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CSA 2010: Goodbye, SafeStat. Hello, SMS.

The Comprehensive Safety Analysis, CSA 2010, which includes the Safety Measurement System (SMS), is scheduled to be fully in place by December 10, 2010. CSA 2010 will replace the Safety Status Measurement System, SafeStat, to measure how commercial motor carriers and drivers are complying with safety rules.

Recent cases have made it clear that shippers and brokers must be especially careful in their selection and monitoring of motor carriers. Without proper procedures in place and followed, anyone engaging the services of a motor carrier is at risk for claims of negligent selection, negligent hiring or negligent entrustment. One part of the recommended procedures for qualifying carriers is to check their SafeStat scores. Now, SafeStat is being replaced.

What is SafeStat and why does the FMCSA believe it should be replaced?

SafeStat is the Federal Motor Carrier Safety Administration's (FMCSA's) current system for measuring safety performance of interstate commercial motor vehicles and intrastate commercial motor carriers that transport hazardous materials. Through SafeStat, the FMCSA evaluates the relative safety status of individual motor carriers in four areas: Accident, Driver, Vehicle and Safety Management. An overall safety status assessment, known as a SafeStat Score, is calculated from the data provided for the four areas. Anyone who has tried to use SafeStat to evaluate

carriers knows the information available is limited. Neither the accident record nor the SafeStat Score is available to the public, because the FMCSA recognizes the inaccuracy and inconsistency of the data provided to calculate those scores.

What is SMS?

CSA 2010 has three major components:

- Measurement
- Evaluation
- Intervention

SMS is the measurement component of CSA 2010

How does SMS differ from SafeStat

1. SafeStat is organized in four broad categories—Safety Evaluation Areas; SMS is organized in seven Behavior Analysis Safety Improvement Categories (BASICS).
2. SafeStat identifies carriers for a compliance review; SMS identifies safety problems to determine who to investigate and where to focus the investigation.
3. SafeStat gathers information from roadside inspections, using only out-of-service and moving violations; SMS emphasizes on-road safety performance, using all safety-based inspection violations.
4. SafeStat has no impact on a carrier's safety rating; SMS will be used to propose adverse safety fitness determination based on the carrier's current on-road safety performance.

5. With SafeStat, violations are not weighted based on relationship to crash risk; with SMS, violations are weighted based on relationship to crash risk.
6. SafeStat accesses carriers only; SMS has two distinct safety measurement systems: one for individual carriers and one for individual commercial motor vehicle drivers.

What are the BASICS?

SMS will calculate safety performance based on seven BASICSs.

1. **Unsafe Driving**—Dangerous or careless operation of CMVs. Data includes driver traffic violations and convictions for speeding, reckless driving, improper lane change, inattention and other unsafe driving behavior.

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- 2. Fatigue (Hours-of-Service)**—Driving a CMV when fatigued. This is distinguished from incidents where unconsciousness or an inability to react is brought about by the use of alcohol, drugs or other controlled substances. Data includes (1) hours-of-service violations discovered during an off-site investigation, on-site investigation, roadside inspection or post-crash inspection and (2) crash reports with driver fatigue as a contributing factor.
- 3. Driver Fitness**—Operation of a CMV by drivers who are unfit to operate a CMV due to lack of training, experience or medical qualification. Data includes (1) inspection violations for failure to have a valid and appropriate commercial driver's license or medical or training documentation, (2) crash reports citing a lack of experience or medical reason as a cause or contributory factor and (3) violations from an off-site investigation or an on-site investigation for failure to maintain proper driver qualification files, or use of unqualified drivers.
- 4. Controlled Substances and Alcohol**—Operation of a CMV while impaired due to alcohol, illegal drugs and misuse of prescription medications or over-the-counter medications. Data includes (1) roadside violations involving controlled substances or alcohol, (2) crash reports citing driver impairment or intoxication as a cause, (3) positive drug or alcohol test results on drivers and (4) lack of appropriate testing or other deficiencies in motor carrier controlled substances and alcohol testing programs.

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- 5. Vehicle Maintenance**—CMV failure due to improper or inadequate maintenance. Data includes (1) roadside violations for brakes, lights and other mechanical defects, (2) crash reports citing a mechanical failure as a contributing factor and (3) violations from an off-site investigation or an on-site investigation associated with pre-trip inspections, maintenance records and repair records.
- 6. Cargo Related**—Shifting loads, spilled or dropped cargo and unsafe handling of hazardous materials. Data includes (1) roadside inspection violations pertaining to load securement, cargo retention and hazardous material handling and (2) crash reports citing shifting loads or spilled/dropped cargo as a cause or contributing factor.
- 7. Crash Indicator**—Histories or patterns of high crash involvement, including frequency and severity. Data includes law enforcement crash reports and crashes reported by the carrier and discovered during on-site investigations.

What advantages does SMS have over SafeStat?

According to the FMCSA, SMS will be more efficient and effective than SafeStat for targeting the safety problems of both motor carriers and their drivers. CSA 2010 introduces a new enforcement and compliance model that allows FMCSA and state enforcement agencies to contact a larger number of carriers earlier in order to address safety problems before crashes occur.

How will SMS be used?

The FMCSA will use the SMS data to determine when to make interventions. Interventions include early contact (warning letter, carrier access to safety data and measurement information, targeted roadside inspection); investigations (off-site investigation, on-site focused investigation, on-site comprehensive investigation) and follow-on interventions (cooperative safety plan, notice of violation, notice of claim, settlement agreement).

The intervention process is triggered by: (1) one or more deficient BASICs, (2) a high crash indicator or (3) a complaint or fatal crash. Intervention selection is influenced by (1) safety performance, (2) hazardous material or passenger carrier status, (3) intervention history and (4) investigator discretion.

How does this affect me and what should I do about it?

For shippers, carriers and third-party logistics companies, it is time to learn how SMS works and to put in place procedures for monitoring SMS scores of the carriers you use. You will need to have procedures in place and to document that you have followed them, so you can defend against claims of negligent selection, negligent hiring and negligent entrustment.

For carriers, it is time to not only learn how SMS works, but to set in place systems for measuring and monitoring your safety performance, so you do not find yourself subjected to an intervention that can cost you time, money and customers.

For more information, please contact Martha Payne at (541) 764-2859 or mpayne@beneschlaw.com.

The Consignee Has a Duty to Accept a Damaged Shipment

If girls were like consignees, I would have had a lot more dates in high school. The reason being, a consignee has a duty to accept, and cannot reject, a damaged shipment from the carrier, unless the goods are considered to be worthless. As a skinny kid with acne, I was certainly a damaged shipment, but I would not have considered myself worthless. I mean, I *was* on the football team and I even had a short stint with a garage band.

While the girls I went to high school with did not see the practicality of a non-rejection policy, the imposition of such a duty upon the consignee is predicated upon the sensible consideration that the consignee is often a dealer of the type of goods involved and, thus, is in a much better position to dispose of the damaged goods than the carrier. In other words, if a carrier attempts to deliver a shipment of damaged widgets to a widget seller, the widget seller is in a much better position to locate a secondary buyer for the damaged widgets than the carrier. Worthless goods are those goods that are so severely damaged they cannot be used for their intended purpose and there is no secondary market for resale. For instance, in *Oak Hall Cap & Gown Co., Inc. v. Old Dominion Freight Line, Inc.*, 899 F.2d 291 (4th Cir. 1990), the court considered a load of smoke-damaged gowns to be worthless because they

could no longer be used for their intended purpose, had no secondary resale market at the time of original tender and were worth nothing more than salvage value.

A consignee claiming that goods are worthless has the burden of proving this fact in court. However, it is good practice for

carriers to obtain an independent evaluation of the damaged shipment's value immediately after rejection by the consignee. The longer a carrier waits to have the shipment valued by an expert, the more likely it is that the value of the shipment will decrease.

If a consignee wrongfully rejects a shipment, the carrier will usually have contractual duties to notify the shipper for instructions.¹ However, the consignee and shipper are often one and the same. In the case where a consignee-shipper wrongfully rejects a shipment, the carrier is not under any duty to mitigate the consignee's damages and the carrier can sell the shipment for whatever price it can obtain. See *Fraser-Smith Co. v. Chicago, Rock Island & Pac. RR. Co.*, 435 F.2d 1396, 1401 (8th Cir. 1971). Simply put, when the consignee-shipper abandons goods to the carrier by refusing to take physical possession of the goods,

the carrier will be liable only to the same extent as if the consignee had accepted the goods in accordance with its legal duty, and the consignee cannot recover additional damages.

"A consignee claiming that goods are worthless has the burden of proving this fact in court."

In conclusion, a consignee cannot rightfully reject a shipment unless that shipment is completely worthless.

Additionally, it is good practice for carriers in possession of a wrongfully rejected shipment to have the goods immediately valued by an expert, in order to prove later that the goods were not worthless.

For more information, please contact Thomas Kern at (614) 223-9369 or tkern@beneschlaw.com.

¹For more information regarding the status and duties of a carrier once goods have been rejected, please see: *The (Damaged) Freight Stops Here. (But Now What Do We Do With It?) The Pitfalls Of Salvage And Damage Mitigation*, by Eric Zalud, *The Transportation Lawyer*, Oct. 2001, Vol. 3, No. 2, Pg. 38-41.

Benesch's Transportation & Logistics Group Adds New Members

Benesch's Transportation & Logistics Group continues to expand both its capabilities and its size with the addition of new members.



Yanping Wang

Partner **Yanping Wang**, a member of the firm's Corporate & Securities Practice Group and China Group, as well as Partner-in-Charge of the firm's Shanghai Office, has recently joined the Transportation

& Logistics Group. Ms. Wang assists clients in establishing a broad range of business relationships in China, including mergers, acquisitions, joint ventures and strategic alliances. With respect to transportation and logistics experience, Ms. Wang has conducted research on the body of transportation and logistics law in China to help clients understand and explore the framework and market of Chinese transportation law. She advises international freight forwarders in their daily operations, and has assisted clients in applying for NVOCC licenses and in matters relating to importing goods into China. Ms. Wang received her LL.B. from the Political Science & Law University of China in 1991, her LL.M. from Renmin University of China in 1994 and her J.D. from the University of Kansas School of Law in 2000.

Three of Benesch's Litigation Practice Group associates, **L. Jason Blake**, **Ryan P. Hatch** and **Thomas B. Kern**, have also recently joined the Transportation & Logistics Group.



L. Jason Blake

L. Jason Blake focuses his practice on the areas of contract and commercial business disputes. He has pursued and defended claims within these practice areas on behalf of Fortune 500 companies, small businesses, public entities and individuals in state and federal courts, as well as in alternative dispute resolution proceedings. He has represented numerous national transportation companies in various aspects of litigation throughout the country. Mr. Blake's recent successes include the successful dismissal of claims for disputed freight losses and settling a disputed lost cargo claim for pennies on the dollar. Mr. Blake is also a member of the firm's Construction and Energy Practice Groups. He received his B.A. from The Ohio State University in 1998 and his J.D. from the University of Pittsburgh School of Law in 2002.



Ryan P. Hatch

Ryan Hatch focuses his practice on product liability claims, complex commercial disputes and transportation-related matters, including freight loss and damage claims.

He handles transportation matters including drafting and advising clients on carrier selection protocols and other regulatory matters, successfully defending and prosecuting

Carmack Amendment claims and representing domestic and international third-party logistics providers in payment disputes. Mr. Hatch received his B.A. from St. Olaf College in 1998 and his J.D. from The Ohio State University, Moritz College of Law in 2006.



Thomas B. Kern

Thomas Kern focuses his practice on the areas of commercial litigation; transportation and logistics, including cargo, casualty and freight charge litigation; the long-term care

industry; and defending companies against consumer-related claims involving advertising and the Telephone Consumer Protection Act and Consumer Sales Practices Acts. Mr. Kern's transportation experience includes defending and prosecuting Carmack Amendment claims, and other state law freight claims, for shippers, carriers and consignees. He also represents domestic and international third-party logistics providers in payment disputes and defends trucking companies in casualty and personal injury lawsuits resulting from automobile accidents. Mr. Kern received his B.S. from The Ohio State University in 2003 and his J.D. from The University of Toledo College of Law in 2008.

Courts Prohibit the Contortion of Contractual Obligations into Tort Claims

In the unfortunate event that freight is damaged in transit, it is not uncommon for an aggressive plaintiff to assert negligence (and other tort) claims in addition to a breach of contract claim against the carrier. Plaintiffs do this because tort claims, unlike contract claims, generally provide plaintiffs with an avenue to recoup punitive damages and attorneys' fees. Of course, the Carmack Amendment provides protection to the carrier, and, in many cases, preempts such claims. In addition, when preemption is not available, carriers must understand that many jurisdictions, including Ohio, prevent plaintiffs from recasting a contract claim into a tort claim in an effort to recoup these extra damages.

For example, in Ohio, courts have held that even a carrier's willful or malicious breach of contract will not alone "give rise to an action in tort." *Ameritrust Co. Nat'l Ass'n v. West Am. Ins. Co.* (1987), 37 Ohio App.3d 182, 186, 525 N.E.2d 491, citing, *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272; *Ketcham v. Miller* (1922), 104 Ohio St. 372, 136 N.E. 145; *Dietz-Britton v. Smythe, Cramer Co.* (8th Dist. 2000), 139 Ohio App.3d 337, 349, 743 N.E.2d 960 ("[N]o matter how willful or malicious the breach, it is no tort to breach a contract."); *Textron Fin. Corp. v. Nationwide Mut'l Ins. Co.* (1996), 115 Ohio App. 3d 137, 151, 684 N.E.2d 126 (Pursuant to Ohio law, a plaintiff may not "convert contract actions into actions in tort by attacking the motive of the breaching party.") Ohio courts are in concurrence on this point:

A tort exists only if a party breaches a duty which he owes to another independently of the contract, that is, a duty which would exist even if no contract existed.

However, when the promisee's injury consists merely of the loss of his bargain, no tort claim arises because the duty of the promisor to fulfill the term of the bargain arises only from the contract.

The tort liability of parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation.

Rice v. Central Reserve Life of North Am. Ins. Co. (1982), 3rd Dist. No. 14-81-4, 1982 WL 6781, at *2 (emphasis added); *Textron*, 115 Ohio App. 3d at 151 ("[T]he existence of a contract action... excludes the opportunity to present the same case as a tort claim.").

The determination of whether an action is one in tort or one in contract is determined by ***whether the cause of action arises from the breach of an agreement of the parties or from the violation of some duty imposed on a party by law, independently of the contract.*** *Argrov Box Co. v. Illini Four Co.* (1981), 2nd Dist. No. CA 6947, 1981 WL 2827, at *4 citing 1 Ohio Jur. 2d Action § 16; see, also, *Am. States Ins. Co. v. Honeywell Inc.* (1990), 8th Dist. No. 56552, 1990 WL 19319, at *3, ("Ohio law indicates that a party to contract can only be liable in tort, in relation to the contract, where some positive duty imposed by law has been breached by the alleged negligent conduct of one of the parties to the contract.")

"[A]n action of tort for negligence cannot be maintained unless the defendant's conduct constituted the breach a duty imposed by law, apart from it being a breach of an obligation created by agreement of the parties,

either express or implied." *Am. States Ins. Co.*, No. 56552, 1990 WL 19319, at *3, quoting *Bowman v. Goldsmith Bros. Co.* (App. 1952), 63 Ohio Law Abs. 428,

"[C]arriers should not play the fool by allowing an aggressive plaintiff to assert bogus tort claims against them in order to recoup punitive damages and attorneys' fees."

431. In other words, there must be some breach of a duty distinct from the breach of contract. *Marlow v. Shiffman* (1909), 20 Ohio Dec. 209. "Where there is no breach of duty distinct from the breach of contract, there is no cause of action in tort." *Conrad v. Wooster Comm. Hosp.* (1990), 9th Dist. No. 2553, 1990 WL 163860 citing *Haas v. Montgomery Ward and Co.* (6th Cir. 1987), 812 F.2d 1015, 1016-17, quoting Prosser and Keeton, *Law of Torts* (5th ed. 1984) 661, §92.

Accordingly, carriers should not play the fool by allowing an aggressive plaintiff to assert bogus tort claims against them in order to recoup punitive damages and attorneys' fees. Simply put, when an obligation is contractual, numerous jurisdictions will not permit a plaintiff to contort this obligation into a tort claim. *Ameritrust*, 37 Ohio App.3d at 186, 525 N.E.2d 491; *Hoskins*, 6 Ohio St.3d 272; *Ketcham*, 104 Ohio St. 372, 136 N.E. 145; *Dietz-Britton*, 139 Ohio App.3d at 349, 743 N.E.2d 960; *Textron*, 115 Ohio App. 3d at 151, 684 N.E.2d 126.

For more information, please contact L. Jason Blake at (216) 363-4631 or jblake@beneschlaw.com.

Recent Events

Eric Zalud and Marc Blubaugh presented *Legal Smorgasbord: Hot Topics in Transportation and Logistics* at the **Ohio Trucking Association's Annual Convention** in Oglebay, West Virginia, on September 1, 2009.

Jason Blake attended the **National Private Truck Carriers Maintenance Conference** in Herndon, Virginia, on September 10–11, 2009.

Thomas Kern attended the **Arkansas Trucking Association Annual Conference** on September 15–16, 2009.

Marc Blubaugh presented *Due Diligence in the Selection of Carriers and Drivers* at the **Canadian Transportation Lawyers Association Annual Conference** in Niagara-on-the-Lake, Ontario, on October 2, 2009. Eric Zalud also attended this conference.

Martha Payne spoke at the **SMC³ Loss Prevention Conference** in Atlanta, Georgia, on October 19, 2009. She presented the carrier's position during the *Claims Liability Workshop*. Jason Blake also attended this conference.

Eric Zalud, Marc Blubaugh, Jason Blake and Bob Spira attended the **Transportation Law Institute**, sponsored by the Transportation Lawyers Association, in Washington, D.C., on November 5–6, 2009.

Eric Zalud and Marc Blubaugh attended the **Transportation Law Association Executive Committee Meeting** in Washington, D.C., on November 7, 2009.

Eric Zalud and Yanping Wang attended the **TerraLex International Law Firm Network Annual General Meeting** in Hong Kong, China, on November 11–14, 2009.

Marc Blubaugh presented *Having a Winning Deposition Strategy* at the **Ohio Trucking Association's Safety Council Monthly Meeting** in Columbus, Ohio, on November 12, 2009.

Bob Spira presented *Carrier Qualification is for Everyone* at the **Transportation Intermediaries Association and Intermodal Association of North America Fall Meeting** in Anaheim, California, on November 15, 2009. Eric Zalud and Martha Payne also attended this meeting.

On the Horizon

Eric Zalud will be attending the **Conference of Freight Counsel Meeting** in Austin, Texas, on January 10–11, 2010.

Eric Zalud, Marc Blubaugh and Bob Spira will be attending the **Chicago Regional Conference of the Transportation Lawyers Association** in Chicago, Illinois, on January 21–22, 2010.

Eric Zalud will be attending the **DRI Trucking Law Seminar** in Las Vegas, Nevada, on February 4–5, 2010.

Marc Blubaugh will be presenting a Webinar for the **Transportation Lawyers Association** on February 19, 2010 regarding the enforceability of limitations of liability in transportation contracts.

For further information and registration, please contact Megan Thomas, Client Services Manager at mthomas@beneschlaw.com or (216) 363-4639.

Help us do our part in protecting the environment.

If you would like to receive future issues of this newsletter electronically, please e-mail Sam Daher at sdaher@beneschlaw.com.

Pass this copy of *InterConnect* on to a colleague, or e-mail Liz Highley at ehighley@beneschlaw.com to add someone to the mailing list.

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