

To Use SMS Scores, Or Not, That Is The Question
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Not a week goes by without more controversy about Safety Measurement System (SMS) scores, their validity, methodology, statistical accuracy and the like. So if you are an intermediary buying motor carrier services, or a shipper buying motor carrier services directly, do you use the SMS scores as part of your carrier selection criteria? Or not? If you do not use the scores, then in event of a catastrophic accident, you may be subject to claims that you failed to take advantage of “public” safety information and that failure constitutes evidence of “negligent hiring”. Now take a look at the results of using the scores.

For our TIA members, if you haven’t already done so, it is highly recommended that you carefully read the TIA 2012 Carrier Selection Framework, especially Section III, titled The Only Possible Motor Carrier Safety “Authority” is the Federal Motor Carrier Safety Administration (see pages 6-12). At the end of the TIA formal position on FMCSA safety data, it states the following:

“It has been, and remains, TIA’s consistent position that the FMCSA safety rating alone determines a motor carrier’s fitness for use, and should always take precedence over, and clearly outweigh, any single score, or collection of scores, or data set, including CSA’s SMS or basic scores.”

What is not contained in the TIA formal position, or elsewhere in the Carrier Selection Framework, are the consequences of using the SMS scores. So what happens if you use the scores? Here are but a few of the answers: in the event of a catastrophic accident involving a motor carrier that an intermediary or shipper hired, to transport freight:

1. The use of the scores will not guarantee that any intermediary or the shipper of motor carrier services will not get sued based on a theory of negligent hiring.
2. The use of the scores will mean that the intermediary, or shipper, may have waived many of the defenses that could otherwise be raised. The intermediary or shipper:
 - a) May have given up the defense that the data, rankings and enforcements are subject to the “hearsay” rule, and therefore not admissible.
 - b) May have given up the defense that the scores lack “trustworthiness” allowed as a defense to the public records exception to the hearsay rule. Federal Rules of Evidence (“FRE”) 803(8).
 - c) May have waived the defense allowed under FRE 404(b) which prohibits the admissibility of prior accidents to prove liability.
 - d) May have waived the defense available under FRE 403 which provides in substance that evidence can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion and misleading of the jury.
 - e) May have waived the defense in relation to enforcement actions against a motor carrier under FRE 407 which provides that subsequent remedial actions are not admissible to prove negligence.

- f) May have waived the right to argue that under the disclaimer found on the FMCSA / CSA web site, that CSA scores are not safety ratings, that no conclusions should be drawn about a carrier safety based on data in the system including the BASICs scores.
- g) May have waived the right to argue that the February 2002 Office of Management & Budget Guidelines which provides in relevant part that information from federal agencies must be objective.
- h) May have waived the ability to attack the causal relationship between basic scores and the predictability of crashes. As you know, the University of Michigan, the GAO, and Wells Fargo reports all are inconclusive. Ongoing dispute concerning this subject is in the Transportation Press Weekly and adds more uncertainty.
- i) You may have waived the defense that the crash predictability is not demonstrated by the basic scores.
- j) You may have waived the defense that the quality of data from the reporting states varies widely.
- k) You may have waived the defense that there is insufficient data because of the number of carriers that are subject to the basic scores.
- l) You may have waived the defense that the various states reporting have different methodologies and conditions for reporting.
- m) You may have waived the defense that there is geographical bias in reporting.
- n) You may have waived the defense that the crash indicator which supposedly is the most relevant score is not public, and even if public, the crash indicator ranking cannot possibly be admissible where it includes (as it does today) preventable and non-preventable crashes.
- o) You may have waived the defenses related to fatigue driving and unsafe driving and reporting methodology.

The foregoing list is not intended to be exhaustive, but is designed to give intermediaries and shippers a clearer understanding of what may result from use of CSA/SMS scores in the carrier selection process.

Conclusion: If the use of SMS scores does not insulate intermediaries and shippers from lawsuits, AND the use of SMS scores may result in the waiver of numerous defenses, then why use the scores? Of course, the other side of the argument may be, if only carriers are selected which have all BASIC Scores above the threshold, then is that not some evidence of the exercise of due diligence? The answer may well be “yes”, but what impact does it have on capacity to move freight?

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