

## cyberlaw: the brave new e-world

By Anne F. Downey



### E-ZPass: Litigation and Legislation

In my last column, we looked at the basics of the E-ZPass system. This month, we will discuss litigation and legislation related directly or indirectly to E-ZPass.

After the Grand Island cashless tolling system rolled out in March, complaints began to pile up from frustrated drivers who received large bills in the mail. The amount of the bills far exceeded the amount of the toll because of penalties. For example, one Buffalo driver who attends church in Niagara Falls every Sunday received a \$1,300 bill, of which \$47 constituted tolls and the rest was fines. The problem arose because she had not received the original bill, which was sent to an old address (drivers are supposed to update their address with the DMV within 10 days of moving).

Under the cashless tolling system, a first bill is mailed within 30-45 days after incurring the toll. When the bill is not paid, a second notice with a \$5 late fee goes out after 60 days. If the bill remains unpaid approximately 90-100 days, a \$50 fine is assessed for each toll violation. State Senator Tim Kennedy (D-63rd) has drafted legislation that would provide a six-month amnesty program for Grand Island toll system users, to allow forgiveness of late fees and other charges as drivers get used to the new system. He also urges the Thruway Authority to adopt its own amnesty policy. In early 2018, facing a wave of complaints, the Thruway Authority offered a five-week amnesty program for Tolls By Mail violations at the Tappan Zee Bridge.

In a September 5, 2018 op-ed piece in *The Buffalo News*, the executive director of the Thruway Authority urged motorists to avoid cashless tolling problems by using E-ZPass. However, signing up for E-ZPass may not solve all problems. In a case pending in the U.S. District Court for the Southern District of New York, *Farina v. Metropolitan Transportation Authority*, 1:18-cv-01433 (filed 2/16/18), Jason Farina alleges that until recently, he had never had any significant problems with his E-ZPass tag or account. However, beginning on November 25, 2017, he received notices from the MTA indicating that he allegedly failed to pay approximately 17 tolls in October, and assessing a \$100 fee per unpaid toll. In most cases, the underlying toll was an \$8.50 charge for crossing the Throgs Neck Bridge. Farina contacted the MTA in early December to obtain an explanation for the bill. He was told to pay the tolls but not the \$100 fees, and to send a letter disputing the fees. Farina did so but never received a response from the MTA, and the fees remained on his account. In late January, Farina received a letter from a debt collection company, and he paid \$530 to Transworld for fear his credit rating would be ruined.

The *Farina* complaint alleges that “in many cases, defendants’ equipment registers a violation even where a valid, fully funded EZ Pass account is in existence. In other words, defendants assess fines and penalties for purported toll violations that were not violations at all simply because their electronic toll reading equipment (called a ‘gantry’) fails to register a valid EZ Pass. Because [the cashless tolling] equipment that scans EZ Pass does not confirm that an EZ Pass is registered (like a toll booth would), a user receives no immediate notification that his EZ Pass has not been read. A user may not find out for months (or even more than a year), when the defendants finally send a letter, notice or summons. If defendants’ EZ Pass scanning equipment does not read an EZ Pass, or if an EZ Pass account is not adequately funded due to an expired or cancelled credit card, defendants immediately begin to assess fines and penalties.”

The *Farina* lawsuit, which seeks certification as a class action, alleges violation of the Eighth Amendment protection against excessive fines, violation of due process under the federal and state constitution, breach of contract, unjust enrichment, violation of the Fair Debt Collection Practices Act, and violation of the New York Consumer Protection Act, among other causes of action. Defendants have moved to dismiss.

The company that handles the back-office administration of E-ZPass is Conduent, a New Jersey entity spun off from Xerox. The NY Thruway Authority has a \$72 million contract with Conduent. From April 2015 to January 2017, the Authority withheld from Conduent nearly \$500,000 due to customer service issues. The current contract is set to expire in October 2019, but State Senator David Carlucci (D-Clarkstown) and State Assemblymember Tom Abinanti (D-Mount Pleasant) want the contract to be canceled immediately. Carlucci has obtained a redacted copy of the Thruway Authority contract with Conduent by means of a FOIL request. Among many other provisions, the performance standards section was blacked out.

During the 2017 legislative session, Carlucci and Abinanti introduced legislation called the Toll Payer Protection Act

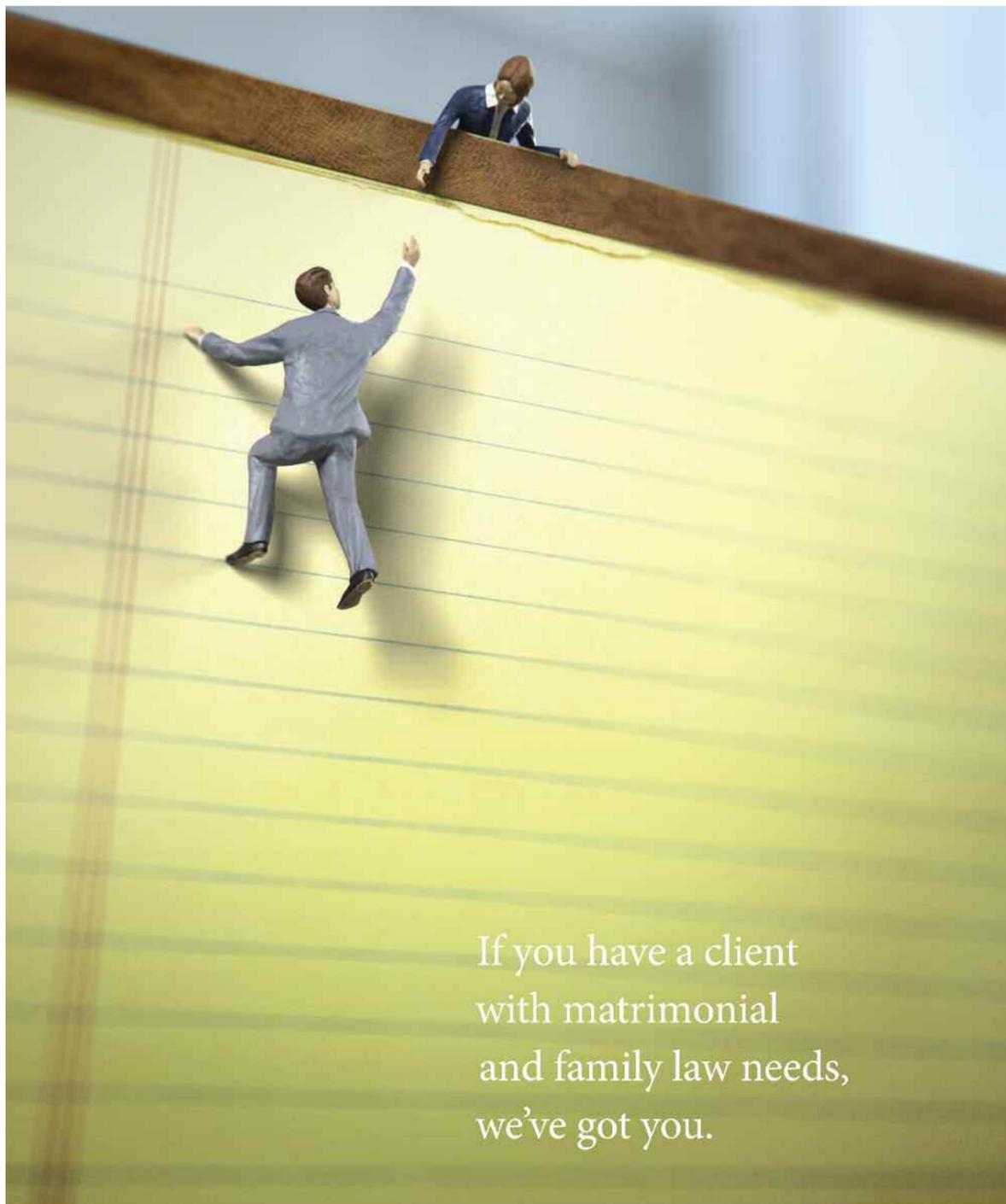
(A9805A/S8946). The bill would amend the General Business Law to establish a New York toll payer bill of rights and end the practice of suspending a driver’s vehicle registration for unpaid tolls. It would also allow drivers to opt into receiving notice by email or text within 72 hours that a cashless toll has been imposed, to which entity payment must be made, and the deadline for payment. The bill would also establish procedures for disputing a toll. The bill passed unanimously in the Assembly, the Senate approved it on June 20, and it awaits signature by Gov. Cuomo, who has until December 31 to sign the bill. In late August, State Senator Chris Jacobs (R-60th) called upon the leadership of the Assembly to forward the bill to the Governor for signature. (Jacobs also continues to push for the elimination of the Grand Island tolls.)

Complaints regarding Conduent’s handling of tolls have arisen in numerous states. In July, two U.S. Senators, Bill Nelson (D-Florida) and Gary Peters (D-Michigan), sent a letter to the Federal Trade Commission requesting an investigation of Conduent’s handling of cashless tolls. Conduent’s CEO, Ashok Vemuri, has admitted that the company experienced frequent outages in his initial months at Conduent and that issues can arise in the implementation phase of the startup of a new tolling system, but stresses that the company has the capability to resolve the issues and is dedicated to meeting its contractual commitments.

Meanwhile, in New Jersey, a lawsuit and administrative proceeding are pending on behalf of drivers charged a \$50 administrative fee in a first invoice mailed to them by the New Jersey Turnpike Authority. The *Reynoso v. NJ Turnpike Authority* case pending in the U.S. District Court for New Jersey, 2:17-cv-12356-JMV-JBC (filed 12/1/17), is stayed pending the outcome of a related administrative proceeding, *Long v. NJ Turnpike Authority*, A-001557017T4 (NJ Super. App. Div.), that challenges the legality of the \$50 fee in light of a state statute permitting only reasonable fees.

Next month, we will look at privacy issues related to E-ZPass. [B]

*“The Farina complaint alleges that in many cases, defendants’ equipment registers a violation even where a valid, fully funded EZ Pass account is in existence.”*



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