

HOUSE No. 2811

The Commonwealth of Massachusetts

PRESENTED BY:

Paul Brodeur

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to fairness in debt collection.

PETITION OF:

| NAME: | DISTRICT/ADDRESS: | DATE ADDED: |
|------------------------------|------------------------|------------------|
| <i>Paul Brodeur</i> | <i>32nd Middlesex</i> | <i>1/20/2017</i> |
| <i>Denise Provost</i> | <i>27th Middlesex</i> | |
| <i>Jay R. Kaufman</i> | <i>15th Middlesex</i> | |
| <i>Jack Lewis</i> | <i>7th Middlesex</i> | |
| <i>Tackey Chan</i> | <i>2nd Norfolk</i> | |
| <i>Marjorie C. Decker</i> | <i>25th Middlesex</i> | |
| <i>Chris Walsh</i> | <i>6th Middlesex</i> | |
| <i>Jason M. Lewis</i> | <i>Fifth Middlesex</i> | |
| <i>Kenneth I. Gordon</i> | <i>21st Middlesex</i> | |
| <i>Tricia Farley-Bouvier</i> | <i>3rd Berkshire</i> | |
| <i>Josh S. Cutler</i> | <i>6th Plymouth</i> | |
| <i>Thomas J. Calter</i> | <i>12th Plymouth</i> | |
| <i>Jonathan Hecht</i> | <i>29th Middlesex</i> | |
| <i>Sean Garballey</i> | <i>23rd Middlesex</i> | |
| <i>Kevin G. Honan</i> | <i>17th Suffolk</i> | |
| <i>Rady Mom</i> | <i>18th Middlesex</i> | |

HOUSE No. 2811

By Mr. Brodeur of Melrose, a petition (accompanied by bill, House, No. 2811) of Paul Brodeur and others relative to debt collection. Consumer Protection and Professional Licensure.

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

An Act relative to fairness in debt collection.

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

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

3 CHAPTER 93L.

4 DEBT COLLECTION FAIRNESS ACT.

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

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

10 “Consumer”, a natural person.

11 “Consumer form contract”, a contract in writing between a business and a consumer
12 involving goods or services including, but not limited to, credit or financial services, primarily
13 for personal, family or household purposes, that has been drafted by the business for use with
14 more than 1 consumer, unless the only other consumer is the spouse of the first consumer.

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

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

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

32 “Debt collector”, a person or entity who regularly collects or attempts to collect, directly
33 or indirectly, consumer debts owed or due or asserted to be owed or due another; provided,
34 however, that it shall not include: (i) an officer or employee of a creditor who, in the name of the
35 creditor, collects debts for the creditor; or (ii) a person, including an attorney, who collects or
36 attempts to collect common expenses or charges levied under chapter 183A or 183B or an
37 obligation or alleged obligation to pay common expenses or charges levied pursuant to a
38 covenant or agreement running with the land; provided further, that “debt collector” shall
39 include: (A) a creditor who, in the process of collecting its own debts, uses a name other than its
40 own which would indicate that a third person is collecting or attempting to collect a debt; or (B)
41 a debt buyer.

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

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

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

53 spouse, partner, beneficiary or dependent or to an account for the benefit of the debtor, the
54 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
76 garnishment under the preceding subsections, then the debtor's earnings shall not be garnished
77 pursuant to the order of attachment with lower priority.

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

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

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

89 (g) An employer shall not take adverse action against an employee or refuse to hire an
90 individual because of a garnishment for a consumer debt or because of an obligation a
91 garnishment imposes against the employer. An employer who violates this section shall be liable
92 in a civil action, action for contempt or other appropriate proceeding to the employee or
93 individual for the wages and employment benefits lost by the employee or individual from the
94 time of the unlawful discipline, suspension, refusal to hire or discharge to the period of

95 reinstatement and an additional penalty of not more than \$1,000. This subsection shall not
96 prevent an employer from using a credit report for employment purposes where otherwise
97 permitted by law.

98 Section 3. (a) An action for the collection of a consumer debt shall be commenced within
99 4 years of the accrual of the cause of action, which shall be the earliest of the date of charge-off,
100 placement for collection or 180 days after the last regular payment was made to the original
101 creditor. This limitations period shall apply to a consumer debt, whether the claim sounds in
102 contract, account stated, open account or other cause, and notwithstanding another applicable
103 statute of limitations, unless a shorter limitations period is provided under the laws of the
104 commonwealth. This time period also applies to a claim for a consumer debt based on a contract
105 or instrument under seal.

106 (b) A consumer debt of a resident of this state that arose in another jurisdiction or a
107 consumer debt that may otherwise be governed by another jurisdiction's laws shall be governed
108 by Paragraph (a) or the other jurisdiction's limitations period, whichever is shorter. Any choice
109 of law provision contained in a consumer form contract will be deemed procedural with respect
110 to statute of limitations and will not alter the period described in Paragraph (a).

111 (c) Notwithstanding any other general or special law to the contrary, a payment after the
112 date of charge-off, placement for collection or 180 days after the last regular payment was made
113 to the original creditor or a written or oral affirmation of the debt or other activity on the debt
114 shall not revive or extend the limitations period or bar the consumer from asserting a defense to
115 the collection of a consumer debt. If a payment on a defaulted or charged-off debt completely

116 cures the default and pays off a delinquency, then a new cause of action may accrue upon a
117 subsequent default or charge-off.

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

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

123 (f) If the limitation period under this section has expired, then the right to collect the
124 consumer debt is extinguished as well as the remedy. A person shall not attempt to collect a
125 consumer debt after the 4-year period described in subsection (a) has expired; provided,
126 however, that nothing in this chapter shall prohibit a creditor or debt collector from accepting a
127 voluntary payment initiated by a debtor after the 4-year period under subsection (a) has expired.
128 Such a voluntary payment will not revive or extend the limitations period. An unpaid portion of
129 the consumer debt shall remain extinguished with collection prohibited.

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

135 (h) Notwithstanding section 20 of chapter 260 or any other general or special law to the
136 contrary, an action upon a judgment or decree on a consumer debt, including an execution upon
137 or trustee process based on the judgment or decree and other activity to collect on the judgment

138 shall be commenced within 5 years after the entry of the judgment or decree. A judgment whose
139 enforcement has been barred by the running of this limitations period shall not be revived or
140 renewed.

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

145 Section 4. (a) In a supplementary proceeding in a civil action for the examination of a
146 debtor or a payment review hearing in a small claims matter arising from a consumer debt, the
147 defendant shall be given notice of the opportunity to submit a financial affidavit in a form
148 prescribed by the court and signed under the penalties of perjury within 30 days of receiving
149 notice. If it appears from the affidavit that a defendant's income and assets are exempt from a
150 court-ordered payment, the defendant may submit the financial affidavit in lieu of appearing in
151 court. A *capias* or other warrant for the arrest of a debtor shall not be issued unless it appears
152 from the affidavit that the defendant possesses income or assets that are not exempt from a court-
153 ordered payment. It shall be the obligation of the plaintiff to serve the notice required by this
154 section upon the defendant by any form of mail addressed to the defendant and requiring a
155 signed receipt or in-hand delivery. If the defendant fails to submit a signed financial affidavit, a
156 *capias* or other warrant for the arrest of a debtor shall not be issued unless the plaintiff submits
157 proof of service that the notice required by this section was served, either by signed return
158 receipt or by a sworn return of service.

159 (b) Notwithstanding the provisions of sections 18 and 20 of chapter 224 or any other
160 applicable law or court rule, no person shall be imprisoned or jailed for failure to pay a consumer
161 debt, nor shall any person be imprisoned or jailed for contempt of or failure to comply with a
162 court order to pay a consumer debt in part or in full.

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

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

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

178 (ii) if a contract or other document evidencing indebtedness provides for the
179 payment of reasonable attorney's fees by the debtor, without specifying a specific percentage,
180 the provision shall be construed to mean the lesser of 15 per cent of the amount of the debt,

181 excluding attorney's fees and collection costs or the amount of attorney's fees calculated by a
182 reasonable rate for such cases multiplied by the amount of time reasonably expended to obtain
183 the judgment; and

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

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

195 Section 6. (a) A violation of sections 2 to 5, inclusive, shall also be a violation of chapter
196 93A.

197 (b) A portion of a contract, including a consumer form contract, that violates sections 2 to
198 5, inclusive, shall be void.

199 SECTION 2. Section 28 of chapter 246 of the General Laws, as appearing in the 2014
200 Official Edition, is hereby amended by adding the following paragraph:- This section shall not
201 apply in a proceeding to attach earnings or a pension to satisfy a judgment for collection of a

202 consumer debt, as defined in section 1 of chapter 93L, and in such an action said chapter 93L
203 shall apply.

204 SECTION 3. Section 3 of Chapter 93L shall not apply to a consumer debt for which the
205 cause of action accrued before January 1, 2018; provided, however, that subsection (b) of section
206 3 of said chapter 93L shall apply to payments made after the effective date of this act. Provided
207 further that subsection (b) of section 6 of chapter 93L shall not apply to a contract, including a
208 consumer form contract that is in effect before January 1, 2018.

209 SECTION 4. This act shall take effect on January 1, 2018