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# Consumer Credit Protection Fair Debt Collection Practice Act

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# CONSUMER CREDIT PROTECTION
# FAIR DEBT COLLECTION PRACTICES ACT

15 U. S. C. § 1692 (Cum. Supp. 1978).

Since the early days of commerce, society has realized that goods and services could be obtained on one day and paid for on another. However, many instances began to occur in which the lender could not collect money owed him. The lender was eventually forced to let someone else collect the money for him. As a result, society provided a caste of individuals known as debt collectors.[1]

Although the term "credit" has been a part of business vernacular for centuries,[2] "consumer credit" is still in its infancy.[3] The reason is that easily accessible sales credit to the public is only possible in an economic environment marked by excess discretionary income.[4] Thus, with the rapid growth of the new middle class, the advent of sales credit, and the rise of discretionary income in the United States, a new class of purchasers of goods and services has emerged, *i.e.*, consumers.[5]

As with the advent of any social change, the growing accessibility of consumer credit[6] has created novel problems. The rise in consumer credit outstanding has greatly contributed to the growth of third party debt collectors in America and the substantial business derived

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[1]*See* Fair Debt Collection Practices Act, Title VIII, 15 U.S.C. § 1692a(6)(a) (Cum. Supp. 1978), which states in pertinent part:

> The term "debt 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.

In subscriptions (A) through (G) several classes of persons who do engage in the collection of debts are excluded from the statutory definition. Therefore, the common law definition has been reduced for statutory enforcement purposes.

[2]"Credit is derived from the Latin term *creditum* which means "something entrusted or loaned." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 311 (1971).

[3]*See* Curran, *Legislative Controls as a Response to Consumer-Credit Problems*, 8 B.C. IND. & COM. L. REV. 409, 410 (1967) [hereinafter cited as Curran].

[4]*See* Curran, *id.* at 413.

[5]*See* Caplovitz, *Consumer Credit in the Affluent Society*, 33 L. & CONTEMP. PROB. 643 (1968).

[6]According to the Federal Reserve Board, total credit outstanding in 1950 was 21.5 billion dollars, where ten years later in 1960 installment credit outstanding alone reached 43.0 billion dollars. *See* STATISTICAL ABSTRACT OF THE UNITED STATES, 534 (1977). The pattern of growth has continued to increase at incredible rates. In 1968 the installment credit outstanding at 82.9 billion dollars nearly doubled the 1960 figures. *See* 54 FED. RESERVE BULL. A52 (Nov. 1968). By October of 1977 the figure had more than doubled again. Outstanding installment credit had reached 209.1 billion dollars. *See* 63 FED. RESERVE BULL. A42 (Dec. 1977).

therefrom. The Senate Reports on Hearings of proposed debt collection legislation reported that

> [t]here are more than 5,000 collection agencies across the country, each averaging eight employees. Last year, more than $5 billion in debts were turned over to collection agencies. One trade association which represents approximately half of the Nation's independent collectors states that in 1976 its members contacted eight million consumers.[7]

Along with the increase of availability of consumer credit, there has also been a rise in bankruptcies[8] and defaulting debtors.[9]

In times of default on note payments, the ultimate remedies available to creditors are assignment of wages,[10] garnishment of wages,[11]

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[7]S. REP. NO. 382, 95th Cong. 1st Sess. 1, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1695, 1696 [hereinafter cited as SENATE REPORT.]

[8]In California for instance, the number of bankruptcy petitions rose from 4,124 to 19,404 between the years 1950 to 1960. In 1964 the number of petitions rose to 29,651. Thus, in the five year period between 1960 to 1964, petitions increased over fifty percent, and over six hundred percent in the fifteen year period between 1950 to 1964. *See* 1950 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORTS TABLE F-2; 1960 *Id.* at F-2; 1964 *Id.* at F-2. *But see* 1976 *Id.* at F-2; 1977 *Id.* at F-2. In 1976 the number of bankruptcy petitions in California had risen to only 39,877 and in 1977 to only 31,596. In the nation as a whole there has even been a marked decrease in the number of petitions for bankruptcy. In 1976 there were 246,549 petitions in the country as a whole, 34,950 in the Fifth Circuit, and 2,894 in Mississippi. In 1977, however, there were only 214,399 petitions in the country as a whole, 32,039 in the Fifth Circuit, and 2,590 in Mississippi. Thus the recent decline in the rate of petitions for bankruptcy may be attributed to the explosion of consumer credit legislation which has been occurring since the late 1960's.

[9]*See* D. CAPLOVITZ, CONSUMERS IN TROUBLE 2 (1974) [hereinafter cited as D. Caplovitz]. Reasons most frequently given for consumer default are 1) Debtor's mishaps and shortcomings, 2) The debtor's belief that the wrong merchandise has been delivered, 3) The debtor's dissatisfaction with the quality of the merchandise, 4) The debtor's actual irresponsibility or dishonesty in trying to escape from his obligations, and 5) The debtor's belief that he has been deceived by the seller. *Id.* at 53-190. *See also* Comment, *Installment Sales: Plight of the Low-income Buyer*, 2 COLUM. J. LAW & SOC. PROB. 1,4 (1966).

[10]*See generally* Felsenfeld, Some Ruminations about Remedies in Consumer-Credit Transactions, 8 B. C. IND. & COM. L. REV. 535, 562 (1967):

> A wage assignment is a voluntary act by a debtor assigning to a creditor all or a portion of his future wages for payment of an obligation. Normally, the employer does not make payments directly to the creditor until he is notified that the debtor, his employee, has defaulted. Thus the wage assignment "secures" the debt—it is not the source of primary payment.

*Id.*

[11]*Id.*

> A wage garnishment is a judicial proceeding which enables a creditor to reach the debtor's wages after default, usually to enforce a judgment.
> * * *
> The fundamental difference between the two procedures is that wage assignment, a voluntary contractual assignment, is initiated with the agreement, while garnishment is instituted by operation of law.

*Id.* at 562-63.

replevin or self-help.[12] The problem with such creditor remedies is a matter of substance.

> The laws regulating consumer credit in most states today are largely borrowed from commercial law, which regulates relationships between buyers and sellers in the business world. The law of contract in commercial transactions is based on the assumption that the parties not only enter the transaction in good faith, but that they fully understand all the rights and duties embodied in the contract's various clauses.
> This model breaks down when the parties to the contract are a business firm and a consumer. The consumer, unlike the business firm, rarely enters into contractual relationships and has little understanding of the document to which he affixes his signature.[13]

It is also held by some that the substantive inadequacies in state laws result from a failure on the part of most state legislatures "to recognize and treat the consumer-credit problem as a *total process* (emphasis added) represented by the consumer-credit market."[14] This may be especially true in those states which have not adopted legislation similar to the Uniform Consumer Credit Code.

## INEFFECTIVENESS OF PAST STATE REMEDIES

At the Senate Subcommittee hearings on Consumer Affairs for proposed debt collection legislation, the committee found "[t]he primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the state level."[15] The Senate hearings revealed that thirteen states, including Mississippi, have no debt collection laws; that another eleven states have collection laws, but they "provide little or no effective protection."[16] Eighty million

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[12]Prior to *Fuentes v. Shevin*, 407 U.S. 67 (1972), there was no requirement that debtor be entitled to a judicial hearing prior to an action in replevin. Under *Fuentes*, however, the Supreme Court declared that a replevin of goods prior to a judicial determination is a violation of due process under the Fourteenth Amendment. *Id.* at 81-86.

[13]D. CAPLOVITZ, *supra* note 9, at 2-3.

[14]Curran, *supra* note 3, at 410.

[15]SENATE REPORT, *supra* note 7, at 1. *See also Proposed Amendment to the Consumer Credit Protection Act: Hearings on S. 656, S. 1130, and H.R. 5294 Before the Subcomm. on Consumer Affairs of Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. 1,2 (1977). (statement of Sen. Riegle). [hereinafter cited as *Senate Hearings*.] *See also* Jordan & Warren, A PROPOSED UNIFORM CODE FOR CONSUMER CREDIT, 8 B. C. IND. & COM. L. REV. 441 (1967) [hereinafter cited as Jordan & Warren].

[16]SENATE REPORT, *supra* note 7, at 2. *See also Senate Hearings*, *supra* note 15, at 2. (statement of Sen. Riegle); 21-22 (statement of Rep. Annunzio). *See also* Curran *supra* note 3, at 421:

> When the licensing requirement is primarily a revenue-raising device, potential licensees often need only file the appropriate forms and pay the required fee. The fact that a creditor possesses such a license may mislead the public into

Americans, nearly 40 per cent of our population, have no meaningful protection from debt collection abuse."[17]

The source of the debt collection problem stems from the original contract the consumer entered into with the seller. When a buyer and seller enter into a contract, the state generally stays out of the negotiations and the parties are allowed to come to an agreement.[18] From the very beginning, the consumer is placed at a disadvantage. Although there has been much in the line of federal legislation requiring the seller to fully disclose all of the details of the credit transaction,[19] most consumers are totally incapable of making an educated decision on such complicated matters.[20] Once the consumer fails to pay, the neutrality of the state ceases and the debtor is subject to the imminent threat of wage garnishment,[21] replevin, or self-help—all actions under law with garnishment and replevin administered through the courts.[22] Therefore, the resulting problems confronting consumers, particularly the indigent and poorly educated, can be linked to the state legislatures' failure to recognize the need to treat the consumer credit market and consumer credit problems as one process.[23]

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> thinking that the state licensing agency considers the licensee to be competent, honest, qualified by experience, or financially able to engage in licensed activity. In fact, however, issuance of the license itself does not connote any prior investigation by the licensing agency, and, consequently, it cannot be considered as the agency's endorsement of the licensee's character and fitness.

*Id.*

[17]SENATE REPORT, *supra* note 7, at 2; *Senate Hearings*, *supra* note 15, at 2. *But see* [1978] 2-5 CONS. CRED. GUIDE (CCH) ¶4330. At the time of publication of this comment, twenty-two states and the District of Columbia had adopted similar legislation.

[18]*See* Curran, *supra* note 3, at 428; Jordan & Warren, *supra* note 15, at 457. The agreement is not exactly perfect, however. The inequities in bargaining positions usually result in an adhesion-standard form contract. The provisions will insulate the creditor's remedies by stating the duties of the consumer to collect in case of a default in payments.

[19]Consumer Credit Cost Disclosure Act, (Truth-in-Lending Act), 15 U.S.C. §§ 1601-1665 (1970).

[20]D. CAPLOVITZ, *supra* note 9, at 3.

[21]Restrictions on Garnishment Act, Title II 15 U.S.C. §§ 1671-1677 (1970).

[22]*See* Jordan & Warren, *supra* note 15, at 457.

[23]*See* Curran, *supra* note 3, at 410. *But cf.* Tennessee Credit Clearing House v. Lindsey, 162 Tenn. 149, 35 S.W. 2d 393 (1931). The case is an early example of the function of the debt-adjusting agency. The agency's function is to help financially troubled debtors to settle their financial obligations acting as an intermediary between the debtor and his creditors. Since all that the creditor wants is the money owed him, the adjusting agency is often able to obtain an extension from the creditor, and thus modify the indebtedness of the consumer in such a way that the debt can be paid. *See also* 15 U.S.C. § 1692a(6)(E), wherefore the concept of nonprofit debt-adjusting agencies are upheld and exempted from the statutory definition of debt collector. *But see* Ferguson v. Skrupa, 372 U.S. 726, 727. nn. 1 & 2 (1963) for legislative power to prohibit adjusting agencies.

### *Failure Under the Common Law to Protect Consumers from Debt Collection Abuses*

Under the common law, debt collectors have been allowed to employ a wide range of tactics with little to fear in their attempts to collect delinquent accounts: 1) skip tracing;[24] 2) letters and telegrams;[25] 3) telephone calls;[26] 4) contact with debtor's employer;[27] 5) deceptive communications;[28] 6) sham legal process;[29] and 7) sham government forms.[30]

In the collection process, debtors' rights to be free from harrassment and abusive collection practices have historically been limited to libel and slander.[31] In recent years the common law remedies have broadened to include invasion of privacy, abuse of process, malicious prosecution, and the intentional infliction of emotional distress.[32] In spite of the additional remedies, the consumer's ability to gain relief

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[24]Many times a debtor has moved his place of residence without leaving a forwarding address. For instance, if the collector is unable to locate the debtor in the telephone book or city directory he may send letters to the address of a person whose name is similar to that of the debtor's hoping that an unwary relative might know of his whereabouts. *See* Fair Debt Collection Practices Act § 802, 15 U.S.C. § 1692 (Cum. Supp. 1978) [hereinafter cited as 15 U.S.C. § 1692]. Under the provisions of the statute a collector seeking location information from any third person must identify himself and his purpose of confirming location concerning the consumer, he cannot state that the consumer owes a debt and when using the mails or telegram, he cannot use language or symbols which communicate that the collector is in the debt collection business. *Id.* at § 1692b. The debt collector is prohibited from communicating the consumer's debt to any third person without the consumer's prior consent. *Id.* at § 1692c(b). It is an unfair collection practice for a collector to use any language or symbol when communicating with the debtor by mail or telegram if it indicates that he is in the collection business. *Id.* at § 1692f(8).

[25]*Id.*

[26]*Id.* at § 1692b,c.

[27]*Id.* at § 1692c(b).

[28]*Id.* at § 1692e. *See also* 15 U.S.C. § 45(a) (1970).

[29]*Id.* at § 1692e(4)(5). This section basically prohibits collectors from theatening to take legal actions when such actions are not legally possible or intended.

[30]*Id.* at § 1692e(9)(10); *See also* 18 U.S.C. §§ 709-712; United States v. Boneparth, 456 F.2d 497 (2nd Cir. 1972) (1970); and § 97-9-1 MISS. CODE ANN. (1972). 15 U.S.C. § 1692a(6)(E), in which the concept of nonprofit debt-adjusting agencies are upheld and exempted from the statutory definition of debt collector. *But see* Ferguson v. Skrupa, 372 U.S. 726, 727, nn. 1 & 2 (1963) for legislative power to prohibit adjusting agencies.

[31]*See* 18 AM. JUR. PROOF OF FACTS, *Actionable Practices in Debt Collection* § 24 (1967).

[32]*See* Annot., 15 A.L.R.2d 158 (1951):

> The law, . . ., recognizes the right of a creditor to attempt, by all legitimate means to collect whatever sums may be due to him from a debtor, and also to threaten resort to proper legal procedure for the collection of such a debt. However, when the creditor's agents become too enthusiastic in their pursuit of the dollars due to the creditor, and resort to insulting and humiliating language, whether verbally or by letter, the courts have, in many instances, held that the creditor may be obliged to respond in damages for injuries caused to the debtor thereby.

*Id.* at 158. *See also* note 32, *supra.*

in court has remained very limited. The need for specific statutory language, as exemplified by the federal Fair Debt Collection Act,[33] can be seen by the failure of the courts, *via* the common law, to protect consumers from unfair debt collection practices.

*Libel and Slander*

When prosecuting for libel or slander, it must be determined (1) whether or not the defendant's publication[34] is true;[35] and (2) whether the publication was made pursuant to a conditional-qualified privilege. In the case of debt collecting agencies and credit reporting agencies a conditional privilege normally exists.[36] When such a qualified condition exists, Mississippi courts have consistently held that for a false publication in an action in libel or slander to stand, the collector or collecting agency must have acted in such a way as to show bad faith and malice.[37] The real difficulty lies in the consumer-plaintiff's burden to prove bad faith and malice in the creditor-defendant's[38] publication. Pursuant to Mississippi law,[39] for there to be malice the published statement must be false and defamatory in order to injure the reputation of an individual and expose him to public hatred, contempt, and ridicule.[40]

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[33]15 U.S.C. § 1692.

[34]"Publication is essential to slander, and it must be in the presence of one or more other parties." Kirk Jewelers, Inc. v. Bynum, 222 Miss. 134, 139, 75 So. 2d 463, 464 (1954). *See also* W. PROSSER, LAW OF TORTS 776, 792 (4th ed. 1971).

[35]W. PROSSER, LAW OF TORTS 824 (3d ed. 1964). Truth is a complete defense in civil libel suits. *See also* MISS. CODE ANN. § 97-3-57 (1972).

[36]*See* Wilson v. Retail Credit Co., 325 F. Supp. 460 (S.D. Miss. 1971), *aff'd*, 438 F.2d 1043 (5th Cir. 1971). "Such a report enjoys a qualified privilege when it is made in good faith as here. . . . It is the rule that where a statement or report is qualifiedly privileged that it is immaterial whether its contents were libelous per se or libelous per quod." *Id.* at 1045. *See also* Garraway v. Retail Credit Co., 244 Miss. 376, 141 So. 2d 727 (1962) & Retail Credit Co. v. Garraway, 240 Miss. 230, 126 So. 2d 271 (1961). (Conditional privilege accorded collectors and mercantile reporting agencies); and Reliance Mfg. Co. v. Graham, 181 Miss. 549, 179 So. 341 (1938) (conditional privilege accorded former employer for statements made concerning termination of former employee).

[37]*See* Wilson v. Retail Credit Co., 355 F. Supp. 460 (S.D. Miss.), *aff'd*, 438 F.2d 1043 (5th Cir. 1971).

> The formulation and communication of confidential credit reports are an integral part of the business community and necessarily involve a certain amount of intrusion or prying into one's personal affairs. It is only where actions of a company engaged in this business are tainted with malice or a reckless disregard for the truth that a cause of action [for an invasion] is established. *Id.* at 467.

*See also* Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co., 430 F.2d 38 (5th Cir. 1970); Garraway v. Retail Credit Co., 244 Miss. 376, 141 So. 2d 727 (1962).

[38]*See* Hooper-Holmes Bureau, Inc. v. Bunn, 161 F.2d 102 (1947). A "plaintiff to recover for damages caused by defamation in these privileged reports must prove the publication was made from express malice." *Id.* at 104. *See also* Garraway v. Retail redit Co., 244 Miss. 376, 141 So. 2d 727 (1962); and Reliance Mfg. Co., v. Graham, 181 Miss. 549, 179 So. 341 (1938).

[39]MISS. CODE ANN. § 95-1-1 (1972). *See also* Alabama & V. R. Co. v. Brooks, 69 Miss. 168, 13 S 847 (1891).

[40]*See also* GA. CODE § 105-701 (1968).

The remedial scope of libel and slander actions is even more complicated since the common law fails to provide a consistent legal structure for consumer-debtors to rely on.[41] It becomes apparent that where a charge or imputation of credit and financial unworthiness does not affect the debtor in his business, vocation, or profession, such a publication is not libelous per se. Even if the debtor does receive adverse feedback as a result of the publication, most collectors and credit agencies are protected by the shield of conditional privilege, so long as malice is not present in the publication.

*Invasion of Privacy*

This tort may be based on the over-zealous debt collector's attempt to collect by giving undue publicity to the debt. "It is generally recognized that a creditor has a right to take reasonable action to pursue his debtor and persuade payment, although the steps taken may result in some invasion of the debtor's privacy."[42] "The right of privacy is designed primarily to protect the feelings . . . of human beings. . . ."[43]

The right of privacy is often infringed upon by creditors when a privileged purpose is established. For instance, a collector's communication with the debtor's employer to solicit the employer's aid in collecting the amount due or to inform the employer that a garnishment action will be brought has been upheld as privileged communications.[44] Calling the debtor and sending him telegrams have been held to constitute a privileged invasion of the debtor's right to privacy.[45] Such communications have been held privileged because the creditor or collector has a right to urge a payment of a just debt and to threaten legal proceedings to enforce such payment.[46] To maintain an action for invasion of privacy when publication of the plaintiff's indebtedness has been communicated to third parties, it is

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[41] *See* Wrought Iron Range Co. v. Boltz, 123 Miss. 550, 86 So. 354 (1920).

> As to language which imputes dishonesty or want of credit in an individual it is very generally recognized that it is impossible to lay down any definite rule which will govern in all cases, and that the language used and the particular facts and circumstances of each case must control.

*Id.* at 558.

[42] Annot., 14 A.L.R.2d 750, 770 (1950).

[43] 77 C.J.S. *Right of Privacy* § 2 (1952).

[44] *See* Patton v. Jacobs, 118 Ind. App. 358, 78 N.E.2d 789, (1948); and Lewis v. Physicians and Dentists Credit Bureau, Inc., 27 Wash. 2d 267, 177 P.2d 896 (1947). *But see* 15 U.S.C. § 1692c(b).

[45] *See* Davis v. General Finance & Thrift Corp., 80 Ga. App. 708, 57 S.E.2d 225 (1950). Such communication with the debtor by the creditor or collector has been upheld so long as the communication was made in good faith minus oppressive or coercive conduct by the creditor. *But see* 15 U.S.C. § 1692c(a)(c),d(5).

[46] *See* Lewis v. Physicians and Dentists Credit Bureau, Inc., 27 Wash. 2d 267, 177 P.2d 896 (1947).

essential for the consumer-debtor to show that the collector has communicated to the public information concerning a private matter, and show that the collector did so in a manner that was coercive and aggressive.[47]

*Emotional Distress and Mental Anguish*

A suit brought by a consumer-debtor will typically arise when a collector, while in pursuit of collecting a just debt, becomes too enthusiastic in his pursuit and resorts to insulting and humiliating language.[48] In carrying the burden of proof, however, the plaintiff-debtor's task is far from simple. The courts have consistently held that the law provides no remedy for a plaintiff's mental distress when the anxiety is a result of the collector's reasonable attempts to inform the debtor that a valid debt needs to be paid[49] and if the debt is not paid the debtor will be subject to civil action.[50]

Recovery has been limited to only those situations where the defendant-collector's conduct has been shown to be extreme,[51] with

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[47]*See* Patton v. Jacobs, 118 Ind. App. 358, 78 N.E.2d 789 (1948). *See also* Quina v. Roberts, 16 So. 2d 558 (La. App. 1944); and Housh v. Peth, 165 Ohio St. 2d 35, 59 Ohio Op. 2d 60, 133 N.E.2d 340 (1956). The conditional privilege of communication with the debtor's employer in an attempt to collect a just debt may be forfeited if the collector attempts to create a situation where the employee may lose his job or make threats to the employer of possible legal entanglements. Some oppressive or coercive conduct by the creditor is essential to the tort.

[48]*See* T. G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481 (Miss. 1972).

> There is a modern trend of court opinions moving toward permitting the recovery for mental distress or emotional damages as an independent ground of recovery, in cases of intentional or willfull wrong or acts done with such gross carelessness or recklessness as to indicate utter disregard for the rights of others.

[49]*See* Clark v. Associated Retail Credit Men of Washington, D.C., 105 F.2d 62 (D.C. Cir. 1939).

[50]*E.g.*, in Carrigan v. Henderson, 192 Okla. 254, 135 P.2d 330 (1943), the court held that the defendant collector was merely threatening to do what he had a legal right to do, and that "fright, worry, agitation, and the like, suffered from threats to take steps for the collection of a debt or for the protection of legal rights based on statute, cannot serve as the basis for damages." *Id.* at 332. *See also* Cluff v. Farmers Ins. Exch., 10 Ariz. App. 560, 460 P.2d 666 (1969); and Annot., 46 A.L.R.3d 772 (1972):

> [T]he courts, while recognizing the potential liability for emotional distress or consequential physical injury, have tended to place explicit limitations upon recovery apparently in recognition of the fact that creditors have a right to seek to collect debts at least by reasonable means, and of the possible danger of opening the door to a flood of litigation for damages for hurt feelings and alleged physical consequences flowing therefrom, which the average person may be expected to be compelled to withstand as a function of living in a modern society.

*Id.* at 778.

[51]*See* Golden v. Dungan, 20 Cal. App. 3d 295, 304, 97 Cal. Rptr. 577, 583 (1971):

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the

the express intent to cause physical injury,[52] or where the distress caused was of a severe nature.[53] The aggrieved debtor must also be prepared to demonstrate that his mental suffering is the natural and probable result of the statements made by the defendant-collector.[54] The courts have declared that "there is a vast difference in causal effect between a simple statement of purpose based on a clear legal right, and aggravated, wanton, or abusive language in excess of anything reasonably calculated to state a person's purpose based upon a clear legal right."[55]

It is historically apparent that in a suit for mental anguish and emotional distress, the debtor must first suffer severe emotional and/or physical injury as a result of the collector's extreme and malicious behavior before the debt collector is forced to cease his harassment tactics.[56]

### *Abuse of Process* and *Malicious Prosecution*

The tort of abuse of process involves the misuse of legal process for some purpose not warranted or commanded by the writ, *i.e.*, coercion, and outside the scope of legal authority[57] for which the process

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plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

*Id.*

*See also* Public Finance Corp. v. Davis, 66 Ill. 2d 85, 306 N.E.2d 765 (1977); Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932); Agis v. Howard Johnson Co., 355 N.E.2d 315 (Mass. 1976); T. G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481 (Miss. 1972); Lyons v. Zale Jewelry Co., 246 Miss. 139, 150 So. 2d 154 (1963); Jones v. Nissenbaum, Rudolph & Seidner, 244 Pa. Super. 377, 368 A.2d 770 (1976); and Moorhead v. J. C. Penny Co., Inc., 555 S.W.2d 713 (Tenn. 1977).

[52]*See* Lyons v. Zale Jewelry Co., 246 Miss. 139, 150 So. 2d 154 (1963). When definite and objective physical injury is produced as a result of emotional distress wrongfully caused by the defendant, the defendant may be liable for physical injuries. *See also* Hall v. Montgomery Ward & Co., 252 N.W.2d 421 (Iowa 1977). "Whether a defendant's conduct in a common-law action is outrageous is determined by an objective standard unless the defendant knew of the plaintiff's peculiar susceptibility." *Id.* at 425.

[53]*See* note 52, *supra.*

[54]*E.g.*, Peoples Finance & Thrift Co. v. Harwell, 183 Okla. 413, 82 P.2d 994, 995 (1938).

[55]*Id. See also* note 52, *supra.*

[56]*See generally* Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936). *But see* 15 U.S.C. § 1692c(a), d, e(4)(5), (7), (8).

[57]In the United States the debtor is protected under 28 U.S.C. § 2007 (prohibition for imprisonment for a debt) and in Mississippi under the MISS. CONST. of 1890, art. III § 30 for inability to pay a civil debt. *Compare* P. ROCK, MAKING PEOPLE PAY 221 (1973). (In support of the system of debtor prisons in England).

was intended.[58] The plaintiff's burden of proof is required to go beyond the establishment of illegal misuse of process. He must also prove that an ulterior motive was involved.[59]

To sustain a cause of action for malicious prosecution, it is necessary to establish malice and want of probable cause.[60] Like abuse of process, malicious prosecution has been applied by creditors and collectors, with the aid of "cooperative law enforcement officials," for the purpose of extorting the debtor to hurry and pay.

Under either cause of action an aggrieved debtor will often find himself unable to effectively pursue his rights. Such lawsuits are costly and time consuming. The average consumer is usually unable to afford the fees for filing costs and depositions. It is also apparent that the job of discovery is complicated since law enforcement officials make impressive witnesses and they are usually reluctant to testify. The abusive collector, although not immune from civil prosecution, is insulated with the confidence that he will probably never be forced to answer for his actions in court.[61]

Failure on the part of the states to provide adequate protective legislation and the common law's inability to quash unfair debt collection practices, substantiate the real need for comprehensive federal legislation. Congress recognized this need when it decided to approach the problems consumers faced due to unfair collection practices.

## BRIEF LEGISLATIVE HISTORY OF FAIR DEBT COLLECTION PRACTICES ACT

The Fair Debt Collection Practices Act 15 U.S.C. § 1692 (Cum. Supp. 1978), an amendment to the Consumer Credit Protection Act (CCPA), was introduced for the second time in the House of Representatives as H.R. 5294.[62] Although the resolution did not encounter

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[58]*See* Hyde Constr. Co., Inc. v. Koehring Co., 387 F. Supp. 702 (S.D. Miss. 1974); Magnum v. Jones, 236 So. 2d 741 (Miss. 1970); and Little v. United States Fidelity & Guar. Co., 217 Miss. 576, 64 So. 2d 697 (1953).

[59]*Id. See also* Edmonds v. Delta Democrat Publishing Co., 230 Miss. 583, 93 So. 2d 171 (1957):

> Typical of the cases where the action will lie is where through the employment of process a man has been arrested or his property seized in order to extort payment of money from him even though the claim be a just one other than in that suit, or to prevent a conveyance, or to compel him to give up possession of something of value, when such were not the legal objects of the suit.

*Id.* at 594, 175.

[60]*See* Hyde Constr. Co., Inc. v. Koehring Co., 387 F. Supp. 702 (S.D. Miss. 1974); Chain v. Int'l. City Bank and Trust Co., 333 F. Supp. 463 (E.D. La. 1971); and Edmonds v. Delta Democrat Publishing Co., 230 Miss. 583, 93 So. 2d 171 (1957).

[61]Jordan & Warren, *supra* note 15, at 457.

[62]H.R. 5294, 95th Cong., 123 CONG. REC. H2919 (daily ed. April 4, 1977). The Resolution was originally introduced and passed during the 94th Congress, 1976 session, but did not have enough time to be acted upon by the Senate. H. R. 13720, 94th Cong., 2d Sess., 122 CONG. REC. H7787-98 (1976).

strenuous opposition in the hearing,[63] opponents raised heated debate immediately before the vote.[64] There were two objections: 1) unwarranted intrusion of the federal government into an area intended for state jurisdiction and regulation,[65] and 2) the proposed criminal sanction imposed on debt collectors who willfully violated the provisions of the Act.[66] Opposition was mounted so quickly, H.R. 5294 passed by only one vote.[67]

By the time the resolution was introduced on the Senate floor for debate and voting, effective compromises had been worked out. The criminal provision was dropped due to testimony during Senate Hearings that described the criminal sanction as unnecessary and probably unenforceable.[68] Proponents also had explained convincingly enough that the possibility of state regulation would still exist because of sections 1692n and 1692o.[69] Under section 1692o a state may be exempted if it enacts substantially similar laws. Furthermore, under section 1692n only inconsistent state laws are annulled by the FDCPA, with state laws affording greater protection left in force. Thus, state regulation would not be foreclosed by the FDCPA. Finally, the fact that many states had failed to enact any debt collection laws and only eight states had strong debt collection statutes pointed to the urgency of federal regulation and uniformity.[70]

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[63]*Proposed Amendment to the Consumer Credit Protection Act: Hearings on H.R. 5294 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency, and Housing*, 95th Cong. 1st Sess. 1-773 (1977). *Cf.*, Supplemental Views on H.R. 5294.

[64]123 CONG. REC. H2924-34. (daily ed. Apr. 4, 1977).

[65]*Id.* at H2928-33 (remarks of Rep.'s Ashbrook, Sawyer, Bauman and Rousselot).

[66]*Id.* at H2933-34 (remarks of Rep. Edwards).

[67]*Id.* at H2934-35.

[68]*Senate Hearings*, *supra* note 15, at 51 (statement of Rep. Chalmers Wylie); 181 (statement of Rep. Charles Wiggins); 442 (A National Survey of the Complaint-Handling Procedures Used By Consumers 1976); 666-67 (statement from the Department of Justice).

[69]§ 1692 n. Relation to State laws.

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

§1692o. Exemption for State Regulation.

> The commission shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the commission determines that under the law of that State, that class of debt collection practice is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

[70]*See* note 17, *supra*.

The "federal intrusion" objection stemmed partly from prior experience with CCPA legislation.[71] Because the FDCPA was patterned after prior CCPA legislation,[72] in particular the liability section, a noteworthy compromise was made to appease the opponents: the one hundred dollar minimum recovery found under the Truth-in-Lending Act[73] was eliminated in an attempt to avoid further nuisance suits and court congestion. A provision was also entered to award the defendant attorney's fees when it could be shown the suit was brought in bad faith.[74]

Further departure from prior CCPA legislation is found in section 1692l(d) of the FDCPA.[75] Under this provision the confusion of interpreting additional commission or other federal agency procedures and regulations will not haunt businessmen and their counsel the way Regulation Z and the Four Installment Rule[76] have. Thus,

> the law is within the four corners of this bill . . ., the Federal Trade Commission has to come back to this Congress to find out what they are supposed to do in the case of a practice which they find, or think should be declared to be, an unethical or unlawful practice: In other words, Congress is the final authority.[77]

Although the American Bar Association continued its opposition, urging that regulation of collection agencies be left to the individual states,[78] the resolution passed the Senate supported by a wide range of the American public, including the two major trade associations.[79] On its return to the House, the Resolution passed with little debate by voice vote.[80] The compromises effectively snuffed out previous opposition.

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[71] *See* SENATE REPORT, *supra* note 7, at 9; *Senate Hearings*, *supra* note 15, at 5 (statement of Sen. Garn).

[72] *See Senate Hearings*, *supra* note 15, at 51 (statement of Chalmers Wylie, ranking minority member).

[73] "[T]he liability under this subparagraph shall not be less than $100 nor greater than $1,000." 15 U.S.C. § 1640(a)(2)(A)(ii) (1970).

[74] 15 U.S.C. 1692k(a)(3).

[75] 15 U.S.C. 1692l(d). "Neither the Commission nor any other agency referred to in subsection (b) of this section may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this subchapter." *Id.*

[76] *See* Mourning v. Family Publications Services, Inc., 411 U.S. 356 (1973). *See also* 15 U.S.L. § 1604; 12 C.F.R. 226.8 (1978).

[77] 123 CONG. REC. H2924 (daily ed. Apr. 4, 1977) (remarks of Rep. Wylie).

[78] *See Senate Hearings*, *supra* note 15, at 763-65. (A.B.A. Report to the House of Delegates Standing Committee on National Conference Groups).

[79] *See* SENATE REPORT, *supra* note 7, at 2. The "bill was strongly supported by consumer groups, labor unions, State and Federal law enforcement officials, and by both national organizations which represent the debt collection profession, the American Collectors Association and Associated Credit Bureaus." *Id.*

[80] 123 CONG. REC. H8993-97 (daily ed. Sept. 8, 1977).

## MAJOR ASPECTS OF THE FAIR DEBT COLLECTION PRACTICES ACT

In a nutshell, the purpose of the FDCPA is to protect consumers from the unethical debt collector.[81] Under the FDCPA, the debt collector is defined to include only those *third parties* who regularly collect consumer debts for others.[82]

The FDCPA provides the consumer-debtor with several major protective measures:

*Acquisition of location information.* When contacting third persons to establish a consumer-debtor's whereabouts, a debt collector must not reveal that the consumer owes a debt in any form or manner. The debt collector is further restricted if he knows that the consumer-debtor is represented by an attorney. If the collector has the attorney's name and address, he is forbidden from contacting third parties whatsoever in an attempt to acquire further location information.[83]

*Communication in connection with debt collection.* Unless the consumer gives prior consent, a debt collector may not contact the consumer at any inconvenient time or place; the collector may not contact the consumer if the consumer is represented by an attorney and may not call the consumer at work if the collector knows that the consumer's employer prohibits such calls.[84] There is also a general prohibition on the collector making third party contacts.[85] To protect himself from continued annoyance, the consumer may give the collector written notice that he refuses to pay the debt and simultaneously order the collector to cease contacting him. The collector is then forbidden from making further contacts, except to notify the consumer of possible further actions.[86] The collector is further forbidden from committing acts with the intent to harass, abuse, or cause apprehension of violence.[87] This is of particular importance due to the Congressional concern over the reputation debt collectors have acquired in the past for abusive practices.[88]

In addition to the prohibitions already stated, the debt collector is also prohibited from making false or misleading representations when

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[81] *See* 15 U.S.C. § 1692.

[82] *Id.* § 1692a(6). *But see* Comment, *Debt Collection Practices: The Need for Comprehensive Legislation*, 15 DUQUESNE L. REV. 97,120 (1976). The law "has been criticized for concentrating its restrictions on the practices of professional debt collectors." *Id.* at 120.

[83] *See* 15 U.S.C. § 1692b.

[84] *Id.* § 1692c(a).

[85] *Id.* § 1692b.

[86] *Id.* § 1692c.

[87] *Id.* § 1692d.

[88] *Id.* § 1692.

attempting to collect debts;[89] using unfair practices, such as charging excess interest on debt or revealing to third parties the consumer's debt;[90] furnishing deceptive forms with the intention of creating a belief in the mind of the debtor a third person other than the debt collector is collecting the debt;[91] and applying payments to disputed debts.[92]

## ENFORCEMENT OF THE ACT

Enforcement of the FDCPA is provided by three avenues. First, an individual may bring an action under section 1692k. Second, section 1692k also provides for a class action when proper. Finally, administrative enforcement by the Federal Trade Commission is included under section 1692l. The authors will concentrate on section 1692k since the primary means of enforcement of the Act like 15 U.S.C. section 1640 (1968) of the Truth-in-Lending Act, is by individuals.[93]

The civil liability section of this Act apparently used the Truth-in-Lending Act civil liability section as a model. The changes made in section 1692k of the Act were made with Congressional intent to retain the substance of 15 U.S.C. section 1640 (1968) of the Truth-in-Lending Act, yet improve the negative aspects some critics felt section 1640 contained.[94] Thus a study of pertinent case law will aid in a greater understanding of the civil liability provisions of the FDCPA.

Probably the most famous section 1640 case is the early decision of *Ratner v. Chemical Bank New York Trust Company*.[95] In this case the federal district court described the intent of the statute: "The scheme of the statute, as both sides agree, is to create a species of 'private attorney general' to participate prominently in enforcement."[96] This concept has been followed uniformly, including the more recent Fifth Circuit case of *McGowan v. Credit Center of North Jackson, Inc.*[97]

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[89]*Id.* § 1692e. Impersonating a government official or attorney, misrepresenting the amount or nature of a debt, misrepresenting a consumer's legal rights, deliberately using false credit information, etc. are prohibited.

[90]*Id.* § 1692f.

[91]*Id.* § 1692j.

[92]*Id.* § 1692h. When applicable, the debt collector must also apply payments in accordance with the consumer-debtor's directions.

[93]*See* note 77, at 52, *supra*. *See also*, Ives v. W. T. Grant Co., 522 F.2d 749, 756 (2nd Cir. 1975).

[94]*See* notes 71-75, 77, *supra*.

[95]329 F. Supp. 170 (S.D.N.Y. 1971).

[96]*Id.* at 280.

[97]"The Congressional goals underlying the Truth-in-Lending Act include the creation of a system of private attorneys general to aid in the effective enforcement of the Act." 546 F.2d 73, 77 (5th Cir. 1976). *See e.g.*, White v. Arlen Realty and Development Corp., 540 F.2d 645, 649 (4th Cir. 1975); Sosa v. Fite, 498 F.2d 114, 121 (5th

To help promote this "private attorney general" concept and allow consumer victims more participation in policing the Act, courts have uniformly held that the language of the Title Act "should be construed liberally in light of its broadly remedial purpose."[98] There is authority for the proposition that the Supreme Court has implicitly affirmed this view.[99] Both the "private attorney general" concept and "liberal construction" view should apply to the FDCPA, since the FDCPA's main purpose is to further consumer protection by self-enforcement.[100]

The second means of enforcement under the FDCPA is the class action provision.[101] Under the comparable Truth-in-Lending Act section, pre-1974 courts struggled to answer the questions of whether the Truth-in-Lending Act meant to provide for class actions and whether class actions should be dismissed because of the possibility of a "horrendous result."[102] However, section 1640 was amended to limit the recovery under a class action. This amendment effectively disposed of the "horrendous result" rule.[103]

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Cir. 1974); Daugherty v. First National Bank and Trust Co. of South Bend, 435 F. Supp. 218 (N.D. Ind. 1977).

[98]Murphy v. Household Finance Corp., 560 F.2d 206, 210 (6th Cir. 1977); Hannon v. Security National Bank, 537 F.2d 327, 328 (9th Cir. 1976); Thomas v. Meyers-Dickson Furniture Co., 479 F.2d 740, 748 (5th Cir. 1973); French v. Wilson, 444 F. Supp. 216, 220 (D. R.I. 1978); Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270, 280 (S.D.N.Y. 1971). *See also* Ives v. W. T. Grant Co., 522 F.2d 749, 756 (2nd Cir. 1975).

[99]White v. Arlen Realty and Development Corp., 540 F.2d 645, 649 (4th Cir. 1975) (holding that Mourning v. Family Publications, Inc., 411 U.S. 356 (1973) implicitly affirmed the "liberal construction" rule of *Ratner*.)

[100]*See*, SENATE REPORT, *supra* note 7, at 5; *see also* notes 71-75, 77, *supra*.

[101]15 U.S.C. 1692k(a)(2)(B).

> In the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or one per centum of the net worth of the debt collector. . . .

*Id.*

[102]*See e.g.*, Mathews v. Book-of-the-Month Club, Inc., 162 F.R.D. 479 (N.D. Cal. 1974); Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972). For more background on the pre-1974 Truth-in-Lending class action controversy see Note, *Class Actions Under the Truth-in-Lending Act*, 83 YALE L.J. 1410-38 (1973).

[103]15 U.S.C. 1640(a)(2)(B) (1970).

> In the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such case shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor. . . .

*Id.*

Courts have uniformly held that the "horrendous result" concept was removed by the amendment. *E.g.*, Boggs v. Auto Trailer Sales, Inc., 511 F.2d 114, 118 (5th Cir. 1975). *See* Paer, *Truth in Lending: Protection for the Consumer or for the Creditor*, 53 N. C. L. REV. 1286-88 (1975); Comment, *The 1974 Amendments to the Truth in Lending Act*, 24 EMORY L.J. 371-72 (1975).

*Boggs v. Alto Trailer Sales, Inc.*[104] contains an analysis of the procedure a federal court should use in determining whether a class action should be maintained. First, the court must exercise its determination "within the parameters of Rule 23 as applied to the appertaining facts once these facts are adduced to the point that a determination may be made."[105] Then the determination of the trial court will stand absent an abuse of discretion.[106] Second, Rule 23 will be applied to Truth-in-Lending Act cases just as it is applied generally. This includes 1) establishing Rule 23(a) prerequisites[107] and 2) proceeding under Rule 23(b) once 23(a) prerequisites are met.[108] Since the *Boggs* decision is a post Truth-in-Lending Act Amendment case, the court's rationale concerning CCPA class actions should apply to the FDCPA also.

If the requirement of maintaining a class action suit under the FDCPA seems formidable, consider the additional rule in the decision of *Eisen v. Carlisle & Jacquelin.*[109] In that case the Supreme Court of the United States held that Federal Rules of Civil Procedure 23(c)(2) (1974) provides that in any class action suit under Rule 23(b)(3), the plaintiff must pay the costs of notice to all members who can be reasonably identified. Also, "[i]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case."[110] Because of the difficulties of maintaining a class action suit under the CCPA, it appears the most favored remedial device will continue to be an individual action. Therefore, the fact that class actions may recover greater punitive damages does not necessarily make them more appealing.

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[104]511 F.2d 114 (5th Cir. 1975).

[105]*Id.* at 117.

[106]*Id.*

[107]FED. R. CIV. P. 23(a):

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all parties is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

*Id.*

[108]"Usually, subsection (b)(3) is the avenue taken by plaintiffs seeking to maintain a class action within the Truth-in-Lending Act." Boggs, 511 F.2d at 117; FED. R. CIV. P. 23 (b)(3) says,

> (b) Class Actions Maintainable.
>
> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisified, and in addition:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

[109]417 U.S. 156 (1974).

[110]*Id.* at 176.

A substantial majority of courts in the United States recognize the general rule that a claim for exemplary damages alone is an insufficient basis for a cause of action, and that in order to justify the recovery of punitive damages, there must be a showing of actual injury which would justify an award of actual or compensatory damages.[111] But under Truth-in-Lending Act case law, where a violation of the Truth-in-Lending Act occurred, the clear majority of courts have given the minimum $100 recovery and thus opened the door to punitive damages, regardless of the technicality of the violations.[112] The rationale is to further the purpose of self enforcement and the "private attorney general" concept. However, under the FDCPA, the minimum recovery was dropped and courts will use the criteria under section 1692k(b)[113] to determine damages.[114] Should the courts continue to award actual and punitive damages for technical violations under the FDCPA, section 1692k(b) will hopefully lead a fair-minded court to allow damages commensurate with the violations.

The question will arise as to whether a suit brought for a strictly technical violation would be considered "harassment and in bad

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[111]17 A.L.R.2d 527.

[112]*E.g.*, Grant v. Imperial Motors, 539 F.2d 506 (5th Cir. 1976) ("[O]nce the court finds a violation no matter how technical, it has no discretion with respect to the imposition of liability.") *Id.* at 510; Pennino v. Morris Kirchbaum & Co., Inc., 526 F.2d 367 (5th Cir. 1976) (failure to use the term "new balance"); Houston v. Atlanta Federal Savings & Loan Ass'n., 414 F. Supp. 851 (N.D. Ga. 1976) (court held language as confusing and misleading where customer's statement provided for late penalty if monthly installments not paid when due, but express terms of mortgage gave 15 days after due date for late charges).

[113]15 U.S.C. 1692k(b).

> (b) In determining the amount of liability in any action under subdivision (a) of this section, the court shall consider among other relevant factors—
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> (1) in any individual action under subsection (a)(2)(4) of this section, the frequency and persistency of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or
>
> (2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

[114]Another disturbing question is whether a plaintiff that can show no actual or punitive damages has standing to sue. Previous Truth-in-Lending decisions were split on the issue. *See* 53 N. CAR. L. REV. Note 125, at 1285. Critics say this helped create a logjam of cases in the federal district courts. *See also Senate Hearings, supra* note 15, at 5.

However, there appears to be no Congressional intent to the effect that eliminating the $100 minimum recovery was meant to rob a plaintiff of standing where he has no actual or punitive damages but merely a technical violation to complain about. It appears that Congress eliminated the $100 minimum recovery merely to allow more discretion in the amount of damages, if any.

faith" under section 1692k(a)(3). This argument should be invalid since Congress meant to set out objective standards to determine violations and the importance of the "private attorney general" concept should not be overlooked.

Jurisdiction for the FDCPA is conferred under section 1692k(d).[115] The question of what is meant by "any other court of competent jurisdiction" has been answered under the comparable Truth-in-Lending Act section jurisdiction.[116] In *Lewis v. Delta Loans, Inc.*[117] the Mississippi Supreme Court held there is nothing inherently wrong with the idea that state and federal courts can exercise concurrent jurisdiction over federally created rights.[118] Unless these federally created rights are expressly restricted to federal courts, state courts have concurrent jurisdiction.[119] Finally, in the absence of congressional intent, the court held that state courts (which include county courts) have concurrent jurisdiction under the Truth-in-Lending Act provision.[120] Although common law remedies carry a greater burden of proof, they may be included under the cause of action if necessary. Furthermore, because of their independent jurisdictional base under section 1692(k)(d), federal district courts should address the propriety of exercising pendent jurisdiction over the state claim.[121]

The Truth-in-Lending Act civil liability section that has spawned the most litigation in recent years is, quite naturally, the provision for attorney's fees.[122] Courts have begun to award attorney's fees under the Truth-in-Lending Act unrestrained by the small amount of damages.[123]

In *McGowan*, in response to a district court's reduction of fees because the attorney had been successful "in only one minor charge,"

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[115]15 U.S.C. § 1692k(d). "An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs." *Id.*

[116]15 U.S.C. § 1640(e) (1970). This section differs from 15 U.S.C. § 1692k(d) only in the fact that the words "without regard to the amount in controversy" are omitted from section 1640(e), but obviously implicit because of the effect of section 1640(e).

[117]300 So. 2d 142 (Miss. 1975).

[118]*Id.* at 144.

[119]*Id.*

[120]*Id.*

[121]*See* FED. R. CIV. P. 18; Murray v. Amoco Oil Co., 539 F.2d 1385 (5th Cir. 1976) held that under the Truth-in-Lending Act, the district court must address the question of pendent jurisdiction because of the independent jurisdictional base of the Truth-in-Lending claim. *See generally*, C. WRIGHT, LAW OF FEDERAL COURTS, 72-77 (3rd ed. 1976).

[122]15 U.S.C. § 1692k(a)(3).

[123]*See* Pedro v. Pacific Plan of California, 393 F. Supp. 315 (N.D. Cal. 1975) (The court awarded $750 damages with $3,000 attorney's fees); Grubb v. Oliver Enterprise, Inc., 358 F. Supp. 970 (N.D. Ga. 1972) (The court awarded $200 damages with $1,750 attorney's fees).

the Fifth Circuit said such a reduction "would be inconsistent with the congressional policy of implementing enforcement of the Truth-in-Lending Act."[124] Furthermore, on remand the district court was to determine a reasonable attorney's fee in accordance with general principles of assessment.[125] The Federal Courts have also held that additional attorney's fees may be obtained for a successful appeal.[126]

The FDCPA interestingly dropped the minimum $100 penalty found under the Truth-in-Lending Act. This presents a question: should attorney's fees be allowed where the court considers the violation to be so technical as to not merit any damages? This answer may lie in the answer to the following: Do the words "foregoing liability" in section 1692k(a)(3) mean there must be some liability under section 1692k(a)(1) or (2)? Probably so, but even if not, reasonable men would assume that where there are no actual damages and a court allowed no punitive damages using section 1692k(b) as a guide an attorney should not receive fees. What grave injustice has he proven? The better view would be to allow attorney's fees only where there are at least nominal damages awarded. Under this viewpoint the congressional intent to avoid further nuisance suits may be furthered.[127]

The other Truth-in-Lending Act suits concerning attorney's fees that will help clarify the FDCPA are *Sellers v. Wollman*[128] and *Hannon v. Security National Bank*.[129] In the *Sellers* case, the Fifth Circuit addressed the question of whether attorney's fees could be given to a member of a Legal Aid Society representing the plaintiff. The Fifth Circuit held that an award for attorney's fees "is not contingent upon

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[124]546 F.2d at 77.

[125]In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) the Fifth Circuit set out the following guidelines to be used as general principles that govern the assessment of attorney's fees:

1) The time and labor required.
2) The novelty and difficulty of the question.
3) The skill requisite to perform the legal service properly.
4) The preclusion of other employment by the attorney due to acceptance of the case.
5) The customary fee.
6) Whether the fee is fixed or contingent.
7) Time limitations imposed by the client or circumstances.
8) Amount involved and results obtained.
9) Experience, reputation, and ability of the attorney.
10) The "undesirability" of the case.
11) The nature and length of the professional relationship with the client.
12) Awards in similar cases.

*Id.* at 717-19.

[126]Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740 (5th Cir. 1973); Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974).

[127]*See* SENATE REPORT, *supra* note 7, at 9; *Senate Hearings*, *supra* note 15, at 5 (statement of Sen. Garn); 51 (statement of Chalmers Wylie, ranking minority member).

[128]510 F.2d 119 (5th Cir. 1975).

[129]537 F.2d 327 (9th Cir. 1976).

an obligation to pay an attorney or the fact that no fee was charged."[130] In *Hannon* the Ninth Circuit held that a law school graduate that represented himself under a Truth-in-Lending Action was not entitled to recover attorney's fees.[131]

Under the FDCPA there appear to be five key defenses available to the defendant debt collector. First, various definitional defenses will be available. Foremost among them is section 1692a(b), which defines what "debt collector" means under the Act and excludes (among others) attorneys, in-house collectors for creditors, process servers, government officials collecting in their official capacities, and bonafide consumer credit counseling services. Included under this defense will be the determination of class for a class action suit.[132] The second key area of defenses available to the defendant would be lack of jurisdiction or a bar of filing an action because of the statute of limitations.[133] Although *Lewis* held state courts have concurrent jurisdiction under the Truth-in-Lending Act, there is no authority concerning concurrent jurisdiction under the Truth-in-Lending Act with courts of more limited jurisdiction. The third key defense is known as the "unintentional error" defense.[134] The courts have consistently held since 1974 that the "unintentional error" defense was meant for "clerical" mistakes only.[135] The fourth key defense is the "good

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[130]510 F.2d at 123; Manning v. Princeton Consumer Discount Co., Inc., 533 F.2d 102, 106 (3rd Cir. 1976); Campbell v. Liberty Financial Planning, Inc., 422 F. Supp. 1386, 1389 (D. Neb. 1976); Gillard v. Aetna Finance Co., Inc., 414 F. Supp. 737, 749 (E.D. La. 1976). It should be remembered, however, that in many Legal Aid Society charters or rules, their attorneys are not allowed to handle "fee generating" cases. The reasoning is that the private bar can handle them satisfactorily. Certainly one would consider FDCPA and Truth-in-Lending actions as "fee generating." *See* R. CLONTZ, JR., 1 TRUTH IN LENDING MANUAL 3-181, (2d ed. 1976).

[131]"Had Congress wished to compensate non-attorneys for 'services' rendered on their own behalf in pressing their individual claims, it certainly would have done so." 537 F.2d at 329.

[132]*See* notes 104-108, *supra*.

[133]*See* notes 115-121, *supra*.

[134]15 U.S.C. § 1692k(c).

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

*Id.*

[135]For comparison, the following cases hold that only a creditor's "clerical" mistakes apply: Ives v. W. T. Grant Co., 522 F.2d 749, 757 (2nd Cir. 1975); Matter of Dickson, 432 F. Supp. 752, 760 (W.D.N.C. 1977); Gillard v. Aetna Finance Co., Inc., 414 F. Supp. 737, 748 (E.D. La. 1976); Powers v. Sims and Levin Realtors, 396 F. Supp. 12, 20 (E.D. Va. 1975); Starks v. New Orleans Motors, Inc., 372 F. Supp. 928 (E.D. La. 1974); Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971). For contrary results holding that section 1640(c) also applies to good faith attempts to comply with the Act, *see*, Hamilton v. G. A. C. Finance Corp., 4 CONS. CRED. GUIDE (CCH) ¶ 98,803 (N.D. Ga. 1974); Thrift Funds of Baton Rouge, Inc. v. Jones, 259 So. 2d 587 (La. App. 1971), *aff'd* 274 So. 2d 150, *cert. denied* 414 U.S. 820 (1937).

faith" reliance on a FTC advisory opinion. The similar Truth-in-Lending provision, section 1640(c), generated a conflict in authorities in the early 1970's as to whether the provision allowed a good faith reliance on advisory opinions of the Federal Reserve Board.[136] Thus, Congress amended section 1640 in 1974 to include 15 U.S.C. section 1640(f), which allows as a "good faith" defense, reliance on an advisory opinion of the FTC. This defense is also available under section 1692k(e) as long as the advisory opinion has not been "amended, rescinded, or determined by judicial or other authority to be invalid for any reason."[137] The fifth and final key defense is the "limitation of damages" aspect. Section 1692k(b) sets out criteria used in determining the amount of liability under an individual or class action.[138]

## CONCLUSION

For the last ten years consumers have made considerable gains in the form of protective federal legislation. In 1968 the Congress passed the Consumer Credit Protection Act (CCPA). The CCPA itself is broken into subchapters,[139] with the FDCPA being its newest subchapter. In order to protect consumers from the extortionate practices of "loan sharks" and organized crime,[140] the Extortionate Credit Transactions Act[141] was passed by Congress in 1968 to provide certain criminal sanctions for extortionate collection practices.[142]

Other pieces of federal consumer protection legislation had also been enacted prior to the FDCPA. For instance, under Title 15 U.S.C. §§ 41-58 (1970) the Federal Trade Commission (FTC) is empowered by Congress to institute proceedings to prevent deceptive practices in the collection of debts and the gathering of information about

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[136]Jones v. Community Loan & Inv. Corp. of Fulton County, 544 F.2d 1228, 1232, *rehearing denied* 545 F.2d 1298, (5th Cir. 1977), *cert. denied* 97 S. Ct. 2642 (1977); Ives v. W. T. Grant Co., 522 F.2d 749, 758 (1st Cir. 1975); Powers v. Sims and Levin Realtors, 396 F. Supp. 12, 20 (E.D. Va. 1975).

[137]15 U.S.C. § 1692k(e).

[138]*See* notes 111-114, *supra*.

[139]I. Consumer Credit Cost Disclosure [Truth-in-Lending Act (15 U.S.C. §§ 1601-1665) (1970)].

II. Restriction on Garnishment (15 U.S.C. §§ 1671-1677 (1970) ).

III. Credit Reporting Agencies [Fair Credit Reporting Act (15 U.S.C. § 1681) (1970)].

IV. National Commission on Consumer Finance Equal Credit Opportunity (15 U.S.C. §§ 1692-1692f (Cum. Supp. 1978) ).

V. Debt Collection Practices [Fair Debt Collection Practices Act (15 U.S.C. § 1692) (Cum. Supp. 1978) ].

[140]*See* Extortionate Credit Transactions, Pub. L. 90-321, § 202(a), 82 Stat. 159 (1970). *See also* Perez v. United States, 402 U.S. 146 (1971); United States v. Calegro De Lutro, 309 F. Supp. 462 (S.D.N.Y. 1970).

[141]18 U.S.C. §§ 891-896 (1970).

[142]*See e.g.*, Perez v. United States, 402 U.S. 146 (1971).

debtors.[143] Another statute, Title 18 U.S.C. sections 709-712 (1970), makes it a crime to falsely advertise and to misuse names so as to indicate a federal agency.[144]

It is also important to note that FTC activity in the area of debt collection dates back over thirty years.[145] The FTC has the authority to require collection services to cease and desist from using materials, from making representations which do not clearly reveal the true purpose for which the information is being requested,[146] and from making any form of representations with the intent to deceive.[147] In the process of administrative enforcement the courts have repeatedly confirmed the Commission's "wide discretion in determining the type of order that is necessary to cope with the unfair practices found. . . ."[148] Even before the codification of section 1692, the FTC had been active in third party debt collection practice cases.[149]

The fact that the FTC has been involved in third party debt collection practice cases for so long has prompted some groups to question

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[143]*See e.g.*, 16 C.F.R. § 237.1, n. (1978). The FTC expressly prohibits agencies from making the following misrepresentations:

(1) That the information is being sought in connection with a survey.
(2) That the agency is a casting agency for the motion picture or television industry.
(3) That an industry member has a prepaid package for the debtor.
(4) That a sum of money or valuable gift will be sent to the addressee if the required information is furnished.
(5) That the debtor's accounts have been turned over to innocent purchasers for value.
(6) That debts have been turned over to an attorney or an independent organization engaged in the business of collecting past-due accounts.
(7) That documents are legal forms.

*Id.*

*See also* 16 C.F.R. § 237.2 (1978) under which the FTC requires that any communication which has as its purpose the collection of a debt or the obtaining of information regarding a debtor disclose this purpose.

[144]*See* S. REP. No. 107, 86th Cong., 1st Sess. (1959); H.R. REP. No. 874, 86th Cong., 1st Sess. (1959). Section 712 prohibits:

> the use by collecting agencies or private detective agencies of any emblem, insignia, or name, or the words "national," "Federal," or "United States," or the initials "U.S." for the purpose of conveying and in a manner reasonably calculated to convey the false impression that such business is a department, agency, bureau, or instrumentality of the United States.

*See also* MISS. CODE ANN. § 97-9-1 (1972).

[145]*E.g.*, Bureau of Engraving, Inc. and Art Instructions, Inc., 39 F.T.C. 192 (1944).

[146]15 U.S.C. § 45 (1970).

[147]*See* note 143, *supra*. *See also* Providence Washington Ins. Co., 89 F.T.C. 345 (1977); Atlantic Industries, Inc., 85 F.T.C. 903 (1975); United States v. Boneparth, 456 F.2d 497 (2nd Cir. 1972); William H. Wise Co. v. Federal Trade Comm'n., 246 F.2d 702 (D.C. Cir. 1957); United States Stationary Co., 49 F.T.C. 745 (1953); and Bureau of Engraving, Inc., 39 F.T.C. 192 (1944).

[148]Federal Trade Comm'n. v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965).

[149]*See* notes 143 & 146, *supra*. *See also* Higgins, *ABA National Institute Proceedings on Consumer Credit: June 16-17, 1977*, 33 THE BUSINESS LAWYER 1013, 1015 (Feb. 1978).

the need for increased federal legislation. Some observers feel that "[t]he Commission's case-by-case approach has made quite clear what is expected of creditors, and there is little or no need to codify these cases in the form of a trade regulation rule."[150] Other observers state that section 1692 is an "unwarranted [f]ederal intrusion into an area best left to the states,"[151] that the "Federal Fair Debt Collection Practices Act will be one more regulatory burden on small businesses, the cost of which will be borne by the consumer."[152]

At first glance, the unsuspecting mind might be tempted to acknowledge the warnings of the opponents of the FDCPA. It is logical to assume, for instance, that there have been too many frivolous nuisance suits, as exemplified under the Truth-in-Lending Act,[153] and that there will be increased federal intervention in an area of law that had previously been determined by state and common law remedies. But once the thoughtful mind is able to penetrate the haze of "state's rights," etc., the root of all the warnings appears—money. To the third party debt collector, time is money, and money is time. The faster a collector can get a delinquent debtor to pay his bill, the quicker he can press on to new fields to conquer. It is interesting to note, however, that the FDCPA is supported by a wide range of the American public, including the collection industry itself.[154]

Some opponents of the FDCPA may claim that the CCPA, prior to the addition of section 1692, provides the debtor with adequate protection from debt collection abuses. This too is erroneous. The thrust of the Truth-in-Lending Act[155] "is to require full disclosure of credit costs so that consumers will be able to shop for credit."[156] Sections 1671 to 1677 on restrictions on garnishments are the legislative attempt to "remove the hardships stemming from the use of that remedy."[157] The Fair Credit Reporting Act [158] has a two-fold purpose. It is designated to regulate the consumer reporting industry and to

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[150]Higgins, *ABA National Institute Proceedings on Consumer Credit: June 16-17, 1977*, 33 THE BUSINESS LAWYER 1013, 1016 (Feb. 1978).

[151]SENATE REPORT, *supra* note 7, at 9 (additional views of Messrs. Schmitt, Garn, and Tower). *See also* 123 CONG. REC. H2928-33 (daily ed. Apr. 4, 1977) (remarks of Reps. Ashbrook, Sawyer, Bauman, and Rousselot).

[152]SENATE REPORT, *supra* note 7, at 9. *See also Senate Hearings*, *supra* note 15, at 3,4 (statement of Sen. Schmitt); 4-7 (statement of Sen. Garn).

[153]*See* SENATE REPORT, *supra* note 7, at 9; *Senate Hearings*, *supra* note 15, at 5 (statement of Sen. Garn).

[154]*See* note 79, *supra*.

[155]15 U.S.C. §§ 1601-1665 (1970).

[156]*Id.*

[157]*See* Caplovitz, *supra* note 5, at 653. *See also* Moo, *Legislative Control of Consumer Credit Transactions*, 33 LAW AND CONTEMPORARY PROBLEMS 656 (1968). "Basically the CCPA is only a disclosure law. It does not regulate or control . . . debtor's remedies, or any of the substantive features of a consumer credit transaction." *Id.* at 662.

[158]15 U.S.C. § 1681 (1970).

place disclosure obligations on users of collection reports.[159] It is a necessary link in the chain of consumer credit protection; but, like the other three subchapters of the CCPA, it gives no relief for the consumer-debtor who is plagued by the abusive third party debt collector.

It is inevitable that the FDCPA will continue to undergo some valid criticisms and some that are not so valid. For instance, the argument that the FDCPA will intrude on the rights of states to manage their own affairs is both an old and very weak one. Every time Congress seeks to enlarge the protective scope of the federal jurisdiction in the area of civil and human rights, there are always those who balk in the name of states' rights. The argument by legislators may derive from their indifference towards those who cannot protect themselves and/or their inability to grasp the historical significance of what they are saying. History has revealed on many occasions that as a civilization becomes more industrialized and urbanized in its evolution to modernity, the need for centralized and ordered government becomes more critical. Therefore, whether or not we like the idea of increasing federal encroachments, we must often adjust if our belief in a just and ordered system is to survive.

The argument in favor of the case-by-case approach is weak in its substantive origins. For instance, the ability of the common law to provide adequate legal protection before the abusive collector has had an opportunity to do his damage is practically non-existent. As previously discussed,[160] the common law is not designed for prevention, only compensation. By having specific legislation, accompanied by supportive regulations, the debtor and the collector are both protected. The debtor no longer is subjected to unnecessary harassment and the collector is encouraged to remember that an ounce of prevention will keep him from having to defend himself in court for collecting a just debt.

The fact that there has been some prior federal legislation[161] in the area of debt collections is by no means absolute in its effectiveness as a means of protection from debt collection abuses. Here the statutory failure is derived not only from a lack of substantive grit, but also from the presence of a loosely aligned confederation of statutes and a hodgepodge of complimentary regulations.[162] The FTC has historically engaged in policing collection agency practices and under section 1692 will continue to do so.[163] The difference is that laws governing debt collection practices may now be interpreted under one unambiguous source of federal legislation.

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[159]*See* Caplovitz, *supra* note 5, at 653.

[160]*See* pp., 161-66 *supra*.

[161]*See* pp., 166-68 *supra*.

[162]*See* 15 U.S.C. §§ 41-58; 18 U.S.C. §§ 709-712; and 18 U.S.C. §§ 891-896 (1970).

[163]*See Senate Hearings*, *supra* note 15, at 20, 21 (testimony of Rep. Annunzio).

If the FDCPA has any serious shortcomings it is only that the wording of the Act excludes attorneys and in-house-collectors from the statutory definition of debt collector.[164] The debtor's remedies and protections under law remain stagnant when the debtor is pursued by one of the aforementioned parties. One may even speculate that the FDCPA will create an increase in attorney collections.

The shortcomings, however, are far outweighed by the potential benefits which the consumer community stands to gain. At the same time, it is likely to perceive that the FDCPA will one day become the standard to which *all* collectors will adhere. It is not conjecture to say that, although in-house-collectors are immune from civil liability under the Act's sanctions, they will be more and more aware of the consumer-debtor's rights and will hopefully follow the FDCPA as their ethical guideline. The debt collecting industry will certainly attain a new sense of consciousness as to the rights of the individual because of the passage of the FDCPA.

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[164] *See* 15 U.S.C. § 1692a(6)(A),(F).