City Attorneys Department
League of California Cities
Annual Conference
October 1998

Margaret W. Baumgartner
Deputy City Attorney

DID CONGRESS INTEND TO PREEMPT LOCAL TOW TRUCK REGULATIONS?

I. THE TOWING INDUSTRY

Many municipalities regulate local tow truck operations. Municipalities have an interest in local tow services because tow trucks often serve a quasi- public service by responding to scenes of accidents, or to persons who are broken down on the side of the road. Also, law enforcement agencies work closely with tow companies to tow illegally parked and abandoned cars. Thus, bad service by tow companies may reflect badly on a municipality. Moreover, the usually urgent need for tow services provide an opportunity for unscrupulous operators to take advantage of uninformed consumers.

Municipal legislation concerning tow companies varies from city to city, but often includes: (1) the method that law enforcement agencies use to choose which tow company should respond to a request for service; (2) requirements for permits for tow operators, including minimum qualifications for operators; and (3) regulation of some safety issues, including inspection of the vehicles. These regulations control the quality of the services rendered to the public and to local law enforcement agencies.

Recent federal legislation suggests that Congress may have preempted local tow truck regulations. Some courts analyzing the federal legislation have held local tow regulations preempted, while other courts have held that Congress did not intend to preempt local regulation of tow trucks. Additionally, the federal legislation grants municipalities some narrow exceptions to preemption. Given this state of the law, a municipality should examine its tow regulations to determine which steps, if any, it should take the address the issues raised.

II. THE HISTORY OF MOTOR CARRIER LEGISLATION RELATED TO TOW TRUCKS

Prior to 1994, the Motor Carrier Safety Act did not expressly preempt state or local tow truck regulation. Rather, the Motor Carrier Safety Act exempted from the jurisdiction of the Surface Transportation Board and the Secretary of Transportation's general grant of jurisdiction over interstate commerce certain types of vehicles and transportation. Included within the exemption "except to the extent that the Secretary or Board, as applicable, finds it necessary to exercise jurisdiction to carry out the transportation policy of section 13101" was "(1) transportation provided entirely in a municipality, ...or (3) the emergency towing of an accidentally wrecked or disabled motor vehicle." Because neither the Board nor the Secretary ever acted to take jurisdiction over local towing activities, federal law did not govern. Intrastate Towing Ass'n v. City of Cincinnati, 6 F.3d 1154 (6th Cir. 1993) (holding that section 13101 and legislative history "indicate Congress's intent not to preempt local towing services.")

In 1994, Congress, through the Federal Aviation Administration Authorization Act of 1994 preempted state economic regulations "related to a price, route, or service" of "any motor carrier" and "motor private carrier." 49 U.S.C. Section 11501. Congress deregulated motor carriers in response to Federal Express Corp. v. California Public Utilities Comm'n, 936 F.2d 1075 (9th Cir. 1991), which held that Federal Express was an "air carrier" and therefore not subject to local regulation. This decision gave Federal Express a decisive competitive advantage over other shippers such as United Parcel Service, who are "motor carriers."

In 1995, Congress passed the Interstate Commerce Commission Termination Act ("Act"), which, among many other changes, changed the number of the section preempting state regulation of motor carriers to 49 U.S.C. Section 14501, without altering the language. Section 14501 provides that neither a State nor a

political subdivision of a State may "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier. or any motor private carrier."

At the same time that Congress renumbered the general preemption rule, it added an additional exemption by adding Section 14501 (c)(2)(C). Section 14501 (c)(2)(C) provides that the general preemption of the Act does not apply to State or local regulation "relating to the price of for-hire motor vehicle transportation by tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." The Act defines the terms it uses. A "motor carrier" is "a person providing motor vehicle transportation for compensation." 49 U.S.C. Section 13102(12). "Transportation" is:

> the movement of passengers or property, or both, regardless of ownership and agreement concerning use; and (8) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit...storage, handling. and interchange of passengers and property. 49 U.S.C. Section 13102(19).

There is little question that tow trucks move property. Tow trucks thus arguably fall within the definition of motor carrier. 1 See *Harris City* Wreckers *Owners for Equal Opportunity v. City of Houston*, 943 F.Supp. 711 (S.D. Tex. 1996) (holding that tow trucks are motor carriers); *426 Bloomfield Ave. Corp. v. City of Newark*, 904 F.Supp. 364 (D.N.J. 1995) (same).

Although a cursory reading of these sections suggests that the Act preempts all local tow truck regulations, the Act must be read as a whole. *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-22 (1991). The Act is, moreover, a "linguistic morass" that is difficult to decipher. 426 Bloomfield Ave. Corp., 904 F.Supp. at 370. The courts have therefore looked to legislative history in order to determine Congress's intent. Even when relying on legislative history, however, courts have decided both for and against preemption of local tow regulations.

III. CASE LAW REGARDING PREEMPTION OF STATE AND LOCAL TOW TRUCK REGULATIONS

Two courts have held that the Act expressly preempted state and local tow truck regulations. In *Harris City Wreckers Owners for Equal Opportunity v. City of Houston*, 943 F.Supp. 711 (S.D. Tex. 1996), the City of Houston regulated tow companies in many respects, including limiting the number of permits available. The tow companies challenged the regulations as preempted. The city argued that Section 13101, which was not eliminated when Congress passed the Act, continued to exempt local towing regulation from federal preemption. The city also relied on prior case law.

While summary judgment motions were pending, Congress added the exemption in Section 14501 (c)(2)(C). The court relied on that section in holding that Congress intended the Act to preempt all local economic-based regulations of tow companies. The court found that by adding Section 14501 (c)(2)(C) Congress "removed any statutory uncertainty about its intent to preempt state and local towing regulations with the passage of new subsection (c)(2)(C) specifically allowing state and local regulations relating to the price of non- consensual towing." The court went on to find that "[t]he addition of Section 14501 (c)(2)(C) confirms congressional intent in Section 14501 (c)(1) to preempt state and local towing regulations. If Congress had not intended to preempt such regulations the addition of Section 14501 (c)(2)(C) to cancel this preemptive force would have been unnecessary." Harris County Wrecker Owners, 943 F .Supp. at 722.

Locally, the Orange County Superior Court in an unpublished opinion in *Tocher v. City of Santa Ana*, held that the Act preempted the City of Santa Ana's broad regulation of tow trucks. See opinion attached. *Tocher* is currently on appeal to the Ninth Circuit. See also Kelly v. United States, 69 F.3d 1503 (10th Cir. 1995) (the court makes the assumption that the Act "may have had some unintended effects, such as freeing the reins on intrastate towing and wrecker services"); *Cardinal Towing and Auto Repair, Inc. v. City of Bedford*, 991 F Supp. 573 (N.D. Tex. 1998) (agreeing "in principle" with the reasoning in *Harris County Wrecker Owners*.)

There is a line of cases that have held that Congress did not intend the ICC Termination Act to preempt local tow regulations. In *426 Bloomfield Ave. Corp. v. City of Newark*, 904 F.Supp. 364 (D.N.J 1995), the court held that when read as a whole and in context of its legislative history, the Act did not preempt state or local

regulations of tow trucks. The court relied in part on the fact that because Congress has not replaced State or local regulation with any federal regulation, it would leave the arena of tow truck operations completely unregulated. The court refused to "assume that Congress intended such an unfathomable legislative design." 904 F.Supp. at 372. Similarly, in *Giddens v. City of Shreveport*, 912 F.Supp. 953, 966 (W.D. La. 1995), the court held that even if tow trucks technically fall within the definition of "motor carriers" "it is neither likely nor logical that Congress intended to preempt local regulations" of tow trucks. Both of these cases were decided prior to the amendment to the Act exempting the price of non-consensual tows. See 49 U.S.C. Section 14501 (c)(2)(C).

In 1998, the City and County of San Francisco prevailed in a matter in which a tow operator claimed federal preemption of its regulations requiring tow operators to obtain a license in order to tow vehicles within the City and County of San Francisco. In an oral opinion, the court in Servantes v. City and County of San Francisco (opinion attached) held that because the Act stated that it did not apply to local regulation of tow trucks, San Francisco's tow regulations were not preempted. Unfortunately, the court's analysis of the preemption issue in Servantes is not set forth in detail.

IV. CONSTITUTIONAL CHALLENGES TO THE BREADTH OF THE ICC TERMINATION ACT

In both *Kelly*, 69 F.3d 1503, 1509 (10th Cir. 1995) and *Harris City Wreckers Owners*, 943 F .Supp. 711, 733 (S.D. Tex. 1996), the courts rejected the argument that preemption of local tow truck regulations exceeds Congress's powers to regulate interstate commerce under the Commerce Clause. The cases relied on Congress's express findings that intrastate motor carriers affect interstate commerce. Kelly, 69 F .3d at 1508; Harris County Wrecker Owners, 943 F .Supp. at 733. Given the broad reach of the commerce clause, this conclusion is not surprising.

Additionally, the court in Kelly rejected a claim by the City that the Act intruded on areas traditionally reserved to the states, and therefore violated the Tenth Amendment to the United States Constitution. The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Relying on New York v. United States, 505 U.S. 144 (1992), the Kelly court held that even if the Act intrudes upon a domain traditionally left to the states, it is constitutional as long as it falls within the commerce power. Because Congress did not exceed its powers under the Commerce Clause, the Act did not violate the 10th Amendment. *Kelly*, 69 F .3d at 1509

V. OPTIONS

Congress may have preempted state and local regulations of tow operations. Assuming that Congress did intend to reserve to the federal government the ability to regulate tow operations, the preemptive effect of the Act will not be limited to local regulations of tow trucks. See McFarland, *The Preemption of Tort and Other Common Causes of Action Against Air, Motor and Rail Carriers*, 24 Transp. Law Journal 1555 (Winter 1997). Local regulations are, however, of the most immediate interest to municipalities that have enacted and enforce them. What should a municipality do in light of the current state of the law?[2] The following are some options:

1. CONTINUE TO ENFORCE ALL TOW TRUCK REGULATIONS. In

In jurisdictions where a governing court has not yet ruled on the issue of federal preemption, or where a court has ruled that the regulations are not preempted, a municipality could continue to enforce all local tow regulations. The municipality should then be prepared to litigate the issue of preemption.

2. NARROWLY TAILOR REGULATIONS TO FALL WITHIN THE PREEMPTION EXEMPTIONS SET FORTH IN THE ACT.

A municipality could examine its regulations to determine which ones appear to fall outside the preemptive effect of the Act, or tailor new regulations to fall within those exceptions. The areas outside the scope of the

act include those not "related to price, route and service," safety regulations, the price of non-consensual tows and financial responsibility requirements.

(a) Related to Price, Route and Service.

Congress used the same language in Section 14501 that it used to preempt local regulation of air carriers, and Congress intended the same scope of preemption. See *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*, 98 C.D.O.S. 6519, 6520 (9th Cir. Aug. 24, 1998) (citing to legislative history). There are numerous cases reported on the scope of the preemption as it applies to air carriers. Air carriers, however, were never regularly subjected to municipal ordinance, and therefore many of the issues are different.

Air carrier cases, however, indicate that preemption of regulations "related to price, route and service" encompasses a wide variety of regulation, including those that (1) specifically regulated air carriers; (2) indirectly regulate rates, routes, or services; or (3) have a significant effect on rates, routes or services, : even though they are laws of general effect. *Morales v. Transworld Airlines, Inc*., 504 U.S. 374, 386 (1992). For example, in *Huntleigh Corp. v. Louisiana State* , Board of Private Security Examiners, 906 F.Supp. 357 (M.D. La. 1995), the court held preempted Louisiana's law requiring security guards performing pre-departure screenings at airports to have certain training and permits because the law was related to "services" of air carriers. In contrast, the court in *Californians for Safe and Competitive Dump Truck Transportation* examined recent cases interpreting the scope of preemption. The Ninth Circuit found that such cases indicate that the Supreme Court is "attempting to preserve the proper and illegitimate balance between federal and state authority." The court then held that California's Prevailing Wage regulations was "no more than indirect, remote and tenuous[ly]" related to the price of dump truck operations and therefore not preempted. 98 C.D.O.S. at 6520.

Presumably, most local ordinance directly regulate tow companies. They I would therefore not fall outside the scope of preemption. To the extent that any local regulations only remotely affect the price, service or route of tow operations, however, they may not fall within the preemptive effect of the Act.

B Areas of Regulation Specifically Exempted from the Act's Preemptive Effect.

Safety. Section 14501 (c)(2)(A) states that the Act does not "restrict the safety regulatory authority of the State with respect to motor vehicles." Arguably, this section exempts regulations applying to the safety of vehicles, as opposed to operations only. See McFarland, *The Preemption of Tort and Other Common Causes of Action Against Air, Motor and Rail Carriers*, 24 Transp. Law Journal I 155, 171 n.96 {Winter 1997) {raising the issue of safety regulation of vehicles as opposed to operations). In the only published case to discuss the scope of this exception, however, the court held that Section 14501 "does not preclude the city from enacting regulations designed to meet the legitimate safety concerns" [of the municipality. Hams *County Wreckers Owners for Equal Opportunity v*. *City of Houston*, 943 F.Supp. 711 {S.D. Tex. 1996). The court in Harris County [Wrecker Owners did not, however, specifically address the potentially limiting language of the section.

Because safety is the area that falls most directly within the traditional jurisdiction of the state, however, courts are the most reluctant to find safety regulations preempted. See *New York Conference of Blue Cross v. Travelers Ins*., 514 U.S. 645, 1676 {"'where federal law is said to bar state action in fields of traditional state regulation', it is assumed that 'the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") Thus, a court may find this exemption includes all issues regarding safety of motor carrier vehicles and operations.

Price of non-consensual tows. Congress expressly left to state the ability to "enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." 49 U.S.C. Section 14501 {c){2)(C). Thus, a municipality may set the price of such tows,

which should also include the price of storage and handling for such tows, and other circumstances limiting the price. See 49 U.S.C. Section 13101 (defining "transportation" to include storage of property).

This exception to preemption does not resolve the problems of lack of consumer choice because it is restricted to those situations in which law enforcement agencies request the towing services.

Minimum amounts of insurance. Under Section 14501 (c)(2)(A), a municipality may require tow operators maintain certain insurance limits. Although these three areas are within the power of a municipality to regulate, these areas are narrow. They do not allow the municipality to have the general oversight of tow operations that municipalities often have today.

3. CONTRACT WITH A TOW COMPANY FOR THE PROVISION OF SERVICES.

The City and County of San Francisco contracts with a towing service for the provision of towing services at the request of law enforcement. This includes tows of abandoned vehicles and tows of cars parked in tow-away zones. (A copy of pertinent portions of the City's contract is attached.) A contract allows a municipality to control the quality of services provided by tow operators for non-consensual tows, but does not cover tow operators who perform tows at the request of the public in either emergency or non-emergency situations.

In *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 991 F.Supp. 573 (N.D. Tex. 1998), the City of Bedford amended its local tow ordinance to eliminate the rotation-request system and implement an exclusive contract with one company. The plaintiff tow companies challenged this amendment as violative of the preemption provisions of the Act. The court stated that it was "not persuaded that Congress intended by the [Act] to prohibit a municipality from entering into a contract with a tow truck operator to perform, upon call from the municipality, services that directly or indirectly benefit the municipality by causing vehicles to be moved from one place to another for safety or other reasons related to conduct of the municipalities operations and business." See also *Brumfield Towing Services, Inc. v. City of Baton Rouge*, 911 F.Supp. 212 (M.D. La. 1996) (refusing to find preempted the City's decision to contract for towing services).

4. SEEK LEGISLATIVE AMENDMENTS.

A municipality could seek legislative clarification of the intent of Congress, or seek an exemption from the Act. For example, the language in Section 13506 exempts from the jurisdiction of the Board and Secretary: transportation provided entirely in a municipality , in contiguous municipalities, or in a zone that is adjacent to, and commercially a part of, the municipality or municipalities, except when the transportation is under common control, management, or arrangement for a continuous carriage or shipment to or from a place outside the municipality, municipalities, or zone, or the emergency towing of an accidentally wrecked or disabled motor vehicle.

Tows by tow trucks are almost always within a municipality or in one commercial zone. Such an exemption could be included within the preemptive effect of the Act, thereby allowing local regulation of this type of towing, and leaving preempted any other type of motor carrier service that would more directly impact interstate commerce.

5. REPEAL ALL TOW TRUCK REGULATIONS.

A municipality may, of course, repeal or decline to enforce all local tow regulations. This would avoid any adverse ruling against the municipality. Because the federal government has not acted to replace local legislation, however, repeal may create the same type of "chaos" noted in *Brumfield Towing Service, Inc.,* 911 F .Supp. at 215, following the City of Baton Rouge's complete deregulation of towing services. Moreover, without some indication of how a municipality will choose a tow operator to perform services, the choice is open for challenge based on discrimination or favoritism.

VI. SUMMARY

Although it is by no means clear that Congress initially intended the FAAAA to deregulate local towing services, it may have done so. This creates a dilemma for municipalities who regulate local tow companies. Although there are a number of options available for municipalities to resolve portions of the dilemma, it is not likely to be fully resolved absent either a decision by the Supreme Court on the matter or a Congressional Act clarifying the Act.

ENDNOTES

1 The act also includes "motor private carrier," which are defined as "a person, other than a motor carrier, transporting property by motor vehicle when –
(A) the transportation is as provided in section 13501 of this title;
(B) the person is the owner, lessee, or bailee of the property being transported; and
(C) the property is being transported for sale, lease, rent or bailment or to further a commercial enterprise.
Section 13501 states that the Secretary and the Board have jurisdiction if the transportation crosses state lines, or "in a reservation under the exclusive jurisdiction of the United States or on a public highway." Although it is possible that a court could find that a tow truck is a "motor private carrier" because it uses public highways, such a reading is contrary to common sense. See *426 Bloomfield Ave. Corp. v. City of Newark*, 904 F.Supp. 364, 369 n.8 (D.N.J. 1995) (finding it "odd that Congress would bury the most sweeping jurisdictional grant of the entire Act with so little fanfare" but holding that any other reading would not make sense either); but see *Harris City Wreckers Owners for Equal Opportunity v. City of Houston*, 943 F .Supp. 711 (S.D. Tex. 1996) (finding without analysis that tow trucks are motor private carriers.)

2 The specific provisions of California state law regulating tow trucks, including laws regulating impoundment, storage charges and liens, as well as traditional safety regulations concerning the number and types of lights that a vehicle must carry are too numerous to address individually. For a summary of Such regulations, see Sheidenberger, Review of Selected 1995 California Legislation: Transportation and Motor Vehicles, 27 Pac. L.J. 1045 (Winter 1996).

The author attached a short, unpublished Federal District Court order (Central District, California) from a case entitled *Tocher v. City of Santa Ana* (SA CV 98-224 AHS) that resolves the case on the ground of A & A Wrecker Service, Inc v. City of Galveston, No. G-95-111 (S.D. Tex filed June 10, 1994).

The Author also attached an agreement for towing, storage and disposal of abandoned and illegally parked vehicles between the City of San Francisco and Local Towing Companies, which is not included in this version.

The Author attached a portion of a deposition taken as part of litigation entitled *Servantes, SBA Bayshore Towing v. City of San Francisco Police Department*, No. C 98-1559 Cal (N. Cal). The date was June 12, 1998.
Attachments are not available on line. Contact the League of California Cities, Legal Department (916/658-8276) to check out a hard copy of this document.