

Advisory | Class Action Litigation



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The Massachusetts Debt Collection Regulations – Latest Consumer Class Action Litigation Trend

The Lawsuits and Litigation Implications

Recently, Massachusetts courts have seen an increase in putative class action complaints asserting violations of the Massachusetts Debt Collection Regulations, 940 C.M.R. § 7.00 *et seq.* (**MDCR**). Although there is no private right of action under the MDCR, the Massachusetts Consumer Protection Act (General Laws Chapter 93A) provides the vehicle for these lawsuits. In addition, the Massachusetts Office of the Attorney General may bring an enforcement action under Chapter 93A for MDCR violations.

The new lawsuits rely on *Armata v. Target Corporation*, 480 Mass. 14 (2018)—a Massachusetts Supreme Judicial Court (**SJC**) decision—for the proposition that the frequency-of-calls provision of the MDCR applies to efforts to contact a debtor using a predictive dialer even when the debtor does not answer the call and the creditor decides not to leave a voicemail message. Rather, the SJC concluded that a creditor violates the MDCR by *initiating* communications more than twice within a seven-day period if the creditor is able to reach the debtor or is able to leave a voicemail message (whether the creditor leaves a message or not). A creditor does not violate the MDCR only if the creditor is “truly unable to reach a debtor or to leave a message for the debtor[.]” e.g., if the debtor’s voicemail was not set up, was full, or the phone had been disconnected. As the creditor in *Armata* did not meet that exact standard, the SJC instructed the trial court to enter summary judgment on “liability” in favor of the debtor and remanded the case for further proceedings on damages, costs, and injunctive relief.

The *Armata* decision unfortunately creates uncertainty under Chapter 93A as it seems to revitalize the concept of “per se” liability warranting damages under Chapter 93A, which the SJC expressly abandoned in *Tyler v. Michaels Stores, Inc.*, 464 Mass. 493 (2013). For example, even if a creditor engages in an unfair or deceptive act or practice, a debtor is only entitled to damages in a consumer-based claim under Chapter 93A, Section 9 by alleging an appropriate Chapter 93A “injury” was caused by the unfair or deceptive act or practice and by sending a thirty-day demand letter before initiating litigation (except in certain circumstances). Therefore, violation of the MDCR should not, in-and-of-itself, establish liability for damages under Chapter 93A. Concomitantly, the decision also highlights what may be a difference of opinion between federal and state court judges, as noted in 2019 by the First Circuit Court of Appeals in *LimoLiner, Inc. v. Dattco, Inc.* Specifically, in *LimoLiner, Inc.*, the First Circuit explained:

The Magistrate Judge relied on *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 775 F.3d 109 (1st Cir. 2014), and on *Sharp v. Hylas Yachts, LLC*, 872 F.3d 31 (1st Cir. 2017), to reject LimoLiner’s claim that because Dattco had violated the Attorney General’s motor vehicle regulations, it was per se liable under Chapter 93A. *LimoLiner*, 2017 WL 6947783, at *8. LimoLiner argues that this court’s precedents on per se Chapter 93A liability go beyond any Massachusetts appellate court decision. We do not address whether there is any tension between our decisions, on the one hand, and the SJC’s decisions, including *Armata v. Target Corporation*, 480 Mass. 14, 99 N.E.3d 788 (2018), on the other. And we note that LimoLiner has never suggested that we certify the issue of per se liability for violations of the Attorney General’s motor vehicle regulations to the SJC.

Furthermore, although the recently filed complaints allege “actual damages” and “injury” in the form of emotional distress, fear, embarrassment, and invasion of privacy, they do not provide additional facts to demonstrate that the acts leading up to the alleged violation were themselves unfair or deceptive, proof of which may be required by the SJC’s 2013 decision in *Klaimont v. Gainsboro Restr., Inc.*, 465 Mass. 165 (2013). In *Klaimont*, the SJC explained that a specific Attorney General’s regulation was subject to the confines of Chapter 93A, and violation of the regulation alone would violate Chapter 93A “only if the conduct leading to the violation is both unfair or deceptive and occurs in trade or commerce.” *Armata*, however, did not address the *Klaimont* standard to the extent it should apply.

Although each new case must be assessed on its merits, Chapter 93A-related decisions from the District of Massachusetts and the First Circuit over the past few years arguably have narrowed the scope of Chapter 93A. Whether such narrowing will apply to alleged violations of the MDCR in federal court or how state and federal courts will reconcile *Armata*, *Tyler*, and *Klaimont* remains to be seen.

In addition to the frequency-of-calls provision, the MDCR sets forth a list of acts or practices deemed by the Attorney General to be unfair or deceptive under Chapter 93A. Violations of these other provisions, as summarized below, could also trigger putative class action litigation.

The MDCR

A. Scope. The MDCR declares certain acts “unfair or deceptive” under Chapter 93A that arise out of five categories: (1) Contact with Debtors; (2) Contact with Persons Residing in the Household of a Debtor; (3) Contact with Other Persons Regarding a Debt; (4) General Unfair or Deceptive Acts or Practices; and (5) Validation of Debt. The MDCR applies to acts or practices for the collection of debts from persons within Massachusetts only and is preempted by federal law regarding debt collection to the extent federal law mandates actions or procedures prohibited by the MDCR.¹ Also, the MDCR will be interpreted

¹ There is no known, reported case law finding that any aspect of the MDCR is preempted by federal law.

consistently with the federal Fair Debt Collection Practices Act with respect to language in the MDCR that is substantively identical to the federal law.

B. Unfair or Deceptive Acts Involving Contact with a Debtor. A creditor engages in unfair or deceptive acts or practices when contacting a debtor by:

- Threatening to sell or assign to another the obligation of a debtor and representing or implying that the result of such sale or assignment would be that a debtor would lose any defense to the claim or would be subjected to harsh, vindictive or abusive collection attempts;
- Threatening that nonpayment of a debt will result in (i) arrest or imprisonment of any debtor, (ii) seizure, garnishment, attachment, or sale of any property or wages of any person or the taking of other action requiring judicial order without informing the debtor that there must be in effect a judicial order permitting such action before it can be taken, or unless such action is lawful and the creditor intends to take such action, or (iii) any action that cannot legally be taken or that is not intended to be taken;
- Using profane or obscene language;
- Communicating by telephone without disclosing the name of the business or company of the creditor and without disclosing the first and last name of the individual making such communication, or a first name and a personal identifier for such individual such as a code or alias, provided however, that any such individual utilizing a personal identifier shall only use one such personal identifier at all times and provided that a mechanism is established by the creditor to identify the person using such personal identifier;
- Causing any debtor to incur expenses in the form of long distance or collect telephone calls, text messaging, download fees, data usage fees, or other similar charges, except the creditor may place non-collect telephone calls to the debtor's place of residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number, subject to the limitations set forth in next bullet point;
- Initiating 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 to either the debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number and two such communications in each 30-day period other than at a debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number, for each debt, provided that a creditor may treat any billing address of the debtor as the debtor's place of residence, and provided further that a creditor shall not be deemed to have initiated a communication with a debtor if the communication by the creditor is in response to a request made by the debtor for said communication;
- Placing telephone calls at times known to be times other than the normal waking hours of a debtor, or if normal waking hours are not known, at any time other than between 8:00 a.m. and 9:00 p.m. EST;
- Placing any telephone calls to the debtor's place of employment if the debtor has made a written or oral request that such telephone calls not be made at the place of employment, provided that any oral request shall be valid for only 10 days unless the debtor provides written confirmation postmarked or delivered within seven days of such request. A debtor may at any time terminate such a request by written communication to the creditor;
- Failing to send the debtor a "Notice of Important Rights" (as provided in the MDCR) in writing within 30 days after the first communication to a debtor at his or her place of employment regarding any debt, provided that a copy of the notice shall be sent every six months thereafter so long as collection

activity by the creditor on the debt continues and the debtor has not made a written request as described in the prior bullet point;

- Visiting the household of a debtor at times other than the normal waking hours of such debtor, or if normal waking hours are not known, at any time other than between 8:00 a.m. and 9:00 p.m. EST, provided however that in no event shall such visits, initiated by the creditor, exceed one in any 30-day period for each debt, excluding visits where no person is contacted in the household, unless a debtor consents in writing to more frequent visits, provided further that at all times the creditor must remain outside the household unless expressly invited inside by such debtor; and provided further that visits to the household of a debtor that are solely for the purpose of repossessing any collateral or property of the creditor (including but not limited to credit cards, drafts, notes, or the like), are not limited herein;
- Visiting the place of employment of a debtor, unless requested by the debtor, excluding visits that are solely for repossessing any collateral or property of the creditor;
- Confronting or communicating in person with a debtor regarding the collection of a debt in a public place, excluding courthouses, the creditor's place of business, other places agreed to by a debtor, offices of an attorney for the creditor, or places where the conversation between the creditor and a debtor cannot be reasonably overheard by any other person not authorized by the debtor; or
- Stating that the creditor will take any action, including legal action, unless an additional payment or a new agreement to pay has occurred within the stated time period, which in fact is not taken or attempted on such debtor's account. The time period in connection with such statement shall be presumed to expire 14 days from the date the statement is made, unless otherwise indicated by the creditor.²

C. Unfair or Deceptive Acts Involving Contact with Persons Residing in the Household of a Debtor. A creditor engages in unfair or deceptive acts or practices when contacting a person residing in the debtor's household³ by:

- Implying the fact of a debt, orally or in writing, to persons who reside in the household of a debtor, other than the debtor; or
- Contacting or threatening to contact persons who reside in the household of a debtor, other than the debtor, in any of the following ways: (i) using profane or obscene language; (ii) placing telephone calls, disclosing the name of the business, or company of the creditor, unless the recipient expressly requests disclosure of the business or company name; (iii) causing expense to any such person in the form of collect or long distance telephone calls, text messaging, download fees, data usage fees or other similar charges; (iv) engaging any such person in non-identifying communication via telephone with such frequency as to be unreasonable or to constitute harassment to such person under the circumstances, and engaging any person in communications via telephone, initiated by the creditor, in excess of two calls in each seven-day period at a debtor's residence and two calls in each 30-day period other than at a debtor's residence, for each debt; (v) placing telephone calls at times known to be times other than the normal waking hours of the person called, or if normal waking hours are not known, at any time other than between 8:00 a.m. and 9:00 p.m. EST; (vi) visiting the place of employment of any such person, unless requested by such person; (vii) confronting or communicating in person with any such person regarding the collection of a debt in a public place, excluding courthouses, the creditor's place of business, other places agreed to by the person, offices of the person's attorney or of the attorney for

² Certain requirements do not apply to telephone, gas and electric utility companies regulated by General Laws Chapter 164 and the Massachusetts Department of Public Utilities, or the Massachusetts Department of Telecommunications and Cable.

³ A creditor may assume that all contacts directed to the debtor's household are received either by the debtor or persons residing in the household of the debtor unless the creditor knows or should know information to the contrary.

the creditor or debtor, or places where the conversation between the creditor and such person cannot reasonably be overheard by anyone not authorized by such person; or (viii) using language on envelopes or on any other printed or written materials, except materials enclosed in sealed envelopes, indicating or implying that the communication relates to the collection of a debt, which in the normal course of business may be received or examined by any such person residing in the household of a debtor.

D. Unfair or Deceptive Acts Involving Contact with Other Persons Regarding a Debtor. A creditor engages in unfair or deceptive acts or practices when contacting a person not covered within the provisions above by contacting or threatening to contact persons in connection with a debt in any of the following ways: (i) implying the fact of the debt to any such person; (ii) using language on envelopes or any other printed or written materials, except materials enclosed in sealed envelopes, indicating or implying that the contact relates to the collection of a debt, which in the normal course of business may be received or examined by persons other than the debtor; or (iii) causing expense to any person in the form of collect or long distance telephone calls, text messaging, download fees, data usage fees or other similar charges.⁴

E. General Unfair or Deceptive Practices. A creditor engages in unfair or deceptive acts or practices in general by:

- Falsely representing (i) the creditor has information in his or her possession or something of value for the debtor, (ii) the character, extent or amount of the debt, or as to its status in any legal proceeding, (iii) a creditor is vouched for, bonded by, affiliated with, or is an instrumentality, agency, or official of the state, federal or local government, or (iv) a creditor is an attorney or any other officer of the court;
- Using, distributing, or selling any written communication that simulates, or that is falsely represented to be, or that otherwise would reasonably create a false impression that it was, a document authorized, issued, or approved by a court, a government official, or other governmental authority;
- Representing that an existing obligation of a debtor may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges, if in fact such fees or charges may not legally be added to the existing obligation;
- Soliciting or obtaining any written statement or acknowledgement in any form containing an affirmation of any obligation by a debtor who has been adjudicated bankrupt, without clearly and conspicuously disclosing the nature and consequences of such affirmation;
- Using a false, deceptive, or misleading representation, communication, or means in connection with the collection of any debt or to obtain information concerning a debtor;
- Using a false or misleading representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the debtor to (i) lose any claim or defense to payment of the debt or (ii) become subject to any practice prohibited by the MDCR;
- Falsely representing or implying in order to disgrace the debtor that the debtor committed any crime or other conduct;
- Communicating or threatening to communicate to any person credit information that is known or should be known to be false including, without limitation, the failure to communicate that a disputed debt is disputed;

⁴ The MDCR describes various contacts with these other persons that are not unlawful and that should be reviewed in connection with debt collection activities.

- Falsely representing or implying (i) documents are legal processes, (ii) documents are not legal processes or do not require action by the debtor, or (iii) a creditor operates or is employed by a consumer reporting agency;
- Using any business, company, or organization name other than the true name of the creditor's business, company or organization;
- Collecting any amount (including interest, fees, charges or expenses incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law;
- Requesting or demanding from a debtor a post-dated check, draft, order for withdrawal, or other similar instrument or method in payment for the debt or any portion thereof, or for a creditor to negotiate such instrument before the due date of the instrument;
- Taking or threatening to take any non-judicial action to effect dispossession or disablement of property if (i) there is no present right to possession of the property claimed as collateral through a court order or an enforceable security interest, (ii) there is no present intention to take possession of the property, (iii) the creditor knows or has reason to know that demands for payment and/or legal notices were not directed to the debtor's current address, or (iv) the property is exempt from seizure on execution because its value does not exceed the value for exemption set forth in General Laws Chapter 235, Section 34, or the property is otherwise exempt by law from such dispossession or disablement;⁵
- Taking possession of or selling upon execution property that is exempt from seizure on execution because its value does not exceed the value for exemption set forth in General Laws Chapter 235, Section 34, or the property is otherwise exempt by law from such dispossession or disablement;⁶
- Communicating with a debtor regarding a debt by postcard;
- Reporting to a consumer reporting agency on transactions or experiences with a debtor in a name other than that of the creditor;
- Failing to disclose the telephone number and office hours of the creditor or his agents on all written communications to the debtor;
- Requesting any information about the debtor or the debtor's accounts or assets other than information the creditor, in good faith, believes will assist in the collection of the debt owed to the creditor; or
- Collecting or attempting to collect from any person payment of any debt that the creditor knows, or has reason to know based on a good faith determination, is a time-barred debt, or seeking or obtaining from any person an admission, affirmation, acknowledgement of a new promise to pay, or any waiver of legal rights or defenses with regard to any debt that the creditor knows or has reason to know is a time-barred debt, unless the creditor discloses that the debt may be unenforceable through a lawsuit because the time for filing suit may have expired, and that the debtor is not required by law to sign any admission, affirmation, or acknowledgement of, or new promise to pay the debt, or to make any payment on the debt, or to waive any rights with regard to the effect of the running of the applicable statute of limitations.⁷

⁵ This does not apply to first mortgage foreclosures properly conducted in accordance with Massachusetts law.

⁶ See *n. 5*.

⁷ The MDCR provides specific disclosure language to meet this notice provision and provides certain requirements for written and oral notices.

F. Debt Validation. A creditor engages in unfair or deceptive acts or practices by failing to provide to a debtor the following within five business days after the initial communication with the debtor in connection with collection of debt, unless the following information is contained in the initial communication or the debtor has paid the debt: (i) the amount of the debt; (ii) the name of the creditor to whom the debt is owed; (iii) a statement that unless the debtor, within 30 days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the creditor; and (iv) a statement that if the debtor notifies the creditor in writing within 30 days after receipt of this notice that the debt, or any portion thereof is disputed, the creditor will obtain verification of the debt and provide the debtor the additional materials described below.

If the debtor notifies the creditor in writing within the 30-day period above that the debt, or any portion thereof, is disputed, the creditor shall cease collection of the debt, or any disputed portion thereof, until the creditor verifies the debt and provides the debtor, by first class mail, the following materials: (i) all documents, including electronic records or images, that bear the signature of the debtor and that concern the debt being collected; (ii) a ledger, account card, account statement copy, or similar record, whether paper or electronic, which reflects the date and amount of payments, credits, balances, and charges concerning the debt, including but not limited to interest, fees, charges, or expenses incidental to the principal obligation that the creditor is expressly authorized to collect by the agreement creating the debt or permitted to collect by law; (iii) the name and address of the original creditor, if different from the collecting creditor; and (iv) a copy of any judgment against the debtor. The creditor must provide these materials that are in the possession, custody, or control of the creditor. If the creditor does not possess, have custody of, or control the materials, the creditor shall cease collection of the debt until the creditor has made reasonable efforts to obtain the necessary information and provide this information to the debtor.

Conclusion

How state and federal courts will address the MDCR and deal with the above-referenced issues will be determined through these and perhaps other new putative class action filings. In the interim, companies engaged in debt collection should review their policies and procedures for collecting debts from Massachusetts residents to ensure compliance with the MDCR. Any questions about the propriety of your policies or procedures should be brought to the attention of your Greenberg Traurig attorney to discuss strategies to minimize potential liability.

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