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Richard A. Nessler

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ABUSIVE DEBT COLLECTION: SHOULD A PRIVATE RIGHT OF ACTION EXIST?

In an effort to protect consumers from unfair, coercive, and deceptive practices¹ in the collection of consumer debts, the New York State Legislature enacted Article 29-H of the General Business Law.² The statute, known as the Debt Collection Procedures Act ("DCPA"), prohibits both a principal creditor and its agent from engaging in nine specific debt collection practices³ with re-

¹ See Governor's Memorandum on Approval of ch. 753, N.Y. Laws (June 19, 1973), reprinted in [1973] N.Y. Laws 2354 (McKinney). Within Governor Rockefeller's memorandum approving the Debt Collection Procedures Act, he stated: "The consumers of this State rightfully expect fairness in their dealings with the debt collection industry. . . . Enactment of this bill will help to insure that such practices are eliminated and that the debt collection industry maintains a profile of fairness in its dealing with consumers." *Id.*

² See N.Y. GEN. BUS. LAW §§ 600-603 (McKinney 1984).

³ See *id.* § 601. Section 601 of the Debt Collection Procedures Act ("DCPA") states: No principal creditor, as defined by this article, or his agent shall:

1. Simulate in any manner a law enforcement officer, or a representative of any governmental agency of the state of New York or any of its political subdivisions; or
2. Knowingly collect, attempt to collect, or assert a right to any collection fee, attorney's fee, court cost or expense unless such charges [sic] are justly due and legally chargeable against the debtor; or
3. Disclose or threaten to disclose information affecting the debtor's reputation for credit worthiness with knowledge or reason to know that the information is false; or
4. Communicate or threaten to communicate the nature of a consumer claim to the debtor's employer prior to obtaining final judgment against the debtor. The provisions of this subdivision shall not prohibit a principal creditor from communicating with the debtor's employer to execute a wage assignment agreement if the debtor has consented to such an agreement; or
5. Disclose or threaten to disclose information concerning the existence of a debt known to be disputed by the debtor without disclosing that fact; or
6. Communicate with the debtor or any member of his family or household with such frequency or at such unusual hours or in such a manner as can reasonably be expected to abuse or harass the debtor; or
7. Threaten any action which the principal creditor in the usual course of his business does not in fact take; or
8. Claim, or attempt or threaten to enforce a right with knowledge or reason to know that the right does not exist; or
9. Use a communication which simulates in any manner legal or judicial process or which gives the appearance of being authorized, issued or approved by a government, governmental agency, or attorney at law when it is not.

Id. (footnote omitted).

spect to consumer debts.⁴ In addition to the protection provided under the DCPA, the consumer debtor is also afforded protection under the Federal Fair Debt Collection Practices Act ("FDCPA").⁵ Another statute, Regulation 10 of the New York City Consumer Protection Law parallels the FDCPA, but provides protection only to New York City consumers.⁶ Aside from statutory remedies, legal relief also is available to consumer debtors under various traditional tort theories, such as intentional infliction of emotional distress, invasion of privacy, and defamation.⁷

Since the DCPA originally was intended to promote fair and ethical practices in the collection of consumer debts,⁸ a question

In addition to section 601 of the New York General Business Law, the New York City Department of Consumer Protection has adopted its own Debt Collection Practices Regulation. *See* N.Y.C. Consumer Protection Law Regulation 10 (1979); *see also infra* note 6 (discussion of Regulation 10 of N.Y.C. Consumer Protection Law).

⁴ *See* N.Y. GEN. BUS. LAW § 600 (McKinney 1984). Section 600, entitled "Definitions," states:

1. "Consumer claim" means any obligation of a natural person for the payment of money or its equivalent which is or is alleged to be in default and which arises out of a transaction wherein credit has been offered or extended to a natural person, and the money, property or service which was the subject of the transaction was primarily for personal, family or household purposes. The term includes an obligation of a natural person who is a co-maker, endorser, guarantor or surety as well as the natural person to whom such credit was originally extended.
2. "Debtor" means any natural person who owes or who is asserted to owe a consumer claim.
3. "Principal creditor" means any person, firm, corporation or organization to whom a consumer claim is owed, due or asserted to be due or owed, or any assignee for value of said person, firm, corporation or organization.

Id.

⁵ *See* 15 U.S.C. §§ 1692-1692o (1988). The purpose of the federal Act as set forth in section 1692(e) is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." *Id.* § 1692(e).

Although the purpose of both the federal and New York State Acts are similar, the federal Act only applies to third-party debt collectors who regularly collect or attempt to collect debts. *See id.* § 1692a(6). Additionally, the federal Act provides for civil liability, *see infra* note 20 and accompanying text, whereas the New York Act does not, *see infra* note 28 and accompanying text.

⁶ *See* N.Y.C. Consumer Protection Law Regulation 10 (1979). In general, the substantive provisions of Regulation 10 parallel the Federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692o (1988). The New York City regulation, however, covers abusive debt collection practices by creditors and their agents, while the FDCPA is limited in application to third-party creditors. *See supra* note 5.

⁷ *See* R. HOBBS, DEBT COLLECTION HARASSMENT 89-96 (Supp. 1986); S. SHERMAN, WHAT TO DO WHEN YOUR BILLS EXCEED YOUR PAYCHECK 107-09 (1974).

⁸ *See* Memorandum of Joint Legislative Committee on Consumer Protection, *reprinted*

arose as to whether debt collection violations gives rise to an implied private cause of action.⁹ Although the courts have addressed the question, it remains uncertain whether a debt collection violation is a legal wrong redressable in a private civil action, or is enforceable civilly only by the attorney general or criminally by a district attorney.¹⁰ States with similar debt collection statutes either

in [1973] N.Y. LEGIS. ANN. 52 (discussing abusive practices which prompted enactment of DCPA).

⁹ See, e.g., I.F.C. Personal Money Managers, Inc. v. Vadney, 133 Misc. 2d 841, 844, 508 N.Y.S.2d 845, 847 (Sup. Ct. Albany County 1986) (violation of General Business Law § 602 gives rise to private cause of action by debtor); Kohler v. Ford Motor Credit Co., 112 Misc. 2d 480, 482, 447 N.Y.S.2d 215, 217 (Sup. Ct. Albany County 1982) (although not authorized by statute, case law supports existence of private lawsuit), *modified on other grounds*, 93 A.D.2d 205, 462 N.Y.S.2d 297 (3d Dep't 1983); Lane v. Marine Midland Bank, 112 Misc. 2d 200, 202, 446 N.Y.S.2d 873, 875 (Sup. Ct. Erie County 1982) (legislature did not intend private remedies under Act); see also N.Y. GEN. BUS. LAW § 600 commentary at 545 (McKinney 1984) ("Although private suits are not expressly authorized where actual damages are shown to be caused by a statutory violation, there is case law to support liability"). New York courts have recognized private lawsuits arising from violations of statutes which do not explicitly provide such causes of action. See, e.g., Johnson v. Clay Partition Co., 93 Misc. 2d 414, 414, 402 N.Y.S.2d 912, 913 (Sup. Ct. N.Y. County 1977) (recognizing general rule that "private right of action is implied from statutes which on their face provide penal sanctions"), *aff'd*, 65 A.D.2d 737, 411 N.Y.S.2d 189 (1978); Barnes v. Peat, Marwick, Mitchell & Co., 69 Misc. 2d 1068, 1071, 332 N.Y.S.2d 281, 283 (Sup. Ct. N.Y. County 1972) (violation of Securities Act gave rise to implied private cause of action for damages), *modified*, 42 A.D.2d 15, 344 N.Y.S.2d 645 (1st Dep't 1973); Ben Constr. Corp. v. Snushall, 44 Misc. 2d 878, 881, 254 N.Y.S.2d 948, 951-52 (Sup. Ct. Onondaga County 1964) (where personal property statute did not provide absolute right of buyer to cancel contract, court recognized implied right), *aff'd*, 24 A.D.2d 842, 264 N.Y.S.2d 231 (4th Dep't 1965). But see McWilliams v. Catholic Diocese of Rochester, 145 A.D.2d 904, 904-05, 536 N.Y.S.2d 285, 286 (4th Dep't 1988) (no private cause of action for violation of Mental Hygiene Law); Mauersberg v. E.F. Hutton & Co., 116 A.D.2d 417, 421, 501 N.Y.S.2d 748, 751 (3d Dep't 1986) (no private cause of action for violation of Securities Act provision).

The implication of a private right of action is not exclusive to the state courts, as evidenced by the United States Supreme Court, which has recognized its judicial power to imply a private right of action where the invoked statute does not explicitly provide for one. Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969) (analysis of language of Voting Rights Act in light of intended purpose allowed Court to find implied right for private person to seek declaratory judgment against state for failure to comply with Act).

¹⁰ Compare Lane, 112 Misc. 2d at 200-01, 446 N.Y.S.2d at 874 (accepted procedure for violation of Debt Collection Act is to file complaint with any agency that deals with consumer problems) with Vadney, 133 Misc. 2d at 844, 508 N.Y.S.2d at 847 (violation of Debt Collection Act gives rise to private lawsuit) and Kohler, 112 Misc. 2d at 483, 447 N.Y.S.2d at 217 (best method to compel debt collection agencies to comply with Act is to subject them to private suits).

Several commentators have advocated the necessity of private enforcement in order to remedy the evil which the legislatures address in enacting these debt collection guidelines. See, e.g., Homburger, *Harassment of Borrowers by Licensed Lenders*, 1 COLUM. J.L. & Soc. PROSS. 39, 49 (1965) (civil remedies are better solution than criminal sanctions and informal administrative processes to stop harassment in debt collection); Kripke, *Gesture and Real-*

have expressly provided for a private cause of action within their statute¹¹ or have judicially implied a private action based on legislative intent.¹² Texas, for example, in addition to enacting a debt collection statute, has established an independent tort to protect consumers from unreasonable collection attempts.¹³

In view of recent case law, it is clear that the debt collection rules in New York have been a source of intense unsettlement in the area of implied civil liability.¹⁴ Part One of this Note will examine the statutory requirements and remedies available to an aggrieved debtor in New York under the federal government's FDCPA and New York's DCPA. Part Two will survey the leading New York cases which have considered whether a private cause of

ity in Consumer Credit Reform, 44 N.Y.U. L. REV. 1, 46-49 (1969) (absence of vigorous public enforcement coupled with budget difficulties leaves need for private enforcement of consumer protection laws); Spanogle, *Why Does the Proposed Uniform Consumer Credit Code Eschew Private Enforcement?*, 23 BUS. LAW. 1039, 1040-41 (1968) (private enforcement would still be useful).

¹¹ See, e.g., ALASKA STAT. §§ 45.50.471-.561 (1986); CAL. BUS. & PROF. CODE §§ 6850-6956 (West 1975 & Supp. 1990); CAL. CIV. CODE §§ 1788-1788.32 (West 1985); COLO. REV. STAT. §§ 5-1-101 to 12-105 (1974 & Supp. 1989); CONN. GEN. STAT. §§ 42-110a to -110q (1989); FLA. STAT. ANN. §§ 501.201-.213, 559.55-.78 (West 1988); HAW. REV. STAT. §§ 443A-1 to -17 (1985); IOWA CODE ANN. §§ 537.1101-.7103 (West 1987 & Supp. 1990); LA. REV. STAT. ANN. §§ 9:3510-.3571 (West 1983 & Supp. 1990); ME. REV. STAT. ANN. tit. 9-A, §§ 1-107 to 7-127 (1980); MD. COM. LAW CODE ANN. §§ 13-101 to -501, 14-201 to -204 (1983 & Supp. 1990); MASS. GEN. LAWS ANN. ch. 93, § 49 (West 1984); MICH. COMP. LAWS ANN. §§ 445.251-.258 (West 1989); N.H. REV. STAT. ANN. §§ 358-C:1 to -C:4 (1984); N.C. GEN. STAT. §§ 66-49.24 to -.50, 75-50 to -56 (1985); OHIO REV. CODE ANN. §§ 1345.01-.99 (Baldwin 1988); TEX. REV. CIV. STAT. ANN. arts. 5069-11.01 to -.11 (Vernon 1987); VT. STAT. ANN. tit. 9, §§ 2451-2462 (1984 & Supp. 1989); WASH. REV. CODE ANN. §§ 19.16.100-.950 (1989); WIS. STAT. ANN. §§ 427.101-.105 (West 1980).

¹² See, e.g., *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 397, 653 S.W.2d 128, 135 (1983) (statute designed to protect public implies right of enforcement by civil action); *Young v. Joyce*, 351 A.2d 857, 859 (Del. 1975) (statute whose primary purpose is to protect consumers should be liberally construed to allow implied private right to sue); *Rice v. Snarlin, Inc.*, 131 Ill. App. 2d 434, 441-42, 266 N.E.2d 183, 188-89 (1970) (private right of action existed for violation of Illinois Consumer Fraud Act, even though Act did not expressly provide for such remedy); *Hockley v. Hargitt*, 82 Wash. 2d 337, 350, 510 P.2d 1123, 1133 (1973) (implied right for consumer to sue furthers public interests).

¹³ See *Duty v. General Fin. Co.*, 154 Tex. 16, 20, 273 S.W.2d 64, 66 (1954). In *Duty*, the Texas Supreme Court established the tort of unreasonable collection efforts. *Id.* The court held that a cause of action exists when a creditor engages in harassing collection efforts that result in mental anguish and physical injury. *Id.* Subsequently, Texas courts expanded this tort by imposing liability on debtors whose tactics were implemented with reckless disregard for a debtor's health or welfare. See *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857, 860 (Tex. Civ. App. 1957). The Texas courts have further expanded the tort to allow an action to lie in negligent conduct which results in physical illness and mental or emotional pain. See *Moore v. Savage*, 359 S.W.2d 95, 96 (Tex. Civ. App. 1962).

¹⁴ See *supra* note 10 (comparison of divergent views taken by New York lower courts).

action exists for a debtor under the DCPA. Finally, Part Three will analyze the viability of enforcing a private cause of action by applying the most recent statutory interpretation test provided by the New York Court of Appeals, and conclude that amendments to the General Business Law and recent judicial precedent provide a framework within which one may recognize an implied private cause of action under the New York DCPA.

I. REQUIREMENTS AND REMEDIES UNDER THE FEDERAL AND STATE ACTS

In recognition that abuses in debt collection were both a widespread and severe national problem,¹⁵ Congress enacted the FDCPA, the first comprehensive debt collection statute.¹⁶ To effectuate its purpose, the federal Act broadly proscribes harassing and abusive debt collection practices, false or misleading representations, and unfair practices.¹⁷ In addition, the Act provides for en-

¹⁵ See S. REP. No. 382, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 1695, 1695. The Senate Report stated that "[h]earings before the Consumer Affairs Subcommittee revealed that independent debt collectors are the prime source of egregious collection practices." *Id.* at 1696. The report also revealed that the "primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level [and] [w]hile debt collection agencies have existed for decades, there are 13 States, with 40 million citizens, that have no debt collection laws." *Id.* at 1696-97; see H.R. REP. No. 131, 95th Cong., 1st Sess. 3 (1977) (major incentive for enactment of federal Act was paucity of available remedies for egregious practices).

¹⁶ 15 U.S.C. §§ 1692-1692o (1988). In relevant part, section 1692 sets forth the reasons why there is a need for a federal law protecting consumers in all 50 states:

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of Laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

. . . .

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

Id. § 1692.

¹⁷ *Id.* §§ 1692d - 1692e. Section 1692d provides, in pertinent part, that "[a] debt collec-

forcement by an aggrieved individual,¹⁸ the Federal Trade Commission, or the administrative agency responsible for selected industries as defined in the Act.¹⁹ Under the FDCPA, consumers who have been subjected to collection abuses have a right to bring their own private action and may recover, in addition to actual damages, court costs and attorneys' fees.²⁰ Moreover, the federal Act provides that a court may award additional statutory damages of up to \$1,000 for each individual subjected to abusive collection practices.²¹ Although the Act proscribes a broad category of collection activities, its application is restricted to independent debt col-

tor may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." *Id.* § 1692d. Section 1692e provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e.

Although both the legislative history and the statute itself set forth the type of actions to be prohibited by the federal Act, judicial opinions differ as to the standard to be applied when determining whether conduct is false, deceptive, or misleading. Compare *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864, 870-71 (D.N.D. 1981) (district court applied subjective capacity of debtor test) with *Blackwell v. Professional Business Servs., Inc.*, 526 F. Supp. 535, 537-38 (N.D. Ga. 1981) (court applied objective reasonable consumer standard). The court in *Blackwell* specifically refused to adopt the "novel" standard used by the court in the *Bingham* case. See *id.*

Section 1692f of the federal Act sets forth the general rule that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt" and supplements this by categorically listing eight areas of specific conduct considered to be unfair. See 15 U.S.C. § 1692f (1988). Although the federal Act sets forth a list of unfair practices, interpreting the term "unfair" in its general sense has not been an easy task for the courts. See *Averitt, The Meaning of "Unfair Acts and Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 239-45 (1981) (discussing evolution of term "unfair").

¹⁸ 15 U.S.C. § 1692k (1988). Section 1692k provides in pertinent part: "Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—(1) any actual damage sustained . . . as a result of such failure." *Id.* § 1692k(a)(1); see S. REP. NO. 382, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 1695, 1699 ("committee views this legislation as primarily self enforcing; consumers who have been subjected to collection abuses will be enforcing compliance"). The scope of the Act is not limited to the obligated consumer, but any individual who has been harmed under the Act has standing to assert a cause of action. See *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1178 (11th Cir. 1985) (individuals have right to be treated with respect); *Whatley v. Universal Collection Bureau, Inc.*, 525 F. Supp. 1204, 1204 (N.D. Ga. 1981) (aggrieved parents of debtor have standing to sue).

¹⁹ 15 U.S.C. § 1692l (1988). Section 1692l provides: "Compliance with this subchapter shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another agency under subsection (b) of this section." *Id.*

²⁰ *Id.* § 1692k(a)(3).

²¹ *Id.* § 1692k(a)(2).

lectors who collect consumer debt.²² Thus, one who merely extends credit and collects payment incident to credit transaction is not subject to the provisions of the FDCPA. As a result of this exclusion, most debt collection activities are excepted from the federal Act.²³

In contrast with the federal Act, the New York DCPA is broad in scope since it regulates the conduct of all debt collectors seeking to collect consumer debts.²⁴ The DCPA classifies debt collectors as "principal creditors,"²⁵ defining such term to include "any person, firm, corporation or organization [or assignee] to whom a consumer claim is owed."²⁶ Although the DCPA's classification of prohibited practices is much less detailed than the federal Act, it is similar in its prohibition against harassing, unfair, or deceptive collection procedures.²⁷ The major limitation of the DCPA is that it does not specifically provide for a private cause of action; instead, it states that a violation is a misdemeanor²⁸ which may be prosecuted by the attorney general or a district attorney.²⁹ However, while a private cause of action has not been explicitly provided for, it is asserted that one may exist. The remainder of this Note will discuss whether this private right of action exists along established statu-

²² *Id.* § 1692a. The term "debt collector" is defined, in relevant part, as follows:

"[D]ebt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

Id. § 1692a(6); see S. REP. NO. 382, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 1695, 1697-98 (Congress intentionally omitted principal creditors from federal Act). Congress concluded that unlike debt collection agencies, principal creditors will be restrained from engaging in abusive debt collection practices by their business desire to protect their goodwill and thus excluded them from the Act. *Id.* at 1696. In addition, Congress determined that because creditors usually are larger and more stable than debt collection agencies, a Federal Trade Commission action against one creditor could be expected to have an industry-wide deterrent effect, thereby making their inclusion in the federal Act unnecessary. *Id.*

²³ See S. REP. NO. 382, 95th Cong., 1st Sess., pt. 1, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 1695, 1697-98 (listing debt collection activities included in Senate Report accompanying bill, but excluded from final version of Act).

²⁴ N.Y. GEN. BUS. LAW. §§ 600(3), 601 (McKinney 1984).

²⁵ *Id.* § 600(3).

²⁶ *Id.*

²⁷ Compare *id.* § 601 with 15 U.S.C. §§ 1692c-1692f (1988); see *supra* notes 5 & 6 (further comparison of relevant New York and federal debt collection statutes).

²⁸ N.Y. GEN. BUS. LAW § 602(1) (McKinney 1984).

²⁹ Compare *id.* with 15 U.S.C. § 1692k (1988). The federal Act specifically provides for a private cause of action. *Id.*

tory interpretation guidelines.

II. JUDICIAL APPROACHES TO IMPLIED PRIVATE REMEDIES

Although the New York DCPA does not expressly authorize a private cause of action, individuals nonetheless have attempted to privately enforce the statute against creditors or collection agencies alleged to have engaged in prohibited methods of debt collection.³⁰ The first case to consider whether a private right of action exists under the New York statute was *Lane v. Marine Midland Bank*.³¹ In *Lane*, the New York Supreme Court, Erie County, recognized that an implied civil remedy may be available under the DCPA.³² The *Lane* court determined that if the legislative intent sanctioned private enforcement, then implication of a private right of action could be proper.³³ The court dismissed the suit, however, holding that "[a]lthough it is the consumer who ultimately is meant to benefit from the act, there are several indications that the accepted procedure is a complaint to any agency which deals with consumer problems."³⁴ Through the application of the guidelines pronounced by the United States Supreme Court in *Cort v. Ash*³⁵ determining

³⁰ See I.F.C. Personal Money Managers, Inc. v. Vadney, 133 Misc. 2d 841, 843, 508 N.Y.S.2d 845, 847 (Sup. Ct. Albany County 1986) (individual brought suit against creditor who violated General Business Law § 601); Kohler v. Ford Motor Credit Co., 112 Misc. 2d 480, 481, 447 N.Y.S.2d 215, 216 (Sup. Ct. Albany County 1982), *modified on other grounds*, 93 A.D.2d 205, 462 N.Y.S.2d 297 (3d Dep't 1983) (private damages suit existed to recover for injuries resulting from violation of statute); *Lane v. Marine Midland Bank*, 112 Misc. 2d 200, 201, 446 N.Y.S.2d 873, 874 (Sup. Ct. Erie County 1982) ("civil relief on the basis of the act is not barred by its failure to expressly provide for such relief").

³¹ 112 Misc. 2d at 201, 446 N.Y.S.2d at 873 (Sup. Ct. Erie County 1982).

³² *Id.* at 201, 446 N.Y.S.2d at 874. See generally McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167 (1976) (tracing American doctrine of implied causes of action, including examination of Burger Court's approach); Note, *Private Remedies Under the Consumer Fraud Acts: The Judicial Approaches of Statutory Interpretation and Implication*, 67 NW. U.L. REV. 413 (1972) (suggesting that doctrine of implication is effective means of judicial implication of private remedies).

³³ *Lane*, 112 Misc. 2d at 201, 446 N.Y.S.2d at 874.

³⁴ *Id.*; see Memorandum of the Joint Legislative Committee on Consumer Protection, reprinted in [1973] N.Y. LEGIS. ANN. 52. ("attorney general or any district attorney is empowered to prevent an abusive tactic from being continued and persons who violate the provision of this article are guilty of a misdemeanor").

³⁵ 422 U.S. 66 (1975). In *Cort*, the Supreme Court set forth four factors to be considered in determining whether a private right of action may be implied in a statute: (1) whether the plaintiff is a member of the class for whose 'especial' benefit the statute was enacted; (2) whether there is any indication of legislative intent to grant such a right; (3) whether the implication of a private civil remedy would be consistent with the legislative scheme; and (4) whether the cause of action is not one which traditionally has been rele-

whether a private right of action may be implied in a statute, the *Lane* court concluded that the present legislative scheme does not allow a private action for violation of the DCPA.³⁶

In contrast to the *Lane* decision, a more policy-oriented analysis of the possible existence of an implied private cause of action was advanced in *Kohler v. Ford Motor Credit Co.*³⁷ In *Kohler*, the defendant debt collector had visited the plaintiff's place of employment and communicated the nature of the plaintiff's debt to his employer.³⁸ The New York Supreme Court, Albany County, held that a private suit could be brought under the DCPA.³⁹ Finding that the defendant had, in fact, violated the statute,⁴⁰ the court

gated to state law. *Id.* at 78.

After applying the four-prong *Cort* test, the *Lane* court examined articles 29-I, 30, and 33 of the New York General Business Law, which all deal with consumer protection. *Lane*, 112 Misc. 2d at 201-02, 446 N.Y.S.2d at 874-75. Article 29-I, entitled "The Storage of Household Goods," better known as the "truth in storage act," was enacted to protect consumers who place household goods in storage with a warehouseman. *See* N.Y. GEN. BUS. LAW §§ 605-610 (McKinney 1984). Section 609 of the Act provides that "[a]ny consumer bailor damaged by an unlawful detention of his goods . . . may bring an action for recovery of damages" *Id.* § 609. Article 30 entitled "Health Club Services" was designed to protect consumers from deceptive business practices of health clubs. *See id.* §§ 620-631. Section 628 provides that "[a]ny buyer damaged by a violation of this article may bring an action for recovery of damages." *Id.* § 628. Finally, article 33, the Franchise Act, provides for civil remedies under Section 691 of the General Business Law. *See id.* §§ 680-695.

³⁶ *Lane*, 112 Misc. 2d at 202, 446 N.Y.S.2d at 875. Plaintiff also alleged a violation of the FDCPA and asserted a cause of action based on the common-law tort of intentional infliction of emotional distress. *Id.* at 202-03, 446 N.Y.S.2d at 875-76. The *Lane* court dismissed the cause of action based on the Act because the plaintiff failed to prove that the defendant fit within the federal statute's definition of "debt collector." *Id.* However, the court found that plaintiff's complaint stated a cause of action for intentional infliction of emotional distress. *Id.* at 203, 446 N.Y.S.2d at 875.

³⁷ 112 Misc. 2d 480, 447 N.Y.S.2d 215 (Sup. Ct. Albany County 1982), *modified on other grounds*, 93 A.D.2d 205, 462 N.Y.S.2d 297 (3d Dep't 1983).

³⁸ *Id.* at 480-81, 447 N.Y.S.2d at 216. According to the plaintiff, an agent for the defendant came to the plaintiff's place of business and informed the plaintiff's employer that the plaintiff would have to quit his job since the defendant was repossessing the plaintiff's automobile. *Id.* An argument then arose between the plaintiff and the agent for the defendant. *Id.* at 481, 447 N.Y.S.2d at 216. The defendant went forward with the repossession of the car and later sold it at auction for a price well below its book value. *Id.*

³⁹ *Id.* at 483, 447 N.Y.S.2d at 217. The interpretative analysis focusing on the question of whether the plaintiff is within the class of persons intended to be protected by the statute is generally recognized as the doctrine of implication, first established by the United States Supreme Court in *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916). In *Rigsby*, the Court stated that "disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." *Id.* at 39.

⁴⁰ *Kohler*, 112 Misc. 2d at 482, 447 N.Y.S.2d at 217; *see* N.Y. GEN. BUS. LAW § 601(4) (McKinney 1984) (principal creditor not permitted to "[c]ommunicate or threaten to com-

stated that "[a] person injured by the violation of a statutory duty is permitted to maintain an action for that violation if he is within the class of persons intended to be protected by the statute."⁴¹ The court further determined that an implied private right of action against debt collectors who engage in prohibited collection procedures was consistent with the DCPA's purpose "to protect debtors from debt collection practices that the Legislature considered reprehensible."⁴² In addition, the *Kohler* court observed that "there have been prior private lawsuits to recover against debt collectors for collection practices."⁴³

Since the *Kohler* decision, only one case has addressed the existence of an implied private right of action under New York's DCPA. In *I.F.C. Personal Money Managers, Inc. v. Vadney*,⁴⁴ the New York Supreme Court, Albany County, in accordance with the holding of *Kohler*, recognized a private right of action for violation of the New York DCPA.⁴⁵ In *Vadney*, a creditor threatened the defendant with a suit for attorneys' fees if she did not immediately pay her debt.⁴⁶ The *Vadney* court recognized that such action was

municate the nature of a consumer claim to the debtor's employer prior to obtaining final judgment against the debtor").

⁴¹ *Kohler*, 112 Misc. 2d at 482, 447 N.Y.S.2d at 217; see *Pauley v. Steam Gauge & Lantern Co.*, 131 N.Y. 90, 95, 29 N.E. 999, 1000 (1892). In *Pauley*, a widow brought a wrongful death action against the defendant for violation of a New York statute requiring the construction of fire escapes upon the outside of all factories three stories high or taller. *Id.* The court stated that "[t]he requirement of fire escapes was for the . . . special benefit of the operatives . . . and the rule applies that when a statute . . . prohibits a thing for the benefit of a person he shall have a remedy upon the same statute . . . for a wrong done to him." *Id.* at 95-96, 29 N.E. at 1000.

⁴² *Kohler*, 112 Misc. 2d at 482, 447 N.Y.S.2d at 217. The *Kohler* court stated that "[w]hile section 602 of the General Business Law authorizes the district attorney or attorney general to bring an action to compel compliance, that section does not specifically prohibit private suits for compensatory damages." *Id.* at 482-83, 447 N.Y.S.2d at 217. The court further reasoned that it could not think of a better way to force debt collection agencies to act in compliance with the law than to permit private suits against them. See *id.* at 483, 447 N.Y.S.2d at 217.

⁴³ *Id.* at 482, 447 N.Y.S.2d at 217; see *McKimmie v. AVCO Fin. Servs. Co.*, 504 F. Supp. 1286, 1288-89 (W.D.N.Y. 1981) (debtor commenced personal action against creditor for violation of New York's DCPA).

⁴⁴ 133 Misc. 2d 841, 508 N.Y.S.2d 845 (Sup. Ct. Albany County 1986).

⁴⁵ *Id.* at 844, 508 N.Y.S.2d at 847.

⁴⁶ *Id.* at 843, 508 N.Y.S.2d at 846. In *Vadney*, the defendant debtor, Vadney, had retained the plaintiff corporation to prepare her income tax returns. *Id.* at 842, 508 N.Y.S.2d at 846. At that time, the plaintiff corporation gave Vadney an estimate of \$175 to \$250 to complete the returns. *Id.* Vadney alleged that it took the plaintiff six months to complete her tax returns, and that they were prepared in an unprofessional manner. *Id.* The plaintiff corporation sent a bill to Vadney totaling \$500 for preparation of her tax returns. *Id.* at 842-

a direct violation of section 601(2) of the DCPA, and as such, "gives rise to a private lawsuit for damages sustained by the debtor."⁴⁷

Although the courts in both *Lane* and *Kohler* applied their own tests to determine whether a private right of action exists under the DCPA,⁴⁸ such tests were superseded to some degree by the New York Court of Appeals' decision in *Burns Jackson Miller Summit & Spitzer v. Lindner*.⁴⁹ In *Burns Jackson*, a New York City law firm filed a class action suit to recover damages resulting from the transit strike of April, 1980.⁵⁰ The law firm alleged that the strike violated section 210 of the Civil Service Law and sought to enforce the statute privately.⁵¹ The court, confronted with the question of whether a private right of action exists under the Taylor Act,⁵² set forth three factors to determine whether an implied private right of action exists in a penal statute: (1) whether the plaintiff is a member of the class for whose particular benefit the statute was enacted; (2) whether the statute or legislative history indicates that the legislature intended to create a private right of action under the statute; and (3) whether the creation of a private

43, 508 N.Y.S.2d at 846. After Vadney forwarded \$150 in full payment for services, the corporation sent Vadney a letter stating that if it did not receive \$380 within 15 days, it would be forced to instruct its attorney to commence an action against Vadney for the entire balance due, in addition to court costs, attorney's fees, and interest. *Id.* at 843, 508 N.Y.S.2d at 846.

⁴⁷ *Id.* at 844, 508 N.Y.S.2d at 847. Section 601(2) provides that no principal creditor shall "[k]nowingly collect, attempt to collect, or assert a right to any collection fee, attorney's fee, court cost or expense unless such charges [sic] are justly due and legally chargeable against the debtor." See N.Y. GEN. BUS. LAW § 601(2) (McKinney 1984). The *Vadney* court stated that "[a] creditor has no right to have his attorney's fee paid by the debtor unless a statute or a contract between the debtor and creditor specifically so provides." *Vadney*, 133 Misc. 2d at 843, 508 N.Y.S.2d at 847 (citing *Citibank v. Galor Constr. Co.*, 60 A.D.2d 667, 667, 400 N.Y.S.2d 208, 208-09 (3d Dep't 1977)). By threatening the defendant debtor with a right to attorney's fees, which the plaintiff was unable to establish, the plaintiff violated the statute. *Id.* at 844, 508 N.Y.S.2d at 847.

⁴⁸ Compare *Lane*, 112 Misc. 2d at 201, 446 N.Y.S.2d at 874 (court followed guidelines pronounced by United States Supreme Court in *Cort*) with *Kohler*, 112 Misc. 2d at 480, 447 N.Y.S.2d at 215-18 (court disregarded Supreme Court's statutory interpretation approach in *Cort* and followed policy-orientated approach). For a general discussion of these two approaches, see Note, *supra* note 35.

⁴⁹ 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983).

⁵⁰ See *id.* at 322-23, 451 N.E.2d at 461, 464 N.Y.S.2d at 714.

⁵¹ *Id.* at 323, 451 N.E.2d at 462, 464 N.Y.S.2d at 715. The law firm sought damages of "\$50,000,000 per day for each day of the strike." *Id.*

⁵² See N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1983 & Supp. 1990). This statute, known as the Taylor Act, prohibits strikes of public employees or employee organizations. See *id.* § 210.

right of action is consistent with the purpose underlying the legislative scheme.⁵³ The court's three-part inquiry resulted in the conclusion that the legislature did not intend to create a private right of action under the Taylor Act.⁵⁴

The New York Court of Appeals has, in subsequent cases, applied the *Burns Jackson* analysis before implying a private right of action in a penal statute.⁵⁵ In *CPC International, Inc. v. McKesson Corp.*,⁵⁶ the Court of Appeals held that the Martin Act⁵⁷ does not contain an implied private cause of action for violation of its provisions.⁵⁸ In applying the second part of the *Burns Jackson* test, the

⁵³ *Burns Jackson*, 59 N.Y.2d at 325, 451 N.E.2d at 463, 464 N.Y.S.2d at 716. In adopting the three-factor test, the court looked to prior United States Supreme Court cases. *Id.*; see also *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13-18 (1981) (use statutory language, legislative history, and other traditional statutory interpretation aids to determine whether Congress intended private right of action); *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 37-40 (1976) (applying same three part test adopted in *Burns Jackson*); *Cort*, 422 U.S. at 78 (applied factors adopted in *Burns Jackson*).

⁵⁴ *Burns Jackson*, 59 N.Y.2d at 329, 451 N.E.2d at 465, 464 N.Y.S.2d at 718 ("provisions of the present statute and the history of their enactment strongly suggest that a private action based upon the statute was not intended"). Although the *Burns Jackson* court found that the plaintiff was within the class of individuals intended to benefit from the statute, a private right of action was denied because "[a] private action, which would impose per se liability without any of the limitations applicable to the common-law forms of action . . . would inevitably upset the delicate balance established after 20 years of legislative pondering." *Id.* at 330, 451 N.E.2d at 466, 464 N.Y.S.2d at 719.

⁵⁵ See, e.g., *Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d 629, 633-34, 541 N.E.2d 18, 20, 543 N.Y.S.2d 18, 20-21 (1989) (regarding whether private cause of action exists under Penal Law § 260.20(4), *Burns Jackson* test of "central importance"); *CPC Int'l, Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 276-77, 514 N.E.2d 116, 118-19, 519 N.Y.S.2d 804, 807 (1987) (citing *Burns Jackson* and applying test in determining that private cause of action does not exist under Martin Act); see also *Board of Managers v. Fairways*, 150 A.D.2d 32, 36, 545 N.Y.S.2d 343, 345-46 (2d Dep't 1989) (intermediate appellate court applying *Burns Jackson* analysis).

⁵⁶ 70 N.Y.2d 268, 514 N.E.2d 116, 519 N.Y.S.2d 804 (1987).

⁵⁷ See N.Y. GEN. BUS. LAW § 352-c (McKinney 1984). The Martin Act makes it illegal for any person, partnership, corporation, or agent thereof to engage in deceptive practices to promote the sale of any security. The Act prohibits, in pertinent part:

- (a) Any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale;
- (b) Any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances;
- (c) Any representation or statement which is false, where the person who made such representation or statement: (i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made; . . . to induce or promote the . . . sale . . . of any securities. . . .

Id. For a general discussion of the Martin Act, see Survey, *GBL § 352-c: No Private Cause of Action under New York's "Blue Sky" Law*, 61 ST. JOHN'S L. REV. 210 (1986).

⁵⁸ *CPC Int'l*, 70 N.Y.2d at 276-77, 514 N.E.2d at 119, 519 N.Y.S.2d at 807. The majority

court stated that "the specific purpose of the statute was to create a statutory mechanism in which the Attorney-General would have broad regulatory and remedial powers,"⁵⁹ and thus, an implied private action would not be consistent with the legislative scheme.⁶⁰

More recently, the Court of Appeals applied its *Burns Jackson* analysis in *Sheehy v. Big Flats Community Days, Inc.*⁶¹ In *Sheehy*, the court considered whether section 260.20(4) of the Penal Law⁶² gives rise to an implied private right of action in favor of a person who has been injured as a result of his or her consumption of alcohol.⁶³ The *Sheehy* court refused to recognize a private cause of action because such recognition would not be consistent with the legislative scheme.⁶⁴

held that "the particular purpose of section 352-c [the Martin Act] is the creation of an enforcement mechanism within which a private action is not implied." *Id.* at 277, 514 N.E.2d at 119, 519 N.Y.S.2d at 807. Judges Hancock and Simons had a different view, arguing that the implied private action would be in conformity with the broad statutory purpose and therefore would be in compliance with the *Burns Jackson* requirements. *Id.* (Hancock, Jr. & Simons, JJ., dissenting in part) (dissenting opinion included within text of majority opinion authored by Judge Hancock).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 73 N.Y.2d 629, 541 N.E.2d 18, 543 N.Y.S.2d 18 (1989).

⁶² See N.Y. PENAL LAW § 260.20(4) (McKinney 1989). The statute, in relevant part, states:

A person is guilty of unlawfully dealing with a child when: . . .

He gives or sells or causes to be given or sold any alcoholic beverage, as defined by section three of the alcoholic beverage control law, to a person less than twenty-one years old; except that this subdivision does not apply to the parent or guardian of such a person

Id.

⁶³ *Sheehy*, 73 N.Y.2d at 631, 541 N.E.2d at 19, 543 N.Y.S.2d at 19. In *Sheehy*, the plaintiff Margaret Sheehy, a minor, attended an outdoor community function and was served several glasses of beer. *Id.* at 632, 541 N.E.2d at 19, 543 N.Y.S.2d at 19. After being served the alcohol, she travelled across a highway and entered a bar where she was served another alcoholic beverage. *Id.* The plaintiff then attempted to cross the highway and return to the community function when she was struck by an automobile and severely injured. *Id.* Sheehy brought suit against those who served her beer at the community function and the operator of the bar, claiming that serving her alcohol was the proximate cause of the accident. *Id.*

⁶⁴ *Id.* at 635-36, 541 N.E.2d at 22, 543 N.Y.S.2d at 22. The *Sheehy* court found that the plaintiff had satisfied the first two prongs of the three-prong *Burns Jackson* test. *Id.* at 634, 541 N.E.2d at 20, 543 N.Y.S.2d at 20. Under the first prong, the *Sheehy* court stated that "[t]he statutory provision criminalizing the provision of alcoholic beverages to those under the legal purchase age . . . was unquestionably intended . . . to protect such [children and incompetents] from the health and safety dangers of alcohol consumption." *Id.* at 634, 541 N.E.2d at 21, 543 N.Y.S.2d at 21.

Under the second prong of the *Burns Jackson* test, the *Sheehy* court stated that "[s]imilarly, it cannot be denied that recognition of a private right of action for civil dam-

It is clear that the *Burns Jackson* test is the applicable standard to determine whether an implied private cause of action by a debtor should be recognized under the DCPA. It is submitted that application of the *Burns Jackson* test to the DCPA will result in the conclusion that a private cause of action exists on behalf of the aggrieved consumer. Moreover, alterations made to other portions of the New York Consumer Protection statute tend to support this position by illustrating that it was the legislature's intention to permit an implied private cause of action under the DCPA.

III. THE PRIVATE RIGHT OF ACTION RECOGNIZED

Private civil relief for violation of the DCPA by collectors of debt and their agents would supplement the already existing enforcement and disciplinary powers of the attorney general and district attorneys.⁶⁵ Even though civil liability was not expressly provided by the New York Legislature,⁶⁶ courts generally have held that it is the intention of the legislature and not simply a literal reading of the words of the statute that constitutes the law.⁶⁷ Thus, a literal meaning of the statutory language must not be adhered to if it defeats the general purpose policy intended to be promoted.⁶⁸ Accordingly, it is a court's duty to ascertain and declare

ages would, as a general matter, advance the legislative purpose." *Id.* It was the third prong of the *Burns Jackson* test that the court could not satisfy in order to recognize the private action. *Id.* The court found that the legislature had "deliberately adopted a scheme for affording civil damages to those injured." *Id.* at 635, 541 N.E.2d at 21, 543 N.Y.S.2d at 21. The court further recognized that the scheme does not permit recovery to the individual who became inebriated from the illegal sale. *Id.*; see *Mitchell v. The Shoals, Inc.*, 19 N.Y.2d 338, 341, 227 N.E.2d 21, 24, 280 N.Y.S.2d 113, 116 (1967); *Reuter v. Flobo Enter.*, 120 A.D.2d 722, 723-24, 503 N.Y.S.2d 67, 68 (2d Dep't 1986); *Allen v. County of Westchester*, 109 A.D.2d 475, 479, 492 N.Y.S.2d 772, 775 (2d Dep't), *appeal dismissed*, 66 N.Y.2d 915, 489 N.E.2d 773, 498 N.Y.S.2d 1027 (1985).

⁶⁵ See N.Y. GEN. BUS. LAW § 602 (McKinney 1984). Section 602 authorizes the attorney general or the district attorney of any county to bring an action against a debt collector to restrain or prevent any violation of the statute. *Id.* Many legal professionals believe that a private cause of action is necessary to enforce this type of consumer statute. See Kripke, *supra* note 10, at 46-51; Spanogle, *supra* note 10, at 1039-44; Note, *supra* note 32, at 413-19.

⁶⁶ See *Lane*, 112 Misc. 2d at 201, 446 N.Y.S.2d at 874. There was no mention in either the "Governor's Memorandum, the Memorandum of the Joint Legislative Committee on Consumer Protection, nor any item in the Bill Jacket accompanying the act [which] gives any express pronouncement of whether or not private actions under the act are foreclosed." *Id.*

⁶⁷ See *City Bank Farmers' Trust Co. v. New York Cent. R.R.*, 253 N.Y. 49, 56, 170 N.E. 489, 491 (1930); *Schieffelin v. Lahey*, 243 N.Y. 102, 111, 152 N.E. 690, 692-93 (1926); *Bork v. City of Buffalo*, 127 N.Y. 64, 69, 27 N.E. 355, 356 (1891).

⁶⁸ See *United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534, 542-44 (1940);

the intention of the legislature⁶⁹ even though the expression of its intentions may be imperfect at times.⁷⁰ It is suggested, therefore, that a private civil cause of action can be validly asserted under a proper application of the *Burns Jackson* test.

The first part of the *Burns Jackson* test questions whether the plaintiff is a member of the class for whose particular benefit the statute was enacted.⁷¹ As in *Burns Jackson*, the analysis begins with the statute itself.⁷² The DCPA defines the class of debtors to be protected as "any natural person who owes or who is asserted to owe a consumer claim."⁷³ Although the language is rather broad, a further examination of the history⁷⁴ of the DCPA demonstrates that all consumer debtors are within the protected class.⁷⁵

The second part of the *Burns Jackson* test requires an analysis as to whether recognition of a private right of action would promote the legislative purpose of the statute.⁷⁶ In construing a statute to determine its legislative intent, it is well established that courts may take into consideration numerous types of extrinsic aids.⁷⁷ The primary purpose of the DCPA, as exemplified by nu-

Hogan v. Culkin, 18 N.Y.2d 330, 335, 221 N.E.2d 546, 549, 274 N.Y.S.2d 881, 885 (1966); Petterson v. Daystrom Corp., 17 N.Y.2d 32, 38, 215 N.E.2d 329, 331, 268 N.Y.S.2d 1, 4-5 (1966).

⁶⁹ See *Astman v. Kelly*, 2 N.Y.2d 567, 572-73, 141 N.E.2d 899, 902, 161 N.Y.S.2d 860, 864-65 (1957); *River Brand Rice Mills, Inc. v. Latrobe Brewing Co.*, 305 N.Y. 36, 43-44, 110 N.E.2d 545, 548-49 (1953); *Holmes v. Carley*, 31 N.Y. 289, 289 (1865).

⁷⁰ See *Sharkey v. Thurston*, 268 N.Y. 123, 127-28, 196 N.E. 766, 768 (1935); *People ex rel. Streckler v. Warden of City Prison*, 259 N.Y. 430, 433, 182 N.E. 73, 74 (1932).

⁷¹ *Burns Jackson*, 59 N.Y.2d at 325, 451 N.E.2d at 463, 464 N.Y.S.2d at 716; see *Cort*, 422 U.S. at 78 (first part of *Cort* test parallels first prong of *Burns Jackson* test).

⁷² *Burns Jackson*, 59 N.Y.2d at 325, 451 N.E.2d at 463, 464 N.Y.S.2d at 716.

⁷³ N.Y. GEN. BUS. LAW § 600(2) (McKinney 1984). For a definition of the term "consumer claim," see *supra* note 4.

⁷⁴ It is generally recognized that the terms of a statute are to be interpreted in light of the statute's historical background. See *In re Stupack*, 274 N.Y. 198, 206, 8 N.E.2d 485, 490 (1937); *In re Hamlin*, 226 N.Y. 407, 414, 124 N.E. 4, 6, *cert. denied*, 250 U.S. 672 (1919).

⁷⁵ See *supra* note 1. The breadth of consumer coverage provided for by the DCPA is reflected in the statute's legislative history. See Governor's Memorandum on Bills Approved, reprinted in [1973] N.Y. LEGIS. ANN. 314. "This measure will add a new and important dimension to the rapidly expanding body of consumer law. . . . The consumers of this State rightfully expect fairness in their dealings with the debt collection industry." *Id.*

⁷⁶ *Burns Jackson*, 59 N.Y.2d at 325, 451 N.E.2d at 463, 464 N.Y.S.2d at 716.

⁷⁷ See *Lockport Union-Sun & Journal, Inc. v. Preisch*, 8 N.Y.2d 54, 57-58, 167 N.E.2d 839, 840-41, 201 N.Y.S.2d 505, 507-08 (1960) (courts may look to reports of officers or agencies charged with duty of enforcing Act); *People v. Glubo*, 5 N.Y.2d 461, 472-74, 158 N.E.2d 699, 707, 186 N.Y.S.2d 26, 36-38 (1959) (court may look to memorandum by Governor); *Farrington v. Pinckney*, 1 N.Y.2d 74, 86-91, 133 N.E.2d 817, 826-29, 150 N.Y.S.2d 585, 597-605 (1956) (courts may use legislative reports to ascertain motive and intent of legislature).

merous portions of the Governor's Bill Jacket, was to remedy the existing problem of unethical debt collection practices by prohibiting specific types of collection practices.⁷⁸ Courts⁷⁹ and commentators⁸⁰ uniformly agree that the legislative purpose of the DCPA was to protect consumer debtors from unscrupulous debt collection practices. By allowing a private action, the legislative purpose would be promoted by assuring strict enforcement of the DCPA, even in the absence of vigorous public enforcement.⁸¹ In addition, a private cause of action would present the court with more opportunities to address questionable creditor conduct and aid in clearly defining the statute's limitations.⁸²

The final, and often most difficult part of the *Burns Jackson* test, requires an analysis of whether the creation of a private cause of action would be consistent with the legislative scheme.⁸³ The legislative scheme can best be defined as the plan of action the legislature implemented to enforce the provisions of a statute. New York's DCPA specifically provides that "[t]he attorney general or the district attorney of any county may bring an action in the name of the people of the state to restrain or prevent any violation of this [statute]."⁸⁴ Although the DCPA does not explicitly provide for a private cause of action, other portions of the General Business Law which overlap the legislative purpose of the DCPA do provide for such actions.⁸⁵ The most important of these alternative

⁷⁸ See *supra* notes 1 & 75 and accompanying text.

⁷⁹ See *Vadney*, 133 Misc. 2d at 843-44, 508 N.Y.S.2d at 847; *Kohler*, 112 Misc. 2d at 482, 447 N.Y.S.2d at 217; *Lane*, 112 Misc. 2d at 201, 446 N.Y.S.2d at 874. Although these principal cases have held differently on the question of whether a private right of action exists under the DCPA, they are all in agreement that the legislative purpose of the Act was to protect consumers from abuse by debt collectors. See *Vadney*, 133 Misc. 2d at 843-44, 508 N.Y.S.2d at 847; *Kohler*, 112 Misc. 2d at 482, 447 N.Y.S.2d at 217; *Lane*, 112 Misc. 2d at 201, 446 N.Y.S.2d at 874.

⁸⁰ See N.Y. GEN. BUS. LAW § 600, practice commentary at 544-45 (McKinney 1984). "The practices leading to enactment of the . . . [DCPA] included pressure on debtors to pay regardless of the merits of the claim." *Id.* at 544.

⁸¹ See Kripke, *supra* note 10, at 46. Since budget difficulties will always plague state and local governments, it is best to grant a private civil action to assure enforcement of the act. *Id.* For a general discussion of why consumers should have a private cause of action, see Kripke, *supra* note 10, and Spanogle, *supra*, note 10.

⁸² See Spanogle, *The U3C—It May Look Pretty, But Is It Enforceable?*, 29 OHIO ST. L.J. 624, 627 (1968) (private enforcement will assure enforcement even where conduct by creditors is questionable).

⁸³ *Burns Jackson*, 59 N.Y.2d at 330-32, 451 N.E.2d at 466-67, 464 N.Y.S.2d at 719.

⁸⁴ N.Y. GEN. BUS. LAW § 602(2) (McKinney 1984).

⁸⁵ See *id.* § 349 (McKinney 1988) (enacted to protect consumers from deceptive acts and unlawful business practices); *id.* § 350-d (McKinney Supp. 1990) (enacted to prohibit

consumer protection statutes is section 349 of the General Business Law,⁸⁶ commonly known as the Deceptive Business Practices Act ("DBPA"), which deals explicitly with deceptive business practices.

It has long been recognized that similar statutes enacted for the purpose of avoiding similar evils should be construed together⁸⁷ and applied harmoniously and consistently.⁸⁸ The DBPA states that "[d]eceptive acts or practices in the conduct of any business, trade or commerce, or in the furnishing of any service in this state, are hereby declared unlawful."⁸⁹ The essential link between the two acts is that they both address deceptive business practices.⁹⁰ The essential difference between the two acts is that the DBPA was amended by the state legislature in 1980 to provide for a private cause of action.⁹¹

Since the New York Legislature has created a new private right of action under DBPA, it is essential to define judicially the word "deceptive" in order to transmit the private cause of action from the DBPA to the DCPA. The analysis begins with the legislative purpose of the DBPA. In *State v. Colorado State Christian College*,⁹² the court stated that "the legislative purpose in enacting

false advertising); *id.* § 351 (McKinney 1988) (enacted to prohibit deceptive practices in buying and selling of public securities).

⁸⁶ *Id.* § 349(h) (McKinney 1988). Subsection (h) provides:

In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section.

Id. (emphasis added).

⁸⁷ See *Guardian Life Ins. Co. v. Chapman*, 302 N.Y. 226, 231, 97 N.E.2d 877, 879 (1951); *Hennessey v. Walker*, 279 N.Y. 94, 99-102, 17 N.E.2d 782, 784-85 (1938).

⁸⁸ See *Public Serv. Comm'n v. N.Y. Cent. R.R.*, 193 A.D. 615, 618, 185 N.Y.S. 267, 270-71 (3d Dep't 1920).

⁸⁹ N.Y. GEN. BUS. LAW § 349(a) (McKinney 1988).

⁹⁰ Compare *id.* § 601 (McKinney 1984) (prohibits certain enumerated deceptive actions) with *id.* § 349 (McKinney 1988) (prohibits all forms of deceptive practices by any business).

⁹¹ *Id.* § 349(h); see Governor's Memorandum on Approval of Amendments to § 349 and § 350 (June 19, 1980), reprinted in [1980] N.Y. LEGIS. ANN. 147-48. "In recognizing the need for private enforcement, New York joins forty-two other states and the District of Columbia that have granted individuals the right to sue for injuries resulting from consumer fraud." *Id.*

⁹² 76 Misc. 2d 50, 346 N.Y.S.2d 482 (Sup. Ct. N.Y. County 1973).

[the DBPA] . . . was to follow in the steps of the Federal Trade Commission with respect to the interpretation of deceptive acts and practices outlawed in Section 5 of the Federal Trade Commission Act."⁹³ Since the enactment of the Federal Trade Commission Act, a number of cases have supported the theory that unethical collection practices are included under the definition of deceptive.⁹⁴ Recently, in *Floersheim v. Federal Trade Commission*,⁹⁵ a defendant mailed collection letters to delinquent debtors containing the repetition of the words "Washington, D.C." Concluding that the defendant had "exploit[ed] the assumption of many . . . debtors that [mail] emanating from Washington, D.C., . . . [came] from the government,"⁹⁶ the court held that the defendant's actions were clearly deceptive to the debtor and thus in violation of the Federal Trade Commission Act.⁹⁷

In addition to the Federal Trade Commission Act, deceptive collection practices also have been held violative of New York's DBPA. In *In re Scrimpsheer*,⁹⁸ a debtor brought an action against his creditor for sending him repeated notices of the existence of an outstanding debt. The court held that the creditor's notices to the debtor did in fact constitute a deceptive practice in violation of the DBPA and therefore allowed the debtor to maintain a private right of action.⁹⁹ It is submitted, therefore, following this line of case law, that the legislative scheme in New York in amending section 349 of the General Business Law, will allow consumer debtors to maintain private causes of action for deceptive collection practices.

CONCLUSION

In view of recent decisions from the New York Court of Appeals addressing the issue of an implied statutory private right of action, it is apparent that a debtor's private claim will be deemed recognizable only where the judiciary can find a clear legislative intent to create an implied private right. The legislative history of

⁹³ *Id.* at 54, 346 N.Y.S.2d at 487.

⁹⁴ See *Floersheim v. F.T.C.*, 411 F.2d 874, 878 (9th Cir. 1969), *cert. denied*, 396 U.S. 1002 (1970); *Bennett v. F.T.C.*, 200 F.2d 362, 363 (D.C. Cir. 1952); *Dejay Stores, Inc. v. F.T.C.*, 200 F.2d 865, 867 (2d Cir. 1952); *Silverman v. F.T.C.*, 145 F.2d 751, 753 (9th Cir. 1944).

⁹⁵ 411 F.2d 874 (9th Cir. 1969), *cert. denied*, 396 U.S. 1002 (1970).

⁹⁶ *Id.* at 877.

⁹⁷ *Id.* at 878.

⁹⁸ 17 Bankr. 999 (Bankr. N.D.N.Y. 1982).

⁹⁹ *Id.* at 1016-17.

the Debt Collection Procedures Act and the recognition of a private right of action under section 349 of the General Business Law reveal an intent on the part of the legislature to create a private right of action for a creditor's misconduct.

This Note has asserted that the correct statutory analysis is the three-step standard enunciated in *Burns Jackson Miller Summit & Spitzer v. Lindner*. Under the *Burns Jackson* test, it is clear that deceptive practices by debt collectors will give rise to a private civil action. In addition, traditional collection acts categorized as unfair practices also must give rise to an implied cause of action so that the Debt Collection Procedures Act's objective of protecting consumer debtors from harassment, may be achieved to the fullest extent possible. Thus, recognition of a private right of action under the Debt Collection Procedure Act should greatly assist consumers in halting, deterring, and redressing violations of the statute.

Richard A. Nessler

