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Trap for the Unwary?: Target Busted for ATDS Calls in Mass. that Seemed to be Lawful Under AG Guidance

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A tree falling in the forest may not make a sound, but as Target Corporation learned yesterday, an initiated contact counts against a Massachusetts' statute's two-call limitation even if no pre-recorded message is played. This is true despite the fact that the state Attorney General's office had issued guidance suggesting that the calls were lawful.

In *Debra Armata v. Target Corporation*, SJC–12448, 2018 WL 3097094 (Mass. Sup. Crt June 25, 2018) the Massachusetts Supreme Judicial Court considered Target's practice of initiating calls to debtors using a predictive dialer without leaving voicemails under a state debt collection statute forbidding the initiation of more than two "communications" with a debtor per week.

Target argued that using a predictive dialer to launch calls–which would not play a pre-recorded message–did not qualify as an "initiated" communication under the Act in instances where a customer was not reached because no *actual* communication was ever initiated. Target's position was seemingly backed up by Attorney General's guidance to the effect that "unsuccessful attempts by a creditor to reach a debtor via telephone may not constitute initiation of communication if the creditor is truly unable to reach the debtor or to leave a message for the debtor." See *Armata* at *3. The statutory definition of "communication" also seemed to lend support to Target's position–it includes only the "conveying [of] information directly or indirectly to any person through any medium." *Ibid.* So a call attempt that does not result in the conveyance of information does not seem to be a "communication" under the act.

The Massachusetts Supreme Court disagreed, however, finding that the definition of "communication" was broad enough to encompass call attempts–"A creditor…"initiat[es] a communication … via telephone" under the regulation every time it attempts to contact a debtor's telephone to convey information…" *Armata* at *4. In the Court's view, "the fact that Target did not successfully directly convey information to Armata is unimportant, because Target nevertheless initiated the process of conveying information to Armata via telephone." *Id.* at *6.

Notably, however, the term communication" is not defined in the statute to include "the process of conveying information"–as the decision suggests– but rather only as the *actual* "conveying" of information. So the Court's conclusion that initiating all phone calls necessarily amount to initiating "communications" is a bit of a head scratcher. It is also notable, that the Court's conclusion that

unplayed pre-recorded messages constitute “communications” is directly contrary to TCPA authority on the subject. See *Ybarra v. Dish Network, L.L.C.*, 2015 WL 6159755, at *4 (5th Cir 2015)(pre-recorded message calls that are initiated but do not result in a message not actually being played do not violate the TCPA).

But things get even worse for Target–and fans of clear regulatory standards. The Court also narrowly read the AG’s guidance to mean only “attempts by a creditor to reach a debtor via telephone do constitute initiation of communication if the creditor is able to reach the debtor or leave a voicemail message for the debtor.” *Id.* This means that the two call limit may only be exceeded “when debtors do not answer and their voicemail or answering system is not set up, their mailbox is full, or their telephones have been disconnected.” *Id.*

So a caller that believed, in good faith, that an unreachable debtor might be called more than twice a week in reliance on the AG’s own advice can now be sued *by the same AG* based upon the Supreme Court’s alternate interpretation of its own vague guidance. Egads. Only in TCPAland.

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