

# The Transportation Brief®



## TRENDING

- › U.S. DOL strikes again with joint employment guidance that continues the theme of shrinking independent contractors in the U.S. and impacting trucking.
- › Motor carriers evaluate pros and cons of doing business in California.
- › On the heels of CSA BASICs being removed from public view, 3PLs consider whether complete disregard for BASICs is appropriate.
- › Major insurers are retreating from trucking insurance market, and many insurance professionals are signaling an ever hardening market.
- › Class action legal audit and assessment reviews are being prompted by the high frequency of cases being filed, and transportation companies growing tired of plaintiffs' attorney ambushes.

## *Highway Bill Holds FMCSA's Feet to the Fire on CSA Data Use*

In late 2015 the U.S. Senate and House passed the FAST Act, a five-year, \$305 billion highway bill reauthorization. The FAST Act is one of the more prominent transportation-related legislative vehicles. It addresses a wide range of issues with a recurrent theme—if the FMCSA is going to regulate, it must do so with accurate data, while taking into account a broader range of impacts.

A combination of provisions requiring a comprehensive study and action plan to ensure the CSA program identifies high risk carriers with the greatest propensity for crashes, while removing property carrier BASIC alerts and percentiles from public view until such time as the Inspector General certifies that deficiencies have been addressed, underscores the theme. Congress' direction acknowledges the steady drumbeat of reports questioning whether CSA is a reliable indicator of crash risk and severity. Although certain CSA data may no longer be available to the public, there are exceptions that make the data available to the carrier. This may pose a dilemma for carriers and procurers of carrier services as to what information they should obtain and review.

Similarly, on the issue of raising the minimum amount of insurance motor carriers must maintain, Congress directed FMCSA to report on the extent to which the current levels cover medical costs, compensation, and other costs and to determine the frequency with which claims exceed the current required minimums. The report is to augment information FMCSA has already obtained. Before proposing a new regulation on minimum insurance, FMCSA must consider a number of factors, including the impact on motor carrier operations large and small, insurance industry capacity, and motor carrier safety and accident reduction.

The FAST Act contains many other notable provisions, including a roadmap for authorizing hair testing for controlled substance use in lieu of urine testing, and a CDL pilot program for drivers 18-20 years old. For safety regulations, the Act's more lasting impact may be mandated changes to the regulatory process, including improvements to data quality, improved regulatory impact analyses, and less reliance on guidance documents formulated without public participation.

*Timothy W. Wiseman, Indianapolis  
Prasad Sharma, Washington, DC*

# Briefly...

## *Despite Privatization, CSA Scores Remain Critical to Due Diligence*

Due diligence for acquisitions involving the transportation industry focuses on a number of factors unique to transportation operations. Among other things, the DOT safety history of a target carrier is always a relevant inquiry, and the potential for negligent selection claims to be asserted against a target broker tendering freight to carriers involved in highway accidents renders the broker's carrier selection and qualification practices a topic of due diligence.

As discussed in greater detail elsewhere in this issue, the FAST Act compelled the FMCSA to remove carrier BASICs ("CSA scores") from public view. Nonetheless, and in the context of due diligence concerning transportation issues, it is important to remember that carriers continue to have access to their own CSA scores. Target companies may still be required by a potential acquirer to disclose their CSA scores as a part of any due diligence concerning a motor carrier acquisition. The failure of any target broker company to obtain CSA scores as a part of its carrier selection and qualification practices may be considered and compared to industry practices and procedures as a whole.

*Jay D. Robinson, Jr.  
W. Todd Metzger,  
Indianapolis*

## *FAST Act May Support Inadmissibility of CSA Data*

In highway accident litigation trials, the admissibility of CSA scores is hotly contested. Plaintiffs in motor carrier and broker liability cases contend that carriers with higher scores in unsafe driving, hours-of-service compliance and vehicle maintenance BASICs are inherently unsafe. They often attempt to use this data to buttress punitive damage claims. Defense counsel argue that CSA data should be excluded from evidence because of unreliable underlying data, lack of relevance, and improper character evidence.

Under the FAST Act, CSA data previously available on the FMCSA website is no longer publicly accessible. Plaintiffs will try to get the data through discovery on motor carriers. Congress' mandate to keep the data out of public view provides carriers with more support that the scores are neither discoverable nor admissible.

*Michael B. Langford,  
Indianapolis*

## *Impact of Recent Developments on Carrier Selection Decisions*

Property brokers and others that hire motor carriers should consider how Congress' mandate that FMCSA remove BASIC scores from the public view, as well as FMCSA's pending Safety Fitness Determination (SFD) rule, impact carrier hiring decisions. On one hand, failure to request BASIC scores during carrier selection could still be alleged by the plaintiffs' bar as evidence of negligent selection. On the other hand, there is no guarantee that consideration of the data will allow a company to avoid liability, and Congress' mandate to remove the data certainly bolsters a decision to ignore the data. Also, under the SFD rule as proposed, carriers will either be unrated or unfit. Thus, to the extent favorable consideration is currently given to "satisfactory" carriers, revisions to the carrier selection protocol will be required.

*Gregory M. Feary  
Nathaniel G. Saylor,  
Indianapolis*

### *For the Record*

We are pleased to announce that Janis E. Steck and John K. Smeltzer have joined the Firm. Jannie joins the Litigation and Appellate practice group and focuses on highway accident litigation. John will practice in the Corporate Structuring and Business Transactions group, concentrating on mergers and acquisitions and real estate transactions.

The Scopelitis Firm is the sole Indiana-based law firm to make the "Client Service 30" in BTI's "Client Service A-Team 2016," an annual survey of law firm client service performance. Scopelitis joins an elite group of 30 law firms nationwide most recognized by clients for client service excellence.



# Mileposts

## *FAST Act's CSA Reform Warrants Careful Review of Company Policy and Regulatory Obligations*

While many in the transportation industry view the FAST Act's CSA reform as a victory over a system that is demonstrably flawed, it is important to consider what the FAST Act did *not* do—which was to dispose of the CSA system entirely. As discussed throughout this issue of *The Transportation Brief*, the system is still very much alive and can have a significant influence over the day-to-day operations of those within the industry. Industry players would be wise to take stock of their operations in light of changes to the CSA system to ensure they remain in compliance with their regulatory obligations and have policies in place to help minimize liability exposure.

In this issue's cover article, Scopelitis partners Tim Wiseman and Prasad Sharma explore Congress' directive to the Federal Motor Carrier Safety Administration (FMCSA) calling for an evaluation of the CSA system and a fix for its various flaws. Notably, the FAST Act mandated the removal of BASIC alerts and percentile scores from public view until the system is fixed. This data, however, is still used by law enforcement agencies and the FMCSA to target motor carriers for inspections and other forms of intervention. Accordingly, carriers should continue to carefully monitor their CSA data and tailor their operations to minimize the risk of enforcement action. The Firm's regulatory compliance practice, headed by Tim Wiseman, routinely works with carriers of all sizes to ensure their operations are in compliance with the FMCSA's safety regulations because this affects the carriers' CSA data.

On page two of this issue, Scopelitis partners Greg Feary and Nathaniel Saylor address the impact that CSA reform may have on shippers and third-party intermediaries who must select motor carriers to haul freight. Because these entities continue to become bigger targets for plaintiffs involved in motor vehicle accidents, it becomes increasingly important for shippers, brokers and similar entities to implement and/or reevaluate their carrier selection protocol. Feary and Saylor, along with several other attorneys Firmwide, regularly counsel clients on minimizing their exposure by implementing and conforming to company policies such as carrier selection protocols.

## *On the Road*

Kevin Phillips attended the International Warehouse Logistics Associations Winter 2016 Board Meeting, January 20-22, in **Grand Cayman**.

Don Vogel will present a Webinar on "Strategic Approaches to Human Resources Issues in Corporate Transactions: Strategic Considerations Related to Collective Bargaining in Corporate Transactions" for Bloomberg BNA, March 2.

Jacob Fisher will attend the 13th Annual Global Business Conference, March 3, in **Philadelphia**.

Andy Butcher and Kevin Phillips will present "Logistics Law – A Look Back And What May Be On The Horizon Including Class Actions" at the International Warehouse Logistics Associations Convention & Expo, March 15, in **Champions Gate, Florida**. Don Vogel will also attend.

Allison Smith and Jacob Fisher will attend the TAGLaw Southeast & Midwest Regional meeting, March 18-20, in **Atlanta**.

Robert Henry will present "Staying on the Right Side of the Employee/Owner-Operator Divide" at the American Moving & Storage Association's 97th Annual Education Conference & Expo, March 22. He will also present "Legal Update: Contractor vs Employee Definitions/Medical Review of Physicals" at AMSA's 2016 National Safety & Operations Conference, March 24, in **New Orleans**.

Jim Golden will speak on Negotiation Counsel Model at the Harvard Business School, April 21, in **Cambridge, Massachusetts**.

Fritz Damm will attend the North American Transportation Employee Relations Association's Board of Directors meeting, April 7, in **Washington, D.C.**

Fritz Damm will attend DRI's 2016 Trucking Law Conference, April 13-15, in **Chicago**.

Kevin Phillips and Eric Meyers will attend the 2016 International Association of Refrigerated Warehouses – World Food Logistics Organization Convention, April 16, in **Las Vegas**.

Greg Feary will participate in the Labor Relations panel at the Trucking Profitability Strategies Conference, April 19, in **Atlanta**.

Don Vogel, Kathleen Jeffries and Fritz Damm will attend the TLA Annual Conference and Executive Committee Meeting, April 26-30, in **Destin, Florida**. Leonard Kofkin will also attend the Conference.

Kevin Phillips will speak on "Warehouse Security and Legal Liability" at the Inland Marine Underwriters Association's 2016 Annual Meeting, May 15-18, in **San Diego**.

# Dispatches

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Eric Meyers reports that due to increasing budget deficits, coupled with the elimination of law enforcement ticket quotas, Cook County and the City of Chicago continue to aggressively pursue overweight violators traveling on no-truck routes as a means to generate revenue. In an effort to negotiate settlements with reduced fines, several defenses are available, including lack of jurisdiction to hear these types of tickets at an administrative level.

According to Craig Helmreich, the statutes and regulations relating to commercial use of drones are constantly changing at both the national and local levels. Companies that will be successful using drones commercially must stay up to date on the ever changing legal landscape.

The Firm is gauging interest in submitting comments on behalf of a coalition of motor carriers to the FMCSA's recent Safety Fitness Determination proposed rule, which makes sweeping changes to the agency's safety rating process. For more information, please contact Tim Wiseman ([twiseman@scopelitis.com](mailto:twiseman@scopelitis.com)) or Brandon Wiseman ([bwiseman@scopelitis.com](mailto:bwiseman@scopelitis.com)) of the Firm's Indianapolis office.

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