier is “Satisfactory,” and invites shippers, brokers and insurers to review all data available from the FMCSA on a particular carrier before making a decision to use the carrier. Slide 4 specifically states that consistent themes of concerns it has heard from broker and shipper users of the system include:

- Information available in different FMCSA systems can be confusing
- Preference for a simple label that protects from potential liability, though most understand FMCSA’s mission does not include providing business direction to industry

The presentation notes for the slide state further that:

FMCSA’s mission is to reduce crashes, injuries, and fatalities involving large trucks and buses. **Its mission does not include providing business direction to private industry. Shippers, brokers, freight forwarders, and consumers are encouraged to exercise independent judgment about the companies with which they choose to do business.** Accordingly, FMCSA encourages the use of its public data to help make sound business judgments (Emphasis mine).

In the view of ASECTT and the Plaintiffs to the lawsuit, these statements amount to an abdication of the agency’s duty to make safety fitness determinations of carriers and leaves shippers and brokers to make their own judgments based upon all the data provided by the FMCSA, without adequate guidance, thus exposing shippers and brokers to potential liability for choosing carriers whose ultimate Safety Fitness Determinations are Satisfactory or Conditional, but whose CSA BASICs scores may approach or exceed CSA BASIC categories threshold monitoring levels.

At the time of the filing of the lawsuit, ASECTT issued a statement that the FMCSA has "abdicated its role as the ultimate judge of highway safety," leaving shippers and brokers to judge this for themselves and opening them up to potential liability in the process. According to a July 2, 2012 letter by group president Tom Sanderson (also CEO of the major transportation broker Transplace), the FMCSA in making these Addendum statements “(deputizes) the shipper and broker community with the responsibility of making self-enforced safety fitness determinations under penalty of vicarious liability⁷.”

Also according to the statement issued by Sanderson, "ASECTT members believe SMS methodology is a work in progress, unapproved for (FMCSA's) own use in making safety fitness determinations." The group's objective is to force the agency to make the ultimate safety determination, instead of leaving it to individual ASECTT members. The ASECTT members do not want the meaning of the SFD rating to be simply an indication that listed Satisfactory or Conditional carriers are authorized by the FMCSA to be out on the road, but instead to indicate that the agency views the carriers to be safely fit to be on the road.

The FMCSA seems to recognize the dilemma posed by the "once upon a time" nature of the current Safety Fitness Determination process, which is based primarily on the information gathered during an actual On-Site Investigation of a particular carrier in the sometime distant past and plans to address it by incorporating SMS data into the SFD process in the future, after additional rulemaking takes place. The FMCSA ends its presentation notes for Addendum Slide 4 by stating:

The proposed Safety Fitness Determination (SFD) aims to incorporate on-road performance from the Safety Measurement System (SMS) into the safety rating process for motor carriers and **produce an SFD to determine if a carrier is fit to operate.**"

The OOIDA Lawsuit

The OOIDA lawsuit, which was initiated by the Owner Operator driver's group known as OOIDA, in the U.S. District Court for the District of Columbia, formally names OOIDA and four owner-operators as plaintiffs⁸. The suit challenges the use of a database of information on driver violations maintained by the FMCSA under the Pre-Employment Screening Program (PSP), which is not technically a part of the CSA program⁹, but is generally closely associated with it. FMCSA data generated from records of violations from roadside inspection and crash reports is used to score carriers under the CSA, while data kept by states (i.e. tickets, citations, written warnings, convictions) is used not only for CSA carrier rankings, but also to give safety information about drivers to prospective employers via the Pre-Employment Screening Program. The lawsuit contends that the PSP database has inaccurate information regarding driver violations because it contains information on drivers where they have not been found guilty of the alleged violations and that the statutory basis for the gathering and use of the database is violated because the statute requires the use of only reliable and accurate information. Three of the named plaintiff drivers have been found not guilty of alleged violations or had their cases dismissed, while the fourth named driver plaintiff is currently fighting his violation in court.

The suit seeks to have the FMCSA remove drivers' violations from the database if a court finds that the driver is not responsible, to tell prospective employers if a violation that shows up in the database is being disputed by the driver, and why the driver is challenging the information¹⁰ and also to have the agency take an active role in the process of correcting challenged data, which it now leaves largely to the states¹¹ except for challenges initiated through the DataQ System for roadside inspections¹². Three of the named plaintiffs successfully fought their cited violations in court, but could not get the FMCSA to correct the data. According to Jim Johnston, OOIDA president, "[b]y refusing to accept the determination by a court, the FMCSA has in essence made state law enforcement agencies the final judge and jury on all citations¹³." The ATA is supportive. According to Rob Abbott, ATA's vice president of safety policy, "the ATA agrees with OOIDA that dismissed citations should not be used to drive CSA scores or to paint a picture of driver or carrier safety performance¹⁴."

NEW CONCERNS EXPRESSED BY TRUCK AND INSURANCE CARRIERS

There are other groups impacted by CSA who have expressed their concerns without filing lawsuits. These groups include insurance underwriters, infrequent HAZMAT carriers, carriers concerned about the lack of a system for assessment of fault for crash data and carriers concerned about the lack of a clear relationship between CSA percentile rankings and actual carrier crash frequency.

Truck carriers and their associations, including the ATA, were quite vocal this spring when the FMCSA made an abrupt decision to delay the planned March 2012 implementation of a system for assessing fault for reportable crashes and then to use the assessments to weigh reportable crash data for the Crash Indicator BASIC. The frustration over the lack of a fault assessment process mounted when the FMCSA subsequently announced future plans to disclose the number of fatal accidents to which a carrier has been involved separately from the “injuries/crashes” in a carrier’s SMS information category. The FMCSA recently provided more details regarding its plans, when it announced in July that the following actions would be completed by July of 2013¹⁵:

1. Complete research on how it could assign blame for truck crashes based on a carrier’s fault, including whether police reports from crashes “are a sufficient, consistent and reliable source of information on which to base a weighted crash system;”
2. Complete a study on whether assigning crash accountability would allow it to predict a carrier’s risk of future crashes better than the current CSA system based on all reportable crashes; and
3. Complete a study on whether a system of evaluating crash fault system would be worth its cost.

This announcement by the FMCSA was made subsequent to the June release of a study commissioned by the ASECTT which concluded that the CSA percentile rankings of carriers both above and below the arbitrary “monitoring thresholds” indicated with the alert symbol are not valid predictors of crash frequency¹⁶.

Many carriers have also recently voiced substantial concerns over the proposed new Hazmat BASIC. This proposed change was a part of a series of planned “enhancements” to the CSA system announced by the FMCSA this spring, as set forth in the posted “Foundational Document” entitled “Safety Measurement System Changes.”¹⁷ The agency wants to create a new HM BASIC based on vehicle inspections (i.e., Level 1, 2, 5 and 6) and HM violations where the vehicle was transporting placardable quantities of HM. The changes increase the impact of HM violations for carriers whose HM cargos are a small part of their overall freight profile. The public comment on these proposed changes ended on July 30 and the written comments received reflect great concerns. The ATA commented with regard to the new Hazmat BASIC that “[a]s currently structured, the BASIC assigns high scores to many reputable, safe motor carriers with laudable crash rates and low scores in all other categories.” ABF, a leading LTL carrier, told the FMCSA that the hazmat BASIC scores were not a true indicator of safety performance and crash risk, but will lead the public to believe the score to be a reflection of safety¹⁸.

Insurance Underwriters have become another group voicing frustration with CSA and the Pre-Employment Screening Program (PSP). They are concerned with the process being followed in implementing the programs, including questions on how to interpret CSA percentile rankings and how driver data should be used. These concerns were aired during a June 12 session at the meeting of the National Accounting & Finance Council in Tampa¹⁹. The main concerns that surfaced from the session were:

1. Concern that the FMCSA is using CSA to move toward direct intervention with company drivers, perhaps even lifting their licenses while bypassing the drivers' motor-carrier employers;
2. That the driver shortage that may be accelerated by the CSA may lead their insured carriers to lower their hiring standards, and thus increasing insurance carrier exposure; and
3. That the constant adjustment to compliance requirements brought about by the CSA and inconsistent law enforcement around the nation, skews the data upon which CSA rankings and information on drivers is based.

Apparently, concerted efforts are still under way for the underwriters to attempt to understand the full implications of the CSA and PSP, but they also want to make sure that their insured carriers are monitoring BASIC scores and taking steps to obtain or retain scores above monitoring thresholds and also that they are using the database of information on driver violations maintained by the FMCSA under the Pre-Employment Screening Program (PSP), the same program that The OOIDA lawsuit is challenging.

FUTURE CONTROVERSIES

In the near future, expect major CSA developments to continue to occur at a rapid pace. One obvious area that will draw controversy will be the conclusions of the studies now being conducted by the FMCSA on how to determine crash fault and whether it is worthwhile to introduce fault assessment to the reportable accident data now being used within the CSA's SMS system.

Another sure area of controversy will take place during the last phase of implementation of CSA, when the FMCSA expands its use of SMS data to help determine a carrier's Safety Fitness Determination. Under the language of a proposed SFD rule, the FMCSA would utilize SMS data by²⁰:

- **Incorporating on-road safety performance** via the new SMS, which will be updated on a monthly basis;
- **Continuing to include** major safety violations found as part of CSA investigations; and
- **Produce a new SFD** to determine if a carrier is unfit to operate, while using current SMS data.

So, unfortunately, this newsletter article on new and substantial CSA developments is unlikely to be my last!

This Journal is intended to give a unique perspective on the practical business impacts of developments in the law relating to transportation. The contents of this Journal are not intended to be and should not be relied upon as legal advice.

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WALT METZ BIO

Walt's employment profile shows a transportation, warehousing and supply chain executive in-house legal counsel with an established track record of accomplishments achieved for large and medium sized public and private company employers in the trucking, warehousing, logistics and retail industries. Walt was Vice President, General Counsel and Secretary of Americold Realty Trust/Americold Logistics in Atlanta for five years from 2005 to 2010, and has several years of experience working as in-house counsel for major trucking companies. At Americold he directed the legal affairs for North America's largest provider of temperature controlled food distribution and logistics services, Americold Logistics, LLC, including a small trucking operation. Before taking his position at Americold, Walt served in the legal departments of Sears, Roebuck and Company in the Chicago area and Werner Enterprises of Omaha. During Walt's seven plus years at Werner Enterprises he supervised the nationwide defense of high exposure trucking and transportation litigation for the large transportation carrier, and provided advice on claims, litigation and risk management issues, including the structure of self-insured liability and workers compensation programs and the associated layers of excess insurance policies. At Sears he continued to manage litigation, including high exposure commercial litigation and class actions. Walt also completed a short tenure in the Legal Department of Old Dominion Freight Lines in 2011. Since January 1, 2012, Walt has sought a permanent, full time position as a house lawyer for a major transportation/supply chain company and during that time period has published several timely transportation law journal articles, has made himself available for consultation on related issues and has been remotely employed on a short term assignment for a substantial full truckload transportation company. Prior to going in-house, Walt was a member of two Omaha law firms, where he practiced primarily in Commercial Litigation and General Practice. He graduated from the University of Nebraska-Lincoln with High Distinction and was elected to membership in Phi Beta Kappa. He also earned his JD at Nebraska. Walt continues to be a huge Big Red fan!

Walt is available for a new in-house legal opportunity. Walt's complete professional profile can be accessed at: <http://www.linkedin.com/in/waltmetz>.



ENDNOTES:

¹ "CSA" first came into being in 2008 as the CSA Op-Model Test in a small number of pilot test states. During the time the FMCSA was continuing the pilot tests in a small number of states and readying CSA for nationwide implementation, it became known as "CSA 2010" (Comprehensive Safety Analysis 2010). In 2011, CSA 2010 expanded from pilot states testing to nationwide implementation and became known simply as "CSA", which now stands for "Compliance Safety Accountability".

² (<http://www.jdsupra.com/post/documentViewer.aspx?fid=2b80cd60-d261-4776-903f-52e9f816d6dd>).

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http://www.linkedin.com/link?msgID=l3508591373_2&redirect=leo%3A%2F%2Fph%2Fhttp%253A*3*3lnkd%252Ein*3XKCpJT%2F3c8H&trk=plh

⁴ <http://slidesha.re/M4FUMX>

⁵ <https://csa.fmcsa.dot.gov/resources.aspx?locationid=115>

⁶ The Federal Motor Carrier Safety Administration's (FMCSA) Compliance, Safety, Accountability (CSA) program is now providing resources specifically geared towards shippers, brokers, and insurers about the agency's publicly available data. FMCSA makes three sources of safety and compliance data available to the public. These sources are the Safety and Fitness Electronic Records system; the Licensing and Insurance Online Website; and CSA's Safety Measurement System (SMS). The new resources for shippers, brokers, and insurers consist of two factsheets and one PowerPoint presentation. FMCSA developed these new resources in response to feedback from safety stakeholders. One of the factsheets identifies and clarifies all three of FMCSA's

publicly available data sources and the other factsheet offers important facts about CSA's SMS. In addition, the PowerPoint presentation gives an overview of FMCSA's publicly available data sources that includes screenshots from each of those sources. All three resources can be found at this link:

<https://csa.fmcsa.dot.gov/resources.aspx?locationid=115>.

(http://ntassoc.com/uploads/PressRelease/050f0d4a31724a04bb41081de8a50408/FMCSA_Release_New_Shipper_Broker_Resources.pdf)

⁷ "Brokers, Carriers Challenge CSA", By *Oliver B. Patton*, *Washington Editor*, *Truckinginfo*, the web site of Heavy Duty Trucking Magazine, July, 2012.

⁸ "OOIDA Lawsuit Challenges Driver Database Accuracy", By *Timothy Cama*, Staff Reporter, *Transport Topics*, July 23, 2012.

⁹ Carriers who are considering hiring drivers can review "Driver Profiles" if the drivers have authorized the release of their information. These profiles are compiled from the FMCSA Driver Information Resource and will be available to carriers through FMCSA's Pre-Employment Screening Program (PSP). Drivers can view their own profiles. PSP is only available as a pre-screening tool and not for use in evaluating current drivers. PSP was mandated by Congress and is not a part of CSA. (<http://csa.fmcsa.dot.gov/Documents/JusttheFacts.pdf>)

¹⁰ "OOIDA Sues FMCSA over Pre-Employment Screening Program", By *Truckinginfo Staff*, the web site of Heavy Duty Trucking Magazine, July 18, 2012.

¹¹ "OOIDA Lawsuit Challenges Driver Database Accuracy", By *Timothy Cama*, Staff Reporter, *Transport Topics*, July 23, 2012.

¹² According to the FMCSA, The data kept by a State (i.e. tickets, citations, written warnings, convictions) and the data that is kept in the SMS (i.e. violations from roadside inspection and crash reports) are separate. This data must be assessed and, if necessary, corrected under separate processes. All data in the SMS can be verified in the DataQs system. (<https://dataqs.fmcsa.dot.gov>).

¹³ "OOIDA Sues FMCSA over Pre-Employment Screening Program", By *Truckinginfo Staff*, the web site of Heavy Duty Trucking Magazine, July 18, 2012.

¹⁴ "OOIDA Lawsuit Challenges Driver Database Accuracy", By *Timothy Cama*, Staff Reporter, *Transport Topics*, July 23, 2012.

¹⁵ "FMCSA to Publish Crash Accountability Results Next Year", By *Timothy Cama*, Staff Reporter, *Transport Topics*, July 23, 2012.

¹⁶ "Study: No Correlation Between CSA BASIC Data and Crash Performance, *Oliver B. Patton*, *Washington Editor*, *Truckinginfo*, the web site of Heavy Duty Trucking Magazine, June 28, 2012.

¹⁷ http://csa.fmcsa.dot.gov/Documents/SMS_FoundationalDoc_final.pdf

¹⁸ "Carriers Voice Concerns Over New Hazmat BASIC", By *Eric Miller*, Staff Reporter, *Transport Topics*, *Transport Topics*, July 31, 2012.

¹⁹ "Underwriters at NAFC Say They Struggle to Decipher CSA's Insurance Implications," "By *Jonathan S. Reiskin*, *Associate News Editor*, *Transport Topics*, *Transport Topics*, June 18, 2012.

²⁰ FMCSA Presentation to SBA, February, 2012.