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Rolling Out CSA 2010:
The New Motor Carrier Safety Compliance and It's Impact on Trucking Litigation

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The Federal Motor Carrier Safety Administration (FMSCA) has the "primary mission" of preventing "commercial motor vehicle-related fatalities and injuries." *See* A.P. Walsh and D.B. Hall, "Current and Emerging Issues to the Motor Carrier Industry," Transportation Lawyers Association 2010 Conference, *quoting* http://csa2010.fmcsa.dot.gov. The Federal Motor Carrier Safety Regulations (FMCSR), promulgated by the FMSCA, establish important minimum standards for motor carriers in key areas, including driver qualifications, safety, inspections, repair, maintenance, maximum hours of service for driver, drug and alcohol testing, and a motor carrier and driver's record-keeping obligations. *See* A.P. Walsh and D.B. Hall; *see also* 49 C.F.R. § 350.101 et seq. These regulations are typically at the core of truck wreck litigation. Plaintiffs will introduce violations of a FMCSR minimum standard "to establish or support a common law claim for negligence or wantonness, or negligent or wanton entrustment, training, supervision, or retention as to a motor carrier." Conversely, driver and motor carrier defendants "rely upon their compliance with FMCSR requirements to dispute allegations of liability and wrongdoing." *See* A.P. Walsh and D.B. Hall.

In keeping with its "mission" of motor-vehicle safety and accident prevention, the FMCSA also has programs in place to monitor and evaluate a motor carrier's regulatory compliance and safety performance – and "intervene" where necessary to, *e.g.*, correct safety problems and levy fines for non-compliance. As part of their punitive damages case against a defendant motor carrier, Plaintiffs often attempt to introduce a carrier's record of non-compliance and poor safety performance to establish a pattern of wanton neglect – and broadly paint the carrier as a "rogue company." Beginning in late 2010, the FMSCA is planning to rollout its Comprehensive Safety Analysis 2010 (CSA 2010). CSA 2010 will introduce significant changes to how the FMSCA monitors and evaluates motor carrier compliance and safety performance, *and* to how and what degree the FMSCA intervenes to investigate, rate, and penalize motor carriers for non-compliance. Motor carriers and trucking defense attorneys need to be aware of these changes, as they will undoubtedly create a new regulatory environment of more aggressive and comprehensive investigation into safety violations and intervention by the FMCSA – and may provide additional ammunition to Plaintiffs attempting to portray the motor carrier defendant as a rogue company. This note summarizes and outlines CSA 2010's key changes from FMCSA's current method of safety/compliance analysis and intervention/investigation.

In 2008, the FMCSA began field testing CSA 2010; it is currently being field tested in nine states – Colorado, Delaware, Georgia, Kansas, Maryland, Minnesota, Missouri, Montana, and New Jersey – and is scheduled to be rolled out nationwide by the end of 2010. According to the FMCSA, implementation of CSA 2010 is the result of a "rate of crash reduction" that has "slowed," prompting the FMCSA "to take a fresh look at how the agency evaluates the safety of motor carriers and drivers and to explore ways to improve its safety monitoring, evaluation, and intervention processes." http://csa2010.fmcsa.dot.gov. The FMCSA has identified "limitations" in its current compliance review program and its program for measuring a carrier's safety performance (called SafeStat), with regard to "both how safety is measured and how unsafe behaviors, once identified, are corrected." *Id.*

SafeStat vs. CSA 2010.

In terms of how the FMSCA performs its evaluation, CSA 2010 will be significantly broader in scope than its predecessor program SafeStat.

Safestat is organized around four categories, or Safety Evaluation Areas (SEAs): Accident, Driver, Vehicle, and Safety Management. CSA 2010, however, is organized around the following seven specific Behavior Analysis Safety Improvement Categories (BASICs), which are used to measure and score a carrier for safety and compliance:

- Unsafe Driving (e.g., traffic violations, reckless driving, improper lane changes);
- Fatigued Driving (hours of service violations, crash reports);
- Driver Fitness (CDL violation, medical reason for crash, use of unqualified drivers, etc.);
- Controlled Substances/Alcohol (e.g., driver impairment or intoxication, positive test results);
- Vehicle Maintenance (e.g., mechanical defects, violations concerning maintenance records);
- Cargo-Related (e.g., load securement, Hazmat

Continued on next page

ARTICLE CONT.

handling, spilled/dropped cargo);

- Crash Indicator (histories or patterns of high crash involvement).

SafeStat identifies motor carriers for compliance review by focusing on out-of-service and moving violations. CSA 2010, however, first identifies safety problems for determining who to investigate and where/how the investigation should be focused. Further, CSA 2010 focuses on on-road safety performance using every safety-based roadside inspection violation.

While the identification process and compliance review under SafeStat does not affect a motor carrier's safety rating, the new process under CSA 2010 can be used to propose an adverse safety fitness determination based on a motor carrier's current on-road safety performance.

Further, unlike SafeStat, as part of its evaluation CSA 2010 weighs violations in relation to crash risk. Finally, where as under SafeStat only motor carriers are measured/rated for violations, CSA 2010 uses two safety measurement systems – one for the motor carrier and one for the individual driver (although the driver would still not be assessed by FMCSA for violations).

Compliance Review vs. CSA 2010.

In terms of how the FMSCA intervenes to implement corrective action, CSA 2010 also marks a significant departure from the current compliance review (CR) process. Client carriers targeted for investigation/intervention will need to be advised on the new scope, types, and phases of intervention implemented under CSA 2010.

The current CR program is a one-size fits-all investigation – i.e., the extent or scope of safety deficiencies do not have an impact on the extent or scope of the FMSCA's investigation of a motor carrier. Under CSA 2010, however, the FMSCA's choices of interventions can be shaped in response to the size, nature, severity, and/or extent of the safety deficiencies. There is some mutual benefit, as such "tailored" investigations are less resource-intensive for the FMSCA and less time consuming for motor carriers. This "tailored" approach, however, will also likely mean that more motor carriers are contacted by the FMSCA than under the current CR program.

The focus of the current CR is on broad compliance; current CR investigations are focused on discovering acute/critical violations in existence – with major safety violations leading to fines. Moreover, the focus of the investigation and intervention is on the carrier. Under CSA 2010, the focus is on improving any and all behaviors that are deemed to be connected to crash risk and is expanded to include investigation of drivers.

How are carriers "identified" for intervention under CSA 2010? Carriers will be measured/scored using the BASICs categories (discussed above) as criteria. The measurement results will be used to identify carriers for CSA 2010 interventions. Carriers will have access to their BASICs scores, "as well as the inspection reports and violations that went into those results." http://csa2010.fmcsa.dot.gov.) It will be important for carriers to monitor this data, as they can challenge their score and underlying reports and violations for accuracy through FMCSA's DataQs system:

https://dataqs.fmcsa.dot.gov/login.asp.

Types of Investigation and Intervention under CSA 2010.

As more fully described at http://csa2010.fmcsa.dot.gov, in contrast to CR, CSA 2010 offers a variety of levels of investigation and intervention as measured responses to specific BASICs deficiencies. Depending on the number/severity of the deficiencies, an investigation can range from a "warning letter" regarding the deficiency (with "identified" carriers also being subject to targeted roadside inspections), to offsite review of a carrier's records, to on-site investigations focusing on the reported deficiency – or to a comprehensive on-site investigation in cases of 3 or more BASICs deficiencies. What FMCSA calls "Follow-on" corrective interventions can take the form of a self-imposed safety plan to correct the problem (which the carrier would enter into in cooperation with the FMCSA); to formal notices for violations, a challenge to which would require the carrier to submit evidence refuting the asserted violation. The new intervention process also allows for formal "Settlement Agreements" between the carrier and the FMCSA, which, e.g., might set forth the parties' compromise in settlement of a notice of violation or claim and enforcement proceedings.

Proposed New Rules for Safety Fitness Determination.

Plaintiffs in truck wreck cases will almost invariably seek discovery of a defendant motor carrier's fitness-rating history in an attempt to introduce and establish a pattern of wanton safety neglect (or – as Plaintiff "safety experts" might phrase it in discovery and at trial – a "poor safety culture" within the company). Although still in the rule-making phase, the proposed new rules for Safety Fitness determination will potentially mean significant changes to how motor carriers are rated for safety fitness.

Currently, in rating a motor carrier's safety fitness, the FMCSA only uses vehicle out-of-service violations found during roadside inspections and acute/critical violations detected during compliance review; an adverse rating of a carrier generally will only issue where multiple deficiencies are found. Under the proposed new rules, the FMCSA can use

Continued on page 34

ARTICLE CONT. FROM PG. 25

Punitive Damages in South Carolina cont.

On the flip side, *Mitchell* seems to favor a plaintiff as well. For example, in *Mitchell*, potential damages are now a possible multiplier in fixing a punitive damages award, meaning a great deal more money can be awarded. In contrast, the Tort Reform threatens to top a punitive damages award off at a cap, rendering the multiplier and ratio guidepost moot points. The proposed legislation also reduces the overall liability a defendant can be exposed too, which means less compensatory damages and consequently a lesser punitive damages award if the issue is even reached at all. Yet, the Tort Reform is not all negative for a plaintiff. It does bring back the *Gamble* factors making it easier for a plaintiff to introduce evidence in support of a punitive damages award. Also, *Mitchell* adds an additional obstacle between a plaintiff and a punitive damages award by changing the post-judgment review to the de novo standard instead of just abuse of discretion.

Conclusion

In short, our courts and legislature are introducing significant change to the law of punitive damages in South Carolina. We will know by the end of this year's Session which side will have its way – the *Mitchell* Court or the 2010 Tort Reform. As it stands now, the Tort Reform will determine the fate of the *Gamble* factors, the multiplier, and the overall ability to recover larger punitive damages awards, but it will not affect *Mitchell's* de novo standard. Whatever the change, neither the plaintiffs nor defendants will be spared.

ARTICLE CONT. FROM PG. 26

("MSPRC") review. If applicable, the MSPRC will assert the "Medicare lien" on the settlement proceeds.

In general, Medicare will first seek to recover its expenses from the beneficiary/plaintiff. Under MSP regulations, if the beneficiary does not reimburse the government within 60 days of settlement, the government can recoup its payments from any entity that funded the settlement (for example, defendants or insurers) or received the settlement. The latter category most commonly includes beneficiaries and plaintiff's counsel, but might include defense counsel if settlement funds are conveyed to counsel for disbursement.

If the government does not have to file a recovery lawsuit, the settling defendant may be liable for the lesser of the lien amount or the settlement (both of which can be further reduced to reflect the plaintiff's costs of procuring the settlement). However, if the government files a recovery lawsuit, the primary payer is liable for double the amount of the lien – regardless of the amount of the settlement.

While the MSP regulations suggest that a settling defendant's liability may accrue as soon as 60 days after settlement, MSPRC procedures for identifying the reimbursable amount can take several months. Under the latest MSPRC guidelines, it is unlikely that a defendant's liability would accrue sooner than approximately 150 days after settlement.

Interested parties should follow recent legislation introduced in Congress (the Medicare Secondary Payer Enhancement Act, H.R. 4796) that would significantly revise the MSP recovery process.

ARTICLE CONT. FROM PG. 32

all safety-based violations found during roadside inspections to formulate a carrier's safety rating (as well as continuing to use violations found in investigations); and, significantly, an adverse rating can issue based on only one deficient area. Currently, the three rating labels are Unsatisfactory, Conditional, and Satisfactory. The three new proposed labels – Unfit, Marginal, and Continue to Operate – especially the two more adverse of the three ratings, are arguably terms loaded with even more negative connotations for a fact finder. Also of note, while a carrier's fitness ratings are currently updated only when a compliance review is conducted, under the proposed rules a fitness rating will be updated monthly. While it is currently not anticipated that the new fitness determination and rating rules will be promulgated with the roll-out of CSA 2010, carriers and practitioners need to be aware that changes, whether in the current proposed form or as further modified in the rule-making process, are likely on the horizon.

Conclusion.

In sum, CSA 2010 provides for a much more expansive program in monitoring carrier compliance and safety. The wide-ranging investigation and intervention processes under the CSA 2010 will require more on-line monitoring by carriers of their BASICs scores, underlying reporting, and data – and trucking defense attorneys likely will have a corresponding increased role in evaluating and responding to governmental assertions of regulatory violations and claims. Moreover, BASICs data, the underlying reporting, and documentation of investigations/interventions will no doubt provide new areas of discovery and potential fodder for plaintiffs in trucking cases. It will be important for trucking defense practitioners to gain an early understanding of the changes wrought by CSA 2010, so as to best advise clients with regard to compliance and the new landscape of investigation/intervention – as well as to best anticipate the role CSA 2010 will undoubtedly play in truck wreck litigation.