

SENATE No. 2409

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court
(2015-2016)

SENATE, Thursday, July 7, 2016

The committee on Ways and Means, to whom was referred the Senate Bill relative to family financial protection (Senate, No. 2230),-- reports, recommending that the same ought to pass with an amendment substituting a new draft with the same title (Senate, No. 2409).

For the committee,
Karen E. Spilka

The Commonwealth of Massachusetts

**In the One Hundred and Eighty-Ninth General Court
(2015-2016)**

An Act relative to family financial protection.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The General Laws are hereby amended by inserting after chapter 93K the following chapter:-

CHAPTER 93L

FAMILY FINANCIAL PROTECTION ACT

Section 1. As used in this chapter, the following words shall have the following meanings unless the context clearly requires otherwise:

“Charge-off”, a declaration by a creditor that a delinquent consumer loan, consumer credit account or other consumer debt is written off as unlikely to be collected and worthless, pursuant to 26 U.S.C. 166.

“Consumer”, a natural person.

“Consumer form contract”, a contract in writing between a business and a consumer involving goods or services including, but not limited to, credit or financial services, primarily

for personal, family or household purposes, that has been drafted by the business for use with more than 1 consumer, unless the only other consumer is the spouse of the first consumer.

“Consumer debt”, an obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services that are the subject of the transaction are primarily for personal, family or household purposes, whether or not the obligation has been reduced to judgment; provided, however, that “consumer debt” shall not include a common expense or charge levied under chapter 183A or 183B or an obligation or alleged obligation to pay common expenses or charges levied pursuant to a covenant or agreement running with the land.

“Creditor”, a person or entity to whom a debt is owed, including a judgment creditor and any other person or entity that obtains an execution on a debt; provided, however, that “creditor” shall not include an organization of unit owners as defined in section 1 of chapter 183A, a time-share association under chapter 183B or a homeowner association or entity to whom debt is owed pursuant to a covenant or agreement running with the land.

“Debt buyer”, a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third-party for collection or an attorney for litigation in order to collect the debt; provided, however, that a “debt buyer” shall be considered to be a debt collector.

“Debt collector”, a person or entity who regularly collects or attempts to collect, directly or indirectly, consumer debts owed or due or asserted to be owed or due another; provided, however, that it shall not include: (i) an officer or employee of a creditor who, in the name of the

creditor, collects debts for the creditor; or (ii) a person, including an attorney, who collects or attempts to collect common expenses or charges levied under chapter 183A or 183B or an obligation or alleged obligation to pay common expenses or charges levied pursuant to a covenant or agreement running with the land; provided further, that “debt collector” shall include: (A) a creditor who, in the process of collecting its own debts, uses a name other than its own which would indicate that a third person is collecting or attempting to collect a debt; or (B) a debt buyer.

“Earnings”, gross compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, payment for skilled, personal or professional services or otherwise, whether earned as an employee or as an independent contractor.

“Execution”, an attachment, levy, garnishment or other disablement, freeze or seizure of property, whether pre-judgment or post-judgment, to satisfy a debt or a creditor’s exercise of a right of setoff to collect a debt; provided, however, that it shall not include self-help repossession of collateral.

“Exempt”, not subject to execution, levy, attachment, garnishment, setoff, self-help, seizure or other form of process, court order, creditor or other action for debt collection or restitution or other equitable claim unless otherwise specified; provided, however, that funds that are exempt remain exempt when the funds are paid or transferred to the debtor, the debtor's spouse, partner, beneficiary or dependent or to an account for the benefit of the debtor, the debtor's spouse, partner, beneficiary or dependent.

55 “Garnishment”, a legal or equitable procedure through which the earnings, property or
56 funds of a person are required by a court of competent jurisdiction to be withheld by another
57 entity for payment of a debt to a creditor.

58 “Trustee”, a trustee served pursuant to chapter 246.

59 “Value”, current fair market value of accounts, goods or property less the amount of liens
60 or security interests in the accounts, goods or property, based on the price that would be paid,
61 assuming a willing buyer and a willing seller, for accounts, goods or property of similar age and
62 condition; provided, however, that a debtor’s testimony as to the value of property that the debtor
63 owns or as to the advertised value of property similar to that claimed as exempt shall be
64 admissible as evidence of an item’s value.

65 Section 2. (a) If earnings of a defendant are attached to satisfy a judgment for collection
66 of a consumer debt, that debtor’s earnings for a week that are less than 90 times the greater of the
67 federal minimum hourly wage under 29 U.S.C. 206(a)(1) or the state minimum hourly wage
68 under section 1 of chapter 151 in effect at the time shall be exempt from the attachment and not
69 subject to garnishment. This exemption shall be adjusted pro rata for a pay period that is more
70 than weekly.

71 (b) If the debtor’s earnings exceed the amount under subsection (a), not more than 10 per
72 cent of the excess earnings shall be subject to garnishment.

73 (c) If more than 1 order of attachment for a consumer debt is served on a trustee with
74 respect to the same debtor, the order of attachment served earliest shall take priority. If an order
75 of attachment with greater priority consumes the entirety of the income that is available for

garnishment under the preceding subsections, then the debtor's earnings shall not be garnished pursuant to the order of attachment with lower priority.

(d) The protections for earnings under this section apply to debtors whose physical place of employment is in the commonwealth, notwithstanding that the debtor's employer may have corporate offices or other places of business located outside the commonwealth.

(e) This section shall not apply in a proceeding to attach earnings or a pension to satisfy a divorce, separate maintenance or child support order of a court of competent jurisdiction and in such a proceeding, including an action for trustee process to enforce a support order under section 36A of chapter 208, federal law limiting the amounts that may be trustee, assigned or attached in order to satisfy an alimony, maintenance or child support order shall apply.

(f) Except as otherwise permitted by law, an amount held by a trustee for a defendant in a pension, as defined in section 28 of chapter 246 shall be reserved in the hands of the trustee and shall be exempt from attachment to satisfy a judgment for collection of a consumer debt.

(g) An employer shall not take adverse action against an employee or refuse to hire an individual because of a garnishment for a consumer debt or because of an obligation a garnishment imposes against the employer. An employer who violates this section shall be liable in a civil action, action for contempt or other appropriate proceeding to the employee or individual for the wages and employment benefits lost by the employee or individual from the time of the unlawful discipline, suspension, refusal to hire or discharge to the period of reinstatement and an additional penalty of not more than \$1,000. This subsection shall not prevent an employer from using a credit report for employment purposes where otherwise permitted by law.

Section 3. (a) An action for the collection of a consumer debt shall be commenced within 4 years of the accrual of the cause of action, which shall be the earliest of the date of charge-off, placement for collection or 180 days after the last regular payment was made to the original creditor. This limitations period shall apply to a consumer debt, whether the claim sounds in contract, account stated, open account or other cause, and notwithstanding another applicable statute of limitations, unless a shorter limitations period is provided under the laws of the commonwealth. This time period also applies to a claim for a consumer debt based on a contract or instrument under seal.

(b) Notwithstanding any other general or special law to the contrary, a payment after the date of charge-off, placement for collection or 180 days after the last regular payment was made to the original creditor or a written or oral affirmation of the debt or other activity on the debt shall not revive or extend the limitations period or bar the consumer from asserting a defense to the collection of a consumer debt. If a payment on a defaulted or charged-off debt completely cures the default and pays off a delinquency, then a new cause of action may accrue upon a subsequent default or charge-off.

(c) A person shall not bring a suit or initiate an arbitration or other legal proceeding to collect a consumer debt if the applicable limitations period on the consumer debt in subsection (a) has expired.

(d) A waiver by a consumer of a protection or right under this section is void and shall not be enforced by a federal or state court or any other person.

(e) If the limitation period under this section has expired, then the right to collect the consumer debt is extinguished as well as the remedy. A person shall not attempt to collect a

consumer debt after the 4-year period described in subsection (a) has expired; provided, however, that nothing in this chapter shall prohibit a creditor or debt collector from accepting a voluntary payment initiated by a debtor after the 4-year period under subsection (a) has expired. Such a voluntary payment will not revive or extend the limitations period. An unpaid portion of the consumer debt shall remain extinguished with collection prohibited.

(f) If a consumer debt was created by or based upon a consumer form contract, an action for collection of that consumer debt shall be based on a claim for breach of contract and not on an open account, account stated, quantum meruit or other cause of action and shall not allege that this is an instrument or contract under seal. Regardless of the cause of action asserted, a consumer may raise a defense based upon the reasonable value of goods or services provided.

(g) Notwithstanding section 20 of chapter 260 or any other general or special law to the contrary, an action upon a judgment or decree on a consumer debt, including an execution upon or trustee process based on the judgment or decree and other activity to collect on the judgment shall be commenced within 5 years after the entry of the judgment or decree. A judgment whose enforcement has been barred by the running of this limitations period shall not be revived or renewed.

(h) Nothing in this chapter shall prohibit a creditor, debt collector or debt buyer from entering into a repayment agreement that shall be legally binding on the consumer beyond the applicable limitations period on the consumer debt in subsection (a) so long as the repayment agreement is in writing, signed by both parties and based on new consideration.

Section 4. In a supplementary proceeding in a civil action for the examination of a debtor arising from a consumer debt, the defendant shall be given notice of the opportunity to submit a

financial affidavit in a form prescribed by the court and signed under the penalties of perjury within 30 days of receiving notice. If it appears from the affidavit that a defendant's income and assets are exempt from court-ordered payment, the defendant may submit the financial affidavit in lieu of appearing in court. A capias or other warrant for the arrest of a debtor shall not be issued pursuant to section 18 of chapter 224 unless it appears from the affidavit that the defendant possesses income or assets that are not exempt from a court-ordered payment. It shall be the obligation of the plaintiff to serve the notice required by this section upon the defendant by any form of mail addressed to the defendant and requiring a signed receipt or in-hand delivery. If the defendant fails to submit a signed financial affidavit, a capias or other warrant for the arrest of a debtor shall not be issued pursuant to section 18 of chapter 224 unless the plaintiff submits proof of service that the notice required by this section was served, either by signed return receipt or by a sworn return of service.

Section 5. (a) If a plaintiff prevails in an action to collect a consumer debt, interest computed pursuant to section 6C of chapter 231 or section 8 of chapter 235 shall be limited to the rate of interest equal to the weekly average 1-year constant maturity treasury yield, but not less than 2 per cent per annum nor more than 5 per cent per annum, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. Another rate of interest on the judgment shall not be permitted, including the rate provided for in the contract.

(b) If the plaintiff prevails in an action to collect a consumer debt, the plaintiff shall be entitled to collect attorney's fees only if the contract or other document evidencing the indebtedness sets forth an obligation of the consumer to pay attorney's fees, subject to the following provisions:

(i) if the contract or other document evidencing indebtedness provides for attorney's fees in some specific percentage, the provision and obligation shall be valid and enforceable up to but not in excess of 15 per cent of the amount of the debt excluding attorney's fees and collection costs;

(ii) if a contract or other document evidencing indebtedness provides for the payment of reasonable attorney's fees by the debtor, without specifying a specific percentage, the provision shall be construed to mean the lesser of 15 per cent of the amount of the debt, excluding attorney's fees and collection costs or the amount of attorney's fees calculated by a reasonable rate for such cases multiplied by the amount of time reasonably expended to obtain the judgment; and

(iii) the documentation setting forth a party's obligation to pay attorney's fees shall be provided to the court before a court may enforce those provisions; provided, however, that the documentation shall include materials that applicable court rules require the plaintiff to file together with the complaint.

(c) If the debtor is the prevailing party in an action to collect a consumer debt, the debtor shall be entitled to an award of reasonable attorney's fees, unless the case is voluntarily dismissed pursuant to Rule 41(a)(1)(i) of the Massachusetts Rules of Civil Procedure or a stipulation of dismissal explicitly provides otherwise. The amount of the debt that the creditor sought shall not be a factor in determining the reasonableness of the award. In the alternative, at the debtor's election, a prevailing debtor shall be awarded the amount of attorney's fees that the plaintiff would have been entitled to collect if the plaintiff had been the prevailing party.

186 Section 6. (a) A violation of sections 2 to 5, inclusive, shall also be a violation of chapter
187 93A.

188 (b) A portion of a contract, including a consumer form contract, that violates sections 2 to
189 5, inclusive, shall be void.

190 SECTION 2. Section 28 of chapter 246 of the General Laws, as appearing in the 2014
191 Official Edition, is hereby amended by adding the following paragraph:- This section shall not
192 apply in a proceeding to attach earnings or a pension to satisfy a judgment for collection of a
193 consumer debt, as defined in section 1 of chapter 93L, and in such an action said chapter 93L
194 shall apply.

195 SECTION 3. Chapter 93L shall not apply to a consumer debt for which the cause of
196 action accrued before January 1, 2017; provided, however, that subsection (b) of section 4 of said
197 chapter 93L shall apply to payments made after the effective date of this act. Said chapter 93L
198 shall not apply to a contract, including a consumer form contract that is in effect before January
199 1, 2017.

200 SECTION 4. This act shall take effect on January 1, 2017.