A DIFFERENT POINT OF VIEW
on broker liability in light of Jones v. D'Souza

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A string of C.H. Robinson cases starting in 2001 with a wrongful death lawsuit brought in Illinois, and including Schramm v. Foster, 2004 U.S. Dist. Lexis 16875 (D.Md. August 23, 2004), and now Jones v. D'Souza, 2007 U.S. Dist. LEXIS 66993 (D. Va. 2007) have had a chilling effect on transportation brokerage. Applying state law, courts have allowed juries to consider Robinson's liability for the negligent acts or omissions of truck drivers hired by its carriers under "negligent hiring," "vicarious liability," and "master-servant" or *respondiat superior* theories.

Ignored, in part I believe because of C.H. Robinson's method of operation, is the statutory definition of a property broker, the preemptive scheme of federal regulation, and any understanding of the traditional role of the shipper and broker as a member of the traveling and shipping public.

By Federal Statute and Regulations only a motor carrier has a non-delegable duty to exercise dominion and control over the equipment and driver it employs, including owner-operators it "retains" as independent contractors. See 49 C.F.R. §382 through 396, 376 et al.

No similar duty is imposed upon a shipper or broker. A broker is defined as a party who "arranges for transportation for compensation" and is not "a motor carrier." A clear distinction is brought between an instrumentality of transportation which has a direct and non-delegable obligation for safety, and a property broker which does not.

Although "economic regulation" was stripped from the statutes from 1980 through 1995, interstate trucking remained a highly federally regulated public utility from a safety point of view. The Federal Motor Carriers Safety Administration, as a successor to the ICC, assumed without amendment, safety oversight over the operation of commercial motor vehicles and those statutes and regulations including enforcement thereof has been extended through to the states under the MCSAP program.

The liability of a shipper or a broker or the negligent acts or omissions of a carrier they hire, accordingly should be prescribed and defined in accordance with their federal duties and obligations under the statutes and not by the inapplicable vagaries of state law.

Applying state law analogies, the Courts in the C.H. Robinson cases missed the role of the broker in the transportation context. The broker does its duty when it retains an authorized carrier. See 49 C.F.R. 371. To be authorized, a carrier in turn must have authority which is granted and maintained only to an entity determined fit by the Federal Motor Carriers Safety Administration. To be fit, a carrier must (1) have insurance in sufficient amounts to protect the traveling public and (2) to have not been judged unsatisfactory by the Federal Motor Carrier Safety Administration. The Agency in turn employs a sophisticated system for determining and placing out-of-service carriers which it determines by roadside inspections and safety audits to be out of compliance.

As an entity arranging for transportation, a broker is not a service provider and the doctrine of *respondiat superior* does not and should not apply. Having made reasonable inquiry to determine that a carrier remains licensed, insured and authorized, a broker should not be required to second guess the FMCSA's determination of fitness.

Correctly seen, a property broker acts like a real estate broker or stock broker, owing to the principals a duty of due diligence but in the absence of its own negligence, is not vicariously liable for the acts or omissions of either party or for the negligent performance by the service provider of a contract service. A stockbroker who sells corporate stock is not required to inspect the corporate governance of listed companies before making recommendations. Similarly, a travel agent is not responsible to passengers for misplaced luggage or flight interruption by the airlines whose tickets they sell.

If, in a regulated industry like trucking the Federal Government is going to establish a comprehensive system for telling the public who is safe to operate, then shippers and brokers alike should be allowed to rely upon the Government's determination, and unless they assume broader duties, contribute to the accident in some way other than making common use of the proffered service, they should not be subject to liability under inapplicable state law theories.

By last count, there were well over 500,000 carriers determined by the FMCSA to be safe to operate in interstate commerce. No standard other than the Federal standard can or should be applicable when determining the suitability of a service provider by the shipping public, or the broker, its agent.

The broker does its duty when it makes a diligent effort to ensure the actual service provider is licensed and authorized by the FMCSA to provide services as a for-hire carrier. The Courts need to understand this, even as the trial lawyers try to obscure the issues and the broker's role.