A Critical Need for Reform of the Compliance, Safety, Accountability Program and Options for Defense Counsel to Prevent the Admission of CSA Scores into Evidence

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There has been no shortage of criticism of the Federal Motor Carrier Safety Administration’s (FMCSA) Compliance, Safety, Accountability (CSA) program, which was launched in late 2010. Experience has shown that much of the program has benefits. However, aspects of the program have grown substantially problematic. One of those problematic aspects of the program is the ability of the public to view, and, by extension, the ability of plaintiff’s lawyers to utilize, motor carrier CSA Safety Management System (SMS) scores.

Efforts have been underway for some time to remove those scores from public view. The goal of the CSA program is ultimately to improve safety and prevent property damage, injuries and fatalities arising out accidents involving commercial motor vehicle carriers. Obviously, this is a laudable goal, and one that the industry supports. However, whether the current framework of the program actually achieves those goals is debatable.

In a report issued by the U.S. Government Accountability Office (GAO) in February 2014 entitled Federal Motor Carrier Safety: Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers, the GAO determined that "many SMS scores do not represent an accurate or precise safety assessment for a [commercial motor vehicle carrier]." GAO-14-114 at page 16. In its report, the GAO further determined that the safety scores are, in fact, unreliable predictors of subsequent crash performance. There has been widespread industry criticism leveled against the SMS to the extent that its statistical methodology is inherently flawed and results in the misrepresentation of commercial motor vehicle carrier's safety performance and perceived risk.

Within the industry, there has been widespread concern, some of which is now being borne out by experiences on the ground, that the public availability of such data can have significant adverse consequences on carriers with scores deemed problematic. It is undeniable that a score that unfairly characterizes an otherwise safe and responsible motor carrier as being more likely to be involved in a crash will have a significant detrimental impact for that carrier. Those consequences can include an inability to secure insurance or financing, disqualification from contracts with shippers and brokers, as well as attempts to use such data against carriers in litigation.

The American Trucking Associations (ATA) has continued in its efforts to press for commonsense changes to the CSA program and scoring system, most recently by seeking to remove from the scoring program crashes that were not caused by the motor carrier or its driver. Under the current system, all crashes are included in the CSA scoring, thereby including accidents which were not caused by the carrier.
Concurrent with industry efforts to achieve commonsense changes, legislative efforts are also underway to address these concerns and revise the system. House Representative Lou Barletta (R-PA) has filed the "Safer Trucks and Buses Act of 2015" in the House. The purpose of the proposed legislation would be, among other things, to remove CSA rankings and SMS scores from public view. Barletta's proposed legislation would prohibit utilizing data from a crash in which the motor carrier was not at fault, and use only that data which is "determined to be predictive of motor carrier crashes" in the scoring system. H.R. 1371, 114th Cong. (2015). Barletta is not alone in his efforts in this regard and has been joined by Senator John Thune (R-S.D.) and Senator Deb Fischer (R-Neb), both of whom have expressed interest in reform and have been critical of the CSA program.

The use of such public data in the course of litigation can present significant problems in the course of defending a commercial motor vehicle carrier. As those of us who regularly represent and defend the trucking industry know, a common theme presented by plaintiffs' lawyers in such cases is that the trucking industry is solely motivated by profit, and in pursuit of that goal it cuts corners, hires inexperienced or unqualified drivers, operates the commercial motor vehicles recklessly and employs substandard inspection and maintenance practices. Unfortunately, plaintiffs' lawyers have been given a potential tool for supporting such claims in the form of CSA scores that are publicly available.

Indeed, plaintiffs' attorneys have become cognizant of the perceived advantage of utilizing this data against motor carriers in litigation, and they have begun crafting detailed and tailored discovery demands, interrogatories and areas for examination during deposition on these issues.

Plaintiffs' lawyers are now trying to utilize the fact that a carrier has received a warning letter or a percentile ranking in one of the BASICs that falls below other carriers to claim that this particular carrier is dangerous and unfit for being on the road. The fact that such data has been gathered, compiled and presented to the public by the federal government, will lead to a jury attributing much credibility and significance to the data, increasing the risk of significantly unfair prejudice to the defendant motor carrier.

The use of such CSA scores have been admitted in some litigation. For example, in *McLane v. Rich Transp., Inc.*, 2012 U.S. Dist. LEXIS 12777, *8* (E.D. ARK. 2012) the Court held that plaintiff's retained expert could offer testimony regarding the motor carrier defendant's CSA score and its on-road performance overview percentiles. Other trial level courts have reached similar conclusions regarding the discoverability and admissibility of CSA data. But see *Dragna v. A & Z Transp., Inc.*, 2015 U.S. Dist. LEXIS 19766, *28-29* (M.D. LA. 2015) (stating that "the record evidence establishes that BASIC scores are not indicative of motor carrier safety.")

Whether, and to what extent such data will be admissible at trial is not a resolved question, and appellate level decisions are nonexistent. Until either change is achieved through removal of such data from public view or the question of the admissibility of such data is resolved in the courts, defense counsel do have options at their disposal.

The first option is to challenge any attempt to introduce such evidence on relevancy grounds. Under Federal Rules of Evidence 401 “relevant” evidence is that which "has any tendency to make a fact of consequence more or less probable than it would be without the evidence." Fed. R. Evid. 401. Under Federal Rules of Evidence 402, irrelevant evidence is inadmissible. The relevancy defense should be the first one raised by defense counsel in support of a motion *in limine* to preclude any attempt to admit such data at the time of trial. In support of such arguments defense counsel should rely upon the government's own data and conclusions, namely the GAO report previously discussed, as well as positions articulated by industry and stakeholders. The fundamental realities of the unreliable manner in which data is procured demonstrates its inherent flaws, and the argument, therefore, follows that the data does not have "any tendency to make a fact of consequence
more or less probable" under Federal Rules of Evidence 401 and should therefore be deemed inadmissible as irrelevant under Federal Rules of Evidence 402. However, even if the Court determines that the evidence may be relevant, it can still be excluded on other grounds.

One other such ground is to argue that the CMS data constitutes “character evidence” which would be inadmissible under Federal Rules of Evidence 404 if its purpose for introduction is to prove the "character" of the motor vehicle carrier or driver. Additionally, evidence may be excluded under Federal Rules of Evidence 407 if it constitutes a subsequent remedial measure. To the extent that the stated purpose of the CSA program is to improve safety and prevent future accidents, the data should qualify as falling under the subsequent remedial measure umbrella, and, therefore, be excluded on public policy grounds. Finally, there is a substantial risk if such data were to be admitted at the time of trial that it may confuse the issues and otherwise mislead or distract the jury from the central issues in the case, thereby, unfairly prejudicing the defendant, necessitating exclusion under Federal Rules of Evidence 403. As previously discussed, a significant criticism of CSA data is that it includes any and all reportable accidents, but does not take into consideration the respective fault of the involved parties. That is, the data compilation process and methodology does not make any distinction between an accident which was the fault of the commercial motor vehicle driver, or another party. This substantially increases the risk of unfair prejudice to that carrier if such data is admitted.

Until there is definitive legislative action to address these very real concerns over the public availability of such scores, defense counsel should be prepared to address these issues at the outset of litigation with its corporate representatives prior to their depositions. Defense counsel may also require the use of experts to offer testimony and proof regarding the methodology by which the data is gathered, and then use such proof and testimony to lay the foundation demonstrating the data’s unreliability to support a preclusion motion. 

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