

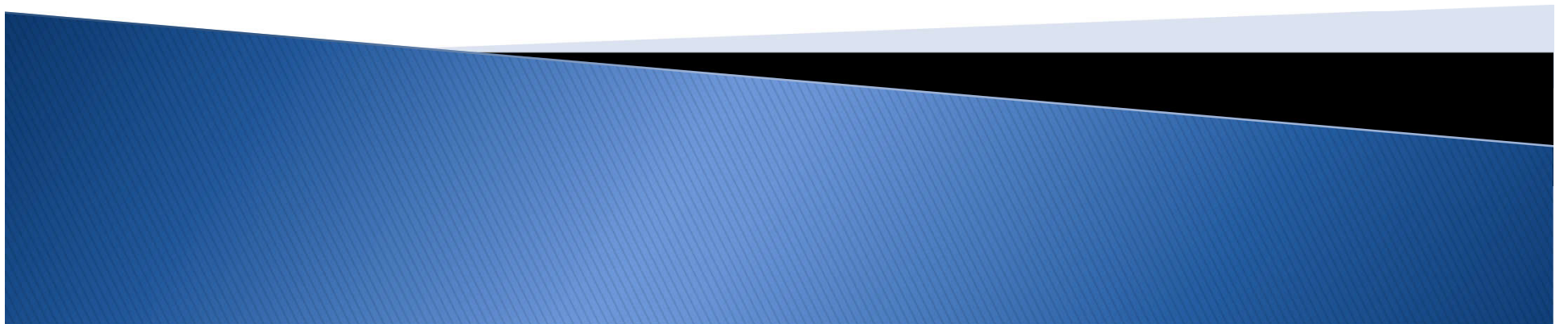
# Moseley Marcinak Presents: 2021 –in–Review (Part 2)

January 19, 2022



# Personal Injury in 2021

Presented by Alex Timmons  
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# Nuclear Verdicts Remain an Issue

- ▶ August 2021 – *Melissa Dzion v. AJD Business Services and Kahkashan Carrier* (Case No.: 2018-CA-000148) – Nassau County, Florida
  - Wrongful Death Action
  - Billion Dollar verdict in Florida – \$900 million punitive award against AJD and \$102 million compensatory damages against both companies
- ▶ Continues the trend that we have seen in recent years of nuclear verdicts against trucking companies – 2018 (\$101 million), 2020 (\$411 million)



# Reptile Theory

- ▶ Plays on juror emotions and build perception that defendant's conduct is a threat to ones own personal safety and the community at large
- ▶ Plaintiff attorneys turn the attention away from incident and focus on carrier's safety practices and policies
  - Hours-of-service, drug/alcohol use, driver histories, etc.
- ▶ AJD Business Services – \$900 million punitive
  - Bad Driving History – long list of moving violations – running weigh stations, logbook violations, prior accidents, distracted driving, speeding
  - Date of Loss Issues – using his cellphone while driving & HOS violation



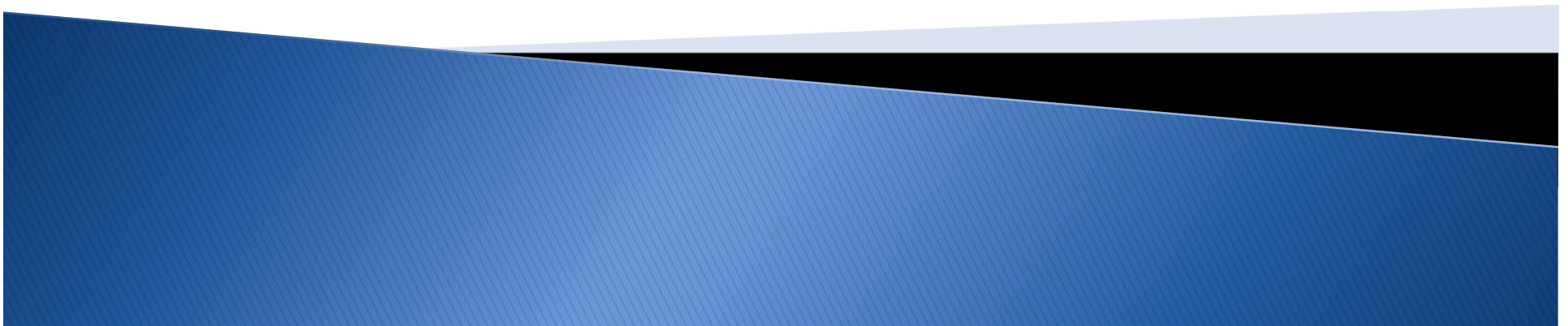
# How to Protect Your Company

- ▶ Make Safety part of the culture and main priority of company
  - Policies and procedures focusing on safety – strict enforcement
  - Driver Training
    - Act on information obtained from ELDs and cameras
  - Monitor safety data – steps to improve safety rating
  - Knowledgeable company representative
- ▶ FMCSA Regulations
  - If possible exceed the regulations
  - Strict hiring policies that are always followed



# Regulatory

Presented by Lesesne Phillips  
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# Annual Inspections of Rear Impact Guards

- ▶ FMCSA issued final rule adding rear impact guards to the list of items required to be examined for annual inspections of all CMVs
- ▶ Labeling of Rear Impact Guards Amended:
  - Label may be on the forward- or rear-facing surface of the horizontal member of the guard, provided it does not interfere with the retroreflective sheeting required by the FMVSS
- ▶ Road Construction Controlled Horizontal Discharge Trailers are Excluded from this Requirement



# California's AB 5 Rule for Independent Contractors

- ▶ California Trucking Association's challenge to California's independent contractor law, AB 5
  - AB 5 would prevent leased owner-operators from operating in the state of California based on the requirements
  - "B" prong of California's ABC test outlaws the leased owner-operator model because it says a worker engaged in the same occupation as his or her employer cannot be an independent contractor
- ▶ 9<sup>th</sup> Circuit Court of Appeals reversed the injunction preventing implementation of AB 5 BUT agreed to leave the injunction in place pending the U.S. Supreme Court's review
  - The U.S. Supreme Court has asked the Solicitor General to file a submission describing the federal government's position on whether FAAAA pre-empts AB 5.





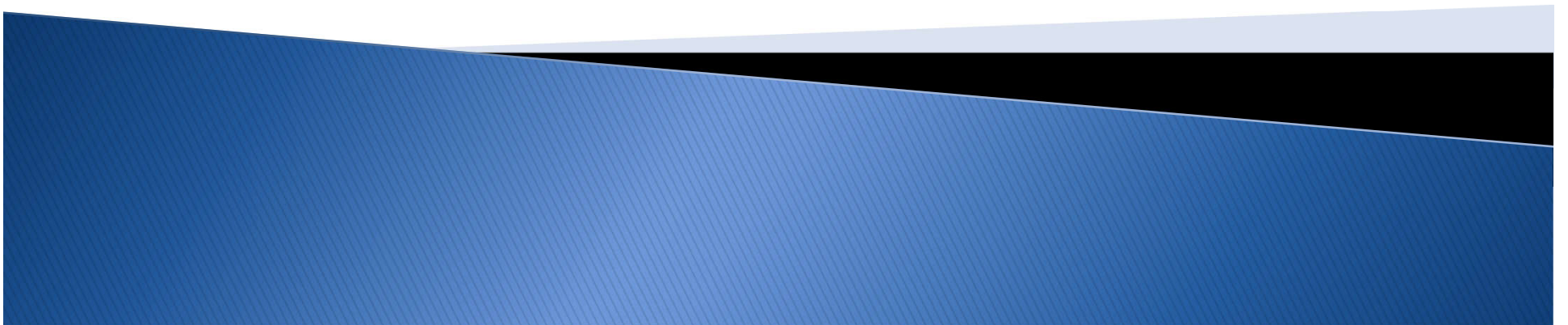
# FMCSA Younger Driver Pilot Program

- ▶ Throughout 2021, FMCSA reviewed considerations to allow younger drivers begin operating CMVs
- ▶ FMCSA has established Safe Driver Apprenticeship Pilot Program allowing individuals aged 18 to 20 to drive CMVs interstate subject to various restrictions
- ▶ Minimum on-duty and driving hours and must be conducted in trucks equipped with specified safety technologies
- ▶ Limited applicability:
  - Program only available for 3 years
  - Limited to 3,000 apprentices in the program at any given time
- ▶ If a motor carrier participates, must register with the Department of Labor



# Cargo Updates

Presented by Fredric Marcinek  
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# *Houston Granite & Marble v. DRT Transportation LLC, et al.*

- ▶ U.S. District Court for the Southern District of Texas
- ▶ Goods were custom pre-cut marble slabs valued at over \$250,000
- ▶ Shipper hired a transportation broker
- ▶ “No touch” load—meaning driver not responsible for loading or unloading
- ▶ After cargo loaded, it was not visible to inspection by driver
- ▶ Carmack claim for damage to the marble filed
  - First element of Carmack—because cargo not visible an open to inspection at the time of loading by the carrier, the shipper could not simply rely on a clean bill of lading, plaintiff needed other substantial and reliable proof the cargo was tendered to the carrier in good condition
  - The court accepted an affidavit from the individual that packaged the shipment stating it was tendered in good condition
- ▶ Limitation of Damages
  - Court utilized four-part *Hughes* Test
    - Maintain a tariff (even though plaintiff failed to request copy)
    - Obtain shipper’s agreement as to choice of liability (email communications)
    - Give the shipper a reasonable opportunity to choose between two or more levels of liability, (email communications) and
    - Issue a bill of lading prior to transport (BOL contained declared value box)



# *Scotlyn USA Division, Inc. v. Titan Trans Corporation*

- ▶ United States District Court for the Middle District of Florida
- ▶ Scotlyn (Broker) hired Titan Trans (Carrier) to transport 21 boxes containing 42,147 pounds of beef
- ▶ Boxes tipped over and were rejected
- ▶ Three day trial
  - Court found while beef damaged, it was still valuable and fit for human consumption
  - Scotlyn failed to present evidence of the amount of damages
  - No mitigation of damages
  - Quality of the beef was degraded due to broker's and shipper's inability to quickly salvage the beef



# *Dubow Textile, Inc. v. Western Specialized, Inc.*

- ▶ United States District Court for the District of Minnesota
- ▶ Plaintiff/Shipper engaged transportation broker Total Logistics (Broker 1) to arrange for transportation of a printer valued at \$150,000
- ▶ Total Logistics engaged another transportation broker Twin Cities Logistics I, Inc. (Broker 2), which hired Western Specialized Inc. (Carrier) to transport the printer
- ▶ Unsigned agreement between Carrier and Broker 2 limiting cargo damage to \$1.50 per pound
  - Carrier found liable for cargo damage, but effectively limited its liability to \$1.50 per pound despite unsigned agreement
  - Court found enough evidence that agreement was reached to limitation in liability
  - Brokers never informed Carrier of the value of the Printer
  - Court cited *Kirby* and *Westwind Marine* stating that agreement between carrier and a logistics company can limit carrier's liability to the cargo owner
  - Court cites *Hughes* test to find carrier appropriately limited liability, but we need an opinion stating there is no need for *Hughes* test if there is a written agreement between the parties



## *Indemnity Insurance Company v. Expeditors International of Washington, Inc.*

- ▶ United States District Court Southern District of New York
- ▶ Ocean vessel cargo damage case where plaintiff alleging over \$600,000 in damages to oilfield equipment from Brazil to the United Arab Emirates
- ▶ Bill of Lading issued describing 16 pieces of oil equipment (only 3 packages damaged)
  - Bill of Lading also incorporated the Ocean carrier's Terms and Conditions, which limited liability to \$500 US Dollars per shipping unit and offered shipper to declare value of shipment and opt out of the limitation of liability
  - No declaration of value
- ▶ Determination of applicable law between United States law or the United Arab Emirates law
- ▶ Law contained in bill of lading was controlling and therefore, the limitation of \$500 per package applied
- ▶ Court noted a strong preference to uphold choice of law provisions in international trade to reduce uncertainty
- ▶ Court granted summary judgment finding liability in the amount of \$1,500



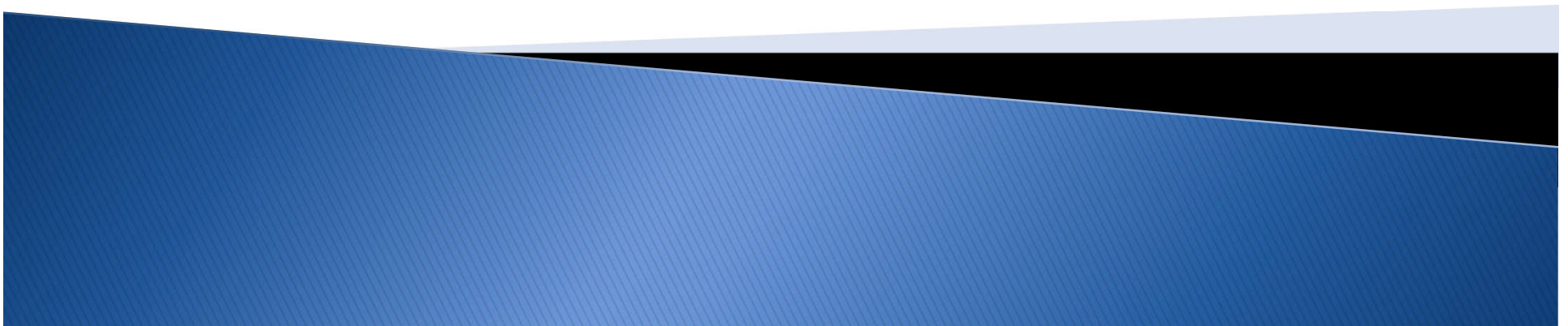
## *Reto Asmis v. Philadelphia Truck Lines, Inc. and Michael Lamont Phelps*

- ▶ United States District Court for the Eastern District of Pennsylvania
- ▶ Household goods transportation from Philadelphia, Pennsylvania to Norfolk, Virginia
- ▶ Household goods damaged in transit and plaintiff filed claims for negligence, conversion, unjust enrichment, and Carmack liability
- ▶ Defendant (Carrier) filed a motion to dismiss the state law claims
- ▶ Court dismissed state law claims under Carmack Preemption with prejudice because the Carmack Amendment clearly preempts state law
- ▶ However, Court left the door open to Plaintiff to file a “true conversion” suit under the Carmack Amendment if it were found that the motor carrier intentionally destroyed or stole the property



# JURY TRIALS/POST COVID BACKLOG 2022

Presented by Tom Chase  
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# COURTS ARE OPEN!

## ▶ Backlogs in System

- Court system goal is for efficient and timely access to litigants
- Judges generally control dockets
- Backlogs exist but so does pandemic
- Courts are open at this time, generally speaking



# Ongoing Backlog Issues

- ▶ Issues Affecting Case Movement
  - Jury panels
  - Court Staff
  - Counsel Issues
  - Witness Issues
  - Limitations on Discovery
  - Community Issues
  - Public Official Position Statements and Orders
  - Public Agency Statements
  - Court Orders
  - Individual Judges



# HOW ARE THE COURTS HANDLING BACKLOG?

## ▶ State Court

- Judicial Branch issues updated orders on Operation of the Trial Courts During the Coronavirus Emergency – latest 11/23/2021 extends until 2/4/2022
- Allows the Chief Justice to issue guidance
- Allows Trial Judges to impose appropriate mitigation measures to address any “unique risk” the virus may pose in any individual case
- Discretion of judges for rulings on motions without hearings
- May have circuit by circuit differences
- Courtroom accommodations
- Masks



# HOW ARE THE COURTS HANDLING BACKLOG?

## ▶ Federal Courts

- Chief United States District Judge issues Orders
- In person operations are ongoing (Order June 3, 2021)
- Masks are required by court order for entry or while occupying any district courthouse with accommodations for removal with social distancing (Order August 4, 2021)
- Courthouse has physical accommodations for addressing pandemic issues
- Instruction to jurors to contact court if traveled internationally, been asked to self-quarantine by a medical doctor, had contact with anyone with COVID-19 or experiencing symptoms. The Court will make “reasonable accommodations” and reschedule appearances as needed.
- Judge discretion on operations



# HOW TO RESPOND?

- ▶ Acknowledge and Adapt = Flexibility!
  - Remote depositions where prudent
  - Motions re scheduling clearly identifying issues encountered
  - Prepare motions understanding a hearing may not be held
  - Be prepared for hearings by Remote Communication Technology
  - Serve documents by e-mail
  - Document any discovery or other issues slowing case down due to pandemic issues
  - Stay abreast of ongoing issues within any particular court or judge





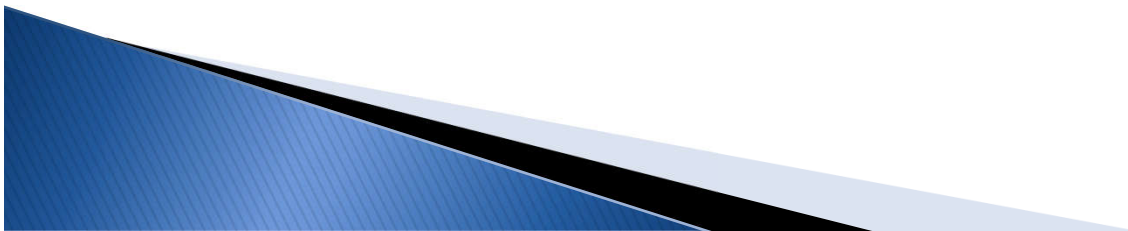
MOSELEY  
MARCINAK  
LAW GROUP

# Random (?) Thoughts on 2021

Presented by Rob Moseley  
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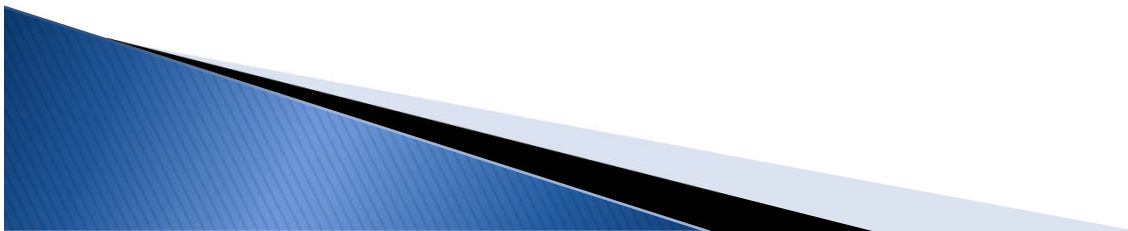
# CMV Accident Litigation

- ▶ CMV Financial Responsibility
  - \$1M
  - Pressure on the system
- ▶ Settlement demand in excess of limits
  - Payment from Carrier



# Mergers and Acquisitions

- ▶ Need for Drivers
- ▶ Need for Equipment





# The Dawn of the Tech Insurer

- ▶ From encouraging cameras and tech
- ▶ To day to day monitoring of the drivers
  - Cameras
  - Accident mitigation



# Legalization/Decriminalization

- ▶ Perceptions
- ▶ Urine Testing Shortcomings
- ▶ D&A Clearinghouse
  - Numbers are high





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