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RECENT AMERICAN TRUCKING ASSOCIATIONS WHITE PAPER HAS FURTHER IMPLICATIONS FOR KEEPING CSA SCORES OUT OF THE COURTROOM

I. Background

Since its inception in December of 2010, the Compliance, Safety, Accountability (CSA) initiative has presented a challenge for trucking companies faced with personal injury litigation. The CSA program, developed by the Federal Motor Carrier Safety Administration (FMCSA), is meant to “improve large truck and bus safety and ultimately reduce crashes, injuries, and fatalities that are related to commercial motor vehicles.” (<http://csa.fmcsa.dot.gov/about/>) As one part of the program, the Safety Measurement System (SMS) attempts to measure the on-road safety performance of motor carriers and drivers in an effort to evaluate their safety performance, and to potentially intervene with the least safe operators. Carriers are evaluated in seven Behavior Analysis and Safety Improvement Categories (BASICS).

In this Newsletter and many other publications, attorneys and industry members have analyzed the impact of this data in accident litigation and suggested a number of good strategies to challenge its admissibility as evidence, many of which focus on the inaccuracy and unreliability of the data itself. A recently issued white paper by the American Trucking Associations (ATA) entitled, *The Reliability of CSA Data and Scores*, has mixed implications for these arguments. <http://www.trucking.org/ATA%20Docs/What%20We%20Do/Trucking%20Issues/Documents/Safety/Are%20CSA%20Scores%20Reliable%20Dec%202013%20Final.pdf>

The paper recognizes SMS scores have the potential to be used against motor carriers in accident litigation, despite the FMCSA’s disclaimer warning that conclusions about a carrier’s safety should not be drawn from CSA data, and considers a recent American Transportation Research Institute (ATRI) study that suggests a possible relationship between SMS data and carrier safety.

This article discusses the studies examined by the ATA white paper, and outlines possible additional strategies for using this research to further efforts to oppose the introduction of SMS data in litigation.

II. Analysis of Research in the December 2013 ATA White Paper

At the outset, the ATA begins its discussion of SMS data by referencing two studies that found there was little, if any, statistical correlation between a carrier’s SMS scores and crash risk.

The first, a study by Wells Fargo Securities in 2012, found that of the 4,600 largest carriers, there was no meaningful relationship between BASIC scores and accident history, and concluded the scores should not be relied on as an indicator of safety performance or crash risk. (Gallow, A.P. & Busche, M., *CSA: Another Look with Similar Conclusions*, Wells Fargo Securities Equity Research, July 12, 2012). Another study performed by University of Maryland professor James Gimpel, concluded, “the association between crash risk and the BASIC scores is so low as to be irrelevant...” (*Statistical Issues in the Safety Measurement and Inspection of Motor Carriers*, Alliance for Safe, Efficient and Competitive Truck Transportation, July 10, 2012).

The 2012 ATRI study that is the subject of the ATA white paper found these prior studies used inappropriate statistical tests to reach their findings, and, while the white paper does not discuss the two earlier studies in detail, it describes the ATRI study as “a more rigorous statistical test.” Despite potential criticism, these earlier studies should still prove useful when attempting to prevent the admission of SMS data at trial. While the reliability of their findings may be subject to dispute, the ATRI study also suffers from its own reliability issues, which practitioners should understand and be prepared to articulate.

a. General Findings of the 2012 ATRI Study

The ATRI study concluded there was a positive relationship between BASIC scores and crashes in three of the five publicly available measurement categories: Unsafe Driving, Hours-of-Service Compliance and Vehicle Maintenance, the most significant of which was found in the category of Unsafe Driving. (*Compliance Safety Accountability: Analyzing the Relationship of Scores to Crash Risk*, October 2012). Additionally, the ATRI found a correlation between crash risk and the number of “alerts” assigned to carriers, which are generated after a carrier’s score exceeds a certain threshold established by the FMCSA in one of the BASICs.

b. Important Caveats to the Statistical Data

As might be expected, the ATRI’s findings come with important caveats that undermine the reliability of the data and the conclusions to be drawn from it, particularly with respect to their use in the context of trucking litigation. First, the ATRI found that, for a small but significant percentage of carriers, perhaps as many as tens of thousands, there was an inverse relationship between scores and crash risk. In other words, carriers had high BASIC scores but low crash rates or vice-versa. Furthermore, the ATRI concedes that a fleet’s crash rate may be as much attributable to bad luck as to the lack of a safety culture.

The ATRI also acknowledged that perceived safety risk is heavily dependent on the amount of data available on a particular carrier. For example, according to the study, only 19 percent of active carriers in the ATRI dataset had adequate data to be scored in one or more of the publicly available BASICs. This lack of data is significant since carriers are scored based on comparative performance.

Although not mentioned as a caveat by the ATRI, the study found a negative relationship between scores in the Driver Fitness and Controlled Substances BASICs. As illogical as it may sound, worse scores in these categories were found to be associated with lower crash risk. This finding in and of itself would appear to challenge the reliability of the study’s conclusions from a common sense standpoint.

The ATA white paper expands on the caveats discussed by the ATRI, highlighting additional problems that make SMS scores unreliable when attempting to evaluate a carrier's safety performance. As to the lack of data discussed by the ATRI, the white paper notes this caveat is especially prevalent with small carriers, defined as five or fewer trucks and which compose a bulk of the industry, of which the FMCSA only has adequate data to score 5.7 percent. Thus, scores for small carriers are extremely volatile, with one or two violations causing the statistical significance of their scores to swing widely.

Also undermining the reliability of the data are a series of assessments conducted by the University of Michigan Transportation Research Institute over the past decade that found a substantial underreporting of accidents in many states, with some reporting less than 20 percent of qualifying crashes. This data insufficiency, combined with other known problems, creates a host of arguments to be used in efforts to exclude SMS data as unreliable. Some of the additional flaws discussed in the white paper are regional enforcement disparity, how carriers' scores in the Crash Indicator BASIC are assigned, how violations are weighted in the system and scoring based on comparative performance.

c. Use of this Information in Defense of Motor Carriers

Since the CSA was only implemented in 2010, the admissibility of SMS data has not been widely considered or discussed by federal or state courts. There are a number of good arguments as to why SMS data should be excluded, including relevance, improper character evidence and unfair prejudice to name a few, and the ATA's white paper provides a further blueprint for counsel to challenge the admissibility of this evidence and to lessen any prejudicial effect it may have at trial, based on its inherent unreliability.

While some may attempt to use the ATRI research to argue that carriers with higher scores in the categories of Unsafe Driving, Hours-of-Service Compliance and Vehicle Maintenance BASICs are inherently unsafe, the caveats and data issues present fertile grounds for challenges. In response to these arguments, litigators should highlight the data deficiencies and improprieties most relevant to their particular client. When attempting to exclude evidence of a small carrier's high score in the Unsafe Driving BASIC, for example, it would be useful to highlight the lack of data on small carriers when coming up with a comparative rank. If the carrier operates in a state with strict enforcement, it is important the court realizes that actions of law enforcement can have a huge impact on SMS data.

Although at least one federal court has permitted the introduction of a carrier's CSA score and its on-road performance overview percentile, the testimony was proffered through a safety expert retained by the plaintiff to criticize the safety of the carrier and the court did not provide any insight into why the testimony was allowed. *McLane v. Rich Trans., Inc.*, 2012 WL 3996832, *1 (E.D. Ark.). Moreover, other courts have not looked favorably on safety data compiled by the FMCSA. In 2008, a federal court in Georgia refused to take judicial notice of safety data compiled by the FMCSA, finding it did not meet the threshold of being the type of evidence whose accuracy could not be questioned. *FCCI Ins. Group v. Rodgers Metal Craft, Inc.*, 2008 WL 4185997 (M.D. Ga.). Furthermore, safety data compiled by the FMCSA has been deemed irrelevant by at least one court in litigation arising out of a trucking accident. *Kemper Ins. Co. v. J.B. Hunt*, 2003 WL 25672797 (N.D. Ga.).

Lastly, evidence of a company's prior compliance review has been found irrelevant to accident litigation. *Frederick v. Swift Trans. Co., Inc.*, 591 F.Supp.2d 1156, 1161 (D. Kan. 2008).

Furthermore, especially when defending a carrier with good SMS scores, it may be beneficial to highlight positive SMS data if the company's training or safety culture are at issue, or possibly in defense of punitive damage allegations. At least one federal district court allowed counsel to use evidence of positive scores in defense of allegations a motor carrier was negligent in its hiring and training of a driver. See, *Grosek v. Panther Trans., Inc.*, 2009 WL 905035, *5 (M.D. Penn.). Of course, the same reliability challenges would still exist.

II. Conclusion

Information provided in the ATA's recent white paper provides a useful update on how to prevent the use of CSA evidence, and limiting its effectiveness if presented. Through increased knowledge of the current science and effective motion practice, litigators are on the front lines in trying to prevent state and federal courts from allowing trucking companies to be punished for unreliable SMS data. In order to present a united and effective front, it is important to keep up to date on how information is collected and utilized, as the FMCSA continues to make modifications to the program. Notably, the FMCSA is currently considering removing violations from SMS data if a carrier was found not guilty or the violation was dismissed. Changes like this can impact the accuracy and reliability of the data, and should continue to prove useful in the courtroom.

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