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DEBT COLLECTION PRACTICES: REMEDIES FOR ABUSE

Collection agencies perform a necessary and unpleasant function: the collection of delinquent debts. If this chore were easily accomplished, the need for the agencies' services presumably would be far less acute. However, in their work the agencies face the problem of forcing a debtor to repay money when he cannot or will not do so. Debtors often do not respond to a polite request for payment. Consequently, the agencies seek other means to recover the money, including the threat of a lawsuit or the request of a debtor's employer to withhold his wages. Such methods have at times been deemed legitimate by courts.¹

Even if conduct of this nature is permissible, agencies, after several futile requests for payment, engage in more extreme conduct not easily justified. This activity may include the threat of loss of employment and the continual harassment of strategically timed telegrams and special delivery letters.² Courts and legislatures have been confronted by the problem of defining the point at which the interest of a collection agency in debt recovery must yield to a debtor's right to be free from harassment. This comment will examine judicial attempts to provide debtors with protection from overly zealous collection agencies. It will then turn to the legislative effort to strengthen the protection afforded by the courts. The statutes of several states in particular and the provisions of a proposed Model Act will receive analysis in terms of their protective purposes and capacity.³

I. COMMON LAW

Courts have sought to moderate the conduct of creditors by allowing debtors to recover for defamation,⁴ invasion of the right of privacy,⁵ and intentional infliction of mental anguish.⁶ The problems encountered and results achieved by attempts to curtail the activities of collection agencies through judicial action become apparent in an examination of representative cases.

A. *Intentional Infliction of Mental Anguish*

*Duty v. General Fin. Co.*⁷ was a major case involving an action for damages for mental anguish and physical injuries received as a result of

¹ E.g., *Davis v. General Fin. & Thrift Co.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950); *Yoder v. Smith*, 253 Iowa 505, 112 N.W.2d 862 (1962).

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

³ The statutes to be examined are: Ark. Stat. Ann. §§ 71-2001-10 (Supp. 1967); Cal. Bus. & Prof. Code §§ 6850-6956.2 (West 1964), as amended, §§ 6867-6956 (West Supp. 1968); Colo. Rev. Stat. Ann. §§ 27-1-1-26 (1964), as amended, §§ 27-1-3-27 (Supp. 1967); Conn. Gen. Stat. Ann. §§ 42-127-133 (1960); Me. Rev. Stat. Ann. tit. 32, §§ 571-83 (Supp. 1968); N.M. Stat. Ann. §§ 67-15-22-89 (1961); N.C. Gen. Stat. §§ 66-41-49 (1965); Ore. Rev. Stat. §§ 697.010-470 (Supp. 1967); National Conference of Lawyers and Collection Agencies, A Model Act to License and Regulate Collection Agencies, 70 Com. L.J. 38 (1965) [hereinafter cited as *The Model Act*].

⁴ *Turner v. Brien*, 184 Iowa 320, 167 N.W. 584 (1918).

⁵ *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

⁶ *La Salle Extension Univ. v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934).

⁷ 154 Tex. 16, 273 S.W.2d 64 (1954).

defendants' efforts to recover money lent to plaintiffs. In their complaint plaintiffs alleged an exhaustive catalogue of harassment. They asserted that defendants had made daily telephone calls to both Mr. and Mrs. Duty; accused them of being "deadbeats"; stated to their neighbors that they were "deadbeats"; threatened to cause both plaintiffs loss of their jobs unless they made the payments demanded; telephoned each of the plaintiffs at work several times daily; personally called on them at work; sent telegrams and special delivery letters during the night; and left red cards in their door, inscribed with insults and thinly veiled threats.⁸ The plaintiffs claimed that all the actions were willful and committed with the knowledge that they would cause plaintiffs mental and physical illness. The court reversed the ruling of the trial court, which had dismissed the petition for failure to state a cause of action, and remanded for disposition.⁹

Several difficulties inhere in actions brought for mental anguish. Some courts, fearing feigned complaints, have refused to award damages for mental injury without the presence of physical harm.¹⁰ The desire to prevent fraudulent claims may also make it more difficult for a plaintiff to recover in those jurisdictions which do allow recovery on the basis of an intentional infliction of mental anguish. This reluctance to award damages, while justified in terms of its intended policy, has limited the effectiveness of court action as a means of restraining the activity of collection agencies. Another difficulty attending this cause of action is the requirement that the emotional stress must be the result of "extreme and outrageous conduct."¹¹ It may be difficult for a plaintiff to establish that the conduct of a collection agency meets this standard. A further obstacle arises from the requirement that the emotional stress be severe.¹² A collection agency's job normally involves causing a debtor some mental unrest. The normal strain caused a debtor by contact with an agency is not enough to entitle him to recover. The debtor has to establish *serious* mental stress. The debtor often may have difficulty in showing an emotional reaction sufficient as a basis for a damage award. Consequently, collection agencies may be able to conduct their business in an offensive manner short of the degree of severity required for tort liability.

B. Invasion of Privacy

Some courts have allowed recovery on a theory of an invasion of the right to privacy. *Housh v. Peth*¹³ involved a plaintiff's contention that the defendant collection agency had harassed her by continually calling her at late hours, by causing her employer to threaten to discharge her, by telling her landlord that plaintiff did not pay her bills, and asking the landlord about her earnings. Plaintiff asserted that these actions constituted an invasion of her

⁸ Id. at 18-19, 273 S.W.2d at 65.

⁹ The lower court had based its ruling on an earlier decision, *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953), in which recovery for mental suffering was denied plaintiff. The court in *Duty* distinguished the prior case on the ground that it contained no allegation of physical injury.

¹⁰ E.g., *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953).

¹¹ See *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961).

¹² See Restatement (Second) of Torts § 46 (1965).

¹³ 165 Ohio St. 35, 133 N.E.2d 340 (1956).

right of privacy and caused her nervousness, mental anguish and similar distress. Plaintiff asked for a temporary restraining order and a permanent injunction against these tactics, and for damages. A temporary restraining order was issued and damages awarded. The Supreme Court of Ohio affirmed the decision, and recognized that a systematic campaign to harass the plaintiff made defendant's conduct an unreasonable effort to collect the money.¹⁴

In *Housh*, the court approved a charge stating that "the invasion of the right of privacy may be defined . . . as the wrongful intrusion into one's private activities in such manner as to outrage or to cause mental suffering, shame or humiliation to a person of ordinary sensibilities."¹⁵ The test adopted by *Housh* for a violation of the right of privacy may not give a debtor sufficient protection, since recovery requires the intrusion to outrage or cause shame or mental suffering to a person of ordinary sensibilities. This standard still permits a collection agency to engage in practices which may be characterized as abusive. For example, the court in *Housh* stated that an agency could inform an employer of his employee's debts without invading the debtor's right of privacy.¹⁶

C. Defamation

A third means of recovery in aid of a debtor against a collection agency is an action for defamation. In *Turner v. Brien*,¹⁷ the plaintiff became embroiled with defendant as to the amount of money owed by the plaintiff. Plaintiff claimed that he owed 16 dollars and offered to pay it. Defendant contended that the amount involved was 20 dollars and refused anything less. During the course of this dispute, defendant arranged to have plaintiff's name listed in a pamphlet as a poor credit risk. Plaintiff alleged that after the appearance of this publication he was refused credit by various merchants and was deprived of the benefit of public confidence and goodwill. Plaintiff further alleged that the publication was false, was known to be so by defendant, and was published with the intent to deprive him of the benefit of public confidence. A verdict for plaintiff was upheld on appeal. The court stated that

the jury could well find that the thought conveyed and intended to be conveyed was that the plaintiff was not worthy of credit. . . . Such publications usually and ordinarily have the effect of depriving one of public confidence and esteem. The general rule is that any publication concerning a person or his affairs, which from its nature, necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, is libelous per se.¹⁸

Actions for defamation as a means of restraining collection agencies from harassing a debtor are not very effective. An agency may escape penalty if it can establish the truth of any allegations which it makes.¹⁹ Even more im-

¹⁴ *Id.* at 41, 133 N.E.2d at 344.

¹⁵ *Id.* at 39, 133 N.E.2d at 343.

¹⁶ *Id.* at 40-41, 133 N.E.2d at 344.

¹⁷ 184 Iowa 320, 167 N.W. 584 (1918).

¹⁸ *Id.* at 325, 167 N.W. at 586.

¹⁹ *Crellin v. Thomas*, 122 Utah 122, 247 P.2d 264 (1952).

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portant is the limited scope of such a remedy. By its very nature, a suit for defamation is concerned primarily with the truth of certain statements or publications, not with the quality or effect of certain associated conduct. Activities such as constant phoning of a debtor are not remedied by a right of action for defamation.

D. *Weaknesses of Common Law Remedies*

Several broad problems accompany judicial remedies. One general difficulty is that a collection agency may act in a manner reprehensible but nevertheless insufficient to entitle a plaintiff to recover in a law suit. For example, a few "obscene" letters to a person, admittedly in debt, may not cause him sufficient mental distress to enable him to recover damages for mental anguish from the agency responsible for the letters. The letters probably do not constitute an invasion of the debtor's right to privacy and, even if they do, damages would be difficult to measure. Finally, "obscenity" is not necessarily defamation. The common law, in such a case, does not provide a debtor with any protection.

Another problem with litigation as a means of curbing abusive agency practices is that a person may not desire the publicity attending a law suit arising out of the collection process. His reluctance to institute an action against an agency does not make agency practices any less objectionable but, unfortunately, protects their continuance.

The fact that debtors most often subjected to abusive practices are also most hesitant to invoke legal protection in the courts serves to render the judicial remedy even less effective. Debtors of lower economic and educational levels are perhaps most susceptible to abuse from agencies. Those at higher levels either are more likely to be able to pay their debts or, if their debts are referred to an agency, are more likely to pay with much less prompting. Agency practices generally do not become blameworthy until initial attempts to obtain payment prove futile. It is among the poor that the need for protection is the greatest, and it is among the same people that alienation from the legal system is the greatest. Protection available only through the courts is of little practical value to this group.

Probably the major inadequacies of common law remedies inhere in the very nature of the adjudicative process. Recovery by one plaintiff does not necessarily mean that an agency will cease its offensive conduct toward other people. The loss of a few law suits may be a minor consideration if the tactics involved succeed in other collection efforts. Another defect of case-by-case treatment lies in the length of time needed for a judicial standard to become discernible. A judicially defined standard of prohibited conduct often reduces to individual determinations of reasonableness. It is not the function of a court to promulgate a list of prohibited acts.

In short, relief available through present common law remedies is not sufficient for several reasons. Not all conduct that one might wish forbidden affords a basis for relief in court. The economic and social class most in need of protection is precisely the class most alienated from the legal system and therefore least likely to attempt to vindicate its rights through litigation. Relief to one debtor does not necessarily provide any protection to other

members of that class. Finally, a judicial sanction can be somewhat indefinite because of difficulties inherent in the translation of adjudicated results into generalized rules. These shortcomings contrast sharply with the capacity of legislative prohibition and regulation.

II. LEGISLATIVE RESPONSE

The obvious legislative solution is the enactment of an enforceable code of conduct for the collection industry. These standards would serve to place certain forms of conduct *definitely* beyond the limits of permissible behavior. Regulatory action does not necessarily involve the awarding of damages to a plaintiff-debtor. Once the possibility of recovery for fraudulent claims is removed, there is no need to establish prerequisites for recovery such as "excessive and outrageous behavior" or "extreme emotional stress." In other words, certain conduct can be barred whether or not it actually injures a debtor.

Much of the effort to regulate the conduct of agencies has been instigated by the collection industry itself. Proposals have included a Model Act containing a section proscribing certain collection practices by agencies.²⁰ Not all state acts seek to protect the debtor. Some statutes, for example, attempt to regulate only the relationship between the creditor and the collection agency.²¹ Attention will be focused on efforts to protect the debtor, and examination of state legislation will be confined to several statutes²² representative of legislative attempts to control the agencies' treatment of debtors. The state statutes, along with the Model Act, will be evaluated in terms of the protection afforded a debtor. The statutes and the Act reduce to several analytical categories: prohibited conduct; methods of administration; and sanctions.

A. Licensing Requirements

All the statutes under consideration, with the exception of Connecticut's, require that collection agencies be licensed.²³ Collecting debts without a license is a misdemeanor and, in most of the states, is punishable by a fine and/or imprisonment.²⁴ Connecticut's failure to require agencies to obtain a license lessens the effectiveness of its statute. The presence of a licensing provision enables a state to scrutinize more carefully entrants into the

²⁰ The Model Act § 6.

²¹ E.g., Nev. Rev. Stat. §§ 649.010-210 (1967).

²² See note 3 *supra*.

²³ Ark. Stat. Ann. § 71-2001 (Supp. 1967); Cal. Bus. & Prof. Code § 6870 (West 1964); Colo. Rev. Stat. Ann. § 27-1-1 (1964); Me. Rev. Stat. Ann. tit. 32, § 573(1) (Supp. 1968); N.M. Stat. Ann. § 67-15-31 (1961); N.C. Gen. Stat. § 66-41 (1965); Ore. Rev. Stat. § 697.030 (Supp. 1967); The Model Act § 3(a).

²⁴ Ark. Stat. Ann. § 71-2010 (Supp. 1967) (fine); Cal. Bus. & Prof. Code § 6871 (West 1964) (fine and/or imprisonment); Colo. Rev. Stat. Ann. § 27-1-21 (1963) (fine and/or imprisonment); Me. Rev. Stat. Ann. tit. 32, § 573(2) (Supp. 1968) (fine and/or imprisonment); N.C. Gen. Stat. § 66-47 (1965) (punishment is in the discretion of the court); Ore. Rev. Stat. § 697.990 (Supp. 1967) (fine and/or imprisonment); The Model Act § 3(b) (fine and/or imprisonment).

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business by imposition of entrance requirements. Without such supervision almost anyone, without regard to qualification, is able to begin collecting debts.

Under these licensing provisions, either an applicant is required to produce evidence of his integrity, reputation and other personal characteristics supposedly relevant to the ability to conduct the agency business properly, or the appropriate state administrative body is given authority to conduct an investigation of the applicant.²⁵ Although such standards of personal worth are often nebulous, they do represent an attempt by the state to place some limitations on the type of entrepreneur who may enter upon a career of debt collecting. The protection afforded a debtor by such a provision is actually very slight. The very uncertainty of the provisions regarding qualifications probably allows many to enter the business who feel that a broad range of questionable conduct toward a debtor is reasonable. Some of the statutes, which grant authority to investigate, do not provide any assurance that this power will be invoked, nor do they give any indication of the extent to which an investigation, once undertaken, must proceed.²⁶

B. *Written Examinations*

In addition to satisfying requirements dealing with his character, an applicant, under several of the statutes, must pass an examination designed to determine his ability to engage in the collection business.²⁷ A test of this nature adds little to the protection received by a debtor. It does, however, serve an incidental function insofar as it heightens an applicant's awareness of the applicable rules and regulations and the corresponding penalties for violation. This knowledge may serve to restrain a licensee from engaging in some of the more outrageous harassing tactics.

²⁵ Ark. Stat. Ann. § 71-2005 (Supp. 1967); Cal. Bus. & Prof. Code § 6875 (West 1964); Colo. Rev. Stat. Ann. § 27-1-3(7) (1964); Me. Rev. Stat. Ann. tit. 32, § 573(4) (Supp. 1968); N.M. Stat. Ann. § 67-15-37 (1961); N.C. Gen. Stat. § 66-42 (1965); Ore. Rev. Stat. § 697.041 (Supp. 1967); The Model Act § 3(d).

²⁶ For example, "The Board shall have the authority to require an applicant for a license to submit an application in writing containing such information . . . and may require such character and business references which it deems appropriate." Ark. Stat. Ann. § 71-2005 (Supp. 1967).

The Board is given the authority to require a written application. However, it does not have to exercise the authority. Likewise, the remainder of the provision gives no indication of the extent to which an applicant's history is to be subject to scrutiny.

Similarly, North Carolina's provisions on persons entitled to a permit are unclear. Its provisions require that certain information be furnished the Commissioner to aid him in the determination whether a permit should be issued. N.C. Gen. Stat. § 66-42 (1963). Another provision states, however, that the Commissioner may issue a license to whomever he thinks proper, without stating what makes an applicant improper. N.C. Gen. Stat. § 66-44 (1963). The statute requires merely that "evidence of good moral character" be given to the Commissioner. N.C. Gen. Stat. § 66-42 (1963). There is no requirement regarding the weight of evidence. The Commissioner, upon its introduction, may then issue a license, if he thinks it is proper.

²⁷ Cal. Bus. & Prof. Code §§ 6885, 6889 (West 1964); N.M. Stat. Ann. § 67-15-37 (1961); Ore. Rev. Stat. § 697.111 (Supp. 1967).

C. *Reports and Additional Information*

Some states require licensees to file other matter besides their name and business address. This information may include any change in name of the business or the address of a new office.²⁸ Such data can be useful for regulatory purposes. For example, if an agency is allowed to open a branch office without an additional license for it, it will be difficult to impose sanctions on the principal office (the licensee) in the absence of any knowledge of the relationship between the two agencies. Of course, the more obvious difficulty is simply the impossibility of supervising an office of unknown existence.²⁹

D. *Prohibited Practices*

Proscription of specific practices constitutes the most direct form of regulation.³⁰ Specificity is characteristic of such provisions.³¹ For example,

²⁸ For example, Colo. Rev. Stat. Ann. § 27-1-9, -11 (1964); N.M. Stat. Ann. § 67-15-62, -68, -70 (1961).

²⁹ California has perhaps gone farthest in requirement of material from applicants and licensees. Each applicant must supply a photograph taken within a year of the date of the application and two legible sets of fingerprints, Cal. Bus. & Prof. Code § 6876 (West 1964). Other provisions require that every employee be registered, Cal. Bus. & Prof. Code § 6894 (West 1964); that notification be given of a change in residence, Cal. Bus. & Prof. Code § 6994.8 (West 1964); and that any change in officers be reported, Cal. Bus. & Prof. Code § 6913.1 (West 1964).

³⁰ Ark. Stat. Ann. § 71-2008 (Supp. 1967); Cal. Bus. & Prof. Code § 6947 (West 1964); Colo. Rev. Stat. Ann. § 27-1-25 (Supp. 1967); Conn. Gen. Stat. Ann. § 42-131 (1960); Me. Rev. Stat. Ann. tit. 32, § 576 (Supp. 1968); N.M. Stat. Ann. §§ 67-15-76, -78 (1961); N.C. Dep't of Ins., Reg. 7, N.C. Gen. Stat. § 66-46 (1965); Ore. Rule 20-270, Ore. Dep't of Commerce, Directory of Licensed Collection Agencies and Debt Consolidating Agencies, Sept. 1, 1968 [hereinafter cited as Ore. Rule]; The Model Act § 6.

³¹ Arkansas and Maine have representative statutes. Arkansas prohibits:

5. Publishing or posting or causing to be published or posted, any list of debtors, commonly known as "deadbeat" lists.
6. Collecting or attempting to collect by the use of any methods contrary to the postal laws and regulations of the United States.
7. Having in his possession or making use of any badge, using a uniform of any law enforcement agency or any simulation thereof, or making any statements which might be construed as indicating an official connection with any federal, state, county, or city law enforcement agency, or any other governmental agency, while engaged in collection agency business.
8. Distributing any printed matter which is made to be similar or to resemble government forms or documents, or legal forms used in civil or criminal proceedings.
9. Advertising for sale or threatening to advertise for sale any claim as a means of endeavoring to enforce payment thereof, or agreeing to do so for the purpose of soliciting claims, except where the licensee has acquired claims as an assignee for the benefit of creditors or where the licensee is acting under the order of a court of competent jurisdiction.
10. Engaging in any unethical practices or resorting to any illegal means or methods of collection.
11. Using profanity, obscenity, or vulgarity, while engaged in the collection of claims.
12. No licensee shall address a letter to or telephone any debtor at his place of employment unless a good-faith attempt has been made to contact such debtor at his usual place of abode by letter, and that the mail has not been returned and for which no answer has been received.

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the use of "deadbeat lists" is prohibited in most states.³² Collecting or attempting to collect by means contrary to the postal laws and regulations is commonly forbidden.³³ Some states have attempted to control obscenity and profanity.³⁴ Other provisions regulate the use of the telephone for purposes of harassment.³⁵ Of course, it is always possible to imagine some form of agency conduct not enumerated by statute. Many states include a broadly termed residual provision in anticipation of unforeseeable forms of improper conduct.³⁶ The effectiveness of such provisions will depend on the enforce-

13. Using violence or threats of physical violence while engaged in the collection of claims.

Ark. Stat. Ann. § 71-2008 (Supp. 1967).

Maine provides:

No collection agency shall: Threaten to bring legal action in its own name or list the name of a lawyer; use or employ justices of the peace, constables, sheriffs or any other officer authorized to serve legal papers in connection with the collection of a claim; use or threaten to use physical violence in connection with the collection of claims; . . . use instruments which simulate the form and appearance of judicial process; . . . publish or cause to be published any list of debtors except for credit reporting purposes or threaten to do so; use "shame cards," "shame automobiles," or similar devices, methods of intimidation or methods contrary to postal regulations to collect accounts; . . . advertise or threaten to advertise for sale any claim as a means of forcing payment thereof, unless such agency is acting as the assignee for the benefit of creditors or acting under an order of court; . . . operate under a name or in a manner which implies that such agency is a branch of or associated with any department of the Federal Government or of any state or municipal government, or use of any seal, insignia, envelope or other format which simulates that of any government department or agency; . . . make repeated or harassing communications to employers, or make collect telephone calls by subterfuge; . . . collect or attempt to collect from any person an amount in excess of the amount submitted by the creditor for collection.

Me. Rev. Stat. Ann. tit. 32, § 576 (Supp. 1968).

³² A "deadbeat list" contains the names of debtors and is given to various people and organizations for the purpose of harassing and embarrassing debtors.

Ark. Stat. Ann. § 71-2008(5) (Supp. 1967); Cal. Bus. & Prof. Code § 6947(b) (West 1964); Colo. Rev. Stat. Ann. § 27-1-25(3) (1964); Conn. Gen. Stat. Ann. § 42-131(j) (1960); Me. Rev. Stat. Ann. tit. 32, § 576 (Supp. 1968); N.M. Stat. Ann. § 67-15-78(B) (1961); Ore. Rule 20-270 [incorporating the Code of Ethics and Rules of Conduct of the Oregon Collectors Association]; The Model Act § 6(j).

³³ Ark. Stat. Ann. § 71-2008(6) (Supp. 1967); Cal. Bus. & Prof. Code § 6947(c) (West 1964); Conn. Gen. Stat. Ann. § 41-131(l) (1960); Me. Rev. Stat. Ann. tit. 32, § 576 (Supp. 1968); N.M. Stat. Ann. § 67-15-78(C) (1961); Ore. Rule 20-270 [incorporating the Code of Ethics and Rules of Conduct of the Oregon Collectors Association]; The Model Act § 6(k).

³⁴ Ark. Stat. Ann. § 71-2008(11) (Supp. 1967); Cal. Bus. & Prof. Code § 6947(l) (West 1964).

³⁵ Ark. Stat. Ann. § 71-2008(12) (Supp. 1967); Me. Rev. Stat. Ann. tit. 32, § 576 (Supp. 1968); N.C. Dep't of Ins., Reg. 7(1), N.C. Gen. Stat. § 66-46 (1965).

³⁶ Thus, Arkansas prohibits "[e]ngaging in any unethical practices or resorting to any illegal means or methods of collection." Ark. Stat. Ann. § 71-2008(10) (Supp. 1967). Similarly, Oregon requires that

[e]ach member will show due consideration for the misfortunes of a debtor and deal with him on the merits of his individual case. Each member will be fair and reasonable with the debtor according to his financial and economic condition and will permit him to pay the debt or obligation in installments of reasonable size and frequency, measured by his earnings and other pressing indebtedness,

ment policies of the agencies entrusted to administer them. Finally, it should be noted that the catalogue of proscribed practices varies from statute to statute,³⁷ and that usually omissions occur in each one. The New Mexico statute, for instance, says nothing of the use of phone calls to a debtor's employer or neighbors or of the employment of physical force or the threat of it.³⁸ By contrast, Arkansas provisions do limit phone calls to employers but not to neighbors.³⁹

E. Administration

Once these provisions are established the regulatory task becomes one of administration. Under most statutes the task of supervising the activities of the collection agencies is given to a state official and/or a state board.⁴⁰ The typical board established by the statutes has as a majority of its members individuals in the collection agency business.⁴¹ Its powers may include the

upon request, unless the debtor has previously broken a pledge regarding the debt or unless there is a *bona fide* reason to believe that the debtor will not keep his pledge.

Ore. Rule 20-270 [incorporating the Code of Ethics and Rules of Conduct of the Oregon Collectors Association].

³⁷ For example, compare the statutes in note 31 supra.

³⁸ N.M. Stat. Ann. §§ 67-15-76, -78 (1961).

³⁹ Ark. Stat. Ann. § 71-2008 (Supp. 1967).

⁴⁰ Arkansas has a state board, Ark. Stat. Ann. § 71-2003 (Supp. 1967); California has a state board advising the chief of a Collection Agency Licensing Bureau, Cal. Bus. & Prof. Code §§ 6860, 6865, 6868.5 (West 1964); Colorado's statute is administered by a state board and the secretary of state, Colo. Rev. Stat. Ann. § 27-1-3 (1964); Maine's statute is administered by the Bank Commissioner and a Credit and Collection Board, Me. Rev. Stat. Ann. tit. 32, § 583 (Supp. 1968); New Mexico's statute is administered by the state bank examiner and a collection agency board, N.M. Stat. Ann. §§ 67-15-24, -27 (1961); North Carolina's statute is administered by the Commissioner of Insurance, N.C. Gen. Stat. §§ 66-41, -42, -45, -46 (1965); Oregon's statute is administered by a Collection Agencies Board, Ore. Rev. Stat. § 697.402 (Supp. 1967); The Model Act establishes a commissioner, The Model Act §§ 1, 3, 8-12.

Connecticut is an exception to the pattern. Under the Connecticut statute, the prosecution of one who commits a violation is given to "[t]he prosecuting attorney or prosecuting grand juror of each town" who shall "diligently inquire and make due complaint to the court having jurisdiction of all violations that come to their knowledge. . . ." Conn. Gen. Stat. Ann. § 42-133 (1960).

A better solution to the problem of enforcement is a separate state administrative body or official concerned with the problems caused by collection agency practices. Town prosecutors and prosecuting grand jurors may be extremely busy. It is inadvisable to increase their burden when there is a feasible alternative.

Furthermore, the presence of a state agency makes enforcement easier. It may be difficult for a local prosecutor to investigate an agency not located in his area. And if the debtor involved is without influence in the town, the prosecutor may be inclined to use his resources on matters where there is greater public pressure for action.

A state organization is also better situated than local officials to coordinate all of the information required of licensees, as presumably it would have greater resources and time to devote to the task.

Finally, the presence of a state office makes it easier to produce uniformity with regard to requirements and to their enforcement. Lack of statewide regulation effort is more likely to lead to a situation where the statute is not as vigorously enforced in certain areas of a state where local officials must deal with a large volume of other business.

⁴¹ Ark. Stat. Ann. § 71-2003 (Supp. 1967); Cal. Bus. & Prof. Code § 6865.5 (West

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authority to establish rules and regulations, the investigation of violations of the statute, and the authority to impose penalties.⁴²

There does not seem to be any particular need for those charged with administration of the statute to have experience in the agency business. A board composed of members of collection agencies could perhaps serve in a purely advisory capacity to the official administering the statute. It seems best that a board of this nature not have even this minimal position in the governmental structure, as it enables those to be regulated to exercise potentially undue influence over administrative decisions.

Most statutes make the boards more than mere advisors.⁴³ This arrangement constitutes a classic example of industry orientation, if not agency "capture." It is difficult to imagine such a board readily promulgating any regulation that would benefit the public at the expense of the industry at large. Concededly, such a board might be very efficient at detection and punishment of violations of high-level visibility. Such a self-policing policy operates in the collection agencies' own interest. Adverse publicity could lead to more stringent legislation. In the cases not receiving such publicity or lacking in visibility of a violation, the regulatory motive arising from the likelihood of industry-wide detriment from non-enforcement is absent and such a board is likely to be more sympathetic to the contentions of an agency than to those of a debtor. In these circumstances the tension latent in the identity of the regulator and regulated becomes apparent. And, unfortunately, the supra-advisory sanctions given such boards by most statutes are likely to remain withheld.

F. Investigation

The state regulatory authority, whatever its composition may be, is generally empowered to investigate the practices of licensees. The states vary on whether investigations are begun only upon the filing of a complaint,⁴⁴ or whether the state body may examine agency conduct without receiving a

1964); Colo. Rev. Stat. Ann. § 27-1-3(2) (1964); Me. Rev. Stat. Ann. tit. 32, § 583 (Supp. 1968); N.M. Stat. Ann. § 67-15-28 (1961); Ore. Rev. Stat. § 697.402(1) (Supp. 1967).

⁴² For example, Arkansas gives the Board "the authority to revoke, suspend, or refuse to issue a license for violation" of the statute, Ark. Stat. Ann. § 71-2004 (Supp. 1967); New Mexico makes its Board an advisor to the chief on the subject of new rules and regulations, N.M. Stat. Ann. § 67-15-29 (1961).

⁴³ Arkansas has only a board, Ark. Stat. Ann. § 71-2003 (Supp. 1967); California appears to have a board that is mainly advisory, Cal. Bus. & Prof. Code §§ 6863, 6868.5, 6925, 6930 (West 1964); Colorado gives administration of the statute to the Secretary of State. Investigation of qualifications for a license is by the board, Colo. Rev. Stat. Ann. § 27-1-3(6) (1964). In addition, it is necessary for the board to find that the complaint is based on probable cause before the Secretary of State will hold a hearing, Colo. Rev. Stat. Ann. § 27-1-18(8) (1964); Maine allows the board to make the final decision on suspension, Me. Rev. Stat. Ann. tit. 32, § 578 (Supp. 1968); New Mexico places the question of suspension in the hands of the board, N.M. Stat. Ann. § 67-15-74 (1961); Oregon makes the board the final authority on administrative remedies, Ore. Rev. Stat. § 697.285(2) (Supp. 1967).

⁴⁴ Ark. Stat. Ann. § 2004 (Supp. 1967); Colo. Rev. Stat. Ann. § 27-1-18 (1964); N.C. Gen. Stat. § 66-45 (1965); The Model Act § 8.

claim of a violation.⁴⁵ Difficulty arises even from those provisions which allow the state body to initiate an investigation. The provisions do not prescribe for a commissioner or board any frequency of investigation into the activities of agencies. The absence of such standards of surveillance encourages the judicialization of state agencies. Instead of actively investigating and eliminating abuses, the regulatory body tends to lapse into merely passive receipt and disposition of complaints. Clearly this role is not adequate to the problem. Much activity will go unreported to the administrative body because, as in the case of judicial remedies, debtors most in need of protection are those least likely to seek relief from an enforcement or quasi-judicative agency. Alienation from the legal processes is likely to inhibit the economically or educationally deprived debtor from seeking recourse from a remote or passive regulatory body.

For these reasons, it would seem reasonable to require the administrative body to investigate an agency if it were being sued in a civil action, even though no complaint had been filed with the agency. Certainly a recovery by a plaintiff against an agency should prompt some action by the state authority. A further method for insuring proper coverage of the collection practices would be a system of spot checking, probably more valuable in its deterrent than its punitive effect.

G. Sanctions

The statutes often provide for both criminal and administrative sanctions for violation of the act. The criminal penalty is generally a fine and/or imprisonment.⁴⁶ Its effectiveness naturally depends upon the diligence of enforcement and severity of punishment. Under the provisions for administrative sanctions a collection agency is usually allowed a hearing before any penalty is imposed.⁴⁷ If the agency is found to have engaged in prohibited activity, it may face suspension or revocation of its license.⁴⁸ The loss of a license is probably the most effective penalty since it makes the further operation of business unlawful. Unfortunately the statutes do not use this sanction as effectively as is possible. Most provisions establishing this penalty commit its application to the discretion of the regulatory body.⁴⁹ This approach is to be

⁴⁵ Cal. Bus. & Prof. Code § 6925 (West 1964); Me. Rev. Stat. Ann. tit. 32, § 578 (Supp. 1968); N.M. Stat. Ann. § 67-15-72 (1961); Ore. Rev. Stat. § 697.230 (Supp. 1967).

⁴⁶ See, for example, Ark. Stat. Ann. § 71-2010 (Supp. 1967); Colo. Rev. Stat. Ann. § 27-1-21 (1964); Conn. Gen. Stat. Ann. § 42-133 (1960); N.M. Stat. Ann. § 67-15-87 (1961); N.C. Gen. Stat. § 66-47 (1965); Ore. Rev. Stat. § 697.990 (Supp. 1967).

⁴⁷ Ark. Stat. Ann. § 71-2004 (Supp. 1967); Cal. Bus. & Prof. Code § 6925.1 (West 1964); Colo. Rev. Stat. Ann. § 27-1-18(8) (1964); Me. Rev. Stat. Ann. tit. 32, § 578 (Supp. 1968); N.M. Stat. Ann. § 67-15-74 (1961); N.C. Gen. Stat. § 66-45 (1965); Ore. Rev. Stat. § 697.270 (Supp. 1967); The Model Act § 8.

⁴⁸ Ark. Stat. Ann. § 71-2004 (Supp. 1967); Cal. Bus. & Prof. Code § 6930 (West 1964); Colo. Rev. Stat. Ann. § 27-1-18(9) (1964); Me. Rev. Stat. Ann. tit. 32, § 578 (Supp. 1968); N.M. Stat. Ann. § 67-15-29 (1961); N.C. Gen. Stat. § 66-45 (1965); Ore. Rev. Stat. § 697.261 (Supp. 1967); The Model Act § 8.

⁴⁹ Thus, the Arkansas statute states that "[t]he Board shall have the authority to revoke. . . ." This provision is not the same as one which says that a board *must* revoke a license, Ark. Stat. Ann. § 71-2004 (Supp. 1967); New Mexico provides that "[t]he willful violation of any rules and regulations established by the chief for the conduct

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contrasted with the mandatory nature of the sections on fines.⁵⁰ Therefore, it is generally possible for an agency to act in a manner prohibited by the regulations and still maintain its license, regardless of the gravity or frequency of its violation. So long as standards for license suspension are lacking and so long as suspension remains a matter of seldom used discretion, its deterrent force will be minimal. At a certain point, a debtor should be assured that the penalties for misconduct provided by the state will be utilized against an agency. For example, a series of violations would seem to indicate sufficient disregard for the regulations to cause the suspension or revocation of a license. Yet, there is no suggestion in the statutes that a certain number of violations is enough to require even a brief suspension. (Some analogy might be drawn to automobile regulations that require a suspension of a driver's license for 30 days for the first violation, 60 days for the second, and so forth.) Without such a requirement, the effectiveness of the legislation depends upon the fortuitous identity of enforcement personnel. And, as has been noted, strict enforcement is already doubtful when the discretion-wielding regulatory bodies are manned by industry-oriented officials.

CONCLUSION

An examination of both the available civil remedies and the relevant state legislation compels the conclusion that neither meets the problem raised by certain practices of collection agencies. Judicial attempts to moderate the conduct of agencies have operated through recovery in actions grounded on intentional infliction of mental anguish, invasion of privacy, and defamation. The common law approach has obvious shortcomings. The requirement that a debtor show damages permits an agency in many cases to act reprehensibly so long as the debtor is not physically or financially injured. Litigation may cause a debtor unwanted publicity. The people most in need of protection, those in the lower economic and educational strata, are those most alienated from the judicial system and least willing to take part in a court action. Finally, judicially developed standards are usually crystallized only after a prolonged line of cases.

Nor does existing legislation adequately cope with the problem. To apply standards of entry into the collection industry, most states require agencies to obtain a license. A written examination may further aid evaluation of applicants seeking to operate collection agencies. Neither of these provisions typically gives a debtor very much protection. Licensing standards reserve

of licensee is sufficient ground for revocation of the license of a licensee, or other disciplinary action." N.M. Stat. Ann. § 67-15-29 (1961); Oregon provides that "[t]he Real Estate Division may suspend, revoke or refuse to renew or grant any license or certificate . . . if the licensee . . . has been . . . convicted of . . . violating any rule and regulation of the division." Ore. Rev. Stat. § 697.261 (Supp. 1967). Compare Colorado's statute providing, "If . . . the secretary of state shall find the licensee guilty of such charges, his license shall be revoked and cancelled." Colo. Rev. Stat. Ann. § 27-1-18(9) (1964).

⁵⁰ For example, "any person who shall violate any provision of this act, shall be guilty of a misdemeanor subject to a fine of not more than \$500.00 and not less than \$50.00." Ark. Stat. Ann. § 71-2010 (Supp. 1967).

great discretion to state bodies with regard to entrance qualifications, and the examinations are usually of a very limited nature.

However, the major defect of present legislation appears to lie in its administrative procedures. The enforcement of the provisions is often committed, at least in part, to a board with a majority composed of personnel chosen from the regulated business. This group retains discretionary control over both the type of conduct prohibited and the penalties attached to such conduct. Such discretionary power is especially significant with regard to revocation of licenses, since standards are lacking as to what type of conduct may result in the loss of a license. The present arrangement allows the regulated group to play a substantial part in the regulation. In addition, present legislation fails to standardize the frequency or scope of administrative surveillance. For states genuinely resolved to curb the abusive practices of the debt collection industry, these legislative deficiencies signal an appropriate starting point for effective reform.

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