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THE TEXAS DEBT COLLECTION PRACTICES ACT: RELIEF FOR THE HARASSED DEBTOR?

WILLIAM R. CROW, JR.

Consumer credit has grown phenomenally in the United States since World War II.¹ The transformation from a prewar cash-and-carry economy to a postwar credit economy in which the annual per capita credit expenditure exceeds eight hundred dollars dramatically illustrates this growth.² The ability of today's consumer to borrow against future earnings has made consumer credit attractive to those who want to share in the amenities available in an upwardly mobile society.³ The desire of credit grantors to supply credit and the eagerness of consumers to acquire goods and services financed by credit may, however, lead to an excessive use of credit.⁴ One author has noted the existence of gross inequities in the credit marketplace due to the explosive, albeit piecemeal, development of consumer credit.⁵ Among the more patent inequities is that existing between the creditor (or his debt collecting agent)⁶ and the defaulting consumer debtor.⁷

1. See NATIONAL COMM'N ON CONSUMER FINANCE, *CONSUMER CREDIT IN THE UNITED STATES* 5 (1972). Between 1950 and 1971, consumer credit outstanding in the United States increased from \$21.5 billion to \$137.2 billion—a five-fold increase and a compounded annual rate of growth of over nine percent. Illustrative of the phenomenal growth of consumer credit is the fact that corporate debt in the same period rose only four-and-one-half times. *Id.*

2. 60 FED. RES. BULL. A47 (Sept. 1976).

3. The growth of consumer credit is, in part at least, attributable to the rapid rise in the amount of discretionary income which Americans have to spend. See NATIONAL COMM'N ON CONSUMER FINANCE, *CONSUMER CREDIT IN THE UNITED STATES* 5-6 (1972).

4. *Id.* at 17. Most suppliers hesitate to extend credit if they doubt that the consumer can repay his debt. The great majority of consumers likewise hesitate to assume obligations they cannot repay. The Commission found, however, that "there may be marginal suppliers of credit who encourage marginal borrowers who cannot obtain credit elsewhere to become overextended." *Id.* at 17. For example, see *In re Tashof*, 74 F.T.C. 1361, 1409-10 (1968), in which the FTC held:

[I]t is manifestly unfair to lure a customer into purchasing on credit without any regard to his ability to pay. . . . As a minimum, a generous credit eligibility policy must be matched either with some rational basis for believing that the customer can and will pay or with an equally generous collection policy. Otherwise, the generous eligibility policy itself is dangerously tantamount to an inducement to customers to part with money under false pretenses.

5. Anderson, *Coercive Collection and Exempt Property in Texas: A Debtor's Paradise or a Living Hell?*, 13 HOUS. L. REV. 84, 92 (1975).

6. The terms "creditor" and "collection agent (or agency)" will hereinafter be used interchangeably, unless otherwise specified.

7. Proxmire, *Foreword* to D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* at ix (1974). The Senator from Wisconsin noted that:

The debtor-creditor relationship is not cause for fiscal concern so long as the debtor continues to make timely payments on his loan or installment credit agreement. Once the debtor cannot (or will not) make his required payments, however, the relationship between the debtor and creditor assumes certain additional legal implications. The creditor may attempt to collect from the defaulting debtor by either judicial or extrajudicial means.⁸ The delay and expense inherent in judicial collection efforts render it likely that the creditor will employ less costly, and sometimes more productive, extrajudicial tactics to obtain payment following default.⁹

The most common extrajudicial method of collection is the "dunning" letter, which requests that the current outstanding payment be made.¹⁰ It is not unusual for some debtors to ignore completely these preliminary demands of the creditor to clear the account. The creditor may at this point seek to recover the claim by other methods. Previously, these methods have included telephone communications to, and personal confrontation with, the debtor.¹¹ Threats of litigation¹² and contact with the debtor's employer¹³ ex-

[T]he rights and remedies available to creditors on consumer credit transactions are derived from the law governing commercial transaction. Commercial law, however, assumes an equal bargaining position for both parties to the contract. This model in no way describes the reality of consumer credit transactions. The consumer borrower does not enter the transaction on equal terms with the creditor. . . . The borrower is faced with a take-it-or-leave-it proposition. If he wants the credit, he must agree to the terms.

Id.

8. *Id.* at ix-x. Senator Proxmire concluded that the typical consumer credit contract is heavily weighted on the side of the lender. The advantage given to the creditor is most evident when the borrower defaults. The creditor may pursue a variety of questionable remedies to enforce his contractual rights, including: (1) demand for payment of the entire amount due if the borrower is even one day late in making a payment; (2) repossession of the collateral without a court order and suit for a deficiency judgment to recover any remaining indebtedness; or (3) in some states a confession of judgment without even notifying the debtor and attachment of the debtor's wages without a court order. Texas prohibits confessed judgments by statute. TEX. REV. CIV. STAT. ANN. art. 2224 (1971). Likewise, the constitutional restriction on wage garnishment is reiterated statutorily to afford the debtor certain unequivocal safeguards. *Id.* art. 4099 (1966); see TEX. CONST. art. XVI, § 28.

9. Chapman, *Role of Consumer Finance Companies in a Credit Economy*, in THE CONSUMER FINANCE INDUSTRY, ITS COSTS AND REGULATION 26 (J. Chapman & R. Shay ed. 1967). The lack of financial knowledge and self-discipline among the growing number of overextended debtors is suggested by the increasing number of personal bankruptcies. High collection costs for the credit granting institutions is a natural result.

10. The typical "dunning" letter may reflect either the creditor's empathy with the debtor's plight or his hostility to the debtor if the debt has remained outstanding for long. See *Clark v. Associated Retail Credit Men*, 105 F.2d 62, 63 (D.C. Cir. 1939); *Barnett v. Collection Serv. Co.*, 242 N.W. 25, 26 (Iowa 1932). See generally Note, *Creditor's Pre-Judgment Communication to Debtor's Employer: An Evaluation*, 36 BROOKLYN L. REV. 95 (1969).

11. *Duty v. General Fin. Co.*, 154 Tex. 16, 18, 273 S.W.2d 64, 65 (1954).

12. *Davis v. General Fin. & Thrift Corp.*, 57 S.E.2d 225, 226 (Ga. Ct. App. 1950).

13. *E.g.*, *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 100 S.E.2d 881, 882-83 (Ga.

emply some of the high-pressure tactics utilized by the unethical creditor or debt collector, but by no means do these represent the more reprehensible methods devised to elicit payment. Most courts have expressed approval of all reasonable means of collecting an outstanding debt.¹⁴ The Texas courts, in the vanguard of jurisdictions allowing recovery in tort for the collector's abuses of the debtor, have even found justification for awarding damages for "unreasonable collection efforts."¹⁵ At the receiving end of many of the abuses inherent in the modern consumer credit system are the poor and the uneducated.¹⁶ Prior to the recent legislative enactments by consumer protection advocates, common law recovery on tort causes of action was the debtor's primary recourse against the coercive and harassing stratagems of the unscrupulous creditor or collector.¹⁷ With the enactment of the Debt Collection Practices Act,¹⁸ the Texas debtor would appear to be in a more equal position vis-à-vis his creditor than was previously the case.¹⁹

As a general rule, the principles applicable to independent contractors work to insulate the employer of the collection agent, usually a retail merchant or a lending institution, from responsibility for torts of the collection

1957); *Yoder v. Smith*, 112 N.W.2d 862, 863 (Iowa 1962); *Voneve v. Turner*, 240 S.W.2d 588, 590 (Ky. 1951); *Quina v. Robert's*, 16 So. 2d 558, 561 (La. Ct. App. 1944). Creditor contact with the debtor's employer has frequently been held actionable, as the aforementioned cases exemplify.

14. Typical of these judicial sanctions is the holding of the Supreme Court of Iowa in *Barnett v. Collection Serv. Co.*, 242 N.W. 25, 28 (Iowa 1932), which stated that: "A creditor or his agent has a right to urge payment of a just debt and to threaten to resort to proper legal procedure to enforce such payment."

15. *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954). The Texas Supreme Court left the boundaries of the new tort action undefined, finding that "[a] decision of the case before us does not require that we . . . outline the limits to which such a creditor may go [to collect]." *Id.* at 20, 273 S.W.2d at 66. See generally *Martin, A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. TEX. L.J. 127 (1967).

16. "Clearly, unemployment, low occupational status, and low income are related to and contribute to defaults in consumer debt transactions." D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 18 (1974). Of the 1,320 debtors surveyed in the Caplovitz study, 25% were not working at the time of the default—"a figure that is more than six times the average unemployment rate during the first half of the sixties." *Id.* The author reasoned further that educational level and vulnerability to deception were inversely proportional, in concluding that:

[T]he better educated, as more sophisticated shoppers, are more likely to demand and receive full disclosure, regardless of the type of seller with whom they deal. Or the better educated may avoid the more unscrupulous sellers, the ones more prone to evade the law. The data suggest that the latter view has much merit. *Id.* at 44.

17. See *Mikva, An Overview*, 26 BUS. LAW. 753, 754 (1971). The author advocated restoration of a marketplace that will give some recognition to the fact that both sides to a consumer credit transaction need some kind of protection. *Id.* at 755.

18. TEX. REV. CIV. STAT. ANN. arts. 5069-11.01 to .11 (Supp. 1976-1977). The Act became effective on August 27, 1973.

19. *Id.* art. 5069-11.11. The remedies afforded under the Act are inclusive of the existing common law theories of recovery.

agency or its employees.²⁰ A creditor will not be relieved from liability, however, if the tort was committed at the creditor's direction or through his negligence.²¹ The collection of delinquent debts is both a necessary and a disagreeable function, made even more unpleasant when the debtor fails to respond to polite requests for payment. Given the sometimes questionable basis for extension of loan or installment credit to high-risk borrowers or consumers, the reasons underlying the use of high-pressure tactics to recover the outstanding debt become apparent.²² Where repossession of the consumer goods is possible, the creditor's losses may be partially recouped.²³ Absent the ability to repossess, the creditor may seek wage garnishment,²⁴ or he may attempt execution on the debtor's nonexempt property.²⁵ Professor David Caplovitz of Columbia University, in his study on defaulting debtors, suggests that because of severe statutory restrictions or outright prohibitions on wage garnishment and property executions in Texas, the intrastate creditors are

20. *E.g.*, *Lynch Jewelry Co. v. Bass*, 124 So. 222, 225 (Ala. 1929); *Fraser v. Morrison*, 39 Haw. 370 (1952); *Insoe v. Globe Jewelry Co.*, 157 S.E. 794, 795 (N.C. 1931) (creditor not liable for a wrongful arrest made by an employee of the collection agency).

21. *Loughan v. Harger-Haldeman*, 7 Cal. Rptr. 581, 585-87 (Dist. Ct. App. 1960).

22. Proxmire, *Foreword to D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* at x (1974). "In . . . 25 percent of the cases, the debtor defaulted because he was overextended. While borrowers have some responsibility to live within their means, the creditor is at least partially responsible for extending credit to borrowers who are already overburdened with debt." *Id.* It is not an infrequent occurrence, for example, for branch managers of chain retail establishments and loan companies to allow high-risk consumers credit on the faulty assumption that the inflated credit transactions will impress a superior in the firm's headquarters. Problems arise when it becomes necessary to extract the Shakespearean "pound of flesh" from a recalcitrant debtor. The branch manager, who has gambled on the debtor's ability to pay, will sometimes authorize wholly unscrupulous collection practices to recover the debt before his superior becomes aware of his lax credit-extension policies.

23. *See generally* D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 183-86 (1974). Repossession is a creditor remedy based on the pre-Uniform Commercial Code principle of the conditional sale under which title to merchandise remains in the creditor pending final payment, and resale of the used merchandise may be effectuated. R. BROWN, *THE LAW OF PERSONAL PROPERTY* 206-07 (3d ed. 1975).

24. D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 225 (1974). Wage garnishment has been called "the most powerful weapon in the creditor's arsenal in the states that officially recognize it." *Id.* at 227. Only Texas and Pennsylvania prohibit garnishment of wages, but the latter does not impose the strict restraints on execution on nonexempt property as Texas does. *Id.* at 227.

25. *See generally* Anderson, *Coercive Collection and Exempt Property in Texas: A Debtor's Paradise or a Living Hell?*, 13 HOUS. L. REV. 84, 88-89 (1975). The Texas debtor, unless his fraudulent intent is disclosed, may play a game of asset "hide-and-seek" with the creditor. Texas permits exemptions from execution on the debtor's homestead, household and kitchen furniture, cemetery lots, tools, apparatus, and books belonging to any trade or profession, among other exemptions. *Id.* at 88-89. In 1973 the Texas Legislature raised the total value of allowable exempted properties to \$15,000 for single adults and \$30,000 for a family. TEX. REV. CIV. STAT. ANN. art. 3836 (Supp. 1976-1977).

more likely to rely on harassment and unusually high interest rates than creditors in other jurisdictions.²⁶

COMMON LAW THEORIES OF RECOVERY FOR HARASSMENT

Prior to the enactment in 1973 of the Debt Collection Practices Act,²⁷ the common law theories on which debtor recovery for abuse and harassment had most often been predicated included the intentional infliction of mental distress,²⁸ the invasion of the right to privacy,²⁹ and defamation.³⁰

Mental Anguish

Perhaps the leading debt collection case in the field of intentional infliction of mental distress is the decision of the Texas Supreme Court in *Duty v. General Finance Co.*,³¹ in which the plaintiff-debtors alleged a prolonged course of harassment and wrongful collection efforts against them commencing from the first time they missed a payment on their loan obligation. Plaintiffs endured a daily barrage of lengthy, threatening telephone calls, threats to blacklist them with a credit-reporting agency, accusations that they were "deadbeats" and repetition of such to the plaintiffs' neighbors and employers, threats to garnish their wages, and denigration in the presence of their fellow employees.³² As a result of this extreme course of conduct, the

26. D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 257 n.1 (1974). The Honorable Henry B. Gonzalez has said that:

Texas probably has the biggest, most aggressive, and unquestionably the most diverse consumer loan industry in the country. Texas small lenders . . . underwrite the biggest number of very high risk small loans in the nation, and they write off perhaps ten percent of these loans . . . and still make annual profits of at least 11% net. The lack of garnishment certainly has not inhibited lenders from doing business [in Texas], has not kept them from entering aggressively into very high risk loans, and has not harmed their profit picture at all.

NATIONAL COMM'N ON CONSUMER FINANCE, *CONSUMER CREDIT IN THE UNITED STATES* 229 (1972).

27. TEX. REV. STAT. ANN. arts. 5069-11.01 to .11 (Supp. 1976-1977).

28. *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954). One of the earliest decisions exemplifying this intentional tort held an undertaker liable for his failure to cremate the body of the plaintiff's son, in an effort to coerce payment of an unpaid funeral expense involving another member of the plaintiff's family. *Gadbury v. Bleitz*, 233 P. 299, 300 (Wash. 1925).

29. *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959) (public disclosure of private facts); *Housh v. Peth*, 133 N.E.2d 340 (Ohio 1956) (intrusion of privacy). A rather interesting innovation on the creditor's disclosure of the plaintiff's debt was noted in *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962), where the creditor publicly stripped the tires off plaintiff's car. This circumstance was held to be a "demonstrable publication" of the debt and therefore actionable. *Id.* at 10.

30. *Turner v. Brien*, 167 N.W. 584 (Iowa 1918).

31. 154 Tex. 16, 273 S.W.2d 64 (1954).

32. *Id.* at 18-19, 273 S.W.2d at 65. The person who is not *willing* to pay is lacking in character, according to the credit industry, and is therefore a "deadbeat," the term of denigration which the industry applies to those who default. " 'Deadbeat' implies bad

plaintiffs grew nervous, irritable, developed severe headaches, and were unable to perform their work as they had prior to the commencement of the defendant's collection efforts.³³ Mrs. Duty lost her job as a consequence of the defendant's abusive attacks on her integrity that were directed to her employer and as a result of her declining efficiency at work. The plaintiffs' credit rating was destroyed in the process. On appeal from the El Paso Court of Civil Appeals, the plaintiffs alleged error in the dismissal of their cause, and the supreme court agreed.³⁴

Prior to the *Duty* decision, the Texas Supreme Court had held that damages could not be recovered for mental anguish alone.³⁵ There was no question before the court in *Duty*, however, as to whether damages might be had for physical injury, injury to property, or other elements of actual damages.³⁶ Relying on an earlier federal decision,³⁷ the Texas Supreme Court in *Duty* acknowledged that the petitioners had alleged physical injury incidental to mental anguish, loss of employment, and acts constituting slander.³⁸ The tort action for intentional infliction of mental distress has proven effective "as a potent counter-weapon against the more outrageous high-pressure methods of collection agencies and other creditors."³⁹ Emotional distress has been variously called mental suffering, mental anguish, and mental or nervous shock, and has been found to include a variety of highly unpleasant mental reactions.⁴⁰ Violent cursing, abuse, and accusations of

faith on the part of the debtor, but the debtor's willingness to pay can also be undermined by bad faith on the part of the creditor. Consumers may default not because they cannot pay or are irresponsible, but because they feel that the creditor has been irresponsible by cheating them in some fashion." D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 51 (1974).

33. *Duty v. General Fin. Co.*, 154 Tex. 16, 19, 273 S.W.2d 64, 65 (1954).

34. *Id.* at 20, 273 S.W.2d at 66. The Supreme Court of Texas held that by reasonable efforts to collect a debt, a creditor runs no risk of liability, but "[r]esort to every cruel device which his cunning can invent in order to enforce collection when that course of conduct has the intended effect of causing great mental anguish to the debtor, resulting in physical injury and causing his loss of employment, renders the creditor liable to respond in damages." *Id.* at 17, 273 S.W.2d at 66.

35. *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 649-50, 254 S.W.2d 81, 86 (1953).

36. *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954). The Texas Supreme Court rejected the rule expressed in *Barnett v. Collection Serv. Co.*, 242 N.W. 25, 28 (Iowa 1932), that where the act is willful or malicious and not merely negligent, recovery may be had for mental pain although no physical injury results.

37. *Clark v. Associated Retail Credit Men*, 105 F.2d 62, 64 (D.C. Cir. 1939). A divided court held that for centuries courts have permitted recovery under the name of assault for intentionally induced fear of a contact either harmful or offensive. In those cases the plaintiff has not been required to show that the fear produced physical consequences. *Id.* at 64.

38. *Duty v. General Fin. Co.*, 154 Tex. 16, 18, 273 S.W.2d 64, 65 (1954).

39. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 57 (4th ed. 1971).

40. RESTATEMENT (SECOND) OF TORTS, § 46, Comment j, at 77 (1965). Among the reactions identified with severe mental or emotional distress are fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. *Id.* at 77.

dishonesty typify the tactics employed by overzealous debt collectors that the courts have found to be actionable.⁴¹ Threats of cancelled credit, arrest, or litigation have provided grounds for recovery when mental distress to the debtor has resulted.⁴² While the *Duty* holding seems to comport with the views of authorities in the field of intentional infliction of mental distress,⁴³ it has been criticized on several grounds.⁴⁴ Generally, the Texas courts have liberally construed physical injury to allow debtor recovery for the intentional infliction of mental distress, and a variety of complaints have sufficed to warrant damages.⁴⁵

41. *Duty v. General Fin. Co.*, 154 Tex. 16, 18, 273 S.W.2d 64, 65 (1954). Technically, the action in *Duty* was one for unreasonable collection efforts, which one author has called a "nebulous concept," indiscriminately mixing intentional misconduct, gross negligence, and ordinary negligence. See Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. TEX. L.J. 127 (1967). Intentional infliction of mental distress has been the basis for recovery in a number of jurisdictions. E.g., *American Sec. Co. v. Cook*, 176 S.E. 798 (Ga. Ct. App. 1934); *Barnett v. Collection Serv. Co.*, 242 N.W. 25 (Iowa 1932); *LaSalle Extension Univ. v. Fogarty*, 253 N.W. 424 (Neb. 1934); *Kirby v. Jules Chain Stores Corp.*, 188 S.E. 625 (N.C. 1936); see Comment, *Negligent Infliction of Emotional Harm to Bystanders—Should Recovery Be Denied?*, 7 ST. MARY'S L.J. 560, 561 n.7 (1975).

42. See generally Annots., 27 A.L.R.3d 1152 and 27 A.L.R.3d 1202 (1969).

43. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 12, at 56 n.81 (4th ed. 1971), citing *RESTATEMENT OF TORTS* § 46, Comment g (1948), which imposes liability in those situations where the actor's conduct has gone beyond all reasonable bounds of decency. See Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

44. Anderson, *Coercive Collection and Exempt Property in Texas: A Debtor's Paradise or a Living Hell?*, 13 HOUS. L. REV. 84, 107 (1975). Professor Anderson criticized retention by the courts of the artificial requirement of physical injury or pecuniary loss in order to establish a cause of action for unreasonable collection practices, contending that by attaching a novel name to what was essentially an old tort action, the court did not offer citizens of Texas the degree of protection afforded citizens of other jurisdictions in earlier decisions which abolished the requirement of physical injury. *Id.* at 107; e.g., *Savage v. Boies*, 272 P.2d 349, 352 (Ariz. 1954); *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 286 (Cal. 1952); *Barnett v. Collection Serv. Co.*, 242 N.W. 25, 28 (Iowa 1932); *Quina v. Robert's*, 16 So. 2d 558, 561 (La. Ct. App. 1944); *LaSalle Extension Univ. v. Fogarty*, 253 N.W. 424, 426 (Neb. 1934). Also criticized was the failure of the Texas Supreme Court to delineate the permissible bounds of coercive collection activity, but this criticism seems unwarranted when specific legislative prohibitions are available. See generally Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. TEX. L.J. 127 (1967).

45. *Ware v. Paxton*, 359 S.W.2d 897, 901 (Tex. 1962) (nervousness); *Duty v. General Fin. Co.*, 154 Tex. 16, 18-19, 273 S.W.2d 64, 65 (1954) (headaches, nervousness, loss of appetite); *United Fin. & Thrift Corp. v. Bain*, 393 S.W.2d 429, 432 (Tex. Civ. App.—Tyler 1965), writ ref'd n.r.e. per curiam, 400 S.W.2d 302 (Tex. 1966) (headaches, nausea, blackouts); *Signature Indorsement Co. v. Wilson*, 392 S.W.2d 484, 488 (Tex. Civ. App.—Texarkana 1965, writ ref'd n.r.e.) (nausea, nervousness, loss of appetite, numbness, crying spells); *United Fin. & Thrift Corp. v. Smith*, 387 S.W.2d 752, 756 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.) (fatigue and crying spells); *Moore v. Savage*, 359 S.W.2d 95, 96 (Tex. Civ. App.—Waco 1962), writ ref'd n.r.e. per curiam, 362 S.W.2d 298 (Tex. 1962) (nervousness and insomnia); *Advance Loan Serv. v. Mandik*, 306 S.W.2d 754, 758 (Tex. Civ. App.—Dallas 1957, no writ) (vomiting); *Allison v. Simmons*, 306 S.W.2d 206, 209 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.)

Perhaps the most encouraging decision to the aggrieved debtor in Texas is a recent holding which allowed the wife of a debtor, who himself suffered a near-fatal heart attack, recovery for her mental anguish although she alleged no physical injury as to herself.⁴⁶

Invasion of Right to Privacy

A second ground of recovery in tort has been recognized where there has been an invasion of one's right to privacy.⁴⁷ Although courts of other jurisdictions have chosen to "distinguish" this tort for purposes of debtor recovery from the intentional infliction of mental distress, the fact situations involved in the cases have been practically indistinguishable from those Texas cases where the action was brought for the intentional infliction of mental distress or for the negligence-tainted concept of unreasonable collection efforts.⁴⁸ The apparent key to recovery for wrongful intrusion into one's privacy is proof that the invasion was outrageous or caused anguish to a person of ordinary sensibilities.⁴⁹

Defamation

An action for defamation offers yet a third ground of tort recovery in situations where the creditor has allegedly maligned a debtor or caused him to

(numbness); *Industrial Fin. Serv. Co. v. Riley*, 295 S.W.2d 498, 502 (Tex. Civ. App.—Dallas 1956), *rev'd on other grounds*, 157 Tex. 306, 302 S.W.2d 652 (1957) (vomiting); *Wright v. E-Z Fin. Co.*, 267 S.W.2d 602, 607 (Tex. Civ. App.—Dallas 1954, writ *ref'd n.r.e.*) (blackouts).

46. *Credit Plan Corp. v. Gentry*, 516 S.W.2d 471, 480 (Tex. Civ. App.—Houston [14th Dist.] 1974), *rev'd on other grounds*, 528 S.W.2d 571 (Tex. 1975).

47. *Housh v. Peth*, 133 N.E.2d 340 (Ohio 1956). The Supreme Court of Ohio found that the action of a collection agency and its representatives in initiating a campaign to harass and torment the debtor was unreasonable and constituted a wrongful invasion of the right of privacy. *Id.* at 344. Although divided as to whether the collector had a privilege to collect the debt, even the dissent accepted the validity of the following jury charge:

The right to privacy is the right to be let alone. Its foundation is in the conception of inviolate personality and personal immunity The violation of the right of privacy consist [sic] of the interference in another's seclusion by subjecting him to unwarranted and undesired publicity, or being harassed in his or her employment.

Id. at 346. (dissenting opinion). No Texas court has cited the *Housh* rule with approval.

48. *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App.—Waco 1962), *writ ref'd n.r.e. per curiam*, 362 S.W.2d 298 (Tex. 1962). In this case the employer was not involved in the dispute between the creditor and the debtor, but was granted relief where the collection efforts were deemed unreasonable as to him. *Id.* at 96.

49. *Housh v. Peth*, 133 N.E.2d 340, 343 (Ohio 1956). Such a standard still allows a collector to engage in potentially abusive practices. The Supreme Court of Ohio acknowledged that a collection agency might continue to inform an employer of his employee's outstanding debt, without intruding on the debtor's right of privacy. *Id.* at 344. See also *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959), holding a creditor's threats against and abuse of defendant in presence of others at defendant's place of employment actionable as an invasion of privacy.

be held in contempt by his peers.⁵⁰ Where the creditor's actions against the debtor result in a subsequent refusal of credit to the debtor on the basis of a false publication intentionally made, the action for defamation will lie against the creditor.⁵¹ The problem with attempting to recover on the basis of defamation is that the truth of the allegations made by the creditor concerning the debt often relieves him of any liability.⁵²

THE LEGISLATIVE RESPONSE:
THE TEXAS DEBT COLLECTION PRACTICES ACT

The Texas Consumer Credit Code was enacted in 1967 with the express intent of correcting "abuses . . . especially prevalent in the area of consumer transactions both cash and credit."⁵³ Targeted for special scrutiny were "[u]nscrupulous operators, lenders and vendors . . . [who] impose intolerable burdens on those segments of society which can least afford to bear them—the uneducated, the unsophisticated, the poor and the elderly."⁵⁴

The recent codification of standards for conduct of debt collection practices in Texas, as well as traditional remedies for the aggrieved consumer debtor,⁵⁵ have been heralded in some quarters as a strong deterrent to improper collecting procedures.⁵⁶ The "debt"⁵⁷ to be collected must have arisen from an obligation, or alleged obligation, involving a "consumer transaction"⁵⁸ in

50. *Turner v. Brien*, 167 N.W. 584, 585 (Iowa 1918) (creditor held liable where he listed debtor's name on "poor credit risk" list while amount owed remained in dispute).

51. *Id.* at 586. "[A]ny publication concerning a person or his affairs, which from its nature necessarily must or presumably will as its natural and proximate consequence, occasion him pecuniary loss, is libelous per se." *Id.* at 586.

52. *See generally* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 114, at 776 (4th ed. 1971).

53. *Foreword to TEXAS CREDIT CODE* (1975). This booklet is a compilation of all consumer protection legislation enacted in Texas since 1967 and is distributed by the Office of the Commissioner of Consumer Credit.

54. *Id.*

55. *TEX. REV. CIV. STAT. ANN.* arts. 5069-11.01 to .11 (Supp. 1976-1977).

56. *See Preface to AMERICAN COLLECTORS ASS'N, TEXAS COLLECTION PRACTICES ACT* (1973). This booklet offers explanations of the statute's significance to the "debt collector," a term which includes credit grantors as well as collection agencies and credit bureaus. *TEX. REV. CIV. STAT. ANN.* art. 5069-11.01(c) (Supp. 1976-1977). A debt collector is further defined as a "person," which includes an "individual, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity." *Id.* art. 5069-11.01(g). The significance of the previous statement lies in the remedies available to the debtor under § 11.10 of the Act. *Id.* art. 5069-11.10. The booklet was prepared by the Associated Credit Bureau of Texas, Inc. and American Collectors Association of Texas, Inc., which concluded that "this Act in no way restricts proper and businesslike debt collection." *Preface to AMERICAN COLLECTORS ASS'N, TEXAS COLLECTION PRACTICES ACT* (1973).

57. *TEX. REV. CIV. STAT. ANN.* art. 5069-11.01(a) (Supp. 1976-1977).

58. *Id.* art. 5069-11.01(e). The Act would, therefore, not pertain where a business concern was seeking debt recovery from another commercial concern, since a "consum-

which one (or more) of the parties was a "consumer"⁵⁹ and the other party was a "creditor."⁶⁰ The Act, while constituting a major advance in filling the prior regulatory void over Texas collection practices, has been criticized because of its narrowly drawn specific prohibitions, which by implication permit debt collecting in any manner that is not specifically forbidden. Unfortunately, case law construing the statute is as yet too sparse to determine realistically how strictly the courts are going to adhere to these prohibitions.

The section of the Act dealing with "threats or coercion" to collect the debt is a good example of the statute's unnecessary specificity.⁶¹ The prohibition of threats or use of violence or criminal means against the person or property of another to collect a debt⁶² is not objectionable since it covers a broad spectrum of potential collection abuses. Likewise, there is little objection to forbidding false accusations (or threats thereof) by the debt collector of fraud or other criminal acts against the debtor.⁶³ If there is such an assertion, the burden of proof is on the debt collector to establish his belief that a crime was committed, or a fraud perpetrated, by the debtor; failure to meet this burden renders the collector liable to the consumer. The Act provides that the debt collector may not represent to a third party (ordinarily a credit bureau or collection agency) that a debt is nondisputed when there is a challenge to its accuracy, and the consumer has notified the collector *in writing* of the dispute.⁶⁴ There is no penalty under the Act if a consumer debt is sold or assigned to a third party; the collector, however, may not threaten sale or assignment of the debt (without so doing) merely to obtain leverage against the debtor in coercing payment.⁶⁵ A collector is forbidden to threaten that

er" under the Act is an individual whose debt is one incurred primarily for personal, family, or household purposes.

59. *Id.* art. 5069-11.01(d).

60. *Id.* art. 5069-11.01(f). The "creditor" is a party who extends credit for personal, family, or household purposes.

61. *Id.* art. 5096-11.02. The courts must have some latitude to construe the Act, so as to proscribe unsavory collection practices which the inventive debt collector may conjure to defeat the Act's effectiveness. See *Clark v. Associated Retail Credit Men*, 105 F.2d 62, 64 (D.C. Cir. 1939). See generally *Tarkington v. Beneficial Fin. Co.*, 516 S.W.2d 722 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.); *Credit Plan Corp. v. Gentry*, 516 S.W.2d 471 (Tex. Civ. App.—Houston [14th Dist.] 1974), *rev'd on other grounds*, 528 S.W.2d 571 (Tex. 1975).

62. TEX. REV. CIV. STAT. ANN. art. 5069-11.02(a) (Supp. 1976-1977).

63. *Id.* art. 5069-11.02(b).

64. *Id.* art. 5069-11.02(c). Where the credit grantor also happens to be the collector, he must exercise care in making certain that the information reported to other grantors of credit and to credit bureaus and collection agencies is accurate. It is unnecessary to report details where the debt is challenged since notification that the debt is "disputed" is sufficient. See generally *Fair Credit Reporting Act*, 15 U.S.C. § 1681 (1970). It should be noted that no provision is made under the Debt Collection Practices Act to forward the debtor's written dispute of the debt if it is received by the creditor or collector *after* the report has been made to a third party that the debt is undisputed.

65. TEX. REV. CIV. STAT. ANN. art. 5069-11.02(d) (Supp. 1976-1977).

the debtor will be arrested, but he may threaten arrest if the debtor has violated a criminal law.⁶⁶ The debt collector may presumably threaten to file criminal charges only where there is a belief on the collector's part that a criminal act has been committed by the debtor. There is no such prohibition against threatening to institute civil litigation to recover the debt, nor is there an express requirement that such a lawsuit ever be filed.⁶⁷ Finally, a collector may threaten seizure, repossession, or sale of goods only where he has a legal or express contractual right to do so.⁶⁸

The Texas Legislature sought to impose specific prohibitions in four areas where debtor harassment and abuse have been especially prevalent.⁶⁹ This action has been criticized as nothing more than the legislature's distaste for bell-ringing and profanity.⁷⁰ The debt collector may not use profane or obscene language when addressing the debtor, although the burden of proving whether the collector intended to abuse the hearer or reader of the language appears to be on the debtor.⁷¹ Nor has one of the most objectionable abuses been entirely eliminated: the telephone call in which the caller does not disclose his identity.⁷² When making a collect telephone call or when transmitting any communication where the recipient of the message is required to incur expense in accepting the communication, the collector initiating the transmission must first disclose his name.⁷³ While simply placing a telephone call is not in and of itself actionable, the repeated and continuous telephoning of the debtor coupled with a willful intent to harass the party so contacted is a violation of the Act.⁷⁴

The Act also outlines practices which the legislature designated as "unfair or unconscionable means" of collecting the debt.⁷⁵ Under this group of

66. *Id.* art. 5069-11.02(e). The most likely, but certainly not the only, reason that the creditor might threaten arrest for criminal violation would appear to be in the situation where a "hot" check was passed as payment for the consumer goods or services. See TEX. PENAL CODE ANN. §§ 31.06, 32.41 (1974).

67. TEX. REV. CIV. STAT. ANN. art. 5069-11.02(f) (Supp. 1976-1977). One court has held that "it cannot be a deceptive practice to advise that an unpaid account will be referred to an attorney for civil action if the debtor does not respond." *Credit Bureau of Laredo, Inc. v. State*, 515 S.W.2d 706, 712 (Tex. Civ. App.—San Antonio 1974), *aff'd*, 530 S.W.2d 288 (Tex. 1975).

68. TEX. REV. CIV. STAT. ANN. art. 5069-11.02(g) (Supp. 1976-1977).

69. *Id.* art. 5069-11.03.

70. Anderson, *Coercive Collection and Exempt Property in Texas: A Debtor's Paradise or a Living Hell?*, 13 Hous. L. Rev. 84, 123 (1975).

71. TEX. REV. CIV. STAT. ANN. art. 5069-11.03(a) (Supp. 1976-1977); see *Ledisco Financial Serv., Inc. v. Viracola*, 533 S.W.2d 951, 954-55 (Tex. Civ. App.—Texarkana 1976, no writ); *Bank of North America v. Bell*, 493 S.W.2d 633, 635 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

72. TEX. REV. CIV. STAT. ANN. art. 5069-11.03(b) (Supp. 1976-1977). There is no violation unless there is proof of two elements: nondisclosure of the caller's name and the willful intent to annoy, harass, or threaten the recipient of the call. *Id.*

73. *Id.* art. 5069-11.03(c).

74. *Id.* art. 5069-11.03(d).

75. *Id.* art. 5069-11.04. Although "unconscionable" is not defined under the Act,

abuses, the debt collector may not entice or pressure the debtor to sign a statement or otherwise acknowledge that the consumer transaction involved necessities of life, when in fact the transaction was for unnecessary goods or services.⁷⁶ The debt collector may attempt to collect any interest, charge, fee, or other incidental expense if that expense was expressly authorized by the agreement that created the obligation, or he may enter into a new agreement with the debtor that effectively extinguishes the original obligation and creates in its place a new agreement with the additional expenses incorporated therein.⁷⁷ The impact of this section lies in its hindering a creditor from collecting or attempting to collect an amount of money for which there is no obligation by the debtor. The prevention of oppression and unfair surprise, in the context used in the Uniform Commercial Code, is a major concern of the Act.⁷⁸

The most lengthy section of the Debt Collection Practices Act identifies "fraudulent, deceptive, or misleading representations." A debt collector who violates this section may be subject to penalty.⁷⁹ The debt collector is prohibited from using names other than the business, professional, or legal name under which he operates his collection service. This prohibition, when considered in conjunction with other existing statutes, still allows the collector a great deal of latitude to perpetrate a fraud on the debtor.⁸⁰ The debt col-

some clarification might be had by resorting to the Uniform Commercial Code commentary on what constitutes unconscionability in the commercial setting. The Code's draftsmen believed that:

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so *one-sided* as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of *prevention of oppression and unfair surprise*

U.C.C. § 2-302, Comment 1 (emphasis added). The official text of this Code section has been adopted in Texas. TEX. BUS. & COMM. CODE ANN. § 2.302 (Tex. UCC 1968). Although there is presently no case authority delineating the scope of "unconscionable means," the gist of § 11.04 appears to be an attempt to deter the dishonest collector's efforts to obligate the debtor to a transaction not originally bargained for.

76. TEX. REV. CIV. STAT. ANN. art. 5069-11.04(a) (Supp. 1976-1977). "Necessaries of life," although undefined in the statute, apparently encompasses food, clothing, shelter, medical, and similar expenses.

77. *Id.* art. 5069-11.04(b). Where a real estate loan is renewed or a contract of sale is reinstated following default by the obligor, the creditor may charge a reasonable fee as consideration for the reinstatement. Otherwise, the section appears unequivocal: no collection of add-on fees is allowed if the written agreement does not authorize them. The effect of this subsection is for all practical purposes the same as subsection 11.05(j) of the Act.

78. U.C.C. § 2-302, Comment 1.

79. TEX. REV. CIV. STAT. ANN. art. 5069-11.05 (Supp. 1976-1977). Sixteen specific practices comprise the list of prohibited practices in this section.

80. *Id.* art. 5069-11.05(a). The upshot of this provision is that the debt collector or his employee *may* presumably use an assumed name in the operation of the collection service if that is his professional appellation. The assumption of a separate identity for collection purposes is ostensibly a tactic that prevents the vengeful debtor from seeking

lector may not falsely represent that he has information or something of value for the consumer in order to discover the debtor's whereabouts.⁸¹ Only where money is demanded by the collector for the alleged debt is disclosure of the identity of the creditor seeking payment required.⁸² If a written communication from the debt collector refers to a debt alleged to be delinquent, the debt collector's name and street address must be clearly indicated in the correspondence.⁸³ In connection with this requirement, a debt collector may not demand that the debtor direct his response to the communication to a place other than the street address or the post office box listed on the creditor's or collector's original transmission.⁸⁴

A violation of the Act occurs if the character, extent, or amount of the debt is misrepresented to the debtor, or if its status in a judicial or governmental proceeding is falsely portrayed.⁸⁵ If the collector represents that he is affiliated with the government, when he has no such affiliation, he may be penalized under the Act.⁸⁶ Likewise, he is forbidden from creating the impression by use, distribution, or sale of a written communication purporting to represent his activity that his services are approved by a governmental agency or other official authority.⁸⁷

personal retribution against the debt collector or his employees. More often, however, an assumed name is little more than a facade, which allows a collector to harass the debtor, then change identities back and forth between a legal name and an assumed name, thereby leaving the debtor perplexed as to which individual, if any, he may maintain an action against. Until recently, in Texas the use of an assumed name required registration by the user of that name with the county clerk. Failure to so register was punishable as a misdemeanor offense. The statute has been repealed, Tex. Laws 1921, ch. 73, § 1, at 142, decriminalized, and transferred to the civil statutes. The new law requires, in part:

[the filing of] a certificate setting forth the name under which such business is . . . to be conducted or transacted, and the true or real full name or names of the person or persons conducting or transacting the same, with the post-office address or the addresses of said person or persons.

TEX. REV. CIV. STAT. ANN. art. 5924.1 (Supp. 1976-1977).

81. *Id.* art. 5069-11.05(b). The debt collector need not disclose his purposes if his aim is solely to discover the location of the debtor. If the communication is for the purpose of attempting to collect the debt, however, that purpose must be made known to the third party. *Id.* art. 5069-11.05(d).

82. *Id.* art. 5069-11.05(c).

83. *Id.* art. 5069-11.05(e). The individual employees of the debt collector are under no such obligation to list their names or street addresses.

84. *Id.* art. 5069-11.05(f). One of the few provisions of the Act obviously aimed at protecting the consumer, this subsection assures the debtor if he wishes to challenge the alleged debt that he is not dealing with some fictitious collection agency; he may in fact go to the address given to dispute the claim. *Id.* art. 5069-11.05(f).

85. *Id.* art. 5069-11.05(g). The debt collector may not impliedly represent that a suit has been filed on the debt when it has not. Nor may the debtor be intimidated by a false report that a warrant exists for his arrest. *Id.* art. 5069-11.05(g).

86. *Id.* art. 5069-11.05(h).

87. *Id.* art. 5069-11.05(i). The use by the collector of a seal or insignia simulating that of a governmental agency is additionally precluded by this subsection. *Id.* art. 5069-11.05(i).

Because attorneys' fees, investigatory fees, and the like are awarded in the court's discretion, the debt collector may not falsely represent to the debtor that the debt will definitely be increased by such fees.⁸⁸ False representation of the status or nature of services rendered by the debt collector or his business may also render him liable.⁸⁹

The collector must conform to United States postal laws and regulations; otherwise the Act effectively allows a "person"⁹⁰ to bring an action in the courts of Texas, even where the federal government refuses to intercede.⁹¹ The debt collector may not send communications that purport to issue from an attorney or a law firm⁹² or represent that the debt is in the hands of an attorney for collection purposes when it is not.⁹³

The final prohibition against deceptive representations under the Act pertains to misrepresenting that the debt payment is being sought by an independent collection service when in fact it is being collected by an "in-house" collection agency, in which the debt is collected by the same party to whom it is owed.⁹⁴

The specificity of the creditor-biased prohibitions against deceptive or fraudulent practices in the Texas Debt Collection Practices Act and the lack of a blanket prohibition against several questionable collection practices come into sharp conflict with the depiction of Texas as a "debtor's paradise."⁹⁵ Section 11.05 of the Act is cross-referenced to the Deceptive Trade Practices—Consumer Protection Act⁹⁶ (DTPA), with the implication that a practice deemed "deceptive" under the Debt Collection Practices Act may also be actionable under the DTPA.⁹⁷ The operations of the debt collector appear

88. *Id.* art. 5069-11.05(k). If the agreement between the debtor and the creditor stipulates a contractual right of the creditor to attorneys' fees, there is no violation of this subsection. *Id.* art. 5069-11.05(j).

89. *Id.* art. 5069-11.05(1). Compare *id.* art. 5069-11.05(1), with 16 C.F.R. § 237.6 (1976).

90. TEX. REV. CIV. STAT. ANN. art. 5069-11.01(g) (Supp. 1976-1977).

91. *Id.* art. 5069-11.05(m).

92. *Id.* art. 5069-11.05(n).

93. *Id.* art. 5069-11.05(o).

94. *Id.* art. 5069-11.05(p). The subsection labels such a scheme as "a subterfuge organization under the control and direction of the person to whom the debt is owed." There is no sanction against a creditor owning its own bona fide collection agency. *Id.* art. 5069-11.05(p). If the debt collector is represented to be a bona fide independent collection agency, it seems logical that: (1) the agency would exist apart from the creditor, with different employees and at a separate location; (2) that the creditor not have sole control of its operation; and (3) that it collect debts for parties other than the creditor.

95. See generally Anderson, *Coercive Collection and Exempt Property in Texas: A Debtor's Paradise or a Living Hell?*, 13 HOUS. L. REV. 84 (1975).

96. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Supp. 1976-1977).

97. Authority for this proposition is merely speculative although at least one court has recently cited both the Debt Collection Practices Act and the *repealed* Texas Deceptive Trade Practices Act, Tex. Laws 1967, ch. 274, § 2, at 609, in the same case.

subject to the DTPA's general declaration and scope.⁹⁸ The DTPA delineates twenty deceptive practices, but this list is not inclusive of all acts prohibited thereunder.⁹⁹ At least four DTPA provisions furnish a probable basis for prosecuting an action not specifically outlawed by the Debt Collection Practices Act¹⁰⁰ where there has been a fraudulent, deceptive, or misleading representation made to the debtor in the collection process.¹⁰¹ The principal advantage to successful recovery under the DTPA is that treble damages may be awarded as well as court costs and reasonable attorneys' fees.¹⁰²

Notably absent from the prohibitions of the Debt Collection Practices Act is any restraint on contact with the debtor's family, his friends and neighbors, or his employer and fellow employees. In the past these contacts have been objectionable to the party contacted, as well as a source of humiliation to the debtor.¹⁰³

The deceptive use of the name of a credit bureau is another aspect of the Debt Collection Practices Act¹⁰⁴ that captures the spirit of the Federal

See Credit Bureau of Laredo, Inc. v. State, 515 S.W.2d 706, 710, 712 n.6 (Tex. Civ. App.—San Antonio 1974), *aff'd*, 530 S.W.2d 288 (Tex. 1975). The court found that there was no deceptive trade practice where a credit bureau advised that an unpaid account would be referred to an attorney for civil action if the debtor did not respond, citing the current Debt Collection Practices Act as authority. *Id.* at 711-12.

98. "False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." TEX. BUS. & COMM. CODE ANN. § 17.46(a) (Supp. 1976-1977).

99. *Id.* § 17.46(b).

100. Forbidden practices likely to govern debt collection deceptions include:

- (1) passing off goods or services as those of another;
- (2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;

(5) representing that goods or services have sponsorship, approval, [or] characteristics . . . which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not.

Id. § 17.46(b)(1)-(3), (5).

101. *Id.* §§ 17.41-63.

102. *Id.* § 17.50(b)(1).

103. The State Finance Commission has promulgated certain regulatory measures deemed necessary for the enforcement of Chapter 3 of the Texas Consumer Credit Code, entitled "Regulated Loans." TEX. REV. CIV. STAT. ANN. art. 5069-3.01 (Supp. 1976-1977). The regulations allow

a [loan] licensee or his agent . . . the right to contact any person in order to secure information concerning a borrower. Provided, however, when any person other than the borrower, the borrower's spouse, a member of the borrower's household, or a co-maker . . . or guarantor of the obligation objects to any such contact, . . . such licensee or his agent shall forthwith cease and desist from any further contact with such person.

Tex. Fin. Comm'n, Regulations, art. 8, § 8.02 (1973). In addition, the Commission requires a decipherable written record of all contacts with the borrower or any other person, including the date, method of contact, contacted party, person initiating the contact, and the essence of the contact. *Id.* § 8.03. No similar protection is afforded consumers obligated on installment loan or retail installment transactions.

104. TEX. REV. CIV. STAT. ANN. art. 5069-11.06 (Supp. 1976-1977).

Trade Commission Guides Against Debt Collection Deception.¹⁰⁵ Both the Texas act and the FTC guidelines prevent a debt collector and an "industry member,"¹⁰⁶ respectively, from purporting to be a credit-reporting agency when it does not provide such a service.¹⁰⁷ The Texas statute excepts from its effect any nonprofit retail trade association qualifying as a bona fide business league¹⁰⁸ that does not engage in debt collection or credit reporting.¹⁰⁹

A separate section of the Texas debt collection statute is designed to prevent a creditor from employing the services of any independent debt collector who repeatedly engages in practices forbidden elsewhere in the Act, once the creditor has actual knowledge of those violations.¹¹⁰ The Act also contains the proviso that a bona fide error will not amount to a violation of any section of the statute, where the collector has adopted reasonable procedures to avoid the error.¹¹¹

Violation of one or more provisions of the Act is a misdemeanor, which is punishable upon conviction by a fine per violation of not less than one hundred dollars, nor more than five hundred dollars.¹¹² The misdemeanor action must be filed within one year from the date of the alleged violation.¹¹³ It does not appear likely that a debt collector will risk violation of the Act and payment of a fine if the alleged debt is significantly smaller than the minimum one hundred dollar penalty. In this regard, the Act should curtail much of the harassment and deception involved in pursuing relatively small outstanding balances on loans and retail installment contracts where the debtor is only a few payments in arrears. Court costs and attorneys' fees reasonable in relation to the amount of work expended may be recovered where a successful action is maintained by the debtor for either actual damages or injunctive relief or both.¹¹⁴ An important aspect of the Debt Collection Practices Act is the section availing debtors, creditors, and all other legal entities of any previously existing remedies at law or in equity to which they may be entitled.¹¹⁵

The circumstances under which the Debt Collection Practices Act was enacted call into question the degree of *consumer* protection it actually affords.¹¹⁶ The existence of a strong creditor lobby in Texas has been con-

105. 16 C.F.R. §§ 237.0-6 (1976).

106. *Id.* § 237.0(a).

107. Compare TEX. REV. CIV. STAT. ANN. art. 5069-11.06 (Supp. 1976-1977), with 16 C.F.R. § 237.4 (1976).

108. I.R.C. § 501(c)(6).

109. TEX. REV. CIV. STAT. ANN. art. 5069-11.06 (Supp. 1976-1977).

110. *Id.* art. 5069-11.07.

111. *Id.* art. 5069-11.08.

112. *Id.* art. 5069-11.09.

113. *Id.* art. 5069-11.09.

114. *Id.* art. 5069-11.10.

115. *Id.* art. 5069-11.11.

116. An emergency rider was affixed to the already approved senate bill and as

sidered before.¹¹⁷ The legislature's assumption that this Act will significantly curtail collection abuses either adds credence to that growing view or suggests a political naivete that is difficult to comprehend.

The UCCC and Pending Federal Legislation

The Uniform Consumer Credit Code (UCCC) has not been adopted in Texas, but certain of its provisions are suggestive of the type of effective prohibitions which might have been incorporated into the Texas debt collection statute.¹¹⁸ In subjecting a creditor who exercises questionably unfair practices in his collection of consumer credit debts to the concept of unconscionability, the UCCC provides a more flexible device for halting multifarious activities than the specific and somewhat rigid treatment found in the Texas legislation. The uniform act further undercuts the remedies available to a creditor who makes extortionate extensions of credit knowing that the consumer will probably be unable to repay this obligation.¹¹⁹ The Texas Debt Collection Practices Act failed to delineate any distinction between a consumer transaction and a commercial transaction,¹²⁰ although in the context of the Texas Consumer Credit Code, the latter term does not appear apposite.

The lack of a cohesive federal policy on debt collection practices is also disconcerting. The federal regulations in existence do not successfully regulate interstate collection practices. The FCC and the United States Postal Service have regulations in the debt collection area, but these are ineffective in correcting unethical collection practices.¹²¹ Texas debtors are fortunate to have

amended was passed in the Texas House of Representatives on June 15, 1973. The constitutional rule requiring that bills be read on three separate days in each house was suspended, and on grounds of an "imperative public necessity," the Act was passed. Acts 1973, 63d Leg., ch. 547, at 1516-17.

117. Comment, *Consumer Credit Regulation in Texas—The Case For the Consumer*, 49 TEXAS L. REV. 1011 (1971). Criticism had earlier been directed toward the first 10 chapters of the Texas Consumer Credit Code, enacted by the 62d Legislature in 1971. *Id.* at 1012-13. The Debt Collection Practices Act is one of three new chapters enacted by the 63d Legislature in 1973.

118. UNIFORM CONSUMER CREDIT CODE § 5.108(2). The court may as matter of law find that a person has engaged in unconscionable conduct in collecting a debt arising from a consumer credit transaction, and grant an injunction or actual damages. The Code forbids threatening injury to the consumer's reputation by disclosure of information affecting his reputation for credit-worthiness knowing that the information is false or communication with the consumer's employer prior to final judgment, for reasons other than to verify the consumer's employment. *Id.* § 5.108(5)(d).

119. *Id.* § 5.107.

120. See generally *Model Consumer Debt Collection Fair Practices Act*, 80 COM. L.J. 184 (1975). The Model Collection Act was drafted over a two-year period by the National Conference Group of Lawyers and Collection Agencies and was created as an aid to state legislative units seeking to eradicate the objectionable practices of the heretofore unregulated debt collectors. *Id.* at 184.

121. H.R. REP. No. 94-1202, 94th Cong., 2d Sess. 2-3 (1976). The Honorable

at least a modicum of protection; thirteen states have no debt collection laws at all.¹²² Currently pending federal legislation would amend the Consumer Credit Protection Act (CCPA),¹²³ creating Title VIII—"Debt Collection Practices" under the administration of the Federal Trade Commission.¹²⁴

THE NEED FOR LICENSING TEXAS COLLECTION AGENCIES

One solution which has been proposed to end some of the more nefarious abuses which collection agencies may inflict on the defaulting debtor involves licensing the agencies before they are allowed to operate within the state.¹²⁵ Notably, the Model Act to License and Regulate Collection Agencies precludes any applicant previously convicted of certain crimes of moral turpitude

Henry Reuss of Wisconsin, Chairman of the Committee on Banking, Housing, and Urban Affairs, stated:

The Federal Trade Commission's powers are greatly limited in dealing with collectors since this agency does not have a law or trade regulation rule on debt collection practices with which to control debt collectors. All the Commission has in the debt collection area is a set of debt collection guidelines. The Commission indicated in its testimony during hearings on this legislation [H.R. 13720, 94th Cong., 2d Sess. (1976)] that it has had little success in regulating debt collectors. Finally, the Commission will not take any action on *individual* cases of consumer harassment.

Id. at 3 (emphasis added).

122. *Id.* at 3. Included are Alabama, Delaware, Georgia, Kansas, Kentucky, Mississippi, Missouri, Montana, Ohio, Oklahoma, Rhode Island, South Carolina, and South Dakota. Illustrative of why the state laws that do exist are ineffective is the fact that of 16 states providing for collection agency boards, 14 require by law that a majority of the board be comprised of debt collectors. *Id.* at 3.

123. 15 U.S.C. §§ 1601-1677 (Supp. V 1975).

124. H.R. 13720, 94th Cong., 2d Sess. (1976). This amendment to the CCPA would impose civil liability ranging from \$100 to \$1,000 per violation in private actions. *Id.* § 811(a)(2)(A). Criminal liability ranging from one year's imprisonment, or a fine up to \$5,000, or both, may be assessed for willful and knowing noncompliance with the proposed law. *Id.* § 812(2). Significantly, the House bill provides that: "[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.* § 815. The most stringent standards yet proposed are encompassed in H.R. 13720 for the regulation of communication between the collector and parties other than the consumer. "A prima facie showing that consent was not obtained may consist of *testimony by the consumer*. Upon such a prima facie showing, the burden of going forward shall be with the debt collector." *Id.* § 804(e) (emphasis added). Communication with third parties other than the debtor's spouse, his parent, his attorney, and his guardian or executor, is severely limited. *Id.* § 804(a)-(d).

125. Exemplifying the type of standards desirable for the operation of collection agencies are those provisions contained in proposed model legislation. See *Model Act to License and Regulate Collection Agencies*, 70 COM. L.J. 38 (1965) [hereinafter cited as *Model Licensing Act*]. This act was drafted by the National Conference of Lawyers and Collection Agencies, created under the auspices of the American Bar Association. The conference participants were equally drawn from ABA members and from representatives of the credit community, including the Commercial Law League of America, the National Association of Credit Management, Inc., the American Collectors Association, and the Associated Credit Bureaus of America. *Id.*

from receiving such a license.¹²⁶ The Model Licensing Act delineates nineteen prohibited practices among debt collectors, which include forbidding the use of collection instruments that simulate the form and appearance of legal process;¹²⁷ the publication of any list of debtors other than for credit reporting purposes;¹²⁸ the use of “shame cards,” “shame automobiles,” or similar devices; methods of intimidation or methods contrary to postal regulations in collection of accounts;¹²⁹ and the sharing of office space, or even a common waiting room, with a practicing lawyer.¹³⁰ The Model Licensing Act expressly forbids a collection agency’s affirmative solicitation, purchase, or receipt of assignments of claims for the purpose of collection,¹³¹ a practice that is currently allowed under Texas law only because it is not prohibited.

Moreover, the Model Licensing Act provides for investigation, suspension, and revocation of licenses in the event a licensee violates any of its provisions or fails to maintain its financial condition sufficiently to qualify for a license.¹³² At present, lenders of *regulated* loans must maintain a written record of all collection contacts, and if the contact occurs at night, the exact time of the contact must be indicated.¹³³ This is currently the only requirement of its kind in Texas, and it affects only a limited number of debtors.

Perhaps most importantly, the Model Licensing Act vests the administrator of the licensing operation with the capacity to make rules and regulations con-

126. The Model Licensing Act provides for disqualification of a license applicant for certain prior convictions:

No license shall be granted to any applicant if an individual or to any partnership or corporate applicant if such applicant . . . has been convicted in any state or federal court of the crime of forgery, fraud, obtaining money under false pretenses, embezzlement, extortion, larceny, burglary, breaking and entering, robbery, criminal conspiracy to defraud, bribery, or any other crime involving moral turpitude, of which the record of conviction . . . shall be conclusive evidence.

Id. § 5.

127. *Id.* § 6(g).

128. *Id.* § 6(j).

129. *Id.* § 6(k). Although the Model Licensing Act does not define either “shame cards” or “shame automobiles,” the reasonable inference as to their meaning would be some object, which when placed in proximity to the debtor’s residence or place of employment, is intended to humiliate the debtor and intimidate him to pay the debt, even where there may be a dispute as to its authenticity.

130. *Id.* § 6(s).

131. *Id.* § 6(f).

132. *Id.* § 8. The administrator of the licensing procedures may additionally require a licensee to submit for examination a verified financial statement of the licensee’s operations to determine whether the licensee is financially responsible to carry on the business of a collection agency. *Id.* § 10(a). The overseer of the licensing process would be authorized to require that books and records be kept at the agency’s business location to ascertain whether there has been compliance with the Model Licensing Act’s provisions. *Id.* § 10(b).

133. D. HOLMAN, *CONSUMER CREDIT LAW IN TEXAS* 48-49 (1970). This requirement is a matter of policy as determined by the Office of the Consumer Credit Commissioner. *Id.*

sistent with its other provisions.¹³⁴ Such rule-making power is the logical step to ensure that there is no circumvention by unscrupulous collectors who remain one step ahead of the lawmakers. Each licensee under the Model Licensing Act is also required to file and maintain in force a surety bond in an amount the licensing authority deems reasonably necessary to safeguard the interests of the public.¹³⁵ Significant also is the Model Licensing Act's inclusion of a wide range of credit institutions under the term "collection agency," thus not limiting its sanctions only to those enterprises ordinarily associated with the term.¹³⁶ When the possibilities for abuse such as that evinced in *Duty v. General Finance Co.*¹³⁷ are considered, it is difficult to understand why Texas has not already enacted legislation patterned after the Model Act to License and Regulate Collection Agencies.

CONCLUSION

The reasons for consumer default can be generally categorized to reflect either an inability or an unwillingness to pay a debt. Unexpected curtailment of income or increased expenditures are frequently causes of the debtor's inability to repay his debt. The unanticipated loss of income and rival demands on remaining resources do not immediately transform the previously solvent consumer into a "deadbeat" simply because he can no longer pay his debts on schedule. The study by Professor Caplovitz revealed that only slightly more than one percent of the defaulting debtors could be classified as "deadbeats;" four times that number were thrown into "default" by subsequently discovered billing errors on the part of the creditor.¹³⁸ The instances of harassment continue to cast doubt on the credit industry's widespread contention that it is willing to come to terms with the debtor who, because of unexpected economic misfortune, is unable to maintain his regular payment schedule.¹³⁹

134. *Model Licensing Act*, *supra* note 125, § 12. Unfortunately the Model Licensing Act fails to outline any policy on creditor contact with the debtor's employer, but the rule-making authority of the license-issuing administrator could feasibly close this avenue of debt recovery if the abuses became rampant.

135. *Id.* § 4. By imposing the possibility of bond forfeiture for willful noncompliance with the Model Licensing Act's provisions, the licensing authority can more effectively ensure that only legitimate collection agencies will remain in business while the marginal operations, which depend for their livelihood upon coercion, abuse, and harassment of default debtors, will either cease such activities or risk loss of license.

136. *Id.* § 2. The term "collection agency" includes "banks, abstract companies doing an escrow business, real estate brokers, public officers, . . . lawyers, trust companies, building and loan associations, savings and loan associations, loan or finance companies or insurance companies."

137. 154 Tex. 16, 273 S.W.2d 64 (1954).

138. Proxmire, *Foreword* to D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* at x (1974).

139. AMERICAN COLLECTORS ASS'N, *A COLLECTION GUIDE FOR CREDITORS* 9-10 (1976). "Absent from this list [of delinquent debtors] are those who lose employment

If a defaulting debtor has no intention of paying his just debt, that disposition will be obvious soon enough without resort to coercion, abuse, and intimidation. The Texas prohibition on wage garnishment¹⁴⁰ and the restrictions on execution on exempt property¹⁴¹ should cause extenders of credit to scrutinize prospective borrowers or users of installment credit more carefully. The creditor's emphasis on the prospect of default should be preventive, not remedial. The Texas Debt Collection Practices Act, while deficient in some important areas, is nevertheless a progressive statute which advances Texas beyond those jurisdictions that have not established any standards for the conduct of collecting past-due accounts. The Act does nothing to proscribe the legal rights and remedies of the scrupulous creditor or collector in the pursuit of a just debt. What it does accomplish in part is restraint of those few underhanded practitioners in the consumer credit field who give the entire collection industry an undeservedly bad reputation.

Amendment of the Act to prevent employer contacts would be a major step forward, since such contacts both humiliate the debtor and frustrate his attempt to pay the debt. Additionally, the enactment of a stringent code to regulate and provide for licensing of collection agencies would tend to elevate the entire industry to a more respectable level while driving the unethical practitioners out of business. Periodic audits of accounts received and the official perusal of records of collector contacts would restore consumer confidence in the industry and help to eliminate the pejorative connotation of debt collection. Until such measures are taken by the Texas Legislature, the collection industry will remain suspect, and the defaulting debtor will continue to suffer unnecessary indignities.

through no fault of their own and those who have unexpected financial reverses. . . . To these people you owe a moral obligation of leniency." The ACA represents about 50% of the firms that collect accounts receivable for the 2.5 million credit grantors in the United States, including retail establishments of all sizes, hospitals, physicians, dentists, banks, corporations, and governments at all levels. Letter from Ms. Marjorie Benson, Director of Consumer Education and Public Relations for the American Collectors Association, Inc., to William R. Crow, Jr., October 15, 1976.

140. TEX. REV. CIV. STAT. ANN. art. 4099 (1966).

141. *Id.* art. 3836 (Supp. 1976-1977).