INTERNET TRUCKSTC
September/October 2012
Volume 6 Number 5

SHIPPER LIABILITY *REVISITED*
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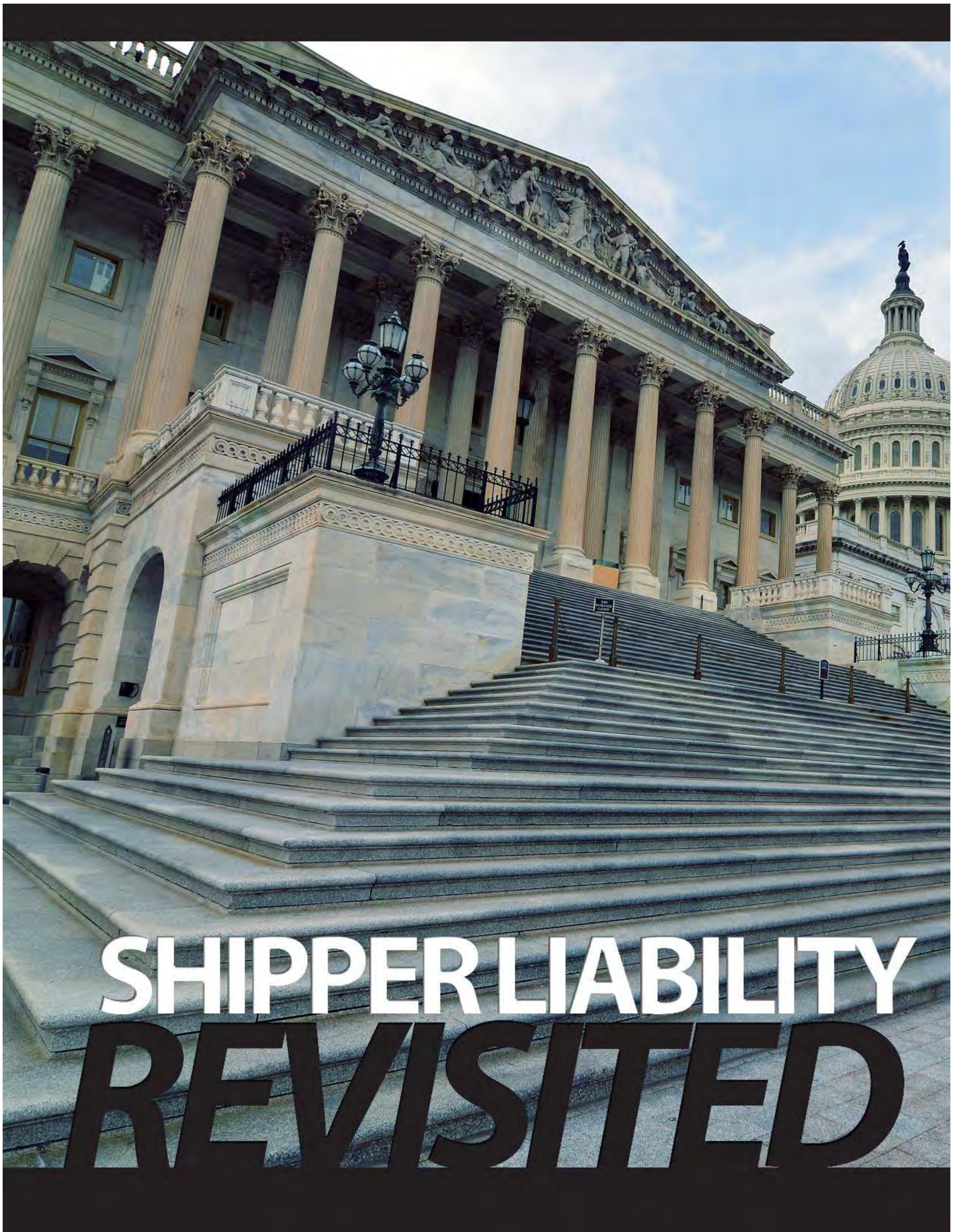
STATE OF THE BROKER
with Scott Moscrip


SHIPPER LIABILITY
REVISITED

This article is addressed to all shippers, brokers and forwarders who use interstate motor carriers. The subject matter, I believe, is the largest major transportation issue facing the shipping industry.

For 25 years, under deregulation, shippers, brokers and forwarders, as customers of interstate motor carriers, have enjoyed the benefits of a competitive marketplace, unfettered from regulatory restrictions on routes, rates and services. The goals of the National Transportation Policy, which include encouraging competition, efficiency and innovative small businesses, has resulted in direct service from multiple providers to every city and town in the country.

The U.S. DOT was charged by Congress, after the termination of the Interstate Commerce Commission, to oversee rules of commerce which protected a level playing field for all carriers. Both the traveling public and the shipping public were intended beneficiaries of the Agency's safety fitness determination and financial responsibility requirements, which mandated that each licensed and authorized motor carrier have minimum public liability and cargo insurance for the protection of the public.

While none of the statutes or safety rules promulgated by the FMCSA have changed, it is clear that the FMCSA no longer views the shipping public as the beneficiary of its regulatory duties.

Over the objection of 29 of 31 commenters, it abandoned the cargo insurance requirement

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rather than increase and expand the scope of the BMC-32 endorsement. In doing so, it stated that you, the shippers, should read every cargo policy of every carrier you hire to be sure that financial indemnity for the carrier's cargo liability exists.

In its enunciated five-year strategic plan, there is no mention of protecting the shipping public or encouraging marketplace competition. Instead, the Agency has shippers, brokers and forwarders in its cross hairs and wants to extend its regulatory powers to you.

mention of the Agency's ill-advised SafeStat publications, and the shipping public was ripe to be leveraged by the Agency's unvetted CSA 2010/SMS initiative.

Anyone who has made a study of SMS knows its percentile rankings have no proven correlation to carrier safety performance. Yet the Agency has leveraged the shipping public into using percentile rankings which have not been approved for the Agency's own use. The Agency is even using its own website to tout SMS, to criticize its own

Here is an excerpt of the Agency's statement:

"All elements of the CMV transportation life-cycle need to be aware of their impact on CMV safety, take responsibility for that impact and be held accountable." (p. 4.)

"The FMCSA will achieve its goal to maintain high safety standards to remain in the industry by identifying gaps in resources or authorities that prevent FMCSA from reaching certain elements of the CMV transportation life-cycle (e.g. entities touching highway movement of freight: shippers, receivers, brokers, freight forwarders) that may have a detrimental effect on safety through their actions." (pp. 8-9.)

In this context, it is ironic that the Agency action which most jeopardizes the shipping public is in not exercising new powers over shippers. Instead, it is now making efforts to leverage you, the shipper, to do its job of determining the safety fitness of each carrier you use under peril of a lawsuit.

Since the passage of the Motor Carrier Act of 1935, it has been the federal regulator's duty to certify carriers as safe for use and you, the shipping public, have been able to rely upon the Federal Government to do its job to the exclusion of state law liability under the Commerce Clause of the Federal Constitution.

When plaintiff's bar began suing brokers and shippers under state law causes of action, you became frightened. A handful of bad decisions, none of which were appealed, and some cursory

'official' safety rating system, and to urge shippers and brokers to use SMS at least co-equally with safety ratings in making 'sound' business decisions. Rather than challenging the methodology and holding the Agency accountable to do its own job, they have uncritically bought into two arguments: (1) SMS is the law, love or leave it, it is here to stay; and (2) if it is public information it is up to the judge to decide whether to admit it. Advocates of this second position will say, "Well, you are going to have to justify you did some due diligence rather than rely upon the Agency's safety fitness determination alone."

I review an average of 10 to 15 shipper contracts each month for carrier and broker clients and can confirm the two studies which show over half of the shippers think SMS is the law and should be used. In my opinion, if shippers buy these arguments and do

not insist that the Agency's ultimate safety decision is the standard you can and should rely upon, individually and collectively, you have lost.

You have lost because there is no way you can accept the FMCSA's most recent guidance that you must accept an independent duty to credential every carrier you use out of fear of being sued. You have lost because once you embrace SMS methodology and admit you use it, you cannot fight the admissibility of the bogus percentile rankings and methodology any skilled defense attorney could mount. You have lost because under SMS methodology, as currently published, 50% of the effective available carriers will always be somehow compromised as above one or more of the arbitrary enforcement thresholds. You have lost because SMS methodology is published monthly and carrier scores fluctuate wildly. You will not know from one month to the next who you can use. You will lose the benefit of federal preemption and any argument that vicarious liability does not uniquely run up the supply chain to every customer who hires a regulated carrier.

Fortunately, though, you do not have to stand idly by and accept SMS methodology as a *fait accompli*. There have been two oversight hearings by House Committees on the issues. ASECTT, four other trade associations and 12 named plaintiffs have brought a lawsuit which will address the Agency's attempt to repudiate its duty and deputize the shipping public to do its job without statutory or regulatory approval. This Court battle is being fought for you and for the good of the industry as a whole. Please join our efforts.

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