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# Trade Regulation -- The North Carolina Consumer Protection Act of 1977

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## COMMENT

### Trade Regulation—The North Carolina Consumer Protection Act of 1977

In the spring of 1975 the Attorney General of North Carolina broke new ground<sup>1</sup> in the field of consumer protection by filing a civil action under North Carolina's unfair trade practices law<sup>2</sup> to enjoin<sup>3</sup> the abusive debt collection practices of the J.C. Penney Company. The attorney general was unsuccessful in the resulting lawsuit. In *State ex rel. Edmisten v. J.C. Penney Co.*<sup>4</sup> the North Carolina Supreme Court severely limited the scope of North Carolina's unfair trade practices law by narrowly construing the phrase "trade or commerce"<sup>5</sup> and concluding that debt collection practices

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1. See Raleigh, N.C., News & Observer, Nov. 27, 1975, at 1, col. 4.

2. Law of June 12, 1969, ch. 833, § 1(b), 1969 N.C. Sess. Laws 930 (formerly codified as N.C. GEN. STAT. § 75-1.1 (1975)). See generally Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C.L. REV. 199 (1972); Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRA. L. REV. 1 (1969); Comment, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. REV. 896 (1970); Note, *Trade Regulation—N.C. Gen. Stat. § 75-1.1—Unfair or Deceptive Acts or Practices in the Conduct of Trade or Commerce*, 12 WAKE FOREST L. REV. 484 (1976).

3. A civil action by the attorney general to obtain injunctive relief is authorized by N.C. GEN. STAT. § 75-14 (1975).

4. 292 N.C. 311, 233 S.E.2d 895 (1977), rev'g 30 N.C. App. 368, 227 S.E.2d 141 (1976). In the supreme court Justice Copeland wrote the opinion for a five to two majority. Justice Huskins submitted a dissenting opinion, in which Justice Exum concurred. In the superior court the attorney general had obtained a temporary restraining order prohibiting J.C. Penney from harassing its credit customers, but that order was later dissolved and a motion for a preliminary injunction was denied on the ground that "such conduct does not fall within the purview of G.S. 75-1.1." 30 N.C. App. at 370, 227 S.E.2d at 144. The State appealed that decision to the North Carolina Court of Appeals, and that court reversed and remanded the case with instructions to enter the preliminary injunction on the ground that "the conduct complained of does fall within the scope prohibited by G.S. 75-1.1." *Id.* at 372, 227 S.E.2d at 144. Judge Arnold wrote the opinion for the court of appeals. Judge Hedrick concurred in that opinion; Judge Parker dissented.

5. Law of June 12, 1969, ch. 833, § 1(b), 1969 N.C. Sess. Laws 930 (formerly codified as N.C. GEN. STAT. § 75-1.1(a) (1975)). Prior to the *Penney* decision there had been indications that this section would be broadly construed. In 1969, following enactment of the original version of § 75-1.1(a), Robert Morgan, then Attorney General of North Carolina, stated that the objective of his office was to "maintain at least a minimum standard of integrity and freedom in the marketplace in dealings between buyers and sellers at all levels of commerce." Morgan, *supra* note 2, at 3. Similar language was used in the original version of § 75-1.1(b). Morgan also referred to "the broad authority" that was granted by § 75-1.1. *Id.* at 19.

Prior to *Penney*, the North Carolina Supreme Court had had only one opportunity to construe the original version of § 75-1.1. On that occasion, in *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975), the court implied that it would take a liberal approach to the statute. See Note, *Consumer Protection—Hardy v. Toler*, 54 N.C.L. REV. 963 (1976). As one commentator remarked, "*Hardy* indicates a judicial attitude opposed to the imposition of unnatural constraints on the purposely broad and inclusive language used." Note, *supra* note 2, at 489.

were not within the scope of that law.<sup>6</sup> At the conclusion of its opinion, however, the court invited the general assembly to amend the statute,<sup>7</sup> and the general assembly responded to that invitation by enacting the Consumer Protection Act of 1977 (CPA).<sup>8</sup>

The CPA made four major changes in the existing law: (1) the text of the basic unfair trade practices provision, section 75-1.1(a), was amended<sup>9</sup> so that the language of that section is now precisely the same as section 5 of the Federal Trade Commission (FTC) Act;<sup>10</sup> (2) section 75-1.1(b) was rewritten to preclude the application of the North Carolina unfair trade practices law to the rendering of professional services;<sup>11</sup> (3) section 75-15.2 was added to provide for the imposition of civil penalties in suits brought by the attorney general under the unfair trade practices law;<sup>12</sup> and (4) sections 75-50 to 75-56 were added<sup>13</sup> prohibiting certain debt collection practices<sup>14</sup> and providing limited remedies for that type of unfair trade practice.<sup>15</sup>

### I. ADOPTION OF FTC ACT WORDING

When section 75-1.1(a) of the North Carolina General Statutes was enacted in 1969, the language of that section<sup>16</sup> closely paralleled that of the

Only one writer seems to have anticipated the definitional problem created by the use of the phrase "trade or commerce." See Comment, *supra* note 2, at 905-06.

Since the *Penney* decision, the North Carolina Court of Appeals has decided *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977), applying the original version of § 75-1.1. In *Love* the court held that, even after *Penney*, § 75-1.1 was broad enough to encompass unfair practices in the leasing of real estate and awarded treble damages to plaintiff-tenant under N.C. GEN. STAT. § 75-16 (1975). See 34 N.C. App. at 516, 239 S.E.2d at 582-83.

6. 292 N.C. at 320, 233 S.E.2d at 901.

7. "Obviously, if we have not properly interpreted G.S. 75-1.1, our General Assembly may amend the statute." *Id.*

8. Law of June 27, 1977, ch. 747, 1977 N.C. Adv. Legis. Serv. 34 (Pamphlet No. 11, Pt. I) (codified as N.C. GEN. STAT. §§ 75-1.1(a), (b), -15.2, -50 to -56 (Cum. Supp. 1977)). In an apparently unrelated action, the 1977 General Assembly also enacted two other laws amending chapter 75 of the North Carolina General Statutes: Law of June 23, 1977, ch. 707, 1977 N.C. Adv. Legis. Serv. 347 (Pamphlet No. 10, Pt. I) (codified as N.C. GEN. STAT. § 75-16 (Cum. Supp. 1977)) (amending § 75-16 (relating to private actions for damages) "to delete the mandatory jury requirements for damages"); Law of June 8, 1977, ch. 498, 1977 N.C. Adv. Legis. Serv. 137 (Pamphlet No. 9) (codified as N.C. GEN. STAT. § 75-27 (Cum. Supp. 1977)) (amending § 75-27 (relating to unsolicited goods) "by deleting from the caption the words 'through the mail' and from the second line thereof the words 'by mail or common carrier'").

9. Law of June 27, 1977, ch. 747, § 1, 1977 N.C. Adv. Legis. Serv. 34 (Pamphlet No. 11, Pt. I) (codified as N.C. GEN. STAT. § 75-1.1(a) (Cum. Supp. 1977)).

10. 15 U.S.C. § 45(a)(1) (Supp. V 1975).

11. Law of June 27, 1977, ch. 747, § 2, 1977 N.C. Adv. Legis. Serv. 34 (Pamphlet No. 11, Pt. I) (codified as N.C. GEN. STAT. § 75-1.1(b) (Cum. Supp. 1977)).

12. *Id.* § 3 (codified as N.C. GEN. STAT. § 75-15.2 (Cum. Supp. 1977)).

13. *Id.* § 4 (codified as N.C. GEN. STAT. §§ 75-50 to -56 (Cum. Supp. 1977)).

14. N.C. GEN. STAT. §§ 75-51 to -55 (Cum. Supp. 1977).

15. *Id.* § 75-56.

16. "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Law of June 12, 1969, ch. 833, § 1(b), 1969 N.C. Sess. Laws 930 (formerly codified as N.C. GEN. STAT. § 75-1.1(a) (1975)).

then current version of the FTC Act,<sup>17</sup> but it was not exactly the same. The North Carolina statute applied to activities "in the conduct of any trade or commerce,"<sup>18</sup> while the FTC Act at that time simply used the term "in commerce."<sup>19</sup> Noting this discrepancy in language, the court in *Penney* concluded that "by modifying the language borrowed from the federal act, the North Carolina legislature must have intended to alter its meaning to some extent."<sup>20</sup>

The court acknowledged that the FTC interpretation of "commerce" was "expansive enough to encompass all business activities, including the collection of debts,"<sup>21</sup> citing several cases in which the FTC had taken action against abusive collection practices.<sup>22</sup> The court also conceded that in

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17. "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111 (formerly codified as 15 U.S.C. § 45(a)(1) (1970)) (amended 1975). In 1975, § 5 of the FTC Act was amended by the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183 (codified in scattered sections of 15 U.S.C. (Supp. V 1975)). The current version of that section reads: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45(a)(1) (Supp. V 1975). Curiously, the state supreme court in *Penney* cited only this current version of § 5 of the FTC Act, which was not adopted until 1975, although the court was discussing the intent of the North Carolina legislature when it adopted the original version of § 75-1.1(a) in 1969. See 292 N.C. at 314, 233 S.E.2d at 897-98.

18. See note 16 *supra*.

19. See note 17 *supra*. The current version of § 5 of the FTC Act uses the phrase "in or affecting commerce." 15 U.S.C. § 45(a)(1) (Supp. V 1975).

The use of the language "in or affecting commerce" in a state statute is actually rather pointless. The purpose of adding that language to the FTC Act was to overrule judicial decisions that had restricted the jurisdiction of the FTC under § 5 of the FTC Act strictly to interstate transactions. See H.R. REP. NO. 1107, 93d Cong., 2d Sess. 29-31, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7712-13. As the phrase "in commerce" in a state statute could not possibly be restricted to interstate commerce, the use of the words "or affecting" would appear to be superfluous.

20. 292 N.C. at 316, 233 S.E.2d at 898-99. This conclusion does not seem compelled. The court, failing to consider the disjunctive character of the phrase "trade or commerce," took the position that "the word 'trade' was used interchangeably with the word 'commerce'" and concluded that such usage indicated an intent to narrow the otherwise broad meaning of "commerce." *Id.* One commentator has suggested that a more likely reason for the discrepancy between the language of the North Carolina statute and the FTC Act is that the legislature simply was trying to use language in § 75-1.1(a) that would parallel the language in N.C. GEN. STAT. § 75-1 (1975), which had been in effect since 1913. Interview with Professor William B. Aycock, author of Aycock, *supra* note 2, in Chapel Hill, N.C. (Sept. 30, 1977). Section 75-1, which is the North Carolina counterpart of the Sherman Act, Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209 (presently codified as 15 U.S.C. § 1 (1970)), uses the language "in restraint of trade or commerce." N.C. GEN. STAT. § 75-1 (1975) (emphasis added). Justice Huskins, in dissent in *Penney*, reached the conclusion that the phrase "trade or commerce" was broad enough to include collection activities. See 292 N.C. at 323-24, 233 S.E.2d at 903 (Huskins, J., dissenting).

21. 292 N.C. at 315, 233 S.E.2d at 898.

22. *Id.* (citing, e.g., *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976)). Since 1967 the FTC has had in effect a set of guides that disapprove certain deceptive collection practices. See *Guides Against Debt Collection Deception*, 16 C.F.R. §§ 237.0-.6 (1977). Guides issued by the FTC are "administrative interpretations of laws" and are intended to provide notice to members of an industry that particular conduct is considered unlawful. *Id.* § 17.1. "Failure to comply with the guides may result in corrective action by the Commission under applicable

1975 in *Hardy v. Toler*<sup>23</sup> it had recognized that interpretations of the FTC Act could furnish "some guidance to the meaning of G.S. 75-1.1."<sup>24</sup> It concluded, however, that the federal decisions were not controlling.<sup>25</sup> Thus, on the premise that the legislature intended that section 75-1.1 have a narrower scope than section 5 of the FTC Act, the court held that it applied only to acts and practices "involved in the bargain, sale, barter, exchange or traffic"<sup>26</sup> and did not extend to activities related to debt collection.<sup>27</sup>

Because the discrepancy in language was the basis of the court's refusal in *Penney* to follow FTC precedent with regard to the scope of the statute,<sup>28</sup> the legislature's adoption of the current FTC language in the CPA would appear to indicate an intention to incorporate into North Carolina law the body of federal law interpreting the FTC Act. The legislative history of the CPA, however, makes this assumption somewhat questionable. The version of the legislation that was first adopted in the House<sup>29</sup> included a provision<sup>30</sup>

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statutory provisions." *Id.* Although the FTC has not promulgated rules relating to debt collection practices, in January 1976 it did announce that it intended to promulgate certain rules in order to codify some aspects of the FTC case law and that it had tentatively designated debt collection practices as one of the areas for promulgation of trade regulation rules. Trade Regulation Rules Embodying Case Law Principles—Proposed Rulemaking, 41 Fed. Reg. 3322 (1976), reprinted in [1977] 4 TRADE REG. REP. (CCH) ¶ 38,005.

It is interesting that, in connection with the *Penney* case, the operations manager of J.C. Penney's credit office in Atlanta submitted an affidavit in which he stated that "[a J.C. Penney collector] is required to adhere to the Federal Trade Commission's guides against deceptive collection practices . . ." Record at 47, *State ex rel. Edmisten v. J.C. Penney Co.*, 30 N.C. App. 368, 227 S.E.2d 141 (1976). For an analysis of the relationship between FTC rules and state law, see Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 DUKE L.J. 225.

23. 288 N.C. 303, 308, 218 S.E.2d 342, 345 (1975).

24. 292 N.C. at 315, 233 S.E.2d at 898.

25. *Id.* (citing *Horton v. Gullede*, 277 N.C. 353, 177 S.E.2d 885 (1970)).

26. *Id.* at 316-17, 233 S.E.2d at 899.

27. In reaching this decision the court also relied on the language of the original version of § 75-1.1(b):

The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

Law of June 12, 1969, ch. 833, § 1(b), 1969 N.C. Sess. Laws 930 (formerly codified as N.C. GEN. STAT. § 75-1.1(b) (1975)). The court placed great emphasis on the phrase "between buyers and sellers" and stated that, in respect to its debt collection activities, J.C. Penney Company was a creditor, not a seller, and that "it is only those activities surrounding the 'sale' that are regulated by G.S. 75-1.1." 292 N.C. at 317, 233 S.E.2d at 899. Justice Huskins pointed out aptly in dissent: "Debt collection may not be *unique* to sellers . . . ; but if debt collection is not *typical* of credit sellers, then bankruptcy soon will be." *Id.* at 325, 233 S.E.2d at 904 (Huskins, J., dissenting).

28. See text accompanying note 20 *supra*.

29. The legislation, H. 1050, N.C. Gen. Assembly, 1977 Sess. (1977), was introduced in the House on May 2, 1977, and was referred to the Committee on the Judiciary III. A slightly amended version of the original bill was adopted by the House on June 3, 1977, and was received by the Senate on June 7, 1977. INSTITUTE OF GOVERNMENT, LEGISLATIVE SERVICE, BILL HISTORY AS OF 07/01/77.

30. Section 3 of H. 1050, N.C. Gen. Assembly, 1977 Sess. (2d ed. June 3, 1977), read as follows:

requiring that the courts be guided by federal administrative and judicial interpretations of the FTC Act, but that provision was eliminated by the Senate and was not included in the final version of the CPA.<sup>31</sup> It is possible that the courts may interpret this direct rejection of such a provision as an indication that, despite the identical language, the legislature did not intend for the courts necessarily to follow FTC interpretations.<sup>32</sup> The courts, however, probably will adhere to the position stated in *Hardy*<sup>33</sup> and recognize that they should be guided by, if not controlled by, interpretations of the FTC Act. In the absence of discrepancies in the language, there would appear to be no basis for departing from that policy.

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G.S. 75-1.1 is further amended by adding a subsection (e) to read as follows:

"(e) In construing this section, the courts of this State shall be guided by the interpretations given by the Federal Trade Commission and the federal courts to § 5(a)(1) of the Federal Trade Commission Act . . . . However, it is the intent of the legislature to foster free and ethical competition, and to give the consuming public of North Carolina the greatest possible measure of protection. Therefore, our courts shall interpret this section to forbid acts and practices not proscribed by the Federal Trade Commission or the federal courts if to do so would serve the interests of good faith, justice, and equity."

Nineteen states have statutes requiring some degree of reference to the FTC Act for the interpretation of state law. The court cited twelve of these statutes in *Penney*, 292 N.C. at 316, 233 S.E.2d at 898. (The court's citation of the Arizona statute should be changed to read ARIZ. REV. STAT. § 44-1522(B) (1967). The South Carolina statute has been recodified at S.C. CODE § 39-5-20(b) (1976).) Eight other states have a similar requirement: ALASKA STAT. § 45.50.545 (Cum. Supp. 1977); GA. CODE ANN. § 106-1201(c) (Cum. Supp. 1977); HAW. REV. STAT. § 480-3 (1967); N.H. REV. STAT. ANN. § 358-A:13 (Cum. Supp. 1975); R.I. GEN. LAWS § 6-13.1-3 (1969); UTAH CODE ANN. § 13-11-2(4) (Cum. Supp. 1977); WASH. REV. CODE ANN. § 19.86.920 (Cum. Supp. 1976); W. VA. CODE § 46A-6-101(1) (1976).

At least one court has called into question the authority of the legislature to determine how the courts shall construe a statute. *Fitzgerald v. Chicago Title & Trust Co.*, 46 Ill. App. 3d 526, 528, 361 N.E.2d 94, 96 (1977).

31. H. 1050, N.C. Gen. Assembly, 1977 Sess. (1977), was referred to the Senate Committee on State Government on June 7, 1977, and was reported favorably by that committee on June 8, 1977. On June 9 the bill was referred to the Senate Committee on the Judiciary II, and on June 17 that committee reported a committee substitute favorably. The committee substitute did not contain the provision that instructed the courts to be guided by FTC interpretations. The substitute was adopted on June 17, but on June 21 the bill was referred again to the Senate Committee on the Judiciary II. On June 22, the committee reported favorably a second committee substitute, which included for the first time the provision on debt collection practices. The second committee substitute was adopted by the Senate on June 22. On June 23 the House concurred in the second Senate committee substitute, and the bill was adopted by the House on June 24, 1977. The bill was ratified and became effective on June 27, 1977. INSTITUTE OF GOVERNMENT, *supra* note 29.

32. In a case pending in the state of Washington, which does not have a statute requiring the courts to be guided by FTC interpretations, the attorney general, in an action based on state law, alleged that a violation of FTC regulations constituted an unfair trade practice under state law. TRADE REG. REP. (CCH), Aug. 23, 1977, at 5. When the two statutes are identical, a court might be persuaded to adopt that position, arguments to the contrary from legislative history notwithstanding. In Pennsylvania, FTC interpretations have been incorporated into state law by judicial decision. *See Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974).

33. *See* 288 N.C. at 308, 218 S.E.2d at 345.

## II. EXCLUSION OF PROFESSIONS

While section 1 of the CPA broadened the scope of section 75-1.1(a) by adopting the language of the FTC Act, section 2 limited it by establishing a new exemption to its application.<sup>34</sup> The amended version of section 75-1.1(b) defines commerce very broadly but explicitly excludes "professional services rendered by a member of a learned profession" from the definition.<sup>35</sup> This limiting definition by its terms applies only to section 75-1.1;<sup>36</sup> consequently, while professionals are not subject to the prohibitions against unfair competition and unfair trade practices contained in section 75-1.1(a), they are still subject to the prohibitions against combinations in restraint of trade contained in section 75-1.<sup>37</sup>

The exemption of professionals from section 75-1.1 applies only to the

34. N.C. GEN. STAT. § 75-1.1(c) (1975), which was in the original law adopted in 1969 and was not affected by the CPA, provides a qualified exemption for the media:

Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

A similar exemption appears in UNIFORM DECEPTIVE TRADE PRACTICES ACT § 4.

35. "For purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. GEN. STAT. § 75-1.1(b) (Cum. Supp. 1977). The CPA does not define "learned professions." The North Carolina Attorney General, however, has issued an Attorney General's Opinion on the meaning of the exemption created by § 75-1.1(b). That Opinion concludes that "[t]he phrase 'learned profession' applies to physicians, attorneys, clergy, and related professions," on the ground that "[t]hese professions are characterized by the need of unusual learning, the existence of confidential relations, and adherence to standards of ethics higher than that in the marketplace." 47 N.C. OP. ATT'Y GEN. — (Nov. 16, 1977).

The "learned professions" traditionally are considered to include theology, law and medicine. Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 7 (1976); see, e.g., *Georgia State Bd. of Examiners in Optometry v. Friedman's Jewelers, Inc.*, 183 Ga. 669, 673, 189 S.E. 238, 241 (1936).

36. The definition of "commerce" contained in N.C. GEN. STAT. § 75-1.1(b) (Cum. Supp. 1977) is explicitly "[f]or purposes of this section." The term "section" refers only to § 75-1.1 and not generally to § 75-1 and any numerical subdivisions. The numbering system of the North Carolina General Statutes uses the chapter number as the first part of each code section number, then numbers the sections in each chapter "consecutively from 'one' on through the end of the chapter." The number of each section consists of "the chapter number, a dash, and the number of the section in the chapter." McMullan, *Original Preface to NORTH CAROLINA GENERAL STATUTES* at ix (1969). This description indicates that each numbered subdivision within a chapter is a section, not a subsection. The Preface also indicates that the table at the beginning of each chapter is to list "the titles of each section." *Id.* at x. The table at the beginning of chapter 75 lists § 75-1 with its title, then § 75-1.1 with its title, which indicates that § 75-1.1 is not a subsection of § 75-1. The language used by the legislature in the CPA also indicates that numbers that include decimals are independent sections. In § 3 of the CPA the legislature refers to "a new Section 75-15.2." Law of June 27, 1977, ch. 747, § 3, 1977 N.C. Adv. Legis. Serv. 34 (Pamphlet No. 11, Pt. I). Despite the decimal, it is not referred to as a "subsection."

37. Whether § 75-1.1(b) means that professionals are exempt from the prohibitions against abusive debt collection practices is discussed in text accompanying notes 79-88 *infra*.

rendering of "professional services"; it presumably provides no protection against liability for unfair or deceptive practices in "commercial" activities engaged in by professionals. For example, professionals would still be subject to liability for deceptive advertising. The narrow language of the exemption may indicate an intention merely to preclude the possibility of professional malpractice suits under section 75-1.1.<sup>38</sup>

The legislative history of the CPA provides no indication of the legislative intent behind the exemption of professionals created by section 75-1.1(b). The original version of the legislation contained a very broad, unqualified definition of "commerce,"<sup>39</sup> but the definition was revised and limited so as to exempt professionals before the final version was enacted.<sup>40</sup> Neither does the text of the Act itself offer any insight into the rationale supporting such an exception.<sup>41</sup> The primary consequence of the exemption

38. This interpretation is reflected in a recent North Carolina Attorney General's Opinion: While the [Senate Judiciary II] Committee recognized that rendering of legal services was not "commerce" as that term is usually defined, it wished to make certain that poor performance by an attorney on behalf of his client could not be characterized as an unfair commercial practice.

. . . .

In summary, the exclusion of professional services was added to G.S. 75-1.1(b) in order to clarify the intent of the legislature to reach only *commercial* activities and not activities of a strictly professional nature.

N.C. OP. ATT'Y GEN., *supra* note 35. For a helpful discussion of the relationship of unfair trade practice law to professional malpractice, see Comment, *The Texas Deceptive Trade Practices—Consumer Protection Act: Application to Professional Malpractice*, 8 ST. MARY'S L.J. 763 (1977).

39. Section 2 of the original version of H. 1050, N.C. Gen. Assembly, 1977 Sess. (1977), proposed that § 75-1.1(b) be rewritten to read as follows: "For purposes of this section, 'commerce' is a term of the largest import, and includes all business activities, however denominated. This section shall be liberally construed to prevent unfair, unethical, deceptive, fraudulent, oppressive, unscrupulous, and otherwise illegal acts or practices of every type and description." The first sentence of this version appears to have been adapted from the language of the United States Supreme Court in *Welton v. Missouri*, 91 U.S. 275 (1875): "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms . . ." *Id.* at 280. This case was cited to the North Carolina Supreme Court by the attorney general in *Penney*. See New Brief for the State at 8, *State ex rel. Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 233 S.E.2d 895 (1977).

40. The original provision was eliminated in the first committee substitute. See note 31 *supra*. It was replaced by the language that appears in the CPA. See note 35 *supra*.

41. One possible rationale is that the professional codes of ethics provide adequate regulation and that further regulation is unnecessary. The FTC Act, for example, while it does not exempt professionals, does contain exemptions for banks and several other industries subject to other government regulation. See note 43 *infra*. An explicit statutory provision such as § 75-1.1(b) is probably necessary if professionals are to be excluded on this basis. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), in which the United States Supreme Court rejected the argument that Congress did not intend to include the professions within the term "trade or commerce" for purposes of the Sherman Act. The Court said: "Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose." *Id.* at 787. In *Goldfarb* the Court also found that the exchange of a professional service—in that case the examination of a land title—for money was "commerce." *Id.* It is clear then that without a statutory exclusion the



is that members of professions who engage in unfair or deceptive practices in the course of rendering professional services will not be subject to the enforcement and remedial provisions<sup>42</sup> that are otherwise available against those who violate section 75-1.1(a).<sup>43</sup>

While the exemption for professionals may prove to be of little practical consequence, it may be subject to judicial attack. For example, a person who is injured by deceptive practices by a member of a profession may seek to have the exemption struck down as an unconstitutional denial of equal protection, on the ground that the classification established in the statute is "not based upon a justifiable distinction."<sup>44</sup> The fact that such other fields as banking and insurance are not exempt from section 75-1.1(a), although they are subject to extensive regulation, lends credence to this argument.<sup>45</sup>

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rendering of professional services would have been within even the limited scope of "trade or commerce" that was recognized by the court in *Penney*.

42. These provisions include: (1) The attorney general may seek mandatory court orders to compel compliance with chapter 75 (N.C. GEN. STAT. § 75-14 (1975)); (2) in any such action, the court may order restitution or cancellation of a contract (*Id.* § 75-15.1); (3) the attorney general may seek civil penalties of up to five thousand dollars per violation (*Id.* § 75-15.2 (Cum. Supp. 1977)); (4) an injured party may bring a private action seeking treble damages (*Id.* § 75-16); and (5) in a private civil action the injured party may also seek recovery of attorneys' fees (*Id.* § 75-16.1 (1975)).

43. A consumer would have no practical remedy against an offending professional under the FTC Act. He could not bring an action based on the FTC Act, as there is currently no general right of private action under that Act. *See* note 131 *infra*. A consumer also would be unlikely to benefit from the consumer redress provisions of the FTC Act, 15 U.S.C. § 57b(b) (Supp. V 1975), as the FTC generally has not acted against professionals in the area of unfair trade practices.

The FTC has acted against professionals for restraining competition. For example, in September 1977 the FTC charged that the advertising restrictions of the American Medical Association restrain competition. *In re American Medical Ass'n*, No. 9064 (FTC, filed Sept. 7, 1977); *see* 830 ANTITRUST & TRADE REG. REP. (BNA), Sept. 15, 1977, at A-11, -12.

Section 5(a)(2) of the FTC Act, 15 U.S.C. § 45(a)(2) (Supp. V 1975), currently exempts banks, common carriers, air carriers and entities subject to the Packers and Stockyards Act. Section 12 of H.R. 3816, 95th Cong., 1st Sess. (1977), H.R. REP. NO. 339, 95th Cong., 1st Sess. 1 (1977), currently pending in the United States Congress, would extend this exemption to savings and loan institutions. Not-for-profit corporations that engage in business for only charitable purposes have been held to be exempt from the FTC Act by implication. *See Community Blood Bank, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969). Section 15(a)(1) of the originally introduced version of H.R. 3816 contained a revised definition of "corporation" that would have enabled the FTC to take action against not-for-profit corporations, but that provision was deleted in committee. *See* H.R. REP. NO. 339, *supra* at 53-54, 120.

The ethics codes of the various professions provide no remedies for the consumer, as they merely establish standards of behavior. *See, e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY (adopted in North Carolina in 1974 with modifications, pursuant to a resolution of the North Carolina State Bar, 283 N.C. 783 (1973), *reprinted in* 4A N.C. GEN. STAT. app. VII (Cum. Supp. 1977)). Only the governing body of the particular profession involved can take action against a member for violating the code. *See, e.g.*, N.C. GEN. STAT. § 84-23 (Cum. Supp. 1977) (Council of the North Carolina State Bar may disbar attorneys); *id.* § 90-14 (North Carolina Board of Medical Examiners may rescind doctors' licenses). Professionals, of course, are subject to suits at common law, and, if an attorney is found to have committed fraudulent practices, the injured party must be awarded double damages. *Id.* § 84-13 (1975).

44. *State v. Glidden Co.*, 228 N.C. 664, 668, 46 S.E.2d 860, 862 (1948).

45. The North Carolina appellate courts have never considered an equal protection claim

## III. CIVIL PENALTIES

Section 3 of the CPA created an important new enforcement tool<sup>46</sup> for the attorney general in civil actions against violators of section 75-1.1. This provision, section 75-15.2,<sup>47</sup> permits the attorney general to recover up to five thousand dollars in civil penalties for knowing violations of section 75-1.1. In providing for civil penalties, North Carolina has joined twenty-nine other jurisdictions<sup>48</sup> that have statutes authorizing such penalties for initial violations.<sup>49</sup> Prior to the enactment of this section, the only action that the

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pertaining to the learned professions, but on several occasions the North Carolina Supreme Court has found that laws creating unjustifiable distinctions between various types of commercial enterprises were unconstitutional denials of equal protection. *See, e.g., State v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972) (invalidating Sunday closing ordinance that applied only to pool halls); *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968) (invalidating ordinance prohibiting heterosexual massages that did not apply to barber shops or hospitals but did apply to massage parlors); *State v. Glidden Co.*, 228 N.C. 664, 46 S.E.2d 860 (1948) (invalidating water pollution law that applied only to corporations chartered after March 4, 1915). The noncommercial character of the learned professions might be considered to constitute a "rational basis" for a statutory exemption for professional activity. The United States Supreme Court's decision in *Bates v. State Bar*, 433 U.S. 350 (1977), however, implies that attorneys, at least, are engaged in commerce. *See id.* at 371-72. After *Bates*, therefore, there may no longer be a "rational basis" for exempting professional activities from statutes that apply generally to commercial activities.

46. See note 42 *supra* for a complete list of remedies available for violations of chapter 75.

47. In any suit instituted by the Attorney General, in which the defendant is found to have violated G.S. 75-1.1 and the acts or practices which constituted the violation were, when committed, specifically prohibited by a court order or knowingly violative of a statute, the court may, in its discretion, impose a civil penalty against the defendant [of up to] five thousand dollars (\$5,000) for each violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant. Any penalty so assessed shall be paid to the General Fund of the State of North Carolina.

N.C. GEN. STAT. § 75-15.2 (Cum. Supp. 1977). The phrase in brackets—"of up to"—does not appear in the ratified bill, but that is apparently a typographical error, as all previous versions of the bill, including the version enacted by the Senate and the House, did include that phrase.

48. Alaska, Arizona, California, Connecticut, District of Columbia, Georgia, Hawaii, Illinois, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington and Wisconsin impose civil penalties. OFFICE OF PUBLIC INFORMATION, FEDERAL TRADE COMMISSION, FACT SHEET: STATE LEGISLATION TO COMBAT UNFAIR TRADE PRACTICES (rev. ed. July 1977) [hereinafter cited as FACT SHEET]; *see, e.g., N.M. STAT. ANN. § 49-15-9* (Cum. Supp. 1975); S.C. CODE § 39-5-110(a) (1976); TEX. BUS. & COM. CODE ANN. tit. 2, § 17.47(c) (Vernon Cum. Supp. 1976-1977). The *Fact Sheet* is a very useful summary of state unfair trade practice law. It includes lists of jurisdictions whose statutes provide for (1) restitution to consumers (47 jurisdictions), (2) civil penalties for initial violations (29 jurisdictions), (3) class actions by consumers (16 jurisdictions), (4) private actions by consumers (42 jurisdictions) and (5) rules and regulations to implement statutes similar to the FTC Act (31 jurisdictions). FACT SHEET, *supra*. The July 1977 edition of the *Fact Sheet* does not reflect the new North Carolina legislation. (Copies of the *Fact Sheet* may be obtained from Mr. Gale P. Gotschall, Counsel for Federal-State Cooperation, Federal Trade Commission, Washington, D.C. 20580.)

49. The FTC Act provides for a civil penalty of "not more than \$ 10,000" for a violation of an FTC order. 15 U.S.C. § 45(l) (Supp. V 1975). The 1975 amendments added a new provision

attorney general could take against a violator of section 75-1.1 was to seek equitable relief under sections 75-14<sup>50</sup> and 75-15.1.<sup>51</sup>

The section 75-15.2 civil penalty will be available only in those cases in which the conduct constituting the violation was "specifically prohibited by a court order or knowingly violative of a statute."<sup>52</sup> Two questions arise in connection with this provision. First, it is not clear from the language of the statute whether it refers to court orders previously entered against the defendant in the attorney general's civil action or is intended to reach conduct that has been prohibited previously by a court order against any person. The FTC Act, by way of analogy, provides that "any person" who engages in conduct that has been prohibited by a cease and desist order with knowledge that the conduct is unlawful may be subject to a civil penalty,<sup>53</sup> and the text of the FTC Act itself and its legislative history make it clear that the cease and desist order need not have been issued against the party to the civil action.<sup>54</sup>

The second question that arises in connection with the type of conduct that is subject to a civil penalty is the meaning of the word "knowingly."<sup>55</sup> Here the language of the FTC Act may again be instructive. The FTC Act provides for civil penalties for the violation of an FTC rule when the unfair or deceptive act involved is committed "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule."<sup>56</sup> This language and the FTC's interpretations of it could provide some guidance to the North Carolina courts in applying the statutory requirement that the conduct be

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imposing a similar penalty on anyone who knowingly violates an FTC rule, *id.* § 45 (m)(1)(A), and on anyone who knowingly engages in conduct prohibited by a cease and desist order, *id.* § 45(m)(1)(B). The interpretation and application of these provisions may provide some guidance as to how § 75-15.2 is to be applied.

50. If it shall become necessary to do so, the Attorney General may prosecute civil actions in the name of the State on relation of the Attorney General to obtain a mandatory order, including (but not limited to) permanent or temporary injunctions and temporary restraining orders, to carry out the provisions of this Chapter, and the venue shall be in any county as selected by the Attorney General.

N.C. GEN. STAT. § 75-14 (1975).

51. In any suit instituted by the Attorney General to enjoin a practice alleged to violate G.S. 75-1.1, the presiding judge may, upon a final determination of the cause, order the restoration of any moneys or property and the cancellation of any contract obtained by any defendant as a result of such violation.

*Id.* § 75-15.1.

52. *Id.* § 75-15.2 (Cum. Supp. 1977).

53. 15 U.S.C. § 45(m)(1)(B) (Supp. V 1975).

54. "While the defendant in such an action need not have been a respondent in a proceeding before the Commission, actual knowledge that the act or practice is a violation of the FTC Act is required." S. REP. NO. 1408, 93d Cong., 2d Sess. 40, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7755, 7772.

55. *See* text accompanying note 52 *supra*.

56. 15 U.S.C. § 45(m)(1)(A) (Supp. V 1975).

“knowingly violative of a statute.”<sup>57</sup>

While section 75-15.2 on its face provides for a maximum penalty of five thousand dollars,<sup>58</sup> the penalty actually imposed can be substantially greater than that. Section 75-8 provides that, when a violation is continuous, each week during which it continues constitutes a separate offense.<sup>59</sup> The FTC Act has comparable provisions under which each *day* of a continuing violation of a rule or a cease and desist order constitutes a separate offense,<sup>60</sup> and it has been held that it is the purpose of such a provision to assure that individuals or corporations who fail to do some act that they are specifically required to do by the FTC may be fined more than the amount prescribed by the statute.<sup>61</sup> Section 75-8, if properly invoked by the attorney general and vigorously applied by the courts, can thus become a very effective deterrent to violations of chapter 75.<sup>62</sup>

The courts, of course, are not bound to impose the maximum penalty, but the second sentence of section 75-15.2 spells out very clearly the particular factors that they must consider in determining the penalty.<sup>63</sup> These guidelines, which are quite similar to those spelled out in the FTC Act,<sup>64</sup> may serve to encourage uniformity in the penalties imposed. They may also provide a basis for appeal on some ground other than simple abuse of discretion, which is notoriously difficult to establish.<sup>65</sup>

#### IV. DEBT COLLECTION PRACTICES

Although the amendment of section 75-1.1(a) was unquestionably a

57. See text accompanying note 52 *supra*.

58. See note 47 *supra*.

59. N.C. GEN. STAT. § 75-8 (1975).

60. 15 U.S.C. § 45(l), (m)(1)(C) (Supp. V 1975).

61. *United States v. J.B. Williams Co.*, 354 F. Supp. 521, 527 (S.D.N.Y. 1973), *aff'd in part, rev'd in part*, 498 F.2d 414 (2d Cir. 1974).

62. The FTC only recently brought its first penalty suits under 15 U.S.C. § 45(m)(1)(B) (Supp. V 1975), which was added to the FTC Act in 1975 as part of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183 (codified in scattered sections of 15 U.S.C. (Supp. V 1975)). To initiate these suits the FTC first sent certified letters to the offending corporations, informing them that they were in violation and citing supporting authorities for the allegation. When the violations continued, the FTC filed penalty suits under 15 U.S.C. § 45(m)(1)(B) (Supp. V 1975) on the ground of knowing violations. Three of the five companies have agreed to settlements. See 815 ANTITRUST & TRADE REG. REP. (BNA), May 27, 1977, at A-14, -15. This appears to be a practical and effective enforcement technique that could be employed by the attorney general under § 75-15.2.

63. See note 47 *supra*.

64. “In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.” 15 U.S.C. § 45(m)(1)(C) (Supp. V 1975).

65. See Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 643-60 (1971).

legislative response to the North Carolina Supreme Court's narrow construction of that section in *Penney*,<sup>66</sup> the legislature's most direct response to the *Penney* decision appears in section 4 of the CPA. Section 4 adds a new article<sup>67</sup> to chapter 75 for the purpose of regulating certain debt collection activities. It is therefore now generally irrelevant whether the court considers debt collection to be included in the term "commerce."<sup>68</sup> However, while these new debt collection provisions, sections 75-50 to 75-56, prohibit a broad range of offensive collection practices,<sup>69</sup> they do not apply to all debt collectors, and the remedies available under them are limited.

### A. Application

As the prohibitions of the new debt collection provisions are directed only against "debt collectors," the statutory definition of "debt collector" determines the applicability of the provisions: "'Debt collector' means any person engaging, directly or indirectly, in debt collection from a consumer except those persons subject to the provisions of Article 9, Chapter 66 of the General Statutes."<sup>70</sup> Under this definition, the applicability of this part of the Act depends not only on the identity of the collector but also on the identity of the debtor.

First, to come within the definition, the debt collector must be trying to collect from a debtor who is a consumer.<sup>71</sup> A consumer, in turn, is defined as "any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes."<sup>72</sup> Therefore, if the debtor is a

66. See text accompanying notes 16-32 *supra*.

67. N.C. GEN. STAT. §§ 75-50 to -56 (Cum. Supp. 1977).

68. The scope of the term "commerce" would still be relevant if the attorney general should attempt to prosecute debt collection agencies under § 75-1.1(a). See note 112 *infra*.

69. See text accompanying notes 89-106 *infra*.

70. N.C. GEN. STAT. § 75-50(3) (Cum. Supp. 1977).

71. *Id.*

72. *Id.* § 75-50(1). This definition is similar to the definition of "consumer goods" in the Uniform Commercial Code: "Goods are (1) 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes . . ." U.C.C. § 9-109(1). The determination whether the debtor is a consumer under this type of definition will depend on the particular purpose for which he incurred the debt, not on the general nature of the goods or services purchased. It may therefore be possible for a creditor to avoid liability under the debt collection provisions of the CPA by establishing that the debtor incurred the debt for a particular "commercial" purpose, even though the goods or services may generally be considered to be of a "personal" nature. The Magnuson-Moss Act eliminates this possibility by defining "consumer product" as one that is "*normally used* for personal, family, or household purposes," 15 U.S.C. § 2301(1) (Supp. V 1975) (emphasis added), thus focusing more directly on the product itself and not the purchaser. The FTC has interpreted this section of the Magnuson-Moss Act as follows: "[T]he use to which a product is put by any individual buyer is not determinative. For example, products such as automobiles and typewriters which are used for both personal and commercial purposes come within the definition of consumer product." Interpretations of Magnuson-Moss Warranty Act, 42 Fed. Reg. 36,115 (1975) (to be codified in 16 C.F.R. § 700.1(a)). Thus, under the Magnuson-Moss Act, a car is always a consumer

corporation or if the debtor is a natural person who incurred the debt for commercial purposes, the party attempting to collect such a debt is not a "debt collector" for purposes of the debt collection provisions and is not subject to their prohibitions.

Second, to come within the definition, the debt collector must be someone who is *not* covered by article 9 of chapter 66,<sup>73</sup> a collection agency licensing and bonding statute<sup>74</sup> which applies basically to persons or firms whose business it is to collect claims owed to their clients.<sup>75</sup> Anyone not coming within the statutory definition of collection agency or anyone specifically excluded<sup>76</sup> from that definition is *not* subject to article 9 of chapter 66 and therefore *is* subject to sections 75-50 to 75-56.<sup>77</sup>

Among those excluded from the definition of collection agency in section 66-42 and therefore included in the definition of debt collector in section 75-50(3) are "[r]egular employees of a single creditor."<sup>78</sup> Thus, unquestionably, the prohibitions of the debt collection provisions will apply to companies like J.C. Penney that act as debt collectors only with respect to their own accounts. The definition of collection agency in section 66-42 also specifically excludes "[a]ttorneys-at-law handling claims and collections in

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product, but, under § 75-50(1) of the North Carolina General Statutes, the purchaser of a car may or may not be a consumer, depending on the purpose for which he purchases the car. Section 75-50 does not specify who has the burden of proving the consumer character of the debtor. N.C. GEN. STAT. § 75-1.1(d) (1975) provides that the party claiming to be exempt from *that section* bears the burden of proof with respect to the claim of exemption. If that requirement were applied by analogy to the debt collection provisions, then a debt collector who claimed to be beyond the scope of the law because the debtor was not a "consumer" would have the burden of proof on the issue whether the debtor was a consumer or not. However, if § 75-1.1(d) is not applied by analogy, the burden probably would be on the debtor-plaintiff to establish that he had incurred the debt for personal rather than commercial purposes, as the plaintiff in a civil action generally must prove all the elements of his claim.

73. N.C. GEN. STAT. § 75-50(3) (Cum. Supp. 1977). Article 9 of chapter 66 appears at *id.* §§ 66-41 to -49 (1975).

74. *Id.* §§ 66-41 to -42.1 (1975).

75. *Id.* § 66.42.

76. Among those excluded from the statutory definition of "collection agency" are banks, licensed real estate brokers, factoring firms and attorneys. *Id.*

77. Fourteen jurisdictions have statutes that regulate debt collection practices by all debt collectors, including collection agencies: D.C. CODE § 28-3814 (1973); FLA. STAT. ANN. §§ 559.55-.78 (Harrison 1974); ILL. ANN. STAT. ch. 121 1/2, §§ 262H-262I (Smith-Hurd Cum. Supp. 1977); IND. CODE ANN. §§ 35-18-13-1 to -6 (Burns 1975); IOWA CODE ANN. §§ 537.6201-.6203, .7101-.7103 (West Cum. Supp. 1977-1978); LA. REV. STAT. ANN. § 9:3562 (West Cum. Supp. 1977); MD. COM. LAW CODE ANN. §§ 14-201 to -204 (1975); N.H. REV. STAT. ANN. §§ 358-C:1-4 (Cum. Supp. 1975), *as amended by* Law of June 27, 1977, ch. 308, 1977 N.H. Laws —; N.M. STAT. ANN. §§ 49-15-1 to -18 (Cum. Supp. 1975); N.Y. GEN. BUS. LAW §§ 600-603 (McKinney Cum. Supp. 1976-1977); OR. REV. STAT. §§ 646.605-.656 (1977); TEX. REV. CIV. STAT. ANN. arts. 5069-11.01 to .11 (Vernon Cum. Supp. 1976-1977); W. VA. CODE §§ 46A-2-122 to -129 (1976); WIS. STAT. ANN. §§ 427.010-.105 (West 1974 & Cum. Supp. 1977-1978).

Some of these statutes apply only to the collection of debts that were incurred in consumer transactions. *See, e.g., id.*

78. N.C. GEN. STAT. § 66-42 (1975).

their own name,"<sup>79</sup> but whether attorneys are therefore subject to the prohibitions of sections 75-50 to 75-56 is not entirely clear.<sup>80</sup> On the one hand, attorneys, as members of a learned profession, are excluded from the definition of "commerce" in section 75-1.1(b)<sup>81</sup> and therefore are not subject to the general provisions of section 75-1.1(a). If the provisions on debt collection practices are construed to be merely a clarification of what behavior is prohibited by section 75-1.1(a), then the exclusion of professionals would also apply to the debt collection provisions. This construction can be supported by reference to the first sentence of section 75-56,<sup>82</sup> which implies that the debt collection provisions are merely a clarification of section 75-1.1 and not independent provisions. On the other hand, the definition of commerce that excludes professionals<sup>83</sup> applies only to "this section," that is, section 75-1.1, and not to chapter 75 in general.<sup>84</sup> The legislative history of the CPA supports the view that the debt collection provisions should be construed independently of section 75-1.1(b), as the exclusion of professionals<sup>85</sup> and the debt collection provisions<sup>86</sup> were added to the Act at different stages of the legislative process.<sup>87</sup> Thus, a violation of sections 75-50 to 75-56 should be considered separately from a violation of section 75-1.1 and should not be subject to the limitations that apply only to the latter section.<sup>88</sup>

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79. *Id.*

80: The universal pattern in the statutes of other states that regulate collection activities of nonagency collectors is to include professionals in the coverage of the statutes. *See* statutes cited note 77 *supra*. Statutes that apply specifically to collection agencies without exception exclude attorneys from the definition of collection agency. *Id.*

The MODEL CONSUMER DEBT COLLECTION FAIR PRACTICES ACT, reprinted in 80 COM. L.J. 184 (1975), was approved by the Board of Governors of the American Bar Association in April 1976 and promulgated by the National Conference of Lawyers and Collection Agencies. This Act defines "debt collector" as "any person engaging, directly or indirectly, in debt collection from a consumer." *Id.* § 1.G (emphasis added).

The MODEL CONSUMER CREDIT ACT 1973 (published by the National Consumer Law Center, Boston, Mass.) is even more explicit. Section 6.102(2) of that Act provides that debt collector "means any person engaging . . . in enforcing claims, and includes creditors . . . when they are so acting." *Id.* § 6.102(2).

81. *See* note 35 *supra*.

82. "The specific and general provisions of this Article shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article." N.C. GEN. STAT. § 75-56 (Cum. Supp. 1977).

83. *See* note 36 *supra*.

84. This limited application of the exception was noted in an early news item relating to the CPA. *See* 822 ANTITRUST & TRADE REG. REP. (BNA), July 14, 1977, at D-2. *See* note 36 *supra* for a discussion of the meaning of "section."

85. N.C. GEN. STAT. § 75-1.1(b) (Cum. Supp. 1977).

86. *Id.* §§ 75-50 to -56.

87. Section 75-1.1(b), which excludes professionals from the definition of "commerce," was added to H. 1050, N.C. Gen. Assembly, 1977 Sess. (1977), in the first committee substitute. Sections 75-50 to -56, relating to debt collection practices, first appeared in the second committee substitute. *See* note 31 *supra*.

88. *See* notes 35 & 36 *supra*.

### B. Prohibited Activities

The CPA specifies five types of prohibited debt collection activities: threats and coercion,<sup>89</sup> harassment,<sup>90</sup> unreasonable publication,<sup>91</sup> deceptive representation<sup>92</sup> and unconscionable means.<sup>93</sup> Following the general prohibition of each type of activity, there is a nonexclusive list of specifically prohibited conduct of that type.<sup>94</sup>

89. N.C. GEN. STAT. § 75-51 (Cum. Supp. 1977).

90. *Id.* § 75-52.

91. *Id.* § 75-53.

92. *Id.* § 75-54.

93. *Id.* § 75-55. Several of the provisions of §§ 75-51 to -56 pertain to activities that were already prohibited by law. For example, under the general heading of "[d]eceptive representation," the Act prohibits a debt collector from "[u]sing or distributing or selling any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by a court, an official, or any other legally constituted or authorized authority, or which creates a false impression about its source." *Id.* § 75-54(5). This provision resembles a previously existing statute that makes it unlawful to simulate court process in connection with the collection of a claim, demand or account. *See id.* § 14-118.1 (1969). Use of simulated official federal forms is also prohibited under federal law. 18 U.S.C. § 712 (Supp. V 1975). The North Carolina statute, § 75-54(5), has been used successfully against offending creditors. For example, in May 1977 a North Carolina landlord was found guilty of violating this section and was given a 30-day suspended sentence and a \$100 fine. *North Carolina v. Watts*, No. 77CRS23202 (Mecklenburg County Dist. Ct., filed May 19, 1977), *appeal filed* (Mecklenburg County Super. Ct. May 19, 1977).

In this case defendant landlord had issued a notarized notice to a tenant entitled "State of North Carolina, County of Mecklenburg NOTICE TO VACATE," and the district court found that the language and the notary seal were sufficient to imply that the notice was an official legal document. In the district court the tenant testified that he thought the notice had come from the state. *See Simulation Statute Asserted*, N.C. LEGAL SERVICES NEWSLETTER, June 1977, at 1. For another example of this type of document, see *Tester v. National Credit Exch., Inc.*, 299 So. 2d 46, 47 (Fla. Dist. Ct. App. 1974).

94. The structure and content of these sections is very similar to the MODEL CONSUMER DEBT COLLECTION FAIR PRACTICES ACT, *reprinted in* 80 COM. L.J. 184 (1975); *see note 80 supra*. Other statutory patterns that may be used in order to regulate debt collection practices include: (1) MODEL ACT TO LICENSE AND REGULATE COLLECTION AGENCIES, *reprinted in* 70 COM. L.J. 38 (1965) (promulgated by the National Conference of Lawyers and Collection Agencies); (2) MODEL CONSUMER CREDIT ACT 1973, §§ 6.101-.207 (published by the National Consumer Law Center, Boston, Mass., and essentially a new version of the Center's NATIONAL CONSUMER ACT (1st final draft, 1970)); (3) MODEL CONSUMER PROTECTION ORDINANCE § 2-404(c), *reprinted in* C. RHYNE & W. RHYNE, CONSUMER PROTECTION LAW AND THE MUNICIPALITY 95 app. A (1975); (4) UNIFORM CONSUMER SALES PRACTICES ACT (especially Comments to §§ 2(5), 3(a), 4(a), (b), relating to the application of this Act to debt collection practices); and (5) UNIFORM DECEPTIVE TRADE PRACTICES ACT (especially § 2(a)(12), a "catch-all" provision that has been held to be broad enough to apply to financing practices, *Garland v. Mobil Oil Corp.*, 340 F. Supp. 1095 (N.D. Ill. 1972) (interpreting the Illinois Deceptive Trade Practices Act that is based on the UNIFORM ACT)). *See generally* Scott & Strickland, *Abusive Debt Collection—A Model Statute for Virginia*, 15 WM. & MARY L. REV. 567 (1974); Comment, *Recent Statutes Regulating Debt Collection, or Nunc, de Minimis Curat Lex*, 14 B.C. INDUS. & COM. L. REV. 1274 (1973); Comment, *Debt Collection Practices: The Need for Comprehensive Legislation*, 15 DUQ. L. REV. 97 (1976); Comment, *Proposals for Limiting Collection Practices: New Hope for the Debtor in Default*, 17 SANTA CLARA L. REV. 685 (1977).

For examples of common abusive practices, see the dissenting opinion of Justice Huskins in *Penney*, 292 N.C. at 321-23, 233 S.E.2d at 901-02, in which he describes some of the activities that led the attorney general to file suit against J.C. Penney.



. One of the particularly significant provisions under the general heading of "[t]hreats and coercion" prohibits a debt collector from "[r]epresenting that nonpayment of an alleged debt may result in the seizure, garnishment, attachment, or sale of any property or wages unless such action is in fact contemplated by the debt collector and permitted by law."<sup>95</sup> As garnishment of future wages is not available to creditors in North Carolina,<sup>96</sup> most threats of garnishment, unless specifically limited to past wages, would be a violation of the Act.<sup>97</sup>

Under the general heading of "[h]arassment," one of the listed prohibited activities is "[p]lacing telephone calls or attempting to communicate with any person, contrary to his instructions, at his place of employment, unless the debt collector does not have a telephone number where the consumer can be reached during the consumer's nonworking hours."<sup>98</sup> Of the fourteen affidavits submitted by the attorney general to support the suit against J.C. Penney Company, thirteen stated that the company had contacted the consumer at his place of employment or had contacted or threatened to contact the consumer's employer or both.<sup>99</sup> Contacting the employer in order to put pressure on the debtor is one of the most common types of collection harassment.<sup>100</sup> As section 75-52(4) applies to calls to

95. N.C. GEN. STAT. § 75-51(6) (Cum. Supp. 1977).

96. Because of statutory and judicial limitations, prospective wage garnishment is available in North Carolina only in child support cases. See generally Note, *Remedies—Domestic Relations: Garnishment for Child Support*, 56 N.C.L. REV. 169 (1978).

The unavailability of wage garnishment, while obviously a direct benefit to the debtor, may actually work to his disadvantage in the area of debt collection activities. Research has shown that the technologically efficient methods of collecting on debts, in descending order of efficiency, are (1) wage garnishment, (2) debtor harassment and (3) execution on nonexempt property. If wage garnishment is not an available method of collection, debtor harassment becomes the economically efficient method. Therefore, where wage garnishment is not available, harassment is more likely to occur. Anderson, *Coercive Collection and Exempt Property in Texas: A Debtor's Paradise or a Living Hell?*, 13 HOUS. L. REV. 84, 96-97 (1975). See also D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 182 table 10.1 (1974).

Even when garnishment is available, it may not be the "economically efficient" method of collection it once was. In a series of cases in recent years, the United States Supreme Court has imposed certain due process requirements on creditor remedies. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972) (replevin); *Swarb v. Lennox*, 405 U.S. 191 (1972) (confession of judgment); *Snidach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (garnishment). See generally, Comment, *Debt Collection Practices: The Need for Comprehensive Legislation*, *supra* note 94. Since 1970, 15 U.S.C. §§ 1671-1677 (1970) has also limited the amount of wages that can be garnished.

97. Cf. *Inter-Continental Servs. Corp.*, 86 F.T.C. 1098, 1103 (1975) (FTC issued cease and desist order prohibiting debt collector from falsely representing that failure to pay would result in garnishment or attachment).

98. N.C. GEN. STAT. § 75-52(4) (Cum. Supp. 1977).

99. Affidavits appear in Record at 8-45, State *ex rel.* Edmisten v. J.C. Penney Co., 30 N.C. App. 368, 227 S.E.2d 141 (1976). See also 292 N.C. at 321-23, 233 S.E.2d at 901-02 (Huskins, J., dissenting).

100. See D. CAPLOVITZ, *supra* note 96, at 182 table 10.1. The Penney affidavits appear to indicate that this tactic is used frequently in North Carolina despite the general unavailability of wage garnishment. See generally note 96 *supra*.

“any person,” it is broad enough to prohibit calls to the consumer himself at his place of employment as well as calls to the consumer’s employer. Unauthorized contact with the consumer’s employer would also violate section 75-53(1), under the general heading of “[u]nreasonable publication,” which prohibits “[a]ny communication with any person other than the debtor or his attorney, except . . . [w]ith the written permission of the debtor or his attorney.”<sup>101</sup>

Two of the provisions under the general heading of “[u]nconscionable means” are particularly significant. First, the waiver prohibition contained in section 75-55(1) prohibits a debt collector from “[s]eeking or obtaining . . . a waiver of any legal rights of the debtor without disclosing the nature and consequences of such . . . waiver and the fact that the consumer is not legally obligated to make such . . . waiver.”<sup>102</sup> This provision will prove helpful in actions against collectors who mislead consumers as to the “nature and consequences” of the waiver, but problems of proof are likely to arise in cases in which the consumer alleges that the collector failed to make the proper disclosures. Even more serious problems will arise in those cases in which the collector in fact makes the required disclosures but the consumer does not understand them. While an absolute prohibition of waiver may not be necessary or even desirable,<sup>103</sup> the statute would offer much more protection for consumers if it provided more specific limitations on the seeking of waivers.<sup>104</sup>

The other significant provision of section 75-55 is subsection (4), which prohibits “[b]ringing suit against the debtor in a county other than that in which the debt was incurred or in which the debtor resides if the distances and amounts involved would make it impractical for the debtor to defend the claim.”<sup>105</sup> The practice of some creditors of bringing suits in

101. N.C. GEN. STAT. § 75-53(1)(a) (Cum. Supp. 1977). The FTC has ordered collectors not to contact consumers’ employers. *See, e.g.*, Inter-Continental Servs. Corp., 86 F.T.C. 1098, 1103-04 (1975).

102. N.C. GEN. STAT. § 75-55(1) (Cum. Supp. 1977).

103. For example, there may be occasions when it would be advantageous to both the consumer and the creditor to waive some of their legal rights in order to settle a disputed claim.

104. Several jurisdictions include absolute waiver prohibitions in their statutes on unfair trade practices. *See, e.g.*, ALASKA STAT. § 45.50.542 (Cum. Supp. 1977); ME. REV. STAT. tit. 5, § 214 (Supp. 1973); N.H. REV. STAT. ANN. § 358-A:10I (Supp. 1975); TEX. BUS. & COM. CODE ANN. tit. 2, § 17.42 (Vernon Cum. Supp. 1976-1977). For a discussion of a potential problem created by the Texas waiver provision, see Note, *Implied Warranties: Can They Still Be Waived in Texas*, 26 BAYLOR L. REV. 440 (1974).

The FTC has proposed that the obtaining of certain waivers, including, for example, a “waiver . . . of an exemption from attachment . . . on real or personal property,” be deemed an unfair act or practice under § 5 of the FTC Act. Proposed Trade Regulation Rule—Credit Practices, 40 Fed. Reg. 16,347 (1975) (to be codified at 16 C.F.R. § 444.2).

105. N.C. GEN. STAT. § 75-55(4) (Cum. Supp. 1977). In related action, the General Assembly this year amended chapter 1 of the General Statutes to add a new section relating to venue in certain actions to recover a deficiency:

inconvenient forums can be particularly oppressive for consumers. Although the practice might have been attacked under section 75-1.1 as an unfair trade practice,<sup>106</sup> the deterrent value of the explicit prohibition in section 75-55(4) should give added protection to the consumer.

### C. Remedies

While the CPA is broad enough to reach all debt collectors except collection agencies<sup>107</sup> and perhaps members of the learned professions,<sup>108</sup> and while the list of prohibited activities is comprehensive enough to reach almost any undesirable collection practices,<sup>109</sup> the remedies available for violations of the Act are limited. The first sentence of section 75-56 provides that, "in the area of commerce regulated by this Article,"<sup>110</sup> the provisions of sections 75-50 to 75-56 "exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1."<sup>111</sup> The apparent effect of this provision is to prevent an action directly under the general provisions of section 75-1.1 against any activity that is within the ambit of the debt collection provisions.<sup>112</sup> As there is virtually no offensive collection practice that would not be within either the general or specific prohibitions of sections 75-50 to 75-56, the practical effect of the first sentence of section 75-56 is to ensure that any action against nonagency debt collectors is subject to the limitations on remedies imposed by the subsequent portion of section 75-56.<sup>113</sup>

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Subject to the power of the court to change the place of trial as provided by law, actions to recover a deficiency, which remains owing on a debt after secured personal property has been sold to partially satisfy the debt, must be brought in the county in which the debtor or debtor's agent resides or in the county where the loan was negotiated.

*Id.* § 1-76.1.

106. The FTC has taken action under § 5 of the FTC Act against firms that sue consumers in distant forums. *See, e.g., Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976).

107. *See* text accompanying notes 70-77 *supra*.

108. *See* text accompanying notes 79-88 *supra*.

109. *See* text accompanying notes 89-106 *supra*.

110. N.C. GEN. STAT. § 75-56 (Cum. Supp. 1977). The "area of commerce regulated by this Article" is not defined in the statute. Based on the definitions in § 75-50, the phrase presumably refers to debt collection from a consumer by any person not subject to the provisions of article 9 of chapter 66. *See* text accompanying note 70 *supra*.

111. N.C. GEN. STAT. § 75-56 (Cum. Supp. 1977).

112. *See* text accompanying notes 89-106 *supra*. As the debt collection practices of collection agencies are regulated under N.C. GEN. STAT. §§ 66-41 to -49 (1975) and are not regulated by §§ 75-50 to -56, it appears that an action could be brought under § 75-1.1 against a collection agency. In commenting on the regulation of collection agencies in North Carolina, a representative of the Consumer Protection Section in the North Carolina Department of Justice has suggested the possibility of a suit under § 75-1.1: "[I]f the actions of a collection agency appear sufficiently deleterious to the public, and are not fully corrected by action of the North Carolina regulators, we will take such action—either under the Federal Act, or generally under G.S. 75-1.1." Letter to the author from Alan S. Hirsch, Ass't Att'y Gen., Consumer Protection Section, N.C. Dep't of Justice (Oct. 20, 1977) (emphasis added) (copy on file in office of *North Carolina Law Review*).

113. One commentator, discussing Texas law, states that under the Texas statute it may be

Section 75-56<sup>114</sup> imposes three limitations on the remedies available for violations of the debt collection provisions. The first limitation provides that "civil penalties in excess of one thousand dollars (\$1,000) shall not be imposed . . . for any violation under this Article . . . ."<sup>115</sup> This limitation apparently refers to the civil penalties that are available under section 75-15.2<sup>116</sup> in an action brought by the attorney general and that otherwise may be imposed up to a maximum amount of five thousand dollars.<sup>117</sup> However, as section 75-8 provides that each week of a continuing violation shall constitute a separate offense,<sup>118</sup> the actual penalty imposed may exceed one thousand dollars when the violation is continuing.<sup>119</sup> This limitation on the amount of civil penalties that may be imposed reduces the deterrent effect of a civil action, but vigorous application of the continuing violation provision of section 75-8 in appropriate cases could help to discourage abusive practices.<sup>120</sup>

The second limitation imposed by section 75-56 prohibits the award of treble damages, which are otherwise available under section 75-16.<sup>121</sup> The negative implication of this limitation is that, while *treble* damages are not

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possible to proceed under the general unfair trade practices law rather than under the collection practices law and therefore to have recourse to more stringent penalties. *See* Comment, *The Texas Debt Collection Practices Act: Relief for the Harassed Debtor?*, 8 ST. MARY'S L.J. 773, 787 (1977). The first sentence of § 75-56 appears to be intended to cut off that possibility in North Carolina.

114. Notwithstanding the provisions of G.S. 75-15.2, G.S. 75-16, and G.S. 75-16.1, civil penalties in excess of one thousand dollars (\$1,000) shall not be imposed, nor shall damages be trebled or attorney's fees assessed for any violation under this Article nor shall the provisions of this Article be construed to confer any right of private action not already available at common law or by means of other specific statutory authorization.

N.C. GEN. STAT. § 75-56 (Cum. Supp. 1977).

115. *Id.*

116. *See id.* Section 75-15.2 is mentioned particularly in the introductory disclaimer clause of the second sentence of § 75-56: "Notwithstanding the provisions of G.S. 75-15.2 . . . ."

117. *See* note 47 *supra*. This limitation does not limit total *recovery* to one thousand dollars. An early news item on this provision commented erroneously that "[t]he act limits recovery to a maximum of \$1,000 with no right to treble damages or attorney's fees." Green & Lehman, *Consumer Protection Act of 1977*, N.C. LEGAL SERVICES NEWSLETTER, July 1977, at 4.

118. N.C. GEN. STAT. § 75-8 (1975), *discussed at* text accompanying note 59 *supra*, is not excluded from application by § 75-56. *See* note 114 *supra*.

119. *See* text accompanying notes 58 & 59 *supra*.

120. In addition to seeking imposition of civil penalties under § 75-15.2 against violators of §§ 75-50 to -56, the attorney general may also proceed with criminal prosecution under N.C. GEN. STAT. §§ 75-6 or -7 (1975) (providing that violation of any provision of chapter 75 is a misdemeanor, except that violation of § 75-1.1 is not a crime), or with civil action under *id.* § 75-14 (authorizing the seeking of mandatory court orders to carry out the provisions of chapter 75). As a violation of §§ 75-50 to -56 is also a violation of § 75-1.1, *see id.* § 75-56 (Cum. Supp. 1977); text accompanying notes 110-13 *supra*, the attorney general may also seek an injunction under *id.* § 75-15.1 (1975) as well as restoration of money or property and cancellation of contracts.

121. N.C. GEN. STAT. § 75-16 (Cum. Supp. 1977), *quoted in* note 127 *infra*. The treble damage provision of § 75-16 is made expressly inapplicable to violations of §§ 75-50 to -56. *Id.* § 75-56.

available, *simple* damages may be awarded.<sup>122</sup> The third limitation imposed by section 75-56 prohibits the assessment of attorneys' fees, which are otherwise available with certain qualifications under section 75-16.1.<sup>123</sup>

The final clause of section 75-56,<sup>124</sup> which provides that the debt collection provisions confer no new right of private action, appears to impose a major additional limitation. The limitation, however, has little practical effect; it explicitly recognizes the continued availability of rights of private action that were "already available at common law or by means of other specific statutory authorization."<sup>125</sup> This clause, therefore, recognizes the injured party's right to bring any tort action that is otherwise available with respect to the types of conduct prohibited by the debt collection provisions.<sup>126</sup> The major effect of the clause is to preserve the right of private action made available by section 75-16<sup>127</sup> against violators "of the

122. Section 75-56 prohibits only the *trebling* of damages to be awarded under § 75-16: "[N]or shall damages be trebled." *Id.* There is no reference to the *cause of action* granted by § 75-16.

123. In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to pay the claim which constitutes the basis of such suit; or
- (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

*Id.* § 75-16.1 (1975). Section 75-16.1 is also made expressly inapplicable to actions under §§ 75-50 to -56. *See id.* § 75-56 (Cum. Supp. 1977).

124. *Id.* § 75-56 (Cum. Supp. 1977), *quoted in note 114 supra.*

125. *Id.*

126. Among the causes of action in tort that may apply to debt collection abuses are libel and slander, invasion of privacy, interference with contractual relations, intentional or negligent infliction of mental distress, and abuse of process. In practice, however, common law torts do not provide effective remedies for collection abuses in North Carolina, for North Carolina courts have consistently limited their application rather severely in this field. *See, e.g., Penner v. Elliott*, 225 N.C. 33, 33 S.E.2d 124 (1945) (cause of action for libel and slander will not lie for a statement made publicly to the effect that plaintiff will not pay his debts, will not work and is a person with whom respectable people will not associate). *See generally* CALIFORNIA CONTINUING EDUCATION OF THE BAR, PRACTICE BOOK NO. 52, DEBT COLLECTION TORT PRACTICE (C. Brosnahan ed. 1971); Frenzel, *Creditors Rights and Ancillary Remedies: Post Judgment*, in 2 NORTH CAROLINA BAR ASSOCIATION INSTITUTE ON DEBTOR-CREDITOR RIGHTS AND REMEDIES x-1 (1974); Greenfield, *Coercive Collection Tactics—An Analysis of the Interests and the Remedies*, 1972 WASH. U.L.Q. 1; Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. TEX. L.J. 127 (1967); *Outrage and Emotional Distress: New Directions in Tort Law*, 7 N.C. RESEARCHER 445 (1976).

127. If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

N.C. GEN. STAT. § 75-16 (Cum. Supp. 1977).

provisions of this Chapter [75],<sup>128</sup> as section 75-16 unquestionably constitutes "specific statutory authorization"<sup>129</sup> of a right of private action. It is true that section 75-56 limits the damages that may be awarded in such an action to simple damages,<sup>130</sup> but nothing in section 75-56 invalidates the right conferred on the injured party by section 75-16 to bring an action for damages.<sup>131</sup>

128. *Id.*

129. *Id.* § 75-56, *quoted in note 114 supra.*

130. *See text accompanying notes 121 & 122 supra.*

131. *See note 122 supra.* This provision was misinterpreted by early commentators who stated erroneously that "[t]here is no private right of action so that to get the \$1,000 penalty, you would have to add the 75-1.1 claim to a tort claim such as one for invasion of privacy or intentional infliction of emotional distress." Green & Lehman, *supra* note 117, at 4. Under no circumstances is the civil penalty awarded to the plaintiff in a private action. The civil penalty is imposed only in civil actions brought by the attorney general, and any such penalty must be paid to the General Fund of the State of North Carolina. *See N.C. GEN. STAT. § 75-15.2 (Cum. Supp. 1977), quoted in note 47 supra.*

The probable intent of the final clause of § 75-56 was to deny to consumers the right to bring private actions for violations of §§ 75-50 to -56. These sections were added to the legislation at the last minute in response to objections voiced by representatives of the North Carolina Bankers Association and the North Carolina Merchants Association, who felt that the general provisions of § 75-1.1 did not provide enough guidance as to what collection activities would be prohibited. The Bankers Association was particularly interested in limiting consumer suits because of concern about "nuisance" suits. The debt collection provisions were drafted jointly by representatives of the North Carolina Bankers Association and of the attorney general's office at the request of the Senate Committee on the Judiciary II, after the committee had already approved the bill without those provisions. The new sections were then adopted by the committee, but they were not discussed by it. Letter to the author from Alan S. Hirsch, *supra* note 112; Telephone Interview with Alan S. Hirsch (Nov. 4, 1977).

It appears likely that the relationship of the last clause of § 75-56 to the pre-existing provisions of chapter 75, particularly § 75-16, was simply overlooked. Therefore, while the language of § 75-56 clearly preserves the right of action granted by § 75-16, the drafters of the legislation probably did not intend the clause to have that effect.

In contrast to the North Carolina law, there is currently no right of private action under the FTC Act. *Holloway v. Bristol-Myers*, 485 F.2d 986 (D.C. Cir. 1973). *But see Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582 (N.D. Ind. 1976) (recognizing a limited right of private action under § 5 of the FTC Act). The House version of a bill currently pending in the United States Congress originally included a provision that would have permitted both individual and class actions by consumers under the FTC Act. H.R. 3816, 95th Cong., 1st Sess. § 7 (1977), H.R. REP. NO. 339, *supra* note 43. In floor debate, however, the bill was amended to eliminate that provision. 123 CONG. REC. H10,901 (daily ed. Oct. 13, 1977). *See generally Note, Federal Trade Commission Act: A Private Cause of Action for Consumers*, 9 CONN. L. REV. 294 (1977); *Note, Consumer Protection—Standing*, 28 S.C.L. REV. 711 (1977).

Section 813 of the new federal Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692k (West Supp. Pamphlet No. 3 1977), authorizes individual and class actions by consumers. However, *id.* § 1692k(a)(3) provides that the court may award attorneys' fees to the defendant if the action "was brought in bad faith and for the purpose of harassment." This provision may have been included in response to several congressmen who opposed the availability of private actions on the ground that the suits would be brought by "lawyers, possibly of questionable motivation, for technical violations." G. HANSEN, R. KELLY, J. ROUSSELOT & C. GRASSLEY, SUPPLEMENTAL VIEWS ON H.R. 5294, H.R. REP. NO. 131, 95th Cong., 1st Sess. 28 (1977).

The general concern about frivolous lawsuits against creditors is reflected in H.R. 9555, 95th Cong., 1st Sess. (1977), which was introduced in Congress on October 13, 1977. Section 8 of this bill provides for redress for creditors who are objects of frivolous consumer actions. For an excellent discussion of the pros and cons of consumer class actions, see AMERICAN ENTER-

The denial of a right of private action for violation of the debt collection provisions would have lessened the effectiveness of the new law immensely.<sup>132</sup> When the right of private action was added to chapter 75 in 1969, it was characterized as "the most significant portion of the new North Carolina legislation,"<sup>133</sup> and it was suggested that this provision might be the key to effective enforcement of section 75-1.1.<sup>134</sup> Although private actions may be brought for violations of the debt collection provisions, the combined effect of the limitation on damages and the denial of attorneys' fees will be to discourage their use against debt collectors. Actual damages resulting from abusive collection practices may be relatively insignificant; without the possibility of recovering treble damages and attorneys' fees, consumers will have little incentive to bring a suit.<sup>135</sup>

## V. POTENTIAL PROBLEMS

The major substantive weakness of the CPA is the inapplicability of the debt collection provisions to some debt collectors.<sup>136</sup> Under these provisions, the attorney general may act only against debt collectors who are not collection agencies and who are collecting from consumer debtors,<sup>137</sup> in addition, it is only those debt collectors who are subject to private actions by consumers under the CPA.<sup>138</sup> The activities of collection agencies are

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PRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, LEGISLATIVE ANALYSIS NO. 8, CONSUMER CLASS ACTIONS (1977).

132. The availability of private remedies is one of the three "major principles" of the MODEL CONSUMER CREDIT ACT 1973:

[A]dequate private remedies must exist so that consumers affected by illegal practices can obtain effective judicial redress. Even the most efficient of administrative agencies cannot police the day-to-day practices of an industry as large and pervasive in our economy as consumer credit. Consumers aggrieved by illegal practices can and should be their own best advocates.

*Id.* Introduction at v.

133. Comment, *supra* note 2, at 900.

134. *Id.* See also Morgan, *supra* note 2, at 14.

135. The provisions for treble damages, N.C. GEN. STAT. § 75-16 (Cum. Supp. 1977), and attorneys' fees, *id.* § 75-16.1 (1975), serve as an inducement to private enforcement of chapter 75. See Comment, *supra* note 2, at 900; Note, *supra* note 2, at 487. The unavailability of significant recovery is likely to discourage consumers from filing actions for damages under § 75-16 for violations of §§ 75-50 to -56, and such an action appears to be the only action available to the individual consumer against violators of the debt collection provisions. As a violation of §§ 75-50 to -56 is a misdemeanor under N.C. GEN. STAT. § 75-6 (1975), the consumer could not seek injunctive relief. See *Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R.*, 210 N.C. 36, 185 S.E. 479 (1936) (plaintiff in a private action may not seek injunctive relief for criminal acts). Professor Aycock points out that this limitation on injunctions against criminal acts "appears to be no bar to a suit for injunction brought by a victim of an unfair trade practice proscribed by [section 75-1.1]," as § 75-6 provides that a violation of § 75-1.1 is not a crime. Aycock, *supra* note 2, at 255. But see text accompanying notes 82-88 *supra* (discussing whether §§ 75-50 to -56 are independent provisions or merely a clarification of § 75-1.1).

136. See text accompanying notes 70-77 *supra*.

137. N.C. GEN. STAT. § 75-50(3) (Cum. Supp. 1977).

138. Consumers, of course, may bring a tort action against *any* debt collector. But see note 126 *supra* (tort remedies for debt collection abuses in North Carolina are generally ineffective).

regulated by administrative regulations<sup>139</sup> issued by the Commissioner of Insurance.<sup>140</sup> Since the federal Fair Debt Collection Practices Act<sup>141</sup> became effective on March 20, 1978, North Carolina collection agencies have been subject to federal regulation.<sup>142</sup> Collection practices in North Carolina thus are subject to regulation by two state agencies, the Department of Justice and the Department of Insurance, as well as the federal government.<sup>143</sup> Effective, consistent enforcement of debt collection standards would be much more likely if enforcement authority were vested in only one

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139. N.C. ADMIN. CODE tit. 11, §§ 13.0200-.0221 (1978). These regulations relate primarily to the mechanics of acquiring the required license and bond and to the preparation and approval of forms to be used by the collection agencies. The regulations, however, set forth a list of "prohibited collection practices," *id.* § 13.0221, and many of the listed practices closely resemble those prohibited in §§ 75-51 to -55 of the CPA. For example, the regulations prohibit a collection agency from:

(3) communicating with the debtor or person related to the debtor with such frequency or at such unusual hours in such a manner as can reasonably be expected to threaten or harass the debtor;

(5) communicating with the debtor or the debtor's family after being notified in writing by an attorney for the debtor that all future communication should be with the attorney;

(11) threatening action unless like action is taken in regular course of business or is intended for that particular debt . . . .

*Id.* Subsection (3) is similar to N.C. GEN. STAT. § 75-52(3) (Cum. Supp. 1977); (5) is similar to *id.* § 75-55(3); and (11) is similar to *id.* § 75-51(7).

140. See N.C. GEN. STAT. § 66-46 (1975). The regulations that are currently in force, N.C. ADMIN. CODE tit. 11, §§ 13.0200-.0221 (1978), went into effect on January 1, 1978. Similar regulations with an effective date of February 1, 1976, had been issued previously, but, because of irregularities in the promulgation of automobile insurance regulations that were issued at the same time, there was some question as to whether any of the Department of Insurance regulations ever became legally effective. See *American Guarantee & Liab. Ins. Co. v. Ingram*, 32 N.C. App. 552, 233 S.E.2d 398, *cert. denied*, 292 N.C. 729, 235 S.E.2d 782 (1977). On September 26, 1977, a hearing was held on a revised version of the previously adopted collection agency regulations, and the current regulations were subsequently promulgated. Letter to the author from Mary K.B. Britt, Acting Deputy Commissioner, Special Services Division, N.C. Dep't of Insurance (Oct. 19, 1977) (copy on file in office of *North Carolina Law Review*); Telephone Interview with Mary K.B. Britt (Jan. 23, 1978).

141. 15 U.S.C.A. §§ 1692-1692o (West Supp. Pamphlet No. 3 1977).

142. State laws will be preempted only to the extent that they are inconsistent with the federal law:

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

*Id.* § 1692n. See generally H.R. REP. NO. 131, *supra* note 131, at 7-8; 123 CONG. REC. H2922 (daily ed. April 4, 1977) (remarks of Rep. Annunzio).

143. Under the Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692l (West Supp. Pamphlet No. 3 1977), the FTC has general enforcement authority; violations of the Act are deemed unfair or deceptive acts or practices in violation of the FTC Act. It is noteworthy that *id.* § 1692l(d) prohibits the FTC from promulgating regulations or rules with respect to the debt collection practices of debt collectors who are subject to the Fair Debt Collection Practices Act. See generally CONG. REC., *supra* note 142, at H2921 (remarks of Rep. Annunzio).



agency; this would be possible only if the debt collection provisions of the CPA applied to all debt collectors. The federal Fair Debt Collection Practices Act authorizes the FTC to grant exemptions from the federal law where state law provides substantially similar requirements, provided that enforcement provisions are adequate.<sup>144</sup> If the provisions of sections 75-50 to 75-56 also applied to collection agencies, North Carolina would be eligible for an exemption from the federal law.<sup>145</sup> As a result, all enforcement authority in the field of debt collection practices would be vested in one official, the attorney general, with the likely concomitant result that enforcement would be more effective and consistent.

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144. 15 U.S.C.A. § 1692o (West Supp. Pamphlet No. 3 1977). Apparently a state must submit an application in order to obtain such an exemption. See CONG. REC., *supra* note 142, at H2922 (remarks of Rep. Annunzio).

The federal statute limiting garnishment includes a similar provision that authorizes the Secretary of Labor to exempt states from the federal limitations "if he determines that the laws of that State provide restrictions on garnishment which are substantially similar to those provided in [the federal law]." 15 U.S.C.A. § 1675 (West Supp. Pamphlet No. 2 1977). The regulations that the Secretary of Labor has promulgated under this section may give some indication of what type of regulations the FTC will adopt to implement the exemption provisions of the Fair Debt Collection Practices Act. See *Restriction on Garnishment*, 29 C.F.R. §§ 870.50-.57 (1976). So far only Kentucky and Virginia have been granted exemptions from the garnishment limitations. *Id.* § 870.57(a), (b).

145. Of course, North Carolina could seek an exemption from the federal law on the basis of the North Carolina Department of Insurance regulations relating to collection agencies. See notes 139 & 140 *supra*. It is not clear, however, that an exemption would be granted on the basis of administrative regulations alone. See *Fair Debt Collection Practices Act*, 15 U.S.C.A. § 1692n (West Supp. Pamphlet No. 3 1977), *quoted in* note 142 *supra* (referring to "the laws of any state" (emphasis added)). It is also possible that the enforcement provisions under the regulations would be considered inadequate. The only remedies available against agencies that violate the regulations are (1) criminal prosecution for a misdemeanor under N.C. GEN. STAT. § 66-47 (1975) or (2) revocation of the collection agency permit under *id.* § 66-45. The only ground for holding a revocation hearing is "that the holder of the permit is not conducting his business in a businesslike way." *Id.* In practice, very few permits are revoked. In 1976, for example, the permits of four agencies were revoked following hearings. In each of these cases, the principal ground for revocation was improper handling of trust accounts. Letter to the author from Mary K.B. Britt, *supra* note 140.

Although a final decision has not been made, the North Carolina Department of Insurance is giving serious consideration to applying for an exemption from the federal law. *Id.* The Department is also considering seeking legislation that would incorporate the collection agency regulations into chapter 66 of the General Statutes. Telephone Interview with Mary K.B. Britt, Acting Deputy Commissioner, Special Services Division, N.C. Dep't of Insurance (Nov. 4, 1977). This would give collection agencies more effective notice of what is expected of them and would probably provide a stronger basis for exemption from the federal law.

Even if the state is granted an exemption from the federal law, the state could still make use of the federal law to reach out-of-state collection agencies that operate illegally in North Carolina. Currently the Department of Insurance and the Department of Justice are virtually powerless against such violators. The creditor who employs such an agency, however, may be guilty of a misdemeanor under N.C. GEN. STAT. § 66-41 (1975). See also *Divine v. Watauga Hosp.*, 137 F. Supp. 628 (M.D.N.C. 1956) (federal court, applying North Carolina law, refused to enforce a contract between a North Carolina creditor and an out-of-state collection agency on the ground that the contract was illegal because of the agency's noncompliance with North Carolina law).

The failure to integrate the new sections governing debt collection practices with the pre-existing provisions of the chapter is the major technical weakness of the new legislation. This lack of integration is apparent in three areas. First, the effect of the exemption for professionals that is created by section 75-1.1(b)<sup>146</sup> on the debt collection provisions of sections 75-50 to 75-56 is uncertain.<sup>147</sup> Second, although it is clear that under section 75-6 violations of sections 75-50 to 75-56 are misdemeanors, it is not clear that the drafters of the legislation intended them to be criminal violations.<sup>148</sup> Third, while it appears that the drafters of the legislation intended to prohibit private actions for violations of the debt collection provisions, the language of the last clause of section 75-56 clearly preserves the right of private action created by section 75-16.<sup>149</sup>

This lack of integration probably resulted from the last-minute decision to add specific debt collection provisions to the CPA.<sup>150</sup> If these provisions had been introduced at an earlier stage of the legislative process, when they would have been subjected to examination and discussion in committee, it is likely that some of these matters would have been clarified. The lack of integration does not seriously weaken the new law, but, at the very least, it is likely to give rise to otherwise unnecessary litigation.

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146. See text accompanying notes 34-37 *supra*.

147. See text accompanying notes 79-88 *supra*.

148. See notes 120 & 135 *supra*. Although it appears likely that the drafters of the legislation were not aware that violations would be misdemeanors, there is really no reason that criminal penalties should not be imposed against offending collectors. As collection agencies in North Carolina are subject to criminal prosecution for violation of the regulations governing their collection practices, N.C. GEN. STAT. § 66-47 (1975), it seems appropriate that creditor collectors be subject to the same penalties. There is precedent in other jurisdictions for subjecting violators of a general debt collection law to criminal prosecution. See, e.g., TEX. REV. CIV. STAT. ANN. art. 5069-11.09 (Vernon Supp. 1976-1977) (violation is a misdemeanor with fines of not less than \$100 nor more than \$500).

149. See note 131 *supra*.

150. *Id.*

