State regulation of towing

Number: INFORMAL

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The Honorable Sally A. Heyman
Representative, District 105
1100 Northeast 163 Street, Suite 303
North Miami Beach, Florida 33162

Dear Representative Heyman:

You ask about the impact of the decision of the Eleventh Circuit Court of Appeals in *R. Mayer of Atlanta, Inc. v. City of Atlanta,*[1] on Florida law.

In sum, the court's decision in *R. Mayer of Atlanta, Inc. v. City of Atlanta, supra*, clearly affects the ability of state and local government to regulate the price, route, or services of towing companies. Several exceptions to the preemption provided in 49 United States Code section 14501(c)(1), however, exist. State statutes or local ordinances regulating the activities of towing companies for non-consensual towing services are not preempted by the federal act and, therefore, may continue to operate. In addition, the state may regulate matters of safety and financial responsibility.

In *R. Mayer of Atlanta, Inc. v. City of Atlanta, supra*, several towing companies brought suit against the City of Atlanta challenging the city ordinances which required permits and registration with local law enforcement to perform consensual towing services within the city limits. The Eleventh Circuit Court of Appeals held that the city's licensing scheme for towing companies was related to the service of a towing company and was thereby preempted by 49 United States Code section 14501(c)(1) "because the ordinances limit who is permitted to provide the services and require that individuals and companies satisfy various criteria before they provide the services."[2] Section 14501(c)(1) provides in pertinent part:

"Except as provided in paragraphs (2) and (3), a State, [or a] political subdivision of a State, . . . 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." (e.s.)

Section 13102(12) of 49 United States Code defines "Motor carrier" as "a person providing motor vehicle transportation for compensation." The Eleventh Circuit concluded that motor vehicle transportation by a tow truck for the compensation of the tow truck company was encompassed by this definition, and thus the regulation of towing companies was subject to the preemption provisions of section 14501(c)(1). While the court rejected the city's argument that 49 United States Code section 13506(b) constituted a limitation on the preemptive effect of section 14501(c)(1) to the extent that the ordinance regulated transportation provided entirely within the city limits or related to the emergency towing of disabled vehicles,[3] it noted that there are several exceptions to the above prohibition.

For example, in 49 United States Code section 14501(c)(2)(C), Congress created an exception to the preemptive scope of section 14501(c)(1) for non-consensual towing services. Section 14501(c)(2)(C) provides that section 14501(c)(1) does not apply to the authority of the state or political subdivision to enact or enforce provisions relating to the price of towing services "if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle."

Thus, state statutes or local ordinances regulating the activities of towing companies for non-consensual towing services would not appear to be preempted by the federal act.[4] To the extent, however, such provisions also sought to regulate consensual services provided by towing companies, such provisions could be challenged under the court's decision.[5]

The Eleventh Circuit Court of Appeals in *R. Mayer of Atlanta, Inc. v. City of Atlanta, supra*, also recognized the exception afforded by 49 United States Code section 14501(c)(2)(A) relating to "the safety regulatory authority of a State with respect to motor vehicles" and "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." Such exception, however, applies only to regulations adopted by the state, not local governments. Thus, under the court's decision, while the state may regulate towing companies with respect to safety issues and financial responsibility, local governments may not.[6] I would, however, note that the United States Supreme Court has granted certiorari in *Columbus, Ohio v. Ours Garage & Wrecker Services*.[7] At issue is whether section 14501 preempts cities (as opposed to states) from enacting safety regulations regarding local tow-truck operations.

The determination of what constitutes a safety regulation appears to be made on a case by case basis. For example, in *Cedar Bluff 24-Hour Towing, Inc. v. City of Knoxville*,[8] the court concluded that a section in city ordinance regulating storage of a motor vehicle after towing was not preempted since storage of vehicles has almost nothing to do with transportation and involves mutually exclusive aspects of the towing transaction. In *Northway Towing, Inc. v. City of Pasadena, Texas*,[9] however, the court concluded that the city ordinances requiring permits and imposing storage requirements did not fall within safety exception and were preempted.

In *Tocher v. City of Santa Ana*,[10] the Ninth Circuit Court of Appeals concluded that certain sections of the California Vehicle Code fell within the "safety regulation" exception. Such provisions included a provision prohibiting a police officer (or other unauthorized person) from removing any unattended vehicle from a highway without strict compliance with the Vehicle Code, and a requirement that the towing company notify a property owner if it was necessary to cut, remove, or damage a fence in order to remove a vehicle. The court held that each of these provisions was designed to make the towing and removal of vehicles safer by insuring that only professionals tow vehicles and that the removal did not endanger the general public or the owner of the property where the vehicle was removed. Other provisions of the Vehicle Code such as the acceptance of credit cards and written authorization by the property owner, however, were based on consumer protection rather than safety, and therefore, the court held that the safety exception was inapplicable.

In *Ace Auto Body & Towing, Ltd. v. City of New York*,[11] the Second Circuit Court of Appeals found that requirements regarding licensing, the displaying of information, reporting,

recordkeeping, criminal history, insurance, and the posting of bond by towing companies, as well as a requirement that they maintain their own storage and repair facilities, were within the safety regulation and financial responsibility exemption. The court declared that "[m]ost of these requirements are so directly related to safety or financial responsibility and impose so peripheral and incidental an economic burden that no detailed analysis is necessary to conclude that they fall within the s. 14501(c)(2)(A) exemptions."[12] Thus, the Second Circuit held that 49 United States Code section 14501(c) does not preempt such regulations.

Accordingly, state statutes or local ordinances regulating the activities of towing companies for non-consensual towing services would not appear to be preempted by the federal act. To the extent such provisions also seek to regulate consensual services provided by towing companies, however, such provisions could be challenged. The decision of the court in *R. Mayer of Atlanta, Inc. v. City of Atlanta, supra*, indicates that the regulation of towing companies in providing consensual towing services must be enacted by the state rather than local government and must relate to safety or financial responsibility in order to qualify for the exemption afforded by 49 United States Code section 14501(c)(2)(A).

I trust that the above advisory comments may be of some assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

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[1] 158 F.3d 538 (11th Cir. 1998), *cert. denied,* 526 U.S. 1038 (1999).

[2] *Id.* at p. 545. *And see Stucky v. City of San Antonio,* 260 F.3d 424 (5th Cir. 2001), in which several towing company owners sued city, challenging ordinances prohibiting tow trucks from removing disabled vehicles from public streets without being directed to do so by city; the court held that the ordinances were preempted by the Interstate Commerce Commission Termination Act as they related to consent towing.

[3] *See,* 49 U.S.C. s. 13506(b), stating:

"Except to the extent the Secretary or [Surface Transportation] Board, as applicable, finds it necessary to exercise jurisdiction to carry out the transportation policy of section 13101, neither the Secretary nor the Board has jurisdiction under this part over--

(1) transportation provided entirely in a municipality . . . [or]

(3) the emergency towing of an accidentally wrecked or disabled motor vehicle."

[4] The Fifth, Sixth and Ninth Circuit Courts of Appeals have recently upheld various non-

consensual municipal towing provisions under a municipal-proprietor or market participant exception to preemption. *See Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Texas*, 180 F.3d 686 (5th Cir. 1999) (upholding city ordinance that provided for non-consensual police tows to be conducted by the company that received a contract from the city; the ordinance placed certain conditions on the contract applicant but did not affect private towing arrangements in any way); *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1085 (2001) (striking down city's towing regulations that applied to all towing companies, including permit requirement, but upholding provision authorizing chief of police to establish a towing rotation for non-consensual police tows, to establish the standards for placement in the rotation, and to limit that rotation to the number of towers deemed necessary); *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001) (s. 14501[c][1] did not prevent city from choosing which towing companies with which it would do business and setting standards for those companies who would be allowed to conduct police ordered tows as well as limiting number of participating towing companies; requirement, however, that all tow drivers in the city obtain towing license, even those not doing work for the police department, was preempted).

[5] *See, e.g.,* s. 321.051, Fla. Stat., providing for the Florida Highway Patrol wrecker operator system which authorizes operators to remove and store wrecked or disabled vehicles from a crash scene or remove and store abandoned vehicles, in the event the owner or operator is incapacitated or unavailable or leaves the procurement of wrecker service to the officer at the scene. Such a system would appear permissible; however, provisions such as s. 321.051(3)(b), Fla. Stat., which prohibits an unauthorized wrecker operator from driving by the scene of a wrecked or disabled vehicle before the arrival of the authorized wrecker operator and initiating contact with the owner or operator of such vehicle by soliciting or offering towing services, and towing such vehicle, might be called into question in light of the court's decision in *R. Mayer of Atlanta, Inc. v. City of Atlanta, supra.*

[6] There is some conflict among the circuits regarding whether the omission of the "political subdivision" language in 49 U.S.C. s. 14501(c)(2)(A) reflects Congress's intent that safety regulation by political subdivisions not be exempted from preemption. The Fifth, Sixth, Ninth and Eleventh Circuits have held that this exception does not apply to safety regulation by political subdivisions. *See Stucky v. City of San Antonio,* 260 F.3d 424 (5th Cir. 2001)*; Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001); *Tocher v. City of Santa Ana,* 219 F.3d 1040 (9th Cir. 2000); *R. Mayer of Atlanta, Inc. v. City of Atlanta, supra*. The Second Circuit came to the opposite conclusion, holding that safety regulation by political subdivisions does fall within the exception to preemption. *See Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999). *And see Northway Towing, Inc. v. City of Pasadena, Texas*, 94 F. Supp.2d 801 (S.D. Tex. 2000). As you are aware, however, Florida is within the jurisdiction of the Eleventh Circuit Court of Appeals.

[7] 2002 WL 10618 (U.S. Jan. 4 2002) (Case No, 01-419).

[8] 78 F. Supp.2d 725, 728-30 (E.D. Tenn. 1999).

[9] 94 F. Supp.2d 801 (S.D. Tex. 2000).

[10] 219 F.3d 1040 (9th Cir. 2000), *cert. denied,* 121 S.Ct. 1085 (2001).

[11] 171 F.3d 765 (2d Cir. 1999).

[12] *Id.* at 776.