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**THE CSA PROGRAM GETS A FAST FIX:
A REVIEW OF THE 2015 FAST ACT**

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A. THE HISTORY OF BASIC SCORES

1. The CSA Program

Established in December 2010, Compliance, Safety, Accountability (“CSA”) is a Federal Motor Carrier Safety Administration (“FMCSA”) initiative intended “to improve large truck and bus safety and ultimately reduce crashes, injuries, and fatalities” involving commercial motor vehicles.² CSA historically used its Safety Measurement System (the “SMS”) as a “workload prioritization tool” to identify carriers with potential safety problems.³ The SMS organized data from roadside inspections, crash reports, and FMCSA investigations into seven Behavior Analysis and Safety Improvement Categories (“BASICS”): (1) Unsafe Driving; (2) Crash Indicator; (3) Hours of Service (“HOS”) Compliance; (4) Vehicle Maintenance; (5) Controlled Substances/Alcohol; (6) Hazardous Materials Compliance; and (7) Driver Fitness.⁴

A carrier’s measurement (or “score”) for each BASIC depended on: (1) the number of adverse safety events (or “violations”) related to the BASIC; (2) the severity of each adverse safety event; and (3) when the adverse safety

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2 Federal Motor Carrier Safety Administration, *About CSA – What Is It?*, <https://csa.fmcsa.dot.gov/about/> (last visited May 2, 2016).

3 Federal Motor Carrier Safety Administration, *Safety Measurement System (SMS) Methodology: Behavior Analysis and Safety Improvement Category (BASIC) Prioritization Status*, Version 3.0.5, 1-1 (Methodology Revised Sept. 2015, Document Revised Feb. 2016), <https://csa.fmcsa.dot.gov/Documents/SMSMethodology.pdf>.

4 *Id.*

event occurred.⁵ After a score was computed, the carrier was placed in a “peer group” and ranked against its “peers” by comparing the BASIC measurement of the carrier to the measurement of other carriers in its peer group.⁶ The SMS assigned each carrier a percentile from 0–100 based on this ranking system.⁷ According to the SMS, the higher the percentile, the “worse” the carrier’s safety performance.⁸ A carrier was ranked each month, and violations could affect a carrier’s score for up to twenty-four months.⁹

If a carrier’s percentile in a BASIC was above an arbitrarily set “intervention threshold,” the carrier would be “prioritized for interventions.”¹⁰ Such “interventions” included warning letters, FMCSA investigations, or further monitoring.¹¹ In addition, the carrier’s BASIC score was marked with an alert symbol (“”) that indicated the carrier was above the arbitrary intervention threshold in that BASIC.¹² And, up until December 2015, the public could view each motor carrier’s percentile rank on the SMS website (<https://ai.fmcsa.dot.gov/sms/>) for five of the seven BASICs: (1) Unsafe Driving; (2) HOS Compliance; (3) Vehicle Maintenance; (4) Controlled Substances/Alcohol; and (5) Driver Fitness.¹³

2. Reliability of BASIC Scores

Prior to December 2015, some shippers used the publicly available BASIC scores to make motor carrier hiring decisions. This practice was controversial due to the questionable reliability of the underlying SMS data. Recognizing as much, the FMCSA added a disclaimer, which stated that the alert symbol was “not intended to imply any federal safety rating of the carrier pursuant to 49 USC 31144,” and warned that “[r]eaders should not draw

⁵ *Id.* at 2-4, 2-5.

⁶ *Id.* at 2-5, 2-6.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 2-7, 2-8.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 2-1, 2-2.

conclusions about a carrier's overall safety condition simply based on the data displayed in this system."¹⁴ The FMCSA further explained that, "[u]nless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways."¹⁵ Notably, the FMCSA website made no express suggestion anywhere that a shipper should ever, in any way, consider the SMS data before hiring a motor carrier.

Individual FMCSA officials shared this sentiment. For example, Darin Jones, Field Administrator of the Midwest Service Center for the FMCSA, testified in the matter of *DND International, Inc.*, Doc. No. FMCSA-2014-0159, that the FMCSA cannot rely upon BASIC scores (*i.e.*, the statistical or percentile data) to determine a motor carrier's safety fitness.¹⁶ Field Administrator Jones explained that no pertinent information could be gleaned from a single BASIC score without analysis of the investigative results behind a particular violation because "a score in and of itself does not provide the necessary unsafe operating practice and performance."¹⁷ In other words, Field Administrator Jones explained, any claim that a low percentile score necessarily shows a carrier to be unsafe "is incorrect."¹⁸

The Department of Transportation's Inspector General historically agreed with this position. In 2004, the Inspector General issued a report criticizing the SMS's predecessor (SafeStat) and concluded that, "while SafeStat is sufficient for internal use, its continued public dissemination and external use require prompt corrective action."¹⁹ The Inspector General remained equally

14 See Federal Motor Carrier Safety Administration, *How Does SMS BASIC Status Relate to Crashes?*, <https://ai.fmcsa.dot.gov/SMS/Home/SMSToCrash.aspx> (last visited May 2, 2016).

15 *Id.*

16 See *In the Matter of DND International, Inc.*, Doc. No. FMCSA-2014-0159-0011, U.S. Department of Transportation, Office of Hearings, Washington, D.C., 603:7-21 (Apr. 14, 2014) (Hon. Richard C. Goodwin presiding), <https://www.regulations.gov/#!documentDetail;D=FMCSA-2014-0159-0011>.

17 *Id.* at 579:21-580:2.

18 *Id.* at 580:1-2.

19 Office of Inspector General, Rep. No. MH-2004-034, *Audit Report on Improvements Needed in the Motor Carrier Safety Status Measurement System*, 1 (Feb. 13, 2004), <https://www.oig.dot.gov/sites/default/files/mh2004034.pdf>.

critical 10 years later, noting that the FMCSA had recently admitted at a Congressional Subcommittee hearing that it only had “sufficient data to assess the safety performance of nearly 200,000 out of approximately 525,000 active carriers in at least one safety category.”²⁰ The Inspector General also criticized the SMS methodology because the FMCSA’s documentation of “important processes” underlying the BASIC scores, “such as validation and testing, is incomplete.”²¹

Numerous independent industry studies confirmed that BASIC scores have no correlation to motor carrier safety and are incredibly misleading for the transportation industry to rely on. In November 2011, Wells Fargo released a comprehensive study of the 200 largest carriers in the CSA database.²² The study compared the crash ratios in the Unsafe Driving and Fatigued Driving (now HOS) BASICs and found “various aspects of the program problematic.”²³ The study ultimately concluded that there was “no meaningful statistical relationship between actual accident frequency and BASIC scores for Unsafe Driving, Fatigued Driving or Driver Fitness.”²⁴ Wells Fargo expanded on its research in a follow-up July 2012 report:

We continue to find the FMCSA’s Compliance, Safety, Accountability (CSA) safety program problematic. Based on our research, we do not believe stakeholders should rely on CSA BASIC scores as an indicator of carrier safety performance or feature crash risk. . . . [W]e have expanded our carrier dataset to the 4,600 largest North American (NA) trucking companies. . . . In summary, the findings from the larger data set strengthens our conviction in our earlier findings (*i.e.*, There is no meaningful statistical relationship between “poor” BASIC scores and accident incident) and also

²⁰ Office of Inspector General, Rep. No. MH-2014-032, *Actions are Needed to Strengthen FMCSA’s Compliance, Safety, Accountability Program*, 1 (Mar. 5, 2014), <https://www.oig.dot.gov/sites/default/files/CSA%20Report.pdf>.

²¹ *Id.* at 5.

²² See Gallow, A.P. & Busche M., *CSA: Good Intentions, Unclear Outcomes*, Wells Fargo Securities Equity Research, 1 (Nov. 4, 2011).

²³ *Id.*

²⁴ *Id.*

demonstrates even greater dispersion in the intended results and unintended consequences of the CSA methodology.²⁵

Academic studies are similarly critical. In May 2012, University of Maryland Professor Dr. James Gimpel published a scathing independent evaluation of BASIC scores.²⁶ Dr. Gimpel observed “a litany of systematic biases that are contaminating the SMS methodology, from the irregular data collection practices across geographic areas and agencies, to inappropriate definitions of the measures themselves.”²⁷ He concluded that any “statistical relationships detected in the [] data are not only a cloudy reflection of the true population, but may well be flat wrong.”²⁸

Dr. Gimpel highlighted two flaws in particular: (1) the process by which the data was generated, and (2) geographic disparity. First, Dr. Gimpel noted that “the data collection process is predisposed by design toward recordkeeping only on problems or violations, but not on the problem-free carriers and drivers.”²⁹ Accordingly, carriers can have “a series of clean inspections and never have these data points included.”³⁰ Conversely, “even truck drivers with clean inspection records will have accidents, but the systematic exclusion of clean inspection data by the SMS system eliminates these important cases from consideration in statistical modeling.”³¹

Second, the data is heavily skewed by geographic location. As an example, Dr. Gimpel noted there is an abnormally “high number of inspections in California, Arizona, and Texas compared to a relative dearth of inspections in much of the Northeast.”³² Similarly, what local regulators

25 Gallow, A.P. & Busche, M., *CSA: Another Look with Similar Conclusions*, Wells Fargo Securities Equity Research, 1 (July 12, 2012).

26 See Gimpel, J., *Statistical Issues in the Safety Measurement and Inspection of Motor Carriers*, University of Maryland, 1 (May 2012).

27 *Id.* at 13.

28 *Id.*

29 *Id.* at 1.

30 *Id.*

31 *Id.* at 13.

32 *Id.* at 2.

choose to focus on is highly variable, as evidenced for example by Unsafe Driving BASIC scores that are far worse for carriers operating out of Kentucky (along with West Virginia and New Hampshire) than carriers located in Montana and North Dakota.³³ As another example, carriers operating out of Florida, Georgia, and Idaho have the highest scores in the Fatigued Driving (now HOS) BASIC, while “just across the border from Idaho” the scores are “considerably lower in Washington state.”³⁴ He explained that such differences could not be explained away by traffic density, road conditions, or population density measures, and instead “reflects the vagaries of local enforcement -- not safety attributes of carriers operating in these regions.”³⁵ He summarized the geographic disparity as follows:

Since the data are an inferior representation of the nationwide population of motor carriers and their safety habits, it is fundamentally unsound to generalize from any of the information contained in the data on inspected vehicles to the broader population of all carriers. . . . In summary, using data generated only by happenstance of where inspections occur, based on idiosyncratic local enforcement practices, introduces selection bias, providing a misleading picture of important statistical relationships that inform essentials of the regulator regime. Findings based on the data are dubious due to the atypical or unusual nature of the sample.³⁶

Dr. Gimpel ultimately drew three critical conclusions: (1) the biases at the implementation stage prevent the BASIC indicators from assessing what they are intended to evaluate; (2) BASIC violations are not reflective of the actual performance and safety of carriers, but are an artifact of the application of the measuring instrument; and (3) accidents are very poorly predicted by the BASIC scores.³⁷

³³ *See id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 2-3.

³⁷ *Id.* at 2, 12-13.

The SMS data received similar criticism in a United States Governmental Accountability Office (“GAO”) report issued in February 2014. The report found fundamental flaws in the SMS methodology and resulting BASIC scores, and noted that the scores are “imprecise” and “lack sufficient information to reliably compare safety performance across carriers.”³⁸ Based on these findings, the GAO recommended that the FMCSA “[r]evise the SMS methodology to better account for limitations in drawing comparisons of safety performance information across carriers.”³⁹

Based on the GAO’s conclusions, the House of Representatives passed a bill that “direct[ed] the FMCSA to carry out recommendations for its Compliance, Safety, Accountability program (CSA) as outlined in the Government Accountability Office’s February 2014 report.”⁴⁰ The bill charged as follows:

FMCSA shall revise Safety Measurement System (SMS) methodology to better account for data limitations that undermine meaningful comparisons of safety performance information across carriers. FMCSA is directed to conduct a formal analysis that specifically identifies what are the limitations in data used to calculate SMS scores as well as limitations in resulting SMS scores and report that analysis to the House and Senate Committees on Appropriations within 180 days of enactment. Such analysis shall also identify, for each purpose for which SMS scores are used, what data sufficiency standard is necessary to ensure SMS is reliable enough to serve that purpose. FMCSA is also directed to demonstrate that any use of data, including SMS, to determine a carrier’s fitness to operate has adequately accounted for data limitations.⁴¹

³⁸ United States Government Accountability Office, *Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers*, GAO-14-114, 16 (Feb. 2014), <http://www.gao.gov/assets/670/660610.pdf>.

³⁹ *Id.*

⁴⁰ See H.R. Report 113-464, at 36 (2014), accompanying H.R. 4745, 113th Cong. (2014) and H.R. 83, 113th Cong. (2014) (enacted).

The GAO issued a follow-up report in March 2015, where it reemphasized the need for the FMCSA to improve the SMS methodology.⁴² In response to the House’s directive, the FMCSA issued a report in October 2015 disagreeing with the conclusions of the GAO’s February 2014 report.⁴³ Despite the clear message from the House, the FMCSA ignored the GAO’s findings and, instead, substituted the FMCSA’s own flawed and continually-criticized analysis of its SMS methodology.⁴⁴

3. BASIC Scores in Litigation

Despite all of the foregoing criticism, because the SMS data remained publicly available, opportunistic plaintiffs’ attorneys frequently sought to use above-threshold BASIC scores and the corresponding alert symbol as a chief piece of “evidence” in lawsuits alleging that a shipper or broker was negligent for hiring a “dangerous” motor carrier. These attorneys would, for instance, highlight a single month where a carrier was above the intervention threshold to claim that the motor carrier was generally “unsafe,” and should not have been used by the shipper or broker to haul goods. Defense attorneys were, in turn, forced to move *in limine* to exclude the prejudicial data and, in so doing, were forced to rapidly educate a judge usually unversed in the industry standards on the lack of relevance and reliability that the seemingly “official” BASIC scores in fact possessed.⁴⁵

41 *Id.*

42 See United States Government Accountability Office, *Improvements to Data-Driven Oversight Could Better Target High Risk Carriers*, GAO-15-433T (Mar. 2015), <http://www.gao.gov/assets/670/668814.pdf>.

43 See Federal Motor Carrier Safety Administration, *Limitations and Uses of Safety Measurement System Data for Assessing Motor Carrier Safety, Pursuant to the Explanatory Statement accompanying “The Consolidated and Further Continuing Appropriations Act, 2015” (Public Law 113-235) and House Report 113-464 accompanying House Bill 4745* (Oct. 2015), <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/SMS%20Data%20Limitations%20Report%20Enclosure%20FINAL%20October%202015.pdf>.

44 See *id.*

45 Such motions, in turn, led to mixed outcomes. Compare, e.g., *Rogers v. S. Star Logistics, Inc.*, 3:14-CV-179-WHA-WC, 2015 WL 3485021, at *2 (M.D. Ala. June 2, 2015), with *Pracht v. Saga Freight Logistics, LLC*, 3:13-CV-529-RJC-DCK, 2015 WL 6622877, at *5 (W.D.N.C. Oct. 30, 2015).

The most recent federal court to address the issue rejected the claim that a transportation company should rely on such scores when hiring a motor carrier, and specifically, while evaluating the motor carrier's safety practices, held in no uncertain terms that "BASIC scores are not indicative of motor carrier safety."⁴⁶ In *Dragna v. A & Z Transp., Inc.*, before hiring motor carrier A&Z, KLLM Logistics vetted A&Z by verifying that it had "current valid motor carrier authorization from the federal government, the required insurance policies, carrier safety rating, BASIC scores, and had no fraud activity or negative reports."⁴⁷ The plaintiffs argued that "there was more information available that KLLM should have reviewed before hiring A&Z," and that KLLM's decision to hire a motor carrier with, *inter alia*, "three above threshold BASIC scores, without conducting more research about the scores, fell below the reasonable care standard required of brokers."⁴⁸ The court disagreed:

As for A & Z's BASIC scores, KLLM knew that three were above threshold level in the following categories: unsafe driving (83.9); fatigued driving (82.1); and vehicle maintenance (94.8). Plaintiffs argue that these three BASIC scores show that "KLLM had direct knowledge of A & Z's poor above-threshold performance" in these three areas and, pursuant to KLLM's own internal policy, it should have conducted an internal review with A & Z to learn more about the BASIC scores. Plaintiffs adamantly contend that, had KLLM complied with its own internal policy of conducting an internal discussion with KLLM and A & Z representatives, it would not have hired A & Z.

⁴⁶ *Dragna v. A & Z Transp., Inc.*, Civil Action No. 12-449-SDD-RLB, 2015 WL 729844, at *7 (M.D. La. Feb. 19, 2015).

⁴⁷ *Id.* at *6.

⁴⁸ *Id.* at *7.

When the Court considers the evidence, it finds that Plaintiffs' claim must fail. . . . [T]here is no evidence showing that, had KLLM Logistics conducted a more in-depth review into A & Z's BASIC scores, the ultimate outcome—the selection of A & Z—would not have occurred. Plaintiffs essentially put forth conclusory statements that such a turn of events would have been inevitable; yet, conclusory statements without evidentiary support cannot defeat summary judgment. Finally, the record evidence establishes that BASIC scores are not indicative of motor carrier safety. Hence, the Court finds that, when it considers the evidence, no reasonable juror could find that KLLM Logistics had knowledge that A & Z was an irresponsible independent contractor at the time it hired A & Z for the BASF shipment.⁴⁹

The court in turn granted summary judgment on the negligent hiring claim.⁵⁰ The Fifth Circuit affirmed the district court's decision on appeal.⁵¹ The Fifth Circuit specifically held that there was no evidence that the three above-threshold scores should have disqualified A & Z from being hired as a motor carrier.⁵²

B. THE FAST ACT

Congress recognized the FMCSA's failure to revise the SMS methodology as recommended by the GAO and the House, and in late 2015, methodology

⁴⁹ *Id.* (footnotes omitted).

⁵⁰ *See id.* at *8.

⁵¹ *Dragna v. KLLM Transport Services, L.L.C.*, No. 15-30216, 2016 WL 197194, at *4 (5th Cir. Jan. 15, 2016).

⁵² *Id.*; *c.f.*, *FCCI Ins. Group v. Rodgers Metal Craft, Inc.*, No. 4:06-CV-107, 2008 WL 4185997, at *1 (M.D. Ga. 2008) (finding data in Safestat was not capable of being accepted for judicial notice).

as recommended by the GAO and the House, and in late 2015, both the Senate and the House passed bipartisan bills that included provisions to remove entirely all BASIC scores from public view.⁵³ A compromise bill requiring a massive CSA overhaul, titled the Fixing America’s Surface Transportation (FAST) Act (Pub. L. No. 114-94), was ultimately passed and signed into law on December 4, 2015 by President Obama.⁵⁴

1. The Groundwork for the FAST Act

The Senate’s version of the bill, the DRIVE Act, specifically required that BASIC scores be pulled from public view until the FMCSA “fully implemented or satisfactorily addressed the issues raised in the February 2014 GAO report . . . which called into question the accuracy and completeness of safety performance calculations.”⁵⁵ The DRIVE Act also mandated, under the heading “Limitation on use of CSA analysis,” that “[t]he enforcement prioritization, alerts, or the relative percentile for each Behavioral Analysis and Safety Improvement Category developed through the CSA program within the SMS system may not be used for safety fitness determinations” until the CSA program is revised.⁵⁶ Because of the FMCSA’s stubborn insistence that its methodology is not flawed, the Senate mandated that an independent organization (specifically, The National Research Council of the National Academies) conduct the analysis and overhaul of the CSA program.⁵⁷

The House’s version of the bill, the STRR Act, mirrored the above-cited provisions regarding (1) pulling CSA scores from the public domain until issues from the February 2014 GAO report were addressed; (2) prohibiting the use of CSA scores in making safety fitness determinations; and (3) requiring an overhaul of the CSA program following a study by The National

⁵³ See The Surface Transportation Reauthorization & Reform Act of 2015 (“STRR Act”), H.R. 3763, 114th Cong. § 5223 (2015); DRIVE Act, H.R. 22, 114th Cong. § 32003 (2015).

⁵⁴ See The Fixing America’s Surface Transportation (FAST) Act, Pub. L. 114-94, 114th Cong. § 5221 (2015).

⁵⁵ DRIVE Act § 32003(a)(3).

⁵⁶ *Id.* at § 32003(b).

⁵⁷ *Id.* at § 32001(a).

Research Council of the National Academies.⁵⁸ The STRR Act went one step further, however, in expressly stating that “SMS data or analysis of such data, may not be admitted into evidence in a case or proceeding in which it is asserted or alleged that the entity’s selection or retention of a motor carrier was negligent.”⁵⁹

2. The Requirements of the FAST Act

These competing bills ultimately culminated in the passage of the FAST Act, which combined many provisions from the DRIVE and STRR Acts. Of note, first, it requires the FMCSA to commission the National Research Council of the National Academies to conduct a study of the CSA and SMS to analyze the accuracy of the BASICS and the methodology used to calculate the percentiles.⁶⁰ In addition, the study must consider whether the SMS provides “comparable precision and confidence” through the SMS alerts and percentiles for the crash risk of motor carriers, and “whether alternatives to the SMS would identify high risk carriers more accurately.”⁶¹ The FAST Act then requires that the Administrator of the FMCSA submit a report containing the results of the study, and make those results available to the public by publishing them to a publicly-accessible website.⁶²

In addition, the FAST Act requires the FMCSA Administrator to submit a corrective action plan that responds to, and identifies how the FMCSA will address, the numerous deficiencies identified in the CSA and SMS.⁶³ The Inspector General will then review the FMCSA Administrator’s corrective action plan and report to Congress on whether the plan is adequate to address and fix the CSA and SMS.⁶⁴

⁵⁸ See STRR Act §§ 5221, 5223(a)(4), and 5223(b).

⁵⁹ *Id.* at § 5224.

⁶⁰ FAST Act § 5221.

⁶¹ *Id.* at § 5221(b)(2).

⁶² *Id.* at § 5221(c).

⁶³ *Id.* at § 5221(d).

⁶⁴ *Id.* at § 5221(e).

Most importantly, until the corrective action plan is implemented and the CSA program is fixed, the FAST Act requires the FMCSA to remove the percentile-based BASIC scores from public view.⁶⁵ Specifically, the FAST Act states that “no information regarding analysis of violations, crashes in which a determination is made that the motor carrier or the commercial motor vehicle driver is not at fault, alerts, or the relative percentile for each BASIC developed under the CSA program may be made available to the general public until the Inspector General” certifies that the deficiencies in the program have been corrected.⁶⁶ The FAST Act also bars use of the BASIC scores to make safety fitness determinations until adequate revision of the SMS methodology.⁶⁷

3. Absolute Measures Remain

Unfortunately, despite the many positive benefits enacted by the FAST Act (only some of which have been discussed above), the FAST Act permits the FMCSA to keep carriers’ raw inspection and violation data, including the “absolute measures” underlying the flawed BASIC scores, available to the public.⁶⁸ The “absolute measure” is the time and severity-weighted calculation of a carrier’s violation-performance in each BASIC, and is effectively the carrier’s violation-performance score before the FMCSA applies the “peer group” curve.⁶⁹ At this time, it is unclear how, if at all, these absolute measures are, or will in the future be, utilized by industry stakeholders.

Commentators have expressly cautioned against blind use of the “absolute measure” scores when making motor carrier hiring decisions because, they note, “there is tremendous complexity” in the “absolute measure” scores that require “experience, training, and careful handling before attempting to put

⁶⁵ *Id.* at § 5223.

⁶⁶ *Id.* at § 5223(a).

⁶⁷ *Id.* at § 5223(b).

⁶⁸ *Id.* at § 5223(c).

⁶⁹ See Federal Motor Carrier Safety Administration, *Safety Measurement System (SMS) Methodology: Behavior Analysis and Safety Improvement Category (BASIC) Prioritization Status*, Version 3.0.5, 2-5, 2-6 (Methodology Revised Sept. 2015, Document Revised Feb. 2016), <https://csa.fmcsa.dot.gov/Documents/SMSMethodology.pdf>.

them to use.”⁷⁰ Importantly, “absolute measures” cannot be compared across BASICs because the range of scores is disparate.⁷¹ For example, the five public BASIC categories apply an “absolute measures” scale of 0 to 172.272; however the Controlled Substance BASIC category applies a scale of 0 to 20,⁷³ and three other BASIC categories apply a scale of 0 to 30.⁷⁴ Accordingly, a measure of 10 in Unsafe Driving is incomparable to a measure of 15 in Hours of Service or Controlled Substance. Mr. Steve Bryan of Vigillo, LLC, a company that uses and analyzes the CSA data to advise motor carriers and shippers, explains that the “insistence on referring to these as ‘absolute measures’ is causing some to believe they can be compared” when, in fact, “they cannot”; put simply, the raw “absolute measure” “is meaningless.”⁷⁵ Further, many of the defects that caused Congress to pass the FAST Act are “baked into the [absolute] Measure.”⁷⁶

Mr. Jeff Tucker, CEO of Tucker Company Worldwide, Inc., a freight transportation and logistics company, commented that the FMCSA’s decision to post the absolute measures “represents an affront to the intent of Congress when it passed the FAST Act,” and will muddy the waters for motor carriers and those in the transportation industry.⁷⁷ Given that the data underlying the “absolute measures” is as unreliable as the flawed percentile rankings, the absolute measures should be precluded by courts and ignored by industry stakeholders.

Nonetheless, ignoring Congress’s plain intent in passing the FAST Act, at least one company, SaferWatch, which bills itself as “the leading freight carrier qualification and compliance monitoring service,” recently introduced

⁷⁰ See Bryan, S., *CSA Measures - Amateurs and Explosives*, Vigillo, LLC (Mar. 15, 2016), <https://vigillo.com/2016/03/amateurs-and-explosives/>.

⁷¹ *Id.*

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Tucker, J., *FMCSA’s publishing BASIC scores undermines FAST Act*, *Journal of Commerce* (Feb. 26, 2016), http://www.joc.com/regulation-policy/transportation-regulations/us-transportation-regulations/fmcsas-publishing-basic-scores-undermines-fast-act_20160226.html.

to the public a service called “CSA-e,” which is designed to translate “absolute measures” into a “score” that can be compared against other motor carriers.⁷⁸ SaferWatch even admits that “CSA-e is based on the same methodology as the CSA scores formerly provided by the FMCSA.”⁷⁹ Accordingly, SaferWatch is effectively attempting to revive the FMCSA’s flawed scoring system that the FAST Act sought to correct and, in doing so, effectively seeks to circumvent Congress’s prohibition against reliance on that flawed system. Other for-profit companies will surely follow suit and develop their own scores based on the absolute measures which remain in the public domain.

It is entirely conceivable that such new “scores” will, in turn, be utilized and cited by the same opportunistic plaintiffs’ attorneys in negligent hiring cases, because the burden in civil litigation requires that the plaintiff attempt to offer at least **some** type of evidence to establish that a shipper or broker knew of a carrier’s supposedly “dangerous” propensities. Defense attorneys must vigorously move to preclude the introduction of such “scores,” because the use of these “scores,” developed by companies using an admittedly flawed (and now outlawed) methodology, would be just as prejudicial and irrelevant as the FMCSA’s BASIC scores that plaintiffs’ attorneys sought to offer as evidence. The FAST Act prudently removed the percentile rankings from public view. Any attempt to thwart Congressional intent by offering such rankings or “scores” through a backdoor (*e.g.*, a third-party service) should be rejected by courts. A court need only look at the plain language of the FAST Act (or the express language of its predecessor, the STRR Act) for guidance to find that such data should not be admitted into evidence in a negligent hiring case until the deficiencies identified in the SMS methodology are corrected.

⁷⁸ See SaferWatch, *Industry’s First CSA-Equivalent™ Scoring Option* (Mar. 9, 2016), <http://www.saferwatch.com/main/saferwatch-introduces-industrys-first-csa-equivalent-scoring-option/>.
⁷⁹ See *id.*

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