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Ted L. Perryman and Jennifer A. Wood identify key arguments defense counsel may use to show why FMCSA's CSA data are not admissible to prove carrier liability at trial.

Admissibility of FMCSA's Compliance, Safety, Accountability (CSA)

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What is CSA?

In late 2010 the Federal Motor Carrier Safety Administration ("FMCSA") introduced a new safety initiative designed to reduce crashes, injuries, and fatalities related to commercial motor vehicles.[1] The program, called Compliance, Safety, Accountability ("CSA"), tracks data compiled by FMCSA and its state partners and then uses a complicated methodology to assign ratings to motor carriers in various categories. Those categories are known as Behavior Analysis and Safety Improvement Categories ("BASICs"), and include Unsafe Driving, Hours-of Service Compliance, Driver Fitness, Controlled Substances/Alcohol, Vehicle Maintenance, Hazardous Materials Compliance, and Crash Indicator.[2] BASICs are tracked by FMCSA in its Safety Measurement System ("SMS"), and published on the SMS website.

Within each BASIC there are three types of data that could be used at trial. First is the percentile rank, which ranks the motor carrier against its peers in a given class size of carriers. Second is a snapshot of violations recorded against the motor carrier or its drivers over a 24 month period. Third is a detailed Inspection History of all roadside inspections involving the motor carrier over the past 24 months? The first category, percentile rank or score, is the most troublesome, because it appears simple and yet is deceptively misleading and unreliable when used in the context of litigation.

Because plaintiffs' counsel may argue in favor of admission of CSA evidence during a trial involving a motor carrier, it is vital that defense attorneys representing trucking companies be familiar with CSA, and be prepared to argue why CSA evidence is not admissible.

What is the intended purpose of CSA?

The CSA program is not designed with personal injury litigation in mind. Rather, FMCSA developed CSA as a tool to help it improve safety and reduce crashes. FMCSA uses the data to pinpoint carriers that may need closer scrutiny by the Agency or its state partners. FMCSA has acknowledged that CSA data are unreliable for other purposes. There are multiple disclaimers found on the FMCSA website, including one that says "Readers should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system."[3] Another disclaimer cautions against use of SMS for purposes other than those expressly described by FMCSA since it "may produce unintended results and inaccurate conclusions."[4] However, in spite of these disclaimers, plaintiffs' counsel may attempt to introduce CSA data to help establish cases against truck drivers and trucking companies.

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[1] *See About CSA –What Is It?*, Fed. Motor Carrier Safety Admin., http://csa.fmcsa.dot.gov/about/ (last visited August 21, 2013).

[2] *See Safety Measurement System; CSA BASICs*, Fed. Motor Carrier Safety Admin., http://csa.fmcsa.dot.gov/about/basics.aspx (last visited August 21, 2013).

[3] This is found at the bottom of the Carrier Overview page for every motor carrier on FMCSA's SMS website.

[4] *SMS Information Center; What is the motor carrier Safety Measurement System?*, Fed. Motor Carrier Safety Admin., http://ai.fmcsa.dot.gov/sms/InfoCenter/Default.aspx#question30894 (last visited August 21, 2013).

What is the danger of allowing CSA evidence at trial?

In the typical case, a plaintiff will make claims against a truck driver and the trucking company (*respondeat superior*) for negligence in causing a crash. In the same lawsuit, motor carriers are often faced with claims of negligent supervision, entrustment or retention. If the trucking company happens to have an alert in the Unsafe Driving BASIC and is in the 67th percentile in that category, [5] a plaintiff would be eager to introduce the fact that the trucking company has exceeded a government threshold and has been specially flagged as a "repeat offender." It would no doubt be pointed out that the motor carrier was "worse" than 67% of all other carriers. The conclusion is that the carrier does not properly supervise or train its employees.

One can easily see how CSA data can mislead a jury. Jurors would not know the methodology involved in determining the BASIC percentile, and would be inclined to trust data coming from a government agency. Therefore, defense attorneys must be prepared to explain to the court why CSA evidence is inadmissible.

Why CSA evidence is inadmissible.

The Federal Rules of Evidence[6] provide several arguments against admissibility of CSA data. In some cases, the argument depends upon the underlying claims brought against the motor carrier. The rules are complimentary, and one rule should not be relied upon to the exclusion of any others.

Character Evidence - Rule 404(b).[7]

Application of this rule is wholly dependent upon the reason the plaintiff wants to introduce the CSA data. If BASIC percentiles or other CSA data are introduced to prove that a carrier has a history of unsafe behavior, and the jury should therefore conclude that the driver was engaged in similar behavior and was negligent, the data would be inadmissible. Rule 404(b) "generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge."[8]

However, there are other reasons a plaintiff may seek to introduce CSA evidence that could be admissible under 404(b). For example, suppose the argument is that fatigued driving was the proximate cause of the accident. The plaintiff may then seek to introduce the Hours-of-Service Compliance BASIC to prove that the carrier encouraged or at a minimum tolerated its drivers violating HOS regulations. The threshold inquiry a court must make before admitting similar acts

[5] An alert means the carrier's percentile for that BASIC is either over an established threshold, or the investigation results show a Serious Violation. *See SMS Information Center; How is a carrier's Behavior Analysis and Safety Improvement Category (BASIC) Overall Status determined?*, Fed. Motor Carrier Safety Admin., http://ai.fmcsa.dot.gov/SMS/InfoCenter/#question30900 (last visited August 21, 2013).

[6] Throughout this article we refer only to the Federal Rules of Evidence. Naturally, some states have not adopted the FRE, so be sure to review individual state rules for discrepancies.

[7] "Crimes, Wrongs, or Other Acts. (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. (2) Permitted Uses; … This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b).

[8] *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character.[9] If the fatigued driving example falls under the "permitted uses" category and the CSA data are probative of some other material issue, such as intent or motive, CSA evidence may be admissible.

Hearsay Exception – Rule 803(8).[10]

CSA evidence is clearly hearsay, since it is an out of court statement (prepared by FMCSA) offered to prove the truth of the matter asserted (that the motor carrier is unsafe). However, it could fall under the public records exception to the hearsay rule found in Rule 803(8) of the Federal Rules of Evidence. The vital elements of the exception are that the statement must set out factual findings and not indicate a lack of trustworthiness.

"Factual findings" include factual observations, opinions, conclusions, and evaluations.[11] As such, CSA data appear to be factual findings. However, to be admissible, factual findings generally must be final in nature, or later adopted as final.[12] Interim agency reports or preliminary memoranda do not satisfy Rule 803(8)'s requirements.[13] The state-level inspections and attendant violations from which CSA data are derived might be considered final in nature. However, the "conclusions" or BASIC percentile scores drawn from those inspections are not at all final. The weights given to violations and the percentiles assigned to carriers within each BASIC are not a final safety determination. FMCSA has explicitly said "the SMS is not a Safety Fitness Determination nor is it a safety rating pursuant to 49 CFR Part 385; also, it does not represent FMCSA's **final** determination about the safety of the carrier."[14] The only final determinations about carrier safety are the ratings of Satisfactory, Conditional, and Unsatisfactory. CSA data more closely resemble interim agency reports than final agency findings. It is entirely possible for FMCSA to "reject" BASIC percentiles that exceed threshold requirements by giving the carrier a Satisfactory rating following a comprehensive audit.

Even if CSA data were to be considered factual findings, the data must still be deemed trustworthy. For a number of reasons, the source of CSA data and other circumstances indicate a lack of trustworthiness. The burden of establishing a lack of trustworthiness in a public record is placed on the opponent of the evidence.[15] Thus, it is imperative that defense attorneys understand how CSA data are compiled and why the evidence is not trustworthy.

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[9] *Id*. at 686.

[10] "The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: (8) *Public Records*. A record or statement of a public office if: (A) it sets out: (i) the office's activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) neither the source of information nor other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803(8).

[11] *See Bank of Lexington & Trust Co. v. Vining-Sparks Sec., Inc.*, 959 F.2d 606, 616 (6th Cir. 1992), citing *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 168-69 (1988).

[12] *See Smith v. Isuzu Motors Ltd.,* 137 F.3d 859, 861-62 (5th Cir. 1998).

[13] *See id.* at 862.

[14] *See SMS Information Center; What is the motor carrier Safety Measurement System?*, Fed. Motor Carrier Safety Admin., http://ai.fmcsa.dot.gov/sms/InfoCenter/Default.aspx#question30894 (last visited August 21, 2013) (emphasis added).

[15] *See Montiel v. City of Los Angeles*, 2 F.3d 335, 341 (9th Cir. 1993), quoting *Keith v. Volpe*, 858 F.2d 467, 481 (9th Cir.1988).

There is no single definition of trustworthiness for Rule 803(8). Rather, the analysis is on a case-by-case basis. One argument can be based on the *Daubert* factors, which help determine the reliability of expert scientific testimony.[16] More often than not, CSA evidence may be offered through an expert witness. Another argument can be based on the Advisory Committee for the Federal Rules of Evidence, which suggests four non-exclusive factors that may be relevant to a determination of trustworthiness.[17]

Although an exhaustive list of all the ways CSA evidence is unreliable or untrustworthy cannot be detailed in an article of this length, a few examples are provided.

1. Research Studies Show Lack of Statistical Correlation

CSA data have not been tested or proven to be predictive of future safety issues. FMCSA itself has said that SMS is not a safety rating, and no report or study has shown that a high percentile ranking is indicative of future crashes. Of the research studies that have been conducted, one found no meaningful statistical correlation between BASIC scores and actual accident incidence on the basis of miles driven or number of power units in their sample dataset.[18] Another said that for many carriers, the association between crash risk and BASIC scores is so low as to be irrelevant.[19] Although a third study did find some positive correlation between three BASICs and the incidence of crashes, it also found an inverse relationship between two BASICs and the crash rate.[20] .

2. Statistical Outliers Are Common

The third study noted above also found that the relationship between BASIC scores and crash risk may be applicable to the industry, but not necessarily to individual carriers.[21] There are carriers with high BASIC scores and low crash rates, and others with low BASIC scores and high crash rates. There is no way to know which carriers with high BASIC scores will have a high crash rate, and which will be an outlier.

3. Regional Enforcement Disparity

There is no guarantee that any one state's procedures are uniform with respect to another state's procedures, and as such the potential error rate can be enormous. One state may easily employ relatively more roadside inspectors than another, or be more aggressive with its law enforcement traffic stops than another. Nor do the rules guarantee that all violations are issued with equal objectivity, since some violations associated with the Unsafe Driving BASIC are inherently subjective, like "following too close." Whether or not to register a violation at all is generally a subjective judgment call. This may be referred to as regional enforcement disparity. As just one example of the many discrepancies that exist from state to state, FMCSA-sponsored evaluation reports prepared by the University of Michigan Transportation Research Institute

[16] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993).
[17] *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 n. 11 (1988).
[18] *See* Anthony P. Gallo, *CSA: Good Intentions, Unclear Outcomes*, Transportation & Logistics, Wells Fargo Securities, LLC (October 2012).
[19] *See* James Gimpel, *Statistical Issues in the Safety Measurement and Inspection of Motor Carriers*, University of Maryland (July 10, 2012), https://docs.google.com/file/d/0B6aiirmQGAQSb09jYUpQT3dTTlU/edit?pli=1.
[20] *See Compliance, Safety, Accountability: Analyzing the Relationship of Scores to Crash Risk*, American Transportation Research Institute (October 2012).
[21] *See id.*

show that some states report fewer than 30% of all crashes that should be reported, whereas other states report more than 80%.[22]

4. Data May Be Neither Timely Nor Relevant at Time of an Accident

CSA data are not necessarily timely, because BASICs are determined by considering 24 months of on-road performance and 12 months of investigation results.[23] A great deal can happen with any given carrier over a 24 month period. A plaintiff may want to introduce the Unsafe Driving BASIC to prove negligent supervision against a motor carrier. However, the percentile score for that BASIC could include violations for drivers who have long since been terminated for those violations. Or the carrier might have implemented new safety training in that time frame which has produced a significant decline in violations.

5. Methodology Itself is Subjective and Arbitrary

Finally, the methodology used to calculate CSA data is not a strict statistical standard. Violations are subjectively weighted with different points assigned to different kinds of violations. For example, failure to wear a seat belt has a severity weight of 7, while failure to obey a traffic control device has a lesser severity weight of 5.[24] The percentile score itself is based on a bell curve, so that the "worst" carriers may still receive a Satisfactory safety rating from FMCSA. In addition, CSA only includes carriers regulated by FMCSA, not all carriers in the country.[25] Over 11% of carriers are not included in CSA data because they operate purely intrastate and do not ship hazardous materials.[26] Of those regulated by FMCSA, only 12% have sufficient data to be scored in at least one BASIC, which means that 88% of carriers have no score at all.[27] The 12% of carriers with scores are ranked on a bell curve against only their peers within that 12%, not against the entire industry.

To summarize the argument for the inadmissibility of CSA evidence under Rule 803(8), the key points are: (1) BASIC percentiles and other CSA data are not factual findings in that they are not final agency determinations of safety and may later be rejected by the agency when it determines actual safety ratings; and (2) CSA evidence is not trustworthy for a variety of reasons, some examples of which include (a) a lack of statistical correlation between BASIC percentile scores and crash risk, (b) the existence of statistical outliers, (c) regional enforcement disparity, (d) the extended time

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[22] *See MCMIS Evaluations*, Univ. of Mich. Transp. Research Inst., http://www.umtri.umich.edu/divisionPage.php?pageID=308 (last visited August 21, 2013).

[23] *See CSA Frequently Asked Questions; What is included in the Behavior Analysis and Safety Improvement Categories' (BASICs) details of the Safety Measurement System (SMS)?*, Fed. Motor Carrier Safety Admin., http://csa.fmcsa.dot.gov/FAQs.aspx?faqid=30893 (last visited August 21, 2013).

[24] *See Carrier Safety Measurement System (CSMS) Methodology, Version 3.0.1*, Fed. Motor Carrier Safety Admin., A-4-A-5 (August 2013), http://csa.fmcsa.dot.gov/documents/SMSMethodology.pdf

[25] *See CSA Frequently Asked Questions; Which carriers are included in the Safety Measurement System (SMS)?*, Fed. Motor Carrier Safety Admin., http://csa.fmcsa.dot.gov/FAQs.aspx?faqid=1458 (last visited August 21, 2013).

[26] *See Safety Report: Analysis of Intrastate Trucking Operations*, National Transportation Safety Board, 19 (March 28, 2002), http://www.ntsb.gov/doclib/safetystudies/sr0201.pdf .

[27] *See* House Committee on Transportation and Infrastructure, Subcommittee on Highways and Transit hearing "*Evaluating the Effectiveness of DOT's Truck And Bus Safety Programs*" September 13, 2012, written follow-up responses by FMCSA to questions posed by committee members, provided January 2013.

period for data collection, and (e) the subjective and arbitrary methodology itself.

Relevant but Inadmissible – Rule 403.[28]

In the event all other arguments fail and the CSA evidence is deemed relevant, there is still a strong argument to be made using Rule 403. CSA evidence is certainly prejudicial and can confuse the issues and waste time.

If the plaintiff alleges negligence in the form of unsafe driving, and the carrier has an alert in their Unsafe Driving BASIC, it is easy to see that this kind of "bad rating" from the government would appeal to a jury's sympathies and provoke its instinct to punish the carrier, which would be unfairly prejudicial. If a BASIC were offered into evidence by a plaintiff, the defense could easily spend an inordinate amount of time offering explanatory evidence about each and every one of the violations contained within the BASIC. This is particularly so if any citations were later dismissed by a judge, or if the driver in question was terminated, etc. This series of mini-trials on unrelated issues would confuse and unnecessarily prolong the matter.

Conclusion

While most trucking defense attorneys are familiar with CSA, the challenge is demonstrating that the data and scores are not reliable. Industry organizations such as the American Trucking Associations and private companies such as Vigillo LLC are actively developing data to test the reliability and trustworthiness of CSA percentile scores. As more studies are undertaken and additional data are developed, a body of evidence should be presented to demonstrate the inadmissibility of CSA.

[28] "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

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