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## Exposing Patterns Of Unsafe Behavior In Your Trucking Cases

by Andrew R. Young

**M**aximize your client's damages and fight to make our roadways safer by turning what is seemingly an ordinary negligence case into an extraordinary result. Historically, the Federal Motor Carrier Safety Administration (FMCSA) has adopted hundreds of pages of safety regulations for the safe operation of interstate Commercial Motor Vehicles (CMV).<sup>1</sup> A comprehensive knowledge of these regulations and of the FMCSA's **new** Compliance, Safety, Accountability (CSA) enforcement program will expose patterns of unsafe behavior and additional theories of liability.

Enacted in 2010, the CSA enforcement program can easily be adopted as the theme of your next trucking negligence case. The CSA will also serve as a roadmap to increase settlement values and verdicts for injuries and fatalities caused by crashes that are the result of regulatory safety violations. If the defendant trucking company and/or truck driver fail to comply with safety

regulations causing a crash, injury and/or death, then use the CSA to guide you to hold the defendants accountable.

"With CSA, the FMCSA, together with State Partners and industry, is working to further reduce CMV crashes, fatalities, and injuries on our nation's highways."<sup>2</sup> To accomplish this goal, the CSA program has been designed to identify and initiate contact with a greater number of high-risk motor carriers to address safety problems before crashes occur.<sup>3</sup> The CSA has three major components: 1) a new Safety Measurement System (SMS); 2) a new intervention process; and 3) a new safety ratings process.<sup>4</sup> The University of Michigan Transportation Research Institute (UMTRI) performed an evaluation of the CSA enforcement model and concluded that this new compliance program now reaches approximately three times the number of motor carriers in comparison to the predecessor enforcement model.<sup>5</sup>

## I. Do You Know Your Defendant Trucking Company's On-Road Safety Performance?

### A. The SMS and BASIC scores explained

The CSA's **Safety Measurement System (SMS)** provides the FMCSA with a new way of monitoring and evaluating a trucking company's regulatory compliance by quantifying and assessing its on-road safety performance.<sup>6</sup> The SMS attempts to accomplish four goals: 1) identify unsafe motor carriers for intervention; 2) identify unsafe patterns within several broad categories; 3) monitor the safety performance of motor carriers on a near-continuous basis; and 4) provide safety measurements data to the safety ratings process identifying those companies that are potentially unfit to operate.<sup>7</sup>

Data drives the entire enforcement process. The data originates from daily roadside inspection reports, traffic enforcement stops, state crash reports, and compliance reviews.<sup>8</sup> The bulk of the SMS data is generated through random roadside inspections to determine if a truck and its driver are both code compliant. A trucking company and driver must have comprehensive knowledge of the Federal Motor Carrier Safety Regulations (FMCSRs). Honest trucking companies will spare no expense to ensure that both their equipment and drivers are safe and code compliant and pass roadside inspection with few or no violations. Unfortunately, the trucking industry is highly competitive and many trucking companies push their equipment and drivers beyond the limit and beyond code compliance. Understanding, identifying, and exposing FMCSR violations will increase settlement value and jury verdict potential.

At the roadside inspection, officers stop CMVs to inspect, among other things, driver qualifications, hours-of-service log books, and vehicle equipment. Department of Transportation (DOT) officers are attempting to find any number of the over 640 possible regulatory infractions.<sup>9</sup> Depending on the extent and nature of the violation found, an individual truck and driver can be taken "Out-of-Service (OOS)" until corrective action.<sup>10</sup> While roadside inspections result in various infractions, most of the time the CMV is not taken OOS. Any and all infractions discovered are entered into a central database and indexed by motor carrier.<sup>11</sup>

Each violation is then placed into one of the SMS's seven categories, known as the Behavioral Analysis Safety Improvement Categories (BASICS).<sup>12</sup> The following BASIC categories help the FMCSA identify patterns of safety violations:

**Unsafe Driving** – Operation of CMVs by drivers in a dangerous or careless manner. *Example violations:* Speeding, reckless driving, improper lane change, and inattention.

**Fatigued Driving (Hours-of-Service)** – Operation of CMVs by drivers who are ill, fatigued, or in non-compliance with the Hours-of-Service (HOS) regulations. This BASIC includes violations of regulations pertaining to logbooks as they relate to HOS requirements and the management of CMV driver fatigue. *Example violations:* Exceeding HOS, maintaining an incomplete or inaccurate logbook, and operating a CMV while ill or fatigued.

**Driver Fitness** – Operation of CMVs by drivers who are unfit to operate a CMV due to lack of training, experience, or medical

qualifications. *Example violations:* Failure to have a valid and appropriate commercial driver's license (CDL) and being medically unqualified to operate a CMV.

**Controlled Substances/Alcohol** – Operation of CMVs by drivers who are impaired due to alcohol, illegal drugs, and misuse of prescription or over-the-counter medications. *Example violations:* Use or possession of controlled substances / alcohol.

**Vehicle Maintenance** – Failure to properly maintain a CMV. *Example violations:* Brakes, lights, and other mechanical defects, and failure to make required repairs.

**Cargo-Related** – Failure to properly prevent shifting loads, spilled or dropped cargo, overloading, and unsafe handling of hazardous materials on a CMV. *Example violations:* Improper load securement, cargo retention, and hazardous material handling.

**Crash Indicator** – Histories or patterns of high crash involvement, including frequency and severity. It is based on information from State-reported crashes.<sup>13</sup>

A motor carrier's score for each BASIC depends on the following: 1) the number of adverse safety events; 2) the severity of the violations or crashes; and 3) timing or when the adverse safety event occurred.<sup>14</sup>

### B. Example of a trucking company with a poor BASIC score

The following is an example of the SMS Data and BASIC Score for Reliable Transportation Services, Inc. ("Reliable Transportation"), a company that was ordered unfit for operation and shut down by the U.S. Department of Transportation on March 30, 2012<sup>15</sup>:











**NOTE: This Carrier is Currently Under an Out-of-Service Order from FMCSA**

## Select a BASIC below to view details

### BASICs Overview

(Based on a 24-month record ending February 24, 2012)

### PERFORMANCE

	On-Road	Investigation	=	BASICs Status
 <b>Unsafe Driving</b>	81.9%		=	
 <b>Fatigued Driving (Hours-of-Service)</b>	92.5%		=	
 <b>Driver Fitness</b>	84.1%		=	
 <b>Controlled Substances and Alcohol</b>	No Violations		=	
 <b>Vehicle Maintenance</b>	56.7%		=	
 <b>Cargo-Related</b>	Not Public	Not Public	=	Not Public
 <b>Crash Indicator</b>	Not Public	Not Applicable	=	Not Public

### USE OF SMS DATA/INFORMATION

### History

For more information on the BASICs Overview please visit our [Information Center](#)

A "Complete Measurement Profile" of all violations making up the BASIC scores for Reliable Transportation is also available on the FMCSA website. The following is an example of a few of Reliable Transportation's infractions taken from the FMCSA website:

### Unsafe Driving BASIC:

Section	Violation Description / Roadside Inspection	Severity Weight
392.2T	Improper turns	5
392.2R	Reckless driving	10
392.2P	Improper passing	5
392.2C	Failure to obey traffic control device	5
392.2FC	Following too close	5
392.2PK	Unlawfully parking and/or leaving vehicle in the roadway	1

### Fatigued Driving (HOS) BASIC:

395.3(a)(1)	Requiring or permitting driver to drive more than 11 hours	7
395.3(a)(2)	Requiring or permitting driver to drive after 14 hours on duty	7
395.8	Log violation (general/form and manner)	2
395.8(e)	False report of driver's record of duty status (OOS)	9
395.8(f)(1)	Driver's record of duty status not current	5



## Driver Fitness Violations

Section	Violation Description / Roadside Inspection	Severity Weight
383.51(a)	Driving a CMV (CDL) while disqualified (OOS)	10
391.45(b)	Expired medical examiner's certificate	1
383.41(a)	Driver not in possession of medical certificate	1

## Vehicle Maintenance

393.11	No/defective lighting/reflective devices/projected	3
393.45(b)(2)	Failing to secure brake hose/tubing against mechanical damage	4
393.75(a)	Flat tire or fabric exposed (OOS)	10
393.9T	Inoperative tail lamp	6
393.9TS	Inoperative turn signal (OOS)	8 <sup>16</sup>

The FMCSA's "basis for determining that Reliable Transportation's motor carrier operations pose an imminent hazard to the public is that Reliable Transportation has violated countless federal statutory and regulatory motor carrier safety rules and has been in at least **seven crashes in the last year, which include six crashes since December 2011.**" (Emphasis added)<sup>17</sup>

Assume that you represent a client involved in one of the Reliable Transportation crashes or an equivalent delinquent trucking company crash. Unless you look up the tortfeasor trucking company's CSA information, you would not realize that this company exceeds scoring thresholds in three broad categories and has had multiple truck accidents over a short period of time. Additionally, you would not know that Reliable Transportation is now labeled as an "Imminent Hazard."

### C. Using the CSA and FMCSRs to represent your client

The FMCSA's analysis has found that those carriers that exceeded BASIC intervention thresholds in at least one category (*i.e.*, about 50,000 carriers or approximately 10 percent of the total active population) were responsible for 45% of the recorded crashes.<sup>18</sup> As

such, your client's truck accident has a ***near probability*** of involving a trucking company that has an identifiable pattern of regulatory safety violations. It is imperative that you look beyond the police report and learn to use the CSA and FMCSRs to assist you in zealously representing your client and that you understand the safety culture of the tortfeasor trucking company. The information found will likely not only exponentially increase the value of your client's case, but will also assist you in exposing patterns of safety abuse that will result in true accountability.

Timing is of the essence. The more recent the regulatory violation and/or accident, the more heavily it is scored. The SMS scores are calculated for the most recent two year time period with updates every thirty days. Point totals that exceed threshold (algorithms) trigger compliance intervention. Immediately after you are retained by your client, check and preserve the available data regarding your defendant trucking company's CSA information. If you wait a year or more to check the trucking company's SMS, the data and scores are likely to change evidencing a very different (hopefully safer) on-road safety performance.<sup>19</sup> If the company goes out-of-business, or becomes inactive, the scores may no longer be available.

With updates every thirty days and score changes as violations extend beyond the two year period, the CSA relies heavily on the SMS for continuous monitoring and tracking of the on-road safety performance of a trucking company. The UMTRI study also concluded that crash rates were higher for carriers exceeding SMS BASIC thresholds than for carriers not exceeding thresholds.<sup>20</sup> The crash rate was highest for truck companies exceeding BASIC thresholds for the Unsafe Driving, Fatigued Driving, and Controlled Substance and Alcohol categories.<sup>21</sup>

A plaintiff's attorney should send "Letters of Preservation" to the tortfeasor company. The FMCSRs only require document retention for a limited period of time depending on the nature of the category. For instance, the FMCSRs require a very limited three month retention of vehicle inspection reports and certification of repairs.<sup>22</sup> The FMCSRs require only a six month retention of Fatigued Driving records also known as driver Hours of Service log books.<sup>23</sup> Your seemingly simple rear-end accident could be due to out-of-adjustment air brakes or a tired trucker. The vehicle maintenance records or hours of service log book records are important to understanding why the truck driver hit the back of your client's vehicle. If the CSA information shows

that the tortfeasor trucking company exceeds thresholds in the “Vehicle Maintenance” or “Fatigued Driving” scores then you are going to want to send a Spoliation Letter to preserve all vehicle maintenance and/or hours of service records for the truck and driver involved in your client’s accident.

## II. CSA's New Focused And Varied Intervention Process

The SMS is the first step in determining whether a trucking company has a safety problem that requires inclusion in the CSA’s new focused intervention process. Deficient BASIC scores will trigger intervention. A high crash indicator or fatal crash will also likely trigger intervention.

The CSA allows the FMCSA to efficiently and effectively target safety compliance to correct behaviors specific to BASIC categories. The CSA interventions provide the FMCSA with more versatility by allowing for a variety of compliance intervention tools to take action against problem companies and drivers. The CSA interventions supplement the old on-site Compliance Review (CR) with the following additional methods: Warning Letters; Carrier Access to Safety Data and Measurement; Targeted Roadside Inspections; Off-Site Investigation; On-Site Focused Investigation; On-Site Comprehensive Investigation; Cooperative Safety Plan; Notice of Violation; Notice of Claim; and Operations Out-of-Service Order.<sup>24</sup> The type of intervention is determined by safety performance, intervention history, and the discretion of the investigator. The CSA interventions also serve as an educational tool to improve the safety performance of trucking companies and truck drivers. Understanding all of the various intervention tools will allow for better Freedom of Information Act (FOIA)



requests and assist you in preserving and obtaining written and oral discovery.

The old SafeStat intervention process relied on the CR Model as the only intervention tool available to the FMCSA. A compliance review is an on-site, comprehensive safety audit of a trucking company’s business to ensure regulatory compliance.<sup>25</sup> A safety rating, fine, penalty, or suspension from operation and/or a Safety Fitness Determination did not occur without a CR. CRs were and still are resource-intensive, often requiring three to four days to complete. The UMTRI results concluded that, under the old SafeStat program, the FMCSA effectively contacted only 3.2 percent of all trucking companies for regulatory compliance. Now, 9.9 percent of trucking companies are effectively contacted under the new CSA program.

**Warning Letters** - CSA intervention starts with a warning letter. This provides early contact with carriers who have identifiable safety problems.<sup>26</sup> The warning letter helps the trucking company become aware of safety performance problems so that they can be addressed before becoming a pattern of abuse and more difficult to correct.<sup>27</sup> Failure to correct problems results in further intervention. According to the UMTRI study, the mere receipt of a warning letter with no further action was effective to improve a trucking company’s safety behavior.<sup>28</sup> “After 12 months of followup, only about 17

percent of test carriers still exceeded at least one SMS threshold, compared to about 45 percent of the control group carriers that were matched to test carriers.”<sup>29</sup>

**Carrier Access to Safety Data and Measurement** - Trucking companies have access to their CSA information. They should also be aware of the regulatory infractions and safety violations at the time of each inspection or crash event. A trucking company can change behaviors toward safety improvements prior to further intervention by simply tracking their own violations or SMS information.<sup>30</sup> Scores are now publicly available for customers, shippers, brokers, lawyers, and insurance underwriters. As such, the new CSA program provides a trucking company with an economic incentive to improve its scores.

**Targeted Roadside Inspection** - The CSA provides roadside inspectors with BASIC scores highlighting a specific trucking company’s patterns of safety violations. The roadside inspectors will make a determination of whether to inspect based on the data available. When a trucking company has been demonstrating a pattern increasing a specific BASIC score, the inspector will likely emphasize that BASIC category during the roadside inspection.<sup>31</sup> With time, it is hoped that a trucking company develops a safety culture which will be reflected by the SMS data. As roadside inspections produce

clean, “no violations” results and as poor inspections fall outside the two year time frame, scores will improve.

**Offsite Investigation** - The FMCSA can use off-site investigation to further target specific BASIC categories by requiring a trucking company to submit documentation to prove compliance through record keeping.<sup>32</sup> Documents include vehicle inspection and maintenance records, driver logs, driver qualification records, toll receipts, drug testing records, etc.<sup>33</sup> The FMCSA will then evaluate the items produced. If the trucking company is not compliant in submitting requested documentation or the documentation is inadequate, the carrier may be subject to an on-site focused investigation.

**Onsite Investigation** - The onsite investigation can be either a *focused* investigation or a *comprehensive* investigation. The focused investigation will target specific problem areas if one or more scores exceed thresholds. For example, if roadside inspections have demonstrated a pattern of vehicle maintenance violations for out-of-adjustment air brakes, the onsite focused investigation will target maintenance records regarding brakes.

An onsite *comprehensive* investigation addresses all aspects of a trucking company and does not target one specific category. This intervention is similar to the old SafeStat intervention Compliance Review. DOT inspectors go to the trucking company’s place of business and perform a several day comprehensive investigation of all aspects of the trucking company’s operations.<sup>34</sup> Reliable Transportation had an onsite comprehensive investigation that resulted in the sixteen page order deeming it unfit for further operation.

**Cooperative Safety Plan (CSP)** - The CSP is a voluntary plan in which the

FMCSA and the trucking company work together to create a plan to address significant gaps in safety management and oversight as evidenced by patterns of non-compliance. The goal is to create written policies and procedures describing the safety measures to be utilized to provide corrective action toward improvement in the problem areas.<sup>35</sup> The CSP is adopted with deadlines to allow for an efficient, self-auditing system of checks and balances, further allowing for improvement on a continuing basis. Failure to improve will result in further enforcement.

**Notice of Violation (NOV)** - The NOV allows a trucking company the opportunity to avoid a fine by immediately rectifying an unsafe behavior. It requires a response from the trucking company. Formal notification is given to the trucking company regarding the specific regulatory safety violation. To avoid further consequences, the trucking company is then required to prove the corrective action taken.<sup>36</sup>

**Notice of Claim (NOC)** - Persistent unsafe behavior results in a Notice of Claim. Through the NOC intervention, the FMCSA has the ability to fine a trucking company.<sup>37</sup> The FMCSA can bring a civil action, in a United States District Court, against the offending

trucking company. If the penalty is not paid or contested within 30 days, the FMCSA can also prohibit the trucking company from operating until the civil penalty is paid.

**Operations Out - of - Service Order (OOS)** - An “Operations OOS” order deems the entire trucking company unfit and requires it to cease all motor vehicle operations.<sup>38</sup> By way of the aforementioned example, Reliable Transportation was issued an “Imminent Hazard Operations Out-of-Service Order.”<sup>39</sup> “The United States finds [Reliable Transportation Services, Inc.’s] commercial motor vehicle operations constitute an **imminent hazard**. This finding means that based upon your present state of unacceptable safety compliance, your operation of any commercial motor vehicle poses an **imminent hazard** to public safety.” (Emphasis in the Original)<sup>40</sup>

Again, by way of practical application, if you represent a client from one of the six crashes involving Reliable Transportation and rely simply on the negligence listed in the police report, you are missing an opportunity to explore greater settlement value and potential punitive damages. The Reliable Transportation OOS order states that the onsite comprehensive investigation



“disclosed violations of the FMCSRs so widespread as to demonstrate a continuing and flagrant disregard for compliance with the FMCSRs and a management philosophy indifferent to motor carrier safety. Reliable Transportation’s actions and operations establish an imminently hazardous and potentially deadly situation for its drivers and the motoring public.”<sup>41</sup> This example highlights the point that a trucking accident injury case should not be thought of as a simple negligence case to be settled based on the “contributing circumstances” listed in the police report alone.

In addition to the spoliation letter, Freedom of Information Act (FOIA) requests can be sent to the FMCSA to receive the above-referenced intervention information. A FOIA letter may produce warning letters and other intervention documentation for the time-period involving your accident. FOIA requests can also produce: all documents relating to the subject accident; roadside vehicle inspection reports; compliance reviews; and out-of-service violations. Additionally, the new CSA program is keeping track of an individual truck driver’s information. The truck driver’s information is stored through the Pre-Employment Screening Program (PSP). The PSP is designed to assist the trucking industry in assessing each truck driver’s crash and serious violation history.<sup>42</sup> Most importantly, a FOIA request will provide a trucking company’s Safety Fitness Determination.

### III. CSA’s Safety Fitness Determination (SFD)

For now, a Safety Fitness Determination (SFD) remains based upon the safety methodology outlined in 49 CFR Part 385. As such, a trucking company is labeled as satisfactory, conditional, or unsatisfactory.<sup>43</sup> Only through an onsite

investigation or compliance review can an SFD be downgraded. The SFD is therefore limited to the trucking company’s most recent compliance review.<sup>44</sup> Due to limited resources, an SFD may not adequately reflect the safety fitness of a trucking company because it may not have been updated for a significant period of time.

If the recent proposals to update the CSA are enacted, the SFD will: 1) not be tied to onsite investigations; 2) be updated regularly; 3) be based on violations of all safety-based regulations; and, 4) label a trucking company as unfit, marginal, or continue to operate.<sup>45</sup> Under CSA’s new proposals, safety fitness determination will be tied to performance data, thus allowing the FMCSA to determine safety fitness based on ongoing SMS data, not just compliance reviews.<sup>46</sup>

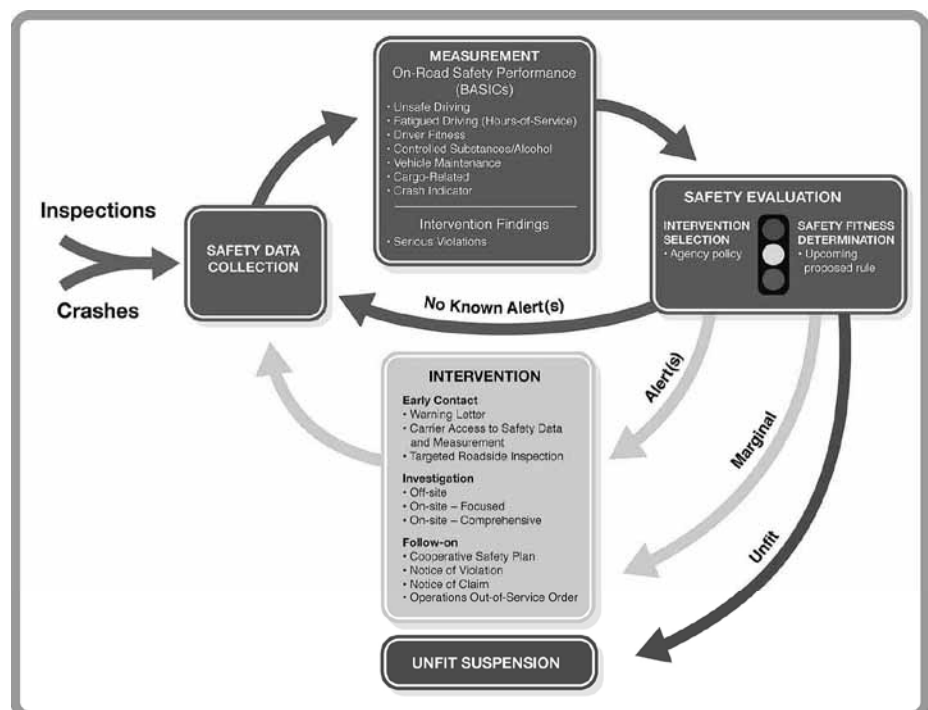
### IV. The CSA Scores Expose Potential Third Party Defendants To Liability

Prior to CSA, a trucking company’s safety compliance weaknesses could be secreted away from public knowledge. Only if the trucking company were one of the lucky 3.2% that underwent an

FMCSA compliance review audit and SFD labeling, would its safety violations be exposed. Now, CSA Scores are available for public inspection. The public nature of the CSA enforcement program is likely the biggest catalyst pressuring trucking companies to take a hard look at becoming safety compliant and implementing safety management programs to continually improve CSA scores.

Why? Because the public affects the trucking company’s bottom line. Those looking at the scores include insurance companies that underwrite liability policies; freight brokers; third-party logistics firms; shippers; and/or customers who are concerned about becoming a defendant through claims of negligent hiring and vicarious liability. Plaintiffs’ attorneys will be eager to allow the CSA scores to act as a roadmap for additional theories of liability. And, juries will undoubtedly be angry over CSA scores that exceed FMCSA enforcement intervention thresholds.

An Illinois appellate court upheld a \$23,775,000.00 verdict wherein a jury concluded that a federally licensed





freight broker was vicariously liable for the negligence of a motor carrier and truck driver.<sup>47</sup> While this particular case did not directly involve FMCSA regulatory enforcement scores, a trucking industry trade association publication, *Transport Topics*, reported that shippers and third-party logistics companies are exercising due diligence when selecting a trucking company by checking that company's safety scores.<sup>48</sup> According to *Transport Topics*, "CSA scores give a much brighter light for measuring performance record. It's an accepted industry standard, and it's available to everybody."<sup>49</sup> The "accepted industry standard" of checking CSA scores will lead to the exposure of defendant third parties to vicarious liability and negligent hiring claims.

*Transport Topics* reported that, on March 5, 2012, an Oregon jury awarded \$5,100,000.00 in punitive damages including \$1,680,000.00 against a third-party freight broker on a negligent hiring claim.<sup>50</sup> The tortfeasor truck driver was cited for driving under the influence and reckless driving when he struck and killed another truck driver. The broker was found negligent for failing to check the truck driver and his company's credentials before arranging the load.<sup>51</sup> Following the verdict a confidential settlement was reached between the broker and the plaintiff.<sup>52</sup>

## V. Conclusion

Public transparency of a trucking company's major safety compliance flaws provides incentive to fix the problem. Trucking companies should embrace the new CSA and no longer sweep safety compliance issues under the carpet. Those that do set themselves apart from their competition by demonstrating a culture of safety, and looking out for the safety of the motoring public.

Correspondingly, by being well-versed in the nuances of the FMCSRs and

the FMCSA's new CSA regulatory enforcement program, plaintiffs' attorneys ensure that their clients are zealously represented. Immediately upon being hired for a truck accident case, check the tortfeasor trucking company's CSA scores; send letters to preserve essential records; and make FOIA requests for regulatory intervention information. A trucking accident injury case is not a car accident. Look beyond the police report to maximize value and keep our roadways safe. ■

## End Notes

1. Federal Motor Carrier Safety Regulations (FMCSRs) 49 C.F.R. §§ 350-399.
2. FMCSA CSA Website, <http://csa.fmcsa.dot.gov>
3. Safety Measurement System (SMS) Methodology, Version 2.2, January 2012. John A. Volpe, National Transportation System Center, Cambridge, MA 02142, Page 1-1.
4. FMCSA CSA Website, <http://csa.fmcsa.dot.gov/yourrole/others.aspx>
5. Paul E. Green and Daniel Blower, *Evaluation of the CSA 2010 Operation Model Test*, August, 2011, The University of Michigan Transportation Research Institute, Report No. FMCSA-RRA-11-019. This study compared the effectiveness of the new CSA model with the previous Motor Carrier Safety Status Measurement System (SafeStat). The study concluded: 1) CSA's SMS better identifies motor carriers for safety intervention than the previous SafeStat system; 2) CSA interventions are effective in improving motor carriers' safety behavior; 3) CSA interventions use enforcement resources efficiently; and 4) CSA reaches more carriers to improve safety compliance.
6. Safety Measurement System (SMS) Methodology, Version 2.2, January 2012. John A. Volpe, National Transportation System Center, Cambridge, MA 02142, Page 2-1.
7. Paul E. Green and Daniel Blower, *Evaluation of the CSA 2010 Operation Model Test*, August 2011, The University of Michigan Transportation Research Institute, Report No. FMCSA-RRA-11-019, page xiv.
8. There are six different types of roadside inspections: 1) Full Inspection; 2) Walk-Around; 3) Driver Only; 4) Special Study; 5) Terminal; and 6) Radioactive. According to the FMCSA Motor Carrier Management System (MCMIS) data snapshot in 2009, in Ohio there were 82,757 total roadside inspections.
9. Safety Measurement System (SMS)

Methodology, Version 2.2, January 2012. John A. Volpe, National Transportation System Center, Cambridge, MA 02142, Appendix A, A1-40.

10. 49 CFR §§ 395.13, 396.9(c), 396.11(c), and 398.(c)
11. Under the old SafeStat system, roadside inspection violations were only entered into the database if an OOS violation was issued on the vehicle. The OOS reports comprise a fraction of all roadside inspections. Under the new SMS system, all roadside inspection violations are scored and entered into the SMS using all infraction data to identify motor carriers exhibiting a higher crash risk.
12. The seven BASIC behavior categories were derived from sources such as, Daniel Blower and Kenneth L. Campbell, *Large Truck Crash Causation Study Analysis Brief*, February 2005. <http://www.ai.fmcsa.dot.gov/ltccs>.
13. FMCSA CSA Website, <http://csa.fmcsa.dot.gov/about/basics.aspx>. A proposed rule change has been introduced to move cargo/load securement violations from the "Cargo-Related" BASIC category to the "Vehicle Maintenance" BASIC category. The "Cargo-Related" BASIC is to be renamed the "Hazardous Materials (HM)" BASIC to identify HM-related safety problems and change how HM carriers are classified. See Federal Register, The Daily Journal of the United States Government, "Improvements to the Compliance, Safety, Accountability (CSA) Motor Carrier Safety Measurement System (SMS)" 03/27/2012 notice. The comment period ends on May 29, 2012. Changes are to be made available to the public in July 2012. <https://www.federalregister.gov/articles/2012/03/27/2012-7360/improvements-to-the-compliance-safetyaccountability-csa-motor-carrier-safety-measurement-system-sms>
14. Safety Measurement System (SMS) Methodology, Version 2.2, January 2012. John A. Volpe, National Transportation System Center, Cambridge, MA 02142, 2-4 to 2-6.
15. FMCSA CSA Website, SMS Results, <http://ai.fmcsa.dot.gov/sms/>. To search for and find a motor carrier's BASIC Scores and Complete Measurement Profile, enter the USDOT# in the search box. The USDOT# for Reliable Transportation is 1720152.
16. *Id.*
17. U.S. Department of Transportation Federal Motor Carrier Safety Administration, Reliable Transportation Services, Inc. USDOT 1720152 and Jay Zachary Barber, Individually. Order No.: UT-2012-5000-IMH. "Imminent Hazard Operations Out-of-Service Order" <http://www.fmcsa.dot.gov/documents/about/news/2012/reliable-transportation-services-shutdown-order.pdf>



18. See Federal Register, The Daily Journal of the United States Government, "Improvements to the Compliance, Safety, Accountability (CSA) Motor Carrier Safety Measurement System (SMS)" 03/27/2012 notice. <https://www.federalregister.gov/articles/2012/03/27/2012-7360/improvements-to-the-compliance-safetyaccountability-csa-motor-carrier-safety-measurement-system-sms>.
19. Regularly search and preserve your defendant trucking company's SMS data. FMCSA Website, <http://ai.fmcsa.dot.gov/sms/> Go to this website to capture your defendant trucking company's on-road safety performance information while it is most relevant. Periodically revisit this website to see whether or not your defendant trucking company has an improving or worsening on-road safety performance.
20. Paul E. Green and Daniel Blower, *Evaluation of the CSA 2010 Operation Model Test*, August 2011, The University of Michigan Transportation Research Institute, Report No. FMCSA-RRA-11-019, page xv.
21. *Id.*
22. 49 CFR §396.11(c)(2).
23. 49 CFR §395.8(k)(1)
24. FMCSA CSA Website, <http://csa.fmcsa.dot.gov/about/interventions.aspx>
25. The Public Utilities Commission of Ohio has regulatory authority to conduct comprehensive reviews of the safety records, policies, and procedures of motor carriers. In 2009, the PUCO conducted 560 compliance reviews of the business practices of trucking companies to ensure regulatory compliance. See - Public Utilities Commission 2010 Annual Report. PUCO Website, <http://www.puco.ohio.gov/>
26. FMCSA CSA Website, [http://csa.fmcsa.dot.gov/Documents/CSA2010\\_WarningLetterFactsheet.pdf](http://csa.fmcsa.dot.gov/Documents/CSA2010_WarningLetterFactsheet.pdf)
27. *Id.*
28. Paul E. Green and Daniel Blower, *Evaluation of the CSA 2010 Operation Model Test*, August 2011, The University of Michigan Transportation Research Institute, Report No. FMCSA-RRA-11-019, page xviii.
29. *Id.* at page xix.
30. FMCSA CSA Website, <https://csa.fmcsa.dot.gov/about/interventions.aspx>
31. *Id.*
32. 49 U.S.C. Chapter 5, Subchapter I - Powers, §§501-508
33. FMCSA CSA Website, <https://csa.fmcsa.dot.gov/about/interventions.aspx>
34. *Id.*
35. *Id.*
36. *Id.*
37. 49 U.S.C. Chapter 5, Subchapter II - Penalties, §§521-526
38. FMCSA CSA Website, <https://csa.fmcsa.dot.gov/about/interventions.aspx>
39. U.S. Department of Transportation Federal Motor Carrier Safety Administration, Reliable Transportation Services, Inc. USDOT 1720152 and Jay Zachary Barber, Order No.: UT-2012-5000-IMH. "Imminent Hazard Operations Out-of-Service Order", page 1. <http://www.fmcsa.dot.gov/documents/about/news/2012/reliable-transportationservices-shutdown-order.pdf> Pursuant to 49 U.S.C. §521(b)(5) (A), 49 U.S.C. §5121, 49 U.S.C. §13905(f), 49 U.S.C. §31144(c)(1) and (2), 49 U.S.C. §31144(c)(5), and 49 C.F.R. § 386.72(a) and (b).
40. *Id.*
41. *Id.* at page 7, 8.
42. FMCSA Website, <http://www.psp.fmcsa.dot.gov/Pages/default.aspx>
43. 49 CFR Part 385.3
44. FMCSA CSA Website, <https://csa.fmcsa.dot.gov/FAQs.aspx?faqid=1446>
45. *Id.*
46. FMCSA CSA Website, <https://csa.fmcsa.dot.gov/FAQs.aspx?faqid=1445>
47. *Sperl v. C.H. Robinson*, 408 Ill. App. 3d 1051, 946 N.E.2d 463 (2011).
48. "CSA Scores Help Shippers Avoid Potential Lawsuits" by Stephanie Overman, *Transport Topics*, February 27, 2012, pg 5 and pg 10. (Transport Topics Publishing Group, a division of American Trucking Association, Inc.)
49. *Id.*
50. "Broker Liable in Crash Involving 3rd Party; Jury Awards Victim's Widow \$5.1 Million" by Rip Watson, *Transport Topics*, March 26, 2012, pg 4 and pg 28.
51. *Id.*
52. *Id.*



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# Constitutionality of Medical Malpractice Damage Caps Under R.C. 2323.43 In Light of *Arbino* And Subsequent Trial Court Decisions

by Christian R. Patno

Inch by inch and pound by pound, I have witnessed the whittling down of patient victim rights in Ohio since the beginning of my practice over 20 years ago. Physicians, their wealthy insurance carriers and hospitals have successfully argued and lobbied in Ohio for the shortest statute of limitations, the requirement of an affidavit of merit to even file a case, the most stringent damages caps, statutes of repose, introduction of collateral source evidence, use of periodic future damages payments, and have now even impinged on attorney-client relationships with caps on attorney fees. What medical victim rights remain following the extreme limits placed by legislation have been further curtailed by court rules and case law. The devastating effect of this tort “reform” has caused numerous victims to be left with little to no remedy and many attorneys who specialize in medical malpractice to leave this area of law altogether or remain uncertain as to its future. Even now, nine years after R.C. 2323.43 was enacted capping damages on medical malpractice cases, the constitutionality of this statute remains in flux.

## I. Overview Of Relevant Ohio Supreme Court Precedents.

Historically, *Morris v. Savoy*<sup>1</sup> and *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*<sup>2</sup> have been the Ohio gold standard test for constitutional assessment of statutory caps on

medical malpractice awards. In *Morris* and *Sheward*, the Ohio Supreme Court found the medical malpractice non-economic damages cap tort reform statutes unconstitutional. The court focused on the legislature’s lack of factual support for imposing these caps. *Morris* and *Sheward* held the statutory caps unconstitutional since they lacked a real and substantial evidentiary relationship to the reduction of malpractice premiums. The caps were also found unconstitutional on a second level since they imposed the cost of the intended benefit to the general public upon those most severely damaged by medical care.

In 2002, the Ohio Legislature set its wheels in motion attempting to remedy the deficiencies found by the Supreme Court in *Morris* and *Sheward* by enacting R.C. 2323.43. In so doing, the legislature created a statute that is in direct conflict with R.C. 2315.18, the statute that caps damages in most other (non-medical malpractice) tort cases. The conflict exists due to the different ways the two statutes treat the most severely injured tort victims. Under R.C. 2323.43(A)(3), the maximum non-economic catastrophic damage award in a medical malpractice action is limited to \$500,000 for each plaintiff and \$1,000,000 for each occurrence. By contrast, under R.C. 2315.18(B)(3), there is absolutely *no* limit for non-economic damages for those victims