Win, Lose or Draw

ASECTT v. FMCSA

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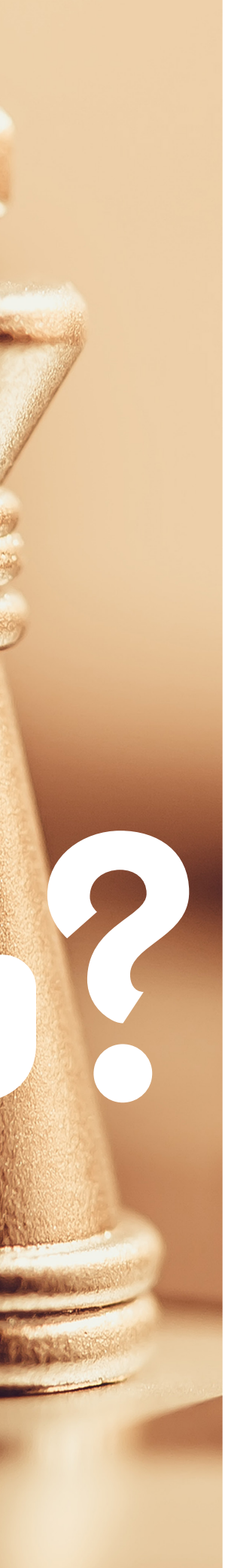

On June 17, 2014, the D.C. Court of Appeals issued its decision in ASECTT v. FMCSA. At issue was whether the FMCSA's guidance issued in May of 2012 amounted to a new rule directing shippers and brokers to use SMS methodology in credentialing carriers. Petitioners' arguments were supported by declarations showing that SMS methodology does not accurately measure carrier safety performance and that the guidance amounted to a new rule requiring shippers and brokers to use SMS methodology to bar from use thousands of carriers which the agency itself has found are fit to operate on the nation's roadways.

The court ignored the effect the agency's website publication and on procedural grounds denied petitioners' relief finding that the agency's guidance did not amount to a new rule for which relief could be granted. The press largely covered the court's decision as a loss. To be sure, the court which was not "astonished" by the agency's action and missed an excellent opportunity to rein in a clear bureaucratic overreach of the type that has come to characterize the current administration and its agency.

> "IT IS TIME FOR THE INDUSTRY AS A WHOLE TO PUT ASIDE PAROCHIAL INTERESTS AND SEND CLEAR AND UNIFIED MESSAGES TO CONGRESS THAT BROAD LEGISLATION IS NEEDED."

Yet, was the decision a resounding defeat for petitioners as some pundits have concluded?

A close reading of the decision shows that the agency's defense was based upon the argument, which the court accepted, that the agency did not intend its guidance as a new rule and the agency argued that its website advice and publication of SMS methodology does not change the agency's duty to determine carrier safety fitness, nor does it trump the settlement in NASTC et al. v. FMCSA to which the agency agreed when suit was filed after the agency announced SMS scores would be made public.

Thus, in finding that the petitioners lacked the basis to sue because the "guidance" did not constitute a new rule, the court may have allayed petitioners' and the industry's worst fears. That is, the agency through website guidance and a highly orchestrated publicity campaign, could abdicate its responsibility for determining carrier fitness, transferring that duty to shippers and brokers under peril of negligent selection liability.

Clearly, ASECTT v. FMCSA was not a resounding victory, but I believe it was not a defeat.

It drew clearly the battle lines between rulemaking and agency advocacy, forcing the Agency into a "rope-a-dope" posture of defending its website publications as having no legal effect in trumping existing regulations or rules.

In the meantime, after it was sued, the agency has buried the complained of "guidance document" and in shuffling its website, largely refrained from further pronouncements which could provide fodder for an activist plaintiff bar intent on using SMS methodology to sue upstream shippers and brokers for negligent selection in every fatality accident.

Hopefully ASECTT v. FMCSA will be seen in the light of history as just a draw – a necessary battle in a longer war.

In the two years it took to litigate this case, the agency's industry support for SMS methodology has deteriorated. In December 2013 the ATA publicly reversed its policy and issued a statement condemning the accuracy of SMS methodology. It has seen the light and urges that scores be removed from public view. OOIDA has issued a call for the administrator to step down because the website is being used for lobbying, not carrying out the agency's existing regulatory duties. The TIA, whose members are the object of "broker busting" classes by plaintiff's bar have called for legislation to remove SMS methodology as an issue in tort suits.

Finally, the Inspector General and GAO studies of SMS methodology which were commissioned by House committees at the request of ASECTT and others have been completed. These independent studies confirm the mounting criticism of all who have studied SMS methodology. It is systemically flawed and lacks sufficient data to statistically measure small carriers which make up the vast majority of carriers the FMCSA regulates.

It now seems doubtful that the agency can deliver a safety fitness determination rulemaking involving SMS methodology any time soon. As a result of building pressure, the battlefront should move from the agency and the court to congressional oversight and regulation reining in the FMCSA. Congress needs to confirm, once and for all, that the Commerce Clause applies. The sgency's ultimate safety fitness determination is the sole standard for determining whether a carrier is fit to use. The sgency's finding preempts and trumps the effort by plaintiff's bar to hold the shipping public liable for the negligent acts or omissions of authorized interstate carriers.

It is time for the industry as a whole to put aside parochial interests and send clear and unified messages to Congress that broad legislation is needed. Until then, ASECTT v. FMCSA must be seen as an important battle in a longer war, the results of which will have broad implications on competition, carrier choice, federalism and preemption.

I can only hope that the cavalry is on the hill.

P.S. — I am happy to report that the surety involved in the costly California interpleader of a $75,000 broker's bond has dismissed that action to be re-filed in Federal Court where no filing fee for claimants is required. Also, a coalition of responsible surety and bond beneficiaries will be pressing the FMCSA to implement the simplified procedures envisioned by the act for distributing future bond payments to claimants.

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