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## Abusive Debt Collection - A Model Statute for Virginia

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ABUSIVE DEBT COLLECTION—A MODEL  
STATUTE FOR VIRGINIA

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I. ABUSIVE COLLECTION — THE PROBLEM STATED

Among the many by-products of the phenomenal growth of consumer credit<sup>1</sup> in the last two decades has been the attempt on the part of existing legal institutions to grapple with the problem of coercive debt collection. The existence of the problem is no longer disputed, and the nature and extent of the abuse surrounding debt collection practices has been the subject of voluminous commentary.<sup>2</sup> Given the dynamics of the competing interests involved when a creditor attempts to collect a just debt which the debtor is unable to pay, an essential conflict requiring regulated resolution becomes apparent. Unfortunately, the problem is compounded when it is recognized that the debt may not be validly due and owing, that the debtor may have a defense, real or perceived, or that the debtor may merely be unwilling to pay, either in fact or as perceived by the creditor. Since the information available to either party is imperfect, it frequently is impossible to determine the actual dimensions of the conflict as viewed from the vary-

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1. As of December 1973, the total amount of credit outstanding was \$180,486,000,000. 60 FED. RES. BULL. A 54 (Feb. 1974).

2. See *Summary of Hearings on Debt Collection Practices, National Commission on Consumer Finance*, 88 BANKING L.J. 291 (1971); Berger, *The Bill Collector and the Law*, 17 DEPAUL L. REV. 327 (1968); Greenfield, *Coercive Collection Tactics—An Analysis of the Interests and the Remedies*, 1972 WASH. U.L.Q. 1 (1972); Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. TEX. L.J. 127 (1967); Smith & Straske, *Collection Procedures and Right of Privacy*, 36 FLA. B.J. 1085 (1962); Comment, *Debt Collection Practices: Remedies for Abuse*, 10 B.C. IND. & COM. L. REV. 698 (1969); Comment, *Effectively Regulating Extrajudicial Collection of Debts*, 20 MAINE L. REV. 261 (1968); Note, *Credit Transactions—Debtor and Creditor—Improper Collection Practices*, 31 N. DAK. L. REV. 277 (1955); Comment, *Recovery for Creditor Harassment*, 46 TEXAS L. REV. 950 (1968).

ing perceptions of the parties.<sup>3</sup> The inevitable result of the inability of either party to assess accurately the optimum means by which any given conflict should be resolved has been the development of a series of abusive collection tactics and practices utilized by debt collectors in attempts to recover outstanding obligations.<sup>4</sup>

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3. See Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970). Professor Leff suggests increasing the information to both parties as a means of reducing the transaction costs implicit in coercive collection.

4. The catalogue of abuses is too extensive to relate in full, but some of the more spectacular examples bear repeating. In *Digsby v. Carroll Baking Co.*, 76 Ga. App. 656, 47 S.E.2d 203 (1948), an employee of the Carroll Baking Company went to the home of the Digsbys to collect a \$2.00 debt. Mrs. Digsby, who was pregnant, was home alone. When she informed the collector that she could not pay, he became boisterous, used vulgar and abusive language, and threatened to take something from the house to get the \$2.00. Mrs. Digsby asked him to leave as she was becoming ill. The employee responded by saying that if he could not get the money any other way, he would "take it out in trade," meaning he was going to have sexual intercourse with Mrs. Digsby. Mrs. Digsby was forced to go to the hospital that day, and her child was born that night.

A comparable situation arose in *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 242 N.W. 25 (1932). Mrs. Barnett was a widow who lived with her two children and was employed as a saleslady at a dry goods store. She was indebted \$28.75 to a coal company. Collection Service Company, retained to collect the outstanding bill, sent Mrs. Barnett dunning letters containing such threats as "You will settle your account with the above through this office within the next five days or we will tie you up tighter than a drum" and "We will bother [your employer] until he is so disgusted with you that he will throw you out the back door."

The use of the telephone and the employer of the debtor as instruments of abuse is illustrated in *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956). Mrs. Housh owed a doctor's bill of \$197. The collector, having tricked Mrs. Housh into signing a cognovit note for \$222, proceeded to engage in a series of harassing telephone calls. He frequently called Mrs. Housh at the school where she was employed; on one occasion his three calls within fifteen minutes resulted in a threat of her employment termination. In addition, the collector called the supervisor of music for the Dayton Public Schools, as well as Mrs. Housh's landlord, claiming that Mrs. Housh did not pay her bills and inquiring about her income. For a period of about two weeks, he called Mrs. Housh eight or nine times a day, and as late as 11:45 p.m.

A final illustration of the cumulative impact of a repeated pattern of abuse is provided by *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954). General Finance Company was found liable for engaging in the following harassing activities while attempting to collect a debt from Mr. and Mrs. Duty:

Daily telephone calls to both Mr. and Mrs. Duty, which extended to great length; threatening to blacklist them with the Merchants' Retail Credit Association; accusing them of being deadbeats; talking to them in a harsh, insinuating, loud voice; stating to their neighbors and employers that they were deadbeats; asking Mrs. Duty what she was doing with her money; accusing her of spending money in other ways than in payments on the loan transaction; threatening to cause both plaintiffs to lose their jobs unless they made the payments demanded; calling each of the plain-

The extent of such practices is difficult to determine. When questioned about their techniques, firms engaging in debt collection universally report that they have promulgated policies against harassment in an effort to maintain customer good will.<sup>5</sup> To the extent that such statements can be accepted without question, the abusive practices which do occur must be attributed to overly aggressive individual collectors possibly concerned with default ratios as a reflection on their job performance. Such collectors, of course, are reluctant to discuss these practices candidly, making it difficult to measure accurately the extent of harassment tactics by surveying the collection industry. On the other hand, compiling accurate empirical data on collection practices through a consumer sample is equally difficult. Debtors have a tendency to exaggerate descriptions of contacts made by the debt collector. They may be acutely sensitive to any collection attempt, no matter how harmless it might seem to an objective outsider, and their reports may reflect their resentment.<sup>6</sup>

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tiffs at the respective places of their employment several times daily; threatening to garnishee their wages; berating plaintiffs to their fellow employees; requesting their employers to require them to pay; calling on them at their work; flooding them with a barrage of demand letters, dun cards, special delivery letters, and telegrams both at their homes and their places of work; sending them cards bearing this opening statement: "Dear Customer: We made you a loan because we thought that you were honest."; sending telegrams and special delivery letters to them at approximately midnight, causing them to be awakened from their sleep; calling a neighbor in the disguise of a sick brother of one of the plaintiffs, and on another occasion as a stepson; calling Mr. Duty's mother at her place of employment in Wichita Falls long distance, collect; leaving red cards in their door, with insulting notes on the back and thinly-veiled threats; calling Mr. Duty's brother long distance, collect, in Albuquerque, New Mexico, at his residence at a cost to him in excess of \$11, and haranguing him about the alleged balance owed by plaintiffs.

273 S.W.2d at 65.

5. Homburger, *Harassment of Borrowers by Licensed Lenders*, 1 COLUM. J.L. & Soc. PROB. 39 (1965).

6. The only comprehensive effort to measure harassment techniques through a consumer sample has been by Professor Caplovitz in a study entitled *Debtors in Default*. His survey consisted of a series of questions concerning creditor harassment to which debtors in four cities (Philadelphia, Detroit, New York, and Chicago) were asked to respond. Twenty-eight percent of the debtors reported receiving "insulting" letters; 15 percent reported the use of abusive and obscene language in communications by creditors; 16 percent replied that creditors had either threatened to contact or actually contacted friends and relatives; and 36 percent reported that creditors had contacted their employers. 2 D. Caplovitz, *Debtors in Default* 10-2 to 10-9 (June 1971) (published by the Columbia University Bureau of Research).

Those engaging in debt collection should be entitled to a presumption of regularity in view of the absence of data revealing the true extent of offensive collection practices. It may be assumed that the great majority of all lending institutions, credit sellers, and collection agencies employ acceptable methods in their attempts to encourage the debtor to pay.<sup>7</sup> Nevertheless, in today's credit-oriented society, attention must be directed toward the small minority of firms involved in coercive and overreaching activities. With over \$180 billion of credit currently outstanding<sup>8</sup> and an average per capita indebtedness of \$900, it is reasonable to assume that few consumers are untouched by the credit industry. Since credit plays such a major role in consumer transactions, it is vital that collection practices be effectively regulated.

The regulation, however, must be undertaken with a basic understanding of the dynamics of consumer credit. The current rates for credit reflect, among other factors, collection costs. If strict limitations are placed on collection practices, rates presumably will rise. Furthermore, if debt collection becomes too costly a process, at some point it will be more profitable to reduce costs by restricting the availability of credit to low-income, high-risk consumers. The effect of regulation would then be to deny credit altogether to that group of marginal consumers whom the regulation initially was designed to protect. There remains, nonetheless, a need to deter callous debt collectors from engaging in unjustifiably injurious activities. Thus, the fundamental problem is of perceiving, in the absence of compelling empirical data, the optimum means by which outrageous collection practices can be restricted without creating an equally injurious imbalance in the credit system. Traditional efforts to control abuse have proceeded along two parallel lines of development.

The most highly developed approach has been the judicial expansion of traditional tort remedies to fit the particular circumstances of abusive collection practices.<sup>9</sup> Tort theories recognized as providing a basis of

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7. Professor Caplovitz found that harassment was more typical of certain types of creditors than others. Collection agencies and small loan companies were the largest offenders; finance companies and low-income retailers were close to the average of harassment for the sample; banks, general retailers, and credit unions were below the average. *Id.* at 10-40.

8. See note 1 *supra*.

9. See generally Greenfield, *Coercive Collection Tactics—An Analysis of the Interests and the Remedies*, 1972 WASH. U.L.Q. 1.

recovery for various types of abuse include defamation,<sup>10</sup> invasion of privacy,<sup>11</sup> intentional infliction of emotional distress,<sup>12</sup> interference with contractual relations,<sup>13</sup> and abuse of process.<sup>14</sup> The primary difficulty with this approach has been the considerable latitude it leaves creditors to act in debt collection situations without incurring liability. This is

10. The tort of defamation applies in the consumer-debtor context only if it can be demonstrated that publication of false matter by the creditor resulted in pecuniary injury. *See, e.g.,* *Dun & Bradstreet, Inc. v. Robison*, 233 Ark. 168, 345 S.W.2d 34 (1961); *Blyther v. Pentagon Fed. Credit Union*, 182 A.2d 892 (D.C. Mun. Ct. App. 1962); *Ragland v. Household Fin. Co.*, 254 Iowa 976, 119 N.W.2d 788 (1963); *Fennell v. G.A.C. Corp.*, 242 Md. 209, 218 A.2d 492 (1966); *Hinkle v. Alexander*, 244 Ore. 267, 417 P.2d 586 (1966); *Weaver v. Beneficial Fin. Co.*, 200 Va. 572, 106 S.E.2d 620 (1959).

11. *See, e.g.,* *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961); *Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 216 P.2d 571 (1950); *Carey v. Statewide Fin. Co.*, 3 Conn. Cir. 716, 223 A.2d 405 (1966); *B-W Acceptance Corp. v. Callaway*, 224 Ga. 367, 162 S.E.2d 430 (1968); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956); *Mills v. First Nat'l Credit Bureau, Inc.*, 192 N.E.2d 511 (Ohio Ct. App. 1963); *Tollefson v. Price*, 247 Ore. 398, 430 P.2d 990 (1967) (publication of overdue payment in newspaper). Generally, recovery in the cited cases has been based upon the theory that public disclosure of private facts by a debt collector constitutes an invasion of privacy. *See generally* W. PROSSER, *THE LAW OF TORTS* § 117 (4th ed. 1971).

12. This tort theory was developed to permit recovery for outrageous conduct undertaken willfully or intentionally through acts producing emotional or mental injury. Initially, the ability to recover was severely restricted by the imposition of a requirement that there be resulting physical injuries, but this obstacle to recovery has been largely eroded in recent cases. *See, e.g.,* *First Nat'l City Bank v. Gonzalez*, 293 F.2d 919 (1st Cir. 1961); *Digsby v. Carroll Baking Co.*, 76 Ga. App. 656, 47 S.E.2d 203 (1948); *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963). Two cases illustrative of the kind of abuse which clearly justifies recovery are *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925), in which the creditor kept the body of the debtor's son and refused to cremate it until the debtor paid for a previous funeral, and *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936), in which the creditor's threat to have the debtor arrested and his calling her a deadbeat resulted in her premature delivery of a dead child.

13. Generally, this tort requires the existence of a contract between the debtor and a third party, knowledge of that fact by the creditor, an intention to induce a breach of the contract, and a resultant breach. In essence, evidence is required, for example, that the creditor's objective was to cause the debtor's employer to discharge him. *See, e.g.,* *Hill Grocery Co. v. Carroll*, 233 Ala. 376, 136 So. 789 (1931); *Long v. Newby*, 488 P.2d 719 (Alas. 1971); *Warschauser v. Brooklyn Furniture Co.*, 159 App. Div. 81, 144 N.Y.S. 257 (1913); *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 167 A.2d 472 (1960).

14. This tort requires a misuse of legal process to accomplish an improper ulterior purpose, specifically, the collection of a private debt. Typically, it is applied where the creditor utilizes criminal process in order to coerce payment. *See, e.g.,* *Cline v. Flagler Sales Corp.*, 207 So. 2d 709 (Fla. Ct. App. 1968); *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967); *Mullins v. Sanders*, 189 Va. 624, 54 S.E.2d 116 (1949).

but an obvious consequence of the effort to apply legal theories which had their geneses in completely different contexts. In addition, the existence of ill-defined and somewhat inapplicable theories of tortious liability has resulted in a distressing inconsistency of application. This inconsistency is found not only in the unwillingness of some courts to apply a given theory of recovery to an abusive debt collection but more significantly in the inability of factfinders to perceive a cohesive and comprehensive standard to which a given behavior pattern and its consequences can be applied.

Traditional tort theory suffers from additional disabilities. Initially, the debtor faces the problem of proving the requisite intent. To establish interference with the employment relationship, for example, the consumer must demonstrate that the collector intended to induce the contract breach, that is, the loss of the job.<sup>15</sup> In an action for emotional distress, the debtor must show more than that he or she suffered distress as a result of the collector's intentionally employed practices; it must be established that the collector intended the mental distress.<sup>16</sup> Moreover, beyond questions of intent, the debtor ultimately must satisfy the requirement that measurable damages be shown. Conduct by a collector may be reprehensible, yet the consumer may be unable to demonstrate damage. In a suit for intentional infliction of emotional distress, for example, some courts require that the plaintiff show some physical manifestation of the injury in order to recover.<sup>17</sup>

A final obstacle facing a consumer seeking redress for wrongful collection activities by means of a tort action is the burden of overcoming the defenses permitted the collector in a number of situations. If a consumer brings a defamation action because the debt collector has published the fact that the debt was owing, the collector may defend by asserting the truth of the publication.<sup>18</sup> In actions for invasion of privacy, where consent is a defense, some courts have held that by entering into a debt agreement the consumer has consented to a subsequent invasion by a party to the agreement.<sup>19</sup> Such defenses, despite their obvious appeal in traditional tort litigation, do much to insulate

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15. See note 13 *supra*.

16. See note 12 *supra*.

17. See, e.g., *Clark v. Associated Retail Credit Men*, 105 F.2d 62 (D.C. Cir. 1939); *Berrier v. Beneficial Fin., Inc.*, 234 F. Supp. 204 (N.D. Ind. 1964); *Turner v. ABC Jalousie Co.*, 251 S.C. 92, 160 S.E.2d 528 (1968); *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953).

18. See, e.g., *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927).

19. E.g., *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 213 Ga. 682, 100 S.E.2d 881 (1957).

the overzealous debt collector from having to answer for what may be unjustified practices.

The failure of existing tort theories to provide either party with sufficient awareness of permissible standards of conduct and the general recognition of the inability of such theories to control abusive debt collection have led to the development, in at least one state, of a new debt collection tort.<sup>20</sup> Although such developments are to be applauded, there remains a serious question regarding the capacity of diverse state courts to formulate any coherent and viable theory of recovery within any reasonable period of time.<sup>21</sup> It is this fundamental concern with the ability of developing tort theory to deal adequately with a problem requiring a delicate balancing of interests which necessitates an examination of an alternative approach, which involves comprehensive legislation.

A review of existing state and federal legislation reveals a paucity of effective measures dealing with creditor harassment.<sup>22</sup> There are, for example, a number of individual federal statutes which conceivably can be employed to control specific aspects of collection abuse, including the mail fraud statute,<sup>23</sup> proscriptions against use of the telephone

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20. *United Fin. & Thrift Corp. v. Bain*, 393 S.W.2d 429 (Tex. Civ. App. 1965). See generally Comment, *Recovery for Creditor Harassment*, 46 TEXAS L. REV. 950 (1968).

21. A perhaps not totally inappropriate analogy may be found in the development of strict products liability as a distinct tort theory unbridled by the perceived restrictions of the Uniform Commercial Code. Even with the impetus of Dean Prosser's famous article on privity, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960), combined with Justice Traynor's majority opinion in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), and the subsequent adoption of RESTATEMENT (SECOND) OF TORTS § 402A (1966), the field of products liability remains a morass of inconsistency between judicial and statutory theories of recovery.

22. See generally *Summary of Hearings on Debt Collection Practices, National Commission on Consumer Finance*, 88 BANKING L.J. 291 (1971).

23. 18 U.S.C. §§ 1341-1342 (1970). Section 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it



in interstate communications to annoy or harass,<sup>24</sup> and the prohibition of utilization of the name or initials of a federal agency to convey the false impression that such agency is involved in collection of a debt.<sup>25</sup> These statutes, however, apply only to a narrow range of creditor abuses in the collection process, and their efficacy is further hampered by the fact that they were never intended to provide a means of controlling abusive debt collection.<sup>26</sup> Legislative remedies at the state level

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is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

Recovery under this section for abusive collection is available only under a limited set of circumstances. The essential elements of proof of a violation are the existence of a scheme or artifice to defraud *or for obtaining of money by means of false pretenses, representations, or promises*, and the use of the United States mails in furtherance of the scheme. *Beck v. United States*, 305 F.2d 595, 598 (10th Cir.), *cert. denied*, 371 U.S. 890 (1962).

24. 47 U.S.C. § 223 (1970). Section 223 of the Communications Act makes it a crime to use the telephone in interstate communications to make "repeated telephone calls, during which conversation ensues, solely to harass any person at the called number," or knowingly to permit others to use a telephone under one's control for such purpose. Penalties for violation of section 223 are a fine up to \$500, or six months' imprisonment, or both. In addition, tariffs of telephone companies filed pursuant to section 203 of the Communications Act forbid use of an interstate telephone service "for a call or calls, anonymous or otherwise, if in a manner reasonably to be expected to frighten, abuse, torment, or harass another," or for calls that "interfere unreasonably with the use of the service by one or more other customers." *Id.* § 203. Violations are subject to various enforcement proceedings under the Act. *See id.* §§ 401, 411; Federal Communications Commission Notice No. 70-609 (1970).

25. 18 U.S.C. § 712 (1970). The statute provides:

Whoever, being engaged in the business of collecting or aiding in the collection of private debts or obligations, or being engaged in furnishing private police, investigation, or other private detective services, uses as part of the firm name of such business, or employs in any communication, correspondence, notice, advertisement, or circular the words "national", "Federal", or "United States", the initials "U.S.", or any emblem, insignia, or name, 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 or in any manner represents the United States, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

In *United States v. Boneparth*, 456 F.2d 497 (2d Cir. 1972), the court sharply limited the scope of this provision by holding that a credit seller collecting his own debts is beyond its purview. *But see* CAL. BUS. & PROF. CODE § 6853 (West 1964), deeming such a party to be a collection agency.

26. The only federal statute designed specifically to provide a comprehensive regulation of collection practices is Title II of the Consumer Credit Protection Act, 18 U.S.C. §§ 891-896 (1970), which regulates strong-arm collection tactics arising out of extortionate credit transactions. The statute is limited in its application, however, to

are somewhat more extensive than existing federal controls.<sup>27</sup> State legislation typically includes licensing requirements,<sup>28</sup> together with various provisions restricting the use of abusive or harassing communications,<sup>29</sup> prohibiting the simulation of legal process,<sup>30</sup> and proscribing any conduct likely to produce a breach of the peace.<sup>31</sup> Nevertheless, in the absence of a coherent state or federal regulatory model,<sup>32</sup> the problem of behavioral control remains largely unsolved. Any effort to utilize existing state or federal statutory remedies to accomplish purposes for which they were not intended produces an inconsistency of application which induces a modification in the methods of abuse or harassment rather than a modification in the behavior itself.

Against this background, there have been recent efforts, particularly in the context of uniform statutory proposals, to develop a coherent and comprehensive legislative response to the problem of abusive collection. An analysis of these proposed statutory models reveals some of the difficulties inherent in accomplishing this goal. For example, the

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loan sharks who make usurious loans and then utilize extortion to enforce collection. Most abusive collection practices which affect the marginal consumer are clearly beyond the scope of this statute.

27. A number of states have enacted provisions which regulate, in some form, the operation of collection agencies. *See generally* 1 CCH POVERTY L. REP. ¶¶ 3700-3720 (1972). The difficulty lies not in the total absence of such provisions but in the general failure to articulate a unified regulation of the full range of abusive collection practices. In addition, there is a wide variation in the effectiveness of the enforcement devices under these provisions. *See, e.g.,* ARIZ. REV. STAT. ANN. § 32-1053 (Supp. 1973) (license revocation); CAL. BUS. & PROF. CODE § 118 (West 1962) (loss of license); COLO. REV. STAT. ANN. § 27-1-25 (e) (Supp. 1967) (private action for damages).

28. *See* 1 CCH POVERTY L. REP. ¶ 3700 (1972). The California collection agency law requires licensing of the agency and its employees and requires an annual examination and audit of the licensee's account. CAL. BUS. & PROF. CODE §§ 6850-6956.2 (West 1964). In Idaho, collection agencies must obtain a permit in order to conduct business and employees must be licensed. IDAHO CODE § 26-2223 (Supp. 1973). *See also* NEVADA REV. STAT. § 649.075 (1969); VA. CODE ANN. § 54-729.2 to -729.24 (Repl. Vol. 1972).

29. *See* 1 CCH POVERTY L. REP. ¶ 3720 (1972).

30. *See, e.g.,* COLO. REV. STAT. ANN. § 27-1-25 (Supp. 1967); FLA. STAT. ANN. § 817.38 (1965); IND. ANN. STAT. § 10-5008 (Supp. 1973); LA. REV. STAT. ANN. § 14-353 (Supp. 1974).

31. *E.g.,* VA. CODE ANN. § 8 630 (Repl. Vol. 1957). *See generally* 1 CCH POVERTY L. REP. ¶ 3720 (1972).

32. Several states have enacted more or less comprehensive debt collection legislation. *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 32-1002 to -1057 (Supp. 1973); ME. REV. STAT. ANN. tit. 32, §§ 573-583 (Supp. 1973); MASS. GEN. LAWS ANN. ch. 93, §§ 24-28, 49 (1972); WIS. STAT. ANN. §§ 427.101-.105 (1973). But even these statutes suffer from significant limitations. The Arizona statute, for example, exempts from certain of its proscriptions persons engaged in collecting debts arising out of their own business. ARIZ. REV. STAT. ANN. § 32-1021D (Supp. 1973).

Uniform Consumer Credit Code (UCCC), which has been adopted in seven states, contains a provision prohibiting "unconscionable conduct in the collection of debts."<sup>33</sup> Apart from problems posed by the failure to specify standards of behavior, this provision is enforceable only by the state administrator, not the aggrieved consumer, and only through the injunctive process, not damages.<sup>34</sup> The capability of such a vague statutory proscription with its severely limited remedy to control abusive collection procedures is doubtful. On the other hand, proposals for regulating debt collection contained in the National Consumer Act (NCA)<sup>35</sup> reflect the general failure of that proposed statute adequately to consider the necessity of balancing the relevant interests with sufficient precision to prevent a forced withdrawal of the poor consumer from the credit market. The NCA contains restrictions which would, in many cases, prevent any extrajudicial efforts to resolve collection disputes and is, therefore, subject to the criticism that it would merely increase the transaction costs eventually borne by the consumer.<sup>36</sup>

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33. UNIFORM CONSUMER CREDIT CODE § 6.111(1)(c) (1968) provides: "The Administrator may bring a civil action to restrain a creditor or a person acting in his behalf from engaging in a course of . . . fraudulent or unconscionable conduct in the collection of debts arising from consumer credit sales, consumer leases or consumer loans."

34. *Id.* In order to grant relief under this provision, a court must find that the creditor has engaged or is likely to engage in a course of fraudulent or unconscionable conduct, that such conduct has or is likely to cause injury to consumers, and that the creditor has caused or will be able to cause injury primarily because the transactions involved are credit transactions. *Id.* § 6.111(2).

35. NATIONAL CONSUMER ACT §§ 7.101-303 (First Final Draft 1970) [hereinafter cited as NCA]. In form, the NCA provisions on debt collection are relatively straight forward, containing a laundry list of proscribed practices (*id.* §§ 7.201-208), including the practice of law by debt collectors; collection through threats or coercion; unreasonable harassment or abuse in collection attempts; unreasonable publication of the indebtedness; fraudulent or misleading representations in collection attempts; and unfair or unconscionable means of collection. The difficulty with the statute, however, lies in the broad and all-inclusive manner in which such practices are defined. Its prohibitions include accusations which, if true, would tend to disgrace the debtor or subject him to society's ridicule or contempt (*id.* § 7.202(2)); the placing of telephone calls without disclosing the caller's identity (*id.* § 7.203(2)); and the communication of *any* information related to an indebtedness to the debtor's employer or to any other person through a means other than legal process, regardless of the circumstance (*id.* §§ 7.204(1), (2)). Although the statute reflects the laudable objective of a pervasive regulation designed to eliminate all abusive collection practices, it suffers from the criticism that, by failing to delimit more carefully the truly abusive practices, it has the effect of eliminating most, if not all, extrajudicial collection efforts, thereby significantly increasing transaction costs.

36. A further difficulty with the NCA in terms of its enactment into law lies with the broad and unrestricted powers granted the state administrator to establish rules

A slightly amended version of the NCA chapter on debt collection has been promulgated in the Model Consumer Credit Act (MCCA).<sup>37</sup> Although the remedies available against an abusive creditor have been more carefully delimited, the MCCA, like the UCCC and the NCA, suffers from the absence of a standard of conduct reflecting a carefully drawn balance between the competing interests of debtor and creditor. A more positive statutory model is the recently enacted Wisconsin Consumer Act.<sup>38</sup> This statute, conceived as a compromise between the UCCC and the NCA, contains provisions on debt collection reflecting a greater concern for the necessity of permitting some forms of extrajudicial debtor-creditor contact in order to promote nonadjudicative dispute settlement.<sup>39</sup>

A generalized deficiency of all these statutes appears to lie in the absence of any articulated sense of the purpose of debt collection

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and regulations proscribing other conduct deemed in violation of the statute. *Id.* § 7.209. Although this again reflects a laudable objective, that of attempting to increase the statute's flexibility of response to the ability of creditors to devise additional abusive practices, such provision limits to a significant degree the creditor's ability to pattern his collection activities in reliance upon the predictability of proscribed practices. It may be assumed that such administrative latitude will leave the statute particularly vulnerable to industry criticism.

37. MODEL CONSUMER CREDIT ACT §§ 6.101-303 (1973) [hereinafter cited as MCCA]. The MCCA modifies the NCA debt collection provisions by eliminating the power of the administrator to define additional proscribed practices through regulation and by limiting the enforcement provisions to a right of action for damages. Compare NCA §§ 7.301-303 with MCCA § 8.108. In addition, the MCCA adds the requirement that every debt collector provide the consumer, prior to any collection attempt, with a description in writing of the legal relationship between the debt collector and the previous creditor. MCCA § 6.301.

38. WIS. STAT. ANN. §§ 427.101-105 (1973).

39. The Wisconsin Consumer Act evidences far more than the NCA or the MCCA an effort to balance the desire to curb abusive collection practices with the recognition of the legitimate interest of the creditor in nonadjudicatory dispute settlement. Thus, although in form it proceeds by establishing a list of proscribed practices (*id.* § 427.104), the range of the practices is carefully delimited to conduct *intended* to abuse, harass, or defraud, and the nature of the conduct proscribed is specified with particularity. There are, for example, no provisions regarding subjection of the debtor to "ridicule" or social "contempt," or prohibiting "unfair" practices. In addition, significant extrajudicial contacts are permitted under carefully prescribed conditions. For example, the collector is permitted to contact the debtor's employer for the purpose of verifying employment status or earnings or where the employer has an established debt counseling service. *Id.* § 427.104(d). Additionally, contact with third persons regarding the debt is permitted unless the collector is aware that such person does not have a legitimate business need for the information. *Id.* § 427.104(e). Finally, threats of legal action constitute a violation only if the action is not taken in regular course or is not intended with respect to the particular debt. *Id.* § 427.104(l).

legislation. There is need for a comprehensive statute setting forth with a degree of particularity those collection practices which go beyond the bounds of public acceptance and informing the consumer of the availability of redress in the event such practices are employed. Such a statute should establish standards which protect the debtor from abusive collection practices but which do not overly restrict collection efforts to the extent that the marginal consumer's access to the credit market is seriously impaired. The balancing of competing interests is not a prophylactic concession to the political process statutory proposals must negotiate; rather, it results from recognition that the purpose of the legislation is narrowly confined to an attempt to modify debt collection behavior in the context of the complex economic status of the interest which the statute seeks to protect. Ultimately, therefore, the problem becomes one of defining the point at which the interest of the creditor in effective means of collection, as well as that of the consumer in free access to the credit market, must yield to the debtor's right to be free from unconscionable practices in debt collection.

## II. A PROPOSED MODEL STATUTE

One of the difficulties with existing legislative proposals to control abusive debt collection practices has been that the effort to provide uniform statutory treatment has removed the solution from the realities in which it is designed to operate: a particular state with its preexisting statutory and judicial approach to the debtor-creditor relationship. The following proposed statute, therefore, has been deliberately drafted with specific reference to the existing law of a single state. Virginia has been chosen primarily because of the authors' familiarity but also because it is reasonably representative of jurisdictions which heretofore have paid little or no attention to the specific problem of abusive collection practices.

To the extent statutory standards regulating debt collection activities currently exist at all in Virginia, they exist through specialized licensing legislation requiring that all collection agencies be licensed.<sup>40</sup> The Virginia Collection Agency Board<sup>41</sup> has issued rules and regulations governing the conduct of licensed agencies.<sup>42</sup> These regulations are of limited scope, however, and are incapable of reaching the activities of debt col-

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40. VA. CODE ANN. § 54-729.3 (Repl. Vol. 1972).

41. See *id.* § 54-729.4.

42. Va. Col. Agency Bd., Rules & Regulations (Sept. 1970).

lectors not licensed under the statute, including small loan companies and credit sellers who undertake their own collection.<sup>43</sup>

Other statutory provisions in Virginia of potential utility in restricting abusive collection practices include the "insulting words statute," which makes actionable all words tending to produce a breach of the peace;<sup>44</sup> a prohibition of abusive or indecent language over the telephone;<sup>45</sup> a statute forbidding threats of death or bodily injury to a person or member of his family;<sup>46</sup> and a section proscribing the simulation of legal process.<sup>47</sup> Unfortunately, because of the general nature of these sections, they are not easily cognizable by debt collectors or consumers as effective limitations on collection practices. These random provisions thus fall short of constituting the unified regulation necessary to afford adequate notice and effective remedy.

### A. *Scope of the Regulation*

Any attempt to develop a comprehensive regulation of debt collection requires a resolution of the appropriate scope and coverage of the statute in terms of the types of transactions to be encompassed, as well as a delineation of the extent of control within that framework. In dealing with these questions, a fundamental determination has been made to bring within the regulatory model only those practices which are utilized in efforts to collect debts arising from consumer credit transactions.<sup>48</sup> This determination is based upon a series of unstartling assumptions. Initially, it is believed that the private consumer is most vulnerable to abusive practices. The marginal consumer model, which is a principal focus of the legislation, assumes an individual generally

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43. Such lending institutions are licensed or certified under other legislation. See VA. CODE ANN. §§ 6.1-244 to -310 (Repl. Vol. 1973) (Small Loan Act); *id.* §§ 6.1-195.1 to -195.76 (Savings and Loan Act); *id.* §§ 6.1-196 to -226 (credit unions); *id.* §§ 6.1-227 to -243 (industrial loan associations). These statutes, however, do not speak to debt collection practices.

44. *Id.* § 8-630 (Repl. Vol. 1957).

45. *Id.* § 18.1-238 (Repl. Vol. 1960).

46. *Id.* § 18.1-257.

47. *Id.* § 18.1-313.

48. The scope of the proposed statute is essentially identical to that of the Wisconsin Consumer Act, WIS. STAT. ANN. §§ 427.103, 421.301(13), (17) (1973), in limiting its provisions to cases where the debt arises for "personal, family, household, or agricultural purposes." See Appendix *infra*, § 2(c) & accompanying Comment. The National Consumer Act, on the other hand, includes within the purview of its restrictions on debt collection activities a noncorporate business debtor who acquires equipment for use in his business. NCA § 1.301(8)(a).

inexperienced and unsophisticated in commercial transactions and having a comparatively low level of education.<sup>49</sup> To the extent these characteristics prevail, the debtor will be unaware of his legal status and unwilling or unable to undertake any positive action to protect it. More significantly, he frequently will believe that since the debt is owing, there are no limitations on the conduct of the creditor in his efforts to collect the obligation. The exclusion from the coverage of the legislation of commercial dealings between creditors and business debtors does not rest upon the assumption that such transactions are free from abusive collection practices; rather, it is assumed that such parties have sufficient access to existing means of nonadjudicatory dispute settlement to produce a relative parity in their bargaining positions.

Within the context of consumer credit transactions, however, it is intended that the statute be broad in its regulatory reach. The chapter is directed toward the activities of all persons engaging in debt collection, whether they be licensed collectors, employees of credit sellers, or lending institutions, and whether or not collection is a primary function of their organization.<sup>50</sup> If all who collect debts are bound by the same regulatory code, the aspect of competitive advantage is removed from abusive practices, and with it goes some of the incentive to engage in such activities. Furthermore, the existence of a single set of standards to control all debt collectors would increase the likelihood of consumer awareness of such controls.

The statute is also intended to apply regardless of the subject matter of the consumer credit transaction or the amount of the debt. In the context of controlling offensive collection activities, there appears to be little justification for distinguishing among transactions involving goods, services, realty, or money. The potential for abuse in collection exists regardless of the nature of the original credit transaction from which the claim arose.<sup>51</sup> On essentially the same rationale, the statute does not include a monetary limit for covered transactions. The Consumer Credit Protection Act (CCPA)<sup>52</sup> may be compared to the model legislation in this respect. The CCPA, in providing for disclosure of

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49. See generally 2 D. Caplovitz, *supra* note 6, at 10-18 to 10-22.

50. See Appendix *infra*, § 2(e) & accompanying Comment. The inclusion of all those who engage in debt collection activities, whether directly or indirectly, is consistent with NCA § 7.103(3) and WIS. STAT. ANN. § 427.103(3) (1973).

51. See Appendix *infra*, § 2(b) & accompanying Comment. This definition is derived from NCA § 1.301(10).

52. 15 U.S.C. §§ 1601-1681 (1970).

credit terms, exempts from its coverage credit transactions, other than real property, in excess of \$25,000.<sup>53</sup> Disclosure is required to avoid the uninformed use of credit and to encourage comparative evaluation of credit terms. It is reasonable to assume that consumers entering personal property transactions in excess of \$25,000 are informed about the use of credit and are in a position to compare available terms; hence, such an exemption is justified. A monetary exclusion is unwarranted, however, in the context of a debt collection statute, since the amount of the debt owing should not be relevant in determining the appropriate methods by which collection may be undertaken.

### B. Prohibited Collection Practices

There are two basic drafting approaches which can be utilized in regulating collection practices. The first method is to specify the permissible activities which can be employed by a debt collector, requiring him to seek adjudicatory relief if such self-help attempts fail to produce a recovery. The alternative approach is to list proscribed practices and provide a remedy for violations. The permissive approach has the advantage of providing clear standards of conduct under which both creditor and debtor are aware of the limits of acceptable conduct. In addition, this approach minimizes the possibility of a debt collector devising an abusive collection tactic not appearing on a list of proscribed practices. It is, however, difficult, if not impossible, to compile an exhaustive list of acceptable debt collection activities. An incomplete list could prove unduly restrictive and result either in an unacceptable increase in the cost of credit or an equally unacceptable limitation on free entry into the credit market. To avoid these consequences, the proposed statute adopts the alternative approach of providing a "laundry list" of the most offensive collection practices,<sup>54</sup> with remedies for victims of such conduct.<sup>55</sup> Although there is a risk that debt collectors will develop new methods of coercion not encompassed within the regulation, this approach eliminates the most abusive collection activities, while permitting the majority of debt collectors to continue to utilize reasonable extrajudicial collection practices.

The proscribed practices are specified in section 3 of the statute.<sup>56</sup> Section 3(a), prohibiting collectors from threatening litigation, is in-

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53. *Id.* § 1603(3).

54. *See* Appendix *infra*, § 3 & accompanying Comment.

55. *See id.* § 4 & accompanying Comment.

56. *See id.* § 3 & accompanying Comment. Proscribed practices under other proposed statutory models are discussed in notes 33-39 *supra* & accompanying text.



cluded more for the benefit of collectors than the protection of consumers.<sup>57</sup> Regulation XI, 2 of the Virginia Collection Agency Board, promulgated in 1970, proscribes threatening litigation and subjects a collector to the possibility of a license revocation for such a practice. In addition, threatening litigation for the collection of debts violates the Virginia prohibition against the practice of law without a license,<sup>58</sup> in light of the ruling of the Unauthorized Practice of Law Committee of the Virginia State Bar that such activity by debt collectors constitutes the practice of law.<sup>59</sup> This provision is included in the proposed chapter on debt collection for purposes of unity and to provide further notice to collectors that threatening litigation to collect a debt is forbidden by law.

Debt collectors are barred from using methods of communication that simulate legal process under section 3(b).<sup>60</sup> This section merely incorporates existing law<sup>61</sup> into the debt collection chapter for reasons of unity and notice. Writings presently forbidden for purposes of collecting money include those resembling warrants, writs, process, motions for judgment, and notices of execution liens.<sup>62</sup> All such communications are likewise prohibited under this chapter.

Section 3(c) prevents the collector from coercing payment through deception concerning his business status,<sup>63</sup> particularly through the use of such devices as insignias, emblems, and initials other than those of the collector. This provision is designed primarily to prevent the deceptive practice of inducing consumer belief that a governmental entity has become involved in the transaction. Acting under such belief, debtors may choose to waive possible defenses to the validity of the debt rather than assert them against the government. In *Floersheim v. FTC*,<sup>64</sup> for example, the court enforced an order that a Los Angeles firm cease and desist mailing bills from "The Washington Building, Washington, D.C." on the ground that the practice was designed to

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57. A similar provision appears in section 6(a) of the Model Act to License and Regulate Collection Agencies, drafted by the ABA National Conference of Lawyers and Collection Agencies and reported in 70 *COM. L.J.* 38, 39 (1965).

58. VA. CODE ANN. § 54-44 (Repl. Vol. 1972).

59. Opinion No. 38, Unauthorized Practice of Law Committee, 30 VA. ST. B. REP. 34, 36 (1968).

60. See Appendix *infra*, § 3(b) & accompanying Comment.

61. VA. CODE ANN. § 18.1-313 (Repl. Vol. 1960).

62. *Id.*

63. See Appendix *infra*, § 3(c) & accompanying Comment.

64. 411 F.2d 874 (9th Cir. 1969).

exploit the assumption of many low income debtors that anything emanating from Washington signifies government involvement.<sup>65</sup> The Federal Trade Commission has issued guides<sup>66</sup> against debt collection deception which include a requirement of disclosure of purpose<sup>67</sup> and a prohibition against false implication of government affiliation.<sup>68</sup> This collection deception also is restricted under federal law providing criminal liability for any person who uses initials, emblems, or insignias in a manner falsely indicating the involvement of a federal department.<sup>69</sup> These prohibitions are recognized in this provision and made applicable to purely local activities.

In addition to speaking to situations where correspondence suggests government involvement, section 3(c) prohibits misrepresentations of the identity of the collector. Existing Virginia statutes provide criminal sanctions for impersonating an officer of the peace<sup>70</sup> and for the unauthorized use of a police officer's uniform.<sup>71</sup> Section 3(c) would provide further notice of these provisions, as well as affording a remedy to the debtor who is misled by a collector engaging in such unlawful practices. Allowing private recovery for such acts further underscores the preventive policy of the statute by strengthening the enforcement potential.

Section 3(d) protects the consumer, his family, and his property from violence or threats of violence.<sup>72</sup> Although such practices are proscribed by existing statutes in Virginia,<sup>73</sup> this provision, as well as others dealing with currently prohibited practices, is included in order to create a unified body of standards and to provide a private remedy for those victimized. Threats of violence are prohibited not only because of the potential for physical or emotional injury to the consumer but also because of the possibility that debtors may be induced by fear into paying invalid claims. The abuse inherent in such practices is particularly acute in cases where the consumer has a valid defense which he relinquishes because of creditor coercion. Moreover, even if a claim is valid, the debtor has the right to be free from such threats. In an

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65. *Id.* at 877.

66. 16 C.F.R. §§ 237.0-.6 (1973).

67. *Id.* § 237.2.

68. *Id.* § 273.3.

69. 18 U.S.C. § 712 (1970).

70. VA. CODE ANN. § 18.1-311 (Repl. Vol. 1960).

71. *Id.* § 18.1-312.

72. See Appendix *infra*, § 3(d) & accompanying Comment.

73. VA. CODE ANN. §§ 18.1-184, -257 (Repl. Vol. 1960).

early Virginia case, *Mitchell v. Commonwealth*,<sup>74</sup> it was held that the guilt or innocence of an extortion victim is irrelevant. Similarly, the question of liability on the obligation should not affect the debtor's right to be free from physical harm.

Section 3(e) bars the use of obscene language in communication with the customer or a related person through the mail, over the telephone, or in person.<sup>75</sup> This section incorporates a number of existing provisions under which such language is proscribed, making them specifically applicable in the debt collection context and furnishing a private remedy. Virginia Code section 8-630 provides: "All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace shall be actionable."<sup>76</sup> This statute is applicable to written as well as oral communication,<sup>77</sup> and criminal punishment is provided by statute.<sup>78</sup> In addition, Virginia Code section 18.1-238 provides: "If any person shall curse or abuse anyone or use vulgar, profane or indecent language over any telephone in this State, he shall be guilty of a misdemeanor."<sup>79</sup> Without doubt, some debtors are unwilling to pay just claims even though they have the financial ability to do so, and there would perhaps be little inclination to strengthen existing legislation for their benefit. Nevertheless, the ability to pay should not be a relevant consideration in this context, and the proposed provision should be included to protect *any* debtor and his family from verbal abuse causing humiliation and emotional distress. Furthermore, a great many debtors fail to make payments because of financial stress caused by factors ultimately beyond their control. It is manifestly unreasonable to submit these individuals to unnecessary distress, and the need for legislation to operate in such circumstances is apparent.

Regulating the content of communication between debtor and creditor is a necessary adjunct to controlling collection practices. Such regulation, however, does not provide protection against abuses arising out of the mere fact of communication itself. A number of courts have recognized a right of action for invasion of privacy and mental anguish

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74. 75 Va. 856 (1880).

75. See Appendix *infra*, § 3(e) & accompanying Comment.

76. VA. CODE ANN. § 8-630 (Repl. Vol. 1957).

77. *Chaffin v. Lynch*, 83 Va. 106, 1 S.E. 803 (1887).

78. VA. CODE ANN. § 18.1-255 (Repl. Vol. 1960) (fine not less than \$2.50 nor more than \$500).

79. *Id.* § 18.1-238.

in the debt collection context resulting from harassing communications. Damages have been awarded a debtor who received numerous phone calls at home and work from a collection agency,<sup>80</sup> and recovery has been granted against a creditor who visited the debtor at the restaurant where she worked and followed her around shouting in an abusive manner.<sup>81</sup> Finally, an action has been allowed where the lenders employed various devices, including daily phone calls to the debtors, a flood of demand letters, and long distance collect calls to relatives.<sup>82</sup> All of these situations would be barred by section 3(f) of the proposed chapter.<sup>83</sup> In addition, the clause, "in such a manner as can reasonably be expected to harass," would include circumstances where the communication, though not making reference to the debt, was designed to annoy and cause distress.<sup>84</sup>

The vague standards provided in section 3(f) can be criticized for failing to provide adequate notice. Questions of how frequent is too frequent and of what manner might reasonably harass raise problems of case-by-case determination of abusive practices. Nevertheless, it is difficult to devise more specific standards which would effectively control reprehensible conduct in varying contexts. In defense of this provision, it may be noted that a role of the courts is to reflect contemporary standards of fair conduct, and an admittedly imprecise section such as this provides just such an opportunity. The language employed is intended to afford adequate notice to collectors that they must exercise prudence in their collection attempts in view of the latitude afforded the judiciary. It is believed that the collector can exercise proper judgment in determining how often to call and what to say, while retaining a viable collection tactic.

Section 3(g) prohibits the collector from revealing information concerning a claim to persons other than those liable for the debt.<sup>85</sup> The judgment implicit in this provision is that the collection of a debt through extrajudicial settlement should be exclusively the concern of the debtor and creditor. An overly zealous collector may well attempt

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80. *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

81. *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959).

82. *Duty v. General Fin. Co.*, 154 Texas 16, 273 S.W.2d 64 (1954).

83. See Appendix *infra*, § 3(f) & accompanying Comment.

84. See *id.* Such a situation arose in *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961), where the creditor's agent, a woman, called the debtor's wife and sister-in-law and suggested to them that an illicit relationship existed between her (the agent) and the debtor.

85. See Appendix *infra*, § 3(g) & accompanying Comment.

to coerce payment by contacting neighbors, co-workers, and employers.<sup>86</sup> This section is designed to protect these individuals from becoming involved in the transaction; but, more importantly, it seeks to avoid situations where a debtor may be coerced into waiving defenses to prevent further disclosure of the debt to third parties, whether that coercion emanates from the debtors' desire to protect the third party or to protect his own interest.

A further problem arises where it is the debtor's spouse who is harassed with frequent or abusive communications concerning the debt. The spouse, in many situations, is unable to do anything to effect repayment yet may be extremely vulnerable to emotional distress resulting from such communications. An Illinois statute proscribes attempts to collect a debt from a spouse, unless the spouse is also liable, or unless the debt has been outstanding for 30 days.<sup>87</sup> Section 3(g) of the proposed statute recognizes that a spouse may be contacted if he or she is in fact liable. Unlike the Illinois statute, however, no exception is provided in the case of debts outstanding for 30 days, since the reasons for barring such communications appear equally as valid regardless of the period of delinquency. Furthermore, many collectors make no attempt to effectuate repayment until a debt has been outstanding for at least 30 days; such an exception thus might well frustrate the basic purpose of the section.

In addition to restricting individual communications to third parties, section 3(g) bars general communications to the public through the publication of "deadbeat" lists. Several states which by statute regulate licensed collection agency activities prohibit the use of such lists.<sup>88</sup> The basic justification for the prohibition is that the consumer is not afforded notice and an opportunity to contest the charges before they are made public.<sup>89</sup> Although the posting of "deadbeat" lists is not violative of constitutional guarantees of due process absent a showing of state

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86. See, e.g., *Duty v. General Fin. Co.*, 154 Texas 16, 273 S.W.2d 64 (1954).

87. ILL. ANN. STAT. ch. 121½, § 262H (Supp. 1973).

88. E.g., ARK. STAT. ANN. § 71-2008(5) (Supp. 1973); CAL. BUS. & PROF. CODE § 6947(b) (West Supp. 1974).

89. See *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), in which the Supreme Court held unconstitutional a statute under which a chief of police, without notice to the debtor or hearing, caused a notice to be posted in all retail liquor stores forbidding sales or gifts of liquor to the appellee. The Court held that procedural due process required that the individual involved be given notice of the intention to post and an opportunity to present his position. *Id.* at 436-37.

action,<sup>90</sup> notions of fundamental fairness dictate that such activity should not be permitted. It can be argued, in fact, that these publications should be barred regardless of whether notice and an opportunity to contest are afforded the debtor. The publication of "deadbeat" lists is typical of creditor activity which has tended to produce the physical and emotional injuries frequently suffered by debtors subject to abusive collection practices. Moreover, such publications may have a deleterious effect on the consumer's financial situation, thereby decreasing the likelihood that he will be able to pay the outstanding obligation.

Two exceptions to the third-party communications prohibition are recognized. Section 3(g)(1) permits disclosures pursuant to credit reporting statutes.<sup>91</sup> Credit reporting systems have become central to the nation's credit economy. Prohibiting the use of such procedures without providing adequate alternatives could greatly alter the credit market, resulting in rate increases and restrictions on the availability of credit to the marginal consumer. There are grave shortcomings in the existing credit reporting industry, but providing solutions for these problems is beyond the scope of this legislation. Nevertheless, the proposed statute evidences a limited attempt to correct one abuse of credit reporting by requiring notification to the customer of all credit reporting disclosures. Such notification affords the consumer an opportunity to dispute any information or to furnish necessary clarification before suffering injury to his credit rating which might unjustifiably impair his ability to function effectively in the marketplace.

A second exception to the nondisclosure provision appears in section 3(g)(2), which authorizes communication with employers who have established debt counseling services.<sup>92</sup> Debt counseling can often furnish an efficient and effective means of nonadjudicatory dispute settlement between creditors and defaulting consumers.<sup>93</sup> Communications to employers who do not provide debt counseling, however, are prohibited because of the detrimental effect such contacts could have on the employment relationship. Many employers, including the federal government, have a policy of dismissing employees involved in col-

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90. Arguably, statutory licensing and regulation of those engaging in collection activities could constitute the requisite state action. See *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 604-05 (S.D.N.Y. 1970).

91. See Appendix *infra*, § 3(g)(1) & accompanying Comment.

92. See *id.* § 3(g)(2) & accompanying Comment.

93. It should be noted that in Virginia no fee may be charged for such services furnished in connection with a debt pooling plan unless performed by a licensed attorney. VA. CODE ANN. § 54-44.1 (Repl. Vol. 1972).

lection disputes without any prior inquiry into the nature of the debt.<sup>94</sup> From the employer's perspective this is not a completely arbitrary action. He may well be concerned about possible garnishment proceedings and the transaction costs such proceedings would entail. Dismissal of the debtor may provide the easiest manner of avoiding these difficulties. Even if the employee is not initially dismissed, the employer may induce payment through explicit or implicit threats of dismissal. This situation produces once more the likelihood that the debtor will be coerced into paying an invalid claim.<sup>95</sup>

This provision is of particular importance because in Virginia there currently is no protection afforded the consumer from employer contacts. The "insulting words statute"<sup>96</sup> does not bar statements by the collector to the debtor's employer, provided such statements do not impute dishonesty or relate to the debtor's performance as an employee.<sup>97</sup>

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94. Heaungson, *Debt Collection Practices Before the National Commission on Consumer Finance*, 88 BANKING L.J. 291 (1971).

The ability of the employer to discharge the debtor after garnishment proceedings have been instituted is restricted by Title III of the Consumer Credit Protection Act, which prohibits an employer from discharging an employee on the ground that the employee's wages were subjected to garnishment for any one indebtedness. 15 U.S.C. § 1674(a) (1970). For willful violations, the employer is subject to a fine of not more than \$1000 or imprisonment of not more than one year, or both. *Id.* § 1674(b). The extent to which this provision would prohibit the employer from discharging the employee prior to the institution of garnishment proceedings is not clear. It has been held, however, that the Act prohibits the utilization of warnings for first-time garnishments for the purposes of a warning-discharge rule. Dept. of Labor, Wage-Hour Administrator's Opinion No. 1078 (WH-31) (Apr. 28, 1970). This ruling, based upon the interpretation of the statute as prohibiting a discharge based wholly or partly on a first-time garnishment, would seem to indicate that the prohibition extends to anticipated garnishments as well.

Once the employee has been subject to a first-time garnishment, Title III would not, of course, prohibit dismissal for subsequent garnishments, actual or anticipated. Such action, however, may well be prohibited by a provision of Title VII of the Civil Rights Act of 1964 making it an unlawful employment practice for an employer "to discharge any individual . . . because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1) (1970). This provision has been utilized to invalidate an employer policy of discharging an employee after several garnishments on the ground that since a disproportionate percentage of the members of minority groups are subject to garnishment, the effect of the policy was to discriminate against members of such groups. *Johnson v. Pike Corp. of America*, 332 F. Supp. 490 (C.D. Cal. 1971). In addition, the court in *Johnson* held that the employer's affirmative defense of "business necessity" (recognized by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)) applies only to job capability and performance and does not encompass inconvenience, annoyance, or even expense to the employer. 332 F. Supp. at 495.

95. 2 D. Caplovitz, *supra* note 6, at 10-4.

96. VA. CODE ANN. § 8-630 (Repl. Vol. 1957).

97. *Weaver v. Beneficial Fin. Co.*, 200 Va. 572, 106 S.E.2d 620 (1959).

As indicated above, in a tort action the consumer must show intent by the collector to bring about termination of the employment, and some courts have imposed an additional requirement that the employment relationship be one existing for a definite period rather than one terminable at will. In view of the absence of protection for the employment relationship and the improbability of the debt being repaid should employment be terminated, it would appear that the detrimental effects and unfairness that may result from allowing the employer to be brought into a debtor/creditor dispute outweigh whatever advantage debt collectors may gain from contacting employers. Thus, section 3(g)(2) authorizes disclosure of indebtedness to employers only when such information might work to the benefit of all parties through the furnishing of debt counseling.

Section 3(h), prohibiting "any other conduct" which can reasonably be expected to harass the debtor was included to allow the courts latitude in handling collection cases.<sup>98</sup> It is impossible to anticipate all offensive practices that an overzealous debt collector might devise. Through this provision the courts are authorized to redress grievances resulting from acts which, although not specifically enumerated, are nonetheless violative of the underlying purposes of the statute. A problem with this provision is that it appears to impair the previous attempts to set meaningful standards of conduct and to delimit the perimeters of prohibited practices. It is fair to say that section 3(h) provides little notice to collectors of those activities which might fall within its scope. An alternative approach would be to omit the catchall provision and require the legislature to amend the statute with specific provisions as new abusive practices develop. Assuming that there are certain collectors whose only concern is coercing payment with the least expense and effort possible, it is likely that frequent statutory amendments would be required to address novel techniques of collection. Such amendments, unfortunately, would only be considered after a consumer had suffered injury. It is foreseeable that the most oppressive collectors would continually stay ahead of the legislature in devising abusive approaches to debt collection. Therefore, it is believed to be more satisfactory to include a provision such as section 3(h) which would provide relief from practices developed in attempts to circumvent proscriptions on other collection tactics. Sections 3(a) through 3(g) give notice to the collector of the types of activities deemed

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98. See Appendix *infra*, § 3(h) & accompanying Comment.



harassing. These standards should furnish adequate guidelines for the well-meaning collector whose activities will not approach the perimeters of unacceptable practice.

### C. Remedies

Effective control of abusive collection practices depends ultimately upon the question of enforcement. The primary enforcement method utilized by the proposed statute is the private civil action by the individual debtor aggrieved by creditor action. The necessity of effective enforcement, however, requires a recognition of supplemental remedies as well. Therefore, the statute permits debtors to raise statutory violations as a complete defense to the underlying obligation<sup>99</sup> and to petition for license revocation.<sup>100</sup> In addition, it leaves undisturbed existing criminal sanctions for violations which are currently prohibited by Virginia law.<sup>101</sup>

Section 4(b) specifies the basic enforcement mechanism of the statute by permitting any consumer injured by a statutory violation to recover actual damages or \$200, whichever is greater.<sup>102</sup> Although, as noted, existing criminal sanctions would remain for a number of the practices prohibited by the model statute, civil remedies, for several reasons would always be available to an aggrieved debtor. Initially, there exists the problem of enforcement of criminal sanctions. By creating civil penalties, the opportunity is given the individual consumer to initiate the action. It is recognized that some grievances will never be redressed if the initiative is left entirely to the consumer. Nevertheless, since a number of the prohibited practices do not justify criminal sanctions, the statute creates no additional criminal penalties. Civil remedies provide a flexible remedy for what may be little more than overzealousness which,

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99. See *id.* § 4(a) & accompanying Comment.

100. See *id.* § 4(d) & accompanying Comment.

101. See *id.* § 4(e) & accompanying Comment.

102. See *id.* § 4(b) & accompanying Comment. See generally Spanogle, *Why Does the Proposed Uniform Consumer Credit Code Eschew Private Enforcement?*, 23 BUS. LAW. 1039 (1968). Professor Kripke has criticized the suggestion that the private action for minimum penalties, attorney's fees, or both would promote enforcement by increasing consumer incentive. He contends that penalties generally are not sufficiently large to provide a realistic incentive and that the probable result if they were would be fabricated litigation with inflated damages claims. Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 46-51 (1969). It can be argued that Professor Kripke's suggested alternative, the expansion and development of legal services offices for poor consumers (*id.* at 49), provides the least realistic possibility of effective regulation of abusive creditor practices.

while requiring sanction, may not deserve the opprobrium associated with criminal prosecution. For those activities which have been recognized as criminal, the public policy against such actions is underscored by allowing private relief while retaining criminal sanction.

There are two additional reasons for providing civil as opposed to further criminal remedies. The first is that some of the listed practices are lacking in specificity. The loose definitions allow for flexibility in dealing with unanticipated abusive practices. Were such practices subject to criminal penalties, constitutional due process problems would require resolution. A final rationale for providing a civil remedy as the principal means of enforcement is to permit those who have been victimized to be compensated for their harm. Consumers are furnished a statutory right to recover actual damages. In addition, if a penalty is assessed under the provision for a \$200 minimum recovery, it is awarded to the individual who has been wronged.

A good faith defense is allowed the collector for an unintentional violation resulting from a bona fide error.<sup>103</sup> Such an error could arise in a situation where several employees of a collecting firm contacted a consumer within a short period of time, each failing to note this contact in the consumer's file. Since no intent to harass might exist under such circumstances, a defense should be permitted. It is apparent, however, that such defenses could be fabricated. The statute, therefore, requires that the collector sustain the burden of proving his defense by clear and convincing evidence. An alternative method of avoiding difficulties from fabricated defenses would be to impose strict liability on the collector for all violations. Because such an approach might have a severe detrimental impact on the credit market, it has been rejected.

There are two principal reasons for imposing a \$200 minimum recovery under section 4(b) for victims of prohibited practices. First, it is necessary to provide a substantial deterrent to such practices. The use of abusive tactics must be made more costly than the use of acceptable means of collection. Second, effective enforcement of the statute requires that there be adequate incentive for an injured consumer to seek redress. If the provable damages resulting from an abusive collection technique are small, the consumer will be reluctant to expend the time and effort required to obtain a judgment. Guaranteeing the party wronged a minimum recovery of \$200 will encourage challenges to those collectors utilizing abusive practices and vindicate the public policy expressed in the proposed statute.

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103. See Appendix *infra*, §§ 4(a), (b), (c) & Comment 4(a).

A similar concern for increasing the incentives to undertake private enforcement justifies the provision in section 4(c) for recovery by successful plaintiffs of court costs and attorney's fees.<sup>104</sup> Few consumers will seek redress if the bulk of their recovery represents the costs of bringing the action. The purpose of the statute will be better effectuated by allowing consumers to recover those costs necessary for them to assist in its enforcement.

Notwithstanding these incentives, the likelihood is great that some collectors will never be challenged in spite of the abusive nature of their collection practices. Low-income consumers are often unaware of the existence of statutory grounds for contesting collector activity or, if aware of their rights, are reluctant to utilize the judicial system to assert them. Unfortunately, there is little that can be done by statute to educate debtors as to their rights or to reduce their fear of the judicial system. Recognizing that many injured consumers will never initiate action against abusive collectors, the statute includes a provision whereby proof of proscribed practices may be used as a shield. Section 4(a) provides that if a consumer is sued on an obligation, proof of a violation of the chapter will constitute a total defense.<sup>105</sup> A consumer willing to appear in court, rather than have a default judgment entered against him, may raise the violation as a complete defense to liability on the debt. This provision is cumulative with section 4(c), thus allowing a consumer to recover attorneys' fees in cases where he defends successfully.

There are two shortcomings of section 4(a). One problem is that many low-income debtors are subject to default judgments either because they do not understand what is required of them or because they fail to notify the proper parties of their inability to appear in court at the appointed time. Section 4(a) provides no relief for these debtors. It is clear, however, that abolition or restriction of default judgments is beyond the established purpose and scope of this statute, particularly in view of the increased costs of such a provision. The second difficulty arises from the requirement that the customer *prove* a violation of the chapter as a means of establishing a defense. Many of these practices, by their nature, are difficult to prove, and section 4(a) affords no presumptions. The alternative would be to place the burden of proof on the collector, requiring him to prove the negative. This virtually im-

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104. See *id.* § 4(c) & accompanying Comment.

105. See *id.* § 4(a) & accompanying Comment.

possible burden, like others previously discussed, might result in an impermissible increase in the cost of credit. Furthermore, in order to avoid the possibility of fictitious allegations by consumers, it is necessary to require that they sustain the burden of proof; otherwise, the consumer would be free to raise a defensive shield in every case. Imposing the proof burden on the consumer will aid the courts in their factual determinations. It should be noted that under section 4(e), all other statutory and common law defenses to the claim remain available to the debtor.

As a final cumulative remedy, section 4(d) allows an injured consumer to petition the Collection Agency Board to hold license revocation proceedings.<sup>106</sup> Since a number of the prohibited practices appearing in this chapter are also barred by the rules and regulations promulgated by the Virginia Collection Agency Board, with a possible penalty of loss of license, a provision for private petition increases the effectiveness of the Board's authority. Threat of license revocation serves as an ultimate deterrent to abusive collections. It can be assumed that few collection agencies will be willing to risk the future of their operations merely to collect additional outstanding debts. Isolating collection agencies from all other collectors to be subject to this sanction is justified upon the ground that only these organizations devote their entire business to collection activities.

### III. CONCLUSION

An attempt has been made in this model statute to establish a unified body of standards of conduct for all debt collectors and to provide private remedies to those consumers injured by violations of these standards. The restrictions placed upon collection tactics make it incumbent upon creditors to undertake more sophisticated determinations of those consumers who are likely to default on their obligations. It is anticipated, however, that the restrictions imposed are not so severe as to result in substantial increases in the cost of credit which would force marginal consumers from the market.

The basic purpose of the statute has been to afford consideration to the needs of all interested parties. The creditor/collector has an interest in prompt payment and low collection costs. The consumer/debtor desires freedom from harassment, protection of his reputation and relationships with family, friends, and employer, and an oppor-

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106. See *id.* § 4(d) & accompanying Comment.

tunity to assert valid defenses. Society is concerned about the cost of credit, control of collection practices, and a right to redress for grievances. The proposed statute attempts to reflect these competing interests in a manner designed to provide the greatest benefit for the least cost.

## APPENDIX

### PROPOSED VIRGINIA DEBT COLLECTION ABUSE ACT

#### § 1. SCOPE

This chapter applies to conduct and practices in connection with the collection of claims arising from consumer credit transactions.

#### OFFICIAL COMMENT

The purpose of this chapter is to compile provisions relating to collection practices found throughout the Virginia Code and the existing tort law relevant to debt collection into a cohesive body of law in order that those engaging in collection will have notice of the restrictions placed on their practices.

The rules and regulations adopted by the Virginia Collection Agency Board shall apply to debt collection by licensed collection agencies wherever no specific provision is found in this chapter. In the case of conflict, this chapter governs.

#### § 2. DEFINITIONS

(a) "Claim" means any obligation or alleged obligation arising from a consumer credit transaction.

(b) "Consumer Credit Transaction" means a transaction between a merchant and a customer in which real or personal property, services, or money is acquired on credit, and in which transaction the customer's obligation is payable in installments or for which credit a finance charge is or may be imposed.

(c) "Customer" means a person, other than an organization, who seeks or acquires real or personal property, services, money, or credit for personal, family, household, or agricultural purposes.

(d) "Debt Collection" means any action, conduct, or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due a merchant by a customer.

(e) "Debt Collector" means any person engaging directly or indirectly in debt collection.

(f) "Merchant" means any person who regularly deals in goods of a kind, realty, services, or money, or who otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction, or to whom such knowledge or skill may be attributed by employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

#### OFFICIAL COMMENT

This section assumes that transactions between a merchant and a casual or inexperienced buyer require special and clear rules which may not apply to transactions between professionals. No attempt is made to regulate commercial dealings between merchants.

(a) "Claim". New. The term refers to any money, goods, or services for which a customer is or may be liable.

(b) "Consumer Credit Transaction". New. The term "credit" refers to the fact that the customer is allowed time in which to make payment. An obligation is "payable in installments" if payment is permitted by agreement to be made in two or more installments. The term "finance charge" includes all charges payable directly or indirectly by the customer as an incident to the extension of credit, including interest, amounts payable under a discount, service charges, and insurance costs.

(c) "Customer". New. The definition reflects concern for the unique situation of the unprofessional, individual buyer.

(d) "Debt Collection". New. The term is defined broadly to include all activities in seeking to recover a debt which might lead to harassment of a customer. The term includes activities undertaken to secure payment of a claim which may be proven invalid.

(e) "Debt Collector". New. Included in the term are merchants, credit sellers, lending institutions, collection agencies, and those offering forms to be used as a collection device. The term does not include a printing company responsible only for the printing of the forms.

(f) "Merchant". The definition is derived from VA. CODE ANN. § 8.2-104 (Added Vol. 1950), but is expanded to include those dealing in realty, services, and money. The term includes, but is not limited to, a seller, lessor, manufacturer, creditor, arranger of credit, and lending institution. The professional status under the definition attaches only when a merchant is dealing in his mercantile capacity. The clause "or to whom such knowledge or skill may be attributed by his employment of an agent or broker . . ." means that even persons whose primary purpose is other than

the aforementioned activities may be included within the term "merchant" if they employ personnel acting in such a capacity.

### § 3. PROHIBITED PRACTICES

In attempting to collect an alleged claim arising from a consumer credit transaction, a debt collector shall not:

- (a) Threaten the institution of legal proceedings;
- (b) Utilize a communication which simulates legal or judicial process;
- (c) Misrepresent or create false impressions concerning the true nature of his business;
- (d) Threaten violence or harm to the customer, those related to him, or his property;
- (e) Use obscene, defamatory, or threatening language in communicating with a customer or person related to him;
- (f) Communicate with the customer or a person related to him with such frequency or at such unusual hours or in such a manner as can reasonably be expected to harass;
- (g) Disclose or threaten to disclose to a person other than the customer, or his spouse if also liable, information concerning the existence of the claim, except through proper legal proceedings. But this paragraph does not prohibit:
  - (1) disclosure to another person of information permitted to be disclosed to him by statute, provided the customer is notified of such communication;
  - (2) disclosure to the customer's employer when the employer has an established debt counseling service;
- (h) Engage in any other conduct which can reasonably be expected to harass the customer or persons related to him.

#### OFFICIAL COMMENT

(a) The Unauthorized Practice of Law Committee of the Virginia State Bar has stated that threatening institution of legal proceedings constitutes the practice of law. Opinion No. 38, April 9, 1968. Those practicing law without authority are subject to misdemeanor prosecution. VA. CODE ANN. § 54-44 (Repl. Vol. 1972). Including this provision in the chapter gives notice to all debt collectors that such a practice is prohibited. This provision appears in the Model Act to License and Regulate Collection Agencies, drafted by the ABA National Conference of Lawyers and Collection Agencies.

(b) The simulation of judicial process for the purpose of collecting money is currently proscribed by VA. CODE ANN. § 18.1-313 (Repl. Vol. 1960). The provision is included in this chapter for the purpose of present-

ing a unified body of law controlling debt collection. Examples of proscribed writings include those intended to represent warrants, process, notice of motion for judgment, and notice of execution lien.

(c) The debt collector shall not engage in such conduct as might deceive the consumer of the collector's true status. Activities barred under section 3(c), as tending to create false impressions, include use of names other than the true business name, use of insignias or initials suggesting government involvement, and impersonation of an officer of the peace, as is currently proscribed by VA. CODE ANN. § 18.1-311 (Repl. Vol. 1960).

(d) The purpose of this subsection is to prevent extortionate credit practices, currently barred by VA. CODE ANN. § 18.1-184 (Repl. Vol. 1960), by providing private redress for the victims. Protection is extended to those related to the customer and his property, as such threats might invoke greater fear than threats of harm to the customer himself. It is not necessary that the customer have anticipated that such practice would occur at the time the transaction was entered. All attempts to collect claims through threats of violence and harm are prohibited. This provision reflects the reasoning behind the torts of assault and battery and intentional infliction of emotional distress.

(e) This provision makes the "insulting words statute," VA. CODE ANN. § 8-630 (Repl. Vol. 1957), specifically applicable in the debt collection situation and facilitates private recovery. Private actions for use of such language have also been authorized in tort actions for intentional infliction of emotional distress and libel. Both written and oral communications are included within the scope of this section. In addition to the "insulting words statute," which has been held to apply to written as well as oral communication, *Chaffin v. Lynch*, 83 Va. 106, 1 S.E. 803 (1887), several other sources provide the basis for this section. Under VA. CODE ANN. § 18.1-238 (Repl. Vol. 1960), it is a misdemeanor to use obscene language over the telephone. In addition, 18 U.S.C. § 1718 (1970) prohibits the mailing of material displaying on the outside cover obscene, defamatory, or threatening matter; Regulation XI, 3 of the Virginia Collection Agency Board forbids licensees from violating the U.S. Postal Laws.

(f) This provision derives its basis from the invasion of privacy tort. See *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956). Communication may be in the form of letters, visits, or phone calls. Although disclosure to others of information regarding the claim is barred under section 3(g), it is necessary to include communication to persons related to the debtor in this section in order to prevent harassing communication which may not mention the alleged debt. See *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961). "[I]n such a manner as can reasonably be expected to harass" includes such practices as calling relatives long distance, collect,



*Duty v. General Finance Co.*, 154 Tex. 16, 273 S.W.2d 64, (1954); coercive communications, *Holloway v. Davis*, 44 Ala. App. 346, 208 So. 2d 794 (1967); and contacting the customer at his place of employment, *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959).

(g) This provision also is based in the invasion of privacy tort. It prevents communications to friends and relatives which might harass or distress them and cause embarrassment to the customer resulting in a decision to forego legal defenses to the claim. Also barred are communications to the public through such practices as the publication of "deadbeat" lists and the placing of signs in store windows advertising nonpayment by named customers. See *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927).

Subsection (1) excepts communications authorized by statutes such as the Fair Credit Reporting Act, 15 U.S.C. § 1681 (1970). However, a requirement of notification of such communications to the customer is imposed in order that he might contest invalid claims and clarify misleading information.

Subsection (2) excepts communications to employers with established debt counseling services. It is recognized that such services may be extremely beneficial to all parties concerned, and use of such services is to be encouraged. In all other situations, however, no communications can be made to the employer due to the potential for disruption of the employment relationship.

(h) The purpose of including this provision is to allow the courts latitude in dealing with collection practices. It is recognized that abusive practices not covered by the preceding list might be utilized, and this section could provide a remedy in such situations. The preceding sections provide collectors with notice as to the type of conduct which may constitute harassment.

#### § 4. REMEDIES

(a) *Release from Obligation.* Proof that a debt collector has violated any provision of this chapter shall constitute a complete defense to any legal action to enforce the claim that was being collected at the time such violation occurred, and the customer shall be released from all obligation on said claim: Provided, however, that if the debt collector shows by clear and convincing evidence that the violation was not intentional and resulted from a bona fide error, the customer shall not be released from the claim.

(b) *Damages.* A customer injured by violation of this chapter may recover actual damages or \$200, whichever is greater. A debt collector may not be held liable for damages in any action brought under this section if the debt collector shows by clear and convincing evidence that the violation was not intentional and resulted from a bona fide error.

(c) *Costs and Fees.* If a customer establishes that a debt collector has violated any provision of this chapter and the collector does not show by clear and convincing evidence that the violation was not intentional and resulting from a bona fide error, the customer shall be awarded court costs and attorney's fees based on work reasonably performed.

(d) *License Revocation.* A customer injured by violation of this chapter by a licensed collection agency may petition the Collection Agency Board to hold a hearing to determine if the license of such agency should be revoked: Provided, however, that no hearing shall be held if the customer has sought and failed to prevail under section 4(a), section 4(b), or both.

(e) *Other Remedies Not Affected.* The grant of remedies in this chapter does not affect remedies available to a customer under principles of law or equity; nor does it affect criminal charges which may be brought for conducting proscribed practices.

#### OFFICIAL COMMENT

This section sets forth certain remedies of the customer in the event of violation of this chapter by the debt collector. All remedies provided in the subsections are cumulative.

(a) The burden of proof rests with the customer to establish that a violation has in fact occurred. If such burden is successfully sustained, the burden passes to the collector to show that such violation was not intentional and resulted from a bona fide error. Should the collector fail to establish such a defense by "clear and convincing" evidence, the customer is released from liability. The use of the word "shall" indicates that the action is both authorized and required.

(b) A minimum monetary penalty is specified to cover cases where a violation is established but proof of damages is difficult. A good faith defense is allowed the debt collector for actions for damages; however, no presumptions are created, and the standard of proof resting on the collector is "clear and convincing evidence."

(c) A customer who prevails under section 4(a), section 4(b), or both, is entitled to an award of attorney's fees. This award is not discretionary except as to amount. In determining the amount of the award, consideration shall be given to the work reasonably performed by the attorney, not to the amount of the recovery. Provision is also made for a prevailing customer to recover court costs.

(d) In order to promote the purpose of the Rules and Regulations of the Collection Agency Board, the customer is authorized to seek a license revocation hearing. This provision is cumulative with other customer remedies. However, a limit is placed on the cumulative nature of the

remedy if the customer has been unsuccessful in asserting the violation under section 4(a), section 4(b), or both, in order to avoid burdening the Collection Agency Board with hearings based on frivolous charges.

(e) Such actions as suits for declaratory judgments, injunctive relief, and tort claims remain unaffected. Misdemeanor prosecution for practices prescribed by this chapter is cumulative with the remedies afforded the customer.

#### § 5. EFFECT ON OTHER LAWS

This chapter does not annul, alter, or affect, or exempt the debt collector from complying with, any other laws of the State of Virginia, except to the extent that those laws are inconsistent with the provisions of this chapter, and then only to the extent of such inconsistency shall this chapter prevail.

#### OFFICIAL COMMENT

All legislation inconsistent with this chapter is superseded.

#### § 6. SEVERABILITY

If a provision enacted by this chapter is held invalid, all valid provisions that are severable from the invalid provision remain in effect. If a provision enacted by this chapter is held invalid in one or more of its applications, the provision remains in effect in all valid applications that are severable from the invalid application or applications.

#### OFFICIAL COMMENT

All provisions and clauses within this chapter are to be given effect insofar as they are legally valid.