Massachusetts Debt Collection Laws

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After managing global recoveries on behalf of General Electric losses for several years, Attorney Jeremy Cohen established Cohen & Associates as a debt collection law firm in 2008. Now, with a staff of 25, Cohen & Associates is starting to receive nationwide recognition for its commitment to collections.

A lifelong Bostonian, Mr. Cohen graduated from Clark University and Suffolk Law School. He has previously co-authored an article about international recoveries for the National Association of Subrogation Professionals. Mr. Cohen has also spoken at seminars regarding collections in Massachusetts as well as the impact of the Consumer Fraud Protection Bureau on the industry.

Volunteerism is a huge component of the culture at Cohen & Associates. As a board member for the Northeast Arc, Attorney Cohen participates in governance and fundraising for the non-profit organization committed to helping citizens with disabilities learn life skills. The firm hires clients of the ARC for paid positions in the administrative unit. He is also a Corporator for the Salem Five Bank.

I. Foundational Debt Collection Laws

a. Statutes of Limitations

The Commonwealth of Massachusetts has a 6- year statute of limitations on all written contracts, promissory notes and credit card claims. The statute begins calculating the dates, generally, from the date the contract was breached. M.G.L.A. c. 260 § 2 . It is important to note that the statute easily extends to 20 years when the parties affix a seal to it that renders it “signed under seal.” The validity and negotiability of an instrument is not affected by the fact that it is signed in such a manner.

b. Bad Check Laws and Penalties

Governed by M.G.L.A. c. 266 § 37 , the crime of attempted larceny by check is committed when a person “draws, utters or delivers” a check knowing that there are insufficient funds for payment, and with intent to defraud. Proof of the refusal of payment by the drawee is prima facie evidence of the intent to defraud and knowledge of insufficient funds. Paying the outstanding obligation with costs and fees within 2 days of being notified of the insufficiency is a defense to the crime.

Massachusetts law allows for a civil proceeding “in addition to any criminal penalties that may be imposed in accordance with law.” The creditor files an application for a criminal complaint for larceny by check with the clerk-magistrate. The clerk can issue the complaint or deny the application in some instances without a hearing.

Debt collectors can send a letter to the debtor that both makes a demand for payment of a dishonored check and provides notice that a *criminal* action may be forthcoming. The debtor is then given 30 days to provide good funds and is notified that he may be liable to the payee for the face amount and for additional damages, as determined by the court. The most on point case dealing with the larceny by check scenarios seems to be Commonwealth v. Dunnington, 390 Mass. 472, 477-478 (1983) Massachusetts law sets boundaries for the additional damages, in that they are neither less than $100 nor more than $500. The written demand must be printed in a font of at least 10 and in both English and Spanish. The form required by the statute can be found under the General Laws section of the Massachusetts State Legislature website.

Massachusetts also provides relief for the victim of a bad check through a request to the court at the conclusion of the criminal case. Such an order may be issued by the court in the context of a plea of guilty or an "admission to sufficient facts" by the defendant. It is possible that restitution is ordered as a condition of probation. If the defendant fails to make payment, the victim may seek enforcement of the probation order.

c. General Wage Garnishment Exemptions

Wages due a defendant from his employer may not be attached via trustee process unless the plaintiff's claim has been reduced to a judgment and the plaintiff has obtained written approval from a judge after a hearing. Of utmost importance is that money cannot be attached unless, when service is made upon the trustee, it is due absolutely and without contingency. Acushnet Saw Mills Co. vs. Napoleon St. Pierre 316 Mass. 621 (1944), citing Krogman v. Rice Bros. Co., 241 Mass. 245 (1922).

Both Massachusetts and Federal law place a ceiling on the maximum amount of a wage attachment per pay period. The defendant is entitled to whichever exemption leaves him with the higher amount of his wages for the pay period. Under an amendment to the state statute, M.G.L.A. 246 § 24 , effective April 7, 2011, wages are exempt from attachment in "an amount not exceeding the greater of 85 percent of the debtor's gross wages or 50 times the greater of the Federal or the Massachusetts hourly minimum wage for each week or portion thereof." Under Federal law, the maximum amount of wages subject to trustee process is 25 percent of the net disposable income of the defendant.

As of December 2012, the minimum wage in Massachusetts is $8.00 per hour. The Federal minimum wage is $7.25.

II. Debt Collection Licensing, Bonding, and Regulations

a. Regulations Overview

The Massachusetts Division of Banks, in concert with the Office of Consumer Affairs and Business Regulation, oversee the licensing of participants in our industry operating in the Commonwealth. All licensing applications and information can be found under the Consumer Affairs and Business Regulation section of the Massachusetts State Legislature website. Fundamental to all parties who transact business in Massachusetts is the state's consumer protection act, known as (Massachusetts General Law) Chapter 93A. The act gives additional teeth to actions filed in State Court by threatening to award double and treble damages and legal fees to aggrieved parties. The act was authored to regulate business and help consumers avoid being the victims of unfair and deceptive acts or practices. The Act does not define exactly what conduct may be "unfair" or "deceptive," but Massachusetts courts have construed the general prohibition to be broad enough to include debt collection activities.

209 C.M.R. §18 speaks to the licensing of debt collectors and buyers as well as loan servicers and out-of-state attorneys. Chapter 93A § 24A states that:

No person shall directly or indirectly engage in the Commonwealth in the business of a debt collector, or engage in the Commonwealth in soliciting the right to collect or receive payment for another of an account, bill or other indebtedness . . . without first obtaining from the commissioner (of the Division of Banks) a license to carry on the business, nor unless the person for whom he or it may be acting as agent has on file with the state treasurer a good and sufficient bond.

209 CMR 18.00 has established procedures and requirements for the registration, licensing and supervision of *debt collectors* and *third party loan servicers*. A review of these requirements is strongly recommended by visiting Massachusetts Trial Court Law Libraries.

b. Those Regulated

Massachusetts has traditionally followed the interpretations of the FDCPA as determined by Federal courts and the Federal Trade Commission. Therefore, a debt buyer who meets the definition of a *debt collector* would be subject to the Commonwealth's Debt Collection Law and is required to obtain a license in order to collect debt from a consumer. Massachusetts defines a *debt collector* in section 24 of Chapter 93 as "any person who uses an instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of a debt, or who regularly collects or attempts to collect, directly or indirectly, a debt owed or due or asserted to be owed or due another."

Collection agencies are also subject to regulation in Massachusetts. They must be licensed, and their business operations are regulated by the Division of Banks. In working with the Attorney General's office, the Division of Banks has revised its debt collection guidelines under the Code of Massachusetts Regulations, 209 C.M.R §18.00

Attorneys licensed by the Massachusetts Board of Bar Overseers are excluded from a collection licensing requirement when they are collecting consumer debt on behalf of a client. This approach continues to survive in spite of the 1995 U. S. Supreme Court decision, which held that attorneys who regularly engage in consumer debt collection activity, even when that activity consists of litigation are "debt collectors" under the FDCPA and subject to compliance with its requirements and restrictions. See Heintz v. Jenkins, 514 U.S. 291 (1995)

The Division of Banks has opined that the "attorney-at-law" exclusion applies solely to attorneys licensed to practice law in the Commonwealth. The thinking is that these attorneys are already subject to both the Supreme Judicial Court's Rules of Professional Conduct as well as the oversight of the Board of Bar Overseers along with the Attorney General's Code of Massachusetts Regulations (C.M.R.) and the FDCPA.

Attorneys not licensed to practice law in the Commonwealth, who regularly engage in or whose principal purpose is debt collection, must obtain a license as a debt collector. In this situation, the unlicensed attorney collecting debt would be conducting business as a debt collector and not as an attorney.

Debt buyers, defined in Massachusetts as "entities purchasing debt in default at the time of purchase," must be licensed as debt collectors and are subject to the Commonwealth's debt collection laws. It has been determined by the Division of Banks that a *passive debt buyer* need not obtain a debt collector license, if they have outsourced their collections to a licensed debt collector or an attorney licensed to practice law in Massachusetts.

If an attorney or law firm licensed to practice law in Massachusetts is also the *debt buyer,* the attorney or law firm would be required to obtain a license as a *debt collector*. The attorney exclusion would no longer apply, as the attorney would neither be acting as a passive debt buyer nor collecting on behalf of a client.

III. Collection Practices Specific to Auto Deficiencies

Consumer debt encompasses financial obligations arising out of transactions where the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes. *Pursuing claims for an automobile loan deficiency judgment where there was a default under a consumer credit transaction per M.G.L. c. 255.*

In any consumer credit transaction involving a secured loan, a default can arise by the debtor's failure to make one or more payments as required by the agreement. The collector needs to make certain that the creditor has complied with all required notices to debtor regarding his rights to cure within the proper time frame and that it has preserved its rights to pursue a deficiency judgment. M.G.L.A. c.255 13I(b) .

Lenders and sellers who enter into secured credit agreements obtain special rights in the property that was the subject of the credit issuance. When a consumer defaults on his payment obligation, the creditor can proceed directly against the property serving as the security and repossess it, retain it or sell it in satisfaction of the debt. See M.G.L c. 106 § 9-610 for details regarding the disposition of collateral after default.

A creditor may not both retain the collateral *and* pursue a deficiency judgment. Massachusetts allows the secured creditor to recover a deficiency resulting from deducting the *fair market value* of the collateral (typically the sale price at auction) from the unpaid balance when it exceeds a statutorily specified amount (see next ¶). A deficiency judgment is the "finding of personal liability upon debtor for the unpaid balance of secured debt after disposition of collateral fails to provide proceeds sufficient to satisfy underlying debt." M.G.L. c.255D § 22.

The specified amount referenced above is $2,000 for motor vehicle installment sales and $1,000 for installment sales of general consumer goods. A creditor owed an unpaid balance of $2,000 dollars or less that takes possession of or accepts surrender of the collateral loses any right to a deficiency. The unpaid balance is defined as the "amount which the debtor would have been required to pay upon prepayment." M.G.L.A. c. 255B, §20B(d)

IV. Process Service Options and Costs

Rule 4 of the Massachusetts' Rules of Civil Procedure focuses on service of process. Unlike the Federal Rule 4, in Massachusetts Rule 4 requires that the plaintiff (or his attorney), rather than the court clerk, deliver process to the server. Rule 4(d)(1) also allows service "by leaving copies thereof at his last and usual place of abode." A plaintiff may obtain blank summons forms in advance at a cost of $5.

a. Sheriff's Fees

In Massachusetts, county sheriffs are charged with serving process within their jurisdictional limits. M.G.L c. 262 § 8 concerns the fees which a sheriff, deputy sheriff or constable may charge. Typical costs for standard service are approximately $45. The cost includes a $20 basic fee along with a $10 attest (2 copies) fee along with travel (.32 cents per mile), postage and handling. The cost to serve a *Capias* (civil arrest warrant) upon the defendant is $60. If the defendant cannot be located, there is a $15 *diligent search* fee.

b. Constable Fees

Constables are officials who are authorized to serve process under specified circumstances. Constables may be appointed in cities and towns for terms not exceeding three years, and they may serve process only within the city or town in which they were appointed for cases in which the amount of the claim is no more than $7,000 (as amended M.G.L c,41 §92). A plaintiff can request, by a Rule 4(c) motion, that the court appoints a constable as a special process server in any case, even one that is outside the

constable's appointed jurisdiction or above the claim limits of Mass.R.Civ.P. 4.1. The return of service by a constable of a notice or demand is prima facie evidence of service. Constables generally charge $15 to $25 more than sheriffs.

c. Garnishment Fees

When filing a suit on a judgment to have a wage garnishment approved (along with a $205 filing fee and service on defendant cost), it is customary in Massachusetts to simultaneously file a motion for approval of successive service of the trustee summons by First Class mail. This request, if approved, allows subsequent service by mail after the initial service by the sheriff (approximate cost $50). This can save significant costs for both the debtor and creditor.

d. Debtor Exams (Supplementary Process)

Customarily the execution is first used to initiate supplementary process (SP) against the defendant. The cost is $45 for the application, plus sheriff service fees (see ¶ IV.a above). Please refer to M.G.L c.224 §§ 14-30 for more information on sp proceedings.

"Supplementary Process is a procedure where a debtor who has refused to pay voluntarily is brought before the court so that the court can conduct a searching inquiry into the ability of the judgment debtor to pay his legal obligation, to relieve him from harassment if found unable to pay, but to compel him to do what an honest man ought to be willing to do if found able to pay in whole or in part." In re Birchall 454 Mass. 837 (2009), quoting Giarruso v. Payson, 272 Mass. 417, 420 (1930). This method can be successful where the creditor has been unable to obtain information about the assets of the debtor.

The venue for bringing a supplementary process action can either be the district court for the county in which the debtor either lives or has a usual place of business or employment. Bringing the action in the court that issued the underlying judgment does not satisfy the venue requirements if none of the elements are met. M.G.L. c.224 § 6.

There does appear to be an alternative to SP that can be pursued using the writ of execution under Rule 69 of the Massachusetts Rules of Civil Procedure. Mass. R. Civ. P. 69 . Here the creditor relies on the very discovery tools that were available pre-trial, without having to file a separate action and obtain a separate docket number. Creditors can also obtain court orders to compel payment by means of a post-judgment motion. An added benefit is that discovery under Rule 69 may be obtained from non-parties and is very broad. See, Geehan v. Trawler Arlington, Inc., 371 Mass. 815 (1977). Federal Rule 69 is essentially the same. "The law allows judgment creditors to conduct full post judgment discovery to aid in executing judgment." Credit Lyonnais, SA v. SGC International Inc. (1998).

V. MA Attorney General Regulations

On March 1, 2012, Attorney General Martha Coakley amended the state's Debt Collection Regulations because "given the industry's recent advances in technology, we concentrated on how we could bring our regulations up-to-date and streamline them to be consistent with other state and Federal agencies…. These amendments ensure that the playing field is level for both creditors and consumers so that all parties are better protected" according to the AG. The amendments are found under the Attorney General Section on the Massachusetts State Government's website. The amended regulations include:

- A definition of "creditor" that includes a buyer of delinquent debt who hires a third party to collect, also known as a "passive debt buyer;"
- An amended definition of "communication" so that abusive dialogue by phone recordings and text messages are prohibited;
- The incorporation of prohibited practices from the Division of Banks, in order to ensure a consistent regulatory approach at the state and Federal level.

940 CMR 7.00: Debt Collection Regulations

VI. Noteworthy MA Debt Collection Case

Thomas Schaefer, Plaintiff, v .ARM Receivable Management, Inc., Asset Acceptance, LLC, and Northland Group, Inc., Defendants. **United States District Court, D. Massachusetts. July 19, 2011.**

The Plaintiff brought this action alleging numerous violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 against Defendants. An assignee of the debt mailed Plaintiff a letter stating that a debt of $3,864.09 had been assigned to it for collection. The letter also offered to settle the debt for $1,661.56, approximately a 43% discount of the total amount due. A few months later the debtor received another letter stating he owed a debt of $3,904.97. The debt had increased by $40.88. The letter also offered to settle for $1,561.99.

The complaint asserted that the Defendants' collection letters violated the FDCPA on the grounds that: i) they each falsely represented the character, amount or legal status of the alleged debt in violation of 15 U.S.C. § 1692e(2) ; ii) they used false representation or deceptive means to collect the debt in violation of 15 U.S.C. § 1692e(10) ; iii) they used unfair and deceptive means to collect a debt. The plaintiff argued that because his alleged debt was over six years old, it was barred from judicial enforcement by the statute of limitations. He also alleged that by seeking payment on the debt and offering to settle the debt, the defendants sought to revive the time-barred debt which constituted an "unfair and unconscionable collection tactic" under 15 U.S.C. § 1692(f) and a "misrepresent[ation] of the legal status of the debt" under § 1692e(2)

The court found that there was no violation where "The FDCPA permits a debt collector to seek voluntary repayment of the time-barred debt so long as the debt collector does not initiate or threaten legal action in

connection with its debt collection efforts." Indeed, provided that a debt collector does no more than this in regard to a time-barred debt (and does not threaten litigation if the debtor does not comply with the request), the debtor is not being misled about the status of the debt.

The Plaintiff further alleged that the defendants violated 15 U.S.C. § 1692e(1) and 1692(f) of the FDCPA by failing to advise him of the tax consequences of accepting a discount of his debt if he agreed to settle it. He claims that such failure was "deceptive" under 15 U.S.C. § 1692e(10) and amounted to an "unfair or unconscionable collection tactic" under § 1692(f) .

The court determined that the defendants had no affirmative duty to advise the debtor of potential tax consequences if he accepted their settlement offers. The language of the FDCPA does not require a debt collector to make any affirmative disclosures of potential tax consequences when collecting a debt. Defendants' motion for judgment on the pleadings is GRANTED.
Retrieved from *pacer.mad.uscourts.gov*

VII. Massachusetts State Materials

www.ma-trialcourts.org
Provides access to basic docket information for Massachusetts Superior Courts cases.

http://www.mass.gov/obcbbo/
Look up a lawyer, finding phone and address

http://www.sec.state.ma.us/cor/coridx.htm
Home page for the Massachusetts Secretary of State Corporations Division

http://www.lawlib.state.ma.us/
Link page for Massachusetts Registry of Deeds

http://www.mass.gov/Eoca/docs/idtheft/sec_plan_smallbiz_guide.pdf
Small business Guide for Formulating a Comprehensive Written Information Security Policy

Please be advised that this is not intended as legal advice. Changes to laws, statutes, regulations and costs can and do occur. We recommend that you contact an attorney for advice specific to your legal matters and your state.