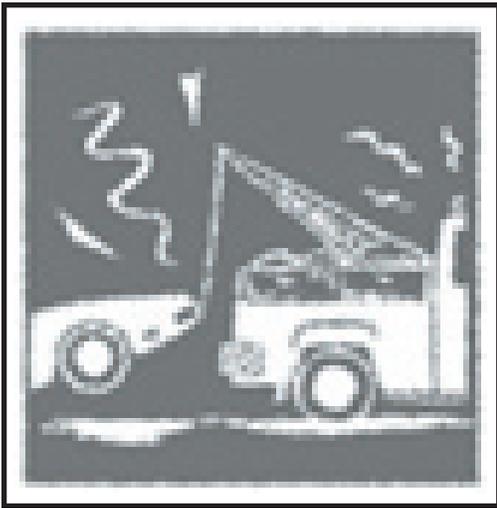


The Trouble with Tow Trucks

Federal Preemption of State Law Claims Against Tow Truck Companies

By Dan Casey Stinnett*



Imagine an elderly woman driving down a freeway in a big city when, suddenly, her car dies. She does not know what is wrong, but luckily, while the car is still moving she is able to coast it over to the narrow emergency lane. The woman is stuck on the freeway with no way to get herself or her car to safety. She has a cell phone and through a friend she gets the number of a tow truck service. When the truck arrives, the driver tells her the tow to his repair shop will cost about eighty dollars. Then, after taking her and her car to his shop, the driver informs the woman that because of the difficulty he had hooking up to her car, the charge will be two hundred and fifty dollars. Plus, he says, if she wants the vehicle towed to another repair shop, he will charge an additional two hundred dollars as a “transfer fee.” The woman protests that this is unfair and refuses to pay, but the driver tells her that if she does not pay, she cannot have her car back.

Until recently, a consumer in this situation would have had a number of legal protections. There would probably have been standard tow rates established by the city to avoid overcharging. If state law allowed a wrecker service or an automobile storage lot to claim a garageman’s lien, the lien would probably have been limited by law to a debt for a reasonable charge. The state’s transportation code may have included protections for tow service consumers, and the state would likely have a general consumer protection statute against misrepresentations and unfair business practices.

Since the mid-1990s, all of these protections have been in jeopardy. Over the past decade, federal laws seeking to deregulate the trucking industry have been interpreted by the courts to mean that states are very limited in how they may regulate tow truck companies.

Through a long and confusing series of statutory constructions, arguments by analogy, and dictionary references, state and federal appellate courts seem to have rendered wrecker services virtually untouchable by state governments. This has been done in spite of an absence of regulation by the federal government. Today, state consumer protection laws may no longer be enforceable against tow truck companies in the face of federal preemption by the Motor Carrier Safety Act (“MCSA”). The purpose of this article is to explore the extent to which the “MCSA” preempts state law claims against tow truck companies.

Part I begins with a brief legislative history of the “MCSA” provisions preempting state law and its exceptions to preemption. Part II covers cases recognizing the preemption of state and local laws directly regulating tow trucks, and Part III reviews the very few cases addressing preemption of more general consumer protection laws as they apply to motor carriers. The article then explores the guidance available from two important cases involving nearly identical federal preemption of airline regulation. Finally, the author suggests several arguments to preserve consumer protection laws that have not yet been addressed in any reported case.

I. LEGISLATIVE HISTORY

Since 1964, the United States Transportation Code has exempted from federal jurisdiction any regulation of towing unless the Interstate Commerce Commission, and now the Surface Transportation Board, finds it necessary to regulate.¹ The current 49 U.S.C.A. § 13506(b) reads as follows:

Except to the extent the Secretary or 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.

Prior to 1978 this provision, then 10526(b), ended with the phrase “in interstate commerce.” This phrase was deleted in 1978 as mere surplusage,² which may indicate that as originally enacted the MCSA was not presumed to address intrastate towing.

Also in 1978, Congress passed the Airline Deregulation Act in part to prevent state governments from interfering with free competition between airlines. Years later, Congress came to view this as an unfair advantage for the airlines over the trucking industry.³ To remedy this problem, Congress twice amended the Motor Carrier Safety Act. The above provision exempting the regulation of emergency towing from federal jurisdiction remains in place in spite of the following provision preempting state regulation of towing, which was added in 1994 as part of the Federal Aviation Administration Authorization Act (“FAAAA”). Now codified as 49 U.S.C.A. § 14501(c)(1), the Act states:

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.

The law includes two exceptions to federal preemption. The first, now codified as § 14501(c)(2)(A), allows states to regulate for 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.

Soon after the passage of the “FAAAA,” towing companies and associations began to challenge state regulations. The courts in these early cases upheld the states’ power to regulate towing because of the provision, mentioned above, exempting from federal jurisdiction the authority to regulate the emergency towing of accidentally wrecked or disabled vehicles.

Before knowing how the courts would interpret the 1994 version of the “MCSA,” it seemed possible to some congressmen that courts might find all regulation of towing was preempted by the act. One month after the passage of the “FAAAA,” one of its sponsors, Rep. Rahall, introduced a “Technical Corrections”

act to exempt from the deregulating effects of the “FAAAA” any regulation by states and cities of tow truck services. He stated, “Again, in my view, the intent of [the preemption section] was to address issues relating to the transportation by motor carrier of general freight and express small packages. I do not believe there was any intent to affect motor carriers, such as tow truck drivers.”⁴ Rahall’s bill was considered in both the House and Senate, but even after Rahall agreed to limit its effects to two years,⁵ neither house of Congress acted on the bill.

A year later in 1995, Congress again amended the MCSA, with the Interstate Commerce Commission Termination Act (“ICCTA”), to specifically add a second exception to the MCSA’s preemption clause. 49 U.S.C.A. § 14501(c)(2)(C) 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.

This exemption allowed states to regulate non-consent towing—defined in case law as towing services that “occur when law enforcement or other local authorities determine that a vehicle must be towed and the owner of the vehicle is not afforded the opportunity to request towing services from a specific company.”⁶ Since then, federal appellate courts have taken the addition of this very specific exemption to mean that the general preemption clause must be read much more broadly than formerly thought. They reason that because Congress took special care to exempt non-consent tows, all other state regulation of towing is preempted notwithstanding the earlier clause exempting towing from federal jurisdiction. This appears to render the intrastate towing industry outside of both federal and state regulatory jurisdiction until such time as the Surface Transportation Board shall find it necessary to establish new federal regulations.

II. PREEMPTION OF TOWING REGULATIONS

Generally, courts prior to 1995 seemed reluctant to declare that state law claims were preempted by federal law governing motor carriers in interstate commerce. Repeatedly, when carriers put forward the argument of preemption, courts found the areas of state law actually preempted to be very limited.⁷ One court, refusing to find state laws preempted, wrote, “To do so would leave the towing industry unlike any other portion of the transportation industry, free from any regulation by federal, state or local government.”⁸ Nevertheless, this is the interpretation now given to the “MCSA” since the passage of the “ICCTA” in 1995.⁹

The “ICCTA” of 1995 amended the “MCSA” to add an exception to the preemption of state law created in section 14501. The exception allows states to regulate the price charged for the towing of vehicles that occurs without the prior consent or authorization of the vehicle’s owner.¹⁰

In *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, two towing associations, representing members who did not possess the permits required by the city to tow vehicles from accident scenes, challenged the city ordinance as being preempted by federal law.¹¹ The ordinance at issue regulated the licensing, pricing, areas of operation, minimum levels of financial responsibility, storage facilities, and minimum equipment required of towing services.¹²

A towing company had to possess a permit called an “E-tag” in order for city authorities to call that company’s wreckers to the scenes of accidents or arrests.¹³ Applications for E-tags were accepted by the city only once every two years.¹⁴ The towing service provided at the scene of an accident or arrest was non-consensual because the towing was requested by city authorities instead of the vehicle owner, and the wrecker ordinance set the price for non-consensual towing at \$57.00, plus additional charges for heavy-duty towing.¹⁵

The plaintiffs argued that the city wrecker ordinance was expressly preempted by 49 U.S.C. § 14501(c)(1).¹⁶ The city argued that “local towing is traditionally a state activity that is outside the scope of the Act,” and pointed out that “49 U.S.C. § 13506(b)(1), (3) exempts towing from federal regulation.”¹⁷ However, the court concluded that “Congress removed any . . . uncertainty about its intent to preempt state and local towing regulations with the passage of the ICC Termination Act of 1995.”¹⁸ That act exempted state and local regulation of non-consent towing from preemption. The addition of this specific exemption “confirms congressional intent . . . to preempt state and local towing regulations. If Congress had not intended to preempt such regulations, the addition of section 14501(c)(2)(C) to cancel this preemptive force would have been unnecessary.”¹⁹ The court did not see the restriction on the jurisdiction of the Secretary of Transportation and the Surface Transportation Board contained in section 13506(b) to be inconsistent with section 14501(c)(1), preempting state and local regulation.²⁰ “Reading section 13506(b) together with section 14501(c), the court concluded that Congress has deregulated portions of the intrastate towing industry.”²¹

Supporting its conclusion, the court pointed to the legislative history of the act: The House committee report said about the exemption for non-consent tow regulations, “[t]his is only intended to permit states or political subdivisions thereof to set maximum prices for non-consensual tows, and is not intended to permit re-regulation of any other aspect of tow truck operations.”²² In addition, Rep. Rahall stated, “Regulation of routes and services, as well as regulation of consensual towing, would still be preempted.”²³

The court stated that although the meaning of section 13506(b) may have once been in doubt and has been interpreted by other courts as implying that the regulation of towing services should be left to state and local authorities, the passage of section 14501(c)(2)(C) clearly indicated that Congress intended to preempt state and local regulation of towing services other than regulating the price of non-consent tows.²⁴

Next, the court in Harris County Wrecker turned to the issue of defining “relating to” as used in the context of section 14501(c)(1). The Harris County Wrecker court noted that this preemptive provision was almost identical to the preemptive language found in the Airline Deregulation Act of 1978, which forbade states or their political subdivisions from enacting or enforcing laws relating to the rates, routes, or services of an air carrier.²⁵

To find the meaning of “relating to,” the court looked to the case law defining the phrase as it was used in the Airline Deregulation Act. In 1992, the Supreme Court defined “relating to” very broadly and included any state or local law that has



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“a connection with or reference to” the rates, routes, or services of an airline.²⁶ Relying on this broad definition, the Harris County Wrecker court stated that, “[b]ecause courts have given the broadest possible scope to this equivalent preemptive clause in the ADA, § 14501(c)(1) should also be accorded a broad preemptive reach.”²⁷ The Harris County Wrecker court went on to conclude that each of the challenged city ordinances at issue had a connection with or reference to a price, route, or service of a motor carrier and were therefore preempted.²⁸ Although state and local governments may regulate the price of non-consent towing according to section 14501(c)(2)(C), the restrictions on the number of E-tags issued was a restriction on service and was therefore preempted.²⁹

The city in Harris County Wrecker argued alternatively that

its regulations fit into the exception created for state safety regulation because restricting emergency towing operations to certain geographic regions and limiting their number were legitimate safety regulations.³⁰ The court held that although federal law did permit municipalities to enact safety regulations and the federal statute exception allowing for states to regulate safety included the state’s right to delegate this authority to municipalities,³¹ because the city relied primarily on economic and social criteria in the E-Tag issuance process, such regulations were not truly safety regulations and were therefore preempted.³²

In Atlanta, Georgia, towing companies challenged city ordinances that required wrecker services to provide information to the mayor’s office and to police in order to obtain the permits and registration necessary to operate legally in the city in *R. Mayer of Atlanta, Inc. v. City of Atlanta*.³³ Oddly, as the facts are given in the reported case, there does not seem to have been any attempt on the part of the city to control the prices, routes, or services provided by the companies. The city required only that information be reported by the wrecker companies to the appropriate authorities.³⁴ For example, one ordinance required that the company provide the Atlanta Mayor’s office with its rate schedule, apparently without any restriction on the rates that may be charged.³⁵ Nevertheless, because the ordinances referred to price, route, or service, the Eleventh Circuit found the ordinances to be preempted by federal law.³⁶

Agreeing with Harris County Wrecker, the Eleventh Circuit found in *R. Mayer of Atlanta, Inc. v. City of Atlanta* that exempting the price regulation of non-consent towing from the overall deregulation of the trucking industry was an indication that Congress intended to forbid states and local authorities to regulate consent towing.³⁷ The *R. Mayer* court further agreed with Harris County Wrecker in reading “related to” very broadly.³⁸ However, the *R. Mayer* court parted company with the court in Harris County Wrecker on the issue of a municipality’s authority to establish safety regulations. Where the court in Harris County Wrecker had found that a state could delegate this power to its political subdivision, the court in *R. Mayer* disagreed.³⁹

Presuming that Congress does not accidentally omit a phrase from one subsection of a statute when that phrase is used in other subsections, the court concluded that the omission

of “political subdivision” from the safety regulation exception was intentional, and therefore municipalities may not regulate consent towing even for reasons of safety.⁴⁰

In June of 2002, the Supreme Court handed down its decision in *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, resolving the conflict among the circuits over whether municipalities may create safety regulations for motor carriers.⁴¹ On this issue, the Fifth, Sixth and Ninth Circuits had followed the Eleventh Circuit’s interpretation in *R. Mayer*, finding that municipalities could not create safety regulation for motor carriers.⁴² The Second Circuit disagreed.⁴³

In *Ours Garage*, Justice Ginsberg, writing for the majority, held that, “[a]bsent a clear statement to the contrary, Congress’ reference to the ‘[R]egulatory authority of a State’ should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts.”⁴⁴ Observing that, “[h]ad 49 U.S.C. § 14501(c) contained no reference at all to ‘political subdivision[s] of a State,’ the preemption provision’s exception for exercises of the ‘safety regulatory authority of a State,’ § 14501(c)(2)(A), undoubtedly would have embraced both state and local regulation,”⁴⁵ and relying on the basic principles of federalism espoused in *Public Intervenor v. Mortier* the court concluded that the statute does not provide the requisite “clear and manifest indication that Congress sought to supplant local authority.”⁴⁶ Instead, Ginsburg wrote, “Congress’ clear purpose in § 14501(c)(2)(A) is to ensure that its preemption of States’ economic authority over motor carriers of property. . . ‘not restrict’ the preexisting and traditional state police power over safety.”⁴⁷ Although the Supreme Court has resolved who may regulate for safety, what constitutes a safety regulation is still debatable.

Contrary to the cases arising in other circuits, the Second Circuit has allowed a broader range of regulation for non-consent towing. Towing companies challenged the city’s rotational towing program in *Ace Auto Body & Towing, Ltd v. City of New York*.⁴⁸ The city conceded that its regulation of consensual tow rates was preempted, but maintained that it had the authority to regulate the rates for nonconsensual tows according to section 14501(c)(2)(C).⁴⁹ The plaintiffs argued that “Congress intended the provision to apply to tows that are nonconsensual solely by virtue of the owner’s or driver’s physical incapacity at the accident scene, and not to tows that are nonconsensual solely because the City’s rotational system dictates the tower be summoned to the scene by the Police Department.”⁵⁰ The court concluded that the exception for non-consent tows encompasses any tow performed without the prior consent or authorization of the owner or operator of the motor vehicle, “regardless of the reason for the lack of consent.”⁵¹

The city also argued that its regulation of non-consent towing was within the safety exception created in section 14501(c)(2)(A).⁵² The plaintiffs countered that the exception for safety regulation was restricted by the subsection’s use of the term “motor vehicles,” indicating that the exemption “extends only to safety regulation of the mechanical components of motor vehicles, e.g., windshield wipers and brakes, and not to municipal management of vehicular accidents.”⁵³ The court accepted the city’s argument and held that the text of the federal statute was broad enough to include the authority to enact safety regulations with respect to motor vehicle accidents and break-downs.⁵⁴

The Ninth Circuit concluded in *Tocher v. City of Santa Ana*, that several city ordinances directly affecting the price, route, or service of a motor carrier were preempted by the MCSA, including regulations of wrecker service rates, business hours, and transactions with consumers.⁵⁵ The court held that “[t]hese operating requirements not only have the indirect

effect of raising costs, but also directly influence the relationship between a customer and a towing business.”⁵⁶

Recognizing the “municipal-proprietor exception” to the preemption doctrine, the court did allow Santa Ana’s rotational tow list to survive preemption on the ground that as a proprietor, the city may contract for services, exempting only that portion of the rotational tow list program that required list members to have operating permits otherwise found to be preempted.⁵⁷ The court also declared valid the portion of the California Vehicle Code regulating the removal of vehicles from private property as an appropriate safety regulation enacted by the state.⁵⁸

In New Orleans, the Towing Association challenged city ordinances forbidding wreck chasing, accident-scene solicitation, and the use of certain emergency equipment, such as rotating lights, by tow truck services.⁵⁹ The Association also challenged the city’s rotational towing ordinance governing how police summon wreckers to accident scenes.⁶⁰ The federal district court rejected the city’s argument that the exception to federal jurisdiction created by section 13506 meant the states retained jurisdiction.⁶¹ The city also argued that the ordinances were created for the purpose of promoting public safety.⁶² Reasoning that the city laws were preempted if they have the “forbidden significant effect,” the court said, “even if the City Council’s primary objective was to promote public safety, the law would be preempted if it relates to the services of tow truck operators, unless there is an exemption to preemption.”⁶³ The court did then find that the ordinances fell within an exemption.

Reviewing the record of city council meetings, the court found that safety regulation was the intent behind the ordinances.⁶⁴ The Towing Association argued that the exception for safety regulation was limited to “motor vehicles” and did not cover the safety of “motor carriers.”⁶⁵ The court disagreed stating that,

to the extent the safety exception is unclear, it is plausible that the phrase ‘safety regulatory authority of a State with respect to motor vehicles’ was meant to include a state’s authority to enact safety regulations dealing with motor vehicle accidents and breakdowns.

* * *

Unless states and localities can pass regulations in this area, no one can protect the public from safety hazards caused by unsolicited tow trucks converging on accident scenes.⁶⁶

A federal district court in Texas granted a towing company’s motion for summary judgment and enjoined the city from enforcing its towing ordinances. In *Northway Towing, Inc. v. City of Pasadena*,⁶⁷ the court found that a city could regulate for safety but did not find Pasadena’s ordinances to be safety regulations.⁶⁸ The city’s ordinances required tow truck drivers to obtain permits and forbid wreckers that tow without the vehicle driver’s consent from towing the vehicle outside of the city limits.⁶⁹ The city had argued that the permit system allowed police to recognize legitimate wrecker drivers from car thieves posing as wrecker drivers and keeping non-consent towing within the city allowed vehicle owners to safely regain possession of their vehicles.⁷⁰ The court rejected both of these rationales and found there was no connection between the ordinances and public safety.⁷¹

The city of San Antonio had ordinances that forbade a wrecker service to pick up a vehicle at any accident scene unless summoned by police.⁷² The city also contracted for this accident-scene towing service.⁷³ The company that won the contract had the exclusive right to provide accident-scene service in the



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city.⁷⁴ In *Stucky v. City of San Antonio*, towing companies that were not awarded the contract sued saying that the ordinance was preempted because it restricted service for consent tows.⁷⁵ The court stated that by excluding competing wreckers from all scenes of automobile collisions, the city interfered with competition.⁷⁶ Although a city as proprietor, or market participant, has the right to contract for services, the city may not use its market participation in a manner that restricts free competition in the market place. Although *Stucky* was abrogated by *Ours Garage* on the issue of whether a municipality may issue safety regulations for motor carriers, *Stucky* is illustrative of how courts will deal with other issues. To decide *Stucky*, the Fifth Circuit looked to its own decision in the earlier case of *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*.⁷⁷ In that case, the court had decided that Bedford's single-contract towing ordinance for nonconsensual towing services was not preempted.⁷⁸ In *Stucky*, the court borrowed the analysis used in *Bedford* to decide if the same contractual relationship was acceptable for consent towing and whether such a service contract fit within the safety exception provided in the "MCSA."⁷⁹

Recognizing the state's right to contract for services as a proprietor, the court applied a two-part analysis to determine whether a state's contracting was for the purpose of obtaining services or for the purpose of using its "substantial leverage through its spending power" to regulate the market:⁸⁰

First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?⁸¹

The plaintiff in *Stucky* conceded that the City is the consumer in non-consent tow situations because the City is choosing the towing service.⁸² However, the plaintiff asserted that in a consent tow, "the driver of the disabled vehicle is the market actor, and when the City by statute chooses a towing service for that individual, it is regulating, not purchasing services in a proprietary manner."⁸³ On this point, the court found in favor of *Stucky* holding that the city's ordinance was primarily an attempt to control a market instead of participate in that market, largely because of the dissimilarities between the city in this situation and that of a normal market participant.⁸⁴

In making its decision, the court seemed to accept without close scrutiny the plaintiff's definition of a non-consent tow and rejected the defendant's definition saying that "the City cannot, by sleight of hand (or language) simply eliminate the concerns addressed by the inquiry regarding whether a tow is consensual or nonconsensual. . . ."⁸⁵ The city had defined non-consent tow to mean any tow from an accident scene.⁸⁶ However, in rejecting this definition, the court opened a new problem that it did not address: When is a vehicle owner "not available" to give his consent at an accident scene? Must he be absent from the scene entirely? What if he is injured? How incapacitated must an injured driver be in order to be "not available" to give his consent? If the driver is at the scene and still conscious, must he be consulted about his choice of towing service regardless of the extent of his injuries? A simple and

clear distinction between what is and is not a consent tow, defined by law, as was the case in *San Antonio*, would allow a court, or a police officer at the scene, to avoid this difficult factual determination. When abolishing this legal definition, the court did not give guidance on how to distinguish consent from non-consent tows.

The City of Dallas did win a small victory in a challenge to one of its towing regulations in *Cole v. City of Dallas*.⁸⁷ The Fifth Circuit found enough room in Dallas' safety regulation exception to allow for the city's restrictions forbidding the issuance of wrecker driver's permits to persons with a history of criminal convictions, mental illness, or unsafe driving records.⁸⁸ "That the criminal history regulation has, at its core, concern for safety is manifest," wrote the court.⁸⁹ The court further held that "[i]t is difficult to imagine a regulation with more direct protective nexus or peripheral economic burden."⁹⁰

III. CASES APPLYING PREEMPTION TO CONSUMER PROTECTION LAWS

In the unreported case of *Horn v. A.J.'s Wrecker Service, Inc.*, plaintiffs' truck was parked in the parking lot of a Hypermart.⁹¹ The driver was assured by Hypermart's security guard that he would be allowed to leave the truck in the lot over night and a posted sign stated that there was no parking for longer than 48 hours.⁹² The plaintiffs' truck was towed without his consent the very next morning.⁹³ He consequently sued for negligence and violations of Texas' Deceptive Trade Practices Act.⁹⁴ The trial court granted, and the appellate court affirmed, the defendant tow truck company's motion for summary judgment holding that the regulation of towing is preempted by federal law except for the regulation of the price of non-consent towing.⁹⁵ Since the plaintiffs' cause of action was based on the service provided by the towing company, state law claims based on negligence and deceptive trade were found by the court to be preempted.⁹⁶

Two courts in California, one federal and one state court, have found room in the safety exception to preserve the state's consumer protection laws. In *Hott v. City of San Jose* the plaintiff sought an injunction to stop the city from enforcing an ordinance that prohibited her towing company from engaging in fraud.⁹⁷ She based her argument on the ground of federal preemption.⁹⁸ The city argued that its regulation was not preempted, but instead, fit within the exception created in the "MCSA" for safety regulation.⁹⁹ Prior to this suit, the city held an administrative hearing where it was determined that the towing company had "engaged in unlawful, illegal, dishonest, fraudulent, deceitful, and unfair business practices. . . in violation of several provisions of the California Vehicle Code and the San Jose Municipal Code."¹⁰⁰

The court distinguished *Hott* from a case involving similar preemption provisions applied to airlines because those provisions do not create a safety exception.¹⁰¹ The court did not further analyze the airlines cases, which found consumer protection laws to be preempted as they apply to airlines.¹⁰² Neither did the court bother to make a close analysis of how an anti-fraud law could be a safety exception. The court cited the San Jose city ordinances at issue, but did not explain their

connection to fraud.¹⁰³ The court seemed to reason, without articulating it, that if a city can regulate for safety, it has the power to issue and revoke licenses. Since the city has that power, it can revoke a license for any purpose.

Another California case, *People ex rel. Renne v. Servantes*, involved a city attorney suing a towing company for unfair business practices.¹⁰⁴ The appellate court said that the towing company owner, Patrick Sevantes,

over a period of years committed myriad unfair business practices and abused the public, towing hundreds of cars off private property in abject disregard of applicable California laws and San Francisco regulations. Such practices included towing vehicles without a permit, towing vehicles from private property without authorization from the property owners, refusing to accept credit cards as payment for towing and storage charges to allow release of the vehicle, and imposing excessive towing and storage charges.¹⁰⁵

The city attorney sued under California's Business and Professional Code that prohibits unfair business practices, defined as those practices that are "forbidden by law, whether civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made."¹⁰⁶ The trial court found in favor of the city and ordered a civil penalty, disgorgement, and additional penalties for violations of the court's temporary injunction.¹⁰⁷ Servantes appealed the judgment partly on the ground of federal preemption.¹⁰⁸

The appellate court acknowledged that in *Tocher*, the Ninth Circuit had found the regulation of towing services to be preempted and that the Ninth Circuit denied that such requirements as forcing a tow truck company to accept credit cards could be included in the safety regulation exception.¹⁰⁹ The Servantes court then stated that it was not bound by a federal circuit court opinion and "[i]n the absence of a controlling United States Supreme Court decision on a federal question, [this court is] free to make an independent determination of law."¹¹⁰

Looking at the California Vehicle Code requirements for towing from private property, which was one of the underlying offenses in the city's unfair practices claim, the Servantes court disagreed with *Tocher* and found that this statute was more than "merely a consumer protection" law.¹¹¹ The court then found that the Vehicle Code provision was a safety regulation.¹¹² Quoting *Berry v. Hannigan*, the court said,

It cannot be doubted that the unexpected loss of the use of one's vehicle directly affects the safety and welfare of vehicle operators and owners. A person may be stranded hundreds of miles from home with no alternative mode of return travel and with no place to stay until the vehicle can be recovered. . . . Legislation which tends to assist members of the public from involuntarily losing the use of their vehicles once they have been removed fairly and clearly promotes the safety and welfare of the public.¹¹³

After finding that a municipality can regulate for safety under the "MCSA," the court found that the San Francisco ordinances at issue in this case were "directly related to safety concerns and fall within the safety regulation exception."¹¹⁴ The city's permit scheme controls the quality of persons providing non-consent tows, allows police to reject applicants from unsuitable persons, and ensures that the towing companies will be accountable for their drivers.¹¹⁵ The state law also helps ensure that "vehicles will be towed only for proper purposes."¹¹⁶

An important case for Texas consumers is *Whitten v. Vehicle Removal Corp.*¹¹⁷ In *Whitten*, the plaintiff's car was removed without his permission from his apartment complex parking lot while he was on a trip to California.¹¹⁸ The towing company said that it removed the car at the instruction of the apartment manager.¹¹⁹ The vehicle's inspection sticker had expired and there were signs in the parking lot warning that vehicles without valid registration or inspection stickers would be towed at the owner's expense.¹²⁰ Whitten sued the towing company for violations of Chapter 684 of the Texas Transportation Code, the Deceptive Trade Practices Act, the Texas Constitution, and for other contract and tort claims.¹²¹ Whitten sued in justice court and the towing company challenged jurisdiction based on federal preemption of the majority of Whitten's claims.¹²² The trial court granted the motion as to most of Whitten's claims.¹²³ The tort and contract claims were tried and the court granted directed verdict on some claims and a judgment notwithstanding the verdict on the remaining breach of contract claim that Whitten take nothing.¹²⁴

Whitten appealed only the trial court's ruling on federal preemption, arguing that the regulation of non-consent towing is not preempted, or alternatively, if the regulation of non-consent towing is generally preempted, Chapter 684 is excluded as a safety regulation.¹²⁵ Whitten did not appeal any of his other claims.¹²⁶ After reviewing the case law on federal preemption by the "MCSA," the appellate court said,

We have found no case, however, and the parties have cited none, which addresses preemption in the context of a claim for damages by a vehicle owner against a towing company alleging his vehicle was wrongfully towed. We nonetheless find the weight of authority compelling that all regulation of intrastate towing services is preempted by federal law unless the regulation falls within a recognized exception. . . . [W]e are not persuaded that Whitten's private right of action under chapter 684 of the transportation code falls within any exception; therefore, we conclude Whitten's claim is preempted by section 14501(c)(1).¹²⁷

Whitten argued that section 13506(b), exempting from federal jurisdiction the regulation of emergency towing, is inconsistent with section 14501(c)(1), forbidding states to regulate the price, route, or service of motor carriers.¹²⁸ But the court disagreed.

The issue before us is not whether Congress delegated this regulatory authority to federal authorities but whether Congress withheld it from the States. A plain reading of section 14501 does not condition preemption under subsection (c) on the motor carrier being subject to the jurisdiction of the Secretary or the Board.

* * *

Furthermore, section 13506 does not prohibit the Secretary and the Board from regulating intrastate towing services. Instead, it provides that any such regulation is contingent on a finding that the regulation is necessary to carry out the interstate transportation policy of the United States Government. . . . Presumably, in the event the Secretary or the Board were to determine federal regulation in this area is necessary, Congress intended that these federal authorities be able to act to carry out the goals of United States transportation policy unencumbered by the diverse regulatory schemes of state and local governments.¹²⁹

Whitten also argued that non-consensual tows do not fall within

preemption because they are not “services” because no benefit accrues to the party whose vehicle is towed.¹³⁰ The court rejected this argument saying that it is “evident that the legislation uses the term ‘services’ in the sense of work performed, or operations, rather than as a benefit performed for customers.”¹³¹

The court also rejected Whitten’s argument that Chapter 684 of the Transportation Code fell within the safety regulation exception. Chapter 684 regulates the removal of unauthorized vehicles from a parking facility or public roadway and includes requirements regarding the placement of towing signs and notice provisions.¹³² The Chapter also provides for a private cause of action when the chapter is violated.¹³³ The court made a distinction between the preemption provision, which applies to “motor carriers” and the safety regulation exception that applies only to “motor vehicles” stating that Congress chose its words carefully and meant to exempt all safety regulation pertaining to motor carriers when it used the more narrow qualifying words, “motor vehicles.”¹³⁴

Even if Chapter 684 did contain a safety component, the court said that it would still be preempted as an economic regulation relating to the routes and services of tow trucks.¹³⁵ The court’s reason for this is that the statute imposes strict liability and provides for additional damages for intentional, knowing, or reckless conduct, as well as attorney’s fees “similar to consumer protection statutes for deceptive trade practices and usury.”¹³⁶

After reviewing the case law on airline deregulation, the court said, “Specific-purpose legislation, such as consumer protection laws, is too policy-laden to escape preemption in the face of broadly worded federal preemption statutes.”¹³⁷

The court also rejected Whitten’s contract claim stating that he had failed to identify any language in the contract between the towing company and the apartment complex that would indicate an intention by the contracting parties to make Whitten a third-party beneficiary.¹³⁸ Further, the court found no evidence that the towing company breached any contract.¹³⁹

IV. ANALOGOUS AIRLINE CASES: MORALES AND AMERICAN AIRLINES

Guidance on how federal courts are likely to treat consumer protection laws in the face of preemption by the “MCSA” can be found in their interpretations of the Airline Deregulation Act (“ADA”) passed by Congress in 1978. The “ADA” expressly preempted state enforcement of any law “relating to rates, routes, or services” of any air carrier.¹⁴⁰ Nine years after the “ADA” became law, the National Association of Attorneys General (“NAAG”) adopted a set of “Air Travel Industry Enforcement Guidelines” establishing standards for the content and format of airline advertising, the issuance of “frequent flyer” miles, and how passengers giving up their seats on overbooked flights are to be compensated. The purpose of the guidelines was to explain how state laws were to be applied to airfare advertising and frequent-flyer programs.¹⁴¹ After Texas notified several airlines of its intent to sue based on the “NAAG” guidelines, Trans World and others sued to enjoin Texas from enforcing the guidelines on the ground of federal preemption.¹⁴² The district court granted the injunction and the Fifth Circuit affirmed.¹⁴³

The Supreme Court, in upholding the Fifth Circuit’s opinion (Justice Scalia writing for the majority), first noted that preemption by federal statute may be either expressed or implied and then focused on the meaning of “related to” to determine the intent of Congress.¹⁴⁴ Citing Black’s Law Dictionary, the Court determined that the ordinary meaning of “relating to” is “to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,” said the Court,

“and the words thus express a broad pre-emptive purpose.”¹⁴⁵

The Court pointed to its earlier decisions interpreting ERISA where it gave the same phrase in that statute a “broad scope” and an “expansive sweep.” The Court had found that “relating to” as used in the ERISA¹⁴⁶ statute preempted all state laws that have “a connection with or reference to” an employee benefit plan.¹⁴⁷ Because the identical phrase was used in the “ADA,” the Court concluded that it was “appropriate to adopt the same standard here: State enforcement actions having a connection with, or reference to, airline ‘rates, routes, or services’ are pre-empted under” the “ADA.”¹⁴⁸

Again citing earlier ERISA case law, the Court explained that a state law may be preempted even if it is not specifically designed to affect the preempted subject or affects it only indirectly.¹⁴⁹ Also, the “ADA’s” “relating to” preemption is not limited to inconsistent state regulation. Like the ERISA preemption provision, the “ADA” preemption displaces “all state laws that fall within its sphere, even including laws that are consistent with” its “substantive requirements.”¹⁵⁰

Having defined “relating to” in the broadest possible way and giving the “ADA” an expansive sweep, the Court then turned to the actual “NAAG” guidelines that were preempted. Scalia wrote that the “NAAG” guidelines “quite obviously” related to airline fares, including the requirement that print advertisements of fares contain “clear and conspicuous disclosure” of restrictions, such as those on time availability, refund or exchange rights, etc., and the requirement that billboard advertisements of fares state that substantial restrictions apply.¹⁵¹ Because the guidelines regulated the advertisement of airline fares, the Court concluded that the guidelines related to airline rates.¹⁵² The Court also cited *Illinois Corporate Travel v. American Airlines, Inc.* stating that “[p]rice advertising surely ‘relates to’ price.”¹⁵³

Although the Court began its opinion by defining the issue as “whether the Airline Deregulation Act . . . pre-empt[s] the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes,”¹⁵⁴ the Court never addressed whether the Texas Deceptive Trade Practices Act, which the “NAAG” guidelines were intended to apply, was itself preempted. The Court expressly preempted only the “NAAG” guidelines and not the underlying statute.

In his dissent, Justice Stevens, joined by Justice Blackmun and the Chief Justice, criticized the Court, claiming that it “disregards established canons of statutory construction, and gives the ADA pre-emption provision a construction that is neither compelled by its text nor supported by its legislative history.”¹⁵⁵ Stevens argued that laws governing false advertising of airfares do relate indirectly to the airfares themselves because determining whether advertising is misleading depends on the actual product.¹⁵⁶ However, the regulation is still designed “to affect the nature of the advertising, not the nature of the product.”¹⁵⁷ To demonstrate the logic of his argument, the Justice pointed to a New York case in which the court addressed an airline violation of state deceptive advertising laws. That court found that the state’s laws were only remotely and indirectly related to airline rates, routes, and services. The court stated that “New York does not care about how much Pan Am charges, where it flies, or what amenities it provides. . . [A]s far as New York is concerned, Pan Am is free to charge \$200 or \$2,000 for a flight from LaGuardia to London, but it cannot take out a full-page newspaper advertisement telling consumers the fare is \$200 if in fact it is \$2,000.”¹⁵⁸

Justice Stevens believed that the Court should have placed more emphasis on the presumption against preemption

of traditional state regulation and not preempt “every traditional state regulation that might have some indirect connection with, or relationship to, airline rates, routes, or services unless there is some indication that Congress intended that result.”¹⁵⁹ After briefly reciting the history of airline regulation, Stevens wrote, “the state prohibitions against deceptive practices that had coexisted with federal regulation in the airline industry for 40 years, and had coexisted with federal regulation of unfair trade practices in other areas of the economy since 1914, were not mentioned in either the ADA or its legislative history.”¹⁶⁰

Scalia criticized Stevens’ dissent stating that if Congress had intended to preempt only those state provisions that regulate airline rates, routes, and services, then Congress could have adopted the rejected Senate bill which used the phrase “determining” in place of “relating to.”¹⁶¹ However, by that same logic, had Congress intended to preempt any state law that even refers to airline rates, routes, or services, then Congress could have used the phrase “refers to.”

Another important airline case providing guidance on the preemption of consumer protection laws is *American Airlines, Inc. v. Wolens*.¹⁶² In this case, the plaintiffs were airline consumers who were unhappy about the airline’s retroactive changes to its frequent-flyer program, which devalued the credits they had already earned.¹⁶³ The plaintiffs alleged breach of contract and also sued under the Illinois Consumer Fraud and Deceptive Business Practices Act.

The Illinois Supreme Court allowed both the consumer fraud and breach-of-contract claims, reasoning that frequent-flyer programs were not an essential operation of an airline and that the “ADA” ruled out “only those State laws and regulations that specifically relate to and have more than a tangential connection with an airline’s rates, routes or services.”¹⁶⁴ After the United States Supreme Court vacated the judgment and remanded the case for further consideration in light of its recent *Morales* decision, the Illinois Court repeated its earlier judgment because it viewed the plaintiffs’ state law claims as being only tangentially or tenuously related to the airline’s rates, routes, and services.¹⁶⁵ The United States Supreme Court again granted certiorari and reversed the Illinois Court’s judgment as it applied to the consumer fraud claim but affirmed the State Court’s judgment as to the breach of contract claim.

Describing the Illinois Consumer Fraud statute as being “paradigmatic of the consumer protection legislation underpinning the NAAG guidelines,” the Supreme Court said that “the [Consumer Fraud] Act does not simply give effect to bargains offered by the airlines and accepted by airline customers.”¹⁶⁶ The Court then concluded that the plaintiffs’ claims under the Consumer Fraud Act were preempted “in light of the full text of the preemption clause, and of the ADA’s purpose to leave largely to the airlines themselves. . . the selection and design of marketing mechanisms.”¹⁶⁷ The Court did not cite any passage of the “ADA” that refers directly to “marketing mechanisms” but relied entirely on its decision in *Morales*, connecting the regulation of airline fair advertising to the regulation of airline rates themselves.¹⁶⁸

Oddly, neither the Illinois appellate court nor the Illinois Supreme Court made any reference to the “NAAG” guidelines in the *Wolens* case.¹⁶⁹ However, Justice Ginsberg seems to so closely connect the “NAAG” guidelines to the Consumer Fraud Act as to assume that if federal law preempts the one, it must necessarily preempt the other in all its possible applications.

The Court then distinguished requirements imposed by state law from remedies available through common law. Noting the importance of contracts and the references to contracts in

the Federal Aviation Act, the Court concluded that the “ADA” was not intended to preempt contract claims.¹⁷⁰

In his dissent, Justice Stevens pointed out the differences between the Illinois consumer fraud statute and the “NAAG” guidelines found to be preempted in *Morales*. He stated that the statute simply restricts companies (including airlines) from defrauding their customers and that the *Morales* did not address preemption of general state laws that prohibit fraud.¹⁷¹ Stevens referred to the extension of the “ADA’s” preemption to include general “background rules” to be “an alarming enlargement of *Morales*’ holding.”¹⁷²

Justice Stevens could see no distinction between a claim for breaching a private agreement and a claim based on fraud in the making or performance of that same agreement. He would instead characterize the Consumer Fraud Act as a codification of common-law negligence law.¹⁷³ The majority, he said, would not hold all common-law negligence rules to be preempted.¹⁷⁴ The Consumer Fraud Act is no more a state-imposed public policy than a common-law negligence rule, according to Stevens.¹⁷⁵

In her concurring opinion, in which Justice Thomas joined, Justice O’Connor concluded that both the Consumer Fraud Act claims and the plaintiff’s breach-of-contract claims were preempted by the “ADA.” But like Stevens, O’Connor could see no difference between a state law imposed by statute and one imposed by common law.¹⁷⁶

V. ARGUMENTS FOR PRESERVING CONSUMER PROTECTION LAWS

The reported cases addressing whether the “MCSA” preempts state law have thus far concerned primarily the distinction between permissible regulation of non-consent towing and impermissible regulation of consent towing, the breadth of the safety exception, and whether the safety exception allows municipalities as well as states to regulate for safety reasons. As yet, no case has declared a general consumer protection statute to be preempted by the “MCSA,” although considering the high court’s treatment of the ADA, it seems very likely that federal courts will hold consumer protection statutes to be preempted by the MCSA.

Long before consumer protection laws were passed by states, the common law on contracts recognized a claim for misrepresentation. If common-law contract claims can survive federal preemption as indicated by *American Airlines*, then to the extent that a consumer protection law mirrors the common-law claim, it too should survive preemption. If the two different claims, based on the same set of facts, would give the same result for the same reasons, then it is senseless to preempt one without preempting the other. This was part of Justice Stevens’ dissent in *American Airlines*, but has not yet been considered in an “MCSA” case. Given the right set of facts in the right court, this may still be a persuasive argument.

Another matter not yet fully analyzed by the courts concerns the distinction between consent and non-consent tows. What situation constitutes effective consent? If a driver gives prior authorization to a wrecker service to tow his vehicle, but he does not authorize the charge, has he given his consent? If the wrecker driver withholds from the vehicle owner the fact that the driver intends to charge an exceptionally high rate, then the owner could not have effectively given his consent. Arguably, the wrecker service in such a case has performed a non-consent tow and should be limited by the locally regulated rates for non-consent towing. Also, if his vehicle has broken down on a busy freeway, how dangerous does a situation have to be to say that the consumer was under duress? If he was under duress, can he

give effective consent?

As in *Hott and Servantes*, a defender of state consumer protection laws may want to argue that such laws are in essence safety regulations. Without a state enforced protection against fraud and misrepresentation, a consumer may find it extremely difficult to arrange for necessary towing services in an emergency situation. He may be more likely to attempt to tow his own vehicle from a freeway without the appropriate equipment or safety devices. This can easily create a public hazard, and the state should be allowed to take advantage of the safety exception in the “MCSA” to use its consumer protection laws in a manner so as to avoid such a problem.

The most logical defense of consumer protection laws appears in Stevens’ dissent in *Morales*. The purpose of laws like the Texas Deceptive Trade Practices Act is not to regulate the price, route, or service of a towing company, but to regulate lying. The “NAAG” guidelines required the airlines to perform certain acts and avoid certain other very specific behaviors. A more general application of the DTPA aimed simply at holding a towing company accountable for its misrepresentations may not appear to a court as a regulation of price, route, or service. As yet, no court has declared the Texas DTPA to be preempted by the “MCSA.”

*Casey Stinnett is a 2002 graduate of the University of Houston Law Center and a solo practitioner in Liberty, Texas.

1. Act of Dec. 17, 1963, Pub. L. No. 88-208, 1963 U.S.C.C.A.N. (77 Stat.) 402, 444.
2. Act of Oct. 13, 1978, Pub. L. No. 95-473, 1978 U.S.C.C.A.N. (92 Stat.) 3009, 3069.
3. 426 Bloomfield Ave. Corp. v. City of Newark, 904 F. Supp. 364, 369-71(1995).
4. 140 CONG. REC. H1830 (daily ed. Sept. 12, 1994) (statement of Rep. Rahall).
5. 140 CONG. REC. H10,351-52 (daily ed. Sept. 29, 1994) (statement of Rep. Rahall).
6. *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 541 n. 2 (11th Cir. 1998).
7. E.g., *Interstate Towing Ass’n, Inc. v. City of Cincinnati, Ohio*, 6 F.3d 1154 (6th Cir. 1993); *Giddens v. City of Shreveport*, 901 F. Supp. 1170 (W.D. La. 1995); *426 Bloomfield Ave. Corp. v. City of Newark*, 904 F. Supp. 364 (D. N.J. 1995).
8. *Giddens v. City of Shreveport*, 901 F. Supp. 1170, 1183 (W.D. La. 1995) (citing 49 U.S.C. § 11501(e) (now 14501(c)).
9. *Id.* at 374 (former 49 U.S.C.A. § 11501 is now amended as § 14501).
10. 49 U.S.C.A. § 14501(c)(2)(C).
11. *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711 (S.D. Tex. 1996).
12. *Id.* at 714.
13. *Id.*
14. *Id.*
15. *Id.* at 715.
16. *Id.* at 716.
17. *Id.* at 721.
18. *Id.* at 722.
19. *Id.* at 721.

20. *Id.*
21. *Id.*
22. *Id.* at 723 (citing H.R. Rep. No. 31-104 at 119-20 (1995)), reprinted in 1995 U.S.C.C.A.N. 793, 831-32.
23. *Harris County Wrecker*, 943 F.Supp. at 723 (citing 141 Cong. Rec. H15602 (1995)).
24. *Id.*
25. *Harris County Wrecker*, 943 F.Supp at 724.
26. *Id.* at 725.
27. *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992)
28. *Harris County Wrecker*, 943 F.Supp. at 725.
29. *Id.*
30. *Id.*
31. *Id.* at 726.
32. This point would later be overruled by *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), which would in turn be abrogated by *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424 (2002).
33. *Harris County Wrecker*, 943 F.Supp. at 728-32.
34. *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998).
35. *Id.* at 540-41.
36. *Id.* at 540.
37. *Id.* at 545.
38. *Id.* at 544.
39. *Id.* at 545.
40. *Id.* at 545 (citing 49 U.S.C. § 13102(18)). The court stated that “[s]ection 14501(c)(2)(A) excepts from the preemptive scope of § 14501(c)(1) ‘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.’ . . . The exception thus authorizes a ‘State’ to enact safety and insurance-related regulations, but is conspicuously silent regarding the authority of a municipality or any other political subdivision of a state to enact such regulations. The Act itself defines the term ‘State’ to ‘mean. . . the 50 States of the United States and the District of Columbia,’ and therefore provides no justification for reading the term ‘State’ to include its political subdivisions.”
41. *Id.* at 545-46.
42. *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 122 S.Ct. 2226 (2002).
43. *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), vacated by, 536 U.S. 936 (2002).
44. *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2nd Cir. 1999).
45. *City of Columbus*, 122 S.Ct. at 2230.
46. *Id.* at 2232.
47. *Id.* at 2233.
48. *Id.* at 2235.
49. *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2nd Cir. 1999).
50. *Id.* at 777.
51. *Id.*
52. *Id.* at 777-78.
53. *Id.* at 772.
54. *Id.* at 774.
55. *Id.*
56. *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000).
57. *Id.* at 1047.
58. *Id.* at 1049-50.
59. *Id.* at 1051.
60. *New Orleans Towing Ass’n, Inc. v. City of New Orleans*, 2000 WL 193071 at 1-2 (E.D. Lou. 2000).
61. *Id.*
62. *Id.* at 5.
63. *Id.*
64. *Id.* at 6.
65. *Id.* at 7.
66. *Id.* at 8.
67. *Id.*

68. *Northway Towing, Inc. v. City of Pasadena*, 94 F. Supp. 2d 801 (S.D. Tex. 2000).
69. *Id.* at 803.
70. *Id.*
71. *Id.* at 803-04.
72. *Id.*
73. *Stucky v. City of San Antonio*, 260 F.3d 424, 427 (5th Cir. 2001).
74. *Id.* at 434-35
75. *Id.*
76. *Id.* at 428-29.
77. *Id.* at 436.
78. *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999).
79. *Id.* at 697.
80. *Stucky*, 260 F.3d at 434.
81. *Id.* at 433 (citing *Cardinal* at 692).
82. *Stucky*, 260 F.3d at 433 (citing *Cardinal* at 693).
83. *Stucky*, 260 F.3d at 434.
84. *Id.*
85. *Id.* at 434-35.
86. *Id.* at 435-38.
87. *Id.* at 434 n. 11.
88. *Id.*
89. *Cole v. City of Dallas*, 314 F.3d 730 (5th Cir. 2002).
90. *Id.*
91. *Id.*
92. *Id.* at 735.
93. *Horn v. A.J.'s Wrecker Serv., Inc.*, 2000 WL 1184597 (Tex. App.—Dallas 2000) (not designated for publication).
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Hott v. City of San Jose*, 92 F. Supp. 2d 996 (N.D. Cal. 2000).
100. *Id.* at 998.
101. *Id.* at 998-99.
102. *Id.* at 997.
103. *Id.* at 1000.
104. *Id.* (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)).
105. *Hott*, 92 F.Supp.2d at 999-1000.
106. *Id.*
107. *People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081 (Cal. Ct. App. 2001) cert. denied, 536 U.S. 939 (2002).
108. *Id.* at 1083.
109. *Id.* at 1087.
110. *Id.* at 1084.
111. *Id.*
112. *Id.* at 1090.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 1091 (quoting *Berry v. Hannigan*, 7 Cal. App. 4th 587, 591 (1992)).
118. *Servantes*, 86 Cal. App. 4th at 1094.
119. *Id.*
120. *Id.* at 1095.
121. *Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293 (Tex. App.—Dallas 2001, pet. denied).
122. *Id.* at 297.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 297-98.
131. *Id.* at 300.
132. *Id.* at 303.
133. *Id.* at 303-4.
134. *Id.* at 304 n. 7.
135. *Id.*
136. *Id.* at 304.
137. *Id.*
138. *Id.* at 305-6.
139. *Id.* at 307.
140. *Id.*
141. *Id.*
142. *Id.* at 309.
143. *Id.* at 312.
144. *Id.*
145. 49 U.S.C. § 1305(a)(1).
146. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992).
147. *Id.* at 379-80.
148. *Id.* at 374.
149. *Id.* at 383.
150. *Id.* (citing *Black's Law Dictionary* 1158 (5th ed. 1979) (the actual reference is to the word “relate”).
151. 29 U.S.C. § 1144(a).
152. *Morales*, 504 U.S. at 383-84.
153. *Id.* at 384.
154. *Id.* at 386.
155. *Id.* at 387.
156. *Id.*
157. *Id.* at 388.
158. *Illinois Corporate Travel v. American Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989), cert. denied, 495 U.S. 919 (1990).
159. *Morales*, 504 U.S. at 378 (citation omitted).
160. *Id.* at 419 (Stevens, J., dissenting).
161. *Id.* at 420.
162. *Id.*
163. *Id.* at 420 n. 1 (quoting *New York v. Trans World Airlines, Inc.*, 728 F. Supp. 162, 176 (SDNY 1989)).
164. *Morales*, 504 U.S. at 421.
165. *Id.* at 423.
166. *Id.* at 385 n. 2.
167. *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).
168. *Id.* at 224.
169. 815 Ill. Comp. Stat. 505/2 (1992).
170. *American Airlines, Inc. v. Wolens*, 513 U.S. at 225 (citing *American Airlines, Inc. v. Wolens*, 589 N.E.2d 533, 536 (Ill. 1992)).
171. *Id.* at 226.
172. *Id.* at 227-28.
173. *Id.* at 228.
174. *Id.*
175. *Wolens v. American Airlines, Inc.*, 565 N.E.2d 258 (Ill. App. Ct. 1990); *Wolens v. American Airlines, Inc.*, 589 N.E.2d 533 (Ill. 1992).
176. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229-30 (1995).
177. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995).
178. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 236 (1995) (Stevens, J., dissenting).
179. *Id.*
180. *Id.*
181. *Id.* at 237.
182. *Id.*
183. *Id.* at 238-50.