Proposals for Limiting Collection Practices: New Hope for the Debtor in Default

Nancy Anne Holst
PROPOSALS FOR LIMITING COLLECTION PRACTICES: NEW HOPE FOR THE DEBTOR IN DEFAULT

The last two decades have witnessed a marked increase in the utilization of credit by the consumer in America.\(^1\) While this practice has facilitated the distribution of a wider range of goods and services, it has generated concomitant problems. What happens when the consumer is unable to meet his payment obligations on time? Quite naturally, he is confronted by the creditor, who is seeking payment. This "request" may take a variety of forms, and varies in intensity and ingenuity. Common techniques include recurring telephone calls at all hours of the day and night, sometimes accompanied by abusive language, repeated personal visits to the debtor threatening repossession, eviction or even arrest, phone calls and visits to neighbors and employers seeking assistance in locating the debtor and collecting money allegedly owed. More ingenious collectors write letters on attorney's stationery, intimating lawsuits which are never filed, or send papers resembling official court documents in an effort to frighten the debtor into payment to avoid costly litigation.

While the law recognizes that the creditor has a legitimate interest in recovering just debts owed to him,\(^2\) at some point this interest must give way to the debtor's right to be free of unwarranted harassment.\(^3\)

Recent United States Supreme Court decisions\(^4\) have weakened the collector's traditional weapons of garnishment and replevin, and this development has caused an increased reliance on nonjudicial collection techniques. Further, the sheer size of our modern economy has placed the consumer at a disadvantage. Personal dealings based on goodwill between customer and merchant are no longer the rule. Delinquent accounts are often turned over to collection agencies whose specialization allows them to utilize greater resources than are

---

available to individual creditors. Hence, when a buyer in default attempts to work out a payment compromise, he will probably be dealing with an institution insensitive to his needs and unencumbered by the need to maintain customer goodwill. Furthermore, the ordinary customer can rarely afford to mobilize the legal process necessary to protect his rights, and as a result, consumers are vulnerable to deceptive collection practices.

Last year $3 billion in debts were turned over to professional debt collectors, who managed to collect $850 million of that amount. Unfortunately, only thirty-seven states and the District of Columbia have laws to regulate the collectors, and enforcement of these laws is somewhat of a hit-and-miss proposition. There are no uniform standards or uniform penalties for wrongdoing. Even worse, thirteen states have no laws at all.

Interstate debt collection is a major area of abuse. The widespread use of the WATS telephone line has greatly increased the volume of interstate contacts, and state laws cannot regulate such interstate collection practices. Consequently, a debt collector can harass a consumer across state lines without fear of sanctions.

Remedies for abusive collection tactics have traditionally been either the regulatory efforts of specialized administrative agencies, or tort law. In California, collection agencies must be licensed by the Bureau of Collection and Investigative Services, which has the responsibility to regulate them through the Collection Agency Act. The Bureau has promulgated regula-

5. For a description of the process of assignment of creditor accounts to a collection agency, see Grant, Resort to the Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles—Alternative Methods for Allocating Present Costs, 14 U.C.L.A. L. Rev. 879 (1967).
8. Id. An illustration of the effectiveness of state laws is the fact that fourteen of the sixteen state laws providing for collection agency boards require that a majority of the board be composed of debt collectors!
9. These states are Alabama, Delaware, Georgia, Kansas, Kentucky, Mississippi, Montana, Ohio, Oklahoma, Rhode Island, South Carolina and South Dakota.
10. H.R. REP. No. 94-1202, 94th Cong., 2d Sess. 2 (1976) [hereinafter cited as REPORT].
11. Id. at 3.
tions\textsuperscript{13} which attempt to describe which acts by collectors are permissible and which are not, but the Bureau's jurisdiction extends only to licensed collection agencies and thus excludes non-licensees and "in-house" collectors.\textsuperscript{14} Alternatively, a lawsuit based on a tort cause of action can be filed, but has been ineffective to curb collection agency abuse. The problems here have been the cost to the debtor in securing legal services and the fact that recovery is not always certain unless special damages can be proved.

An avenue of more promise is the recent enactment in a few states of unfair and deceptive trade practices statutes.\textsuperscript{15} These statutes create a private right of action in the harassed debtor for violations of certain prohibited practices\textsuperscript{16} by a collector, without the need to show the particular amount of damage suffered. Thus, the laws afford the possibility of greater leverage and control over unfair collection methods than has heretofore existed. The Bureau of Collection and Investigative Services has proposed amendments to existing regulations controlling licensed collection agencies. In addition, in the last session of the California legislature there was introduced into the Assembly a bill\textsuperscript{17} which was an attempt to assimilate the best features of existing legislation with the critical need for more control in this area. Finally, the federal government has begun to recognize collection problems, and a House banking subcommittee began hearings in April, 1976, on proposed legislation\textsuperscript{18} to bring the debt collection industry under federal regulation.

This comment focuses on what remedies presently exist, both at the state and federal levels, and on the proposed regula-

\begin{itemize}
\item \textsuperscript{13} CAL. ADMIN. CODE tit. 16, §§ 606-636 (1975).
\item \textsuperscript{14} "In-house" collectors is a general term employed to refer to finance companies, banks, thrift institutions, department stores, etc., which do their own debt collecting.
\item \textsuperscript{16} Examples include, impersonating a law enforcement officer or representative of a government agency; threatening to use force or violence to collect a debt; threatening to disclose to another information affecting the debtor's reputation for creditworthiness or otherwise when the debt is disputed; attempting to enforce a claim against the debtor which is not legitimate; posting or publishing a list before the general public of consumers allegedly owing debts ("deadbeat lists").
\item \textsuperscript{17} A.B. 2833, 1975-76 Sess. (1976).
\item \textsuperscript{18} H.R. 29, 95th Cong., 1st Sess. (1977).
\end{itemize}
tion of collection practices. In pointing out the inadequacies of protections presently available, it is hoped that more meaningful measures will be formulated.

PRESENT SANCTIONS AGAINST UNFAIR COLLECTION PRACTICES

Traditional Tort Remedies

Recovery in tort has traditionally centered around a small nucleus of established tort theories. Although courts have been more liberal in granting recovery in recent years, the remedy is subject to a number of inherent weaknesses. Often the collector's conduct is not severe enough to constitute a cause of action. Many debtors wish to avoid the publicity


20. Texas was the first state to go so far as to recognize a separate tort for unreasonable collection efforts. Liability arises where the debtor is unreasonably harassed by a collector, and these efforts cause great mental anguish, resulting in physical injury. Physical injury is still a prerequisite to recovery, but the Texas courts have been flexible in broadening the scope of just what may be included in this category. Thus, it has been held that physical injury includes: nervousness and indigestion (Duty v. General Fin. Co., 154 Tex. 16, 273 S.W.2d 64 (1954)), nausea (United Fin. & Thrift Corp. v. Bain, 393 S.W.2d 429 (Tex. Civ. App. 1965), writ refused per curiam, 400 S.W.2d 302 (1966)), loss of appetite (Signature Indorsement Co. v. Wilson, 392 S.W.2d 484 (Tex. Civ. App. 1965)), fatigue (United Fin. & Thrift Corp. v. Smith, 387 S.W.2d 752 (Tex. Civ. App. 1965)), loss of memory (Houston-American Life Ins. Co. v. Tate, 358 S.W.2d 645 (Tex. Civ. App. 1962)). In lieu of physical injury, recovery has also been allowed for injury to property, reputation, or other actual damage. Harned v. E-Z Fin. Co., 151 Tex. 641, 254 S.W.2d 81 (1953).

The Supreme Court of Texas has upheld recovery based on negligent conduct which results in actual damages, and held that willful conduct is prerequisite only to recovery of exemplary damages. Moore v. Savage, 359 S.W.2d 95, 96 (Tex. Civ. App.), writ refused per curiam, 362 S.W.2d 298 (1962). This development represents a significant step forward as it focuses on a separate and distinct problem unique to the debtor-creditor relationship.
which necessarily arises from such a suit. If the debtor, as is often the case, is from the lower economic level of society, his use of the legal system is hampered by a lack of knowledge and resources. Even where an attorney is retained and suit filed, the plaintiff must prove actual (pecuniary) damages. If he surmounts this hurdle, recovery is allowed, but it is limited to the facts of the individual plaintiff's case, and does nothing to deter the collector (outside of financial sanctions) from repeating the same tactics on another debtor.

The traditional tort theories have been the subject of frequent comment; hence, they will not be examined in depth here. Tort claims upon which recovery against collectors has been founded include: invasion of privacy, defamation, intentional infliction of emotional distress, abuse of process, and interference with the employment relationship.

An additional theory was enunciated by a California court:

21. In a survey of the most frequent users of installment credit, the profile that emerged was that of a young, married consumer with children at home and a family income between $7,500 and $15,000. Consumer Credit in the United States: Report of the National Comm'n on Consumer Finance 12 (1972).


24. See authorities cited in note 19 supra.


28. McGann v. Allen, 105 Conn. 177, 134 A. 810 (1926) (while under arrest, plaintiff was taken to department store and detained for questioning). See also Czap v. Credit Bureau, 7 Cal. App. 3d 1, 7, 86 Cal. Rptr. 417, 420 (1970) (court found abuse of process by credit bureau which, knowing plaintiff's wages were exempt from execution, nevertheless garnished them, and threatened to procure other levies, thereby jeopardizing plaintiff's job, and thus forcing her to pay the debts from her exempt earnings).

of appeal in *Laczko v. Jules Meyers, Inc.*, in which it was held that a violation of a statutory duty constitutes a tort and makes traditional tort remedies available to the plaintiff.

A tort in essence is the breach of a nonconsensual duty owed another. Violation of a statutory duty to another may therefore be a tort and violation of a statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the statute itself. Any injured member of the public for whose benefit the statute was enacted may bring the action.

California Business and Professions Code section 6947 outlines a series of acts prohibited to collection agencies. It is possible to argue that a violation of section 6947 is per se tortious, giving rise to a private right to damages. Not only is the concept untested, but it is subject to many of the problems inherent in more traditional types of tort remedies, including access to the legal system and proof of damage.

**Administrative Sanctions in California**

The State of California requires every collection agency to be duly licensed. The Bureau of Collection and Investigative Services, under the control of the Department of Consumer Affairs, is charged with the responsibility to regulate collection agencies through the Collection Agency Act, and has promulgated regulations to aid in implementing that Act. While the practice of licensing would seem to insure some degree of control advantageous to consumers, the Bureau's effectiveness is

31. *Id.*
32. *See* notes 41-43 *infra* for text of relevant sections.
33. Other statutes which may give rise to tort liability by analogy include 15 U.S.C. § 45(a)(1) (1970) (unfair or deceptive acts or practices in commerce are unlawful); 47 U.S.C. § 223(1)(D) (1970) (prohibits use of repeated telephone calls in interstate commerce to harass any person); CAL. BUS. & PROF. CODE § 6105 (West 1975) (attorney who lends his name to be used by one not an attorney constitutes cause for disbarment); *id.* §§ 6125-6126 (person not a member of the Bar may not practice law).
35. *Id.* §§ 6850-6956.
37. *See generally* Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559, 586 (1968). The initial objective of licensing is registration of a definable class. This permits the consumer to inquire about the status of the licensee, while at the same time allowing the state to investigate and initiate corrective proceedings in case of violations.
limited by the scope of the term "collection agency". The statute expressly exempts attorneys, banks, title companies, and credit insurers, among others. Consequently, the Bureau's usefulness to the consumer is limited.

Nevertheless, for those who are covered by the statute, the legislature has attempted to control outrageous collection practices by setting out a limited number of acts which are statutorily prohibited to licensed agencies. These practices range from publication of so-called "deadbeat" lists to false misrepresentation of official connection with any government agency, and the use of profanity. Furthermore, the ethical practice regulation of the Bureau requires all licensees to deal "openly, fairly and honestly in the conduct of the collection agency business." A similar "laundry list" appears in other Bureau regulations.

The Bureau is empowered to impose sanctions for violations by licensees. It is a misdemeanor to misuse one's license. Article 10 of the Collection Agency Act sets out the procedure to handle violations of the prohibited practices listed in section 6947. Section 6947.1 provides that any intentional violation of

38. CAL. BUS. & PROF. CODE § 6852 (West 1975) defines "collection agency" as "all persons engaging directly or indirectly . . . in soliciting claims for collection."
39. Id.
40. Id. § 6947.
41. Id. § 6947(b) provides that a creditor shall not: "Publish or post, or cause to be published or posted, any list of debtors, commonly known as "deadbeat" lists, except that this subdivision shall not be construed to prohibit the confidential distribution of trade lists containing debtor information."
42. Id. § 6947(e) provides that a creditor shall not have in his possession or make use of any badge, use a uniform of any law enforcement agency or any simulation thereof, or make any statements which might be construed as indicating an official connection with any federal, state, county, or city law enforcement agency, or any other governmental agency, while engaged in collection agency business.
43. Id. § 6947(k) prohibits: "Use of profanity, obscenity, or vulgarity, while engaged in the collection of claims."
44. CAL. ADMIN. CODE tit. 16, § 627 (1975).
45. Id. §§ 618-621.
47. Id. § 6925 provides that any person aggrieved by any wrongful act of an agency may file with the chief a written statement alleging the violation(s). If the complaint warrants administration action, the agency will assign the case to an investigator, who makes a formal recommendation to the agency. Section 6930 provides a choice of sanctions which may be imposed by the director only after a hearing (and
subdivisions (a) through (k) of section 6947 shall result in liability to any aggrieved person for all actual damages sustained. For a willful violation of subdivision (I), all actual damages but not less than $250 per violation, are recoverable. The section also provides for an award of attorney’s fees to the prevailing party. Criminal sanctions against the unlicensed are provided in sections 6871 and 6931. In addition, any superior court in the state has jurisdiction to enjoin any person collecting without a license.

Further, California courts have held that, since the purpose of the statute is to protect the public, violations of section 6947 are actionable by the injured party, even absent a showing of intent or willfulness.

Recently, the Bureau of Collection and Investigative Services proposed amendments to its regulations for licensed collection agencies. These amendments were passed and became effective January 1, 1977. The changes include valuable improvements.

The amendments to section 620 require that collection forms contain information indicating that the collection agency is licensed and that complaints may be directed to the Bureau of Collection and Investigative Services. Additions to section 622 require agencies to submit proposed collection forms to the Bureau, which must approve them prior to their use. The prior approval procedure should significantly affect the use of false and misleading letters and other printed matter.

condition in any manner, whether directly or indirectly, the filing, recording, or delivery of an acknowledgment of satisfaction of judgment upon the performance of any act or the payment of any amount by a judgment debtor in excess of that to which the judgment creditor or assignee is entitled pursuant to the judgment.

49. Id. §§ 6871, 6931.

50. Id. § 6872.


53. However, §§ 618, 620(b), 621(c), 622, 627(d) and 627(g) were the subject of a preliminary restraining order obtained as a result of strong opposition by licensed collection agencies. They were ultimately upheld by the Sacramento Superior Court. Order of Judge Mamoru Sakuma, Haggerty v. California, No. 75-1048, April 1, 1977.


55. Id. § 622(b), (c), amending Cal. Admin. Code tit. 16, § 622 (1975).
Additions to section 627, the ethical practices and conduct section, prohibit a licensee from contacting a debtor at work unless otherwise instructed by the debtor; prohibit a licensee from contact during hours when the debtor is likely to be asleep; require the licensee to determine the legitimacy of a disputed debt; and forbid any representation, for purposes of harassment, that legal action will be taken against the debtor. The section also provides standards by which to make the determination that harassment was the purpose of the collector.

Although the amendments are a step forward, it is important to remember that the remedy afforded is less than complete. The Bureau is hampered in its enforcement efforts by two major obstacles; its jurisdiction is still limited to licensed collection agencies to the exclusion of many other debt collectors and its manpower resources are finite.

Unfair and Deceptive Practices Acts

A brighter development is the emergence, on both the state and federal level, of unfair and deceptive practices acts. California has enacted Civil Code section 3369, which provides that any unlawful, unfair or fraudulent business practice may be enjoined in any court of competent jurisdiction. Perhaps the most beneficial aspect is the provision that actions may be brought not only by the Attorney General, a district attorney, or city attorney, but also upon complaint of "any board, officer, person, corporation or association." Section 3370.1 allows a penalty, not to exceed $2,500 for each violation of section 3369. However, this penalty applies only to actions brought by the Attorney General, district or city attorney, and the money goes to the state, county or city.

These sections were utilized in a recent California case, Barquis v. Merchant's Collection Association, where the plaintiff alleged that the collection agency knowingly filed actions in inconvenient forums "for the purpose of impairing its adversaries' ability to defend these actions, and with the intent, and

60. Id.
62. Id. (emphasis added).
63. Id. § 3370.1 (West 1955).
effect, of obtaining an increased number of default judgments.” The California Supreme Court found this conduct to be an abuse of process, but in addition held that the repeated violations constituted an “unlawful business practice” enjoinable under section 3369.

The Federal Trade Commission Act states that “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” The Federal Trade Commission (FTC), with court approval, has employed this provision as a vehicle for condemning various collection activities, by issuing cease and desist orders. Violation of such an order carries a stiff penalty, and the Act also provides that the FTC may file a civil action for knowing violations. In addition, under the Rules of Practice, the FTC is empowered to promulgate trade

---

64. 7 Cal. 3d 94, 98, 496 P.2d 817, 819, 101 Cal. Rptr. 745, 747 (1972).
65. See also People ex rel. Mosk v. National Research Co., 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1962) (defendant's sale of skip tracer forms enjoinable as unfair competition under section 3369 where forms were similar to official forms used by state departments of motor vehicles and employment).
67. See Rothschild v. FTC, 200 F.2d 39 (7th Cir. 1952) (Commission acted within its powers in issuing cease and desist order against collection service which by means of misleading letters and postcards attempted to obtain information concerning debtors of its subscribers); Silverman v. FTC, 145 F.2d 751 (9th Cir. 1944) (cease and desist order proper to restrain sale of post cards designed for use by creditors in obtaining by subterfuge information concerning debtors); Dorfman v. FTC, 144 F.2d 737 (8th Cir. 1944) (threats to sue for the purpose of extorting money from customers where no money is due may be forbidden by FTC and an order to cease and desist from such practice is within its power under the FTC Act).
68. See Mohr v. FTC, 272 F.2d 401 (9th Cir.), cert. denied, 362 U.S. 920 (1959) (condemning sale in interstate commerce of skip trace forms containing false and misleading statements to elicit information regarding delinquent debtors' whereabouts); DeJay Stores, Inc. v. FTC, 200 F.2d 865 (2d Cir. 1952) (use of form letter representing that signer had important letter for debtor and requesting address constituted deceptive practice); International Art Co. v. FTC, 109 F.2d 393 (7th Cir. 1940) (unfair practice for seller to falsely represent to purchaser that his account had been sold to innocent purchaser for value when such agency was a “dummy” set up by seller for purpose of making collections). An interesting application is Floersheim v. FTC, 411 F.2d 874 (9th Cir.), cert. denied, 396 U.S. 1002 (1969). In that case, the defendant was a seller of forms to creditors to aid in debt collection. Though the seller lived and sold the forms in Los Angeles, they were mailed from Washington, D.C., contained repetitious use of “Washington, D.C.” and were set in elaborate type style to simulate legal documents. The FTC deemed them deceptive and exploitative of low income debtors who tend to believe that anything coming from Washington, D.C., comes from the government. The FTC ordered Floersheim to print in large type that the United States government is not interested in the debt, and further ordered that creditor's identity be displayed prominently on all forms.
70. Id. § 45(m)(1)(A).
regulation rules which define specific acts or practices as unfair or deceptive under the Act.\textsuperscript{71} Pursuant to this provision, the Commission has published in the \textit{Federal Register}\textsuperscript{72} a proposed trade regulation rule relating to collection of debts.\textsuperscript{72} Among other practices, the following are prohibited: receiving from a consumer any obligation which fails to provide that the creditor shall not communicate with consumer's employer or any person not liable for the debt (other than spouse or attorney), except as permitted by court order; any provision requiring the payment of attorney's fees or other costs incident to collection of the obligation and late charges in excess of finance charges. An alternative provision sanctions a price-fixing arrangement whereby the consumer agrees to pay attorney's fees, if referred to an attorney for collection, but the amount is limited.

To date, the trade regulation rule has not been adopted. The FTC has, however, promulgated guides against debt collection deception.\textsuperscript{74} While not fixed rules (therefore, violation of a guideline does not constitute a violation of the Act), the guidelines do alert creditors as to what practices the Commission deems deceptive.\textsuperscript{75}

In addition to the deceptive practices acts already described, there exist a number of federal statutes which have been utilized over the years, in lieu of anything better, to curb certain collection practices. It is a crime punishable by a $500 fine or six months' imprisonment or both, to use the telephone in the District of Columbia or interstate or foreign communication to make "repeated telephone calls, during which conversation ensues, solely to harass any person at the called number"\textsuperscript{76} or to cause the telephone of another repeatedly to ring with intent to harass.\textsuperscript{77} The statute has limited application due to the jurisdictional requirement of interstate communication.

Title 18 of the United States Code contains a series of sections applicable to certain collection tactics. Section 712\textsuperscript{78}

\textsuperscript{71} 16 C.F.R. § 1.8 (1976).
\textsuperscript{73} Id.
\textsuperscript{74} 16 C.F.R. § 237 (1976).
\textsuperscript{75} See FTC v. Mary Carter Paint Co., 382 U.S. 46, 47-48 (1965) ("Guides Against Deceptive Pricing" promulgated by FTC were guides, not fixed rules and were designed to inform businessmen of the factors which would guide FTC decision).
\textsuperscript{77} Id.
provides that it is a crime for anyone in the course of collecting a debt to use in any communication, notice or advertisement the words "national," "federal," "United States" or "U.S.," in order to convey the false impression that his business is a department or agency of the United States.\textsuperscript{79} Sections 891-896\textsuperscript{80} deal with extortionate credit transactions. Section 891(6) defines extortionate extension of credit.\textsuperscript{81} When applicable, section 894(a)\textsuperscript{82} authorizes a fine of $10,000 or 20 years' imprisonment, or both, for knowingly participating in the use of extortionate means to attempt to collect any extension of credit. The statute was designed to prevent loan sharking, and its scope offers only limited aid to the debtor.\textsuperscript{83}

Sections 1341 and 1342\textsuperscript{84} forbid the use of the United States mails to further any scheme to defraud or obtain money or property by false pretenses.\textsuperscript{85} Section 1718\textsuperscript{86} prohibits display on any envelope or wrapper to be conveyed by the mails, of defamatory or libelous language. Again, this regulation has not had far-reaching effects on collection efforts, but it has been effective to curb the most flagrant abuses.\textsuperscript{87}

Unfortunately, the problem with all the aforementioned federal remedies is their parochial application and the difficulty of enforcement by the various agencies charged with implementing them.

The Federal Trade Commission's powers are greatly limited in dealing with collectors since this agency does not have a law with which to control collectors but must rely only on a set of guidelines that do not have the force of law.

\textsuperscript{79} Cf. United States v. Boneparth, 456 F.2d 497 (2d Cir. 1972) (statute does not reach a merchant collecting his own debts).
\textsuperscript{81} Id. § 891(6) reads:
An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.
\textsuperscript{82} Id. § 894(a).
\textsuperscript{85} Bronzin v. United States, 309 F.2d 158 (8th Cir. 1962).
\textsuperscript{87} See United States v. Prendergast, 237 F. 410 (D.C. Ore. 1916); In re Barber, 75 F. 980 (E.D. Wis. 1896); United States v. Dodge, 70 F. 235 (E.D. Pa. 1895); United States v. Brown, 43 F. 135 (C.C.D. Vt. 1890).
The Federal Communications Commission is restricted solely to investigations involving collector's use of the telephone.\textsuperscript{88}

The FTC cannot directly help a private individual who claims to have been defrauded; rather, the agency acts to prevent consumers from being harmed in the future by fraudulent practices.\textsuperscript{89} Nevertheless, the Commission does not really have an impact on the industry-wide practices.\textsuperscript{90} The Commission may sue one company, but the suit has no effect on what other companies will do. The FTC simply does not have the resources or manpower to effectively regulate the collection industry, which has grown to gigantic proportions.

Because of the inadequacy of existing state and federal remedies, there have been attempts to effectuate workable, practical and effective legislation dealing with debt collection abuses. This concern has led to introduction in both the House of Representatives\textsuperscript{91} and the California State Assembly\textsuperscript{92} of bills designed to correct the deficiencies presently existing. The Assembly Bill met with stiff opposition from the banks and collection agencies, and died in committee when the legislature adjourned on August 31, 1976. But a brief examination of both bills will highlight the strengths, weaknesses and possible improvements in each, in the hope that meaningful legislation will eventually be enacted.

A PROSPECTIVE FEDERAL SOLUTION: H.R. 29

On February 19, 1976, Mr. Frank Annunzio, chairman of the Consumer Affairs Subcommittee of the House Committee on Banking, Currency and Housing, introduced a bill (originally H.R. 11969) designed to attack the abuses in the collection industry.\textsuperscript{93} He was careful to note that the bill had been drafted in conjunction with trade organizations as well as con-

\textsuperscript{88} Hearings, supra note 7, at 23 (statement of Frank Annunzio, Chairman, Subcommittee on Consumer Affairs).

\textsuperscript{89} See generally 1 Pov. L. REP. (CCH) ¶ 3400 (1972).

\textsuperscript{90} Hearings, supra note 7, at 298 (statement of Lewis H. Goldfarb, Deputy Assistant Director, Division of Special Statutes, Bureau of Consumer Protection, FTC). Mr. Goldfarb cited one example where the FTC obtained a consent decree against a large debt collector who complied with the order, but came back six months later, on the verge of going out of business, to state that they were complying with FTC law, but that twelve of their competitors were engaged profitably in the same practices.


\textsuperscript{93} 122 CONG. REC. 1192-93 (daily ed. Feb. 19, 1976).
sumer groups "to insure that the Debt Collection Practices Act is understood as one which seeks neither to wipe out the debt collection business nor to protect deadbeats from having to pay legitimate debts.""94

Hearings on the bill were held in Washington, D.C., on March 30 and 31, April 6, 7 and 8, 1976. After consideration of the testimony received, the Subcommittee adopted a number of amendments and ordered a clean bill introduced. On May 12, 1976, Mr. Annunzio introduced H.R. 1372095 into the House of Representatives, where it was passed and referred to the Senate for their confirmation. No action was taken by the Senate before the 94th Congress ended. Consequently, the bill was reintroduced in the House of Representatives on January 4, 1977,96 as H.R. 29, again by Mr. Annunzio, where it was pending further action at the time of this writing.

The Scope of Protection

Section 802(f) defines "debt collector" as "any person who engages in any business the principal purpose of which is the collection of any debt, or any person who directly or indirectly collects or attempts to collect a debt owed or due or asserted to be owed or due another . . . ."97 The House Report indicates that this definition was designed to exclude from coverage a business that extends credit and only collects debts incidental to the extension of such credit (thus, excluding banks, retailers, credit unions, finance companies, and attorneys collecting debts on behalf of clients).98 It is also intended to exclude any wholly owned subsidiary that collects debts for which the parent company is the creditor.99 At the hearings on the bill, considerable testimony was given as to whether "in-house" collectors should be subject to the measure. Opponents argued it was unfair not to regulate all who collect debts, and that ninety percent of the debt collectors would be exempt.100 However, about seventy percent of consumer complaints came from ten

94. Id.
95. Id. at 4347 (daily ed. May 12, 1976).
98. REPORT, supra note 10, at 3.
99. Id. at 3-4.
100. See, e.g., Hearings, supra note 7, at 179 (testimony of Jack Fletcher, member of American Collectors Association's National Legislative Council and President, United Creditors Service, Inc., Nashville, Tenn.).
percent of the debt collectors—those employed by collection agencies, and the Subcommittee decided to focus the legislation on only that segment of the collection industry.

**Notice**

Section 808 contains an important protection for the consumer. It provides that the collector must, within five days of initial contact, send the consumer a written notice stating the amount of the debt, name and address of the original creditor, the creditor currently owed, and a statement that unless the consumer disputes the validity of the debt within thirty days, the collector will assume its validity. If the consumer does dispute its validity within that time, the collector must cease all collection efforts until certification of the bill’s validity is received from the creditor and a copy mailed to the consumer. This procedure will serve to eliminate a major source of complaints—attempted collection of a mistaken debt.

**Communications in Connection with Collection Activities**

Section 803 provides that no collector may communicate other than by telephone, mail or telegram with any person for purposes of acquiring location information about any consumer—i.e., “skip tracing.” This provision was inserted to end the harassment of relatives, employers, school teachers, or anyone who might have an idea where a debtor had moved, as well as to protect the privacy of the debtor. The section requires that the collector identify himself and his employer; that he not communicate with each person more than once (except to reconfirm location information previously supplied); and that he refrain from stating that the consumer owes a debt.

The proposed Act sets forth the circumstances in section 804 under which a collector may communicate with a consumer, spouse or third party for the purpose of collecting the debt. To eliminate round-the-clock harassment, contacts are limited to the hours between 8 a.m. and 10 p.m. While opponents argue that this limitation hampers their ability to reach persons who work at odd hours, the fourteen-hour time span

---

101. *Id.* at 247 (testimony of Thomas Raleigh, Manager, Illinois Collection Agency, Office of Consumer Services).
102. See *id.* at 29-30, 181, 204.
103. See generally *id.* at 314-15.
was deemed sufficient for debt collection purposes. The collector may contact individuals personally for the purpose of collecting a debt but not for the purpose of acquiring location information. It is unclear precisely how that distinction will be made in practice.

The collector is also prohibited from contacting a consumer once it is established that the latter is represented by an attorney, unless the attorney is unjustifiably nonresponsive to communication from the collector (quere: what conduct will be deemed sufficient to satisfy this?). A much debated provision is section 804(a)(3) which states that after the initial contact with the debtor, no more than two communications per week are allowed. Section 804(b) limits the collector to one communication with the debtor at his place of employment. This represents an effort to eliminate the propensity of employers to fire workers who fall deeply in debt and whose creditors repeatedly interrupt the work day of the individual. Similarly, section 804(c) forbids communication with third parties, except, as to employers, after a court order establishes the consumer’s liability. The section attempts to reduce the collectors’ reliance on the employer to aid them in getting the debtor-employee to pay, especially without first establishing that the debt is valid.

Prohibited Practices

After receiving testimony of the use of physical threats and trickery by debt collectors, the Subcommittee passed section 805. It forbids harassment, intimidation or threats to collect a bill. Several modes of conduct are expressly forbidden, including violence to persons or property, abusive language, so-called “deadbeat” lists, harassing telephone calls or visits to home or office. The latter was inserted to end the use of a peculiar technique known in the trade as “beating”—the continuous calling of an individual, at five minute intervals, until he is “beaten” down and agrees to pay.

Section 806 parallels some of the federal statutes con-
tained in Title 18 of the United States Code, but is more comprehensive in scope. It generally prohibits any debt collector from making any false or misleading representation to any person, and then enumerates sixteen examples of what constitutes a “false or misleading representation.” These are generally the worst of the abusive collection techniques, and the ones most frequently employed.

Section 807 forbids the collection of any amount unless expressly authorized by the agreement creating the debt, and also forbids the acceptance of any post-dated check. The latter was by far the most hotly contested prohibition. Collectors have long used this as a ploy to get a debtor to give them a check, albeit dated for the future. Ostensibly, the debtor is told that furnishing a post-dated check will eliminate any need for further harassment. Then the check is deposited prior to the date on the check, and the debtor becomes liable for a criminal violation for writing a bogus check. Section 807(2) seeks to eliminate this practice.

In sum, the prohibited practices sections of the bill attempt to outlaw the most common and offensive tactics employed by collectors, while still allowing them reasonable access to pursue legitimate debts. Its specificity will be an asset in enforcement, and provides collectors with a uniform standard by which to gauge their activities. For that reason, it should aid the debtor and collector alike, and fills a heretofore existing void.

**Penalties**

The Act would make any violator liable to the person injured for any actual damages sustained, implying that these damages must be pleaded and proved. It also provides statutory liability, in individual plaintiffs, of not less than $100 nor more than $1,000. The provision of a private right of action

---

108. H.R. 29, 95th Cong., 1st Sess. § 806 (1977). Included are false representations as to the character, amount or legal status of any debt; that any individual is an attorney; that nonpayment of the debt will result in imprisonment, or the seizure, garnishment or sale of any of the debtor’s wages or property; that the collector is seeking information in connection with a survey, or has a package or gift for the consumer.
109. See hearings, supra note 7, at 125-27 (testimony of D. Barry Connelly, Vice President, Public Affairs/Public Relations, Associated Credit Bureaus).
111. Id. § 812(a)(2)(A).
is one of the main strengths of this legislation. The consumer need not rely on a district attorney or any government agency to prosecute his complaint. He is no longer confined to narrow tort theories of recovery, with elements often difficult to establish. In addition, the bill provides for the recovery, in successful actions, of reasonable attorney's fees and costs,\footnote{112. Id. \textsection 812(a)(3).} so that the average consumer will no longer be forced to forego court action because of a lack of funds. The threat of private enforcement should also be an effective deterrent to small-time operators, who heretofore have not feared action by the federal government because they knew their activities would very likely never come to light.\footnote{113. \textit{Hearings, supra} note 7, at 297.}

H.R. 29, by implication, provides for class action suits in specifying that the court shall determine the amount of recovery,\footnote{114. H.R. 29, 95th Cong., 1st Sess. \textsection 812(a)(2)(B) (1977).} taking into account such relevant factors as the amount of any actual damages awarded, the frequency and persistence of the violations, the resources of the debt collector, the number of persons adversely affected and whether the violation was intentional.\footnote{115. Id. \textsection 812(b).}

Subsection (c) is an escape valve for the collector. If he can demonstrate by a preponderance of the evidence that the violation was not intentional and was the result of a bona fide error, he may avoid liability.\footnote{116. Id. \textsection 812(c).} Subsection (e) provides a further exemption from liability for any act done or omitted in good faith in conformity with any interpretation of the FTC, even if such interpretation is later rescinded or held invalid by a court.\footnote{117. Id. \textsection 812(e).}

In addition to civil liabilities the proposed Act provides for criminal penalties of a $5,000 fine, one year in jail, or both, for wilful and knowing violations.\footnote{118. Id. \textsection 813.} Presumably, enforcement of this provision will be the province of the FTC pursuant to section 814.\footnote{119. Section 814 specifies that compliance with the Act shall be enforced by the Commission.} Enforcement problems similar to those which exist for present statutes administered by that agency may arise. Those enforcement problems combined with the penal nature of the statute could generate opposition to the passage
of the Act. Perhaps a compromise enforcement procedure could be arranged to facilitate implementation of this section, by removing the stigma of a penal sanction. The section would be more palatable to the collection industry if a civil penalty, similar to that provided for by the Federal Trade Commission Act, were authorized and the imprisonment provision deleted.

H.R. 29 would apply to debt collectors in every state, regardless of whether or not the individual state has licensing requirements and its own regulations of the industry. This uniform application will help provide stability throughout the industry, and enable more uniform enforcement by the FTC. The one weak spot in its application is the exclusion of "in-house" collectors, but they have traditionally not been among the worst offenders, and hence the exclusion is not crucial.

What the proposed Act does is provide some important protections to the consumers from the unscrupulous tactics of many collectors. It will make mandatory a procedure to determine at the outset the validity of any debt in question. It will prohibit harassment and coercion in attempting to squeeze money from the debtor. Most important, it provides the consumer with a statutory cause of action against any violator, and in addition imposes monetary sanctions stiff enough to be taken seriously by the collection industry. It is an important piece of legislation that deserves serious consideration by Congress.

**CALIFORNIA'S PROPOSED LEGISLATION**

Assembly Bill 2833 (A.B. 2833), known as the Consumer Debt Collection Fair Practices Act, was introduced to the California Assembly on January 22, 1976, by Assemblyman Herschel Rosenthal. Existing state law does not include a comprehensive act enumerating prohibited conduct in the collection of consumer debts. Although licensed collection agencies are subject to the Bureau's regulations, and the Collection Agency Act, there are no presently existing sanctions on those collectors exempt from these prohibitions who are operating within

120. 15 U.S.C.A. § 45(1) (Supp. 1976) mandates a civil penalty of not more than $10,000 for each violation of a cease and desist order of the FTC.

121. Section 816 states that the Act does not exempt any person from state laws respecting debt collection practices except to the extent that the two may be inconsistent. In that case, the federal law would be controlling to the extent of the inconsistency.
A.B. 2833 attempted to fill that gap. The bill was prepared and sponsored by the Western Center on Law and Poverty at the request of Assemblyman Rosenthal. The bill was amended in Assembly on May 6, 1976, and was referred to the Assembly Judiciary Committee for interim study, where it eventually died when the legislature adjourned on August 31, 1976. At the present time the bill is under study by the Western Center. They feel there is a clear need for this type of legislation, and hope to re-sponsor a compromise bill in the near future which will meet with less strident opposition from the financial institutions. The hope is that in this manner some sort of meaningful legislation will finally be enacted. A.B. 2833 can be profitably compared with the other solutions outlined above.

**The Scope of the Act**

In constrast to H.R. 29, its federal counterpart, A.B. 2833 defines “debt collector” as “any person engaging, directly or indirectly, in debt collection from a consumer . . . .” Because many of the activities proscribed by A.B. 2833 were already prohibited for licensed collection agencies under the Business and Professions Code, the bill is primarily designed to regulate unlicensed debt collectors, including banks, retailers, and credit unions. It has received considerably more attention because of that. The opposition of “in-house” collectors has already resulted in several amendments to the text of the original bill in an effort to win their support (or at least neutrality) and thus hopefully to increase the chances of passage by the full Assembly some time in the future.

**Communications in Connection with Collection Activities**

The proposed Act is not as harsh in its prohibitions on

---

122. Statement by Brian Paddock, Directing Attorney, Western Center on Law and Poverty, in telephone interview on February 10, 1977. After this comment went to press, Assemblyman Herschel Rosenthal introduced A.B. 1078 into the Assembly on April 1, 1977. It is substantially similar in content to A.B. 2833.


124. See text accompanying note 36 supra.

125. Letter from Brian Paddock to Eric Wright (April 27, 1976) [on file at SANTA CLARA L. REV.].

126. The most significant amendments were the deletion of a section providing that violators were guilty of a misdemeanor, and the inclusion of section 1882.7, allowing limited contacts for specified purposes with a debtor’s employer. See letter from Brian Paddock to Nancy Wilson (May 13, 1976) [on file at SANTA CLARA L. REV.].
contacts with employers as H.R. 29. The collector is allowed to contact the employer for purposes of skip tracing "when the debt collector has no other reasonable means of obtaining such information, provided such communication does not involve anything relating to the nature or amount of the alleged debt." Furthermore, the collector may contact the employer "to establish whether the employee has a debt counseling service or procedure, or is willing to assist in working out a program for paying off the debt." A.B. 2833 does not address the validity or frequency of debtor contact or third party contact and allows for continued communication with the employer after this initial contact is established. The California bill ignores the entire area of limiting collection contact and in this respect is substantially weaker than H.R. 29.

Prohibited Practices

The debt collector, unless an active member of the State Bar, is specifically barred from certain practices which are deemed to constitute the practice of law. Included is the prevalent practice of falsely using an attorney's name or stationery in communications with a debtor. Additionally, the bill prohibits threats, harassment, and coercion. Section 1882.6 specifically delineates conduct of a coercive nature that is deemed a violation of the Act. This includes the threat or use of violence to harm an individual, his reputation or property; the use of knowingly false accusations that a consumer is willfully refusing to pay a just claim; the threat that nonpayment of a claim will result in arrest, garnishment or attachment of any property or wages of the consumer without a judgment; and the attempted execution upon property which the collector knows is exempt under state or federal law from execution. It is unclear whether the statutory listing is meant to be exclusive.

The bill includes a section prohibiting a number of com-

128. Id. § 1882.7(a)(3).
129. E.g., id. § 1882.5.
130. Id. § 1882.5(d).
131. Id. § 1882.6(a).
132. Id. § 1882.6(c).
133. Id. § 1882.6(e).
134. Id. § 1882.6(k).
mon misrepresentations, including the use of pseudonyms,\textsuperscript{135} the false claim that the collector has something of value for the consumer,\textsuperscript{136} and any false claim of connection with the state or federal government.\textsuperscript{137} One subsection in particular adds a valuable and unique provision. It is designed to curb a prevalent abuse—that of falsely leading a consumer to believe that a court appearance will be necessary on a certain date, unless the debt is paid.\textsuperscript{138} Debtors can often be coerced into paying even disputed sums when faced with the possibility of expensive and time-consuming litigation, especially as they are often ignorant of their legal rights.

The provision makes it a violation of the Act to seek to, or to obtain a waiver of any debt discharged in bankruptcy, to acknowledge a debt barred by a statute of limitations or to waive an exemption from attachment, seizure, levy or execution.\textsuperscript{139} This provision represents a positive step to protect the legal rights of consumers and should be widely advertised as such to ensure consumer awareness.

These prohibited practices largely parallel those presented by the proposed federal Consumer Credit Protection Act. However, the state law applies to a wider group of debt collectors, and to that extent, would be controlling. In addition, it sets out with more specificity actual tactics prohibited, and provides for some innovative consumer protections apparently overlooked by the federal statute, especially the prohibition against threatening the debtor with court appearances should he fail to pay.\textsuperscript{140}

**Penalties**

Perhaps the greatest strength of the proposed bill is that it provides the consumer with a remedy other than filing a complaint with the Bureau of Collection and Investigative Services, or pursuing a tort lawsuit.\textsuperscript{141} The Act provides that any person may seek injunctive relief to restrain a violation, as

\textsuperscript{135} Id. § 1882.9(a).
\textsuperscript{136} Id. § 1882.9(c).
\textsuperscript{137} Id. § 1882.9(f), (g).
\textsuperscript{138} Id. § 1882.9(f). See letter from Brian Paddock to Nancy Wilson (May 13, 1976) [on file at SANTA CLARA L. REV.].
\textsuperscript{139} A.B. 2833, 1975-76 Reg. Sess. § 1882.10(a).
\textsuperscript{140} See note 138 supra and accompanying text.
\textsuperscript{141} Letter from Brian Paddock to Nancy Wilson (May 13, 1976) [on file at SANTA CLARA L. REV.].
well as providing for treble damages (it also provides a minimum $300 recovery in the event the consumer is unable to show his actual damages), attorney's fees and costs.\textsuperscript{142} It should be noted that the debt collector is similarly protected from frivolous suits by the provision assessing defendant's attorney's fees and costs against the plaintiff upon a finding by the court that an action was brought simply to harass the collector.\textsuperscript{143}

The Act does not, however, empower the consumer to institute disciplinary proceedings against a collection agency licensed pursuant to the Business and Professions Code.\textsuperscript{144} Also notably missing from the bill is the escape valve allowed by H.R. 29's section 812(c). This measure permits the collector a good faith defense for an unintentional violation resulting from a bona fide error, if the error can be demonstrated by clear and convincing evidence. Inclusion of such a provision would certainly be to the collector's advantage, without working a real hardship on the consumer, and would undoubtedly aid in passage of the bill.

Both the proposed federal and state legislation are designed to protect against the same type of abuses. The scope of California's proposed law is broader and will thereby regulate a larger segment of the collection industry. California is also more specific in what activities it will and will not allow a collector to pursue, although it is noticeably weaker when it comes to limiting communications with a debtor, his family or employer. California has neglected to include a procedure whereby the collector must ascertain the validity of the debt before proceeding with any attempts to collect it.\textsuperscript{145} Nor has California seen fit to include a provision whereby the collector must cease further direct collection efforts (except to advise the consumer that an attorney may subsequently invoke local creditor's remedies) when the debtor absolutely refuses to pay or discuss an account.\textsuperscript{146} Furthermore, it has not addressed itself to the problem of post-dated checks, discussed previously.\textsuperscript{147} Those debt collectors operating in California who fall within the jurisdiction of the federal law will be subject to these regulations, but unless the state legislation is amended, certain "in-

\textsuperscript{143} Id.
\textsuperscript{144} Id. § 1883.2.
\textsuperscript{146} Id. § 804(d).
\textsuperscript{147} See text accompanying note 99 supra.
house" collectors will not be affected at all by these important considerations.

**CONCLUSION**

Where will these procedures leave a debtor who has fallen victim to any or all of the weapons in a collector's arsenal of tactics? If fortunate enough to possess the financial resources needed, and resourceful enough to be able to show any special damages, he might file a tort claim against the collector. However, his victory will have no effect on the next victim of that collector. If the collector operates in a state with the foresight to require licensing, unscrupulous tactics, if brought to the attention of the regulatory agency, might be deemed a violation of these statutes and a variety of sanctions applied. Again, the effectiveness rests with the administrative agency, and not with the individual who has been harmed. Federal statutes offer relief in certain limited circumstances, and recent work by the Federal Trade Commission has been encouraging. But the Commission has not the resources to put even a small dent in the problem.

These inadequacies have been recognized by the recently proposed legislation analyzed here. Both the Debt Collection Practices Act\(^{148}\) and the proposed Consumer Debt Collection Fair Practices Act\(^{149}\) represent viable attempts to put an end to the tyranny of the unscrupulous bill collector. While these statutes do not contain all the provisions that the most adamant advocates would like, they do incorporate some of the more workable alternatives, and will place no undue hardship on the collection industry itself. It is hoped that the respective legislators are sufficiently cognizant of the difficulties presently existing for the debtor in default to take affirmative action on the proposed legislation. While minor changes and revisions may be in order, the proposed acts supply the consumer with the basic tool he has always lacked, a private right of action for specifically enumerated violations of ethical practice in the collection of debts.

_Nancy Anne Holst_

---