

SENATE No. 2651

Senate, July 25, 2018 -- Text of amendment (16) (offered by Senator Eldridge) to the House Bill relative economic development in the commonwealth

The Commonwealth of Massachusetts

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

1 by striking out, in line 262, the figure “2” and inserting in place thereof the following
2 figure:- 3;

3 by inserting after the word “chapter.” in line 438, the following:-

4 CHAPTER 93N.

5 DEBT COLLECTION FAIRNESS ACT.

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

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

11 “Consumer”, a natural person.

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

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

16 “Consumer debt”, an obligation or alleged obligation of a consumer to pay money arising
17 out of a transaction in which the money, property, insurance or services that are the subject of the
18 transaction are primarily for personal, family or household purposes, whether or not the
19 obligation has been reduced to judgment; provided, however, that “consumer debt” shall not
20 include a common expense or charge levied under chapter 183A or 183B or an obligation or
21 alleged obligation to pay common expenses or charges levied pursuant to a covenant or
22 agreement running with the land or a residential mortgage loan. A “residential mortgage loan”
23 shall mean any loan primarily for personal, family, or household use that is secured by a
24 mortgage, deed of trust, or other equivalent consensual security interest on a dwelling as defined
25 in 15 U.S.C. section 1602(w) or residential real estate upon which is constructed or intended to
26 be constructed a dwelling as so defined..

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

32 “Debt buyer”, a person or entity that is engaged in the business of purchasing delinquent
33 or charged-off consumer loans or consumer credit accounts or other delinquent consumer debt
34 for collection purposes, whether it collects the debt itself or hires a third-party for collection or

35 an attorney for litigation in order to collect the debt; provided, however, that a “debt buyer” shall
36 be considered to be a debt collector.

37 "Debt collector", any person who uses an instrumentality of interstate commerce or the
38 mails in any business the principal purpose of which is the collection of a debt, or who regularly
39 collects or attempts to collect, directly or indirectly, a debt owed or due or asserted to be owed or
40 due another. Notwithstanding the exclusion provided by clause (f), debt collector shall include a
41 creditor who, in the process of collecting its own debts, uses a name other than its own which
42 would indicate that a third person is collecting or attempting to collect a debt. Debt collector
43 shall also include a debt buyer or a person who uses an instrumentality of interstate commerce or
44 the mails in a business the principal purpose of which is the enforcement of security interests.
45 Debt collector shall not include:

46 (a) an officer or employee of a creditor while, in the name of the creditor, collecting debts
47 for the creditor;

48 (b) a person while acting as a debt collector for another person, both of whom are related
49 by common ownership or affiliated by corporate control, if the person acting as a debt collector
50 does so only for a person to whom it is so related or affiliated and if the principal business of the
51 person is not the collection of a debt;

52 (c) an officer or employee of the United States or a state of the United States to the extent
53 that collecting or attempting to collect a debt is in the performance of their official duty;

54 (d) a person while serving or attempting to serve legal process on another person in
55 connection with the judicial enforcement of a debt;

56 (e) a nonprofit organization which, at the request of a consumer, performs bona fide
57 consumer credit counseling and assists the consumer in the liquidation of debts by receiving
58 payments from the consumer and distributing the amounts to creditors;

59 (f) a person collecting or attempting to collect a debt owed or due or asserted to be owed
60 or due another to the extent the activity (i) is incidental to a bona fide fiduciary obligation or a
61 bona fide escrow arrangement; (ii) concerns a debt which was originated by the person; (iii)
62 concerns a debt which was not in default at the time it was obtained by the person; or (iv)
63 concerns a debt obtained by the person as a secured party in a commercial credit transaction
64 involving the creditor;

65 (g) attorneys-at-law collecting a debt on behalf of a client; and

66 (h) an agent or independent contractor employed for the purpose of collecting a charge or
67 bill owed by a tenant to a landlord or owed by a customer to a corporation subject to the
68 supervision of the department of public utilities or the department of telecommunications and
69 cable or the division of insurance insofar as the person collects charges or bills only for the
70 landlord or supervised corporations.

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

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

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

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

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

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

94 Section 2. (a) If earnings of a defendant are attached to satisfy a judgment for collection
95 of a consumer debt, that debtor’s earnings for a week that are less than 75 times the greater of the
96 federal minimum hourly wage under 29 U.S.C. 206(a)(1) or the state minimum hourly wage
97 under section 1 of chapter 151 in effect at the time shall be exempt from the attachment and not
98 subject to garnishment. This exemption shall be adjusted pro rata for a pay period that is more
99 than weekly.

100 (b) If the debtor's earnings exceed the amount under subsection (a), not more than 15 per
101 cent of the excess earnings shall be subject to garnishment.

102 (c) If more than 1 order of attachment for a consumer debt is served on a trustee with
103 respect to the same debtor, the order of attachment served earliest shall take priority. If an order
104 of attachment with greater priority consumes the entirety of the income that is available for
105 garnishment under the preceding subsections, then the debtor's earnings shall not be garnished
106 pursuant to the order of attachment with lower priority.

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

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

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

118 (g) An employer shall not take adverse action against an employee or refuse to hire an
119 individual because of a garnishment for a consumer debt or because of an obligation a
120 garnishment imposes against the employer. An employer who violates this section shall be liable
121 in a civil action, action for contempt or other appropriate proceeding to the employee or

122 individual for the wages and employment benefits lost by the employee or individual from the
123 time of the unlawful discipline, suspension, refusal to hire or discharge to the period of
124 reinstatement and an additional penalty of not more than \$1,000. This subsection shall not
125 prevent an employer from using a credit report for employment purposes where otherwise
126 permitted by law.

127 Section 3. (a) An action for the collection of a consumer debt shall be commenced within
128 4 years of the accrual of the cause of action, which shall be the earliest of the date of charge-off,
129 placement for collection or 180 days after the last regular payment was made to the original
130 creditor. This limitations period shall apply to a consumer debt, whether the claim sounds in
131 contract, account stated, open account or other cause, and notwithstanding another applicable
132 statute of limitations, unless a shorter limitations period is provided under the laws of the
133 commonwealth. This time period also applies to a claim for a consumer debt based on a contract
134 or instrument under seal.

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

140 (c) Notwithstanding any other general or special law to the contrary, a payment after the
141 date of charge-off, placement for collection or 180 days after the last regular payment was made
142 to the original creditor or a written or oral affirmation of the debt or other activity on the debt
143 shall not revive or extend the limitations period or bar the consumer from asserting a defense to

144 the collection of a consumer debt. If a payment on a defaulted or charged-off debt completely
145 cures the default and pays off a delinquency, then a new cause of action may accrue upon a
146 subsequent default or charge-off.

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

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

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

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

164 (h) Notwithstanding section 20 of chapter 260 or any other general or special law to the
165 contrary, an action upon a judgment or decree on a consumer debt, including an execution upon

166 or trustee process based on the judgment or decree and other activity to collect on the judgment
167 shall be commenced within 5 years after the entry of the judgment or decree. A judgment whose
168 enforcement has been barred by the running of this limitations period shall not be revived or
169 renewed.

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

174 Section 4. (a) In a supplementary proceeding in a civil action for the examination of a
175 debtor or a payment review hearing in a small claims matter arising from a consumer debt, the
176 defendant shall be given notice of the opportunity to submit a financial affidavit in a form
177 prescribed by the court and signed under the penalties of perjury within 30 days of receiving
178 notice. If it appears from the affidavit that a defendant's income and assets are exempt from a
179 court-ordered payment, the defendant may submit the financial affidavit in lieu of appearing in
180 court. A *capias* or other warrant for the arrest of a debtor shall not be issued unless it appears
181 from the affidavit that the defendant possesses income or assets that are not exempt from a court-
182 ordered payment. It shall be the obligation of the plaintiff to serve the notice required by this
183 section upon the defendant by any form of mail addressed to the defendant and requiring a
184 signed receipt or in-hand delivery. If the defendant fails to submit a signed financial affidavit, a
185 *capias* or other warrant for the arrest of a debtor shall not be issued unless the plaintiff submits
186 proof of service that the notice required by this section was served, either by signed return
187 receipt or by a sworn return of service.

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

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

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

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

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

210 attorney's fees and collection costs or the amount of attorney's fees calculated by a reasonable
211 rate for such cases multiplied by the amount of time reasonably expended to obtain the
212 judgment; and

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

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

224 Section 6. (a) A violation of sections 2 to 5, inclusive, shall also be a violation of chapter
225 93A.

226 (b) A portion of a contract, including a consumer form contract, that violates sections 2 to
227 5, inclusive, shall be void.; and

228 by adding the following sections:-

229 SECTION 23. Section 28 of chapter 246 of the General Laws is hereby amended by
230 adding the following paragraph:- This section shall not apply in a proceeding to attach earnings

231 or a pension to satisfy a judgment for collection of a consumer debt, as defined in section 1 of
232 chapter 93N, and in such an action said chapter 93N shall apply.

233 SECTION 24. Section 3 of Chapter 93N shall not apply to a consumer debt for which the
234 cause of action accrued before January 1, 2019; provided, however, that subsection (b) of section
235 3 of said chapter 93N shall apply to payments made after the effective date of this act. Provided
236 further that subsection (b) of section 6 of chapter 93N shall not apply to a contract, including a
237 consumer form contract that is in effect before January 1, 2019.

238 SECTION 25. Chapter 93N of the General Laws shall take effect on January 1, 2019.