



# Rollin' On <sup>®</sup>



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## DROPBOXES, FIEFDOMS, RECYCLING AND MORONS

Every day I'm sure you'll be driving along and notice a big dropbox behind a business establishment and you think to yourself, I wonder who transports that box and where to. This is a natural thought. Let's take a closer look at the exciting world of dropbox transportation.

The various local cities and counties, except for Portland and most of Multnomah County, regulate the transportation of these dropboxes through a franchise system, where exclusive franchises are awarded to certain haulers, many of whom are national conglomerates which in some cases still use the name of the prior owner. These companies then proceed to overcharge and underserve the businesses customers within their fiefdom. And the customers have no recourse, as there is no competition.

It gets worse. Much of the material that goes into these dropboxes is recyclable, and common sense would dictate that this material should get recycled. There are recycling facilities in the Metro area that want that stuff. However, many of these companies own their own landfills, and it's frequently in their best interests to landfill it, thus getting paid for both the haul and the dump. Getting paid twice is more fun than getting paid once.

Let's keep in mind that Oregonians, and I'm sure free-thinking nonmorons everywhere, given the choice, would rather recycle than landfill. Portland has won national recognition for its recycling accomplishments, all achieved through a competitive environment, which is obviously the American way. But the other local governmental entities deny their

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constituents that choice by requiring them to use their local hauler. They encourage the businesses to separate their discards, even though the material recovery facility (MRF) can do a better job as they have the time, space and expertise. Revenue is not an issue, since the local government can still assess a tonnage fee in lieu of a franchise fee like the City of Portland.

Enough is enough, thought a hauler client of mine. What can be done about this feudal system of playing favorites with a chosen few? As of 1995 federal law preempts state and local regulation of the transportaton of property. So a couple of years ago off we went to federal court, alleging that these archaic systems were preempted by federal law as this concerned the transportation of property. We encountered huge opposition from franchises across the state who intervened in the lawsuit. My client utilized a MRF that has a recycling rate of over 50%, the best in the region. The nonrecyclable portion could be regulated. The court agreed with us and ruled that this transportation was preempted by federal law.

The local governments, with support from several national entities, filed an appeal with the 9<sup>th</sup> Circuit Court of Appeals in San Francisco. Unfortunately for the business customers and the environment, the 9<sup>th</sup> Circuit recently reversed, saying that Congress did not intend to preempt this type of transportation.

Meanwhile, some of the local governments enacted ordinances in order to prevent my client from picking

up smaller boxes and combining them into one load before transporting them to the MRF. These new ordinances provided that only the franchise haulers could combine those loads, thus effectively denying the smaller businesses access to a competitive service. Again, this action was courtesy of our local governments, with the active support of the national companies and other franchise haulers who helped write these ordinances. We filed another lawsuit in federal court, but this time the court ruled against us, holding that preemption did not apply to these smaller boxes. We didn't like it but we did not appeal.

Meanwhile (again), these new local ordinances permitted my client to compete alongside the favored franchise haulers for the dropbox business. It is likely that these local governments will now seek to repeal their new ordinances and revert back to their feudal days. The question the business customers need to ask themselves is, am I better off having a choice of haulers and having my discards recycled, or should I instead just accept the noncompetitive service of the franchise hauler?

Maybe the 9<sup>th</sup> Circuit's reversal isn't all that bad, since federal law still **allows**, though does not **require**, local jurisdictions to permit competition. Businesses can tell their local governments to allow them to be served by the hauler of their choice. If you're a business and wish to do so and don't know who to contact, just drop me an email or fax, let me know which jurisdiction you're in and I'll get you the information. You need to act, and get your fellow businesses to act, as it is your voice that will make the difference.

### The Obligatory Disclaimer

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

### Short Bio

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 25 years and emphasizing transportation law, business law and related litigation.