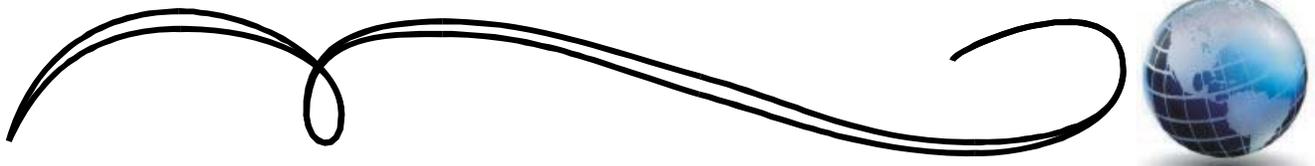


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A Commentary: The Perfect Storm: Schramm Decision, FMCSA, and Impossible Duty for Brokers and Third Party Logistics Companies
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Delta Nu Alpha Transportation Fraternity



**A COMMENTARY:
THE PERFECT STORM: SCHRAMM DECISION, FMCSA, AND AN IMPOSSIBLE DUTY
FOR BROKERS AND THIRD PARTY LOGISTICS COMPANIES ***

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ABSTRACT

Over the last thirty years, there never has been a more confused doctrine than the current “duty of reasonable care” faced by transportation brokers, third-party logistics companies and shippers as they select carriers for transport. The confusion in what was once reasonable and well understood law has been fueled by a perfect storm of judicial reasoning with misplaced reference to faulty empirical data, the complete failure of the Federal Motor Carrier Safety Administration (FMCSA) to properly assess carrier safety worthiness, a feeding frenzy by the plaintiffs’ bar and apathy by many in the industry. The purpose of this commentary is to examine how this uncertainty developed, to identify some of the more glaring issues that must be addressed, and to give some possible guidance as to how the industry, FMCSA and courts should proceed to clarify the duty of a broker in complying with “reasonable care” in selecting carriers.

INTRODUCTION

During thirty years as a transportation attorney, general counsel to three third-party logistics companies and former CEO of a logistics company, there never has been a more confused doctrine than the current “duty of reasonable care” faced by transportation brokers, third-party logistics companies and shippers as they select carriers for transport. The confusion in what was once reasonable and well understood law has been fueled by a perfect storm of judicial reasoning with misplaced reference to faulty empirical data, the complete failure of the Federal Motor Carrier Safety Administration (FMCSA) to properly assess carrier safety worthiness, a feeding frenzy by the plaintiffs’ bar and apathy by many in the industry in the face of some potentially serious challenges to the future of competition in both the carrier and broker sectors of the industry.

The purpose of this commentary is to examine how this uncertainty developed, to identify some of the more glaring issues that must be addressed, and to give some possible guidance as to how the industry, FMCSA and courts should proceed to clarify the duty of a broker in complying with the “reasonable care” standard for selecting carriers.

Since the inception of the property broker concept, brokers have for the most part been held to a very limited duty of reasonable care and diligent inquiry in the selection of carriers for transport. As will be shown, the wisdom of fifty years of state and federal courts construing this duty to be limited is much more well-founded than the more recent and patently unsound extensions of this duty, requiring brokers to be an ombudsman of safety determinations in lieu of the FMCSA.¹ For all of the twentieth century a broker’s duty with slight exception was usually construed to mean that

¹ See *Chubb Group of Insurance Companies v. H.A. Transportation Systems, Inc.*, 243 F. Supp. 2d 1064 (C.D. Cal. 2002); *CGU Int ’l Ins., PLC v. Keystone Lines Corp.*, 2004 WL 1047982, *3 (N.D. Cal. May 5, 2004); *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004); *Jones v. C.H. Robinson Worldwide, Inc.* 558 F. Supp. 2d 630.

brokers had to confirm that carriers they hired satisfied the following requirements:

1. Authorized by what is now the FMCSA;
2. Had regulatory mandated minimum insurance coverage; and
3. Were competent insofar as any knowledge the broker had or with reasonable care could ascertain.²

Perhaps the *Foster* case³ in 1969 was the first real inroad into a broader duty by brokers. It was clearly a precedent for some of the very vague, ambiguous and judicial activist reasoning and extremely poor direction by the Maryland district court in the *Schramm* case. The *Schramm* case, and its mandate that brokers/third party logistics companies must look to a data base (FMCSA's Safety Status Measurement System, "SafeStat") that was full of error, and invalid as a predictor of carrier safety worthiness, pivoted off of *Foster*. It required that brokers look to a source that could only create continued confusion for brokers and shippers, since both the SafeStat system and its successor, Safety Management System (SMS), have been shown to provide misleading and incomplete information from which it is virtually impossible to determine carrier safety worthiness, as will be more thoroughly discussed herein.

If one is to properly address the current enigma faced by brokers in their "new" duty of reasonable care in selecting carriers, decision-makers must understand how the fallacy of this new duty was developed, with some hope that a better understanding of this unfortunate rule of law will be completely corrected.

ANALYSIS

I. The *Foster* Case and How it Was Bad Law and a Faulty Foundation for *Schramm*

The *Foster* case involved a shipper (Foster) who had selected a carrier that was involved in an automobile accident in which persons were seriously injured, after the brakes on the carrier's truck failed. Plaintiffs, in addition to statutory and regulatory infractions that are not pertinent, alleged that the broker was negligent for selecting "...an incompetent and careless contractor (carrier)". The Ninth Circuit Court of Appeals reasoned first that the evidence was insufficient to hold that Foster could have known of prior acts of negligence by the carrier of such number or magnitude to have found the carrier to be incompetent or careless. They also found that Foster had no actual knowledge of either poor reputation or lack of authority on the part of the carrier.⁴

Had the Court stopped there, as they should have, the ambiguous reasoning and inexplicable duties for brokers pronounced in the *Schramm* (2004) case perhaps would never have been visited upon the truck brokerage industry. The *Foster* (1969) court could have followed the conclusion reached in *Mooney v. Stainless, Inc.*, a 1964 case out of the Sixth Circuit Court of Appeals.⁵

...we believe the better rule to be that in order to render an employer liable under the theory of negligent selection of an independent contractor in cases such as the one at bar, it is necessary to establish that, at the time of hiring, the employer had either actual or constructive knowledge that the independent contractor was incompetent.⁶

² *L.B. Foster Company v. Hurnblad*, 418 F. 2d 727, 730 (9th Cir. 1969)

³ *Id.*

⁴ *Foster*, at 730, 731.

⁵ 338 F. 2d 127 (6th Cir. 1964)

⁶ *Id.* at 131

In addition, the mere fact that an independent contractor might subsequently engage in a negligent act raises no presumption that the employer was negligent in selecting the independent contractor for the job.⁷

Instead, as in so many cases where it seems that legal reasoning is replaced with the purpose of sustaining a sympathy verdict, the *Foster* court found that where direct evidence of negligence is missing, a jury can *infer negligence* by a “...carrier’s or transportation broker’s lack of experience, poor financial condition, failure to respect certificate requirements, and willingness to do business at cut rates.”⁸ From this premise, notwithstanding a total lack of affirmative proof of incompetence, or prior negligence, the Court went on to find that Foster “...failed to make a reasonable inquiry as to [the carrier’s] competence.”⁹

If we are to understand the fallacy of the new duty of due care placed upon brokers by the *Schramm* court (and courts that have followed), we must first realize that *Foster* was the *only case cited by Schramm* as a premise for the “new” duty of reasonable care and standard for “reasonable inquiry”. Also, since the *Foster* case was apparently the first court decision to supplant direct evidence of prior knowledge of carrier negligence with *inference of negligence* based upon the business acumen and financial sufficiency of the carrier, we must test that logic against our own fair analysis, before moving on to the failure of the *Schramm* court’s reasoning in establishing an impossible standard of care.

Return to *Foster*, and recall that the *Foster* court found no direct evidence of negligence by the shipper in selecting the carrier, but ruled instead

that negligence could be inferred by the shipper failing to make reasonable inquiry into the “...carrier’s or transportation broker’s lack of experience, poor financial condition, failure to respect certificate requirements, and willingness to do business at cut rates.”¹⁰ Assume *arguendo* that a broker finds a carrier for which he knows of no prior negligence or incompetence. The broker then finds that the carrier has the following characteristics:

1. The carrier is new and may have the best drivers and equipment in the business, but because the carrier is new, there exists a “lack of experience”.
2. Has some weak financials, as all start-ups and many solid performance carriers do, thus is currently in “poor financial condition”.
3. Has certificates of authority that may be conditional because they are new, or may have lapsed because of administrative inefficiency.
4. Is willing to cut rates in order to gain business, as will many very safe carriers who have a “willingness to do business at cut rates”.

Assume further that the broker contracts with this carrier to deliver a load, knowing of no prior acts of negligence and finding that the carrier is not rated as “Unsatisfactory” by the FMCSA. After the carrier accepts the load, there is a horrible accident caused by the driver falling asleep. For the broker in our hypothetical, and the entire broker industry, how can any of the standards put forward by the *Foster* case help, or fairly be considered, in looking for the proximate cause of this accident, or finding that

⁷ *Mooney*, at 131, citing *Matanuska Electric Association, Inc. v. Johnson*, 386 P. 2d 698 (Alaska); *Strickland v. State*, 13 Misc.2d 425, 177 N.Y.S.2d 983; *Eger v. Helmar*, 272 Mich. 513, 262 N.W. 298; *Silveus v. Grossman*, 307 Pa. 272, 161 A. 362; 27 *Am.Jur* (Independent Contractors) 509

⁸ *Foster*, *supra* at 730

⁹ *Id.* at 731.

¹⁰ *Id.*

the selection of the carrier by the broker was negligent. The answer is that such standards are of highly subjective quality and couldn't possibly be helpful in the absence of direct proof of broker negligence. However, when courts allow juries to *infer* negligence from such weak logic, juries will too often create a path to a sympathetic verdict. Such standards are contradictions of sound judicial reasoning, which have in the past required direct evidence that the broker had actual or constructive knowledge that the carrier was incompetent, before attributing to the broker culpability for negligent hiring.

The *Foster* court cited no authority for their highly subjective standard for reasonable inquiry. As in most bad law, they reasoned backward to reach their result, by giving us a checklist of business acumen, rather than a solid inquiry standard. The suggested list of criteria for an inference of negligence is immediately exposed as fallacious when made a part of the following:

- All carriers having poor financials and willing to do business at cut rates are negligent
- Carrier "A" has never had an accident until now, has poor financials, lack of experience and is willing to do business at cut rates.
- Therefore, Carrier "A" must be negligent.

One does not have to be an expert in argument form to see how this syllogism stands out as invalid. Further, other courts have considered this very argument and correctly found that business acumen and financial responsibility have no place in such analysis.

As to the first point, we reject the notion that financial irresponsibility is either equivalent to or a category of incompetence. *Cassano v. Aschoff*, 226 N.J. Super. 110, 116, 543 A.2d 973, cert. denied, 113 N.J. 371, 550 A.2d 476 (1988); see also Restatement (Second) of Torts § 411 comment g (1965) ("The rule stated in this Section makes the employer responsible only for his failure to exercise reasonable care to employ a contractor who is competent and careful. It has no application where the contractor, although competent ... is financially irresponsible.").¹¹

Equating lack of insurance and financial responsibility with incompetence might also wreak havoc in particular industries, *such as transportation*, because persons or entities contracting for transportation services would be required to make continuing inquiry into the financial qualifications of the contractor.¹²
[emphasis added]

Foster was bad law. However, it was clearly the faulty foundation for worse law by the *Schramm* court, thirty-four years later. Both *Foster* and *Schramm* are seemingly examples of how bad law is often created by courts looking for social justice where a tragic accident has occurred, or reaching too far in creating a duty that has not heretofore existed. They both remind us of Justice Holmes' often mis-paraphrased comment, "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."¹³

¹¹ *Mavrikidis v. Petullo*, 153 N.J. 117, 707 A.2d 977 (N.J., 1998).

¹² *Id.* at 139, citing *Robinson v. Jiffy Executive Limousine Co.*, 4 F 3d 237 at 242.

¹³ *Northern Securities Co. v. United States* 193 U.S. 197, 400-401.

II. The Schramm Court Rules that Brokers Must Reference an Invalid Database (SafeStat).

The *Schramm* case, involved an accident in the state of Maryland, caused when the carrier failed to stop at an intersection and plaintiffs' automobile collided with the carrier's vehicle. Injuries to the plaintiffs were catastrophic and permanent. The Maryland District Court considered a motion for summary judgment and granted all parts of the motion, except for that part relating to negligent hiring of the carrier by the broker. With the seed of illogical "reasonable inquiry" planted by *Foster*, what followed was the *sine qua non* for the *Schramm* court to give us the new and intractable duty for transportation brokers:

This duty to use reasonable care in the selection of carriers includes, at least, the subsidiary duties (1) *to check the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by FMSCA*, [italics mine] and (2) to maintain internal records of the persons with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings.¹⁴

Perhaps the *Schramm* court was looking at least in part for a more objective standard of reasonable inquiry than what they saw in the *Foster* decision. Perhaps they saw the same inadequacy in such a business acumen test as demonstrated here. However, they unknowingly resorted to requirements that could not produce a more reliable result when followed. In fairness to the *Schramm* court, they apparently did not know that their effort at a more objective

standard of reasonable care was doomed by the completely inadequate authority they chose for inquiry into carrier safety, i.e., "... the SafeStat database maintained by FMSCA."

In fact, these "subsidiary duties" were on the day announced counterproductive to any notion of improving the process of selecting safe carriers. Furthermore, the sanction of such a useless process by a federal district court both greatly confused the former duty of reasonable care for transportation brokers, and at the same time allowed FMCSA to further avoid its duty to be the one and only entity to administer, evaluate and determine carrier safety worthiness. Consider the first "subsidiary duty" announced by the district court:

"(1) to check the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by FMSCA."¹⁵

To scrutinize fairly the rationale by which the *Schramm* court pronounced this duty, one must ask: What would the broker in the *Schramm* case have found had they looked carefully at SafeStat, prior to selecting the carrier involved in the ensuing accident? The accident and concomitant duties of the broker which were the subject of the court's analysis occurred on May 2, 2002, and the court's decision was announced August 24, 2004. For the interim period between the date of the accident and the court's analysis requiring brokers to look to the SafeStat system, the U.S. Department of Transportation, Office of Inspector General reported the following on February 13, 2004:

1. Of 645,551 active interstate carriers on record, only 26 percent had sufficient data represented to

¹⁴ *Schramm* at 551, citing *Foster*, supra.

¹⁵ *Schramm*, supra

- compute a value for one or more of the four safety evaluation areas.
2. One-third of crash reports, including 37,000 crashes involving interstate carriers, were missing from the FMCSA's database.
 3. As of January, 2003, 42 percent of the reporting on active carriers contained outdated data.
 4. For the fiscal year 2002, the average time in which to upload crash data on carriers took 158 days.
 5. Thirteen percent of the 21,000 crashes and over 70,000 of the inspection transactions occurring in our 6-month sample period contained carrier identification errors, such as failure to identify a carrier associated with the violation, or in a smaller number of instances, identifying the wrong carrier.
 6. In an estimated 11 percent of the inspection errors the wrong carrier was held accountable for the SafeStat related violation.
 7. Problems with the inaccurate data are compounded because no effective system is in place now to facilitate the correction of errors in data reporting.
 8. Missing crash reports may place a lower risk carrier in a deficient category because data for a higher risk carrier is not included in the calculation.
 9. The effectiveness of the SafeStat scoring and ranking calculations is highly dependent on the quality of the crash data file, which in the past was missing a substantial number of reportable crashes.
 10. If public dissemination of SafeStat results is to continue, the data must

meet a higher standard. The types and magnitude of data problems we found argue for immediate and effective action.¹⁶

Perhaps the *Schramm* court was somehow ruling on insufficient or poorly presented evidence, or took unfounded rationale without precedent from briefs by the parties, but for unknown reasons and no proven prior validity, the court created a "subsidiary duty" *sui generis*, that was, by objective facts then available, contrary to any notion of best practice. Moreover, this newly announced duty made it mandatory for brokers to look to a source (SafeStat) that had been found to be unreliable by the Inspector General's office six months before the *Schramm* decision was published. In fact, the Inspector General's report was clearly saying that the data was incomplete, invalid as an indicator of accurate reporting on carriers and recommending that the SafeStat site be taken out of public view and use months before the *Schramm* court mandated its use.

Seemingly, the *Schramm* court was desperate for an empirical source to which brokers and other shippers could turn and get a clear indication of the safety worthiness of carriers. They apparently assumed far greater validity for the information to be found on SafeStat than existed. With all of the information that was available at the time of their decision, they either knew or should have known that SafeStat was anything but a failsafe source of carrier safety evaluation. Still, inexplicably, they created a standard that was immediately incapable of confirming "reasonable care" or "diligent inquiry", since the source to which the court directed brokers could not possibly provide completely valid information, and thus, absolutely could not be reliable, by definition.

¹⁶ U.S. Department of Transportation, Office of Inspector General: *Executive Summary Audit Report No. MH-2004-034, February 13, 2004*; <http://www.oig.dot.gov/sites/dot/files/pdfdocs/mh2004034.pdf>

(The reader is invited to test this conclusion against any of the ten findings mentioned above in the Inspector General’s audit of 2004; *e. g.*, if 11 percent of the inspection errors were attributed to the wrong carrier, how may we *reliably* make any determination as to the carrier we are researching? If 74% of the registered carriers did not have sufficient data represented, how was the broker in *Schramm* to know with *reliability* whether the carrier they were researching was among them? If in 11 percent of the inspection errors the wrong carrier was held accountable for the SafeStat violation, how was the broker to know whether the carrier they were researching was among these wrongfully charged with a violation.)

All indications of the unreliable nature of SafeStat continued to mount from the time of the *Schramm* decision. By 2007, the Inspector General made the following findings and recommendations:

- We found that, although improvements have been made, problems still exist with the reporting of crash data.
- Completeness of data is critical for SafeStat because scoring involves a relative safety ranking of one carrier against other carriers competing for the same business.
- Missing crash reports may place a lower risk carrier in a deficient category because data for a higher risk carrier is not included in the calculation. Consequently, FMCSA should continue to limit public use until it can assess whether significant crash reporting problems remain.
- Before FMCSA allows public access to SafeStat scores, it must improve its ability to measure the completeness of non-fatal crash reporting.¹⁷

Shortly after the Inspector General reported this information to Congress; on February 21, 2008, the FMCSA put the following disclaimer (in part) on the SafeStat website:

“Caution Urged in the Use of SafeStat Data”

The message that followed this notice included a description of how information was reported to the FMCSA and problems with variation in that data reporting. The description was summarized with this statement:

“Accordingly, SafeStat’s ability to accurately and objectively assess the safety fitness of individual motor carriers *may be inconsistent and not conclusive without additional analysis.*” [emphasis added]

This announcement confirming the invalidity of the SafeStat information on carriers was then followed by this boldfaced disclaimer:

WARNING
*Because of State data variations, FMCSA cautions those who seek to use SafeStat data analysis system in ways not intended by FMCSA. Please be aware that use of SafeStat for purposes other than identifying and prioritizing carriers for FMCSA and state safety improvement and enforcement programs may produce unintended results and not be suitable for certain uses.*¹⁸

In the same year that the *Schramm* decision was published, the Inspector General’s Office concluded that SafeStat was no longer a valid measurement device for carrier safety worthiness: “FMCSA must act to revalidate the SafeStat model because changes have occurred

¹⁷ U.S. Department of Transportation, Office of Inspector General: *Letter from Inspector General Scoval to Congressman Petri with attached Briefing, June 19, 2007*; <http://www.oig.dot.gov/sites/dot/files/pdfdocs/SAFESTAT.PDF>

¹⁸ FMCSA, *Safety Measurement System*, <http://ai.fmcsa.dot.gov/SMS/>

since the 1998 study that supported the model's validity."¹⁹

The *Schramm* court established a rule of law that was clearly wrong on the date it was announced. No clear and reliable safety determination was available to the broker in *Schramm* had they "... check[ed] the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by FMSCA", nor was one available to all the brokers henceforth that have been irresponsibly burdened by this decision, which is inexplicable except for the motive of reaching a social justice decision. The FMCSA reporting function that had been a failure since its inception in 1999, was a failure prior to and on the date of the *Schramm* decision, and continues to be a failure to this day, even its present form known as Comprehensive Safety Analysis 2010 (CSA 2010), Safety Management System (SMS), as later developed here.

In summary, the SafeStat measurement system of carrier safety was invalid and unreliable at the time of the ruling in *Schramm*. However, due to a lack of a careful and cogent analysis, courts and court decisions have continued to allow juries to consider the incredulous notion that brokers should have looked to the SafeStat system for information on carriers as a part of their duty of reasonable care in selecting a carrier.²⁰ Perhaps more important, the unusual mandate by a federal court, giving specific direction to such an unreliable source, has been accepted as procedure that must be followed by many who counsel transportation brokers on risk management, and cottage industries have been created to look for and evaluate information that is by any definition unreliable.

III. FMCSA Replaces Safer/SafeStat with Comprehensive Safety Analysis 2010 (CSA 2010) and the Safety Management System (SMS).

The problems with SafeStat and continued public outcry, along with Congressional oversight and pressure, resulted in the FMCSA announcing the agency function that was to replace SafeStat as a carrier safety measurement system. In their Five-Year Plan for 2006-2011, the agency provided the first description of CSA-2010:

The intent of CSA 2010 is to establish an operational model that will determine the relative safety fitness risk attributable to every motor carrier and develop streamlined approaches to change the behavior of poor motor carrier operations and their drivers. The CSA 2010 will ultimately provide FMCSA a new modern-operational model that will greatly enhance the Agency's efficiency at gathering and properly evaluating a greater proportion of the regulated population.²¹

This intent was followed by the rollout of the CSA 2010 Operational Model, in December, 2010, with the following stated purpose: "CSA re-engineers the former enforcement and compliance process to provide a better view into how well large commercial motor vehicle carriers and drivers are complying with safety rules, and to intervene earlier with those who are not."²²

Since the inception of CSA 2010 and the SMS measurement categories for carrier safety, this

¹⁹ *Executive Summary Audit Report, supra.* p. iv. (2004).

²⁰ See, *Jones v. C.H. Robinson Worldwide, Inc.* 558 F. Supp. 2d 630.

²¹ Federal Motor Carrier Safety Administration, *FMCSA Strategic Plan 2006-2011*, <http://www.fmcsa.dot.gov/fmcsa-strategic-plan-102907.htm>

²² Federal Motor Carrier Safety Administration, *CSA - Compliance, Safety, Accountability*, website http://csa.fmcsa.dot.gov/about/csa_how.aspx

new alternative has also been found to be invalid and unreliable for such a purpose. The foundation for the conclusion that this measurement system is also invalid and unreliable for the purpose of determining carrier safety with reasonable certainty includes the following:

1. Anne Ferro, Administrator, FMCSA, stated before Congress that the FMCSA will replace SafeStat with the Safety Management System (SMS), and that the Agency can rate only between two and three percent of the carrier population annually.²³
2. Because of skewed data and disproportionate impact on carriers, the National Association of Small Trucking Companies (NASTC), et al. filed suit against the FMCSA on November 29, 2010, seeking a stay on the implementation of SMS and its ostensible measurements of carrier safety (Behavior Analysis and Safety Improvement Categories “BASICS”).²⁴
3. In a settlement agreement between NASTC, et.al., and FMCSA, on March 4, 2011, the FMCSA, agreed to publish a disclaimer on the SMS website, admitting that,

Readers should not draw conclusions about a carrier’s overall safety condition simply based on the data displayed in the system. [emphasis added] Unless 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 FMCSA, it is authorized to operate on the nation’s roadways.²⁵

4. During the twelve months that SMS has been used by FMCSA to evaluate carrier safety, there have been numerous database changes, with the following noted as deficiencies in fairly rating all carriers within the test states:

- Only 11 percent of regulated carriers have any scores.
- Crash data includes both preventable and non-preventable accidents. Less than 4 percent of regulated carriers have crash data included.
- “Unsafe driving” scores are recorded only in conjunction with roadside inspections, and measure only 4.8 percent of the regulated carriers.
- The “fatigued driving” BASIC measures only 2.5 percent of the regulated carriers.
- “Vehicle maintenance” measures only 9 percent of the industry.
- “Driver fitness” measures only 2 percent of the industry. Most points are accumulated for drivers not having medical cards in their possession – not for actual disqualifying medical conditions.²⁶

Such uncertainty and lack of validity to critical mass measurement of all regulated carriers has led to concern by financial institutions and the capital markets invested in the transportation

²³Committee On Transportation And Infrastructure Subcommittee On Highways And Transit U.S. House Of Representatives; *Statement of Anne S. Ferro, Administrator, FMCSA*, June 23, 2010; <http://www.fmcsa.dot.gov/about/news/speeches/Statement-of-Anne-S-Ferro062310.aspx>

²⁴ *National Association of Small Trucking Companies, et al. v. FMCSA* (D.C. Cir. No. 10-1402)

²⁵ *Id.*, Settlement Agreement, March 4, 2011. Document ID:1297064

²⁶ U.S. Department of Transportation, Paul E Green and Daniel Blower, *Evaluation of the CSA 2010 Operational Model Test*, University of Michigan Transportation Research Institute, FMCSA-RRA-11-019 (Washington, D.C.: Aug. 2011), p. 27.

industry. One such company, Wells Fargo Securities, LLC, completed a thorough statistical analysis and reported their findings on November 4, 2011,

In fact, according to our analysis of the 200 largest carriers in the CSA database, we find no meaningful statistical relationship between actual accident frequency and BASIC scores for Unsafe Driving, Fatigued Driving or Driver Fitness... we feel BASIC scores should not be used exclusively in assessing carrier risk and that they may, in fact, provide misleading information.²⁷

Unfortunately, since the installation of CSA 2010 and its measurement devices for carrier safety contained within the SMS; brokers, shippers and carriers are left with another unreliable measurement system for carrier safety. While CSA 2010 and its measurement system, SMS, are the successors to SafeStat, no court has yet been required to rule on whether brokers have the duty to look to the carrier safety information within SMS. However, brokers operate daily under the threat of vicarious liability should they fail to follow the mandate of the *Schramm* Court, and "...check the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by FMCSA."²⁸

Never has a court offered any more meaningless and completely counterproductive direction. The paranoia and complete uncertainty surrounding the "new" duty of reasonable care for brokers in selecting carriers should never have come to be. It was originated by bad analysis, and over-reaching judicial direction to an invalid source of inquiry. The complete

impossibility of this new duty of care has been exacerbated, rather than alleviated, by the bandwagon tendency for some who advise brokers to parrot the *Schramm* decision, and advise that brokers must "... check the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by FMCSA". Rhetorically, and in fact, we must ask: To find what, exactly, which might be reliable?

It was bad advice when originated by the *Schramm* Court, for all the reasons outlined herein, and it is bad advice today. In light of all the information that has been generated and even the admissions of the FMCSA, for brokers to originate and perpetuate a business process that requires them "...to check the safety statistics and evaluations of the carriers with whom [they] contract..." on either the former SafeStat system, or its successor, the SMS, amounts to drinking the proverbial Kool-Aid. A better argument could perhaps be made that it is negligence *per se* for brokers to make a judgment about the safety worthiness of carriers from what has been demonstrated to be unreliable and certainly incomplete information currently found on the SMS. They will never be able to substantiate diligent inquiry by referring to bits and pieces of unreliable data.

How can such an inquiry satisfy any meaningful duty of due care, when the FMCSA directly contradicts such advice on the SMS website with their very clear disclaimer, "*Readers should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in the system.*"²⁹ Further, as if the disclaimer is not enough, FMCSA adds in its explanation of what SMS is, and is not, "[t]he SMS results displayed on the SMS website *are not intended to imply any federal safety rating of*

²⁷ CSA: *Good Intentions, Unclear Outcomes*; Anthony Gallo, CFA, Senior Analyst; Wells Fargo Securities, LLC, Equity Research Department, November 4, 2011

²⁸ *Schramm*, supra

²⁹ FMCSA, Safety Management System, <http://ai.fmcsa.dot.gov/SMS/Data/carrier.aspx?enc=KxcVSWgEcay9s9SnBUikeRZByr+pUdovFGgZJQ18wgs=>

*the carrier pursuant to 49 USC 31144.*³⁰
[emphasis added] That being so, we must ask was there ever any valid reason for brokers being sent into this nightmare of “checking safety statistics and evaluations of carriers”? The answer is clearly, no! It resulted from bad law and lack of understanding of just how completely invalid the information was at the bottom of the rabbit hole chosen by the *Schramm* Court.

IV. How Must This Folly Be Corrected?

By different means and methods, a strong consensus must be achieved by both courts and Congress that the FMCSA is the only entity charged with determining the relative safety of commercial carriers. The nonsense must end. Laypersons must not be charged with looking at experimental and, so far, invalid tools in a futile effort to somehow document “diligent inquiry” from information that by definition is unreliable as an indicator of current and complete information on all carriers (and therefore, on the carrier they are researching).

Congressional oversight of the FMCSA has been lacking in requiring of FMCSA proper accountability for their primary responsibility, at least since the introduction of the SafeStat system in 1999. No further Inspector General audits and warnings should be required before the FMCSA is either to admit that their responsibility cannot be achieved by current means, or completely sanction the rating of all carriers for which they have not made a determination of “UNSATISFACTORY”, consistent with their own construction of their duty,

Unless 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 FMCSA, it is authorized to operate on the nation’s roadways.³¹

There is in this advisory an immediate dilemma for FMCSA if they, or the courts, suggest that brokers should not be limited in their duty of diligent inquiry to relying exclusively upon a search for an “Unsatisfactory” rating, or not. To suggest that a broker, with limited resources, must look into the maze of unreliable information, or infer relative safety from BASICs that may be distorted for all the reasons discussed herein, is to say that the broker (and the public) cannot rely upon FMCSA to authorize only safe carriers. Courts should in the future be reluctant to hold a broker, with limited understanding and reasons to believe that SMS data may be unreliable, culpable for selecting a carrier that has been authorized by FMCSA, with their vast investment in measurement systems with which to designate carriers as “authorized”.

Title 49, U.S.Code § 31144, requires the Secretary of Transportation (delegated to FMCSA per 49 CFR 385) to:

- (1) determine whether an owner or operator is fit to operate safely commercial motor vehicles, utilizing among other things the accident record of an owner or operator operating in interstate commerce and the accident record and safety inspection record of such owner or operator –
- (2) periodically update such safety fitness determinations;
- (3) make such final safety fitness determinations readily available to the public;

³⁰ SMS Information Center, *What is the Motor Carrier Safety Management System (SMS)?*, <http://ai.fmcsa.dot.gov/SMS/InfoCenter/default.aspx#question1>.

³¹ *SMS Website*, supra

There is no reasonable construction of this statutory language that would impose upon shippers, brokers and third-party logistics companies the duty of determining whether a carrier is safe. That is a statutory duty of the Department of Transportation, through the offices of their administrative agency, the FMCSA. There is no statutory or regulatory authority for the FMCSA to delegate this responsibility to members of the public who must choose a motor carrier from those registered with the FMCSA. There is no statutory or regulatory authority that allows a SafeStat or SMS measurement category (i.e., “BASICS”) to be used as a “safety rating” in lieu of the procedure prescribed by 49 CFR 385, which by regulation mandates the statutory duty of the FMCSA to “make such *final safety fitness determinations* readily available to the public;”³²

49 C.F.R. § 385.1 Purpose and Scope, provides:

- (a) This part establishes FMCSA’s procedures to determine the *safety fitness* of motor carriers, to assign *safety ratings*, to direct motor carriers to take remedial action when required, and to prohibit motor carriers determined to be unfit from operating a CMV. [emphasis added]

If we are to understand the confusion that has been created by the FMCSA and exacerbated by some courts, we must understand the difference between this clear statutory duty and what has resulted by years of FMCSA focus on safety management controls, as a means of achieving the ultimate objective and statutory duty to provide “*final safety fitness determinations*”³³, i.e., assign safety ratings.

These helpful distinctions are made at 49 C.F.R. § 385.3 **Definitions and acronyms:**

- *Safety fitness determination* means the final determination by FMCSA that a motor carrier meets the safety fitness standard under §385.5
- *Safety rating* or *rating* means a rating of “Satisfactory”, “Conditional” or “Unsatisfactory”, which the FMCSA assigns to a motor carrier using the factors prescribed in § 385.7

FMCSA database measurement tools such as the former SafeStat, or the current SMS, are not *safety fitness determinations* or *safety ratings*. They are measurement tools that remain under development toward validity and reliability. They should be viewed as such in the future by courts considering the admissibility of such uncertain data. While they are under development, and until completely valid, they should not be viewed by the public in lieu of or in search of a statutorily required *safety rating*. [emphasis added]

The former SafeStat and current SMS measurement categories have been proven to be nothing more than incomplete attempts to gather metrics with which the FMCSA can make fitness determinations and safety ratings. **THEY ARE NOT COMPLETED SAFETY RATINGS!** It follows that when such tools are of questionable validity and reliability, they should be kept from the public view, rather than be mistakenly designated by courts as sources to which brokers must look. To do so would avoid the many dire consequences brought about by misleading the shipping public, and the courts that have misguidedly given these invalid tools undeserved credence as part of common law duties.

A. Suggested Congressional Action

The FMCSA has completely failed to fulfill the statutory and regulatory duty of providing to the public accurate and timely safety ratings on all

³² 49 U.S. Code § 31144 (3)

³³ *Id.*

registered carriers. This failure is glaring and complete, since the inception of the FMCSA in 1999. There has never been a time, since the inception of the FMCSA, that they have been able to publish a “final safety fitness determination” for all, or even a significant portion of the active interstate motor carriers. As of December 23, 2011, the FMCSA reports:

- 792,704 active interstate motor carriers, with 118,327 (14.92%) of these having a safety rating of either Satisfactory, Conditional, or Unsatisfactory.
- 338,380 For Hire interstate motor carriers, with 61,067 (18%) of these having a safety rating of either Satisfactory, Conditional, or Unsatisfactory
- 454,324 Private interstate motor carriers, with 57,260 (12.6%) of these having a safety rating of either Satisfactory, Conditional, or Unsatisfactory³⁴

Since Administrator Anne Ferro states that the FMCSA can only rate two or three percent of the motor carriers annually³⁵, it is unknown how many of these are current, but by mathematical certainty, many are so old they are meaningless as far as current safety worthiness. While spending \$45 million on CSA 2010 since 2007, and requesting \$78 million for 2012,³⁶ the FMCSA has created new measurement categories for “intervention” (of questionable validity and reliability), but has not created a system that can give a definitive and final Safety Rating on all registered carriers. Their delegated duty, under 49 U.S. Code § 31144, is to “determine whether an owner or operator is fit to operate safely commercial motor vehicles...”,

and to, “make such *final* safety fitness determinations readily available to the public”. [emphasis added]

The FMCSA claims, “The CSA 2010 will ultimately provide FMCSA a new modern-operational model that will greatly enhance the Agency’s efficiency at gathering and properly evaluating a greater proportion of the regulated population.” However, only 11 percent of registered carriers had any scores in the CSA Safety Management System as of August 2011,³⁷ and of those with scores at least one significant study found, “...no meaningful statistical relationship between actual accident frequency and BASIC scores for Unsafe Driving, Fatigued Driving or Driver Fitness.”³⁸

Congress should focus on clarifying for the FMCSA exactly what their duties and priorities should be. At the current pace the FMCSA will have spent over 120 million dollars on CSA 2010 by the end of budget year 2012, and at best they have created a data recording system that has questionable value for predicting carrier safety for less than twenty percent of the 750,000 registered motor carriers. They still have no system that accomplishes the rating of all carriers as either; Satisfactory, Conditional, or Unsatisfactory. However, because of some confused judicial understanding of exactly what the SafeStat and SMS measurement systems can provide, the FMCSA’s continued publication of SMS BASICs measurements imply to the public, and to some courts, that such data is valid for evaluating a clear determination of carrier safety. It simply is not.

Congress must recognize FMCSA’s clear failure to provide final and timely Safety Ratings on all

³⁴ FMCSA data base response to Freedom of Information Act inquiry, December 23, 2011.

³⁵ See. Note 22

³⁶ United States Government Accountability Office; Susan Fleming Director, Physical Infrastructure Issues; Report to Congress, February 25, 2011; GAO-11-416R

³⁷ *Evaluation of the CSA 2010 Operational Model Test, supra*

³⁸ *Wells Fargo, supra.*

registered motor carriers, and that within the context of this failure they have caused courts and the shipping public to be confused and burdened as to a reasonable and fair process for determining the safety worthiness of authorized motor carriers. As a first step in correcting this failure they should require FMCSA to remove from public view the developmental data (BASICS) now being displayed within the SMS. By FMCSA's own admission, its visibility and decisions made there from may have unintended consequences. Removing this data from public view will also relieve brokers and the shipping public from the mistaken judicial inference that such data is a reliable source for a final Safety Rating. Finally, and most import, requiring the FMCSA to remove this incomplete "intervention" data disabuses the notion that brokers and other shippers should have a duty to refer to it as a part of their diligent inquiry and duty of reasonable care.

Once such data is removed from public view, FMCSA may continue to develop it to a point of reliability and perhaps increased efficiency in performing their duty to provide final safety determinations and safety ratings on all registered carriers. In the interim, Congress, the transportation industry, shipping public and courts should not get confused by the FMCSA's apparent effort to rationalize and obfuscate their failure to fulfill their statutory and regulatory duty to provide to the public, "... **final** safety fitness determinations"³⁹ [emphasis added]. They simply have not done so in their entire existence.

B. Future Jurisprudence Must Provide a Duty of Reasonable Care for Brokers That Corrects the Imputed Duty to Refer to an Invalid Data Source

As has been demonstrated, the *Schramm* court required brokers to refer to a system of carrier safety evaluation (SafeStat) that was full of error, invalid and unreliable on the day their decision was announced. The successor to SafeStat, SMS, is at best a work in progress and is also invalid and unreliable as a definitive Safety Rating on motor carriers. It is clearly disclaimed as such by its originator, FMCSA.⁴⁰ Future litigators, and courts who hear such cases, must develop a remedial standard of due care for brokers that eliminates the Hobson's choice of being required to refer to the SMS measurement system for a definitive Safety Rating. For the vast majority of registered carriers it simply is not there. If it is there it is of questionable relevance due to issues of timeliness, errors in reporting and ratios computed that are imbalanced with greater weight to larger carriers.

So much more is known (than at the time of the *Schramm* decision) about the likely unreliability of SMS data that courts should be more inclined to exclude it as irrelevant, lacking in probative value, confusing and untrustworthy. The Federal Rules of Evidence and the corollary state rules, have many provisions that should be considered in motions *in limine* that fully develop the questionable relevance, probative value, confusion factor and hearsay nature of many of the data categories within SMS.

- Fed.R.Evid. 401 says, "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- Fed.R.Evid. 403 provides that even relevant information may be excluded if its probative value is outweighed by a

³⁹ Title 49, U.S.Code § 31144 (3)

⁴⁰ FMCSA, *Safety Measurement System*, <http://ai.fmcsa.dot.gov/SMS/>

danger that the evidence could be confusing, misleading or a waste of the court's time.

- Fed.R.Evid. 803 (8) denies the admission of government reports or data compilations in civil actions if the sources of information or other circumstances indicate lack of trustworthiness.

Assume that a broker researches a carrier and finds proper authority, regulatory insurance in place and a safety rating other than Unsatisfactory. The broker concludes that the carrier is properly authorized by FMCSA, and the broker has no current knowledge of incompetence or unsafe operations by the carrier. The broker knows that the SMS data is incomplete and that it may contain BASICs data that is incomplete and outdated, with ratios that are skewed by large carrier presence, and that a reputable statistical study concluded "...we find no meaningful statistical relationship between actual accident frequency and BASIC scores for Unsafe Driving, Fatigued Driving or Driver Fitness".⁴¹

Is admission of the SMS data, or broker's failure to look at such data, fairly likely to make it more or less probable that the broker was negligent? Given the established unreliability of the former SafeStat information, and the current state of confusion regarding SMS measures, is there any context in which the SMS data should not be excluded under Rule 403? Given the FMCSA's acknowledgement that SMS data is not a safety rating, but rather for internal intervention purposes, along with their disclaimers and published acknowledgment that all carriers are authorized to operate on the nation's roadways, unless they have been given an Unsatisfactory safety rating, is it more or less likely that

presentation of SMS data is both confusing and untrustworthy under Rule 803 (8)?

It is suggested that more courts should rule as the Middle District Court of Georgia did when requested to take judicial notice of safety ratings published on the former SafeStat, finding that such data was not reliable evidence routinely contemplated by the rules governing judicial notice.⁴²

CONCLUSION

V. Conclusion: Returning to a Sensible Duty of Care for Brokers

It has been argued herein that brokers and third-party logistics companies were for many years under a reasonable standard of care in selecting carriers, before the *Schramm* decision erroneously required that they refer to a source (SafeStat) that was invalid and unreliable in order to meet their duty of diligent inquiry and reasonable care. Furthermore, for all the reasons stated herein, the successor to SafeStat, FMCSA's Safety Management System, is as untrustworthy, if not more so.

With the proven failure of the FMCSA to provide final safety determinations and safety ratings for the vast majority of registered motor carriers, there simply is no definitive source with which brokers can make a meaningful determination of carrier safety. They are left with only a semblance of such a source. They can do as they have done for many years and refer to the safety rating provided by the FMCSA, in those instances where it is available. If such a rating is not available, surely the broker cannot be negligent for failure to infer one from what has been shown to be unreliable information.

⁴¹ Wells Fargo, *supra*

⁴² See *FCCI Ins. Group v. Rodgers Metal Craft, Inc.*, 2008 WL 4185997 (M.D. Ga. 2008)

The FMCSA has clearly failed its statutory duty, which in turn means that the Department of Transportation has failed to provide to the public “final safety determinations” and “safety ratings” as mandated by 49 U.S. Code § 31144. Congress has failed to properly recognize the magnitude of this failure and require accountability from FMCSA. Within this context, the courts have failed by requiring of brokers and third-party logistics companies a responsibility that could not be fulfilled, no matter how long they might look as SMS BASICs data. It is time for the Congress, FMCSA and the courts to realize the nature and significance of this folly, and restore to brokers and third-party logistics companies, who are least culpable, a standard of care that is realistic and takes into consideration the magnitude of what has been wrought from the confusion on this issue.

Congress must ask the FMCSA for answers to the following: Can they provide to the public final determinations of safety on all registered carriers? If not, how do they intend to comply with their statutory duty to do so? In asking these question and listening to FMCSA’s response, Congress should not be distracted by FMCSA’s rhetoric about “intervention”...it is not the same as providing safety ratings. If developmental data such as BASICs is a worthy element of ultimately getting to the ability to provide safety ratings, then let it be recognized as such and not as a rationalization for their failure to perform their primary duty. It follows that brokers should not be assigned this duty with the intractable information now admitted by FMCSA to be less than reliable for such a purpose.⁴³

The courts who in the future consider the duty of brokers to use reasonable care in the selection of carriers should do so with recognition of the

errors of the past. Such judicial reformation might start with a more careful analysis of the real role of brokers in the facilitation of providing carriers for loads and loads for carriers. It must also take into consideration that some of the prior decisions that have imposed impossible standards upon brokers have perhaps been motivated by subjective reasoning. Courts who reconsider the duty of brokers, in light of the mistakes of the Schramm decision, might consider the reasoning of Judge Smith of the Georgia Court of Appeals,

...we are troubled by the result in this case... We cannot, however, allow our sympathy for the plight of those injured by commercial trucks to lead us toward imposing strict liability on a party that does not possess the requisite degree of control over another’s conduct. Resolution of this public policy issue lies with the legislative branch of our government, not with the judiciary.⁴⁴

In the interim the courts can return to a more sensible notion that carrier safety is administered by FMCSA, and FMCSA has a statutory duty to provide a final safety determination and safety rating. Brokers and other third parties cannot fairly be charged with this duty. It is reasonable to suggest that this was the recognition of all courts who considered this issue for the fifty years preceding the *Schramm* decision.

* Readers should note that the formatting in this article is reserved for Law Review style articles. Regular research oriented articles should be formatted in conformance with the Journal’s Submission Guidelines.

⁴³ See Note 24

⁴⁴ *Clarendon Nat. Ins. Co. v. Johnson*, 666 E.2d 567, (Ga. App., 2008)

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