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Motor Carrier Update: Impact of CSA-2010 to Pretrial Discovery and Arguments for Excluding CSA-2010 Information During Trial

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Overview of Safety Measurement System Information Center

Those of us who are actively engaged in defending motor carriers and commercial truck drivers in personal injury suits are well aware of CSA-2010's Safety Measurement System (SMS) launched by the Federal Motor Carrier Safety Administration (FMCSA) to help reduce accidents and increase overall safety in the trucking industry. JOHN A. VOLPE, Safety Measurement System (SMS) Methodology, 1-1 (2010). The launch of the SMS website provided the trucking industry with access to information and data related to the safety performance of motor carriers. *Id.* However, SMS also provides the general public with instantaneous access via the Internet of any motor carrier's history for prior accidents, traffic citations, equipment and maintenance violations, and even data regarding driver fitness. Any person who has visited the SMS website has observed firsthand that SMS uses data to measure or rank a motor carrier for seven behavioral and safety improvement categories. *Id.* at 2-1. These behavioral and performance categories are referred to as "BASICS" by CSA-2010. *Id.* The seven BASIC categories that FMCSA ranks motor carriers are (1) unsafe driving; (2) fatigued driving; (3) driver fitness; (4) controlled substance and alcohol; (5) vehicle maintenance; (6) cargo-related; and (7) crash indicator. *Id.*; US Dept. of Transp., CSA 2010, 8 (2009). SMS will measure a motor carrier for each BASIC based on the SMS methodology. *Id.* The measure SMS generates for each BASIC is then used to assign a motor carrier with a ranking or percentile for that particular BASIC. VOLPE at 2-1.

Impact of SMS on Pretrial Discovery

The data and information that is collected and made available by SMS on any particular motor carrier is being actively sought in discovery by claimants in personal injury litigation involving vehicular accidents. Despite the proliferation of claimants seeking to obtain SMS related information in discovery, there exists only one published opinion that analyzes (quite minimally) the discoverability of SMS documentation during pre-trial discovery. That opinion is *Vanduser v. Purdy Brothers Trucking, Inc.*

In *Vanduser v. Purdy Brothers Trucking, Inc.*, No. 7:11-cv-00317, 2011 U.S. Dist. LEXIS 122039, at *1-2 (D. Virginia October 21, 2011), the plaintiff, Douglas Vanduser (Plaintiff), brought a personal injury action against a motor carrier and its employee-commercial driver arising from a vehicular accident that occurred on July 4, 2010. Plaintiff's suit asserted claims based on negligence and negligent hiring, training, supervision and retention. *Id.* at *1-*2. At the time of the accident, the commercial truck driver, Curtis McNealy (McNealy), was working for Purdy Brothers Trucking, Inc. (Purdy Brothers). *Id.* at *2. Plaintiff argued that Purdy Brothers terminated McNealy's employment following the accident. McNealy later obtained employment with another trucking company, Tribe Express, approximately one year after the accident. *Id.*

During pretrial discovery, the plaintiff issued a subpoena duces tecum to Tribe Express seeking documents related to McNealy's employment and driving history. *Id.* More specifically, the plaintiff's subpoena sought McNealy's employment application, as well as documents obtained by Tribe Express from the Safety Measurement System and Motor Carrier Management Information System pertaining to McNealy. *Id.* Defendants quashed the subpoenas, arguing the documentation sought from Tribe Express invaded McNealy's privacy and was not calculated to lead to the discovery of admissible evidence. *Id.* at *3. The district court disagreed with

the defendants and ruled that the documentation was discoverable under Rule 26(b)(1) of the Federal Rules of Civil Procedure. *Id.* at *3-*4.

After a hearing was held on defendant's motion to quash, the district court allowed the plaintiff to obtain all of the documentation sought by the subpoena from Tribe Express. *Id.* at *4. The court noted that the plaintiff's subpoena to Tribe Express was narrowly tailored to discover only documents related to McNealy's driving history. *Id.* The district court ruled that the plaintiff's subpoena was reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1) of the Federal Rules of Civil Procedure because the documents were related to plaintiff's claim for negligent hiring, training, retention, and supervision. *Id.*

While the legal analysis provided by the *Vanduser* opinion regarding the discoverability of SMS documentation lacks substance; nonetheless, the opinion provides claimants with ammunition to argue that records and information from SMS are discoverable and admissible at trial. To diffuse such arguments on the part of claimants, there are viable arguments that motor carriers and commercial truck drivers can use to their favor to prevent discovery and the introduction of SMS related information at trial.

Arguments that Oppose Introduction of SMS information at Trial

Despite the lack of state or federal opinions specifically holding that SMS information is not discoverable or admissible at trial, there are arguments that can be developed to persuade trial courts to exclude such evidence. Motor carriers and commercial drivers defending against personal injury suits can argue exclusion of SMS evidence based on the express disclaimer SMS provides on its website. SMS expressly states on its website that "[r]eaders should not draw conclusions about a carrier's overall safety condition based on the data displayed in [its] system." If SMS instructs readers not to draw any type of conclusions from the data provided by its system, than trial courts should certainly be compelled—based on SMS's express disclaimer—not to allow juries to be exposed to such information based on traditional relevancy arguments.

Another viable argument in support of exclusion of SMS information at trial involves part 385 of the Code of Federal Regulations (CFR). Specifically, under CFR 385.13, a motor carrier that has been issued an "unsatisfactory" safety rating by the FMCSA based on SMS's methodology is prohibited from operating a commercial motor vehicle. A motor carrier can use CFR 385.13 to argue that, as long as it has not been issued an "unsatisfactory" safety rating, it continues to lawfully operate commercial motor vehicles on the nation's roadways. If the motor carrier is lawfully operating under the authority of the FMCSA, an argument can be made that any information or data contained by SMS constitutes as character evidence, as well as subsequent remedial measures; thus, it merits exclusion during trial.

Conclusion

Motor carriers and commercial truck drivers can successfully oppose the discoverability of and introduction at trial of information and data generated by SMS. To accomplish that goal, defense counsel must be able to make trial court's understand that the underlying purpose of CSA-2010 is not to diminish the ability of a motor carrier or commercial driver to defend against personal injury claims arising from vehicular accidents. By educating trial courts of the underlying function and operation of SMS's rating system, defense counsel will significantly increase their chances of keeping SMS information away from the consideration of juries. And despite the unfavorable outcome of the *Vanduser* opinion, all is not lost because traditional arguments based on relevancy, character evidence and remedial subsequent measures can be strengthened with the express disclaimer language provided by SMS and with CFR 385.13.

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