**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, SO AS TO ENACT THE “SOUTH CAROLINA BUSINESS DEBT RECOVERY ACT OF 2011” BY ADDING CHAPTER 42 TO TITLE 15 TO PROVIDE PROCEDURES THAT GRANT TO PERSONS WHO HAVE RECOVERED JUDGMENTS AGAINST ANOTHER PERSON FOR A COMMERCIAL DEBT A RIGHT TO A WRIT OF GARNISHMENT, SUBJECTING TO GARNISHMENT UP TO SPECIFIED LIMITATIONS INCOME, WAGES, INTEREST, RENTS, CAPITAL GAINS, DIVIDEND BONUSES, AND COMMISSIONS OF THE DEBTOR; TO AMEND SECTION 37‑5‑104, RELATING TO THE PROHIBITION AGAINST GARNISHMENT FOR CERTAIN CONSUMER DEBTS, SO AS TO PERMIT GARNISHMENT FOR COMMERCIAL DEBTS AS DEFINED IN CHAPTER 42, TITLE 15; AND TO AMEND SECTION 37‑5‑108, AS AMENDED, RELATING TO A COURT’S DETERMINATION OF UNCONSCIONABLE CONDUCT REGARDING CERTAIN CONSUMER CREDIT TRANSACTIONS, SO AS TO ADD ANOTHER FACTOR FOR THE COURT TO CONSIDER OF INDUCING A DEBTOR IN A CONSUMER CREDIT OBLIGATION TO SIGN A STATEMENT INDICATING THAT THE DEBT IS INCURRED FOR BUSINESS OR COMMERCIAL PURPOSES SUBJECTING THE DEBT TO LEVY OR GARNISHMENT PURSUANT TO THE BUSINESS DEBT RECOVERY ACT DEPRIVING THE DEBTOR OF HIS RIGHTS PURSUANT TO TITLE 37 AND PROVIDING FURTHER PROCEDURES FOR THE COURT TO FOLLOW WHEN MAKING THIS DETERMINATION.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 15 of the 1976 Code is amended by adding:

“CHAPTER 42

South Carolina Business Debt Recovery Act

Section 15‑42‑10. This chapter may be cited as the ‘South Carolina Business Debt Recovery Act of 2011’.

Section 15‑42‑20. (A) Each person who has recovered judgment in a court against another person to recover a ‘commercial debt’, as defined in this chapter, has a right to a writ of garnishment, in the manner provided pursuant to this chapter, to satisfy the judgment he has obtained by subjecting to garnishment income, wages, bonuses, and commissions of the judgment debtor. Except for those types of income, no other types of personal property of the debtor are subject to garnishment, and the term ‘property’ of the debtor or another similar term, as used in this chapter in regard to garnishment, must be construed in the manner provided pursuant to this section.

(B) The term ‘commercial debt’ as used in this chapter means a nonconsumer debtor or a debt resulting from a revolving credit account that is not a consumer credit transaction as defined in Section 37‑1‑301(11) or other debt of a consumer as defined in Section 37‑1‑301(10). A commercial debt, for purposes of this chapter, does not include a mortgage on a residence that qualifies as a person’s legal residence pursuant to Section 12‑43‑220(c).

(C) Child support payments are not income subject to garnishment pursuant to this chapter. However, garnishment of income for required child support payments otherwise provided for by the laws of this State or pursuant to federal law continues in full force and effect and is not affected by the provisions of this chapter.

(D) For a commercial debt, as defined in subsection (B), to be subject to other provisions of this chapter, the debtor and the creditor before entering into the transaction shall agree voluntarily and knowingly, in writing, that the transaction is a commercial debt for this purpose.

Section 15‑42‑30. (A) After judgment is obtained against a defendant, the judgment creditor shall serve notice on the debtor of intent to apply for a writ of garnishment. The judgment creditor also shall serve with the notice an affidavit of search stating the amount of the judgment and that the plaintiff has searched for and was unable to find property on which a levy may be made sufficient to satisfy the judgment. The affidavit of search may be filed only after the return of execution is issued by the sheriff marked ‘nulla bona’. The notice must give the judgment debtor thirty days to serve a written response.

(B) The notice must be in writing and conspicuously state:

(1) the name, address, and telephone number of the judgment creditor to whom the garnished payments must be made;

(2) a brief identification of the debt;

(3) a statement that, if the debt is not paid, the judgment creditor may apply for a writ of garnishment;

(4) the debtor’s right to cure the debt; and

(5) the amount of payment and date by which payment must be made to cure the debt before garnishment.

(C) The notice must be substantially in the following form:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(name, address, and telephone number of judgment creditor)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(name, address, and telephone number of judgment debtor)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(amount of judgment now due)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(description of judgment)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(last date for payment before garnishment applied for)

Section 15‑42‑40. (A)(1) Thirty days after service of the notice, the judgment creditor may file with the circuit court the original notice, affidavit of search, affidavit of service, a response, and a motion for writ of garnishment together with a filing fee of twenty‑five dollars.

(2) If the judgment debtor serves an answer to the notice, the court shall set the motion for hearing and notify all parties of the hearing.

(B) If the judgment debtor fails to answer, the court shall issue a writ of garnishment against the judgment debtor for the amount of the judgment. The judgment subjected to the writ of garnishment may not contain interest, attorney’s fees, or other default‑related charges, except that if the underlying written contractual obligation provides for lawful attorney’s fees or interest at or after judgment on the obligation not in excess of the rate of interest lawfully applied to the contract prior to judgment on the obligation, the judgment may contain interest calculated at a rate no higher than the contract rate, and in the absence of a written contract, the legal rate of interest.

(C) Upon receipt of the writ of garnishment, the judgment creditor shall forward a copy to the employer or other garnishee of the judgment debtor, which writ must provide for the periodic payments of a stated portion of the salary or wages of the judgment debtor as provided in Section 15‑42‑50. The judgment creditor also shall forward to the employer or other garnishee instructions for forwarding the remittance by the employer or other garnishee to the judgment creditor; the content of the instructions must be prescribed by court rule.

(D) Until the judgment is satisfied or until otherwise provided by court order, the court shall allow the judgment debtor’s employer and subsequent employers or other garnishee to collect up to three dollars against the salary or wages of the judgment debtor to reimburse the employer or other garnishee for administrative costs for each deduction from the judgment debtor’s salary or wages.

(E) The employer or other garnishee shall remit the funds withheld to the judgment creditor within fifteen days or by the next pay period, whichever is later, after withholding. An employer or other garnishee who garnishes wages but wilfully violates the requirements of this chapter in regard to the remittance of an employee’s earnings or other garnishable income to a judgment creditor is subject to a civil penalty of not more than two hundred fifty dollars for each violation, maximum one penalty per debtor, to be imposed at the discretion of the court. The creditor has a right of action against the employer for garnished wages not remitted, to include the recovery of reasonable attorney’s fees and costs, except that the employer or other garnishee lawfully may cease to withhold funds from the salary or wages of the judgment debtor upon the satisfaction of the judgment or at another time provided by the court.

(F) The employee must be credited fully with payment toward the debt in the amount garnished even if those funds are not remitted to the creditor by the employer or other garnishee.

Section 15‑42‑50. (A) As used in this chapter:

(1) ‘Disposable earnings’ means that part of the earnings of an individual remaining after the deduction from those earnings of the amount of employee‑elected benefits and those amounts required by law to be withheld, including child support, state and federal taxes, FICA, and amounts pursuant to Chapter 8 of the Federal Bankruptcy Act.

(2) ‘Earnings’ means compensation paid or payable for personal service, whether denominated as wages, salary, commission, bonus, or otherwise.

(3) ‘Employer’ means a person doing business in this State for whom individuals perform a service, of whatever nature, as the employee of the person. If the person for whom the individual performs services does not have control over the payment of wages for the services, the term ‘employer’ means the person having control of the payment of wages.

(4) ‘Person’ includes individuals, firms, partnerships, associations, corporations, the State of South Carolina, and political subdivisions of the State of South Carolina.

(B) Notwithstanding the provisions of subsection (A), the maximum part of the aggregate disposable earnings of an individual for a workweek which is subject to garnishment may not exceed twenty‑five percent of his disposable earnings for that week. The garnishment must not bring an individual’s disposable earnings below the standards set by the Fair Labor Standards Act.

(C) The limitation of garnishment in subsection (B) applies even if the garnishee receives a writ of garnishment in more than one garnishment case naming the same defendant. A garnishee may not withhold from the disposable earnings of the defendant a sum greater than the amount prescribed by subsection (B), as applicable, regardless of the number of writs. Valid prior recorded writs of garnishment have priority over valid subsequently recorded writs of garnishment.

(D) The administrative costs in Section 15‑42‑40(D) must be included for purposes of computing the maximum amount of disposable earnings subject to garnishment.

(E) In the event of a good faith error by the employer or other garnishee in violation of this section or in violation of the Fair Labor Standards Act, the employer or other garnishee must be held harmless by the creditor or creditors.

(F) Multiple garnishments of the same judgment debtor must be satisfied in the order, by date, that the employer receives notice under Section 15‑42‑30(C).

Section 15‑42‑60. Within twenty days of full payment of the amount owed, the judgment creditor must file a satisfaction of judgment with the clerk of court in each county where the judgment was filed. A judgment creditor who fails to file a satisfaction of judgment pursuant to this section is subject to a penalty of two hundred fifty dollars payable to the clerk of court.

Section 15‑42‑70. (A) Funds or benefits from a pension or retirement program or funds or benefits from an individual retirement account are exempt from the process of garnishment until paid or otherwise transferred to a member or beneficiary of the program. The funds or benefits, when paid or otherwise transferred to the member or beneficiary, are exempt from the process of garnishment only to the extent provided in Section 15‑42‑50 for other disposable earnings, except that a greater exemption may be provided in Section 15‑41‑30 or another provision of law.

(B) Disability and workers’ compensation benefits are not subject to garnishment.

Section 15‑42‑80. The remedy provided by this chapter is not exclusive but is in addition to other collection procedures provided by the laws of this State in effect at the time this chapter takes effect and is optional with the judgment creditor.

Section 15‑42‑90. This chapter does not apply to garnishment for income tax purposes or other purposes otherwise provided for by the laws of this State.”

SECTION 2. Section 37‑5‑104 of the 1976 Code is amended to read:

“Section 37‑5‑104. With respect to a debt arising from a consumer credit sale, a consumer lease, a consumer loan, or a consumer rental‑purchase agreement, regardless of where made, except those transactions which are commercial debts as defined in Chapter 42, Title 15, the creditor may not attach unpaid earnings of the debtor by garnishment or like proceedings.”

SECTION 3. Section 37‑5‑108(4)(a) of the 1976 Code, as last amended by Act 42 of 2003, is further amended to read:

“(4)(a) In applying subsection (1), consideration must be given to applicable factors, ~~such as~~ including, but ~~without limitation~~ not limited to:

(i) in the case of a consumer credit sale, consumer lease, or consumer rental‑purchase agreement, knowledge by the seller or lessor at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased;

(ii) in the case of a consumer credit sale, consumer lease, consumer rental‑purchase agreement, or consumer loan, gross disparity between the price of the property or services sold, leased, or loaned and the value of the property, services, or loan measured by the price at which similar property, services, or loans are readily obtainable in consumer credit transactions by like consumers;

(iii) the fact that the creditor contracted for or received separate charges for insurance with respect to a consumer credit sale, consumer loan, or consumer rental‑purchase agreement with the effect of making the sale or loan unconscionable, considered as a whole, when including the sale of insurance from which the consumer receives no potential benefit as referenced in Section 37‑4‑106(1)(a);

(iv) the fact that the seller, lessor, or lender knowingly has taken advantage of the inability of the consumer or debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy, inability to understand the language of the agreement, or similar factors;

(v) taking a nonpurchase money, nonpossessory security interest in household goods defined as the following: clothing, furniture, appliances, one radio and one television, linens, china, crockery, kitchenware, and personal effects, including wedding rings of the consumer and his dependents; except that when a purchase money consumer credit transaction is refinanced or consolidated, the security lawfully collateralizing the previous consumer credit transaction continues to secure the new consumer credit transaction, even if the new consumer credit transaction is for a larger amount or is in other respects a nonpurchase money consumer credit transaction; and further, that a nonpurchase money, nonpossessory security interest may be taken in a work of art, electronic entertainment equipment, except one television and one radio, items acquired as antiques and which are over one hundred years of age, and jewelry, except wedding rings. In construing this subitem ~~(v)~~, the courts must be guided by the interpretations and rulings of the federal courts and the Federal Trade Commission to the Credit Trade Regulation Rule (16 C.F.R. PART 444).

(vi) inducing a debtor or prospective debtor in a consumer credit obligation to sign a statement indicating that the debt or prospective debt is incurred for business or commercial purposes with the effect of making the debt or prospective debt subject to levy or garnishment pursuant to the South Carolina Business Debt Recovery Act, as provided in this chapter, with the purpose or effect of depriving the debtor or prospective debtor of rights he would otherwise have pursuant to the provisions of Title 37. In determining whether a creditor has violated the unconscionability requirements with regard to this subsection, the court may not deem as determinative a statement the debtor or prospective debtor may have signed indicating the debt was incurred for business or commercial purposes but shall afford the parties a reasonable opportunity to present evidence as to the conduct of the parties and the setting, purpose, and effect of the agreement or transaction.”

SECTION 4. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 5. This act takes effect upon approval by the Governor.

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