

Vicarious Liability: WHY THE FMCSA IS THE ULTIMATE JUDGE OF HIGHWAY SAFETY

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In an effort to break through to the “deep pockets” of shippers, brokers and leasing companies, the plaintiff’s bar has promoted four fallacious premises:

- (1) That shippers, brokers and leasing companies cannot rely upon the Federal Motor Carrier Safety Administration’s (FMCSA) ultimate determination of safety fitness with impunity;
- (2) That SafeStat is a required measuring stick for determining carrier use;
- (3) That over 90% of motor carriers who are “unrated” by the FMCSA are not fit to use without further inquiry; and
- (4) That unrated carriers with Safety Evaluation Areas (SEA) scores over 75 are not fit for use and should be barred from use by brokers, shippers, and leasing companies under penalty of vicarious liability, or state law “negligent hiring” or “negligent entrustment” exposure.

Any thoughtful student of federal regulation or the trucking industry should immediately recognize the fallacy of these arguments and the self-defeating results of acceding to these standards. Yet it is alarming to see that substantial brokers, shippers and leasing companies have been duped or browbeaten into accepting these propositions with potential devastating effects.

By responding to the false premises of the plaintiff’s bar under some simplistic “better safe than sorry” analysis, shippers, brokers and leasing

companies fall prey to the law of the unintended consequences as they pronounce an anathema on over one-fourth of the 600,000 motor carriers and quickly kill off, if not hamstring, as many as 125,000 small businesses which the FMCSA has determined are fit, willing and able to provide service.

Let us consider each of the four pillars of plaintiff’s bar’s faulty analysis.

(1) That shippers, brokers and leasing companies cannot rely on the FMCSA’s determination of safety fitness without impunity. Correctly seen, motor carriers, like airlines, bus companies and pipelines, are regulated public utilities which are subject to comprehensive federal regulation. The FMCSA and only the FMCSA is charged with determining what carriers are licensed, authorized and insured to conduct operations in interstate commerce. Federal regulation has a preemptive effect and the regulations place a singular non-delegable duty upon the licensed, authorized and insured motor carrier to be solely responsible for the safe operation of the commercial motor vehicle. The regulations are careful to state that a property broker, for example, is one who arranges for transportation and whose statutory duty is to retain “an authorized carrier” without imposing any other hiring prerequisite.¹

Ironically, it is the plaintiff’s bar which has developed its vicarious liability theories using state, not federal, law concepts and then misused the federal SafeStat system to establish a state law measuring stick.

In the few bad cases which scare brokers, shippers and leasing companies the most, the targeted defendants are victims of their own self-inflicted wounds. By representing themselves as carriers “or assuming by contract or action, carrier duties and obligations,” defendants have unwittingly opened the door to state law liability.² The Court’s decision in *Ill. Bulk Carrier, Inc. v. Jackson*³ offers the best analysis of the state law issues which underpin the plaintiff’s position. If you assume carrier duties in a contract or become embroiled in the carrier’s duties, you can inadvertently assume the liability of the carrier.

In fact, the case law suggests, I maintain, that contracting with a motor carrier as a regulated vendor or customer is the best course of action. All that is or should be required is verification that the FMCSA has determined that the carrier is authorized to operate. Leave it to the Agency and the carrier’s insurer to determine its safety status. Anything more results in unintended consequences.

(2) That the SafeStat can or should be used by the public to screen carriers. SafeStat is a database created by the FMCSA for managing its Congressionally delegated safety duties. It is clear from its website that the data shown on SafeStat is neither intended for public consumption nor fit for public consumption. It reads:

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WARNING:

Because of State data variations, FMCSA cautions those who seek to use the SafeStat data analysis system in ways not intended by FMCSA. Please be aware that use of SafeStat for purposes other than identifying and prioritizing carriers for FMCSA and state safety improvement and enforcement programs may produce unintended results and not be suitable for certain uses.

Unfortunately, notwithstanding this warning, the FMCSA lays out for all to see, the application of a statistical model for assessing what companies need to be the subject of a compliance review and then assigns a score card or compliance percentile ranking in four areas (SEAs). Clearly, the SafeStat is an imperfect and flawed system. It is based on citations, not conviction. It is subject to the laws of adverse selection, the law of large numbers and, at the end of the day, it is used by the Agency only as a heuristic tool for determining which carriers to audit, not for determining fitness for use.

(3) That an unrated carrier (i.e., one which has not been through a compliance review and obtained a satisfactory rating) is one which should not be used without further inquiry. Under the current SafeStat system, an unrated carrier is one which the agency has determined to be fit, willing and able to conduct operations based upon its compliance with federal regulation and accident and roadside inspection data available for its review. An “unrated” status is, in every sense of the word, equivalent to a “satisfactory” rating. Ratings of “satisfactory” “conditional” and “unsatisfactory” are usually assigned only after the Agency has determined that a compliance review is necessary or required. Under the current system, the proper conclusion to draw from a “unrated” finding is that the Agency has determined that the carrier does not warrant

a compliance review and hence its absence of a rating is equivalent, if often not superior to, a rating of satisfactory which has been attached to a carrier for which the Agency thought a thorough investigation was needed.

(4) That unrated carriers with SEA scores over 75 are unsafe carriers. Not only does plaintiff’s bar argue that shippers, brokers and leasing companies should use the corrupted SafeStat system to second guess the Agency, they claim that a new limbo bar should be set at a 75 SEA score for driver or equipment complaints. Shippers, brokers and leasing companies are no longer members of the traveling public who ultimately can rely upon the government’s safety determination, and if you accept this logic, then 25% of the carriers which the Agency authorizes are not actually fit to use.

In response to the above analysis, some would say “Okay, I agree. The imposition of SafeStat scores to bar carriers may not be fair or justified, but I have to protect my company’s interests as a shipper, broker or leasing company against vicarious liability. So why not just give in to plaintiff’s bar, use SafeStat and be safe rather than sorry?”

There are at least three reasons this is a bad idea.

1. You abandon the defense that FMCSA and only FMCSA is charged with the duty of determining who is licensed, authorized and insured. Your best argument is that you are merely a member of the traveling public using a public utility and that the Federal Government, not you, must make the ultimate decision. You are not required to second guess.
2. Assumption of Duty. The argument that is to defeat shippers, brokers and carriers is that, having once assumed the extraordinary duty of qualifying the carrier you have then “assumed the position” and are required to ensure that

that standard is met. Clearly, if any shipper or broker undertakes in a contract to “micro-manage” carrier selection it had better ensure that it meets that bar on every single instance without exception. Using SafeStat, an unyielding and unfair benchmark becomes entirely the standard for conduct.

3. The “Slippery Slope.” Convergent with the misuse of SafeStat by plaintiff’s bar and the “better safe than sorry” guidance provided to some shippers and brokers, our industry is facing implementation of CSA (Comprehensive Safety Analysis) 2010 and the proposed public release of data which will have a catastrophic effect on the motor carrier industry and shippers and brokers who use them.

Misuse of CSA 2010 Data Threatens Competitive and Efficient Transportation. Unfortunately, the problems of vicarious liability will be exacerbated unless the FMCSA immediately terminates its intent to publicize its CSA 2010 scoring system in December of this year. CSA 2010, which is intended as an ultimate replacement for SafeStat, is the FMCSA’s answer to the budget crisis and is ultimately intended to replace the current safety audit system with a progressive intervention program based on ranking carriers by peer group in 7 areas (called “BASIC”). Carriers who have been laboring under CSA 2010 methodology in demonstration states report that it is a “game changer.” Although it has not been subject to rulemaking or notice and comment, the Agency proposes to make available a listing for every for-hire motor carrier showing every citation, warning and crash (regardless of causation). Notwithstanding due process objection, the Agency intends, based upon a point system and peer groups by size or number of safety events, to rank carrier compliance by percentile and to use this data for determining thresholds for progressive inquiry.

Although the data and the statistical analysis are flawed, use of the data for the Agency's use in targeting audits is not the problem.

The Agency intends, without scientific or statistical warrant, to label carriers whose percentile falls above artificial limbo bars in each of the 7 areas as "marginal" or "deficient."

The FMCSA knows full well that labeling a carrier as deficient or marginal will adversely effect its ability to operate as shippers and brokers are forced to bar using carriers so labeled for fear of vicarious liability. Although the number of truck involved fatalities fell 20% in 2009 to the lowest level in 60 years, the FMCSA Administrator stated, "The Agency will not rest until there are zero commercial truck-related fatalities on the roads. We are committed to using every resource available to strengthen commercial truck safety and save lives."

Lost in the zeal to improve highway safety is the Agency's concomitant obligation under the National Transportation Policy to encourage competitive and efficient transportation as well.

The FMCSA, and only the FMCSA, is charged with the duty of determining fitness to operate and this arbitrary profiling of carriers has been roundly criticized by shippers, brokers and carriers alike. Yet the Agency has continued to profile carriers and make the safety data publicly available, reasoning that doing so allows "... the FMCSA to leverage the support of shippers, insurers, and other interested stakeholders to ensure that motor carriers remain accountable for sustaining safety operations over time."⁴

Clearly, the FMCSA does not genuinely believe that the approximately 68% of all carriers who will be labeled as "marginal" or "deficient" should be placed out of service or receive an unsatisfactory safety rating yet labeling over two-thirds of the industry as deficient based on CSA 2010 has that

consequence as shippers and brokers feel compelled to protect their own liability interest are now being forced to use these artificially constructed thresholds in carrier selection.

Major Fortune 500 companies including steamship lines, retailers and 3PLs are being ill advised, I believe, to contractually bar use prospectively of any carrier failing the limbo bar test of CSA 2010 with catastrophic results.

The FMCSA now conducts only 17,000 compliance reviews of the 700,000 active motor carriers per year, auditing only the most at risk, and then (by recent history) awards 62% satisfactory rating placing out-of-service less than 6500 motor carriers per year. Under the CSA 2010 scoring system, an estimated 68% of the for-hire carriers (125,000 carriers) will be labeled as "marginal" or "deficient" in 1 of the 7 "Behavior Analysis and Safety Improvement Categories."

While responsible motor carriers generally support a progressive intervention system, the effect of labeling 68% of the available motor carriers as marginal or deficient, coupled with vicarious liability concerns and "better safe than sorry" contracting practices will devastate the motor carrier industry, affecting most severely small carriers and transactional brokerages in the spot market which eliminates dead head and leads to greater efficiency.

Moreover, the labels "deficient" or "marginal" are simply artificial constructs which have no scientific or statistical support. Here are 10 of the numerous reasons why:

1. Highway crashes are down 32% over the past decade and labeling well over 50% of the industry by category and peer group as marginal or deficient is without scientific or legal warrant.
2. The fact that the FMCSA each year finds less than 5,000 carriers are unfit to operate after audit belies any argument that 175,000 carriers are statistically deficient

or that under CSA 2010 that over 400,000 carriers are marginal.

3. Carrier at fault crash data is the gold standard for measuring carrier performance and neither SafeStat nor CSA 2010 measures this matrix. (Recordable accidents are tracked regardless of who caused them.)
4. SafeStat, and to a great extent, CSA 2010 is based on unscrubbed data including citations and warnings over which the carrier has little or no chance of correcting.
5. Data collected incorporates inconsistent state enforcement practices and statistics are compiled comparing out of service violations against number of audits. Many inspectors fail to log good audits in the system. State enforcement and scale house anomalies can affect carrier violations by a multiple of four.⁵
6. Publication of higher inspection values results in profiling and more violations for carriers with high scores.
7. The system is based upon the assumption that state and local officials uniformly report clean inspections as well as ones involving fines or out-of-service violations.
8. Neither SafeStat nor CSA 2010 considers driver experience as a safety performance factor.
9. The key important driver out-of-service evaluation system is biased to the over-the-road carrier who must complete a paper log to benefit from the local "100 mile exemption" or Electronic On Board Recorder (EOBR) equipped drivers and results in rating carriers as "marginal" or "deficient" based on paperwork which has no nexus to fatigue.
10. The law of large numbers. Small carriers are more susceptible to statistical anomalies as percentage deviations can fluctuate widely

based upon random instances. (For instance, in a peer group of 1 to 10 trucks, one or two bad inspections over the norm in any basic area can result in a high percentile ranking.)

In sum, SafeStat and CSA 2010 are not fit for use as a stand alone measure of carrier safety and the FMCSA's decision to publish the data with labels like "marginal" or "deficient" has a substantial adverse affect on the efficient and competitive transportation system the Agency is required to foster.⁶

Forcing shippers and brokers to second guess the Agency and reduce competition is not what CSA 2010, or SafeStat for that matter, was intended to do. "CSA 2010 is designed to improve upon FMCSA's current system used to monitor the safety of carriers ... and to take follow-up actions where necessary."⁷

For the reasons stated above, the FMCSA should affirm its

non-delegable safety duty and acknowledge that the pejorative use of terms such as "deficient" or "marginal" are not warranted and are inconsistent with the Office of Management and Budget's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies; Republication."⁸

As a prerequisite for CSA 2010, the Agency should make clear that its final determination of carrier fitness has a preemptive effect. Commercial shippers and brokers, like any other user of a federally regulated mode of transportation – bus, plane or train included should be allowed to rely upon the regulatory agency's ultimate determination of safety fitness without fear of vicarious liability.

It is high time, if not too late, for the shipping and traveling public including shippers, brokers and carriers, to recognize that the problem of vicarious liability must be addressed as

a preemption issue. Whether through administrative recourse, Congressional action, or in the courts, these artificial limbo bars must be removed and the ability of shippers and brokers to use carriers the FMCSA ultimately determines are fit to operate must be affirmed. Opposition to release of CSA 2010 data is being organized. A coalition involving affected trucking companies, brokers, bus companies, and shippers is being organized.

Clearly, 21st century logisticians, plaintiff's bar and current regulators have no corporate memory of public utility law, federal preemption or the delegation of safety duties imposed by federal statutes and regulations.

This issue, like none other since deregulation, threatens to sacrifice the benefits of heightened competition and efficient operations at the altar of perceived heightened safety at any cost. 

Endnotes

1. See 49 C.F.R. 371.
2. See *Schramm v. Foster*, 2004 U.S. Dist. Lexis 16875 (D.Md. August 23, 2004); *Jones v. D'Souza*, 2007 U.S. Dist. LEXIS 66993 (W.D. Va. 2007).
3. 2009 Ind. App. LEXIS 900 (Ind. Ct. App. June 16, 2009).
4. Letter from FMCSA Administrator Ferro to President, Minnesota Trucking Association, June 8, 2010.
5. ATA Testimony to House Committee, June 23, 2010.
6. See 49 U.S.C. 13101.
7. "Improving Commercial Vehicle Safety", UMTRI Research Review, p. 1.
8. 67 FR 8452 (February 22, 2002).