Municipal Regulation of and Contracting with Tow Truck Companies

Tow Trucking Basics

1. **Light-Duty:** Light-duty tow trucks generally have a Gross Vehicle Weight Rating (GVWR) of less than 10,000 pounds. They transport automobiles, pickup trucks and small vans.

2. **Medium-Duty:** Medium-duty tow trucks generally have a GVWR of 10,001 to 26,000 pounds. They transport medium-size trucks, buses and recreational vehicles, as well as smaller vehicles.

3. **Heavy-Duty**: Heavy-duty tow trucks generally have a GVWR of over 26,000 pounds. They transport buses, large trucks, trailers and heavy equipment.

Standard tow trucks use a **wheel lift** or under-lift to pull vehicles. A wheel lift picks up the drive wheels of the vehicle (ie the front wheels if it is front wheel drive, the rear wheels if it is rear wheel drive) touching only the tires.

Car carriers or "rollback trucks" transport vehicles on a flat platform that slides or tilts to the ground to facilitate the loading and unloading of the vehicle(s).

Consent Tows vs. Nonconsent Tows

Consent tows – Owner initiates the tow by calling the towing company. Federal and state law largely preempts cities from regulating consent tows. Texas law completely preempts city regulation of consent tows from companies located outside of the city.

Nonconsent Tows – Owner has **not** consented to the tow. Includes incident tows (accidents & arrests), tows from private parking lots, evidence tows, seizure tows.

Nonconsent Tows

1. **Private Property Impounds** – towing vehicles that are illegally or inappropriately parked on private property.

   Can be regulated via ordinance

2. **Police Directed Tows** – Tows directed by police due to circumstance, includes vehicles towed due to accident or arrested driver.

   Can be controlled via ordinance and/or contract

3. **Police Impounds** – tows directed by police b/c vehicle is evidence of a crime or subject to seizure proceedings

   Can be controlled via ordinance and/or contract

Ordinance vs. Contracts

- Ordinance (Regulation):
  - Ordinance approach prohibits nonconsent tows of vehicles without City permit or license
  - Subject to preemption by state & federal law
- Contracts:
  - City provides referrals of police directed tows & police impounds in exchange for wrecker company's agreement to abide by contractual obligations
  - Market participant exception eliminates preemption problems and many legal claims

State Preemption of Local Towing Regulation in Texas

Regulatory preemption only applies to actual towing regulations, not mere contracts.

Cities that have little or no private property towing problems (ie. cities with ample parking) can avoid regulation and preemption issues altogether and simply contract with towing companies to remove the vehicles of arrestees and drivers of disabled vehicles.

Texas Towing and Booting Act

- Texas Occup Code 2308 – TDLR Regs at 16 TAC 86
- Limits towing fees for towing from private lots – max for light duty tows=$250, but authorizes stricter local regulation of nonconsent towing fees, subject to towing fee studies
- Authorizes local safety-based local tow truck regulations
- Max local registration fee for nonconsent tows = $15
- Requires driver background checks & drug & alcoh testing
- Requires signs in private parking facilities to tow
- Provides for hearings (JP) on probable cause to tow

Texas Vehicle Storage Facility Act

- Texas Occup Code 2303 – TDLR Regs at 16 TAC 85
- Max storage fees by Vehicle Storage Facilities (VSF's)=$20 per day
- Requires itemized invoices (tow tickets) to customers
- Prohibits VSF owners from disassembling, using, or removing items from stored vehicles
- Provides fencing & surfacing requirements for VSF's
- Requires notice to vehicle owners

What's Left to Require/Prohibit

- Distribute referrals for incident management tows via single towing company or multiple companies (rotation list)?
- Max price of police directed tows?
- Is primary goal to protect consumer or maximize municipal revenue?
- Increased insurance req'ts (over $500K/$300K state req't)?
- Whether to require tow companies to store vehicles in local VSF?
- What are maximum response times to incidents/accidents?
- Free-cheap towing for City tows / evidence tows / seizure tows?
- Local anti-monopoly rules for contract system – ie. limits on splitting companies for extra referral spots on rotation list?

Public Reaction to Price Cap Changes

College Station votes to remove price caps on towing

Posted: Thursday, April 18, 2013 12:00 am | *Updated: 1:36 pm, Fri Apr 26, 2013.*

Lost in the shuffle of a contentious overhaul of College Station's towing was an ordinance change that could increase costs to consumers by up to 230 percent.

The College Station City Council, following the advice of its police department, voted 5-2 on Thursday to abandon city caps on the amount towing companies can charge within city limits and instead defer to state standards.

The cap for private property tows within College Station will rise from $75 to $250. The cap for drop fees, the charge if your car is hooked up but not yet hauled off, increases from $40 to $125. The cap for non-consent tows, those initiated by police, will rise from $100 to $150.

So the City creates an effective monopoly with a couple of tow companies, then votes to lift the cap on how much they can charge.

The cops are in on it too, figures.

The changes, he said, “will allow him to pay his employees more and provide better service.“ What he really means: My employees will get an extra 50 cents an hour and I can buy a much bigger house.

It will certainly increase abusive business practices. If I as a tow truck driver can make 120 dollars just for a lift, heck yeah!

Wow!!! Just gave the crooks some legal edge. Way to go cs.

Now we find out the city has contracted with a single company, and allowed the rates to be regulated by state law. Hmmm?

Required insurance sometimes matters

Federal Preemption of Local Towing Ordinances

- Only applies to ordinance based regulations – A contract system of allocating towing referrals is exempt from federal preemption. *Cardinal Towing & Auto Repair, Inc., v. City of Bedford, Tex.*, 180 F.3d 686, 691 (5th Cir. 1999).
- FAAAA - Federal Aviation Administration Authorization Act of 1994 – preempts local regulation of price, route, and service of motor carriers - Exemptions for PRICE and SAFETY
- Other Federal Law Based Challenges (eg., Constitution, Antitrust, ADA)

FAAAA Price Exemption - local regulation of price of nonconsent tow 49 USC§14501(c)(2)(C)

Stucky v. City of San Antonio – City cannot classify all tows from public streets as nonconsent

California Tow Truck Ass'n v. City & County of San Francisco – ordinance that does not distinguish consent from nonconsent tows preempted as to consent tows

FAAAA Safety Exemption

49 U.S.C.A. § 14501(c)(2)(A)

City of Columbus v. Ours Garage and Wrecker Service, Inc. 536 U.S. 424 (2002) – Cities have the power to approve safety-related regulation of nonconsent towing.

Cole v. City of Dallas 314 F. 3d 730 (5th Cir. 2002) - City ord requiring criminal history for towing drivers was OK via safety exception.

VRC LLC v. City of Dallas, 460 F.3d 607 (5th Cir. 2006) - City ord requiring posting of towing warning signs on private property was permissible on basis of "safety concerns"

Loyal Tire & Auto Center, Inc. v. Town of Woodbury, 445 F.3d 136 (2d Cir. 2006) – Req't for tow yard within one mile of Town's police department was not genuinely based on safety

Other Federal Law Based Attacks on Local Tow Trucking Regulation

- Equal Protection
- Substantive Due Process
- Procedural Due Process
- First Amendment Retaliation
- Antitrust
- Dormant Commerce Clause
- Americans with Disabilities Act

Equal Protection

A party alleging a violation of equal protection "must prove he was treated differently by the government than similarly situated persons and the different treatment was not rationally related to a legitimate government objective."

Under rational basis review, government policy that allegedly violates equal protection is afforded **presumption of validity** and must be upheld if there is a rational relationship between disparity of treatment and a legitimate government purpose.

Equal Protection (cont'd)

Under "rational basis" equal protection standard, all that is needed to uphold a state's classification scheme is to find that there are "plausible," "arguable," or "conceivable" reasons which may have been the basis for the distinction

Equal protection claims = plaintiff loses

Substantive Due Process Claims

Substantive due process claims against tow trucking regulations generally fail.

To win, a plaintiff must plead and prove both an
(1) arbitrary conduct - shocks conscience &
(2) a constitutionally protected interest adversely affected or impacted thereby

Constitutionally Protected Interest (Property)

Interest must be more than a mere expectation to be a constitutionally protected property interest

Expectation of contract is not property interest

Discretionary policy does not create property interest

Property interest is created by a statute only if it employs mandatory language

Procedural Due Process

- Procedural Due Process Elements
  1. Deprivation of a liberty or property interest
  2. Procedures followed by state in depriving of interest constitutionally insufficient
- Lack of constitutionally protected property interest dooms most procedural due process claims
- Procedural due process requires notice and hearing prior to constitutional deprivation.

First Amendment Claims

- *Board of County Comm'rs, Wabaunsee County, Kansas v. Umbehr , 116 S. Ct. 2342, 2361 (1996)* - First Amendment protects independent contractors from termination of at-will government contracts in retaliation for the contractors' exercise of freedom of speech.
- *O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 116 S.Ct. 2353 (1996)* - Towing contractors are entitled to be protected from retaliation for exercising their 1st Amendment rights

Extension of 1st Amendment protection to entities without existing contractual relationships w/ govt

- *Umbehr* did not extend protection to mere bidders
- *Royal Towing v. City of Harvey* (N.D.Ill 2001) – Duration of the contractual relationship was irrelevant to 1st Amendment rights
- *A.F.C. Enterprises v. NY City School Construction Authority* (E.D.N.Y. 2004) analogized contractor protection to employee protection, which protects prospective employees as well as current employees
- *Oscar Renda Contracting, Inc. v. City of Lubbock* (5th Cir. 2006)- rejected bidders do **not** need a "pre-existing commercial relationship" with a government entity in order to state a claim for first amendment retaliation under the First Amendment

Dangers of 1st Amendment Retaliation Claims

- Fact intensive – can be difficult to get summary judgment
- Attorneys fees in 42 USC 1983 context
- Tow truckers often engage in speech that jurors will assume would naturally be the subject of retaliation – Juror sympathy for defendant's actions effectively works against the defense

Protecting against 1st Amendment Claims

- Limit discretion of policy makers in ordinance authorizing contracts
- Persuade policy-makers to avoid statements that could be interpreted as indicating discriminatory motive

Antitrust Act Claims

- Section 1 of the Sherman Antitrust Act - every contract, combination or conspiracy in restraint of trade or commerce is illegal.
- Test is whether Restraint of Trade promotes or suppresses competition
- Both federal and state antitrust act claims can be made against cities regulating towing companies

Tow Truck Regulatory Activities likely to be alleged to violate antitrust acts

- Limiting price – especially minimum price regs
- Limiting responding companies to particular geographic areas.
- Limiting number of responding companies
- Limiting the number of companies to small number of companies with substantial equipment
- Contracting with a single company for all nonconsent towing referrals

Municipal Defenses to Antitrust Claims

- State action doctrine (Parker Doctrine)
  - State authorization of local towing regulation in Texas
- Local Government Antitrust Act - no antitrust damages against local govt's
- Mere consumer exception to protect contract systems
- Limiting regulation of price to regulation of maximum price

Dormant Commerce Clause

Dormant commerce clause is violated by local regulation if it "unjustifiably discriminates on its face against out-of-state entities or imposes burdens on interstate trade that are clearly excessive in relation to the putative local benefits.

Automobile Club of New York, Inc. v. Dykstra & *California Tow Truck Ass'n v. City & County of San Francisco* - A City violated dormant commerce clause by requiring licensure for a tow truck merely to travel through a jurisdiction or to perform consensual tows in the City for travel to other states.

Americans with Disabilities Act Claims

U.S. Justice Dep't has required cities utilizing services of tow trucking companies to require the companies to be accessible to persons with disabilities-2002 Settlement with City of Bryan, Texas required City to require of its towing companies:

- ADA accessible parking spaces
- ADA accessible routes within storage yard
- ADA-width bathrooms in customer-accessible offices
- Limited slopes on office entrance doors

Useful Provisions in Contracts with Towing Companies

- Control of Maximum Towing Rates
- Using tow truck referrals as a revenue generation mechanism for the municipality
- Specifying place of business or require VSF in city
- Minimum hours of availability for customers
- Maximum response times
- Equipment reqts exceeding state regs (heavy trucks)
- Identification reqt's for tow trucks
- Insurance reqts that exceed state regs
- Indemnification of City
- Other provisions – see paper