Municipal Regulation and Contracting with Tow Trucking Companies

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by Miles K. Risley
City Attorney
City of Wichita Falls

risleyattorney@gmail.com

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Curriculum Vitae

Miles Risley is the City Attorney of Wichita Falls, a city of approximately 100,000 people in north Texas. He received his law degree from the University of Texas in 1992. He graduated summa cum laude from West Texas State University in 1989.

Mr. Risley has practiced municipal law since 1994. Prior to his appointment in Wichita Falls, he was the City Attorney of Victoria, Texas. Prior to joining the City of Victoria Legal Department, he practiced with the law firm of Byington, Easton, and Risley, PC in Austin, Texas. He has also been an adjunct instructor at Victoria College and has served as a U.S. Army Military Intelligence Officer.

Mr. Risley has been a member of the International Municipal Lawyers Association (IMLA) for more than 15 years, and has twice been named as an IMLA Local Government Fellow. Mr. Risley also has received a distinguished service award from the Texas City Attorneys Association (TCAA). He is a Fellow of the Texas State Bar College and has made presentations to IMLA, the TCAA, and the National Contract Management Association. In addition, he is currently on the Board of Directors of the Texas Coalition for Affordable Power, an aggregation group that purchases electricity for 158 cities and other political subdivisions and advocates for consumers of electrical power.

Mr. Risley has dealt with towing companies during every year of his career as a municipal lawyer. He successfully managed litigation in state and federal court alleging the invalidity of the City of Victoria's towing ordinance and defended it to the Texas Attorney General (Tex. Att'y Gen'l Op. No. GA-0315 April 5, 2005) and Texas legislators acting on behalf of the Texas Towing and Storage Association.

Municipal Regulation and Contracting with Tow Trucking Companies

One of the necessary and often contentious tasks pursued by local government is the provision and regulation of towing services for its citizens. The operation of a modern roadway system and the limited parking available in many large cities requires the removal of vehicles outside the presence of and/or without the consent of their owners. The free market operates effectively only in the presence of competition. An arrested or absent vehicle owner is inherently vulnerable to over-charging in the absence of effective price regulation. Consequently, cities must establish controls over involuntary towing services if they want to ensure that safe, effective, honest, and price efficient towing services are provided to these vulnerable groups.

A. Tow Trucking Basics:

Tow trucks generally come in three weight ratings:

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



http://upload.wikimedia.org/wikipedia/commons/2/25/78670.jpg

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



http://upload.wikimedia.org/wikipedia/commons/thumb/0/06/%2705-%2707_Ford_F_550_Towing.JPG/640px-%2705-%2707_Ford_F_550_Towing.JPG

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



http://upload.wikimedia.org/wikipedia/commons/4/4e/Freightliner_FLD120_photo3.jpg

The weight rating or GVRW is not the capacity of a tow truck. The capacity of a tow truck transporting a vehicle on its back is determined by its "deck capacity". The capacity of a tow truck transporting a vehicle with a wheel lift is determined by the application of formula that utilizes the weight of each axle and the degree to which the tow truck's wheel lift overhangs the back of the truck.

Tow trucks are further divided into two other categories:

> **Standard tow trucks** utilize a wheel lift or under-lift to pull vehicles. A wheel lift is a large metal yoke that can be fitted under the front or rear wheels to cradle them, drawing the front or rear end of the vehicle clear of the ground by a pneumatic or hydraulic hoist so it can be towed. This apparatus generally 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"** are designed to transport one to three motor vehicles on a flat platform that slides or tilts to the ground to facilitate the loading and unloading of the vehicle(s). In addition, they are generally equipped with a wheel-lift or under-lift that enables them to tow an additional vehicle behind them. Car carriers are sometimes referred to as slidebacks, rollbacks, equipment transporters, or flatbeds. Car carriers are often used to transport vehicles that would be damaged by conventional towing techniques (all-wheel drive vehicles) or vehicles with severe wheel damage.



http://en.wikipedia.org/wiki/File:Flat_Bed_Tow_Truck.jpg

> Rollback trucks often have wheel lift capabilities, allowing them to tow vehicles in addition to placing them on their bed. However, American rollback trucks usually lack booms. Consequently, they are limited in varying degrees in their ability to perform recovery operations from embankments and ditches.

Towing jobs can be initiated by the owner of the vehicle (consent tows) or be initiated by a government entity or private property owner (nonconsent tows).

> **Consent Tows**: Consent tows are tows in which the owner has a disabled or wrecked vehicle and initiates the tow by calling the towing company. Due to federal preemption, cities are largely prohibited from regulating consent tows.

Nonconsent Tows: There are two types of non-consent tows:

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

2. Police Directed Tows - includes vehicles incapacitated as a result of an accident or involved in a crime -- and the owner cannot or will not secure the services of his/her own towing service.

a. vehicles towed because they are incapacitated or abandoned on a public street, and the owners are unwilling to call a towing company or are absent. Sometimes called "incident management tows".

b. vehicles towed after drivers are arrested

c. vehicles impounded because they are evidence of a crime.

d. vehicles impounded because the driver is unlicensed or uninsured.

B. Regulation vs. Contracts:

Cities often directly regulate the tow trucking industry. This regulation may or may not be in conjunction with the use of contracts between cities and individual towing companies. Before establishing a towing program, cities must carefully examine relevant federal and state laws to avoid preemption of their towing regulations.

Federal and state preemption limits cities' ability to directly regulate towing companies. The market participant exception enhances cities' flexibility when dealing with towing companies by eliminating the spector of preemption and many other claims that towing companies can use to shield themselves from governmental control. Local governments often will simply select a towing company to receive referrals emanating from their dispatch office. Governmental agencies also award exclusive contracts or franchises to towing companies on the basis of (1) the highest bid for payments to a city in exchange for the right to receive towing referrals, (2) the lowest bid for customer service charges, or (3) a combination of both. Most larger cities, on the other hand, utilize a list of towing companies who receive referrals from the local dispatching office. This is known in the industry as a "rotation list".

Cities that have little or no private property towing problems (ie. cities with ample parking) can avoid regulation altogether and simply contract with towing companies to remove the vehicles of arrestees and drivers of disabled vehicles. Cities that have limited parking availability must generally issue actual regulations to protect their citizens from excessive rates charged by persons towing from private property.

C. Regulation of Towing:

If cities choose to regulate towing, then they must deal with state and federal preemption.

1. State Preemption: The towing industry depends upon government referrals for its survival. Therefore, each state has active tow trucking associations that attempt to capture the regulatory capacity of each state and use it to further the interests of their members. Consequently, some states broadly preempt local tow truck regulation, while other states allow broader regulatory authority to their cities.

2. Federal Preemption: The federal government preempted local tow trucking regulation with the Federal Aviation Administration Authorization Act (FAAAA) of 1994. Federal preemption of the trucking industry is now codified as 49 U.S.C.A. § 14501(c)(1) which states, in relevant part:

> 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 price, route, or service of any motor carrier. . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

There are two exceptions to this federal preemption, the regulation of the **price** of nonconsent tows and the regulation of **safety**.

3. Exceptions to Federal Preemption.

a. Regulation of Price of Nonconsent Tows: The price regulation exception to the FAAAA's preemption clause is 49 U.S.C.A. § 14501(c)(2)(C), which reads:

> Paragraph (1). . . does not apply to the authority of a State or 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 phrase "performed without the prior consent or authorization of the owner or operator of the motor vehicle" removes price regulation of nonconsent tows from federal preemption. Federal courts have protected the nonconsent nature of this exception. Ordinances that attempt to redefine all tows on public property as nonconsent tows and thereby regulate the price of consent tows have been struck down. *Stucky v. City of San Antonio*, 260 F.3d 424, 427 (5th Cir. 2001). Ordinances that attempted to regulate consent tows that immediately followed a nonconsent tow have also been struck down. *Houston Professional Towing Ass'n v. City of Houston, Texas*, Not Reported in F.Supp.2d, 2005

WL 2121552 (S.D.Tex.,2005). For a more recent case, see *California Tow Truck Ass'n v. City & County of San Francisco,* Not Reported in F.Supp.2d, 2010 WL 5071602 (N.D.Cal.,2010). In *California Tow Truck Ass'n,* the Court upheld the regulation of non-consent tows while rejecting the City's regulation of consent tows.

b. Regulation of Safety: The safety exception, now codified as Section 14501(c)(2)(A), allows states to regulate safety by stating that federal preemption:

> shall not restrict the "safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, 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.

Until the decision in *City of Columbus v. Ours Garage and Wrecker Service, Inc.* 536 U.S. 424, 122 S.Ct. 2226 (2002), there was a split between courts concerning whether cities had the power to approve safety-related regulation of nonconsent towing. Some courts, such as the *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711 (S.D. Tex. 1996) court, interpreted the 14501(c)(2)(A) exemption from preemption for "safety regulatory authority of a State" to allow cities to regulate a broad variety of safety issues. Other courts, such as the *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998) court, interpreted the phrase strictly, limiting safety-based preemption to state-issued regulations.

This difference in approach was reconciled by the *City of Columbus* decision. 536 U.S. 424 (2002). In *City of Columbus,* the U.S. Supreme Court held that by creating the safety exception, Congress intended to preserve all preexisting and traditional state police power regarding towing, and regulations which are genuinely related to safety fit within the exception.

Other courts have broadly authorized towing regulations on the basis of safety:

> *Cole v. City of Dallas* 314 F. 3d 730(5th Cir. 2002) held that regulation requiring criminal history was included within the safety exception.
>
> *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999) held that the City of New York's rotational system was a permissible safety-related attempt to curtail the competitive incentives that motivate the practice of "chasing," i.e., racing to accident scene. This case also held that the City's requirements for licensing, displaying information, reporting, recordkeeping, checking criminal history, maintaining insurance, and posting bonds were legitimate safety-related requirements.
>
> *Hott v. City of San Jose*, 92 F. Supp. 2d 996 (N.D. Cal. 2000) held that city regulations requiring liability insurance, criminal background check, displaying of

information, reporting, and record keeping were all within the scope of the safety exception.

Fife Enterprises v. Washington State Patrol, 113 Wash. App. 1011 (Wash. App. Div. 3Rd 2002) held that record keeping and equipment safety requirements were exempt under safety exception.

People Ex. Rel. Louise H. Renne v. Servantes, 86 Cal.App.4th 1081 (2001) held that city licensing, record keeping, and background check requirements were permissible regulations under the safety exception.

VRC LLC v. City of Dallas, 460 F.3d 607 (5th Cir. 2006) held that a city ordinance requiring the posting of signs on private property warning that unauthorized vehicles would be towed was permissible on the basis of "safety concerns". In *VRC*, the Court rejected a close connection between the safety concerns and the municipal regulations. The court noted that consumer protection and public safety were not mutually exclusive categories. It held that where safety concerns were real enough to convince the court that the measures were both reasonably related and genuinely responsive to safety concerns, the court need not inquire further. VRC also recognized the abrogation of several cases that had held municipal towing regulations to be preempted, including *Northway Towing, Inc. v. City of Pasadena*, 94 Supp.2d 801, 803 (S.D.Tex.2000), and *Whitten v. Vehicle Removal Corp*., 56 S.W.3d 293, 306 (Tex.App.-Dallas 2001, pet. denied).

Capitol City Towing & Recovery Inc. v. State ex rel. Dept of Public Safety and Corrections, 873 So.2d 706 (La. Ct. App. 1st Cir. 2004) declared that provisions of the state's towing and storage act banning solicitation of towing business, limitating use of police scanners and CB radio, and requiring tow operators to wear clothing that identified towing company were safety regulations. Therefore, they were exempt from federal preemption.

The importance of legislative findings affirming the relationship of towing regulation to safety was highlighted in *California Tow Truck Ass'n v. City & County of San Francisco*, which stated:

> Those findings identify a safety concern with nonconsensual tows. For example, the findings provide, among other things, that (1) "there is a significant risk to the safety of residents and visitors when illegal towing from private property occurs at night"; (2) "there is a risk to public health and safety when the vehicles of senior citizens and persons with disabilities are illegally towed from private property"; (3) "there are no accessible resources for people to research their rights and responsibilities with respect to private property tows"; and (4) "requiring tow car firms to provide information on the legal rights of vehicle owners at the time they reclaim their vehicle would be an effective way of informing vehicle

owners of their rights under California law when their vehicle is towed from private property.

California Tow Truck Ass'n v. City & County of San Francisco, Not Reported in F.Supp.2d, 2010 WL 5071602, 3 (N.D.Cal., 2010)

A few courts have not deferred to statements of safety concerns. In *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136 (2d Cir. 2006), the 2nd Circuit Court of Appeals held that a Town law requiring all tow companies to maintain a tow yard within one mile of the Town's police department to be placed on its rotation list was not genuinely responsive to safety. In *Loyal Tire*, the Court held that a general, prefatory statement of legislative intent was contradicted by the legislative history of the law, which was strongly suggestive of discriminatory motivation.

Also, in *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711 (S.D. Tex. 1996), a Court held that a City's argument of a safety basis for a limitation on the number towing service could be contradicted by evidence that the basis for receiving referral rights was based primarily on economic factors.

4. Procedural limitations on Ability to Assert Claim for Federal Preemption of Towing Regulations:

Federal preemption of local towing regulation is only useful for plaintiffs if the right can be asserted as a private cause of action by towing companies, especially in 42 USC § 1983, with its concomitant right to receive attorney's fees. Since 1980, federal case law has evolved on the question of whether such preemption can be asserted by towing companies against cities. There is now a strong argument that the preemption of towing regulations is <u>not</u> actionable via a 1983 action.

In *Maine v. Thiboutot*, 448 U.S. 1, 4–8, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), the U.S. Supreme Court permitted 42 USC § 1983 actions to be brought against state actors who had violated rights created by federal statute. The Court held that the plaintiffs had a right, under the Social Security Act, to seek a remedy under § 1983 for Maine's failure to administer their monetary entitlements. A year after *Thiboutot*, the Supreme Court rejected a claim that the Developmentally Disabled Assistance and Bill of Rights Act of 1975 conferred enforceable rights in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). Over time, the Court emphasized that not all federal statutes create rights which are remediable by § 1983 by stating "To seek redress through § 1983 ... a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). Then, in *Gonzaga University v. Doe*, 536 U.S. 273, 122 S.Ct. 2268 (2002) the U.S. Supreme Court tightened the test used to determine whether a statute creates federal rights. Under the rule established by the *Gonzaga* Court in 2002, courts must now look to "rights-creating language" and an "individual focus" in the

statute's text and structure to determine whether Congress unambiguously intended to create individual rights. *Id.* at 2278–2279.

A pre-*Gonzaga* case that dealt with the question of a private right of action for an argument based of Section 14501(c)(1) preemption was *Petrey v. City of Toledo,* 246 F.3d 548, 565 (6th Cir.2001), which found that a cause of action existed under Section 1983 for such an action. In *Petrey*, the court relied on *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989), to determine that a plaintiff could seek relief under 42 USC § 1983 for the violation of Section 14501(c)(1) by a local towing regulation.

In *Gonzaga*, the Court determined that the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which provides for the withdrawal of federal funding from educational institutions that impermissibly release student records, did not confer rights to individual students. The Court found that FERPA conferred no rights enforceable under Section 1983 because its nondisclosure provisions contained no rights-creating language, giving them an aggregate, not individual focus, and served primarily to direct the Secretary of Education's distribution of public funds.

After *Gonzaga*, courts held that Section 14501 was not be enforceable through 42 USC § 1983. In *Henry's Wrecker Service Co. of Fairfax County, Inc. v. Prince George's County*, the Maryland District Court held that:

> Plaintiffs' contention that § 14501(c)(1) grants individual rights remediable by § 1983 fails because the statute's text does not "unambiguously," with "rights-creating language," convey Congress' intent to confer individual rights to motor carriers. "The question of whether Congress ... intended to create a private right of action [is] definitively answered in the negative' where 'a statute by its terms grants no private rights to any identifiable class." *Gonzaga*, 536 U.S. at ——, 122 S.Ct. at 2275 *quoting Touche Ross & Co. v. Redington*, 442 U.S. 560, 576, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979).Section 14501(c)(1) merely forbids State and local legislation in the areas of "price, route, or service," as it relates to "any motor carrier ... or any motor private carrier, broker, or freight forwarder." Without "rights-creating language," characterized by a concrete expression of the set of rights to be granted to individual motor carriers, there is no textual basis for Plaintiffs' contention that § 14501(c)(1) confers individual rights remediable by § 1983.
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> *Henry's Wrecker Service Co. of Fairfax County, Inc. v. Prince George's County* 214 F.Supp.2d 541, 544 -545 (D.Md.,2002)

More recently, *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136 (C.A.2 (N.Y.) 2006) held that Section 14501 may not be enforced through Section 1983, stating that the statute had "an aggregate, rather than an individual, focus". *Id.* at 150.

D. Contract System of Distributing Towing Jobs:

Federal courts recognize a distinction between towing regulation and actions a governmental body takes in a proprietary capacity. See *Cardinal Towing & Auto Repair, Inc., v. City of Bedford, Tex.,* 180 F.3d 686, 691 (5th Cir. 1999). A state or municipality acting as a market participant "in a narrow and focused manner consistent with the behavior of other market participants" is not regulating the towing market. *Id.* (citing *Bldg. and Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218, 227 (1993)).

Many towing companies have argued that towing contract systems are subject to federal preemption. Courts that have stricken down towing regulation as preempted under federal law have distinguished towing contract systems as not preempted. *Tocher v. City of Santa Ana* simultaneously invalidated the City of Santa Ana's regulatory system and upheld its contract system with the following language:

> Although the plain language of the statute would appear to encompass a rotational tow list, it is saved from preemption by the municipal-proprietor exception (also called the market participant exception) to the preemption doctrine. *See Dillingham Construction N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1037 (9th Cir.1999); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1062 (9th Cir.1987). The key inquiry under the municipal-proprietor exception is whether the City is acting in a regulatory or proprietary capacity. . . .
>
> *Tocher v. City of Santa Ana* 219 F.3d 1040, 1049 (C.A.9 (Cal.) 2000)[abrogated on other grounds]

Contract systems can provide for towing referrals to an single company or provide for referrals to a rotation list. *Crabtree v. City of Birmingham*, 292 Ala. 684, 299 So. 2d 282 (1974) held that a city did not violate equal protection by granting an exclusive contract to one wrecker service and prohibiting non-franchised wrecker service from responding to accidents via police radios. More recently, in *Cardinal Towing & Auto Repair, Inc., v. City of Bedford, Tex.* 180 F.3d 686, 691 (5th Cir. 1999), the 5th Circuit Court of Appeals upheld an exclusive contract system.

For further discussion of the federal preemption issue, see James Lockhart, *Preemptive Effect of Federal Aviation Administration Authorization Act*, 49 U.S.C.A. §§ 14501(c), 41713(b)(4), 29 ALR, Fed. 2nd Series 563 (Originally published in 2008).

E. Other Federal Law Based Attacks on Tow Trucking Regulation & Contracts:

1. Equal Protection:

Typically, attacks on towing regulation will feature an allegation that the city is violating equal protection in its distinctions. The equal protection clause of the 14th Amendment to the U.S. Constitution requires that the government treat similarly situated entities equally. 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". *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006).

Under the rational basis review, governmental policy that allegedly violates equal protection is afforded a strong presumption of validity and must be upheld as long as there is a rational relationship between the disparity of treatment and some legitimate government purpose. Under the "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. *U.S.R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 101 S. Ct. 453, 66 L. Ed. 2D 368 (1980). To prove a government action lacks rational basis, a plaintiff must negate all the possible rational justifications for the distinctions in the action. *Midkiff v. Adams County Regional Water District*, 409 F.3d 758, 2005 Fed App. 0226P (6th Cir. 2005).

a. No discrimination against Non-residents of City without Rational Basis.

Towing regulations typically discriminate against entities that do not maintain facilities in or near the municipality. This type of regulation is rationally based on a need to ensure limited response times to accident scenes and reduce the probability that residents of the City will need to travel to distant locales to retrieve their vehicles.

In *Defalco Instant Towing, Inc. v. Borough of New Providence*, 380 N.J. Super. 152, 881 A.2d 745 (App.Div. 2005), the Superior Court of New Jersey invalidated an ordinance giving preference to in-town towing companies for police-initiated towing calls.

> In this case, there is nothing in the record to demonstrate that the amended towing ordinance will actually reduce the response time for towing calls by giving preference to local towers or that it will otherwise promote or benefit the public health, safety, and welfare.. . . the record fully supports plaintiffs' claim that "the Borough acted against the advice of their own police department to enact a system that ultimately sought only to protect its local business and economy," and the amended ordinance "amounts to nothing more than a thinly disguised attempt to bolster local businesses in the guise of an alleged faster response time."
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> *Defalco Instant Towing, Inc. v. Borough of New Providence*, 380 N.J.Super. 152, 158-159, 881 A.2d 745, 749 (N.J.Super.A.D., 2005)

Defalco's factual findings were atypical. In that case, the plaintiff was located extremely close to the Town's border and was within a 20-minute driving distance of the entire town. The Town's police department had testified that the discrimination present in the ordinance against the out-of-town plaintiff did not reduce response times.

For an opposite ruling see *Village Auto Body Works, Inc. v Town of Hempstead*, 85 App Div 2d 692, 445 NYS2d 492 (N.Y.A.D., 1981), in which the plaintiff owned a terminal 3,500 feet from the border of the town and was denied a towing license because it did not operate and maintain a terminal within the town. In *Village Auto Body Works*, the Court held that the out-of-town towing company was not denied equal protection of laws because the town's ordinance furthered a legitimate governmental interest in providing quick, safe and reasonably-priced towing service, and in keeping flow of traffic as free as possible.

An additional defense to an equal protection allegation against non-citizen discrimination is the argument that the City has the authority to direct its business to local contractors when acting in a proprietary, rather than regulatory, capacity. This authority was described in *Hughes v. Alexandria Scrap Corp,* 426 U.S. 794 (1976), in which the Supreme Court permitted the State of Maryland to limit its bounties to wreckers taking derelict cars off Maryland highways to Maryland wrecker companies.

b. Class of One Discrimination Not Applicable to Discretionary Government Contracting:

In *Village of Willowbrook v. Olech*, the Supreme Court explained:

> cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.
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> *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000).

One problem with equal protection claims in a tow truck context is that the claimant is frequently the only entity to which claimed discrimination is aimed. This makes the claimant a "class of one". Class of one equal protection discrimination claims are not cognizable where government action is not intended to apply to all parties. See *Engquist v. Oregon Dept. of Agr.*, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008). In that case, the U.S. Supreme Court disapproved class of one employment discrimination claims, explaining that class-of-one equal protection cases can only be successful where the government action at issue is the type that should apply equally to all parties, such as the property assessment scheme in *Olech*. Where the government action is inherently discretionary (such as in employment (or government contracting), a class-of-one claim is not appropriate. The Court explained:

> . . . some forms of state action. . . by their nature involve discretionary decisionmaking. . . In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted.
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> *Engquist v. Oregon Dept. of Agr.*, 128 S. Ct. 2146, 170 L. Ed. 2d 975, (2008).

2. Substantive Due Process:

Municipal governments are prohibited by the 5th and 14th Amendments to the U.S. Constitution from depriving persons of life, liberty or property without due process of law. Plaintiffs will often claim that municipalities are violating the substantive due process rights of tow truck companies when administering tow truck regulations. Substantive due process claims almost uniformly fail in a tow truck regulation context.

When pleading a cause of action for a violation of substantive due process under the 14th Amendment to the U.S. Constitution against a public body or official, a plaintiff must plead and prove both an (1) arbitrary conduct which shocks the conscience and (2) a constitutionally protected interest adversely affected or adversely impacted thereby. See Jeffrey A. Parness, *Pleading Civil Rights Claims*, 97 Ill. B.J. 156, 157 (2009).

When asserting a substantive due process violation in a § 1983 case, a plaintiff must "first identify a life, liberty, or property interest protected by the 14th Amendment and then identify a state action that resulted in a deprivation of that interest." See *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir.1995) (citing *San Jacinto Sav. & Loan v. Kacal*,928 F.2d 697, 700 (5th Cir.1991) and *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972)). To establish a violation of substantive due process, a plaintiff must prove that the government deprived the plaintiff of his liberty or property. Stated differently, a violation occurs only when the government "works a deprivation" of a "constitutionally protected interest." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 223, 106 S.Ct. 507, 512, 88 L.Ed.2d 523 (1985); See also *Simi Inv. Co. v. Harris County, Texas*, 236 F.3d 240, 249 (5th Cir.2000). A constitutionally protected property interest must be more than just a 'unilateral expectation'; it must be a 'legitimate claim of entitlement. See *Furlong v. Shalala*, 156 F.3d 384, 393 (2d Cir.1998) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

Discretionary policies do not bestow upon individuals protected property interests." *Beggs v. Gilkey*, 178 Fed.Appx. 593, 595 (8th Cir.2006) (unpublished). To assert a viable property interest, a plaintiff "must show that his interest in remaining on a rotation list is more than a unilateral expectation . . ." *Blackburn*, 42 F.3d at 940.

An interest stemming from a state statute or municipal ordinance generally creates a property interest only if the statute or ordinance employs mandatory language. Ordinance language concerning a tow rotation list may be mandatory if, for example, the police department is explicitly required to place or keep on the list any and all companies that meet the criteria of the ordinance. Notwithstanding, some courts have stated that property interests may arise from "mutually explicit understandings" or mandatory state law referral requirements and determined that wrecker operators had a property interest in a wrecker rotational list. See *Abercrombie v. City of Catoosa, Okla.*, 896 F.2d 1228, 1231 (10th Cir. 1990); *Gregg v. Lawson*, 732 F.Supp. 849, 853 (E.D.Tenn.1989); *Henson v. City of Syracuse*, 559 N.Y.S.2d 86 (N.Y.App.Div.1990); *Martin v. Stites*, 203 F.Supp.2d 1237 (D Kan. 2002); *Pritchett v. Alford*, 973 F.2d 307, 317 (4th Cir.1992); *Crownhart v. Thorp*, 1992 WL 332298, 2 (N.D.Ill.,1992).

Courts held that governments did **not** violate the substantive due process rights of tow truck companies in the following cases:

Furra, et al. v. City of Nacogdoches, Texas, Not Reported in F.Supp.2d, 2011 WL 2039656 (E.D.Tex.)

Pete's Towing Co. v. City of Tampa, Fla.648 F.Supp.2d 1276 (M.D.Fla.,2009).

Martin v. Stites, 203 F.Supp.2d 1237, 2002-1 Trade Cases P 73,710 (2002).
Crabtree v Birmingham, 292 Ala 684, 299 So 2d 282 (1974).

Chavers v. Morrow, 354 Fed.Appx. 938, 940-941, 2009 WL 4609841, (C.A.5 (Tex.), 2009)

C & H Enterprises, Inc. v Commissioner of Motor Vehicles, 167 Conn 304, 355 A2d 247 (1974)

Giddens v City of Shreveport, 901 F Supp 1170 (WD La, 1995).

Habhab v. Hon, 536 F.3d 963, 968 (C.A.8 (Iowa), 2008)

VRC, L.L.C. v. City of Dallas, 391 F.Supp.2d 437, 441 (N.D.Tex.,2005)

Magnum Towing & Recovery, LLC v. City of Toledo, 430 F. Supp. 2d 689 (N.D. Ohio 2006)

White Plains Towing Corp. v. Patterson, 991 F.2d 1049 (CA.2, 1993).

B & M Serv. Station v. City of Norwich, Nos. 91-CV-1027, 93-CV-1782, 2000 WL 305981 (D.Conn. Feb. 25, 2000).

Many of these cases also held that the local governments did not violate the procedural due process rights of towing companies. (discussed in following section)

3. Procedural Due Process:

Procedural due process generally requires notice and a hearing prior to a constitutional deprivation. The standard analysis under Due Process Clause proceeds in two steps: (1) court first asks whether there exists a liberty or property interest of which a person has been deprived, and (2) if so, it asks whether procedures followed by the State were constitutionally sufficient. *Swarthout v. Cooke*, 131 S. Ct. 859 (2011).

The essential elements of procedural due process of law are notice and the opportunity to be heard prior to depriving a person of his or her protected property interest. *Wolf v. Fauquier County Bd. of Supervisors*, 555 F.3d 311 (4th Cir. 2009); *Bluitt v. Houston Independent School Dist*., 236 F. Supp. 2d 703 (S.D. Tex. 2002).

Even if government action depriving a person of life, liberty, or property survives a substantive due process scrutiny, "procedural" due process requires that such government action be implemented in a fair manner. *U.S. v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2D 697 (1987).

Claims of lack of procedural due process in the regulation or contracting of towing companies almost always fail. Due process is only required when depriving persons of protected property interests. As shown in the substantive due process analysis above, courts are generally loathe to determine that towing companies have constitutionally protected rights to tow and impound vehicles for a particular government entity. *Giddens v City of Shreveport*, 901 F Supp 1170 (WD La, 1995), reported at 912 F Supp 953, represented this analysis:

> The due process issue to be resolved in this case, then, is whether the plaintiffs have "a legitimate claim of entitlement" to the storage of "no preference" and impound vehicles. Guided by the recent decision of the United States Court of Appeals, Fifth Circuit in *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir.1995), the Court concludes that they do not. . . . Because no state or local statute, ordinance or regulatory scheme governed the operation of the rotational list, the Court of Appeals concluded that "Blackburn has failed to allege a property interest in remaining on the list." *Id.* at 941.

To avoid creating the possibility of a claim based on towing regulation, attorneys drafting ordinances for cities should be careful to avoid creating entitlements therein, leaving *some* discretion in their local officals.

4. First Amendment Claims:

In *Board of County Comm'rs, Wabaunsee County, Kansas v. Umbehr*, 116 S. Ct. 2342, 2361 (1996), the U.S. Supreme Court held that the First Amendment protects independent contractors from termination of at-will government contracts in retaliation for the contractors' exercise of freedom of speech. In *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 116 S.Ct. 2353 (1996) the U.S. Supreme Court extended this First Amendment protection for independent contractors to a towing contractor. In doing so, the Supreme Court rejected the notion that a "difference of constitutional magnitude" exists in the relative degree to which employees and independent contractors depend on government sources for their income. *Id.*, 116 S.Ct. at 2359.

In *O'Hare,* the City of Northlake, Illinois removed an existing towing contractor from its rotation list after the contractor refused a requested campaign contribution from the mayor's campaign and placed the mayor's opponent's campaign posters at its place of business. The Supreme Court held that the towing contractor stated a claim for violation of his First Amendment rights. *Id.*

In *Umbehr*, the Supreme Court indicated that it was not extending its statement of First Amendment protection to persons without existing contractual relationships with government entities. *Umbehr,* 518 U.S. at 685, 116 S.Ct. 2342. Based on this refusal, most federal courts have refused to extend First Amendment protection to bidders or applicants of government contracts. See *McClintock v. Eichelberger*, 169 F.3d 812 (3rd Cir.1999). However, commentators have speculated on the expectation that these protections will be extended. See Terrence Welch & Bonnie Goldstein, *The First Amendment and Independent Contractors: The U.S. Supreme Court Expands Governmental Liability*, 44-MAY Fed. Law. 46 (May, 1997). Also see Brent Eckersley, *Constitutional Law: Board of County Commissioners v. Umbehr and O'Hare Truck Service v. City of Northlake--The Extension of First Amendment Protection to Independent Contractors--The Garbage Man can now Talk Trash*!, 50 Okla. L. Rev. 557, (Winter, 1997).

Since *Umbehr*, some lower courts have applied the first amendment protections of these cases to prospective contractors. In *Royal Towing, Inc. v. City of Harvey*, Not Reported in F.Supp.2d, 2004 WL 626137 (N.D.Ill.,2004), a U.S. District Court stated, with respect to a towing company removed from a rotation list:

> even without a binding oral or written contract that defined the duration of the relationship, plaintiffs may succeed as to count I if they can prove that the removal of Royal was retaliation for the political speech. While the new administration was free to amend or terminate its relationship with the plaintiffs' company, it did not have the right to condition the towing contracts on political affiliation.

A.F.C. Enterprises v. NY City School Construction Authority analogized prospective contractors and prospective employees with the following statement:

> The (*Umbehr*) Court discovered no "difference of constitutional magnitude" between contractors and employees, the distinction between which turns on "state law labels ." (*Umbehr*) at 679. "To the extent that salient differences between these classes of workers exist in individual cases, the *Umbehr* Court found 'no reason to believe that proper application of the *Pickering* balancing test cannot accommodate' them.". . . In the light of the *Umbehr* and *O'Hare* Courts' reasoning, it is apparent that no cause exists to create bright-line distinctions between government employees and contractors. Employees are entitled to the protections of the First Amendment whether they are terminated or not hired in the first place.
>
> Not Reported in F.Supp.2d, 2001 WL 1335010, 16 (E.D.N.Y., 2001).

In *Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378 (5th Cir. 2006), the Fifth Circuit ruled that private contractors 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. In *Renda*, a disappointed, rejected low bidder sued the City of Lubbock after City officials rejected his bid on the basis of a lawsuit that bidder had filed against another government entity. The *Renda* majority held that independent contractors should be treated the same as individual government employees in the context of retaliation claims, stating "in a governmental employment context . . . no prior relationship is required before an employee is permitted to assert a claim for First Amendment retaliation." *Id.* at 383. Also see Vincent P. Circelli, *First Amendment--Elements of Retaliation: The Fifth Circuit Rules that Independent Contractors do not need a Pre-Existing Commercial Relationship with a Government Entity in order To Bring a Claim of Retaliation*, 60 SMU L. Rev. 299 (Winter, 2007).

If a tow trucker is refused referrals by the government on First Amendment grounds, then, under the *Umbehr* analysis, the Court would apply the "Pickering Balancing Test" to his First Amendment Claims. See *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Under the Pickering Balancing Test, the Court must balance plaintiff's interests as a citizen, in commenting upon matters of public concern, against the State's interests as an employer or contracting entity, in promoting the efficient referral of tow services.

Nonetheless, at least one court has applied a lower standard of review to alleged First Amendment violations of a wrecker's First Amendment rights. In *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1233 (10th Cir.1990), the 10th Circuit held that removing a tow operator's name from wrecker referral list because of protected speech violated the tow operator's First Amendment rights. In doing so, the *Abercrombie* court treated Abercrombie as an ordinary citizen rather than a contractor or employee. This meant that that the Pickering Balancing Test did not need to be applied to the contractor's right to be free of retaliation for its speech. *See, e.g., Pickering*, 391 U.S. at 568, 88 S.Ct. At 1734–

35; *Blackburn*, 42 F.3d at 931. Also see *Barrett v. Fields*, 924 F.Supp. 1063, 1070 (D.Kan., 1996).

Procedurally, First Amendment claims will be fact intensive. Consequently, they can be difficult claims upon which to win summary judgment. In addition, knowledgeable plaintiffs will emphasize First Amendment claims because they will be seeking attorneys fees. Not only are attorneys fees clearly recoverable in a successful 42 USC §1983 claim based on First Amendment violations, but the lack of a property right will not doom a First Amendment retaliation claim, as it would a due process claim. *See Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Also see *Abercrombie v. City of Catoosa, Okl.* 896 F.2d 1228, 1233 (C.A.10(Okl.), 1990). The fact intensiveness and difficulty in winning summary judgment in a First Amendment claim were demonstrated in *Lucas v. Monroe County,* 203 F.3d 964, 973 (C.A.6(Mich.), 2000), where the Court considered speech complaining about the lack of "fair play" in the Sheriff's office, which eventually led to his removal from the rotation list:

> Even if we were to assume that Chappel's predominant motivation was securing a job for himself, we would not conclude that this motivation so dominated the substance of Chappel's speech that the "point" or "communicative purpose" of his speech was rendered merely a matter of personal concern. Chappel directly addressed matters that are rightly "near [the] zenith" of public concern-matters of public safety, and the gross mismanagement and misappropriation of public monies.
>
> *Lucas v. Monroe County*, 203 F.3d 964, 973 (C.A.6 (Mich.),2000)

In the *Lucas* case, the Court described the elements for prevailing on a First Amendment claim with its requirement that plaintiffs provide evidence on each of the following elements:

> (i) that the plaintiffs were engaged in constitutionally protected conduct;
>
> (ii) that defendants' adverse action caused them to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that conduct; and
>
> (iii) that the adverse action was motivated at least in part as a response to the exercise of their constitutional rights.

Also see *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

5. Federal Antitrust Claims:

Section 1 of the Sherman Antitrust Act provides that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is illegal. Restraint of trade in this usage means restraint of competition. 15 USCA §1. Conduct falls within the scope of this prohibition only if some form of agreement or concerted action can be proven.

The scope of the prohibition is limited to those agreements where the restraint of trade is unreasonable:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.
>
> *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 244 (1918) ("Chicago Board of Trade").

Antitrust plaintiffs are required to demonstrate, by "the facts peculiar to the business to which the restraint is applied", the nature of the challenged conduct and why it is harmful to competition. *Id.* at 244.

Cities are often alleged to have violated the Sherman Antitrust Act when regulating or contracting with members of the wrecker industry. These allegations can include violations of antitrust law through the following actions:

> Price fixing: An agreement between business competitors selling the same product or service regarding its pricing
>
> Geographic market allocation: An agreement between competitors not to compete within each other's geographic territories.

Cities have several possible responses to antitrust allegations in the context of tow truck regulation:

> **a. State Action Doctrine:** The initial response is to rely on state action immunity (also known as “Parker Immunity”).
>
> **b. Local Government Antitrust Act:** If state action immunity does not result in dismissal of the antitrust allegations, cities should point out that the Local Government Antitrust Act prohibits damages in antitrust suits against municipal defendants.

c. City Regulatory Activity Limited to Noncompetitive Market: Another available response is to argue that City regulatory activity is limited to nonconsent tows, thereby ensuring that other cities are not interfering with an otherwise competitive market.

d Noerr-Pennington Doctrine: Cities should remember that the Noerr-Pennington doctrine protects the rights of private parties to lobby for anti-competitive measures.

e. Intrastate Activity: There is some case law that provides that tow truck regulation does not implicate sufficient interstate activity to implicate the Sherman Antitrust Act.

a. State action doctrine:

Government entities may legally restrain trade if authorized by their parent state. This is known in antitrust law as the state action doctrine or as "Parker immunity", from the name of the case in which it was established. *Parker v. Brown*, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943). Technically, the doctrine is not so much an immunity as a judicial determination that Congress did not intend for the Sherman and Clayton Acts to be mechanisms to challenge matters of chosen state policy. *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 28 (1st Cir. 1999).

Parker immunity aka state action immunity applies to states defending their regulatory programs, municipalities defending their regulatory programs to the extent such program are authorized by their state, and private entities operating pursuant to government regulatory programs. The elements of state action immunity differ, based on whether the entity alleged to have violated antitrust laws is:

(1) a state,
(2) a private entity, or
(3) a unit of local government, such as a municipality.

Where the challenged action is by the **state**, then the exemption is said to be complete, without further inquiry. For example, in *Hoover v. Ronwin*, 466 U.S. 558, 104 S. Ct. 1989, 80 L. Ed. 2D 590 (1984), antitrust immunity was found for a state bar testing program administered through direct involvement of the state supreme court, making the conduct "in fact" that of the state as sovereign.

Where the challenged action is by a **private entity**, the exemption is only available if it was both: (1) authorized by the state as a matter of "clearly articulated and affirmatively expressed state policy," and (2) subjected to "active state supervision" to protect against possible abuse and ensure that it reflects the desired state policy. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc*., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980).

Where the challenged action is by a **municipality** or other local government entity, an intermediate standard is employed. The municipality or government entity need only prove that the action was authorized by a state policy. Active supervision by a higher level state body is not required, since "[o]nce it is clear that state authorization exists, there is no need to require the State to supervise actively the [defendant's] execution of what is a properly delegated function." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47, 105 S. Ct. 1713, 85 L. Ed. 2D 24 (1985). Home rule authority to pass laws where not prohibited by the state is insufficient state authorization to gain state action immunity. See *Community Communications Co., Inc. v. City of Boulder, Colo.*, 455 U.S. 40, 51, 102 S. Ct. 835 (1982).

State action immunity may be predicated on a state policy or case law. However, unlike a statute, if state authorization is from court or executive branch department, the burden is on the defendant to demonstrate that the challenged conduct was a foreseeable consequence of "a clearly articulated policy of the State itself," such as a policy "approved by a state legislature" or by the "State Supreme Court." *Hallie v. Eau Claire*, 471 U.S. 34 at 42 (1985), *Southern Motor Carriers Rate Conference, Inc. v. U.S.*, 471 U.S. 48, 63, 105 S. Ct. 1721, 85 L. Ed. 2D 36 (1985).

Courts have applied the state action exemption to cities in the following cases, many of which could be applied to a city's wrecker industry activities:

> *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kan.*, 927 F.2d 1111 (10th Cir.1991) held that the state action doctrine immunized the City from antitrust immunity for a rezoning denial due to a state urban renewal statute and a planning and zoning statute. In that case, the Court held that the financial interest of commissioners in competing businesses did not abrogate the state action immunity. In that case, the court stated "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." *Id.* at 1120.
>
> *R. Ernest Cohn, D.C., D.A.B.C.O. v. Bond*, 953 F.2d 154 (4th Cir. 1991) held that state action immunity and the Local Government Antitrust Act shielded a municipally owned hospital's decision to deny staff privileges to a chiropractor. In that case, the Court held that state action immunity further extended to staff physicians who participated in the decision, since they were acting in their capacity as "employees" of a municipal entity.
>
> *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, (1991) held that the state action immunity applies where the municipality acts in an area in which the state has authorized it to act. In that case, the plaintiff alleged that the city council had conspired with a local billboard company to grant the local company a monopoly within the city, disadvantaging the plaintiff. The Supreme Court held that the city had state-granted zoning authority to pass ordinances controlling billboards, establishing the state action exemption. The Supreme Court in that case also held that there was no "conspiracy" exception to state action immunity

Brumfield Towing Service, Inc. v. City of Baton Rouge, 911 F.Supp. 212 (M.D.La.,1996) held that state authorization to municipalities to "regulate, control, supervise and govern the business of operation and use of wreckers and towing devices" established a city's entitlement to the state action exemption for regulation and contracting with tow truck companies.

Hallco Environmental Inc. v. Comanche County Bd. of County Com'rs, 149 F.3d 1190 (10th Cir. 1998) held that state action immunity shielded a county board and its members from antitrust challenges to their adoption of regulations restricting the construction of new dump sites within the county, where the board acted pursuant to a state statute delegating responsibility over dump sites to counties.

Omega Homes, Inc. v. City of Buffalo, N.Y., 171 F.3d 755 (2d Cir. 1999) held that state action immunity applied to a municipality's decision to award two exclusive dealing contracts for a large urban renewal project, where the city acted pursuant to state legislation granting municipalities decision-making authority over urban renewal programs.

Duck Tours Seafari, Inc. v. City of Key West, 875 So.2d 650 (Fla.App. 3d Dist.2004) held that the state action exemption only applies if it is clear that the state law has delegated to the municipality " 'the express authority to take action that foreseeably will result in anticompetitive effects'... [t]he fact that the state has made a general delegation of home rule power to the local government is not enough to authorize anticompetitive action." *Id*. at 653-55

First American Title Co. v. Devaugh, [in her capacity as the Lapeer County Register of Deeds], 480 F.3d 438 (6th Cir. 2007) held that state action immunity did not apply to contract restrictions imposed on title insurance companies by county agencies, under which the title companies were prohibited from distributing or using copies of official title documents for title search services that would have competed with the County Registers' indexing services. In that case, the Court held that statutes authorizing the Deed Registers to enter into "contracts" as part of a centralized system for recording and providing official title documents showed, at most, a legislative intent to displace competition in the provision of official title documents, and not an intent to further displace competition in the sale and use of unofficial copies or information contained in the documents. Consequently, the statutes did not satisfy the requirement for state action immunity that the challenged conduct reflect "clearly articulated and affirmatively expressed…state policy. Importantly, this case contains dictum stating that the state-action immunity doctrine must be "narrowly construed" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 442 F.3d 410, 440-41 (6th Cir.2006)

Active Disposal, Inc. v. City of Darien, 635 F.3d 883 (7th Cir. 2011) held that the state action exemption shielded municipalities from federal antitrust liability for

> awarding exclusive contracts to private recycling services, where a state statute expressly empowered them to "contract" for garbage and refuse services. In *Active Disposal*, the Court held that the fact that the statute did not specifically authorize the use of exclusive contracts was "irrelevant," since "after all an exclusive contract is merely a subset of the power to contract." *Id.* at 885-886

State statutes differ on the degree of specificity with which they authorize cities to regulate tow trucking services. There are tow trucking associations active in every state that are attempting to restrain cities in their contracting and regulatory authority over the wrecker industry. These state statutes can have the paradoxical effect of enhancing the viability of a Parker Act exemption claim by providing specific authority for municipalities to rely on when regulating wreckers.

b. Local Government Antitrust Act

Responding to a rising tide of antitrust suits against local government bodies in '70's and early '80's, Congress enacted the Local Government Antitrust Immunity Act of 1984 (LGAA). The LGAA's primary operative section reads as follows:

> No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity
>
> 15 USC § 35.

The LGAA eliminated the remedy of damages (single or treble) against cities, towns, villages, and special-purpose political subdivisions. Under the LGAA, plaintiffs were also prohibited from recovering money damages from any local government official, agent or employee when acting in an official capacity. The LGAA left intact the availability of injunctive relief in suits against municipalities, and did not affect a plaintiff's ability to sue private party defendants for damages as well as equitable relief. Municipalities are, thus, still subject to possible suit, unless they can bring themselves within the state action defense as described above. However, the stakes for local government bodies and their employees in such a suit have been substantially lowered.

The LGAA was intended as a response to "an increasing number of antitrust suits, and threatened suits, that could undermine a local government's ability to govern in the public interest." *GF Gaming Corp. v. City of Black Hawk, Colo.*, 405 F.3d 876, 885 (10th Cir.2005). To this end, the LGAA "precluded the courts from awarding monetary relief on antitrust claims brought against local government entities". *Thatcher Enterprises v. Cache County Corp*., 902 F.2d 1472, 1477 (10th Cir.1990). Also see P*ittsburg County RuralWater Dist. No. 7 v. City of McAlester*, 211 F.3d 1279 (10th Cir.2000). By eliminating the threat of monetary damages, the ability of cities to simply moot antitrust claims by modifying their wrecker provisions is greatly increased. See *Chris' Wrecker Service, Inc. v. Town of Fairfield*, 619 F.Supp. 480 (D.C.Conn.1985).

c. Mere Consumer Exemption:

Courts have also held that when a City establishes a price for towing services while acting as a mere consumer, they will generally not be violating the Sherman Anti-Trust Act. In *Brumfield Towing Service, Inc. v. City of Baton Rouge*, 911 F.Supp. 212 (M.D.La.1996), the court held that the City of Baton Rouge, in contracting with one tow company to provide all nonpreference tows for the City, was merely a consumer of services. As a mere consumer, the City could not violate the Sherman Act. *Id*. at 218.

The *Brumfield* case was distinguished in *Martin v. Stites*, 31 F.Supp.2d 926 (D.Kan.1998), in which a towing company alleged that it had been denied a spot on the County rotation list because a competing towing company was involved in an unlawful conspiracy with the local sheriff, who established the policy for giving towing referrals. In *Martin v. Stites*, the District Court stated:

> *Brumfield* does not control the instant case because it did not involve any allegations of conspiracy between the City and the tow company. The court specifically noted that "the City of Baton Rouge [does not] receive any economic benefit from the provision of towing services. The only interest of the City of Baton Rouge is the public interest in removal of disabled vehicles which impede the flow of traffic; the city has no interest in the towing of such vehicles." . . . Viewing the evidence in the light most favorable to Plaintiffs, a reasonable factfinder could find that the county commissioners and Sheriff Stites have an interest in referring a disproportionate number of tows to Mr. Schoenhals.
> . . .
>
> The court also rejects Defendants' argument that they are entitled to summary judgment because the nonpreference tow market is not a competitive market. Defendants submit that the market is not competitive because the tow companies "are simply waiting their turn to perform tows that have already been earmarked for them." Defendants miss the point. The competition lies in the "earmarking" process; tow companies are competing for favorable positions on the county tow list. Moreover, they are competing for the repeat business of customers with whom they made contact through a nonpreference tow call. The court finds Defendants' argument that the market is not competitive as a matter of law unpersuasive.
>
> *Martin v. Stites*, 31 F.Supp.2d 926 (D.Kan.,1998)

d. Noerr Pennington Doctrine:

The Noerr-Pennington doctrine arose from three decisions of the United States Supreme Court. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127,

81 S.Ct. 523, 5 L.Ed.2d 464,reh.denied, 365 U.S. 875, 81 S.Ct. 899, 5 L.Ed.2d 864 (1961), the Supreme Court set forth the doctrine in the context of petitioning a legislature for the passage of laws with anticompetitive intent. In *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), the Court expanded the doctrine's coverage to petitioning the executive for the enforcement of laws. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the doctrine was expanded to petitioning for relief before a court or administrative agency.

The Noerr-Pennington doctrine has been held to shield entities legally lobbying local agencies and governments from liability. More importantly for municipal lawyers, it has been held to protect government entities and their officials from liability for lobbying third party state regulators. See *Hallco Environmental Inc. v. Comanche County Bd. of County Com'rs,* 149 F.3d 1190 (10th Cir. 1998).

As initially conceived, the Noerr-Pennington doctrine shielded from liability under the federal antitrust act all concerted efforts to influence public officials regardless of the intent or purpose of the petitioners. *United Mine Workers v. Pennington*, supra, 381 U.S. at 670. The doctrine was based on the belief that "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." C*alifornia Motor Transport Co. v. Trucking Unlimited*, supra, 404 U.S. At 510-11. However, a sham exception was later established, and lobbying activities fall within the "sham exception" of the antitrust laws when they were found to merely be a disguised attempt to directly injure a competitor and the political actor had no real interest in the outcome. *Friends of Rockland Shelter Animals, Inc. (FORSA) v. Mullen*, 313 F. Supp. 2d 339 (S.D. N.Y. 2004). The Noerr-Pennington Doctrine was held to shield a towing company from antitrust liability in *Western Connecticut Collision Corp. v. Greentree Motors of Danbury, Inc.*, WL 23025580 (Conn.Super., 2003)

e. Lack of Impact on Interstate Commerce:

Municipalities may defend against federal antitrust claims on the basis that the alleged activities do not impact interstate commerce. This defense was supported by the holding in *Walker County Wrecker and Storage Ass'n, Inc. v. Walker County,* 604 F.Supp. 28, 30 (D.C.Tex.,1984), which stated:

> Plaintiffs have failed to state a claim under either the Sherman or Clayton Acts. The principle difficulty with these allegations is that Plaintiffs have failed to allege the requisite effect on interstate commerce. It is a well established principle that a claim brought pursuant to the Sherman or Clayton Act must relate to activities that substantially affect interstate commerce. *Woolen v. Surtran Taxicabs*, 461 F.Supp. 1025, 1033 (N.D.Tex.1978). Plaintiffs claim interstate commerce is affected since

some of the towing originated on an interstate highway. This tenuous allegation is insufficient to sustain a claim under the Sherman or Clayton Acts. See *Boro Hall Corp. v. General Motors Corp.*, 130 F.2d 196 (2d Cir.1942) cert. denied, 317 U.S. 695, 63 S.Ct. 436, 87 L.Ed. 556; *Woolen v. Surtran Taxicabs*, 461 F.Supp. 1025 (N.D.Tex.1978).

Finally, it does not appear this is the type of activity the Federal Antitrust Laws are intended to reach due to the intra-state nature of the activities complained of. See *Foster v. Maryland State Savings and Loan Association*, 590 F.2d 928 (D.C.Cir.1978), cert. denied 439 U.S. 1071, 99 S.Ct. 842, 59 L.Ed.2d 37 (1979).

f. Antitrust Recommendations:

Antitrust law is inherently vague. However, many of the dangerous per se liability rules of the past have been eliminated by the courts over time. Nonetheless, one of the primary objectives of local government wrecker regulation is to limit excessive charges by wrecker companies. To reduce the probability of establishing a class of damaged "consumers", municipalities should avoid establishing minimum prices for towing services. Instead, cities should only establish maximum prices for nonconsensual towing services, leaving towing companies free to negotiate lower prices with their customers. In addition, findings should be placed in ordinances that establish the desire of municipalities to regulate safety and carefully avoid statements that appear to be favoring particular tow truck companies. Further, state statutory authorizations for wrecker regulation should be researched and mentioned in findings to establish that wrecker regulation was approved for the purpose of furthering state-mandated objectives that lead to any limitation of competition.

6. Dormant Commerce Clause:

The federal Commerce Clause, Art. I, § 8, cl. 3 of the Constitution, reserves to Congress the power to legislate in matters relating to interstate commerce. The "dormant" Commerce Clause as the law terms it is the "other-side-of-the-coin" limitation on the power of the states to enact laws imposing substantial burdens on interstate commerce. See *South-Central Timber Development Inc. v. Wunnicke*, 467 U.S. 82, 87, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984). The 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." See *Am. Trucking Ass'n v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433, 125 S.Ct. 2419, 162 L.Ed.2d 407 (2005). A City violates dormant commerce clause by requiring licensure for a tow truck merely to travel through a jurisdiction or perform consensual tows in the City for transport to other states. See *Automobile Club of New York, Inc. v. Dykstra*, 423 F. Supp. 2d 279 (S.D. N.Y. 2006); *California Tow Truck Ass'n v. City & County of San Francisco,* Not Reported in F.Supp.2d, 2010 WL 5071602, 7 (N.D.Cal.,2010).

7. Americans with Disabilities Act Claims:

The U.S. Department of Justice has entertained a unique species of claims against towing companies that are filed with cities. On August 26, 2002, the U.S. Department of Justice entered into an "agreement" with the City of Bryan, Texas, requiring it to modify its policies and procedures for ensuring that the City utilizes the services of towing companies on the City's wrecker rotation list that are accessible to individuals with disabilities. In its settlement agreement, the City of Bryan agreed to require from wrecker companies, for placement on the City's rotation list, certification by the wrecker company that it met specified minimum accessibility criteria and agreed to remove wrecker companies from the City's rotation list that failed to meet the Minimum Accessibility Criteria. See *Settlement agreement between the United States Justice Department and the City of Bryan, Texas*, Department Of Justice Number 204-74-60 (August 26, 2002). http://www.ada.gov/bryantx.htm.

F. Useful Provisions in Contract System:

1. Control of Maximum Towing Rates:

A contract system is normally established for the primary purpose of limiting the rates charged to owners of vehicles that are towed. Not surprisingly, this is a regular area of contention. Towing companies will regularly lobby the government to demand towing rates be increased. Towing companies often base their lobbying efforts on their costs, and, in some states, have passed legislation requiring cities to consider their costs. Accounting representations of costs are subject to manipulation. One method of reducing the annual lobbying for increased costs is to build an automatic inflator, such as a CPI-based inflation adjustment, into the allowable rates. It is relatively simple to perform a survey of allowable area towing rates.

Some states have mandated maximum towing rates. Other states authorize local government entities to regulate rates and specify rate setting mechanisms (ex. Tex. Occup. Code § 2308.203's requirement for towing fee studies for regulated towing rates).

An example of a towing rate provision is as follows:

> *(1) Light duty towing* (towing a vehicle with a gross vehicle weight of 10,000 pounds or less):
>
> > a. A fee of $120.00 per hour shall be paid to a towing company for towing a vehicle from one point to another location within the city as directed by the police department. This fee includes any work performed during the first hour. Time posted after the first hour will be billed in increments of 15 minutes.
> >
> > b. *Second tow truck:* In the event the police officer at the scene determines that a second tow truck is required, a fee of $120.00 per hour shall be paid to the towing company for any work performed at the scene during the first hour after the arrival of the second tow truck. Time posted for the second tow truck after the first hour will be billed in increments of 15 minutes. The use of the second tow truck shall be approved by a police supervisor. Travel time is excluded.
> >
> > c. *Use of a dolly:* No additional fees shall be charged for the use of a dolly.
>
> (2) *Medium duty towing* (towing a vehicle with a gross vehicle weight over 10,000 pounds but less than 25,000 pounds):
>
> > a. A fee of $150.00 per hour shall be paid to the towing company for towing a vehicle requiring a medium duty tow from one point to another location within the city as directed by the police department. This fee includes any work performed during the first hour. Time posted after the first hour will be billed in increments of 15 minutes.
> >
> > b. *Second tow truck:* In the event the police officer at the scene determines that a second medium duty tow truck is required, a fee of $150.00 per hour shall be paid to the towing company for any work performed at the scene during the first hour after the arrival of the second medium duty tow truck. Time posted for the second tow truck after the first hour will be billed in increments of fifteen (15) minutes. The use of the second tow truck shall be approved by a police supervisor. Travel time is excluded.
> >
> > c. *Use of a dolly:* No additional fees shall be charged for the use of a dolly.
>
> (3) *Heavy duty towing* (towing a vehicle with a gross vehicle weight of over 25,000 pounds):

a. A fee of $300.00 per hour shall be paid to the towing company for towing a vehicle requiring a heavy duty tow from one point to another location within the city as directed by the police department. This fee includes any work performed during the first hour. Time posted after the first hour will be billed in increments of 15 minutes.

b. *Second tow truck:* In the event the police officer at the scene determines that a second heavy duty tow truck is required, a fee of $300.00 per hour shall be paid to the towing company for any work performed at the scene during the first hour after the arrival of the second heavy duty tow truck. Time posted for the second tow truck after the first hour will be billed in increments of 15 minutes. The use of the second tow truck shall be approved by a police supervisor. Travel time is excluded.

c. *Extra equipment:* If the towing company is required to rent or lease a piece of equipment which is not required in the normal operation of a towing company, the actual cost for lease or rental of such equipment may be passed on to the vehicle owner.

d. A minimum of two towing company employees must respond and share the responsibilities with each heavy duty tow truck to expedite the clearing of the roadway and increase safety. Failure to respond with two towing company employees will be counted as a failure to respond and the tow truck will not be allowed to work the scene.

2. Revenue Generation for Municipality:

Contract systems have the advantage of allowing a municipality to generate revenue from members of the rotation list. Cities often spend a great deal of time administering the rotation list and managing disputes between wrecker companies and their consumers, as well as with other wrecker companies. Consequently, cities often have an impetus to recover some of these costs or even generate additional revenue from the towing referral system.

Utilizing a contract approach rather than a direct regulatory approach allows a municipality to generate revenue from tow trucking referrals that would ordinarily not be recoverable under a license-fee system because most states strictly limit the ability of City's to generate fees that exceed the cost of administering an ordinance. See AMJUR LICENSES § 12; *City of Houston v. Harris County Outdoor Advertising Ass'n*, 879 S.W.2d 322 (Tex. App. Houston 14th Dist. 1994), writ denied, (Feb. 16, 1995).

It should be self-evident that using the tow truck referral system as a revenue generation mechanism will require higher rates to be charged to recipients of towing services. Therefore, cities that have small resident populations and large commuter populations have a greater incentive to use towing referral as a revenue generator.

3. Business Location:

It is common to require towing companies to locate their storage facility in the City limits or within a limited driving distance of the municipality. In the absence of such a limit, towing companies may store their vehicles at locations so far outside of town as to be inconvenient for a municipality's citizens.

4. Business Hours:

Towing contracts often require towing companies to have 24-hour availability or minimum time availability for persons who wish to retrieve their towed vehicles.

5. Minimum Response Times:

Many towing contracts require a towing company to respond to the scene of an accident or disablement within a specified period of time. Towing associations tend to recommend avoiding strict time response constraints to avoid unsafe driving by towing companies. However, average response time limitations are appropriate and common. If necessary, towing response can be created to assist towing companies in responding within reasonable time frames.

6. Contract Term:

To avoid creating property rights that can lead to due process lawsuits, towing contracts should expire on a defined date.

7. Equipment Requirements:

Towing contracts often require towing companies to have a minimum specified amount of equipment. Cities subject to heavy snows, thick fog, or other natural disasters and cities that are transected by large highways may desire to encourage towing companies to carry more equipment. The requirement for participants in rotation programs to own larger fleets can be beneficial in multi-vehicle accidents by reducing the number of responders that must be handled by each incident manager. Geographic attributes are important. Mountainous areas may require more sophisticated recovery equipment, while urban areas may require smaller trucks for tight spaces. Minimum equipment provisions should be drafted in conjunction with analysis of state equipment requirements to ensure local requirements do not conflict with state requirements.

Minimum equipment requirements are often subject to intense lobbying. Small towing companies seek to minimize equipment requirements while large towing companies often attempt to customize equipment requirements in a manner that excludes competition.

Limited equipment requirements incentivize the division of towing companies into smaller companies. Complex equipment requirements incentivize the combination of companies into larger entities. To avoid incentivizing size in either direction, some cities distribute towing referrals to companies on the basis of the number of trucks that each company operates. An example of this type of system would be to give towing companies one spot on a rotation list for each truck.

As an example, the City of Wichita Falls requires towing companies to have at least one heavy duty tow truck and two medium duty tow trucks. Wichita Falls also has the

following minimum tow truck equipment requirements for each tow truck responding to a City incident:

1. 36-inch crowbar;
2. Magnetic tow lights, unless wireless, w/ appropriate cable & cushions;
3. Emergency overhead warning lights;
4. Safety chain;
5. Fire Extinguishers (A.B.C Type), two 5 lb. extinguishers or one 10 lb. extinguisher;
6. Broom;
7. Shovel;
8. Triangle reflectors, flares, cones, or safety lights;
9. Five gallon or larger trash receptacle;
10. Two-way voice or computer communication between tow truck and company dispatcher;
11. Backing warning signal;
12. Wheel chocks;
13. Two dollies;
14. Straps and tie-downs as specific by the tow truck manufacturer; and
15. Gloves.

8. Tow Truck Identification Requirements:

Incident management tasks are simplified when responding vehicles are clearly marked. Consequently, towing contracts often specify that wrecker companies must clearly mark their vehicles. An example of such a clause is as follows:

> Each tow truck shall have permanently inscribed and legible on each side of the vehicle, in letters of not less than two (2) inches in height, the Tow Truck Company's own name, street address and telephone number and be on a contrasting background. No other Tow Truck Company names may be inscribed on the sides of the vehicle.

9. Training, Experience, and Other Requirements for Drivers:

Some tow truck contracts establish minimum training and/or experience for drivers responding to incident scenes. One of the useful services provided by the tow trucking associations is certification of drivers. See http://www.towserver.net/certification.htm for a listing of some available certifications. Some contracts will also mandate criminal background checks for drivers or allow their removal upon the request of local police.

10. Minimum Insurance Requirements:

Over time, more and more states establish minimum insurance requirements for tow trucking companies. Prior to drafting a minimum insurance provision, municipal attorneys should review their state's minimum insurance requirements.

11. Financial Requirements:

Cities may desire to deal only with towing companies that exist on a sound financial footing. Also, for the convenience of citizens, participants in towing programs may be required to honor specified credit cards.

12. Indemnity & Release:

Participants in towing programs should be required to indemnify the municipality for claims caused by the companies and waive their claims against the municipality. Contracts differ on the enforceability of contractual indemnity and release obligations. Waivers of previously accrued causes of action against municipalities are broadly upheld and are akin to a settlement of a dispute. However, prospective waivers of liability uniquely can violate public policy. See dictum in *Midwest Towing & Recovery, Inc. v. City of Lancaster*, 2011 WL 249467, 4 (S.D.Ohio, 2011).

13. Limit on Owning Multiple Companies or Splitting Companies:

A prohibition on splitting companies for the purpose of securing additional spots on a rotation list was considered defensible under a rational basis review in *Doug Reed Enterprises, Inc. v. City of Baton Rouge*, 591 So.2d 733 (1st Circ. Appeals - Louisiana 1991).

14. Other Desirable Towing Contract Provisions:

Standard boilerplate utilized on other city contracts will be desirable on a city contract with a towing company. In addition, companies may wish to prohibit some or all of the following acts in their towing contracts:

- "Dropping" a vehicle or other property at a location other than designated by the police officer and without prior approval from the Police Department.
- Permitting a tow truck to be operated by anyone while under the influence of prescription drugs which could be reasonably anticipated to interfere with a driver's ability to operate the tow truck, alcohol, and/or illegal drugs;
- Permitting a tow truck to be operated by anyone whose operator's or driver's license is suspended, or permitting the operation of a tow truck by an operator who does not hold the proper commercial driver's license to operate said tow truck.
- Transferring or assigning any call for service to any other Towing Company.
- Any sustained complaint of theft by personnel of Towing Company while acting in their capacity as employees of Towing Company, whether occurring during a Police Tow or otherwise.
- Any sustained complaint of threats made by personnel of Towing Company while acting in their capacity as employees of Towing Company made against third parties during a Police Tow or otherwise.
- Receiving more than ___ tow passes within the term of this contract.
- Driving any Tow Truck to or from the scene of an accident in a manner which endangers the life or safety of any person.
- Failing to maintain in effect any insurance required by this contract or by City Towing Ordinances.
- Failing to comply with all directions of police personnel at the scene of a police tow or employee of City Impound facility.
- Failure to comply with any state or federal law or regulation or city ordinance related to the operation of a towing company or operation of a tow truck.
- Failure to properly clean up debris at an accident scene.
- Failure to comply with record keeping requirements of the contract, including complete and accurate records of the towing, receipt, storage, release, and disposal of all vehicles for a period of three years.
- Employing any driver who has been convicted of a felony within the preceding five years.

- Charging fees in excess of the amounts authorized by this contract or by the City Towing Ordinance.
- Sending a prohibited driver to perform a Police Tow.
- Poaching or circumventing the rotation schedule or policies in place.
- Failing to maintain a currently licensed vehicle storage facility located within the corporate limits of the city .
- Failing to maintain business operation 24 hours a day, 7 days per week.
- Failing to provide vehicle towing service within 30 minutes from the initial request for service for a Light or Medium Duty Tow Truck, and one hour from the initial request for service for a Heavy Duty Tow Truck, except in extraordinary situations where reasonable delay is caused by ice, snow, or other weather-related conditions. Reasonable delay means no more than 2 hours from the initial request for service.
- Failing to directly communicate with responding Tow Truck.
- Failing to notify the City of any change of ownership, president or chief executive officer, or change of address within 5 business days of any such change.
- Failing to deliver the vehicle being towed to the location within the corporate limits of City designated by the police officer at the scene of the tow. Delivery shall be made without delay or detour.
- Failing to fully cooperate with any investigation conducted by the City regarding complaints against Company, whether or not such complaints arise out of services contemplated by this contract.
- Failing to timely pay any taxes or fees due the City.
- Going to any accident scene unless the Company has been called to the scene by the owner or operator of a vehicle or an authorized representative of same, or by the City.
- Soliciting any towing business within the corporate limits of the city at the scene of a wrecked or disabled vehicle, regardless of whether the solicitation is for the purpose of soliciting the business of towing, repairing, wrecking, storing, trading, or purchasing the vehicle.
- Failing to only employ drivers of tow trucks authorized to operate same.
- Failing to provide Impound personnel with an invoice at the time the vehicle is delivered to the location directed by the police officer on the scene together with the signed wrecker selection form to be provided. Additional charges shall be initialed by the police officer on the scene. Those charges not initialed by the police officer on scene will not be honored.
- Operating an impounded vehicle under any circumstances, unless otherwise instructed or after having received approval from a police officer. This prohibition also applies to the lot area of the Impound Facility.
- Permitting a Tow Truck driver to perform a Police Tow when that driver has been disapproved and prohibited by the Chief of Police.
- Unloading Vehicle outside the City Impound Facility, and driving Vehicle into impound. Vehicle will not be unloaded until Tow Truck is completely inside facility.
- Storing any vehicles or Tow Trucks on the public roadways or rights-of-way. The Company shall use reasonable care in the storage of property not belonging to the permit holder so as to minimize the risk of theft or damage.
- Failing to at all times comply with all rules pertaining to standards for the operation of tow trucks adopted by any agency of the State.
- Failing to provide the owner or operator of a vehicle that has been towed by Company with written city contact information at the time the vehicle owner or operator pays the costs of the vehicle's removal or storage. The city contact information shall include the statement: "If you have any questions regarding the towing of your vehicle, you may contact the . . . at . . . ."
- Failing to notify the Chief of Police that a Company Tow Truck is no longer able to perform Police Tows as required by this contract.
- Operating in the City without a City Permit.
- Performing a medium duty or heavy duty tow using a light duty tow truck.
- Performing a heavy duty tow using a medium duty tow truck.
- Failing to respond to Police Dispatch within 15 minutes of the Police Department requesting Company perform a Police Tow. Such response shall include a statement as to whether Company will or will not be able to perform the requested Police Tow.