



Financial Services & Products ADVISORY ■

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What Counts as an Attempt to Contact a Debtor via Telephone to Collect a Consumer Debt in Massachusetts?

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Original creditors, third-party debt collection agencies, and buyers of delinquent consumer debt who hire third parties to collect consumer debt on their behalf, take note. According to the Supreme Judicial Court, the Massachusetts restriction on initiating more than two communications in any seven-day period applies to those who use automatic dialing devices or who voluntarily decide not to leave voicemail messages.

Massachusetts Attorney General (MAG) [Regulation 940 CMR 7.04\(1\)\(f\)](#) prohibits creditors from “[i]nitiating a communication with any debtor via telephone, either in person or via text messaging or recorded audio message, in excess of two such communications in each seven-day period.” Following the amendments that adopted this requirement in 2012, the MAG released “[Guidance with Respect to Debt Collection Regulations](#)” in 2013. The MAG’s guidance carved out an exemption under the revised regulation for unsuccessful attempts by a creditor to reach a debtor via telephone when the creditor is truly unable to reach the debtor or to leave a message for the debtor. Most recently, in [Debra Armata v. Target Corporation & another](#), the Massachusetts Supreme Judicial Court construed the MAG’s guidance in examining whether the communication requirement in 940 CMR 7.04(1)(f) applies to creditors who use automatic dialing devices or voluntarily decide not to leave voicemail messages.

In this case, Target conceded that it telephoned Debra Armata more than twice in a seven-day period to collect a debt, but argued that it did not “initiate” any communications within the meaning of the regulation because it telephoned Armata with an automatic dialing device, which only plays the prerecorded message after the call is answered and no live Target representative is available. Target also contend[ed] that the majority of telephone calls, which Armata did not answer, did not constitute “communications” within the meaning of the regulation because they did not convey any information, given that Target did not leave voicemail messages.”

In rejecting Target’s arguments, the court explained that “[t]he Attorney General’s guidance carves out an exemption under the revised regulation, namely, that ‘unsuccessful attempts by a creditor to reach a debtor via telephone may not constitute initiation of communication if the creditor is *truly unable to reach the debtor or to leave a message for the debtor.*” Stated differently, attempts by a creditor to reach a debtor do not count as the initiation of a communication if the creditor is able to reach the debtor or leave a voicemail message. In so holding, the court explained that the purpose of the MAG’s guidance is to prevent creditors from engaging in practices that would “harass, oppress, or abuse a debtor.” It would not further the purpose of the regulation to penalize creditors such as “when debtors do not answer *and* their voicemail or answering system is not set up, their mailbox is full, or their telephones have been disconnected.”

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Had Target not left a voicemail, would the calls have counted as attempts? The answer is yes. The MAG's regulations define "communication" as "conveying information directly or *indirectly* to any person through any medium." In this case, the court found it "unimportant" that "Target did not successfully directly convey information to Armata . . . because Target nevertheless *initiated* the process of conveying information to Armata via telephone." The court further stated that "[e]ven without the use of voicemail messages, a creditor can convey indirectly that it seeks payment from a debtor by calling and hanging up repeatedly, as underscored by the regulation's antiharassment purpose."

Those collecting debts in Massachusetts should take heed of this decision, as violations of the MAG's debt collection regulations can carry significant penalties. Specifically, the MAG may bring an action against a person to temporarily restrain or enjoin conduct that violates the MAG's regulations. A court may impose civil penalties of up to \$5,000 for each knowing violation and may also require the person to pay the reasonable costs of the investigation and attorneys' fees. A private right of action also exists. Damages may include double or treble damages and attorneys' fees and costs. Finally, the Act permits a class action to be brought when an unfair or deceptive act or practice causes similar injury to a class of persons similarly situated.

The risk of a potential violation is exacerbated by the fact that the MAG's regulations go beyond the federal Fair Debt Collection Practices Act in several respects. For example, as indicated above, the regulations impose more onerous restrictions on communications in connection with collection activities and require that a debtor be given notice of the debtor's right to request that collection-related calls to the debtor's place of employment be ceased, among other restrictions.

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