

DOT To Face More Data Fights After Safety-Record Ruling

By **Linda Chiem**

Law360, New York (January 17, 2018, 7:40 PM EST) -- The D.C. Circuit's finding that the U.S. Department of Transportation can be sued for mishandling safety citation records that potentially hurt truck drivers' job prospects may expose the agency to fresh litigation and force it to better manage its information systems, experts say.

Now that two drivers in the Owner-Operator Independent Drivers Association Inc.'s suit can pursue claims that the Federal Motor Carrier Safety Administration failed to maintain accurate driver safety and accident data that is released to prospective employers, the agency will face heightened pressure to shore up how it manages the databases that commercial motor carriers rely on to vet drivers, according to industry observers.

Even though the D.C. Circuit's **Jan. 12 ruling** dealt mostly with the FMCSA's so-called Motor Carrier Management Information System database of trucker citations for state-law safety violations, experts say trucking companies will view it as a fresh tool to challenge the FMCSA's controversial management of other databases.

"The facts underlying the decision illustrate, once again, that FMCSA has some distance to go in order to get its house in order," said Marc S. Blubaugh, partner and co-chair of Benesch Friedlander Coplan & Aronoff LLP's transportation and logistics group. "From a broad perspective, FMCSA does not inspire deep confidence in its information systems, whether MCMIS or otherwise."

A notable recent example, according to Blubaugh, is the early December hack of the FMCSA's National Registry of Certified Medical Examiners, which has been mostly down for the past month.

Commercial truck drivers rely on the online registry because they are required to get physical examinations every two years from a certified medical examiner. FMCSA said earlier this month that no driver or carrier information was compromised during the hack.

"FMCSA plainly needs to improve its cybersecurity program," Blubaugh said. "A driver who concludes that his or her personal information was compromised as a result of this hack of the medical examiner registry will undoubtedly be heartened by last week's OOIDA decision, which applies Spokeo in a less rigorous way than many other courts."

The D.C. Circuit panel referenced the U.S. Supreme Court's 2014 Spokeo ruling throughout its analysis determining whether the drivers alleged enough actual harm to have standing to sue.

The two drivers whose claims were revived — Klint Mowrer and Fred Weaver Jr. — had their citations for safety violations included in the federal MCMIS database even though they had successfully challenged them in state court.

Their records, which weren't updated to reflect the outcome of their court challenges, were shared through the DOT's Pre-Employment Screening Program, which provides trucking employers with reports containing drivers' crash data from the previous five years and inspection data from the previous three years.

Prasad Sharma, a partner with Scopelitis Garvin Light Hanson & Feary PC, told Law360 that the D.C. Circuit got it right in that the Supreme Court's Spokeo ruling established a more nuanced bar for standing. Here, the two drivers whose inaccurate information was actually disseminated had standing.

But the mere retention of inaccurate information in a database without any imminent disclosure is not the type of concrete injury that confers standing, Sharma said.

"In this case, OOIDA was making the argument that the FMCSA has the duty to ensure the accuracy of the data in MCMIS, and the court agreed that Congress did impose that duty. But it did not give a private right of action," Sharma said.

States primarily collect and report to the FMCSA the data that's ultimately contained in the MCMIS, and are required to ensure that this data is "accurate, complete and timely motor carrier safety data," but the DOT is ultimately responsible for "ensuring, to the maximum extent practical, all the data is complete, timely and accurate," the drivers have maintained in court filings.

The information in MCMIS feeds into other agency databases, including the Safety Measurement System, or SMS, the agency's rating system for scoring commercial motor carriers based on their on-road safety performance. Attorneys say it's a controversial and statistically dubious scoring process that can end up penalizing motor carriers with low safety scores for accidents or road safety violations that might not even be their fault.

The D.C. Circuit decision offers a beacon of light not only for drivers, but trucking companies, which have long criticized the DOT and FMCSA for providing only limited avenues to appeal or challenge safety records that can be outdated or inaccurate, according to Mark J. Andrews of Strasburger & Price LLP.

"The interesting thing the court seems to be saying, under certain circumstances, is there's a private right of action for damages or injunctive relief if there's dissemination of inaccurate information with regard to the safety performance of either a carrier or a driver," Andrews told Law360. "The court goes into some detail on what it would take in terms of standing for such an action to prevail."

Andrews said SMS data for carriers is disseminated much more widely and frequently than the data disseminated through the Pre-Employment Screening Program at the heart of this dispute. He explained that there's an entire cottage industry of consultants that mine SMS data to pair up shippers with brokers deciding which motor carrier to use to haul goods.

"There could be a much bigger issue here, and I would expect that people will try to use this decision to extend the same standards to SMS," Andrews said.

At the very least, the ruling shines a bright spotlight on the FMCSA's wheelhouse of databases feeding into its programs for safety compliance and enforcement and will force the agency to bolster its procedures for better managing or protecting drivers' and motor carriers' data.

"While I don't profess to be an IT wizard, it nevertheless seems to me that reliably running some of these systems should be a cakewalk but is apparently a Herculean task for FMCSA," Blubaugh said. "I am hopeful that the Department of Transportation will focus on shoring up existing information systems and practices before embarking on new adventures."

--Editing by Philip Shea and Kelly Duncan.