

COVID-19: EMERGENCY REGULATIONS DO NOT PASS CONSTITUTIONAL MUSTER

FEDERAL JUDGE ENJOINS ENFORCEMENT OF MASSACHUSETTS ATTORNEY GENERAL'S DEBT COLLECTION BAN UNDER FIRST AMENDMENT

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In response to the COVID-19 emergency, the Massachusetts Attorney General's Office ("AGO") issued a set of emergency regulations¹ intended to broadly prohibit certain debt collection activities in Massachusetts, including prohibitions against initiating debt collection calls or lawsuits, during the pendency of the COVID-19 emergency.² On May 6, 2020, U.S. District Judge Richard Stearns enjoined the AGO's enforcement of those regulations as an unconstitutional restraint on commercial free speech. The court found that the AGO's broad prohibitions violated the constitutional rights of creditors and debt collectors in Massachusetts without providing any meaningful protections to consumers greater than those afforded by existing state and federal consumer protection laws.³

Less than a month after the emergency regulations went into effect, ACA International ("ACA"), the Association of Credit and Collection Professionals, a trade association representing thousands of debt collection agencies, filed suit against the AGO seeking to invalidate the regulations on the basis that, among other things, the regulations violated the First Amendment rights of Massachusetts creditors and debt collectors.⁴ In particular, ACA argued that the AGO exceeded its authority when issuing the emergency regulations because (1) the categorical prohibition against debt collection calls imposed an overbroad restriction on commercial speech, which did not serve a compelling state interest, especially where consumers in Massachusetts are already protected against unlawful debt collection practices by a wide variety of state and federal laws; and (2) the moratorium on filing new debt collection lawsuits impermissibly obstructs creditors' and debt collectors' constitutional right to petition courts for redress of their grievances.⁵

In response, the AGO argued that the emergency regulations should remain in effect where the regulations serve three important interests, namely "(1) shielding consumers from aggressive debt collection practices that wield undue influence in view of the coronavirus pandemic; (2) protecting residential tranquility while citizens have largely had to remain at home during the coronavirus pandemic; and (3) temporarily vouchsafing citizens' financial wellbeing during the coronavirus pandemic."⁶ Moreover, the AGO urged that the emergency regulations should remain in place where the restrictions are temporary, and will remain in place only during the COVID-19 emergency.⁷

Judge Stearns was not persuaded by the AGO's arguments, granting ACA's motion for a temporary restraining order and enjoining the AGO from enforcing the emergency regulation banning telephonic communications with consumers in connection with the collection of a debt—the entirety of 940 CMR 35.04—and the portion of the

regulation barring debt collectors from initiating debt collection lawsuits in state and federal court, 940 CMR 35.03.⁸ In reaching his decision, Judge Stearns concluded that the emergency regulations exceeded the AGO's authority and violated the First Amendment rights of debt collection agencies.⁹

With respect to the regulation barring new debt collection lawsuits, the court held the AGO could not legally impose a restriction that prevented debt collectors from petitioning the courts to seek redress with respect to a consumer's outstanding debts.¹⁰ And, with respect to the regulation barring debt collection calls, Judge Stearns concluded that the broad restriction on commercial speech was not warranted where the regulations did not actually protect the public from any impermissible debt collection activities. Indeed, Judge Stearns held that the regulations did not add any meaningful protections because consumers were already well-protected against impermissible debt collection by virtue of the robust set of existing state and federal consumer laws aimed at curbing invasive debt collection practices, including the Massachusetts Consumer Protection Law, G.L. c. 93A, the Federal Debt Collection Practices Act ("FDCPA"), the Telephone Consumer Protection Act ("TCPA"), the Massachusetts FDCPA and TCPA equivalents, and the AGO's existing debt collection regulations.¹¹ Importantly, the court noted that:

While I laud the Attorney General's desire to protect citizens of Massachusetts during a time of financial and emotional stress created by the Covid-19 pandemic, I do not believe that the Regulation adds anything to their protections that the existing comprehensive scheme of law and regulation already affords to debtors, other than an unconstitutional ban on one form of communication.¹²

Judge Stearns also held that the prohibition against debt collection calls is unwarranted because, "[w]hile the Regulation promises some relief from unwanted telephone calls, it does not pretend to offer any relief from the debt itself or the obligation to repay it in full."¹³

In addition, Judge Stearns was not swayed by the AGO's argument that the emergency regulations should remain in effect because the restrictions are only temporary in nature. He indicated that he was "[t]he most uncomfortable" with the argument "that a total ban is tolerable" because "constitutional rights do not take a holiday simply because governing authorities declare an emergency."¹⁴ Furthermore, the temporary nature of the broad restrictions did nothing to mitigate that fact the regulations had already caused significant injury to debt collection agencies who reported revenue drops of 20%-50% in Massachusetts.¹⁵

Judge Stearns's order thus, in effect, invalidates the emergency regulations and provides relief to the debt collection industry in Massachusetts, allowing debt collectors to resume business during the COVID-19 emergency—within the existing debt collection framework—without exposure to significant liability previously imposed under the emergency regulations. Unless the AGO appeals, for which there is a good possibility, the invalidation of the emergency regulations will also allow debt collectors and creditors in Massachusetts to resume communications with debtors to discuss options to alleviate the hardships occasioned by the COVID-19 crisis. We will continue to monitor efforts by the AGO and others to revive the emergency regulations or promulgate new regulations to further regulate the debt collection industry during the COVID-19 emergency.

FOOTNOTES

¹ 940 CMR 35.00, *et seq.*

² An overview of the emergency debt collection regulations can be [found here](#).

³ *ACA International v. Healey*, Case No. 1:20-cv-107670RGS (D. Mass. May 6, 2020).

⁴ *Id.* at ECF No. 2. ACA also asserted a number of state law challenges to the emergency regulations, including, among others, claims that the regulations violated G.L. c. 231, § 59H, the Massachusetts Anti-SLAAP statute, and Article 30 of the Massachusetts Declaration of Rights by usurping the exclusive right of the Legislature under the Massachusetts constitution by infringing on the trade members' rights to enact laws. It also asserted a claim that the AGO unlawfully exceeded the authority provided to the Attorney General by the Legislature in violation of G.L. c. 93A, § 2. The court, however, declined to address any of these challenges, despite acknowledging their importance, for reasons related to the "Eleventh Amendment sovereign immunity as well as respect for comity among sovereign judicial systems." *Id.* at ECF No. 28, slip op. at 8.

⁵ *Id.* at ECF Nos. 2, 6–8, 25.

⁶ *Id.* at ECF No. 24.

⁷ *Id.*

⁸ *Id.* at ECF No. 28, slip op. at 28–29.

⁹ *Id.*

¹⁰ *Id.* at 22–23.

¹¹ *Id.* at 18–22.

¹² *Id.* at 22.

¹³ *Id.* at 15.

¹⁴ *Id.* at 17, n.9.

¹⁵ *Id.* at 27–28, n.18.

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