Logistics & the Law 2012

CSA/SMS: Shippers, take ACTION!

The implementation of the FMCSA's Safety Measurement System (SMS) has the unintended effect of increasing shippers' exposure to vicarious liability for highway accidents. Our transportation law expert explains how this came to be and calls on the industry to come together to support a legislative solution.

BY **BRENT WM. PRIMUS,** J.D.

Much has been said and written about the Federal Motor Carrier Safety Administration's (FMCSA) Compliance, Safety, Accountability (CSA) Safety Measurement System (SMS) over the past year. During that time, *Logistics Management* has, to its credit, set out to explain why CSA/SMS exists and what it could mean to the dynamics of the shipper/carrier relationship.

However, in this installment of the series that we call "Logistics and the Law," we'll focus on how the very existence of the SMS data exposes shippers to vicarious liability for highway accidents. Simply put, the current situation is a total mess.

We will first take a look at how we got to where we are today. We will then propose a global solution to the problem, namely legislation that would (1) restore the true purpose of CSA/SMS as a means for the FMCSA to identify carriers with potential safety problems, and (2) eliminate a use that was never intended—a courtroom argument for holding a shipper, or any other entity in the supply chain that uses motor carriers, vicariously liable for highway accidents.

Because a legislative solution will require an act of Congress, we will also offer some suggestions on how to weather the storm until Congress acts.

Brent Wm. Primus, J.D., is the CEO of Primus Law Office, P.A. and the Senior Editor of transportlawtexts, inc. He is the author of Motor Carrier Contracts Annotated *and co-author of* U.S. Domestic Terms of Sale and Incoterms 2010. *He also was the Editor of* Freight Claims in Plain English, 4th Edition, *and is a frequent contributor to* Logistics Management. *He can be reached at brent@primuslawoffice.com.*

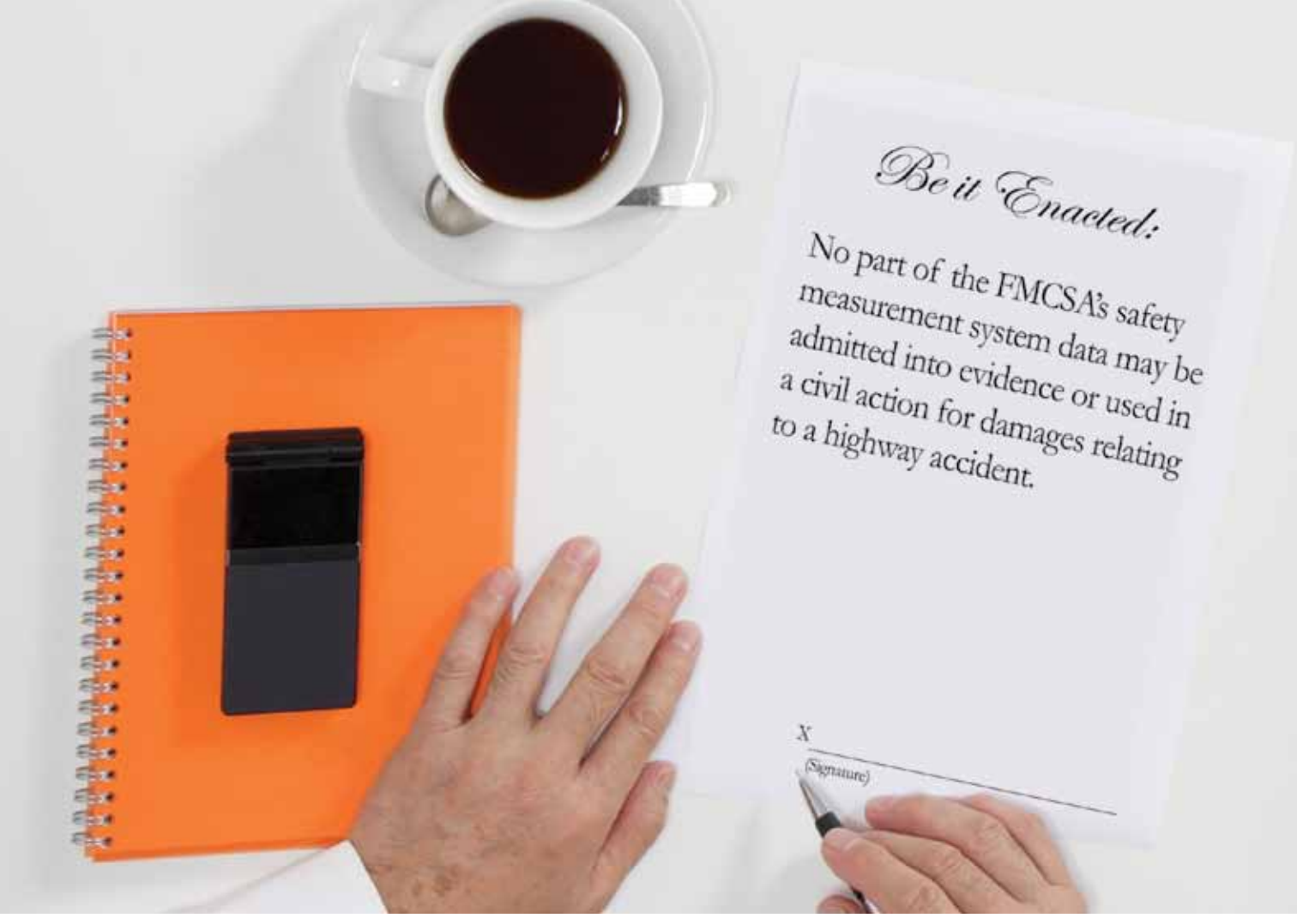
FIRST, SOME HISTORY...

The Motor Carrier Safety Act of 1984 required the Secretary of Transportation to "maintain, by regulation, a procedure for determining the safety fitness of an owner or operator of commercial motor vehicles."

The resulting regulations were first implemented in 1988. Pursuant to these regulations, motor carriers are assigned a safety rating. These ratings are based upon a compliance review that is an on-premises inspection of the carrier's records, driver logs, and procedures to see if they are adequate from a safety viewpoint. The possible ratings are "satisfactory," "unsatisfactory," "conditional," or "unrated."

The first important takeaway for shippers is that this system is still in place today and will remain in place for the indefinite future. CSA/SMS is an independent system and does not replace or supersede the safety rating system. While the terms "unfit" and "marginal" are possible future replacements for the terms "unsatisfactory" and "conditional," they are not currently used for either safety ratings or as part of CSA/SMS.

In the mid-1990s another system was initiated known as



the Motor Carrier Safety Status Measurement System (SafeStat). Under this system, a carrier was assigned a rating in four areas with a score of 75 or above labeled "deficient."

The primary difference between the determination of a safety rating and the determination of a SafeStat score was that the latter was based upon a statistical methodology, not an on-site visit. Up until 2004, most persons in the industry were aware of the fact that a carrier had a safety rating (e.g., "satisfactory" or "unsatisfactory"), but many persons, including myself, had never even heard of SafeStat scores.

This all changed when a U.S. District Court issued a decision in the case of *Schramm v. Foster.* Specifically, the judge denied C.H. Robinson's request to dismiss the case and allowed the case to go to the jury on the theory of negligent hiring of a motor carrier. The judge considered two factors. First, the motor carrier's safety rating was "unrated." Second, at the time of the accident, the motor carrier had a SafeStat rating of 74 in the driver safety evaluation rating.

Although not explicitly so stated, the *Schramm* decision equated a "deficient" SafeStat rating with an "unsatisfactory" carrier safety rating. This would mean that if one of a carrier's ratings was 75 or higher then that carrier should not be used by a shipper just as a shipper should not knowingly hire a carrier with an "unsatisfactory" safety rating.

Indeed, even though the trucker's SafeStat rating was 74—not "deficient"—the judge opined that it was close enough to 75 to warrant further investigation. The problem with the court's analysis in *Schramm* is that its reasoning leads to an illogical result.

Assume for a moment that all of the carriers who had one or more SafeStat scores of 75 or higher went "out of business" because no one tendered them any freight. Immediately thereafter 75 percent of the initial group of carriers would then become 100 percent of a new group of carriers.

Of these carriers, 25 percent would have SafeStat scores of 75 percent or higher and, accordingly, they too would have to be put "out of service"…and so on until all carriers but one had closed their doors. This hypothetical exercise shows the basic flaw in the *Schramm* decision as well as using SafeStat scores or SMS data for carrier selection: at any given point in time there will always be carriers who are safer than others—even though all of them might be perfectly safe when measured by an objective standard.

CSA IMPLEMENTATION, LITIGATION, AND SETTLEMENT

Beginning in the mid-2000s, the FMCSA began work on a new system, CSA, to replace SafeStat. Although the statistical methodology of CSA is different than SafeStat, conceptually the two are the same. They're both intended by the FMCSA to be a way to identify carriers who may not be operating in a manner consistent with a "satisfactory" safety rating.

Under the previous system, a SafeStat score of 75 or above was deemed deficient. Under CSA, there are seven

categories called Behavior Analysis and Safety Improvement Categories, or BASICs. For five of these categories, a carrier's score is available for public view on the FMCSA's website. A score of 60 or 65 (or higher), depending upon the area, originally resulted in the word "alert" appearing next to the carrier's score.

The motor carrier industry was well aware that after *Schramm* many shippers would not be willing to use a motor carrier who had one or more "alerts" posted on the FMCSA website even though the carrier had a "satisfactory" safety rating. The trucking industry was also concerned with the basic methodology used by the FMCSA—for example, an accident that is determined not to be the fault of the carrier still goes against its BASICs score.

Accordingly, three motor carrier trade associations—The National Association of Small Trucking Companies (NASTC), The Expedite Alliance of North America (TEANA), and the Air & Expedited Motor Carrier Association (AEMCA)—brought a lawsuit against the FMCSA seeking to, amongst other things, postpone publication of the percentile rankings and the "alert" designation. The case was resolved through mediation.

The result of the mediation was that the FMCSA will continue to publish the percentile rankings, however the term "alert" has been changed to a yellow triangle containing an exclamation mark. Also, the FMCSA agreed to reword and strengthen the disclaimer on its website regarding the purpose and use of BASICs scores.

The most important aspect of the disclaimer is to clearly state that the BASICs scores do not replace or supersede a carrier's safety rating. In other words, so long as a carrier has not been deemed "unsatisfactory" they are authorized to be on the nation's highways.

SOLVING THE PROBLEM

While the result of the litigation is certainly a step in the right direction, in my opinion it does not solve the problem. At the time that the litigation was commenced, 57 percent of the ranked motor carriers had a BASICs score(s) that would result in at least one "alert."

Even though this is now replaced by the yellow triangle containing an exclamation mark, has anything really changed?

Shippers are now in a "damned if they do, damned if they don't" situation. Suppose a shipper only checks a carrier's safety rating to see if it is "satisfactory," does not check the BASICs scores, and uses a carrier that has one or more yellow triangles containing an exclamation mark (formerly known as an "alert"). If there were then a highway accident, such a reliance on the FMCSA's disclaimer would be portrayed by a plaintiff's lawyer as a cold-hearted disregard for the safety of persons on the highway.

On the other hand, if they do look at the BASICs scores, I have yet to see any explanation of how to interpret them. Those that say it's very important for shippers to check a carrier's score do not state or describe any definitive, non-subjective criteria as to when or when not to use a carrier.

It may be an easy decision if a carrier has two or three scores in the 90th percentile and thus two or three yellow triangles. But what if there is only one yellow triangle, which 57 percent of the carriers have? Is it really feasible that we place 43 percent of the county's motor carriers out of service?

In my opinion there is only one solution that will solve this problem—a federal law that would prohibit the use of the FMSCA data in lawsuits arising out of highway accidents. One sentence will do the job: No part of the FMCSA's Safety Measurement System data may be admitted into evidence or used in a civil action for damages relating to a highway accident. While at first blush this may seem extreme, there is very good precedent for it.

The National Transportation Safety Board is the public agency charged with investigating accidents. The purpose of these investigations are to determine the cause of the accident and thus to hopefully avoid similar accidents in the future. In order to ensure the full cooperation of everyone involved in the investigation, the results of the investigation are by statute inadmissible as evidence in a civil lawsuit.

UNTIL CONGRESS ACTS

As of this time I am unaware of any contract provisions or procedures for carrier selection that would provide absolute protection, or "a safe harbor," for shippers to avoid exposure to vicarious liability for accidents on the highway.

In a perfect world, the most prudent course for a shipper would be to only knowingly use carriers that have a "Satisfactory" safety rating. However, it must also be kept in mind that when a shipper requires a carrier to have a "Satisfactory" safety rating, then the shipper should also have in place internal systems to monitor the carrier's status.

This is because a shipper does not want to be in the position that C.H. Robinson found itself in during the *Schramm* litigation where the judge noted that C.H. Robinson's contract required the carrier to have a "Satisfactory" safety rating, however the trucking company involved in that accident was in fact "Unrated."

The judge in *Schramm* thought that this could provide evidence for a jury to conclude that C.H. Robinson was aware of the importance of having a "Satisfactory" safety rating, but then

USE OF SMS DATA/INFORMATION

The data in the Safety Measurement System (SMS) is performance data used by the Agency and Enforcement Community. A symbol, [on left] based on that data, indicates that FMCSA may prioritize a motor carrier for further monitoring.

The symbol is not intended to imply any federal safety rating of the carrier pursuant to 49 USC 31144.Readers should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system. Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways.

Motor carrier safety ratings are available at http://safer.fmcsa.dot.gov and motor carrier licensing and insurance status are available at http://li-public.fmcsa.dot.gov/.

—The full text of the disclaimer now posted on the FMCSA website

didn't enforce its own requirement.

Further compounding the dilemma for shippers is the fact that of the 190,000 active motor carriers approximately 105,000 of them are "Unrated." The reason a licensed motor carrier may be "Unrated" is usually because the FMCSA has not yet had time to conduct an initial safety review for that company. However, many shippers must use, at least on occasion, unrated carriers to meet capacity needs.

A final consideration is that even with the most prudent process in place for carrier selection, accidents will happen. Where there are serious injuries or deaths it's likely that the shipper will be included in any ensuing litigation. Accordingly, the shipper's final bulwark to avoid a catastrophic economic loss is to have an appropriate liability policy in place.

There is a debate within the insurance industry as to whether the appropriate insurance for vicarious liability for accidents on the highway is "hired & non-owned automobile liability" insurance or "contingent automobile public liability" insurance.

Ultimately it's not the name of the policy that determines the coverage, but the terms of the policy. Accordingly, a thorough understanding of the policy terms is necessary to make sure that the policy would indeed provide coverage for vicarious liability for highway accidents.

CALL TO ACTION

One element of establishing that someone is negligent is to prove that they failed to follow an industry standard. But here there is no true standard to follow; and thus, it's virtually impossible for shippers to defend themselves in court even when they're trying their best to only use carriers that they believe to be safe operators.

"The intended purpose of CSA is to provide the FMCSA with a more efficient mechanism to identify carriers for possible intervention," says Raymond A. Selvaggio, general counsel of the Transportation & Logistics Council. "Using CSA as a sword against shippers and brokers in personal injury litigation runs counter to this purpose. This essentially makes shippers and brokers de facto policemen of the industry, rather than the FMCSA and the various state regulatory bodies that are tasked with this job. The proposed legislation is something that is needed and well warranted."

To conclude, the unintended effect of CSA/SMS on the issue of vicarious liability affects everyone who hires or uses motor carriers—shippers, carriers, brokers, freight forwarders, and intermodal companies hiring dray operators. Shippers, carriers, and others may differ on other issues, however, on this occasion they are called to come together and act as one. □