August 25, 2003

Re: City Wrecker Ordinance

Dear Sir:

You have relayed questions from the City Manager, about the legality of your City's wrecker ordinance. You and the City Manager want my opinion on whether the ordinance violates the federal law that substantially deregulated the wrecker industry, whether the ordinance as applied violates the federal and state antitrust laws, and whether mandatory rates for emergency towing are permissible. In my opinion, the portions of the ordinance that are not genuinely related to safety concerns are invalid under the federal preemption law. It is also probable that the ordinance is being applied in a way that violates the federal antitrust law. Finally, the federal preemption law allows regulation of the price of nonconsensual tows only. Mandatory rates for consensual tows would not be in compliance with the federal preemption law.

The Federal Preemption Issue

The pertinent provisions of the Interstate Commerce Act as amended by the Federal Aviation Administration Authorization Act of 1994 and the ICC Termination Act of 1995 are codified In 49 *United States Code* ' 14501(c):

> (1) GENERAL RULE. B Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not 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 ... with respect to the transportation of property.
>
> (2) MATTERS NOT COVERED. (Paragraph (1))
>
> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles ... or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
>
> * * *
>
> (C) does not apply to the authority of a State or a political subdivision of a State 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.

The U. S. Supreme Court in City of Columbus v. Ours Garage and Wrecker Service, 536 U.S. 424, 122 S.Ct. 2226 (2002), held that the language in (2)(A) above applies to political subdivisions of states although it refers only to "the safety regulatory authority of a State." In doing this the Court negated part of the ruling in the Sixth Circuit case of Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001), which had held local government safety regulation of

wrecker companies preempted. Now, therefore, as a result of the Ours Garage case, municipalities may, under delegation by the state, enact regulations of wrecker or towing companies that are "genuinely responsive to safety concerns." 536 U.S. at 442.

Several types of regulations have been held as coming within the safety concerns of local governments. In Cole v. City of Dallas, 314 F.3d 730 (5th Cir. 2002), the Fifth Circuit Court of Appeals upheld as a valid safety regulation an ordinance requiring a criminal history of the wrecker licensee. Before the Ours Garage case was decided by the Supreme Court, the Second Circuit upheld as a safety measure an ordinance requiring licensing, reporting, record keeping, disclosure of criminal history, posting of bond, and maintaining local storage and repair facilities. Ace Auto Body and Towing, Ltd. v. City of New York, 171 F.3d 765 (2nd Cir. 1999). The federal district court in the case of Hott v. City of San Jose, 92 F.Supp. 996 (N.D. Cal. 2000), held that regulations requiring liability insurance, criminal background checks, displaying of information, reporting, and record keeping were allowable as safety measures. The latest case upholding ordinance provisions requiring a permit for wrecker companies is Galactic Towing, Inc. v. City of Miami Beach, ____ F.3d ____ (11th Cir. August 14, 2003). These ordinance provisions required a permit issued by the city and based the issuance of the permit on the applicant's complying with insurance requirements, undergoing a criminal background check, not having a suspended or revoked permit within five (5) years, and not committing fraud in the application. The ordinance also expressly articulated a public safety purpose. I am including a copy of this case because footnote 2 has the text of the main ordinance provisions that were upheld.

It almost goes without saying that one of the main purposes of cities is to promote and protect the public health, safety, and welfare. Your City's Charter (Chapter No. 47 of the private Acts of 1915, as amended) reflects this purpose. Article 1, ' 4(20) provides that the City has power :

> To define, prohibit, abate, suppress, prevent and regulate all acts, practices, conduct, business, occupations, professions, vocations or trades, uses of property, and all other things whatsoever detrimental, or liable to be detrimental, to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the city ... .

This and other provisions of the Charter make it clear that the City has the authority delegated by the state, as required in the Ours Garage case, to regulate businesses from a safety perspective.

The question then becomes which provisions of the ordinance regulate from a safety perspective and which do not. According to Ours Garage, "Local regulation of prices, routes, or services of tow trucks that is not genuinely responsive to safety concerns garners no exemption from ' 14501(c)(1)'s preemption rule." 536 U.S. at 442. In other words, regulations that cannot be tied in some way to safety will be ruled invalid if questioned. Perhaps the best way to look at

this is to list those provisions that clearly have a safety purpose and then to list the other provisions. Here are the provisions that appear clearly to have a safety purpose:

' 5-707 requiring insurance in certain amounts protects the public and is specifically sanctioned by ' 14501(c)(2)(A).

' 5-709(b) and (c) relative to insurance and fit and proper persons to be entitled to a license.

' 5-712(a) relative to procurement of license by fraudulent conduct.

' 5-714 relative to storage of vehicles.

' 5-715(2), (3), and (6) relative to emergency equipment.

' 5-716(1), (1)(a), (9), (16), (17).

' 5-717(2) and (8).

' 5-719.

Other provisions have an arguable connection to safety. These are:

' 5-708 insofar as the investigation would relate to safety.

' 5-709(3) insofar as this allows a background investigation of the new owners.

' 5-710 insofar as these rules would relate to safety.

' 5-711 insofar as these requirements are used to maintain or promote safety.

' 5-712 (1)(b) and (e) insofar as these relate to safety.

' 5-713 insofar as these wrecker classifications are related to safety.

' 5-716 (3) relative to hold orders.

‘ 5-720 and 721 insofar as the required records relate to safety.

In addition, administrative provisions of the ordinance would probably be upheld as necessary to carry out the safety provisions.

Some provisions of the ordinance appear arguably to run afoul of the federal preemption statute:

' 5-702(3), which limits licensed wrecker services to those that have a location in the City. This is a regulation not related to safety.

' 5-709(1)(a) limiting the issuance of licenses to those required by the public convenience and necessity. This appears to be the type business regulation the federal statute is aimed at. It is difficult to see how a safety rationale can be attached to this regulation.

' 5-709(2) appears to be a business regulation that is not attached to safety.

' 5-712(1)(d) relating to fees insofar as this regulates the price of consensual tows.

' 5-716(18), which regulates the price of consensual tows.

' 5-718, which authorizes regulation of the price of consensual tows.

As my letter to you dated November 20, 2001, indicated, municipalities may establish standards for towing businesses that do business with the municipality as a market participant. Municipalities may also regulate the price of nonconsensual tows. Now, with the Ours Garage case, cities may regulate wrecker and towing companies from the perspective of safety. Therefore, when the City is regulating these companies and is not taking action as a market participant and is not regulating the price of nonconsensual tows, every regulation must have a safety rationale. The City's ordinance probably needs to be amended to clearly state a safety rationale and to make sure each provision that is included, other than administrative and penalty provisions necessary to carry out the ordinance, can be defended as a safety regulation.

The Antitrust Issue

The state antitrust act (Tennessee Code Annotated, ' 47-25-101, et seq.) probably does not apply in this situation. It applies specifically to "products and articles." It does not apply to intangible services. Jo Ann Forman, Inc. v. National Council on Compensation Insurance, 13 S.W.3d 365 (Tenn Ct. App. 1999). Further, the statute does not specifically apply to the actions of the state or local governments. Under rules of statutory construction, a statute does not generally apply to the government unless it specifically says so. Keeble v. Alcoa, 319 S.W.2d 249 (Tenn. 1958).

The federal antitrust act (15 U.S.C. ' 1, et seq.), however, could come into play. Much of

the sting has been removed from the federal act's application to local governments by the Local Government Antitrust Act (15 U.S.C. '' 34 B 36). 15 U.S.C. ' 35 provides that:

> No damages, interest on damages, costs, or attorney's fees may be recovered under ... the Clayton Act ... from any local government, or official or employee thereof acting in an official capacity.

Although the Local Government Antitrust Act prohibits the assessment of damages against local governments and their officials for antitrust violations, it does not prohibit injunctive relief, R. Ernest Cohn, D.C., D.A.B.C.O. v. Bond, 953 F.2d 154 (4th Cir. 1991, cert. denied 505 U.S. 1230, 112 S. Ct. 3057, 120 L. Ed.2d 922), and probably not declaratory relief, Thatcher Enterprises v. Cache County Corp., 902 F.2d 1472 (10th Cir. 1990). Although this latter case is not a Sixth Circuit case, there is nothing in the plain language of the statute that would prohibit declaratory or injunctive relief.

States have immunity for antitrust violations under the Sherman and Clayton Acts. Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L.Ed. 315 (1943). This immunity does not automatically extend to political subdivisions. City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed.2d 364 (1978). To be clothed with immunity, a local government's actions must be done under a "clearly articulated and affirmatively expressed" state policy to "displace competition with regulation or monopoly service." Lafayette, 435 U.S. at 410.

Very broad delegations of authority such as home rule powers do not satisfy this test. Community Communications v. City of Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed.2d 810 (1982). On the other hand, the municipality does not have to point to "specific, detailed legislative authorization." Parker, 317 U.S. at 351. And "It is not necessary ... for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." Town of Hallie v. City of Eau Claire, 471 U.S. 34, at 42, 105 S. Ct. 1713 (1985).

Another issue that arose relative to antitrust liability of local governments was whether the action of the local government must have been compelled by the state before state action immunity attached or whether there had to be active state supervision for the immunity to attach. The Town of Hallie case, mentioned above, answered both of these questions in the negative. The ruling in this case, along with the Local Government Antitrust Act, removed much of the incentive for suing local governments under the federal act.

There are provisions in the City's Charter that at least arguably meet the "clearly articulated and affirmatively expressed" test. Article I, '4(19), for example, authorizes regulation rather than competition relative to all businesses. Under this provision, the City has power:

(19) To license and regulate all persons, firms, corporations or associations engaged in any business ... .

Subsection (20) also has similar language. In City of North Olmsted v. Greater Cleveland Regional Transit Authority, 722 F.2d 1284 (6th Cir. 1983), the Sixth Circuit found similar language adequate to extend immunity to a transit authority's actions. The transit authority's charter allowed it to "acquire, construct, improve, extend, repair, lease, operate, maintain, or manage transit facilities within or without its territorial boundaries ... ." 722 F.2d at 1287.

The problem with these delegations of authority in the City's Charter is that they have been superseded relative to regulation of towing and wrecker companies by the federal preemption statute except as noted above. It is certain that the federal courts would require that the state delegation that would immunize local action must be constitutional. Towing regulations that are not based upon valid authority may give rise to antitrust actions against the City and its officials. See Martin v. Stites, 203 F. Supp. 1237 (D. C. Kansas, 2002).

It seems apparent from looking at the minutes of the wrecker board meetings that the City is not just regulating for safety but is determining which companies can do business in the City regardless of safety issues. In my opinion, a company denied a permit for reasons other than safety would have a cause of action against the City and the members of the wrecker board under the federal antitrust laws as well as the preemption statute. And under the Petrey v. City of Toledo case, the City and its officials can be liable for violating a towing company's right not to be regulated. The court held that "' 1983 relief was available for the violation of that right." 246 F.3d at 565.

Mandatory Towing Rates

49 U.S.C. ' 14501(c)(2)(C) allows municipalities to regulate the price of nonconsensual tows only. The plain language of the statute does not allow the regulation of the price of consensual tows where the owner or operator would be in a position to deal with the towing company. Perhaps this places too much faith in the bargaining skills of the motoring public, but it is the law.

I hope this answers your questions. If we may be of further assistance, please contact us.

Sincerely,

Dennis Huffer
Legal Consultant