Recent Settlement with Massachusetts AG Addresses Compliance Emphasis on Collection Calls, Repossession Notices, and Service Contract Sales

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On September 1, 2021, the Commonwealth of Massachusetts, through the Massachusetts attorney general, entered into a settlement agreement and related Assurance of Discontinuance with a sales finance company. The AOD identifies three areas that should be of particular compliance emphasis for sales finance companies doing business in Massachusetts:

- limitations on the frequency of collection calls;
- content requirements for pre- and post-sale repossession notices; and
- disclosures required in connection with the sale and financing of optional motor vehicle service contracts.

Both the AOD and a related press release make clear that AG Maura Healey intends to pursue similar actions against other sales finance companies doing business in Massachusetts. The AOD states that the AG "is conducting an ongoing investigation into financing and securitization practices in the subprime auto market." The AG adds that "[t]hrough our ongoing, extensive investigation into the subprime auto industry, we have a proven record of taking action and getting results for our residents who have been exploited by unscrupulous lenders."

The AOD does not constitute an admission by the sales finance company of any fact or of any violation of any state or federal law, rule, or regulation. The settlement and the AOD resolve a suit brought by the AG against the sales finance company in a Massachusetts state court.

Collection Calls. Under the AOD, the sales finance company is required to limit its calls to consumers in Massachusetts in a manner compliant with the holding in *Armata v. Target Corporation*, 2018 Mass. LEXIS 364 (Mass. June 25, 2018). A Massachusetts debt collection regulation, 940 C.M.R. § 7.04(1)(f), makes it an unfair or deceptive act or practice for a creditor to "[initiate] a communication with any debtor via telephone, either in person or via text messaging or recorded audio message" more than twice in a seven-day period. *Armata* read this regulation to limit a creditor to attempt collection calls only two times in any rolling seven-day period, whether the creditor left a message for the consumer or actually reached the consumer. Accordingly, a creditor in Massachusetts must incorporate software controls and training for employees to ensure that it makes collection calls that comply with *Armata*.

Repossession Notices. As part of the AOD, the sales finance company is also required to send pre-sale and post-sale repossession notices to consumers in Massachusetts that comply with *Williams v.*

American Honda Finance Corporation, 2018 Mass. LEXIS 351 (Mass. June 5, 2018). We have covered the implications of the *Williams* case in the July 2018 issue of *Spot Delivery*, but a quick recap is in order.

Retail installment sales/consumer credit sales of motor vehicles in Massachusetts are governed by the Motor Vehicle Retail Installment Sales Act. When a vehicle is repossessed and sold, the MVRISA imposes several state-specific consumer protections that displace some of the rules under Article 9 of the Uniform Commercial Code. For instance: (1) a creditor may not pursue a deficiency balance after the sale of collateral if the consumer's unpaid balance was $2,000 or less at the time of default; (2) if a deficiency balance is permissible, the creditor must calculate the deficiency by subtracting the fair market value of the collateral from the unpaid balance due; and (3) the only permissible costs a creditor may add to this calculation are reasonable vehicle repossession and storage costs.

Williams addressed the meaning of the phrase "fair market value," which is not defined by the MVRISA, and determined that it means "the highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market." Further, the court held that the UCC safe harbor Notice of Sale used in many states is deficient in Massachusetts "where the deficiency is not calculated based on the fair market value of the collateral and the notice fails to accurately describe how the deficiency is calculated." More specifically, the court provided the following language for use by creditors in pre-sale notices:

The fair market value of your vehicle will be used to reduce the amount you owe, which is your outstanding balance plus the reasonable costs of repossessing and selling the vehicle. If the fair market value of your vehicle is less than you owe, you (will or will not, as applicable) still owe us the difference. If the fair market value of your vehicle is more than you owe, you will get the extra money, unless we must pay it to someone else.

In addition, the court held that any post-sale repossession notice provided must state that the fair market value of the vehicle was used in calculating the deficiency. Subsequent Massachusetts court cases have applied the holdings of *Williams* retroactively, and that is what the AG appears to have done in this case. Therefore, creditors in Massachusetts must use state-specific pre-sale and post-sale notices modified in a manner that captures the Massachusetts Supreme Judicial Court's holding in *Williams*, rather than the standard UCC Article 9 notices.

Service Contracts. Going forward, the sales finance company must also provide Massachusetts consumers with certain documents in connection with the purchase and financing of motor vehicle service contracts. Specifically, the AOD requires that, before signing a retail installment contract that includes the purchase of a service contract, the consumer must be provided with a clear and conspicuous, single-page, standalone document that discloses that the purchase of a service contract is not required to obtain financing and the total amount by which the purchase of a service contract will increase the consumer's credit sale. The disclosure must be signed and dated by all consumers who purchase the service contract and a representative of the dealer, and copies must be provided to the purchasers and to the sales finance company.

In addition, within seven days after taking assignment of a retail installment contract that includes the purchase of a service contract, the sales finance company must send the consumer a clear and conspicuous, one-sided, single-page, standalone document that offers to cancel the service contract and provide a refund of the purchase price. If the consumer has opted to receive text message

alerts, the sales finance company must also send a text message to him or her regarding the service contract cancellation notice. If the purchaser elects to cancel the service contract within 30 days of the retail installment contract date, the sales finance company must reduce the account balance to reflect the cancellation of the service contract and recalculate the monthly payments based on the original term, finance charge, and reduced amount financed. Within seven days of the cancellation of the service contract, the sales finance company is required to send another one-sided, single-page document to the consumer confirming that the service contract has been cancelled and stating the new account balance and monthly payment. The AOD provides model forms of these notices/disclosures as exhibits.

While Massachusetts law does not specifically require these disclosures or procedures, it is clear that the AG finds them to be best practices to ensure that Massachusetts consumers understand that they have purchased an optional service contract in connection with the sale and financing of the motor vehicle. For that reason, dealers and finance companies doing business in Massachusetts should consider using these model forms in their vehicle finance business.