



MOSELEY
MARCINAK
LAW GROUP

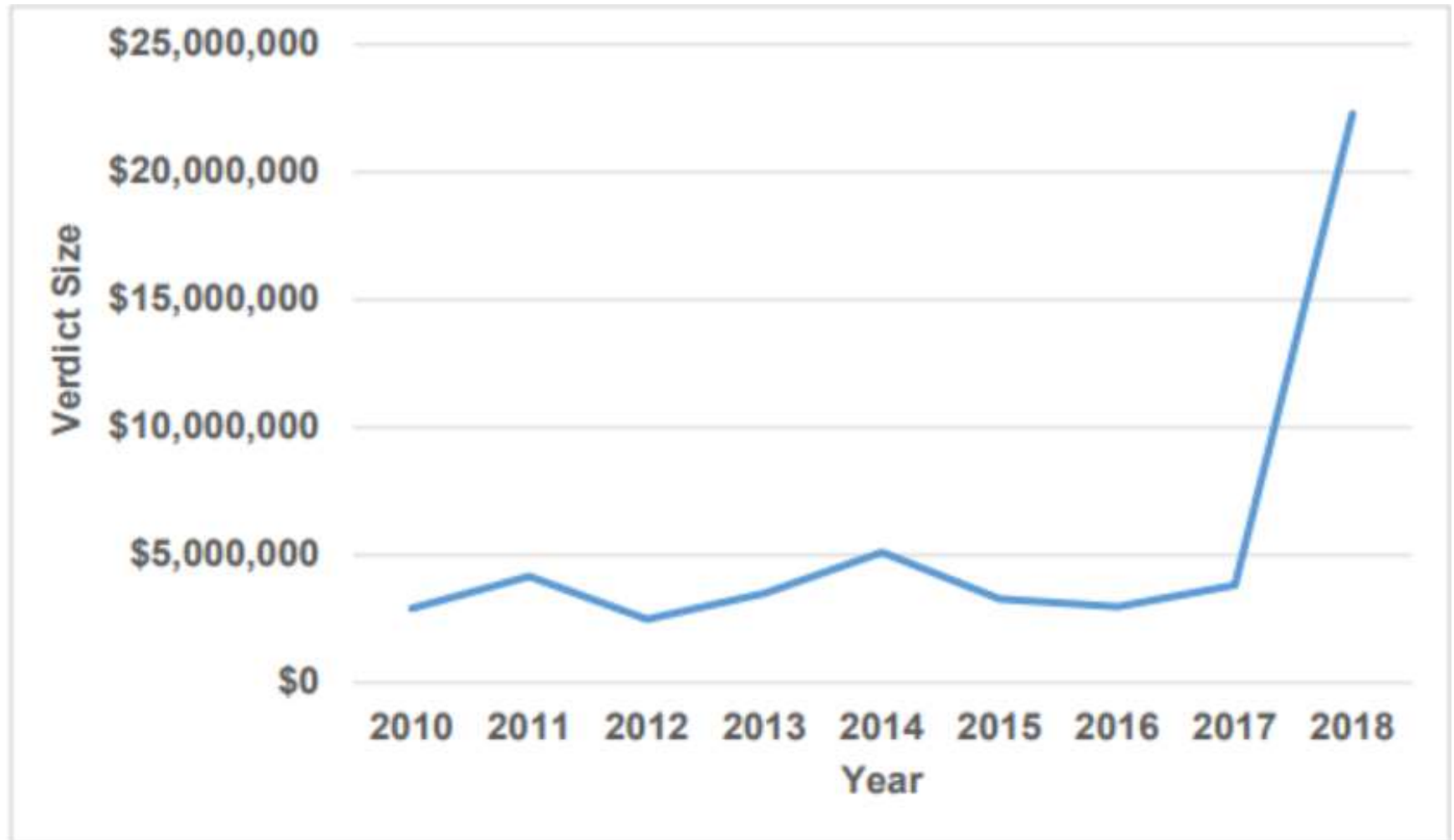
Auto Haulers Ass'n of America Baltimore May 3, 2022

Rob Moseley
PO Box 26148
Greenville, SC 29616
Rob.moseley@momarlaw.com
864-380-5339 (cell)
864- 248-6026 (direct)

Crash Rates

- ▶ Truck Crash rates up 13%
- ▶ 2021 fatalities highest since 2005

1. Truck Accident Litigation



What do jurors think about business?



Verdicts

- ▶ Old Dominion – \$75m Ark
- ▶ Fed Ex Morga case affirmed on appeal in NM
\$164M


Trucking not alone

- ▶ Atlanta Verdict against Ford \$1 B
- ▶ Cal Employment Verdict \$450m

Who is going to pay for this?




Common Themes of Huge Truck Verdicts

1. Better Plaintiff's Attorneys
 - a. Working Harder
 - b. More knowledgeable on trucks (gaps less)
 - c. Smarter
 - d. Not volume lawyers – time to work, prepare
 - e. Tech Savvy
 - f. Swing for the Fence
 - g. COLLABORATION !!
- 

Common Themes of Huge Truck Verdicts

2. Additional Data


- a. CSA/FMCSA
 - b. Track Hiring Process by Subpoena
 - c. Failure to address red flags in data
 - d. Videos
 - e. Electronic Data
- 

Common Themes of Huge Truck Verdicts

3. Recalibration of Verdict Values

- a. Health Care Costs
- b. Value of the dollar
 - 1. Professional athletes
 - 2. Lotteries

Common Themes of Huge Truck Verdicts

4. Conduct from the Top of the MC
 - a. Find the Blind Spots
 - b. Didn't Monitor Technology
 1. Hard brakes and speeding
 2. ELD data
 3. Collision Mitigation
 4. Event Recorders
 5. Inconsistencies with Data
 - c. Motor carrier hired the accident
 - d. No policies or policies not followed
- 

Blind spots



Technology and Litigation

- ▶ Carriers have to understand what they have and how it works
- ▶ Technology = data = responsibility
- ▶ Much of the tech is not ready for prime time
- ▶ No normative data
 - Don't know what it means
 - MC needs to define success

Need a system



Litigation Costs



- ▶ Tons of Experts
 - Accident Recon
 - Trucking
 - Medical Qualifications
 - Cell Phones
 - Telematics

2. Trends: Financial Responsibility

- ▶ What is the \$1 M liability policy doing to you?
 - Average verdict is \$2M
 - Carriers being asked to pony up \$
 - Send your financial statements
 - What can you afford
 - Supply chain pressure on
 - Brokers
 - Shippers
 - Manufacturers



3. Broker/SCAC/Shipper Liability

TRUCKER PATH Trucker Path ▾ Truckloads ▾ Fleet ▾ Services ▾ Partnerships ▾ Blog Contact

Load Board Truckloads

Truckloads from Trucker Path gives carriers free unlimited access to 150,000+ loads daily. Find available freight faster than ever.

[SEARCH ONLINE](#)

[SMS TO DOWNLOAD](#)  

Los Angeles, CA → Chicago, IL
Flatbed (w/ tarps) / Full / 40000 lbs.

DEADHEAD	DISTANCE	RATE
15 mi	2058 mi	\$2.35
PICK UP	DELIVERY	LOAD AGE
17 Jul after 7 PM	24 Jul	6 m

[CALL BROKER](#)
(855) 777-2242

COMMENT
5 days no fees

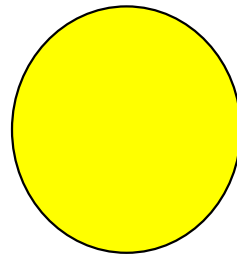
But I am not a broker

Why should I care?

- ▶ Motor carrier changes with broker liability
 - Increased insurance cost
 - MC insurance has to defend broker (defense \$Ms) on vicarious liability claims
 - Broker indemnity obligations
 - MC has to pay on vicarious liability claims

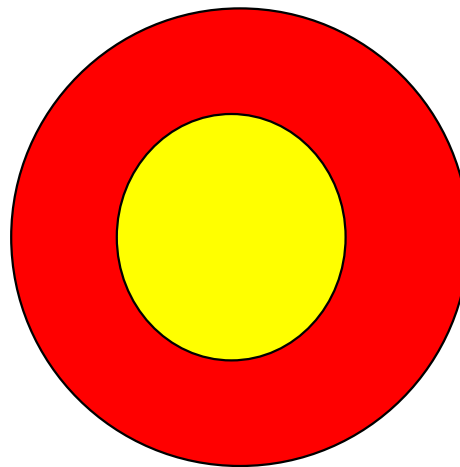
Current Environment

- ▶ Suit against the driver



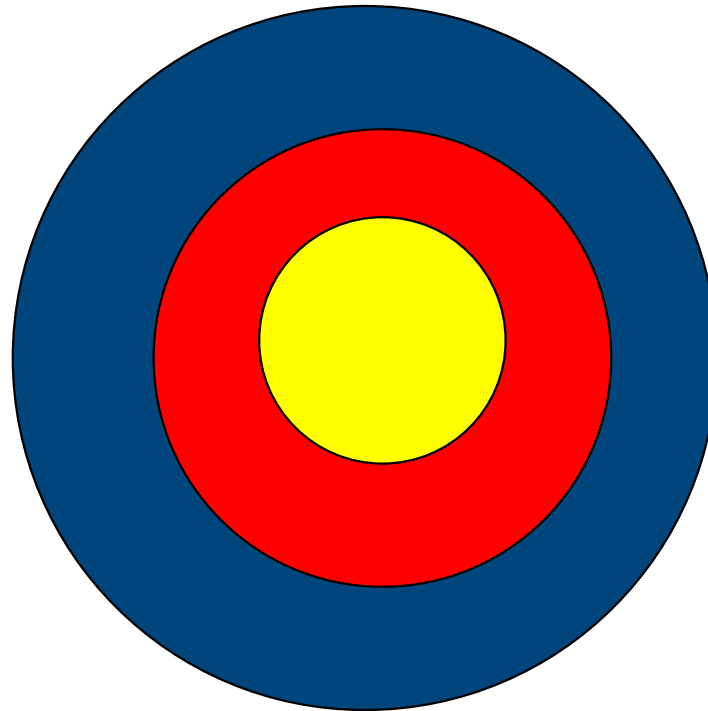
Current Environment

- ▶ Suit Against the Company



Current Environment

- ▶ Suit against Shipper/Broker



Broker Liability

- ▶ Theories of Liability
 - Control
 - Dangerous Activities
 - Representation as Carrier
 - Brokerage industry in general
 - Negligent Selection

Negligent Selection

- ▶ Reasons you should not have hired a carrier
 - Unrated
 - New Carrier
 - Conditional Rating
 - Had electronic devices that could be read while moving
 - Alert(s)
 - Serious violations during Comprehensive Review
 - Insufficient Driver hiring criteria
 - Didn't use PSP
 - Nonpublic Information (actual knowledge)
 - Quick Pay or Factoring

Negligent Selection

- ▶ Reasons you should not have hired a carrier (cont)
 - No authority
 - Drug policy
 - Show the photos
 - TMS and Subscriptions
 - Comments in the TMS
 - Eliminate chameleons in your TMS
 - Multiple cancellations or revocations
 - **Multiple insurance claims!**
- ▶ What other broker approved the carrier.

Brokering Traps

- ▶ Load in to asset based carrier
- ▶ Brokered out without contractual documentation
- ▶ Carrier bills customer
- ▶ Broker gets revenue with no documentation

Power Only

- ▶ Liability Issues
 - Negligent Maintenance
 - Negligent Selection/Entrustment
- ▶ Insurance Issues
 - Policy Language
 - **Endorsement needed**

Miller v. CHR

Federal Preemption

- ▶ 49 USC 14501(c) no state may make a law that affects the price routes and service of a broker or motor carrier.
- ▶ Miller v. CH Robinson
 - Pending in US Supreme Court

Latest Issues – sample case

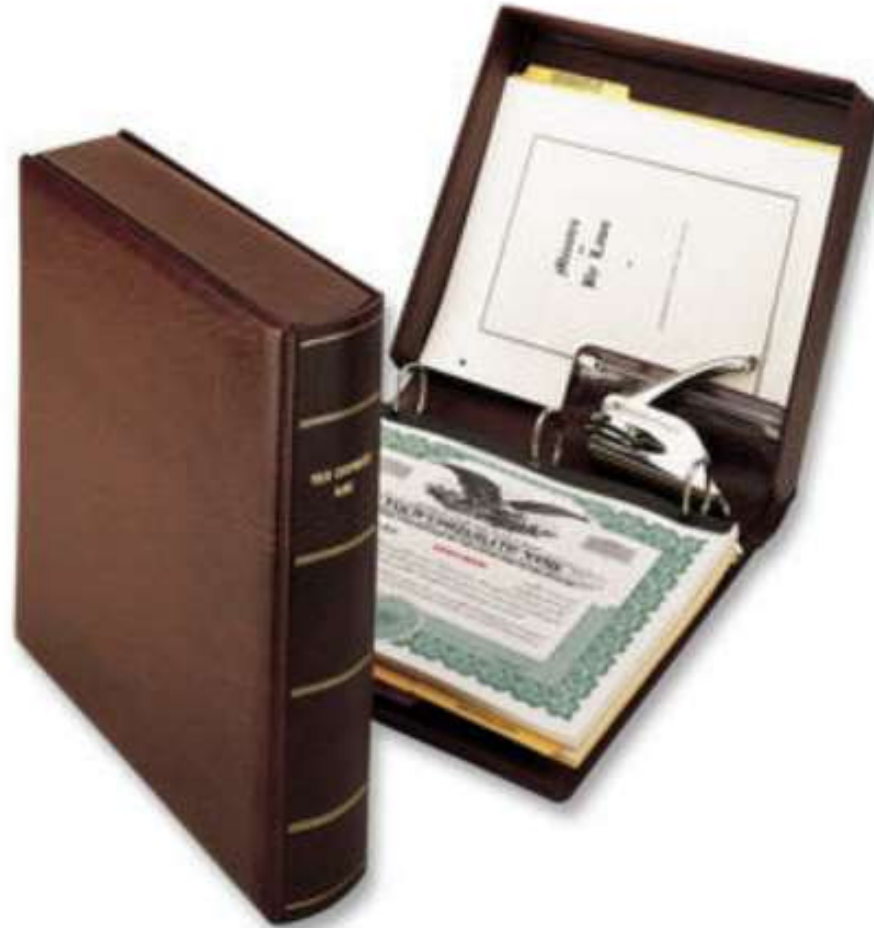
- ▶ Russ v. XPO Logistics, LLC, 2022 U.S. Dist. LEXIS 145938, C.A. No. 19–2719 (D. Minn. Aug. 16, 2022)
 - Fatal accident.
 - XPO served as the freight broker in connection with the shipment. It brokered the load to Ecklund Logistics (“Ecklund”).
 - Ecklund hired a driver, who had previously worked for multiple other carriers. However, Ecklund’s inquiry with the prior employers was limited to determining whether the driver complied with drug and alcohol testing regulations.
 - XPO’s onboarding process involved checking Ecklund’s SAFER rating—which was “Satisfactory”—was old
 - History of insurance claims in the five years preceding onboarding, including 104 property damage claims, 44 collision claims, and 20 bodily injury claims.
 - XPO did not investigate or consider the insurance claims prior to adding Ecklund to its database.
 - Court denied XPO summary judgment on the claim it negligently selected Ecklund as a carrier.
 - XPO was granted summary judgment on the claims alleging it was a motor carrier and that it was vicariously liable for the negligence of the driver under various agency, joint enterprise, and aiding and abetting theories.
 - XPO’s claim for indemnification from Ecklund was deemed premature given that a great number of the claims alleged XPO’s direct negligence, for which it could not be entitled to indemnification.
 - The court also granted summary judgment to XPO and all defendants on the claim alleging violations of the FMCSRs, finding the regulations did not create any private right of action.

More on Russ

Russ v. XPO Logistics, LLC, 2022 U.S. Dist. LEXIS 145938, C.A. No. 19–2719 (D. Minn. Aug. 16, 2022).

- ▶ Ecklund, in turn, leased equipment from KLE.
- ▶ Alter Ego for leasing co?
- ▶ KLE and Ecklund operated out of the same location and shared common ownership.
- ▶ KLE was granted summary judgment for the claims alleging joint venture and alter ego with Ecklund.
- ▶ KLE was likewise granted summary judgment under the Graves Amendment for the claims alleging vicarious liability for the
- ▶ denied summary judgment on the claim it negligently entrusted its equipment to Ecklund

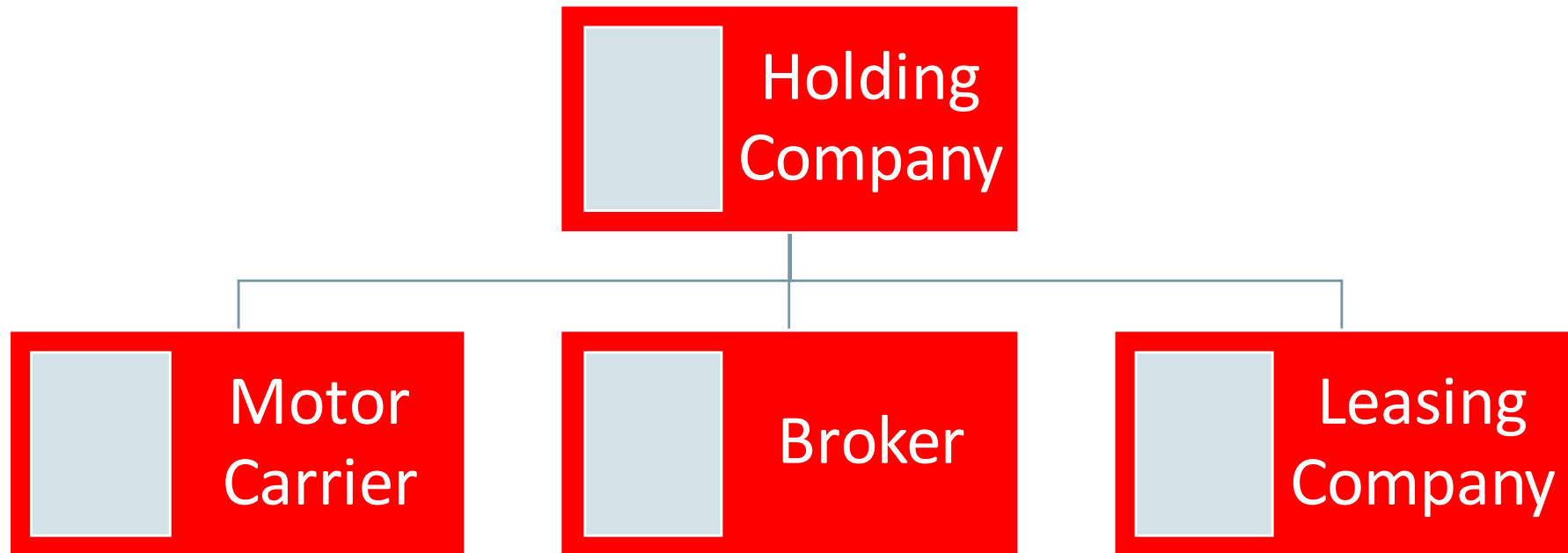
4. Corporate Structure and Process



Are You a Target?

- ▶ Truckers have \$1M + in insurance
- ▶ Tractor Equity
- ▶ Accounts Receivable
- ▶ Brokerage – nothing but cash

Keep Your Companies Straight



Holding Company

- Holding Company
 - No operations
 - No employee
 - Hidden
 - Consolidated tax returns
 - Disregarded tax status between entities
 - No marketing under common name
 - Business cards
 - Websites


Operating Companies

- Each company treated as stand alone
- Shared services agreement
 - Shared employees
 - Shared facilities
 - Account for every dollar
 - Update annually
 - ALLOCATE EVERYTHING!
- Management Company

Asset Management

- ▶ Leasing Companies can help
 - May have state sales tax issues
 - Depends on equity
- ▶ No real estate held by trucking company

What Do Companies Screw Up?

- ▶ Follow the money
 - ▶ How do the bills go out?
 - ▶ How do the loads come in?
 - ▶ Who is your vendor's customer?
 - ▶ Sloppy transfer of equipment
 - ▶ Employees performing services for companies without compensation
 - ▶ Using assets of another entity without compensation
- 

Document/Data Retention


- ▶ FMCSA requirements
- ▶ Other requirements
 - Accounting and tax
 - Labor and employment
- ▶ Keep what you need to and nothing more

Mergers / Acquisitions

- ▶ Trend to consolidate with M&A
- ▶ Small companies are doing it
- ▶ Smaller companies are being acquired
- ▶ Drivers
 - Drivers
 - EBITDA
 - Markets
 - Lanes
 - Specialized Transportation

5. Coverage Issues

- ▶ Insuring Agreement
 - ▶ Exclusions
 - ▶ MCS-90

 - ▶ Understand your Underwriters
- 

Insuring Agreement

▶ Truck Rentals

- Ballentine v. EAN, 2022 US Dist Lexis 28777 (WD TN 2022)
 - Enterprise sold insurance \$100,000
 - Suit against MC insurer
 - No duty of insurer to predict filings
 - No discussion of rental company duties
 - Sue them for insurance agent malpractice?
 - Receiving premiums

Additional Insured

- ▶ Schneider v. USIC, (MD GA 2022)
 - Schneider brokered to Road Cargo
 - USIC insured Road Cargo
 - USIC refused to defend
 - Complaint says Schneider
 - Vicariously liable
 - Broker
 - Motor carrier
 - Issue of self insurance
 - Went beyond 4 corners
 - Duty to defend enforced on SJ

Additional Insured

- ▶ Werner v. SMC Trans (D NE 2022)
 - Werner brokered load to SMC
 - USIC insured SMC
 - Facts
 - Werner owned the trailer
 - Issues on maintenance per complaint
 - Werner tendered – refused by USIC
 - Werner got SJ
 - Sued for defense
 - SJ to Werner

Additional Insured

- ▶ JB Hunt v. USIC (CD CA 2022)
 - JB Hunt brokered to ATF
 - USIC insured ATF
 - Allegations in the complaint that JB Hunt
 - Owned the trailer
 - Was Broker
 - Was Carrier
 - Did not allege vicarious liability (key)
 - Issues
 - JB Hunt self insurance
 - Contract
 - SJ for USIC denied

Additional Insureds

- Possible bad faith for leaving them out of settlements
 - Williamsburg Nat'l v. NY Marine, 2021 US Dist Lexis 187277 (CD CA 2021)
 - Fight between insurer for trucker and AI

Inconceivable

Act III
Communications
presents

Employee Exclusion

- ▶ United Financial v. Mid State Logistics, 2022 US Dist 104532 (MD PA 2022)
 - IC in sleeper berth
 - Stipulated that the policy employee definition was governed by 40 CFR 390.5
 - No coverage
 - Comprehensive list of cases on the subject

Cargo and Broker Coverage

- ▶ Wild Wild West
- ▶ Understand your products

6. Independent Contractors and Employment Matters



AB5 in California

- ▶ S Ct rejected case

NLRB

- ▶ STG Cartage v. Wholesale Delivery, NLRB 2022
 - XPO Contractors deemed employees

ABC Test

- ▶ Portillo v. Nat'l Freight, 2022 US Dist Lexis 103186 (DNJ 2022)
 - IC claim for misclassification
 - NJ had ABC test
 - Deemed to be employees

But CA Meal and Rest Break is Preempted

- ▶ Intl Brotherhood v. FMCSA (9th Cir. 2022)
 - Said that CA state statutes on meal and rest breaks are preempted for interstate drivers

Covenants / Nonsolicitation

- ▶ CRST v. Swift Trans (8th Cir. 2022)
 - Swift hired CRST drivers
 - Drivers had not complied with reimbursement for CDL School and Training
 - Reversed trial court
 - Held that the hiring MC must encourage the breach, not simply hire the driver

Worker's Comp Exclusive Remedy

- ▶ Liss v. TMS Int'l, 2022 US Dist Lexis 101786 (SD IL 2022)
 - Driver hurt and sued consignee
 - Consignee third partied driver employer
 - Employer argued exclusive remedy
 - Court denied SJ to Employer for negligent training of driver.

7. Regulatory



I have a permit!



Safety Ratings

- ▶ Safety Ratings under 49 CFR 385
 - 90% carriers unrated
 - If a compliance review occurs
 - Over 50% Conditional or Unsat
 - What does conditional mean?
 - Shippers and Brokers stay away
 - Underwriters

Brokers and Bona Fide Agent

- ▶ FMCSA received public comments

Maritime Regulations

- ▶ Port backups
- ▶ Detention charges
- ▶ FMC tightening rules on shiplines

FMCSA Financial Responsibility

- ▶ No change in recommendations to Congress
- ▶ Not enough info from insurers

Drug and Alcohol

- ▶ Hair Testing Petition



Rob Moseley
Moseley Marcinak Law Group, LLC
PO Box 26148
Greenville, SC 29616
Rob.moseley@momarlaw.com
864-380-5339 (cell)
864- 248-6026 (direct)