



Where the Rubber Meets the Toll Road

TOLLING AND THE DEBTOR/CREDITOR RELATIONSHIP

Alexis de Tocqueville

(from *Democracy in America*, published in 1835)

If it is a question of taking a road past his property, [a man] sees at once that this small public matter has a bearing on his greatest private interests, and there is no need to point out to him the close connection between his private profit and the general interest. ... The free institutions of the United States and the political rights enjoyed there provide a thousand continual reminders to every citizen that he lives in society. ... Having no particular reason to hate others, since he is neither their slave nor their master, the American's heart easily inclines toward benevolence. At first it is of necessity that men attend to the public interest, afterward by choice.

Use of Toll Road = Service

By operating a motor vehicle on a toll road, the driver of that vehicle enjoys a service provided by the tolling entity – use of a well-maintained, less congested road that avoids the stops and starts of traffic signals or stop signs on non-toll roads. In return, the operator of the vehicle is expected to pay for that service.

Toll Road User = Debtor? To Owe or Not to Owe, that is the question

Does a debtor/creditor relationship exist between the tolling entity and the operator of a motor vehicle who uses the toll road? Why should a tolling entity care about the answer to this question?

Always a good lawyer answer – “It Depends!”

The importance of determining whether a debtor/creditor relationship exists will be more or less significant depending upon a number of factors, among them:

Does state law determine the parameters of toll road requirements?

Is the tolling entity a governmental unit or political subdivision of the State?

Is the collector of unpaid tolls a governmental unit or a third party entity (such as a law firm)?

The Fair Debt Collection Practices Act (FDCPA)

The main reason for concern if there IS a debtor/creditor relationship is the FDCPA. The FDCPA has very specific requirements about what a creditor can and cannot do in order to collect a debt. The penalties for violating the FDCPA can be quite severe, including monetary damages for physical distress, emotional distress, lost wages, statutory penalties of \$1,000.00 per violation plus attorney fees.

The Fair Debt Collection Practices Act (FDCPA)

While there is a specific exception in the FDCPA for: “*any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties,*” that protection does not extend to third party entities that are collecting unpaid tolls on behalf of the United States or any State. In addition, the FDCPA makes it very clear that it does not abrogate any existing state laws to the extent the state law offers greater consumer protection than the FDCPA. This means that while a governmental tolling entity may be in the clear as it relates to the FDCPA, a similar state law may create liability for the governmental entity.

Sovereign Immunity

Because the availability and application of the doctrine of sovereign immunity varies substantially from jurisdiction to jurisdiction, please speak with your counsel of choice about whether the doctrine of sovereign immunity is another avenue to get your governmental entity off the hook in the context of state law. Sovereign immunity, as a concept, basically means that a citizen cannot sue its government without the government's consent.

FDCPA Definition of “Debt”

The FDCPA defines "debt" as:

“any obligation or alleged obligation of a consumer to pay money arising out of a **transaction** in which the money, property, insurance, or services which are the subject of the **transaction** are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.”

“Transactions” and the FDCPA

As a general rule, the Circuit Courts in the United States have determined that in order to qualify as a “transaction” for purposes of the FDCPA, the monies owed must be related to a consensual interaction between the parties.

"the FDCPA limits its reach to those obligations to pay arising from consensual transactions where parties negotiate or contract for consumer related goods or services." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir.1997).

Toll Account does not a Debtor make

Sometimes, the answer to the debtor/creditor equation is relatively clear. For instance, if the operator of the vehicle has a contract with the tolling entity which creates a pre-paid account that is debited for the amount of the toll at or near the time the vehicle is using the toll road, the operator of the vehicle is not a debtor and the tolling entity is not a creditor because the tolling entity is deducting the tolls from an existing account funded by the debtor. There is no debt because the account has a positive balance and tolls are paid as the operator uses the toll road. This example may be likened to a checking account with automatic debits authorized by the account owner.



“You see, what had happened was...”

But what happens if the vehicle operator never had a toll account or the operator's account is not funded properly? The reasons vary (e.g. expired credit card, credit card rejected by the issuing bank, non-sufficient funds in an ETF account), but the results are the same – the tolls are no longer deducted from the pre-paid account because there are no funds available in the account. In order to determine whether or not a debtor/creditor relationship exists after a pre-paid account is drained, it is necessary to analyze the relationship that then exists between the operator and the tolling entity.

The check is in the mail...

If the tolling entity has a “pay-by-mail” or “pay-by-plate” type of tolling model (a statement is mailed to the registered owner of the vehicle when a toll is assessed and the owner does not have a pre-paid account), then arguably a debtor/creditor relationship has been established. The dealings between the parties make it clear that the tolling entity finds it acceptable for the user of the toll road to pay the required toll at some future date. It is important to note that this scenario may very well create a consensual transaction – the toll road consents to the future payment of tolls and the vehicle operator consents to be billed for the tolls.

“I will gladly pay you Tuesday for a toll today!”



This type of tolling model would be similar to the manner in which general stores operated in the frontier days of the United States – a known local resident could come into the general store and purchase supplies on credit. The general store owner would mark the purchases on a ledger, to be paid at a later time (usually when the crops came in, the livestock was sold or the gold was discovered!) The tolling entity may be compared to that general store owner, holding IOUs from operators on the tollway who are not otherwise paying their tolls.

“Sign, sign, everywhere a sign”

Depending upon the signage used by the tolling entity, drivers on the toll road are notified of the “pay-by-mail” or “pay-by-plate” option through signs clearly visible on the toll road and consent to be billed for the tolls incurred is implied by the operator’s continued use of the toll road.



Implied Consent

Legally speaking, this type of tolling model may be called a written contract with implied consent. There is a written contract (the signs that say you may pay by mail) and consent to the written contract is implied from the action of the driver by using the tollway. By choosing to use the toll road, the driver is giving an implied consent to abide by the terms of the contract (i.e. to pay for the tolls when the bill arrives in the mail).

Ignorance of the law is no excuse



NO BREAKING THE LAW

IT IS AGAINST THE LAW
TO BREAK THE LAW
IN THESE PREMISES

[tattooedchurch.com](http://www.tattooedchurch.com)

An example of implied consent is a person's choice to live in a particular country. The new citizen does not sign a piece of paper specifically stating that the person will conform to the laws of that country, but by continuing to live in that country, the new citizen is giving an implied consent that the laws will be followed, even if those laws might seem unusual (e.g. Vicks inhalers are forbidden in Japan, feeding the pigeons is illegal in San Francisco, drivers in France are required by law to have a portable breathalyzer in the vehicle, going without pants is illegal in Greece, wearing your bathing suit anywhere except the beach is illegal in Barcelona).

Quasi-Contract

If a judge should determine that roadway signs are not sufficient to form an actual contract, all may not be lost! Depending upon the laws in your particular jurisdiction, a judge may find that no actual contract exists but, based on the conduct of the parties, the relationship between them and that the fact that the operator of the vehicle may be unjustly enriched without intervention from a court, the court may determine that the circumstances create a quasi-contract.

Quasi what now?

Let's say you are Bob the Builder and someone has asked you to build a house on their beautiful lake lot. You proceed to build a fabulous structure but then find out that the person who hired you did not actually own the lot where you built the house. Will the actual owner have to pay you for your services? Yes, if Bob can prove that the actual owner knew that the house was being built mistakenly, Bob the Builder would be able to recover even though he did not have a contract with the actual owner. The court should make a finding that a quasi-contract existed under these facts.

Non-Consensual Obligations ≠ Transactions

If the tolling entity does not have a “pay-by-mail” or “pay by plate” option for users of the toll road, the tolling entity expects payment for the use of the toll road at the time the vehicle is operated on the tollway. In other words, the tolling entity specifically does NOT consent to the use of the toll road without contemporaneous payment of the toll. If the consequences for failure to pay a required toll at the time of use are established by State law, then a “transaction” presumably has not occurred for purposes of the FDCPA and a debtor/creditor relationship has arguably not been created.