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COVID-19 Debt Collection in Massachusetts: A Story in Three Parts

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We are living in and through unprecedented times. The coronavirus pandemic sweeping across the globe has had a number of crippling effects on the nation - pushing its healthcare system to the brink, driving many out of the workforce, and dashing what was just a few short months ago a booming economy. And, as the saying goes, unprecedented times call for unprecedented measures.

To address the staggering job losses in Massachusetts, in late March, the commonwealth's attorney general issued emergency regulations to provide residents with relief from certain collection-related activities.

Massachusetts has two debt collection regulatory schemes. One (under the administrative authority of the Division of Banks) requires the licensure and regulates the conduct of third-party debt collectors, and the other (issued by the attorney general) regulates the conduct (but does not require the licensure) of creditors collecting their own debts.

The emergency regulations, effective immediately upon their issuance, bridge these two schemes. Some of the limitations found in the emergency regulations apply specifically to "debt collectors" (defined in a manner similar, but not identical, to how that term is defined in the Division of Banks' third-party debt collector regulations), while others also apply to "creditors."

The emergency regulations expressly prohibit certain actions undertaken by both creditors and debt collectors, including:

- Initiating or filing any new collection lawsuit or threatening to do so;
- Initiating or acting on any legal or equitable remedy for the garnishment, seizure, attachment, or withholding of wages, earnings, property, or funds or threatening to do so;
- Initiating, ***threatening to initiate***, or acting upon any legal or equitable remedy for the repossession of a vehicle;
- Visiting or threatening to visit the home or place of employment of a debtor; and/or

- Confronting or communicating in person with any debtor in a public place regarding a debt.

The emphasis on "threatening to initiate" repossession is not found in the emergency regulations. However, I have added it here as a bookmark to be returned to later.

The emergency regulations also make it an unfair and/or deceptive act or practice for a debt collector to initiate any live or prerecorded communication via telephone, except if the debt collector is responding to a request from the debtor to be called or if the sole purpose of the call is to inform the debtor of a rescheduled court appearance or to discuss a mutually convenient date for a rescheduled court appearance.

There are limitations on these prohibitions. For one, the prohibitions do not apply to mortgage debt. Second, the emergency regulations only apply to the collection of consumer-purpose debt. Finally, the emergency regulations sunset on the earlier of 90 days from the effective date of the regulations (which would be in late June) or 30 days after the termination of the current pandemic state of emergency.

Because the emergency regulations were issued quickly and without the benefit of public comment, they left many questions unanswered. The attorney general rectified this problem roughly a week after the passage of the emergency regulations by issuing a Frequently Asked Questions document. For auto finance creditors, there is a relatively important clarification lurking in these FAQs.

And it is here that I return to the notion (emphasized earlier) that not only is the repossession of a motor vehicle prohibited while the emergency regulations are effective, but so too is the *initiation of a threat* to do so. It is this concept on which the following question and answer are premised:

Question: *Do the Emergency Regulations require creditors to halt all activity relative to the repossession of a vehicle?*

Answer: *Yes. Under 940 CMR 35.03(1)(c), a creditor may not initiate, threaten to initiate or act upon the repossession of a vehicle. Calls, emails or letters stating an intention to repossess a vehicle would likely constitute a "[threat] to initiate or act upon any legal or equitable remedy for the repossession of any vehicle" in violation of 940 CMR 35.03(1)(c).*

This particular answer is among the thornier traps for the unwary in the emergency regulations. As a practical matter, it requires both creditors and debt collectors to review all communications with debtors to determine if they directly or indirectly reference repossession of the vehicle as a potential action and to table any such communications while the emergency regulations remain effective.

The final stop on the journey of the emergency regulations is, unsurprisingly, litigation. Shortly after their passage, the emergency regulations were challenged by a trade association for the credit and collection industry. This litigation has resulted, to date, in the federal district court for Massachusetts issuing a temporary restraining order

regarding certain aspects of the emergency regulations. Under the TRO, the Massachusetts attorney general is prohibited from enforcing:

- limitations on telephone calls by debt collectors; and
- the provisions of the prohibited conduct rules in so far as they bar debt collectors from bringing enforcement actions in Massachusetts state and federal courts.

While the TRO was certainly helpful in terms of its clarification of the reach of the emergency regulations, there are several considerations that the financial services industry should keep in mind when developing compliance plans.

For one, the TRO is not a silver bullet, and it does not mean that all of the emergency regulations are on hold. For auto finance creditors, this is especially true with regard to the limitations on repossessing (or threatening to repossess) a vehicle. Although the TRO means that a debt collector cannot be prevented from going to court, Massachusetts provides a right of self-help (i.e., non-judicial) repossession if parties comply with the appropriate notification and cure rights. Self-help repossession is not within the relief granted by the TRO and, at the moment, remains prohibited for both creditors and debt collectors.

There is also something of a definitional puzzle caused by the wording of the court order. Specifically, while the TRO prohibits the attorney general from enforcing the emergency regulations against "debt collectors," it does not appear to provide similar relief to "creditors," as that term is defined in the emergency regulations. Whether this difference between creditors and debt collectors results in varying degrees of comfort in the industry remains to be seen.

Coupled with these drafting considerations, the nature of the TRO is just that - it's temporary and remains in place only until the final adjudication of the underlying suit. The court could ultimately decide that the emergency regulations are proper and lift the TRO, thereby allowing the Massachusetts attorney general to enforce the emergency regulations as initially drafted.

Moreover, even if the emergency regulations are overturned (either in whole or in part), the Massachusetts attorney general has a number of other consumer protection arrows in her quiver. Among them are an expansive unfair and deceptive acts and practices statute and a perhaps compelling argument that the bar for what constitutes "unfair, deceptive, or abusive conduct" should be lower in the face of a worldwide pandemic.

Unsurprisingly, the end result is a confusing mosaic of requirements cobbled together from three separate components - emergency regulations intended to provide relief from certain collection activities in the face of a 100-year pandemic, FAQs to provide clarity on these requirements, and a lawsuit that temporarily halts enforcement of portions of the newly minted rules - set against the backdrop of a regulatory environment that often holds the feet of the financial services industry to the fire to address alleged noncompliant behavior. Creditors and debt collectors alike will need to proceed with caution as they navigate these waters. Unprecedented times, indeed.

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