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## COERCIVE COLLECTION TACTICS—AN ANALYSIS OF THE INTERESTS AND THE REMEDIES

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In September 1971 over 130 billion dollars of consumer credit was outstanding, or over six hundred dollars for every man, woman, and child in the United States.<sup>1</sup> Virtually every consumer in the country is in debt, either to a merchant for goods or services purchased, to a financier who has purchased a vendor's commercial paper, or to a financier who has lent money directly to the consumer. Of these millions of persons in debt, an untold number will fail to pay the debt on the date it becomes due. For some the failure to pay will be justified because of some breach by the creditor, but for most the default will be unjustified. In either event the creditor is likely to attempt to collect the alleged debt. Because of the expense and delay involved in litigation, he is likely to employ extrajudicial tactics to compel payment. The purpose of this article is to define the limits of permissible extrajudicial debt collection tactics and determine the adequacy of the remedies that have established these limits.

### I. THE PROBLEM

The following scenario is a fictionalized account of the employment and consequences of typical collection tactics. Debtor is mar-

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1. Total credit outstanding at the end of September 1971 was \$130,644,000,000. Of this amount, \$104,973,000,000 represented instalment credit, and \$25,671,000,000 represented noninstalment credit. 57 FED. RES. BULL. A56 (Nov. 1971).

ried, has three children, and is employed as a factory worker at an annual salary of seven thousand dollars. Debtor purchases a color television set from Merchant, under a contract that calls for monthly payments for a period of two years. After Debtor makes the payments for eleven months, uninsured medical expenses leave him short of cash. When he fails to make the next payment, Merchant sends him a letter:<sup>2</sup>

Dear Debtor:

This is to remind you that payment on your color television set was due July 1. Please send us \$42.37, the amount due, at once.

Sincerely,  
Merchant

Upon receipt of this letter, Debtor promptly telephones Merchant and informs him that he is having trouble paying all his bills, but that he certainly will try to pay Merchant and to keep current. Merchant expresses sympathy with Debtor's problem, but explains to Debtor that if all of Merchant's customers were unable to pay, Merchant would go broke and that therefore it is essential that Debtor make the payments to Merchant when they are due. Debtor promises to do his best.

Debtor's situation fails to improve, and he misses the next payment, too. Merchant sends another letter:

Dear Debtor:

According to our records, you are now two months behind in your payments on the television set you purchased from us. We understand that sometimes there is a good reason for missing a payment, and that is why we were willing to bear with you when you failed to make last month's payment. Now, however, it is essential that you pay us the amount due, \$85.34, at once. We extended credit to you because we thought you were a good credit risk. Don't prove us wrong.

If you do not pay us \$85.34 immediately, we shall be forced to take drastic action against you.

Sincerely,  
Merchant

When Debtor fails to respond within three days, Merchant telephones

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2. For examples of collection letters, see Comment, *Effectively Regulating Extrajudicial Collection of Debts*, 20 MAINE L. REV. 261, 262 n.5 (1968); *Chicago Collection Agency Cited on Misrepresentations*, 22 UNAUTHORIZED PRACTICE NEWS, June 1956, at 61; authorities cited in notes 3-4 *infra*. As to the effectiveness of dunning letters, see Comment, *Installment Sales: Plight of the Low-Income Buyer*, 2 COL. J. OF L. & SOC. PROB. 1 (1966).

him, wanting to know why he has failed to respond and demanding that he send payment at once. A week later, Debtor still has not responded with payment of the amount due, and Merchant makes another phone call, insisting that Debtor come to Merchant's store with the \$85.34 within three days. At the same time, Merchant writes a third letter:

Dear Debtor:

Your failure to respond to our recent requests for payment on your overdue account places us in the position of having to consider bringing this matter to the attention of your employer. They frown on employees owing these kinds of debts.

We are certainly reluctant to do this, but your failure to take the necessary steps to solve your account leaves us no alternative.<sup>3</sup>

Merchant

Debtor's failure to respond to these communications causes Merchant to continue sending letters and making telephone calls to Debtor. Before long, the tone of the communications degenerates, and Merchant is swearing at Debtor, impugning his integrity, and accusing him of having taken the television set without intending ever to pay for it. Some of the letters and phone calls are directed to Debtor at his place of employment.

When none of these communications results in payment, Merchant carries out the threat contained in his earlier letter and sends the following:

Dear Employer:

We are writing you in regard to the above named customer of ours who is employed by you. We are always reluctant to write the employer of our account, but in this instance it is done as a last resort. Debtor has missed several payments and fails to respond to numerous letters and phone calls.

It is not our purpose to use your office as a collection agency. Nor is it our intent to instigate the removal of Debtor from his employment. However, we feel that if someone in a supervisory position will explain his liabilities and the possible effects of same upon himself, he will be induced to bring his account up to date and pay promptly thereafter.

If we do not hear from Debtor within five days we will be forced to

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3. Compare the letters cited in Comment, *Creditor's Pre-Judgment Communication to Debtor's Employer: An Evaluation*, 36 BROOKLYN L. REV. 95, 98 (1969).

turn the matter over to our attorneys for suit. If this is of any interest to you, and you do not desire to see one of your employees sued for goods purchased on the instalment plan, we would suggest that you communicate with him to the effect that he take some steps towards meeting this just obligation.

Any consideration you give us in regard to this matter will be greatly appreciated.<sup>4</sup>

Sincerely,  
Merchant

Upon receipt of this letter, Employer calls Debtor to his office and demands an explanation. Debtor informs Employer of the illness in his family and of his inability to make the payments. Employer indicates to Debtor that he does not want to be bothered by the creditor and that he has little tolerance for people who do not pay their just debts.<sup>5</sup> Debtor tells Employer that he will do his best to pay the debt.

Meanwhile, the calls and letters to Debtor continue. He receives a letter every day or two,<sup>6</sup> and phone calls even more frequently, sometimes more than one a day.<sup>7</sup> The calls come before Debtor leaves for work, some as early as 6:30 a.m.; they come while Debtor is at work and only his wife is at home; and they come after he returns home from work, some as late as 11:00 p.m.<sup>8</sup> Merchant also con-

4. Compare the letters cited in *Blyther v. Pentagon Fed. Credit Union*, 182 A.2d 892, 894 (Mun. Ct. App. D.C. 1962); *Stannard v. Wilcox & Gibbs Sewing Mach. Co.*, 118 Md. 151, 153, 84 A. 335, 335-36 (1912); *Weaver v. Beneficial Fin. Co.*, 200 Va. 572, 573, 106 S.E.2d 620, 621-22 (1959).

5. See the findings in N.Y. City Bar Ass'n Committees on Grievances & Legal Assistance, *Improper Collection Practices*, 23 RECORD OF N.Y.C.B.A. 441 (1968).

6. See *Advance Loan Serv. v. Mandik*, 306 S.W.2d 754 (Tex. Civ. App. 1957) (over 100 letters in 18 months).

7. See *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (8-9 calls per day for two weeks); *Pioneer Fin. & Thrift Corp. v. Adams*, 426 S.W.2d 317 (Tex. Civ. App. 1968) (30 calls per week for two weeks). In one case the court described the testimony of an employee of the defendant finance company as follows:

He testified that collection letters were followed by contacts by telephone, and [he] confirmed the testimony and allegations of plaintiff-appellee when he testified that the agents and employees were under no particular limitation as to the number of telephone calls which they were permitted to make to a man's job, that they would call every day if necessary, and if necessary they would talk to a man's supervisor concerning the employee's account.

*Connell v. Rosales*, 419 S.W.2d 673, 676-77 (Tex. Civ. App. 1967).

8. See *United Fin. & Thrift Corp. v. Bain*, 393 S.W.2d 429 (Tex. Civ. App. 1965), *writ ref'd, n.r.e.*, 400 S.W.2d 302 (1966) (per curiam) (calls at 6:00 a.m. and 11:30 p.m.); *Advance Loan Serv. v. Mandik*, 306 S.W.2d 754 (Tex. Civ. App. 1957) (calls at 5:30 a.m. and 10:00 p.m.).

tacts Debtor's neighbors and family, asking if they know that Debtor failed to pay the debt and suggesting that they urge him to pay or, indeed, make the payments themselves.<sup>9</sup> Finally, Merchant writes another letter to Employer:

Dear Employer:

Debtor has failed to make any payment on his long overdue account. Therefore, it is necessary for us to sue him. However, as a courtesy to you, we wanted to inform you in advance that suit would be brought and that Debtor's wages would be attached. We have found in the past that when a garnishee is commenced, the employer's time and business functions are disturbed, and we wish to give you a chance to avoid this disruption.

If Debtor contacts us within forty-eight hours, it may still be possible to reach an amicable settlement.<sup>10</sup>

Sincerely,  
Merchant

This letter is the last straw. Debtor has become nervous and unable to concentrate on his job, and Employer has noticed the decline in his performance.<sup>11</sup> To avoid becoming entangled in the litigation over this debt, Employer discharges Debtor.<sup>12</sup> The letters and phone calls continue, and Debtor suffers high blood pressure, headaches, nausea, and fainting spells.<sup>13</sup> Unable to hold a job, Debtor falls behind on other payments, fights with his wife,<sup>14</sup> is evicted from his home, and winds up on the welfare rolls.

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

10. Compare the letters cited in Comment, *Creditor's Pre-Judgment Communication to Debtor's Employer: An Evaluation*, 36 BROOKLYN L. REV. 95, 96-97 & n.9 (1969).

11. See *Advance Loan Serv. v. Mandik*, 306 S.W.2d 754 (Tex. Civ. App. 1957).

12. See *Timperley v. Chase Collection Serv.*, 272 Cal. App. 2d 697, 77 Cal. Rptr. 782 (1969); *Countee v. Bond Stores*, No. B177500 (Los Angeles Small Claims Ct. 1966), reported in 20 PERS. FIN. Q. REP. 67 (Spring 1966) (suspension). See generally Project, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 756-59 (1968).

13. See *United Fin. & Thrift Corp. v. Bain*, 393 S.W.2d 429 (Tex. Civ. App. 1965), writ *ref'd, n.r.e.*, 400 S.W.2d 302 (Tex. 1966) (per curiam). Cf. *Mell v. Edge*, 68 Ga. App. 314, 22 S.E.2d 738 (1942) (debtor was temporarily insane and missed work for 26 days); *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936) (debtor went into premature labor and delivered a stillborn child). See also *Haines v. Public Fin. Corp.*, 7 Ohio App. 2d 89, 218 N.E.2d 727 (1966) (debtor alleged that creditor's tactics, which made her so ill she could not work, were the cause of her filing a petition in bankruptcy).

14. See *Freeman v. Busch Jewelry Co.*, 98 F. Supp. 963 (N.D. Ga. 1951); Bene-

This fictionalization is drawn from the reports of numerous cases. In that sense it is a cumulation of many cases. Yet, the pattern is present in very many cases, and there is at least one case that reads worse than this fictional account.<sup>15</sup> The variations on the theme are innumerable. The creditor may make personal visits to the debtor or his employer; may actually garnish his wages or attach other property; may publish the existence of the debt, either in a credit association journal or in his store window; may repossess the goods; may actually sue on the debt.<sup>16</sup> Similarly, the content of the communications may vary, from the degree of abuse in them to the nature of the threats that are made. But perhaps the most important variation occurs when the debtor is not even indebted to the creditor, either because of a mistake of the creditor or because of some defense on the part of the alleged debtor. In many cases in which no debt is owed and in many in which the debtor only has a good faith belief that no debt is owed, the alleged debtor pays the amount demanded solely to stop the harassment or to avoid being discharged from his job.<sup>17</sup>

Numerous parties are present in the debt collection scene: the debtor; the creditor; the debtor's employer, neighbors, friends, relatives, other creditors; and still others. Each party has some interest in the indebtedness of the debtor. Only through an identification of each of these interests can it intelligently be determined whether a particular tactic or group of tactics should be permitted. Other articles have explored the tactics of debt collection by examining the ele-

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ficial Fin. Co. v. Lamos, 179 N.W.2d 573 (Iowa 1970) (debtor fought with husband).

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

16. See, e.g., *Fennell v. G.A.C. Corp.*, 242 Md. 209, 218 A.2d 492 (1966) (personal visit to employer); *Warschauer v. Brooklyn Furn. Co.*, 144 N.Y.S. 257 (Sup. Ct. App. Div. 1913) (same); *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App.), *writ ref'd, n.r.e.*, 362 S.W.2d 298 (Tex. 1962) (same); *Passman v. Commercial Credit Plan, Inc.*, 220 So. 2d 758 (La. Ct. App. 1969), *cert. denied*, 254 La. 287, 223 So. 2d 410 (1969) (garnishment); *In re Borg-Warner Corp. & Local 255*, 14 Lab. Arb. 745 (1950) (Updegraff, Arbitrator) (same); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927) (publication of debt); *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N.W. 387 (1883) (same); *Salisbury v. Budich*, 172 Misc. 201, 14 N.Y.S.2d 320 (Sup. Ct. 1939) (same); *Kay v. Jansen*, 87 Wis. 118, 58 N.W. 245 (1894) (same); *Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A.2d 292 (1952) (repossession); *St. Louis Post-Dispatch*, Nov. 14, 1971, § C at 2, col. 1 (dentist refused to return dentures until patient paid his bill).

17. See *B-W Acc. Corp. v. Callaway*, 224 Ga. 367, 162 S.E.2d 430 (1968); *D. CAPLOWITZ, THE POOR PAY MORE* 21, 150 (1963).

ments of the theories of action under which debtors have recovered for excessive collection efforts.<sup>18</sup> In order to determine the adequacy of existing remedies and the present limits of permissible conduct, this article focuses primarily on the *interests* that exist in these cases and on the actual tactics employed, and only secondarily on the elements of the theories of action. After examining the interests involved in debt collection and the extent to which these interests are reflected in the existing theories, it focuses on the tactics themselves. This analysis leads to the conclusion that existing theories provide an inadequate means of fixing limits on permissible creditor conduct because they are incapable of considering all the interests that are present when one person attempts to collect an alleged debt from another person.

## II. INTERESTS PRESENT IN DEBT COLLECTION

Because no interest in any area of human relations is ever entitled to absolute protection, the following catalog of interests should not be construed as a suggestion that each interest is entitled to absolute protection, or even that each interest is entitled to equal protection. Indeed, some of the relevant interests may be entitled to little, if any, protection. Different persons will reach different conclusions about the degree of protection to which any given interest is entitled. These conclusions may be affected in no small way by, among other things, one's view of the morality of incurring indebtedness and the morality of failing to discharge that indebtedness when it is due. Be that as it may, sound decisions are likely to occur only if the decision maker is aware of all the relevant interests and consciously attempts to assess their relative importance. What follows, then, is an identification of the interests present in debt collection and a tentative evaluation of

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18. E.g., Berger, *The Bill Collector and the Law—A Special Tort, at Least for a While*, 17 DEPAUL L. REV. 327 (1968); Harris, *Improper Methods of Collecting Debts*, 58 COM. L.J. 5 (1953); Holman, *Contacting Debtor's Employer Regarding a Delinquent Account*, 19 PERS. FIN. Q. REP. 70 (1964); Smith and 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, *Creditor's Pre-Judgment Communication to Debtor's Employer: An Evaluation*, 36 BROOKLYN L. REV. 95 (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, *Collection Capers: Liability for Debt Collection Practices*, 24 U. CHI. L. REV. 572 (1957); Note, *Torts: Scope and Adequacy of Existing Remedies for Improper Debt Collection Activity*, 1959 WASH. U.L.Q. 410.

the importance of each interest. A more intensive evaluation of the *relative* importance of each interest will occur in the discussion of particular collection tactics, since it is in the context of each particular tactic that the conflict between the interests of the various parties can best be appreciated.

### *A. Interests of the Creditor*

The creditor has three interests in debt collection, two of which relate directly to collecting the debt. He has an interest in collecting it as soon as it becomes due. This interest is analogous to the interest of every party to a contract in obtaining the timely performance for which he bargained. The creditor has a further interest in collecting the debt with the expenditure of as little effort and expense as possible. This interest tends to induce him to avoid litigation, which is expensive and time-consuming, and pursue extrajudicial collection efforts, such as letters and telephone calls, which are inexpensive and less time-consuming. The third interest of the creditor relates not to collection of the debt, but rather to a desire to punish the debtor for not paying or a desire to gain revenge for the debtor's failure to pay.<sup>19</sup> Although this desire may be very real in a particular situation, unless society also has an interest in punishing delinquency, it clearly is not entitled to protection. Consideration of this interest therefore will be postponed to the section on the interests of society in debt collection.

It may be that the interests of the creditor in prompt and inexpensive collection of a debt are entitled to little protection, since presumably the interest rate that he charges reflects the risk of nonpayment. This risk of nonpayment actually has three components: the risk of nonpayment immediately upon maturity of the obligation, the risk of nonpayment unless he resorts to employment of a variety of collection efforts, and the risk of nonpayment even after employment of collection efforts. Thus the present interest rate should reflect the present state of collection law. If the limits of permissible collection tactics are altered, that change presumably would subsequently be re-

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19. See Leff, *Injury, Ignorance, and Spite—The Dynamics of Coercive Collection*, 80 *YALE L.J.* 1 (1970). Punishing the debtor may have the incidental effect of deterring the creditor's other debtors from failing to pay their debts to the creditor. Conceivably, this deterrent effect might be the primary reason for the creditor's desire to punish a delinquent debtor.



flected in the interest rate.<sup>20</sup> This does not mean that the creditor has no interest in prompt and inexpensive collection. On the contrary, the creditor's interest in maximizing collection and minimizing expenses of collection will continue, since successful pursuit of these interests will tend to increase revenues and reduce costs, thereby providing him with larger profits and/or permitting him to lower his rate. Nevertheless, since the interest rate does compensate the creditor for the risks of nonpayment and high collection costs, his interests in prompt and inexpensive collection are less entitled to protection than they would be if, for example, he was being compensated only for the risk of nonpayment on the date the obligation matures.

### *B. Interests of the Debtor*

The interests of the debtor in the collection process are numerous. One range of interests consists of protecting the integrity of his body and his personality. The integrity of his body includes both freedom from direct physical attack and freedom from physical consequences of other kinds of collection efforts. Since control of individual conduct by rule of law evolved largely to prevent forcible self-help, the interest in physical integrity is entitled to substantial protection.

The debtor's personality interests include an interest in not having false statements about him communicated to others, since that will result in damage to his reputation. They also include an interest in keeping private facts out of the public light, so the privacy even of certain truthful information is included in his interests. He also has an interest in being left alone, in shutting out the outside world when he so desires. This interest in seclusion includes not only insulating himself from the entire world, but also insulating himself from the intrusions of a particular person or group of persons. The debtor has a further personality interest in maintaining his dignity and self respect, an interest that continues to exist even after he has defaulted on a contractual obligation. These personality interests may be less enti-

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20. The interest rate varies directly with the stringency of controls placed on extrajudicial collection efforts. Therefore, placing greater restraints on the creditor in order to protect interests of the allegedly delinquent debtor will result in a higher interest rate for all debtors.

It is not meant to be suggested that each creditor has only one interest rate at any given time. Obviously, he may have different rates for different kinds of borrowers and for loans for different purposes. The singular "rate" has been used solely for ease of analysis.

tled to protection than his interest in physical integrity, in part because the resulting injury is likely to be less severe, but primarily because of the conflicting interests of other parties.

A second range of interests of the debtor is the maintenance of existing relationships with other persons. These other persons include his immediate family, relatives, friends, neighbors, other creditors, and perhaps most importantly, because of the extreme vulnerability of the relationship, his employer. The employment relationship might be differentiated from the others because it is the only one that is contractual in nature, and therefore it might be classified as a property interest.<sup>21</sup> The debtor's interest in this relationship, however, is very similar to his interest in the others: that the relationship not be disrupted by factors that are not relevant to that relationship. The interest in maintaining relationships with others is very strong. The loss of existing relationships with persons such as members of his family or his friends may have a drastic, adverse effect on the debtor's life. The loss of his employment relationship, however, may also have a drastic effect, not only on the debtor but also on his family. These interests, then, would seem to be entitled to a high degree of protection, which should be limited only by compelling interests of other persons.<sup>22</sup>

It should not be overlooked that the debtor, as well as the creditor, has an interest in payment of the debt. Payment will facilitate continued dealings with the particular creditor involved and, most importantly, will facilitate purchases on credit from other persons who might be reluctant to extend credit to him if they knew that he had failed to pay a debt to some other creditor. This interest might extend even to paying amounts that are not legally owed, since the creditor might invade any or all of the interests discussed above, even though no debt is due. Any interest of the debtor in paying amounts not owed,

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21. The property of the capitalist is his gold and silver, his bonds, credit, etc., for in these he deals and makes his living. For the same reason, the property of the merchant is his goods. And every man's trade or profession is his property, because it is his means of livelihood, because, through its agency, he maintains himself and family, and is enabled to add his share towards the expenses of maintaining the government.

Jones v. Leslie, 61 Wash. 107, 110, 112 P. 81, 82 (1910). The tort theory of interference with contractual relations implicitly recognizes this relationship as a property interest.

22. The debtor also has an interest in protecting his *property* against injury, e.g., by wrongful repossession. Cases dealing with wrongful repossession have been excluded from the scope of this article, since the article focuses on the debtor's interests in his person and personality.

however, conflicts with an obvious interest in not being forced to part involuntarily with property to which the alleged creditor has no just claim. Thus the debtor has a paramount interest in having a real opportunity to assert defenses to an alleged indebtedness and in having those defenses passed upon by a court of law.

### *C. Interests of the Debtor's Employer*

Other persons are interested in the existence of an indebtedness and in the attempts of the creditor to collect. Foremost among these, because of his economic control over the debtor, is the debtor's employer, who has at least four separate interests. First, he is interested in the qualifications of his employees.<sup>23</sup> Insofar as failure to pay a debt reflects on a person's qualifications to hold a particular job, the employer is interested. It may be doubted, however, whether indebtedness in general or indebtedness in a particular case is relevant to job qualifications for the vast majority of jobs. Even in those situations in which indebtedness is relevant to job qualification, it is relevant only when there is not a bona fide dispute over the indebtedness. If the employee reasonably and in good faith denies that he is indebted, then he is no less qualified than if he actually is not indebted.

Secondly, the employer has an interest in the efficiency of his employees.<sup>24</sup> If the employee is so troubled by his debt situation that he is unable to concentrate on his work or performs at a lower level of efficiency, the employer's interest is adversely affected. A further loss of efficiency may result if the employee takes time off the job to see the creditor or to appear in judicial proceedings. Unquestionably, this employer interest in the indebtedness of his employees is substantial.

Thirdly, the employer has an interest in his own reputation in the community. If a large number of his employees are delinquent in paying their debts, his reputation may suffer.<sup>25</sup> One might question whether an employer's reputation in the community, or even among retailers and other persons who extend credit, actually does suffer as a result of the delinquency of his employees. Even if his reputation

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23. *Holt v. Boyle Bros.*, 217 F.2d 16 (D.C. Cir. 1954); *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E.2d 286 (1959); *Stickle v. Trimmer*, 50 N.J. Super. 518, 143 A.2d 1 (1958); *Winstanley v. Bampton*, [1943] 1 K.B. 319 (army officer has interest in indebtedness of his subordinates).

24. *See Voneye v. Turner*, 240 S.W.2d 588 (Ky. 1951).

25. *See Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948).

does suffer some impairment, the injury is not likely to be sufficient to warrant much protection of the employer's interest in his reputation.

Fourthly, and most importantly, the employer may be subjected to expense and inconvenience, even beyond the expense implicit in decreased efficiency of his employees, as a result of an employee's failure to pay his debts. Contacts by the creditor directly to the employer cause the employer aggravation and loss of time, time that could more profitably be spent on activities more directly related to his business.<sup>26</sup> If the contacts are numerous, the aggravation and loss of time may be considerable. If the employer takes the matter up with the employee, the additional loss of time, by the employer and the employee, is obvious. Traditionally, however, the greatest expense and inconvenience has been in connection with garnishment proceedings. If the creditor garnishes the employee's wages in order to collect the debt, the employer will incur increased bookkeeping expenses. In addition, he will incur potential liability to the creditor and, in some states at least, he will become the named defendant in the garnishment proceeding and will have to appear in court.<sup>27</sup> The employer's interest arising from garnishment proceedings has been reduced by reason of the Supreme Court's decision in *Sniadach v. Family Finance Corporation*,<sup>28</sup> which restricts the availability of wage garnishment before judgment, and by reason of Title II of the Consumer Credit Protection Act,<sup>29</sup> which places restrictions on the maximum amount of weekly wages subject to garnishment both before and after judgment. The interest is not eliminated, however, since both *Sniadach* and Title II contemplate the continued use of garnishment in some situations. Moreover, the employer's interest in minimizing the expense and inconvenience of other kinds of contacts is not necessarily reduced by either *Sniadach* or Title II.

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26. See *Countee v. Bond Stores*, No. B177500 (Los Angeles Small Claims Ct. 1966), reported in 20 PERS. FIN. Q. REP. 67 (Spring 1966), in which the employer informed the debtor he was being suspended because "[Your] continued failure to pay [your] debts has caused the Department embarrassment and inconvenience through repeated calls and correspondence from creditors."

27. E.g., WASH. REV. CODE ANN. tit. 7, ch. 33, §§ 110, 190, 200, 210 (Supp. 1971). The cost to an employer of each wage garnishment has been put at \$15-35. See Project, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 756 n.74 (1968). The estimated annual expense to a single large employer was placed at \$200,000. *Id.* at 755-56 n.74.

28. 395 U.S. 337 (1969).

29. 15 U.S.C. § 1673 (1970).

#### D. *Interests of Other Persons*

Among other persons who have interests in the debtor's failure to pay a debt are his family and friends. On the one hand, their interests coincide with his, since presumably they want what he determines is best for him.<sup>30</sup> On the other hand, their own reputations may be affected by his nonpayment of his debts, much in the way in which an employer's reputation may be affected by the delinquency of his employees. Here, too, it may be doubted whether the impact on their reputations is substantial and whether preventing that impact is entitled to much attention.<sup>30a</sup> In addition, however, these persons have a more substantial interest in maintaining their own privacy against intrusion by the creditor who seeks their assistance or who attempts to coerce them into assisting or even into paying the debt themselves.

Neighbors of the debtor also have an interest in protecting their own reputations. Their reputations, however, are even less endangered, and therefore less entitled to consideration, than those of relatives or friends of the debtor. Neighbors also have an interest in maintaining their own privacy against the creditor's intrusions, and this interest would seem to be more entitled to protection than their interests in their reputations.

Other creditors and credit associations also are interested parties, since they have an interest in obtaining information about the debtor's credit activities. Other creditors want that information so that they may take steps to ensure payment of the amounts that are due them or are to become due them. Credit associations desire the information so that they may protect their subscribers from extending credit to the debtor without full knowledge of his credit situation. The interests of both these groups of persons would seem to be entitled to some protection.

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30. Of course, it is possible that their determination of what is best for the debtor will be different from what the debtor determines is best for him.

30a. It may be, however, that in determining whether to extend credit to a person, sellers and lenders consult the credit records of his relatives. Freivogel, *Inconsistencies of Getting Credit*, St. Louis Post-Dispatch, Mar. 21, 1972, § D at 4, col. 2. If so, then the ability of relatives of the debtor to obtain credit may be adversely affected by the debtor's failure to pay his own debts. And the relatives would have a further interest in the debtor's nonpayment of his debts, to the extent that his nonpayment affected their ability to obtain credit.

### E. *Interests of Society*

Society, too, may be characterized as a party interested in the attempted collection of debts that are alleged to be delinquent. To one extent or another, society shares the interests of each of the persons discussed above, because maximization of the welfare of the individual is one of the goals of society.<sup>31</sup> In addition, however, society has interests independent of the interests of the other parties present on the debt collection scene.

It is not likely that society has an interest in punishing delinquency. Certainly, it has no interest in punishing indebtedness, since the economy is based largely on the extension of credit.<sup>32</sup> Society clearly does have an interest in the payment of debts, as it does in the prompt performance of all enforceable contractual obligations, in order to facilitate the flow of commerce. It may also have an interest in encouraging individuals to be productive. These interests, however, probably do not include the punishment of those who default.<sup>33</sup>

Society also has an interest in reducing the congestion of the nation's trial courts. Permitting extrajudicial collection methods that result in payment or compromise of claims tends to reduce the congestion that would exist if all claims were litigated.<sup>34</sup> On the other hand, society has an interest in preventing one person from forcing another person to take a particular act against his will when he is not obligated to take that act. In the context of debt collection, if an alleged debt does not actually exist, society has an interest in not permitting the alleged creditor to coerce payment of the alleged debt by placing the alleged debtor in fear of losing his job or by harassing him until he

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31. It is not suggested, however, that this is the only goal of society.

32. See note 1 *supra*.

33. Note in this connection the Federal and state prohibitions of imprisonment for debt. See, e.g., 28 U.S.C. § 2007 (1970) (prohibiting imprisonment for debt on a writ of execution issued from any United States court in any state where imprisonment for debt has been abolished); CAL. CONST. art. I, § 15; GA. CONST. art. I, ¶ XXI, § 2-121; OHIO CONST. art. I, § 15 (except in cases of fraud). Note also the absence of punitive damages in recovery for breach of contract. See A. CORBIN, CORBIN ON CONTRACTS § 1077 (1964).

34. It may well be questioned, however, whether a compromise is voluntary when one of the parties to the compromise agrees to the settlement because he fears the loss of his job or fears continued abuse and harassment by the other party to the compromise. Cf. *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970), *aff'd*, 92 S.Ct. 767 (1972) (questioning voluntariness of waiver of constitutional right to notice and hearing in confession of judgment situation).

pays merely to put an end to the harassment. Thus society has an interest in preserving the right of each person to judicial redress of grievances and in preserving to each person a real opportunity to assert reasonable defenses to alleged debts. Finally, society has a strong interest in not having persons lose their jobs merely because of the existence of an alleged indebtedness. This interest is not any weaker even when there is no question about the validity of the debt. Loss of employment may be "not only an invasion of a private right, but is an injury to the public, for it tends to produce pauperism and crime."<sup>35</sup>

### III. RECOGNITION OF THESE INTERESTS UNDER TRADITIONAL TORT THEORIES

Excessive debt collection practices are not a new problem. On the contrary, most creditor tactics have been around for decades, if not centuries, and numerous tort theories have been asserted by debtors seeking redress. Whether these traditional tort theories are adequate, however, is an entirely different question. Application of each of the major theories has been described elsewhere,<sup>36</sup> and it is not the aim of this article to provide still another description of them. Rather, the theories will be described only insofar as a description is necessary for a determination of the extent to which the interests present in the debt collection context are considered by each theory. As will be seen, each theory was developed in a context other than debt collection, and no theory is capable of considering all the interests relevant to the attempted collection of debts.

#### A. Defamation

Defamatory matter has been defined as matter that excites adverse, derogatory, or unpleasant feelings or opinions against a person.<sup>37</sup> The remedy of defamation redresses injury to one's reputation resulting

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35. Jones v. Leslie, 61 Wash. 107, 110, 112 P. 81, 82 (1910).

36. See, e.g., the commentary cited in note 18 *supra*.

37. W. PROSSER, THE LAW OF TORTS § 111, at 739 (4th ed. 1971) [hereinafter cited as PROSSER]. If the statement is not defamatory on its face, it still may be defamatory because of its interpretation under all the circumstances. When a statement is defamatory on its face, it sometimes is described as defamatory per se. When it is defamatory only because of its interpretation under all the circumstances, it sometimes is described as defamatory per quod. The terms "per se" and "per quod" will *not* be used in that sense in this article. For the manner in which those terms will be used in this article, see note 39 *infra*.

from the dissemination of false information. The elements of the cause of action are publication of false matter that results in injury to reputation.<sup>38</sup> Although general damages are presumed and are recoverable without proof, if the person is not engaged in an activity that requires the extension to him of credit, then in most states he cannot recover at all unless he can prove actual damages of a pecuniary nature.<sup>39</sup> The

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38. *Id.* Publication need not be to the community at large, though that certainly suffices. *Salisbury v. Budich*, 172 Misc. 201, 14 N.Y.S.2d 320 (Sup. Ct. 1939). It is also sufficient if the publication is to the debtor's family, friends, or employer. For a general treatment of the law of defamation, see PROSSER at ch. 19.

39. *Harrison v. Burger*, 212 Ala. 670, 103 So. 843 (1925); *Reese v. Haywood*, 235 Ark. 442, 360 S.W.2d 488 (1962); *Walker v. Sheehan*, 80 Ga. App. 606, 56 S.E.2d 628 (1949); *Mell v. Edge*, 68 Ga. App. 314, 22 S.E.2d 738 (1942); *Estes v. Sterchi Bros. Stores*, 50 Ga. App. 619, 179 S.E. 222 (1935); *Hudson v. Slack Furn. Co.*, 318 Ill. App. 15, 47 N.E.2d 502 (1943); *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); *Porak v. Sweitzer's, Inc.*, 87 Mont. 331, 287 P. 634 (1930); *Hudson v. Pioneer Serv. Co.*, 218 Ore. 561, 346 P.2d 123 (1959); *McIntyre v. Weinert*, 195 Pa. 52, 45 A. 666 (1900); *Brown v. National Home Ins. Co.*, 239 S.C. 488, 123 S.E.2d 850 (1962); *Nichols v. Daily Reporter Co.*, 30 Utah 74, 83 P. 573 (1905); *Weaver v. Beneficial Fin. Co.*, 200 Va. 572, 106 S.E.2d 620 (1959); *Kay v. Jensen*, 87 Wis. 118, 58 N.W. 245 (1894).

Defamatory matter is either slanderous or libelous, although the distinction is more a matter of history than of logic. Slander generally consists of oral statements [*but see Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959) (search of suspected shoplifter)], and is not actionable without proof of actual damages of a pecuniary nature unless the language carries an imputation of crime, certain diseases, unchastity of a woman, or matters affecting the plaintiff's business. *Cinquanta v. Burdett*, 154 Colo. 37, 388 P.2d 779 (1963); *Liebel v. Montgomery Ward & Co.*, 103 Mont. 370, 62 P.2d 667 (1936); *Cussler v. Wilson's Leading Jewelers*, 291 N.Y.S. 511 (Sup. Ct. App. Div. 1936) (*per curiam*); *Penner v. Elliott*, 225 N.C. 33, 33 S.E.2d 124 (1945); *Galloway v. Cox*, 172 S.C. 101, 172 S.E. 761 (1934). *But see Carter v. Sterling Fin. Co.*, 132 So. 2d 430 (Fla. Ct. App. 1961) (Florida has added a fifth category in which special damages need not be proved).

Originally, proof of actual damages was not necessary for recovery in an action in libel, and this is still the law in England and in a few states. When a statement is defamatory on its face, the majority of states agree with the English rule and permit recovery without proof of special damages. When a statement is defamatory only by resort to extrinsic facts, however, courts in these states have incorporated into the law of libel the slander rules requiring special damages. Thus, a statement not defamatory on its face will be actionable without proof of special damages only if it falls into one of the slander categories. If it falls into one of these categories, it sometimes is described as defamatory *per se*. If it does not fall into one of these categories, it sometimes is described as defamatory *per quod*. In this article, the terms "*per se*" and "*per quod*" will be used only in this sense.

Occasionally, in debt collection attempts, the creditor's statement that a person is indebted to him will be tantamount to an accusation of some crime, and the alleged debtor then will not have to prove special damages. *Blyther v. Pentagon Fed. Credit*



tort purports to consider the plaintiff's interests in reputation and maintenance of relations with others. With respect to consumer debtors, however, it considers these interests only if pecuniary injury can be proved. Further, since one of the elements is falsity, truth of the matter is a defense, and in most states it is an absolute defense.<sup>40</sup> Therefore, the tort fails to consider the debtor's interest in the privacy of private facts that are true. Also ignored is the debtor's interest in being free from intrusion into his solitude, since the requirement of publication means that a communication (or a series of communications) made only to the debtor is not actionable.<sup>41</sup>

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Union, 182 A.2d 892 (Mun. Ct. App. D.C. 1962); *Vail v. Pennsylvania R.R.*, 103 N.J.L. 213, 136 A. 425 (1927). Most frequently, however, it is held that a statement that one is indebted is not defamatory on its face if the person is not engaged in a business in which extension of credit to him is necessary. Since the statement is not defamatory on its face, it will not be actionable without proof of special damages unless it falls into one of the slander categories. Another of those categories, in addition to matter imputing a crime, is matter affecting one in his trade or business. But a statement that one has not paid a debt is not within the scope of that category unless it relates directly to his qualifications for his business. Therefore, in most cases the debtor will not be able to evade the special damages requirement. Some courts have rejected the per se-per quod distinction and therefore also the rule that requires proof of special damages when the plaintiff is not engaged in a trade or business. *Holt v. Boyle Bros.*, 217 F.2d 16 (D.C. Cir. 1954); *Neaton v. Lewis Apparel Stores*, 267 App. Div. 728, 48 N.Y.S.2d 492 (1944); *Hinkle v. Alexander*, 244 Ore. 271, 417 P.2d 586 (1966). See generally PROSSER § 112.

40. *E.g.*, *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Homer v. Englehardt*, 117 Mass. 539 (1875). Of course, a true statement that the debtor is indebted may carry with it an imputation that the debtor is insolvent or refuses to pay all his debts. If the imputation is false, the statement may be actionable. *Weston v. Barnicoat*, 175 Mass. 454, 56 N.E. 619 (1900).

In several states truth is not an absolute defense, and the communication also must have been made in good faith or for justifiable ends. *E.g.*, FLA. CONST. BILL OF RIGHTS § 13, applied in *Florida Pub. Co. v. Lee*, 76 Fla. 405, 80 So. 245 (1918); NEB. CONST. BILL OF RIGHTS § 5, applied in *Wertz v. Sprecher*, 82 Neb. 834, 118 N.W. 1071 (1908); N.D. CONST. art. I, § 9; *Hutchins v. Page*, 75 N.H. 215, 72 A. 689 (1909). See *Ray, Truth: A Defense to Libel*, 16 MINN. L. REV. 43 (1931) (authorities collected); PROSSER § 116, at 797 n.6.

41. *McKinzie v. Huckaby*, 112 F. Supp. 642 (W.D. Okla. 1953); *McCravy v. Schneer's*, 47 Ga. App. 703, 171 S.E. 391 (1933); *Sicard v. Roca*, 43 La. App. 842, 9 So. 629 (1891); *Riley v. Askin & Marine Co.*, 134 S.C. 198, 132 S.E. 584 (1926) (in which a letter addressed to the debtor was opened and read by debtor's parents, recovery denied because debtor had authorized them to open and read her mail, even though creditor did not know of the authorization); *Marshall v. United Fin. & Thrift Corp.*, 347 S.W.2d 623 (Tex. Civ. App. 1961) (in which creditor spoke over the telephone in such a loud voice that people around the debtor could hear him, so the court held there was a sufficient publication); *Judevine v. Benzies-Montanye Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936).

Another defense to the tort is privilege, and a communication will be privileged if it concerns a matter in which the recipient of the communication has an interest.<sup>42</sup> Thus it would appear that the employer's interests in the credit activities of his employees are receiving consideration. This impression is deceptive, however, since the cases reject the existence of privilege when a creditor informs the employer of an alleged indebtedness.<sup>43</sup> The creditor's interest is said to be insufficient to justify informing the employer, since the employer is not in a position to give legitimate assistance.<sup>44</sup> This emphasis on the *creditor's*

42. Thus if a third person solicits information from the creditor, the creditor's response will be privileged. See *Teichner v. Bellan*, 7 App. Div. 2d 247, 181 N.Y.S.2d 842 (1959). This privilege may be lost, however, if the response is not made in good faith. *Miller v. Howe*, 245 Ky. 568, 53 S.W.2d 938 (1932); *Marshall v. United Fin. & Thrift Corp.*, 347 S.W.2d 623 (Tex. Civ. App. 1961). Cf. *Draper v. Hellman, Commercial Trust & Savings Bank*, 203 Cal. 26, 263 P. 240 (1928) (in which the court rejected privilege because the publisher had initiated the exchange). Privilege also may be lost if the communication is not made primarily for the purpose of furthering an interest entitled to protection. PROSSER § 115, at 795 n.79, citing *Over v. Schiffing*, 102 Ind. 191, 26 N.E. 91 (1885); *Hollenbeck v. Ristine*, 114 Iowa 358, 86 N.W. 377 (1901). See also *Weston v. Barnicoat*, 175 Mass. 454, 56 N.E. 619 (1900); *McClain v. Reliance Life Ins. Co.*, 150 S.C. 459, 148 S.E. 478 (1929); *Winstanley v. Bampton*, [1943] 1 K.B. 319 (malice). It might well be questioned whether the communication will ever really be primarily for any purpose other than debt collection.

The privilege that exists in debt collections cases is described as a qualified privilege, since it depends on the concurrence of interest of the person making the communication and the person receiving the communication. The other kind of privilege, absolute privilege, generally protects statements made in connection with judicial, legislative, or executive proceedings. It rarely exists in debt collection. *But see Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962). See generally PROSSER § 115.

43. *Over v. Schiffing*, 102 Ind. 191, 26 N.E. 91 (1885) (privilege lost because the purpose of conveying the information was solely to benefit the creditor and not the employer); *Neigel v. Seaboard Fin. Co.*, 68 N.J. Super. 542, 173 A.2d 300 (1961) (employer has no interest corresponding to that of the creditor insofar as collection of a small loan is concerned); *Evans v. McKay*, 212 S.W. 680 (Tex. Civ. App. 1919); *M. Rosenberg & Sons v. Craft*, 182 Va. 512, 29 S.E.2d 375 (1944) (dictum); cf. *State v. Armstrong*, 106 Mo. 395, 16 S.W. 604 (1891) (conviction for criminal libel, court did not consider any interest of the employer by way of defense); Comment, *Creditor's Pre-Judgment Communication to Debtor's Employer: An Evaluation*, 36 BROOKLYN L. REV. 95, 100 (1969) (suggesting that the employer has an interest only when there is a legitimate connection with the employment relationship). *But see Estes v. Sterchi Bros. Stores*, 50 Ga. App. 619, 179 S.E. 222 (1935), in which a communication "made to [debtor's] employer solely for the purpose of urging the employer to induce the alleged debtor to make payment of the debt" was held not libelous because the debtor was not a merchant. Perhaps the trader-non-trader distinction implicitly protects the interest of the employer.

44. PROSSER § 115, at 787 n.91, citing *Over v. Schiffing*, 102 Ind. 191, 26 N.E. 91 (1885); *Vail v. Pennsylvania R.R.*, 103 N.J.L. 213, 135 A. 425 (1927).

interest seems misplaced. The question to be decided is whether the *employer* has a sufficient interest in the debt activities of his employees (or of that particular employee) to justify the communication to him of matter that otherwise would be actionable. This is the approach taken in cases litigating communication of false matter to a credit reporting agency. These communications are privileged because other creditors and potential creditors of the debtor have a legitimate interest in knowing his credit-worthiness.<sup>45</sup> It is the interest of the recipient of the communication that provides the privilege. True, the privilege may be lost if the communication is not made primarily for a purpose entitled to protection,<sup>46</sup> but the emphasis should be on the interests to be served and not the purpose of the communication.<sup>47</sup>

The debtor's interest in not paying amounts not owed and his interest in having a real opportunity to assert defenses to the claim are not explicitly considered by the defamation cases. It may be, however, that the denial of privilege to notify an employer, for the avowed reason that the employer is not in a position to give legitimate assistance, implicitly recognizes these interests of the debtor. If the employer is not in a position to give legitimate assistance, then presumably only the courts are in that position, and the debtor cannot be precluded from judicial resolution of the dispute. The inability to make recognition of these interests of the debtor explicit exemplifies the difficulty of employing defamation to consider all the interests relevant to debt collection. Several interests, primarily those relating to the debtor's privacy, are not even considered. Of those that are considered, the requirement of pecuniary injury subordinates the interest in maintaining reputation, which is what the remedy was designed to protect, to the creditor's interest in collecting the debt.

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45. Putnal v. Inman, 76 Fla. 553, 80 So. 316 (1918); Woodhouse v. Powles, 43 Wash. 617, 86 P. 1063 (1906); Evans, *Legal Immunity for Defamation*, 24 MINN. L. REV. 607 (1940).

46. See note 42 *supra* and cases cited in note 168 *infra*. It also may be lost if the communication is not made in a reasonable manner. Hanschke v. Merchant's Credit Bureau, 256 Mich. 272, 239 N.W. 318 (1931) (publication to non-members).

47. The creditor who reports an indebtedness to a reporting agency primarily to protect the interests of other creditors is likely to be rare. His primary purpose would usually seem to be to coerce payment of the debt. Therefore, the existence of privilege should be made to depend not so much on the purpose of the creditor in reporting the debt as on the interests to be served by the reporting. The interests of the creditor in collecting may not be sufficient to confer the privilege, whereas the interests of the creditor combined with the interests of other persons in dissemination of credit information may be sufficient.

### B. *Invasion of the Right of Privacy*

Defined as the right to be let alone,<sup>48</sup> this tort actually consists of four separate theories.<sup>49</sup> Only two of them, intrusion into one's solitude and public disclosure of private facts, have been applied to attempts to collect debts.<sup>50</sup> The elements of the intrusion tort are an unreasonable intrusion into the plaintiff's solitude that would be offensive or objectionable to a reasonable man.<sup>51</sup> The elements of the

48. T. COOLEY, *A TREATISE ON THE LAW OF TORTS* 29 (2d ed. 1888). The seminal article on the right of privacy is Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

49. They are intrusion on one's seclusion or solitude or into his private affairs; public disclosure of embarrassing private facts; publicity that places one in a false light in the public eye; and appropriation of one's likeness. PROSSER § 117, at 809-14. The cause of action has been rejected by several courts. *E.g.*, Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955); Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909); Milner v. Red River Valley Pub. Co., 249 S.W.2d 227 (Tex. Civ. App. 1952); Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956).

50. The branch of the tort consisting of placing the plaintiff in a false light in the public eye, however, was asserted in *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959), and was considered in *McKinzie v. Huckaby*, 112 F. Supp. 642 (W.D. Okla. 1953).

51. PROSSER § 117, at 808; *Shorter v. Retail Credit Co.*, 251 F. Supp. 329 (D.S.C. 1966); *Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A.2d 292 (1952); *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709 (Del. Super. Ct. 1967); *Horstman v. Newman*, 291 S.W.2d 567 (Ky. 1956); *Perry v. Moskins Stores*, 249 S.W.2d 812 (Ky. 1952); *Household Fin. Co. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969) (recovery denied in each case); *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962); *Norris v. Moskin Stores*, 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 Acc. Corp. v. Callaway*, 224 Ga. 367, 162 S.E.2d 430 (1968); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Continental Cas. Co. v. Garrett*, 173 Miss. 676, 161 So. 753 (1935); *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956); *Mills v. First Nat'l Credit Bureau*, 192 N.E.2d 511 (Ohio Ct. App. 1963); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959) (recovery granted in each case). *See also* Prosser, *Privacy*, 48 CAL. L. REV. 383, 392 (1960): "It appears obvious that the interest protected by this branch of the tort is primarily a mental one. It has been used chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights."

The intrusion may be physical. *Eagle v. Simmons*, 148 Ala. 92, 41 So. 1023 (1906); *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952) (in which the creditor and his wife simply moved into the debtor's home). Or the intrusion may be non-physical. *Norris v. Moskin Stores*, 272 Ala. 174, 132 So. 2d 71 (1926) (phone calls); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (same).

At least one court has denied the existence of any cause of action for this branch of the right of privacy. *Zimmerman v. Associates Discount Corp.*, 444 S.W.2d 396 (Mo. 1969).

disclosure tort are public disclosure of private facts that would be offensive and objectionable to a reasonable man of ordinary sensibilities.<sup>52</sup>

These torts consider the debtor's interests in the privacy of both true and false facts, freedom from intrusion, dignity, and self respect. The standard of reasonableness permits consideration of the creditor's interest in payment of the debt and the employer's interests in knowing the credit status of his employees. The disclosure tort has been held to require public disclosure,<sup>53</sup> and disclosure merely to a debtor's employer has been held not to be sufficient.<sup>54</sup> Thus the inter-

52. See *Harrison v. Humble Oil & Refining Co.*, 264 F. Supp. 89 (D.S.C. 1967); *Berrier v. Beneficial Fin., Inc.*, 234 F. Supp. 204 (N.D. Ind. 1964); *Carey v. Statewide Fin. Co.*, 3 Conn. Cir. 716, 223 A.2d 405 (1966); *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709 (Del. Super. Ct. 1967); *Voneye v. Turner*, 240 S.W.2d 588 (Ky. 1951); (recovery denied in each case); *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962); *Norris v. Moskin Stores*, 272 Ala. 174, 132 So. 2d 321 (1961); *Trammel v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941); *Montgomery Ward v. Larragoite*, 81 N.M. 383, 467 P.2d 399 (1970); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (recovery granted in each case); PROSSER § 117, at 810-11.

The publicity may be written, *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927), but also may be oral. *Norris v. Moskin Stores*, 272 Ala. 174, 132 So. 2d 321 (1961); *Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 216 P.2d 571 (1950); *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962); *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956). *Contra*, *Lewis v. Physicians & Dentists Credit Bureau*, 27 Wash. 2d 267, 177 P.2d 896 (1947). Or the publicity may be by actions alone. *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959).

Neither branch of the tort requires proof of special damages, though there is some authority to the contrary. *Columbia Fin. Corp. v. Robitcheck*, 243 La. App. 1084, 150 So. 2d 23 (1963). Proof of malice, however, may be required. *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962); *Gouldman-Taber Pontiac v. Zerbst*, 213 Ga. 682, 100 S.E.2d 881 (1957); *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E.2d 286 (1959); *Tollefson v. Price*, 247 Ore. 398, 430 P.2d 990 (1967) (en banc). *Contra*, *Lewis v. Physicians & Dentists Credit Bureau*, 27 Wash. 2d 267, 177 P.2d 896 (1947).

53. *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962); *Trammel v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Tollefson v. Price*, 247 Ore. 398, 430 P.2d 990 (1967) (recovery granted in each case); *Cunningham v. Securities Inv. Co.*, 278 F.2d 600 (5th Cir.), *reh. den.*, 281 F.2d 439 (1960); *Reed v. Ponton*, 15 Mich. App. 423, 166 N.W.2d 629 (1969) (recovery denied in each case).

54. *Harrison v. Humble Oil & Refining Co.*, 264 F. Supp. 89 (D.S.C. 1967); *Gouldman-Taber Pontiac v. Zerbst*, 213 Ga. 682, 100 S.E.2d 881 (1957); *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E.2d 286 (1959); *Peterson v. Idaho First Nat'l Bank*, 83 Ida. 578, 367 P.2d 284 (1961); *Yoder v. Smith*, 253 Iowa 505, 112 N.W.2d 862

ests of the creditor and the employer have been accorded protection in preference to the debtor's interests in privacy of private facts and maintenance of existing relations. The courts have focused on the debtor's right of privacy, and this focus has caused them to ignore the effect that communication might have on his employment relation and his interest in maintaining that relation. The decisions also tend to ignore the debtor's interest in preserving an opportunity to assert defenses, but not because of any implicit requirement of the cause of action. On the contrary, the standard of reasonableness would seem to require a consideration of this factor, since reasonableness may depend on whether the debtor has a defense to the claim and whether the creditor knows or should know of that defense.

It is a defense to invasion of the right to privacy that the person whose privacy was invaded consented to the invasion.<sup>55</sup> Some courts have held that when a debtor incurs an indebtedness, he knows that the creditor will take reasonable steps to collect the debt when it is due and that one of the possible steps is notification of his employer.<sup>56</sup> In-

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(1962); *Lucas v. Moskins Stores*, 262 S.W.2d 679 (Ky. 1953); *Booty v. American Fin. Corp.*, 224 So. 2d 512 (La. Ct. App. 1969) (dictum); *Passman v. Commercial Credit Plan*, 220 So. 2d 758 (La. Ct. App.), *cert. den.*, 254 La. 287, 223 So. 2d 410 (1969); *Household Fin. Co. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969); *Hawley v. Professional Credit Bureau*, 345 Mich. 500, 76 N.W.2d 835 (1956); *Zimmerman v. Associates Discount Corp.*, 444 S.W.2d 396 (Mo. 1969) (by implication); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (dictum); *Lewis v. Physicians & Dentists Credit Bureau*, 27 Wash. 2d 267, 177 P.2d 896 (1947); Comment, *Collection Capers: Liability for Debt Collection Practices*, 24 U. CHI. L. REV. 572 (1957). *Contra*, *Countee v. Bond Stores*, No. B177500, Los Angeles Small Claims Ct., reported in 20 PERS. FIN. Q. REP. 67 (1966); *Gouldman-Taber Pontiac v. Zerbst*, 96 Ga. App. 48, 99 S.E.2d 475, *rev'd*, 213 Ga. 682, 100 S.E.2d 881 (1957). If there is more than mere disclosure, then there may be an actionable invasion of privacy. *Pack v. Wise*, 155 So. 2d 909 (La. 1963); *Booty v. American Fin. Corp.*, *supra*.

55. PROSSER § 117, at 817. The most common application of this defense is in cases in which the alleged tortious conduct consists of misappropriation of one's name or likeness.

56. *Timperley v. Chase Collection Serv.*, 272 Cal. App. 2d 697, 77 Cal. Rptr. 782 (1969); *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709 (Del. Super. Ct. 1967); *Voneye v. Turner*, 240 S.W.2d 588 (Ky. 1951); *Gouldman-Taber Pontiac v. Zerbst*, 213 Ga. 682, 684, 100 S.E.2d 881, 883 (1957):

But one who, like the plaintiff, is employed by a large corporation, who is an active participant in the business world . . . and obtains credit for goods and services used in repairing her car, may expect reasonable conduct on the part of those with whom she does business and from whom she gets credit. Where she seeks and obtains credit from one such as the defendant, she may expect the creditor to investigate her and her reputation, particularly for paying her bills, to ascertain for whom she works, and to communicate with her employer for information about her. She may expect her employer to

curing a debt with this presumed knowledge is thus held tantamount to consent to the creditor's contacting the debtor's employer when the debtor defaults.<sup>57</sup> This sort of reasoning clearly elevates the interests of the creditor over the interests of the debtor.<sup>58</sup>

### C. *Intentional Infliction of Emotional Distress*

This theory was developed in order to redress mental or emotional injury resulting from outrageous conduct that is intentionally undertaken.<sup>59</sup> Among the interests considered by the theory are the debtor's

want her to pay her bill, and may further expect her creditor to use reasonable means to persuade her to do so, and on failure to persuade to force her to do so through the courts. *When she accepts the credit, she impliedly consents for her creditor to take all reasonable and necessary action to collect the bill.* Writing to her employer as this creditor did, was in our opinion a reasonable exercise of his rights and constituted no unwarranted or unreasonable interference with her right of privacy. (emphasis added)

Compare Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962), in which the defendants were government security officers and therefore were entitled to an absolute privilege in communicating information about the plaintiff to his employer, so long as they were acting in the scope of their employment.

57. Similar reasoning could also be employed to recognize a privilege in the creditor to make some publicity of the indebtedness and to make some intrusion into the debtor's solitude.

58. Consider the language of the court in Household Fin. Co. v. Bridge, 252 Md. 531, 250 A.2d 878, 885-86 (1969):

The problem of defining the scope or range within which the creditor might properly act in order to collect his debt, is the problem of balancing the interest of the creditor in collecting his debts against that of a debtor of ordinary sensibilities. Unless some latitude is given the creditor to invade, to a reasonable extent, the debtor's right of privacy, without incurring liability, we may well end up with the result that the creditor will find it preferable to proceed immediately with legal action when a debt becomes in default, without any warning to the debtor, rather than run the risk of being answerable to a supersensitive debtor in an action for invasion of privacy.

This language, of course, makes perfectly good sense, but it may lead a court to fail to consider the debtor's interest in not losing his job. (In *Bridge*, the employer was contacted twice, but the debtor did not lose her job as a result of those contacts.) This reasoning fails to consider that in some instances the amount of the debt will not make it worthwhile for the creditor to resort to litigation. Yet, the smaller the amount of the debt, the less justifiable it would seem to be to place the debtor in risk of losing his job.

The reasoning employed to find consent to the invasion also protects the employer's interests over the debtor's interests, but the courts employing this reasoning do not consider the employer's interests in this context. Rather, they consider the employer's interests only in determining the reasonableness of the invasion. See Household Fin. Co. v. Bridge, *supra*.

59. PROSSER § 12, at 55-56. Not all courts have recognized this cause of action. See, e.g., *Ex parte Hammett*, 259 Ala. 240, 66 So. 2d 600 (1953); *Bartow v. Smith*,

interest in his dignity and self respect, physical integrity, freedom from intrusion, and disclosure of private facts.

To eliminate litigation over relatively trivial conduct, courts have adopted outrageousness as the standard of actionable conduct.<sup>60</sup> The conduct may be outrageous by virtue of what was done, by virtue of the defendant's knowledge of the plaintiff's peculiar susceptibility to emotional distress, or by virtue of a special relationship between the parties that gives the defendant actual or apparent power to damage

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149 Ohio St. 301, 78 N.E.2d 735 (1948). Even those that have accepted the theory have disagreed on the necessary mental quality of the creditor's acts. Thus, some require malice, *Arnold v. Spears*, 217 Miss. 209, 63 So. 2d 850 (1953); some require malice, gross negligence, or recklessness, *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So. 2d 154 (1963); some require malice or other factors, *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950); *Beneficial Fin. Co. v. Lamos*, 179 N.W.2d 573 (Iowa 1970). Others speak in terms of intent to injure, *Clark v. Associated Retail Credit Men*, 105 F.2d 62 (D.C. Cir. 1939); willful and wanton conduct intended to injure the plaintiff, *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930); *Beneficial Fin. Co. v. Lamos*, 179 N.W.2d 573 (Iowa 1970); *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 242 N.W. 25 (1932); *Whitsell v. Watts*, 98 Kan. 508, 159 P. 401 (1916); *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So. 2d 154 (1963); *Stockwell v. Gee*, 121 Okla. 207, 249 P. 389 (1926); *First Nat'l Bank v. Bragdon*, 84 S.D. 89, 167 N.W.2d 381 (1969); *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963); or conduct that is likely to result in injury, unless there is intent to injure or malicious intent and disregard of the consequences, *Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 216 P.2d 571 (1950); *Delta Fin. Co. v. Ganakas*, 93 Ga. App. 297, 91 S.E.2d 383 (1956); *Hamby v. Edmunds Motor Co.*, 80 Ga. App. 209, 55 S.E.2d 743 (1949); *Digsby v. Carroll Baking Co.*, 76 Ga. App. 656, 47 S.E.2d 203 (1948); *Fraser v. Morrison*, 39 Hawaii 370 (1952); *Brownback v. Frailey*, 78 Ill. App. 262 (1898); *Oehler v. L. Bamberger & Co.*, 4 N.J. Misc. 1003, 135 A. 71 (Sup. Ct. 1926); *Crews v. Provident Fin. Co.*, 271 N.C. 684, 157 S.E.2d 381 (1967); *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936); *Carrigan v. Henderson*, 192 Okla. 413, 135 P.2d 330 (1943); *National Life & Acc. Ins. Co. v. Anderson*, 187 Okla. 180, 102 P.2d 141 (1940); *First Nat'l Bank v. Bragdon*, 84 S.D. 89, 167 N.W.2d 381 (1969); *Levine v. Trammell*, 41 S.W.2d 334 (Tex. Civ. App. 1931). A few courts even have said that negligence would suffice. *First Nat'l City Bank v. Gonzalez*, 293 F.2d 919 (1st Cir. 1961); *Interstate Life & Acc. Co. v. Brewer*, 50 Ga. App. 599, 193 S.E. 458 (1937); *Atlanta Hub Co. v. Jones*, 47 Ga. App. 778, 171 S.E. 470 (1933). *Contra*, *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 242 N.W. 25 (1932); *Bartow v. Smith*, 149 Ohio St. 301, 78 N.E.2d 735 (1948); *Medlin v. Allied Inv. Co.*, 398 S.W.2d 270 (Tenn. 1966); *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

60. *Vargas v. Ruggiero*, 197 Cal. App. 2d 709, 17 Cal. Rptr. 568 (1961); *Fraser v. Morrison*, 39 Hawaii 370 (1952); *Campbell v. Parker*, 209 So. 2d 337 (La. Ct. App. 1968); *Warrem v. Parrish*, 436 S.W.2d 670 (Mo. 1969); *LaSalle Extension Univ. v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934); *Peoples Fin. & Thrift Co. v. Harwell*, 183 Okla. 413, 82 P.2d 994 (1938); *Medlin v. Allied Inv. Co.*, 398 S.W.2d 270 (Tenn. 1966); *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963). *Contra*, unreasonable conduct suffices: *Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 216 P.2d 571 (1950); *Fraser v. Morrison*, 39 Hawaii 370 (1952) (but conduct was clearly unreason-



the plaintiff's interests.<sup>61</sup> The cases allowing recovery for excessive collection efforts have been placed in this third category,<sup>62</sup> but the conduct involved in them was outrageous merely by virtue of what was done. In addition to outrageous conduct, the tort requires severe injury.<sup>63</sup> Further, unless the defendant has knowledge of the plaintiff's peculiar susceptibility to injury, or unless he intended to inflict emotional injury, the injury must be such as a person of ordinary sensibilities would undergo under all the circumstances.<sup>64</sup>

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able, so even though court says it is requiring only unreasonableness, actually it is requiring outrageousness). Consider a recent South Dakota case, in which the court said,

Threats to sue and to appeal to defendant's employer must be made willfully and intentionally for the purpose of producing mental pain and anguish in an attempt to collect a debt. The important elements seem to be that the act is intentional, that it is unreasonable, and that the actor should recognize it as likely to result in injury.

First Nat'l Bank v. Bragdon, 84 S.D. 89, 91, 167 N.W.2d 381, 382 (1969). This standard is confusing. See note 244 *infra*.

61. PROSSER § 12, at 56. See *Personal Fin. Co. v. Loggins*, 50 Ga. App. 562, 179 S.E. 162 (1935) (creditor had knowledge of debtor's heart condition). See also Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40 (1956).

62. PROSSER § 12, at 57-59.

63. *Slocum v. Food Fair Stores*, 100 So. 2d 396 (Fla. 1958); *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); *March v. Cacioppo*, 37 Ill. App. 2d 235, 185 N.E.2d 397 (1962); *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

64. *March v. Cacioppo*, 37 Ill. App. 2d 235, 185 N.E.2d 397 (1962); *Hamby v. Edmunds Motor Co.*, 80 Ga. App. 209, 55 S.E.2d 743 (1949) (creditor had knowledge of debtor's susceptibility); *Oehler v. L. Bamberger & Co.*, 4 N.J. Misc. 1003, 135 A. 71 (1926) (same); *Carrigan v. Henderson*, 192 Okla. 413, 135 P.2d 330 (1943) (same); *National Life & Acc. Ins. Co. v. Anderson*, 187 Okla. 180, 102 P.2d 141 (1940) (same); *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930) (intent to inflict injury); *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950) (en banc) (same); *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 42 N.W. 25 (1932) (same).

In some jurisdictions, physical injury is necessary. *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); *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936); *Carrigan v. Henderson*, 192 Okla. 413, 135 P.2d 330 (1943); *Turner v. ABC Jalousie Co.*, 251 S.C. 921, 160 S.E.2d 528 (1968) (concurring opinion); *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953); *Wright v. E-Z Fin. Co.*, 267 S.W.2d 602 (Tex. Civ. App. 1954); *Janvier v. Sweeney*, [1919] 2 K.B. 316. Some of these jurisdictions, however, permit the physical injury to be caused by the emotional distress, rather than being incurred contemporaneously. *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936) (in which the court said there was trespass to the person even though there was no physical contact); *Turner v. ABC Jalousie Co.*, 251 S.C. 921, 160 S.E.2d 528 (1968); *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953); *Wright v. E-Z Fin. Co.*, 267 S.W.2d 602 (Tex. Civ. App. 1954).

The majority of jurisdictions that permit recovery for intentional infliction of emo-

When applied to debt collection cases, these standards of outrageous conduct and very severe injury reflect an elevation of the creditor's interest in collecting the debt over the debtor's interests. Indeed, some courts have recognized a right in the creditor to inflict some worry and concern in the debtor,<sup>65</sup> so that even intent to cause some emotional distress may not ease the requirement of severe injury. Because of these standards, the theory is incapable of giving much consideration to the debtor's interests in preventing intrusion, publicity of private facts, and loss of employment resulting from decreased efficiency. Courts applying this theory have not considered the employer's interest in the credit activities of his employees and his interest in maintaining the efficiency of his employees. If outrageousness were held to depend in part on the existence of defenses to the claim and on the existence of a bona fide dispute, however, the theory would be capable of considering the debtor's interests in asserting defenses and in not paying debts that are not owed. Unfortunately, the courts have tended to ignore these factors in determining outrageousness.<sup>66</sup>

#### D. *Interference with Contractual Relations*

Actionable interference with contractual relations requires the existence of a contract, knowledge of it by the defendant, intent to induce

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tional distress do not require physical injury. *First Nat'l City Bank v. Gonzales*, 293 F.2d 919 (1st Cir. 1961); *Herman Saks & Sons v. Ivey*, 26 Ala. App. 240, 157 So. 265 (1934); *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952) (en banc); *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950) (en banc); *Digsby v. Carroll Baking Co.*, 76 Ga. App. 656, 47 S.E.2d 203 (1948); *American Security Co. v. Cook*, 49 Ga. App. 723, 176 S.E. 798 (1934); *Atlanta Hub Co. v. Jones*, 47 Ga. App. 778, 171 S.E. 470 (1933); *Curnett v. Wolf*, 244 Iowa 683, 57 N.W.2d 915 (1953); *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 242 N.W. 25 (1932); *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So. 2d 154 (1963); *LaSalle Extension Univ. v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934); *Garrison v. Sun Printing & Pub. Ass'n*, 207 N.Y. 1, 100 N.E. 430 (1912); *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925); *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

65. "The right of a creditor to inflict some worry and concern upon a debtor by reasonable means is generally acknowledged and accepted by all as the necessary and usual adjunct to the very existence of the credit system." *Fraser v. Morrison*, 39 Hawaii 370, 375 (1952) (creditor made repeated duns to person who claimed creditor made mistake in identity; creditor never bothered to investigate alleged debtor's claim; no recovery). See also *Clark v. Associated Retail Credit Men*, 105 F.2d 62 (D.C. Cir. 1939).

66. *But see LaSalle Extension Univ. v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934), in which the court refers to the possible result of coercing an alleged debtor to pay an amount that is not actually owed.

breach, and breach.<sup>67</sup> The requirement of intent typically would prevent recovery by a debtor who lost his job. Of course, if the creditor's purpose is to cause discharge of the debtor, the intent requirement poses no obstacle.<sup>68</sup> More frequently, however, the creditor intends only to commit an act that he either knows or should know will result in discharge.<sup>69</sup> Rarely has this been held to constitute sufficient intent.<sup>70</sup>

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67. *American Surety Co. v. Schottenbauer*, 257 F.2d 7 (8th Cir. 1958); *Freed v. Manchester Serv.*, 165 Cal. App. 2d 186, 331 P.2d 689 (1958); *McCormick v. Louis Weber & Co.*, 187 Ill. App. 290 (1914); *Warschauser v. Brooklyn Furn. Co.*, 159 App. Div. 81, 144 N.Y.S. 257 (1913); *Crapanzano v. Uneeda Credit Clothing Stores*, 32 N.Y.S.2d 269 (Mun. Ct. Brooklyn 1941); *Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954), *reh. dismissed*, 242 N.C. 123, 86 S.E.2d 916 (1955); *Smith v. Citizens & S. Nat'l Bank*, 241 S.C. 285, 128 S.E.2d 112 (1962); *Cooper v. Steen*, 318 S.W.2d 750 (Tex. Civ. App. 1958) (reasonable assurance that a contract would have resulted will suffice).

The cause of action has been wholly or partially rejected by some jurisdictions. *E.g.*, *Pickens v. Hal J. Copeland Grocery Co.*, 219 Ala. 697, 123 So. 223 (1929). It has also been rejected by Louisiana, unless the means of interference are unlawful in themselves. PROSSER § 129, at 930 n.64. *See generally* PROSSER § 129; *Carpenter, Interference with Contract Relations*, 41 HARV. L. REV. 728 (1928).

68. *United States Fid. & Guar. Co. v. Millonas*, 206 Ala. 147, 89 So. 732 (1921); *Chiple v. Atkinson*, 23 Fla. 206, 1 So. 934 (1887); *Huskie v. Griffin*, 75 N.H. 345, 74 A. 595 (1909); *Campbell v. Gates*, 236 N.Y. 457, 141 N.E. 914 (1923) (malice exists if defendant intentionally and knowingly for unworthy or selfish purposes induces breach, and actual malice is not necessary); *Warschauser v. Brooklyn Furn. Co.*, 159 App. Div. 81, 144 N.Y.S. 257 (1913); *Crapanzano v. Uneeda Credit Clothing Stores*, 32 N.Y.S.2d 269 (Mun. Ct. Brooklyn 1941); *Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954), *reh. dismissed*, 242 N.C. 123, 86 S.E.2d 916 (1955); *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 167 A.2d 472 (1960).

69. For example, serving a wage assignment on the employer of his debtor when he knows or should know that upon receipt of the assignment the employer automatically will discharge the debtor.

70. *But see* *Crowe v. Domestic Loans*, 242 S.C. 310, 130 S.E.2d 845 (1963) (liable for discharge resulting from numerous phone calls to employer); *Kennedy v. Hub Mfg. Co.*, 221 Mass. 136, 108 N.E. 932 (1915) (wage assignment); *Cotton v. Cooper*, 209 S.W. 135 (Tex. Comm'n App., opinion adopted by Tex. Sup. Ct. 1919) (same). When the wage assignment is valid, the creditor will incur no liability for serving it on the employer. *Haines v. M.S. Welker & Co.*, 182 Iowa 431, 165 N.W. 1027 (1918); *Messina v. Continental Purchasing Co.*, 272 N.Y. 125, 5 N.E.2d 62 (1936); *Cotton v. Cooper*, 209 S.W. 135 (Tex. Comm'n App., opinion adopted by Tex. Sup. Ct. 1919) (dictum). If, however, the assignment is invalid, then the creditor should not have served it on the employer and will be liable for the consequences of his having done so. *Southern Fin. Co. v. Foster*, 19 Ala. App. 109, 95 So. 338, *cert. denied*, 209 Ala. 113, 95 So. 339 (1923) (per curiam); *Holmes v. Union House Furnishings Co.*, 17 Ill. App. 288, 149 N.E.2d 451 (1958); *Doucette v. Sallinger*, 228 Mass. 444, 117 N.E. 897 (1917); *Kennedy v. Hub Mfg. Co.*, 221 Mass. 136, 108 N.E. 932 (1915); *Lopes v. Connolly*, 210 Mass. 487, 95 N.E. 80 (1912); *Scott v. Pru-*

The requirement of breach also may prevent recovery for a debtor. Many employment contracts may be terminated at will, and some courts have held that termination of such a contract is not a breach.<sup>71</sup> Most courts, however, hold that termination of a contract that is terminable at will satisfies the requirement of breach.<sup>72</sup> A more serious defi-

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dential Outfitting Co., 92 Misc. 195, 155 N.Y.S. 497 (Sup. Ct. App. Div. 1915); Cotton v. Cooper, 209 S.W. 135 (Tex. Comm'n App., opinion adopted by Tex. Sup. Ct. 1919) (in which assignment was invalid because if usurious interest were applied to principal, the debt would have been discharged); Evans v. McKay, 212 S.W. 680 (Tex. Civ. App. 1919). *Contra*, Haines v. M.S. Welker & Co., 182 Iowa 431, 165 N.W. 1027 (1918) (even if the service is wrongful, there is no interference; the debtor's remedy is to sue his employer for wrongful discharge).

If the creditor has no reason to know that his act will result in discharge of the debtor, there is even less basis for holding him liable for the discharge. *But see* Post v. Hammer, No. 587911 (Cal. Super. Ct. 1968), reported in 1 CCH Pov. L. Rep. ¶ 3535.40, at 4554 (1968), in which a temporary restraining order was issued to prevent the creditor from contacting the debtor's employer, who was not subject to garnishment, on a theory of preventing interference with the contract relation; *cf.* Crowe v. Domestic Loans, 242 S.C. 310, 130 S.E.2d 845 (1963).

71. *Molloy v. Bemis Bros. Bag Co.*, 174 F. Supp. 785 (D.N.H. 1959), *aff'd in part, vacated in part, on other grounds*, 283 F.2d 32 (1st Cir. 1960) (contract terminable on 90 days' notice); *Terry v. Dairymen's League Co-operative Ass'n*, 2 App. Div. 2d 494, 157 N.Y.S.2d 71 (1956) (court held plaintiff's only remedy was to sue for inducing discontinuance of business relations, for which tort plaintiff has to show malice and no intent to further defendant's own interest); *E.R. Squibb & Sons v. Ira J. Shapiro, Inc.*, 64 N.Y.S.2d 368 (Sup. Ct. 1945) (contract terminable on 10 days' notice). Similarly, resignation has been held insufficient. *Chiple v. Atkinson*, 23 Fla. 206, 1 So. 934 (1887).

72. *Gruen Watch Co. v. Artists Alliance*, 191 F.2d 700 (9th Cir. 1951); *Canuel v. Oskoian*, 184 F. Supp. 70 (D.R.I. 1960); *Speegle v. Board of Fire Underwriters*, 172 P.2d 867 (Cal. 1946); *Mays v. Stratton*, 183 So. 2d 43 (Fla. 1966); *Chiple v. Atkinson*, 23 Fla. 206, 1 So. 934 (1887); *London Guar. & Acc. Co. v. Horn*, 206 Ill. 493, 69 N.E. 526 (1903); *Lopes v. Connolly*, 210 Mass. 487, 97 N.E. 80 (1912); *Moran v. Dunphy*, 177 Mass. 485, 59 N.E. 125 (1901); *Wear-ever Aluminum v. Townecraft Ind.*, 75 N.J. Super. 135, 182 A.2d 387 (1962); *Silva v. Bonafide Mills*, 82 N.Y.S.2d 155 (Sup. Ct. 1948); *Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954), *reh. dismissed*, 242 N.C. 123, 86 S.E.2d 916 (1955); *Evans v. McKay*, 212 S.W. 680 (Tex. Civ. App. 1919). *See also* *Traux v. Raich*, 239 U.S. 33, 38 (1915) (dictum):

It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion. . . .

*Carpenter, Interference with Contract Relations*, 41 HARV. L. REV. 728, 742-45 (1928).

Even if it is not relevant to the issue of breach, terminability at will is relevant to the question of damages, which include lost wages. *United States Fid. & Guar. Co. v.*

ciency in the adequacy of this remedy for debtors is that the injury caused by the communication to the employer may be an impairment of employment relations short of termination. For example, the debtor may suffer demotion, contraction of responsibility, or impairment of his chances for promotion.<sup>73</sup> These injuries cannot be redressed under the theory of interference with contractual relations.

Interference is not actionable if it is justified. Justification has been said to depend on the nature of the defendant's conduct, the plaintiff's interests, the interest sought to be advanced by the defendant, and the social interests in protecting the interests of the parties.<sup>74</sup> Courts have actually considered the creditor's interests in collecting and the debtor's interests in maintaining his employment relation and not paying debts that are not due.<sup>75</sup> For example, repeated duns to an employer whose employee disputes a debt may make the creditor's acts malicious,<sup>76</sup> and malice will prevent justification.<sup>77</sup>

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Millonas, 206 Ala. 147, 89 So. 732 (1921); Mays v. Stratton, 183 So. 2d 43 (Fla. 1966); Chipley v. Atkinson, 23 Fla. 206, 1 So. 934 (1887); Lopes v. Connolly, 210 Mass. 487, 97 N.E. 80 (1912); Evans v. McKay, 212 S.W. 680 (Tex. Civ. App. 1919). Damages also may reflect mental distress and anxiety caused by the interference. United States Fid. & Guar. Co. v. Millonas, 206 Ala. 147, 89 So. 732 (1921); Doucette v. Sallinger, 228 Mass. 444, 117 N.E. 897 (1917); Lopes v. Connolly, 210 Mass. 487, 97 N.E. 80 (1912). Damages are subject to mitigation by what the plaintiff actually earned during the period following discharge. Mays v. Stratton, 183 So. 2d 43 (Fla. 1966); Lopes v. Connolly, 210 Mass. 487, 97 N.E. 80 (1912); Vanarsdale v. Laverty, 69 Pa. St. Rep. 103 (1871).

73. Although proof of causation may be extremely difficult, these sorts of injuries have been alleged in several cases. See, e.g., Holt v. Boyle Bros., 217 F.2d 16 (D.C. Cir. 1954); Evans v. Swaim, 245 Ala. 641, 18 So. 2d 400 (1944); Haggard v. Shaw, 100 Ga. App. 813, 112 S.E.2d 286 (1959); Neigel v. Seaboard Fin. Co., 68 N.J. Super. 542, 173 A.2d 300 (1961); M. Rosenberg & Sons v. Craft, 182 Va. 512, 29 S.E.2d 375 (1944).

74. Freed v. Manchester Serv., 165 Cal. App. 2d 186, 331 P.2d 689 (1958). See also Mitchell v. Aldrich, 163 A.2d 833 (Vt. 1960) (depends on the circumstances, the means employed, and the motive for the interference); Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 745-46 (1928).

75. Thus, existence of a valid wage assignment will confer privilege on the creditor to interfere. Haines v. M.S. Welker & Co., 182 Iowa 431, 165 N.W. 1027 (1918); Cotton v. Cooper, 209 S.W. 135 (Tex. Comm'n App., opinion adopted by Tex. Sup. Ct. 1919); Evans v. McKay, 212 S.W. 680 (Tex. Civ. App. 1919) (dictum). On the other hand, if the assignment is invalid, then the motive for the interference becomes one of malice or extortion, either of which requires loss of privilege. Holmes v. Union House Furnishings Co., 17 Ill. App. 2d 288, 149 N.E.2d 451 (1958); Doucette v. Sallinger, 228 Mass. 444, 117 N.E. 897 (1917) (mistaken identity, creditor informed of mistake but proceeded anyway); Lopes v. Connolly, 210 Mass. 487, 97 N.E. 80 (1912) (same); Scott v. Prudential Outfitting Co., 92 Misc. 195, 155 N.Y.S. 497 (Sup. Ct. App. Div. 1915); Cotton v. Cooper, 209 S.W. 135 (Tex. Comm'n

The interests of the employer have not been considered under this theory, but they would seem relevant to a determination of whether the interference was justified. Justification then would depend not only on the interest sought to be advanced by the creditor, but also on the interests of others that actually are advanced by his conduct.<sup>78</sup>

### E. Abuse of Process

As its name implies, this theory is designed to redress the wrongful use of judicial process. The elements of the cause of action are the existence of an ulterior purpose in procuring the process and some improper use of it after it is issued.<sup>79</sup> For example, a creditor might

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App., opinion adopted by Tex. Sup. Ct. 1919); *Evans v. McKay*, 212 S.W. 680 (Tex. Civ. App. 1919) (debt already paid).

76. *Crapanzano v. Uneeda Credit Clothing Stores*, 32 N.Y.S.2d 269 (Brooklyn Mun. Ct. 1941).

77. *American Surety Co. v. Schottenbauer*, 257 F.2d 6 (8th Cir. 1958); *Evans v. Swaim*, 245 Ala. 641, 18 So. 2d 400 (1944); *Mays v. Stratton*, 183 So. 2d 43 (Fla. 1966); *London Guar. & Acc. Co. v. Horn*, 206 Ill. 493, 69 N.E. 526 (1903); *Moran v. Dunphy*, 177 Mass. 485, 59 N.E. 125 (1901) (dictum). Thus the exertion of pressure on the employer, as by threatening to cease doing business with him, will destroy any privilege that might otherwise exist. *Evans v. Swaim*, 245 Ala. 641, 18 So. 2d 400 (1944); *Jones v. Leslie*, 61 Wash. 107, 112 P. 81 (1910). Similarly, workmen's compensation insurers will incur liability for threatening to cease doing business with the employer unless the employer discharges an employee who refuses to accept the insurance company's proposed settlement. *American Surety Co. v. Schottenbauer*, 257 F.2d 7 (8th Cir. 1958); *United States Fid. & Guar. Co. v. Millonas*, 206 Ala. 147, 89 So. 732 (1921); *London Guar. & Acc. Co. v. Horn*, 206 Ill. 493, 69 N.E. 526 (1903).

78. Cf. PROSSER § 129, at 927:

Most of the law has arisen since the beginning of the twentieth century, and it is necessarily a product of the methods and conditions of modern industry and trade. As these have altered more or less rapidly, and our social ideas have changed with them, the law inevitably has passed through a number of successive changes, attended with some confusion, uncertainty and disagreement. In this field, perhaps more obviously than any other, the problem has continuously been one of adjustment of the conflicting claims of different enterprises, industries, classes and groups, where interests are nicely balanced, and decision on the basis of social policy is not an easy matter.

79. *Cline v. Flagler Sales Corp.*, 207 So. 2d 709 (Fla. Ct. App. 1968); *McClenny v. Inverarity*, 80 Kan. 569, 103 P. 82 (1909); *Wood v. Bailey*, 144 Mass. 365, 11 N.E. 567 (1887); *Marlatte v. Weickgenant*, 147 Mich. 266, 110 N.W. 1061 (1907); *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780 (1947); *Ledford v. Smith*, 212 N.C. 447, 193 S.E. 722 (1937); *Lader v. Benkowitz*, 66 N.Y.S.2d 713 (Sup. Ct. Spec. Term 1946); *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967); *Mullins v. Sanders*, 189 Va. 624, 634-35, 54 S.E.2d 116, 122 (1949):

[T]he mere fact that the creditor has procured a criminal warrant against the debtor for the ulterior purpose of enforcing the collection of the debt will not of itself support an action for abuse of process, for in addition to incurring

obtain a warrant for the arrest of a debtor on the charge of obtaining property under false pretenses, confront the debtor with the warrant, and inform him that unless he pays he will be arrested. This conduct would be actionable.<sup>80</sup> Most frequently, the creditor uses the criminal process, but the action also lies for the wrongful civil attachment of the person of the debtor and for the wrongful attachment of his property.<sup>81</sup>

To a limited extent, this theory considers the debtor's interests in dignity, self respect, and freedom from intrusion. The actual protection given to these interests is severely limited, however, since the debtor may or may not properly be subject to the process. The primary interest considered by this theory is society's interest in maintaining the

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civil liability the debtor may have violated the criminal law so as to justify his arrest and prosecution. So long as the creditor merely aids in the prosecution of the criminal proceeding in the regular manner—that is, by procuring the warrant in a proper way and by appearing as a witness for the prosecution in the criminal proceeding—he is not liable in an action for abuse of process, although the criminal prosecution may result in the payment of the debt. . . .

But it is well settled that where the creditor uses the criminal process of the court as a means of oppression, beyond the mere fact of arrest and the regular prosecution of the charge, to compel the debtor to make settlement . . . the action will lie.

*But see* Lopes v. Connolly, 210 Mass. 487, 97 N.E. 80 (1912); Melton v. Rickman, 225 N.C. 700, 36 S.E.2d 276 (1945) (dissenting opinion).

The process need not be regularly issued or valid on its face. McClenny v. Inverarity, 80 Kan. 569, 103 P. 82 (1909); Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947). *Contra*, Ammons v. Jet Credit Sales, 34 Ill. App. 2d 456, 181 N.E.2d 601 (1962).

80. If, however, the debtor does not comply with the creditor's demand and if the creditor does not actually carry out the threatened arrest, the debtor may not be able to recover, since he will have suffered no pecuniary injury. Gore v. Gorman's, Inc., 148 F. Supp. 241 (W.D. Mo. 1956). Other courts, however, have permitted recovery for humiliation and injury to reputation without requiring the debtor to prove the damage. Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1963). *See also* McGann v. Allen, 134 A. 811 (Conn. 1926); McClenny v. Inverarity, 80 Kan. 569, 103 P. 82 (1909).

81. *See* cases cited in note 79 *supra* for abuse of criminal process. *Cf.* Grist v. White, 14 Ga. App. 147, 80 S.E. 519 (1914), holding that the cause of action is not available if the creditor employs criminal proceedings. Arrest pursuant to the criminal process is not necessary. Lader v. Benkowitz, 66 N.Y.S.2d 713 (Sup. Ct. Spec. Term 1946). Abuse of civil process was present in Nix v. Goodhile, 95 Iowa 282, 63 N.W. 701 (1895), in which the creditor garnished wages he knew to be exempt; *cf.* Lopes v. Connolly, 210 Mass. 487, 97 N.E. 80 (1912) (creditor refused to withdraw wage assignment even after he learned of mistake in identity; even though there was no ulterior motive present in this case, the court indicated that abuse of process would lie).

purity of the judicial process, and in some jurisdictions this interest may not be very strong. Several states have statutes or rules of procedure that authorize the dismissal of misdemeanor actions in cases in which the aggrieved party has a civil remedy and in which the aggrieved party has received satisfaction from the defendant.<sup>82</sup> In a state that has such a rule, recovery by a debtor for abuse of process would be extremely difficult, since the rule implicitly condones the use of criminal process to collect debts.<sup>83</sup>

A related theory of action, malicious prosecution, has as one of its elements the lack of probable cause for initiation of the proceedings against the plaintiff.<sup>84</sup> This theory considers the interest, shared by the

82. *E.g.*, 19 PURDON PA. STAT., RULES OF CRIM. PROC. Rule 315 (Supp. 1971); IOWA CODE §§ 5622-23 (1897), *cited in* White v. International Text-Book Co., 156 Iowa 210, 136 N.W. 121 (1912); VA. CODE § 3973 (1904), *cited in* Glidewell v. Murray-Lacy & Co., 124 Va. 563, 98 S.E. 665 (1919).

83. Glidewell v. Murray-Lacy & Co., 124 Va. 563, 98 S.E. 665 (1919). *Cf.* Cole v. Rogers, 167 S.E. 781 (Ga. Ct. App. 1933):

[Where a person released on bail] without any compulsion from any use to which the process was put, but being motivated merely by the pendency of the criminal proceedings, and for the purpose of relieving himself of the criminal prosecution, he voluntarily pays the prosecutor, thereby discharging whatever civil liability he may be under, arising out of the transaction which formed the basis for the criminal prosecution, and pays the court costs of the prosecution, it does not appear that the process of the court has been put to any use other than that for which it was lawfully intended.

*See also* Wood v. Bailey, 144 Mass. 365, 11 N.E. 567 (1887); Melton v. Rickman, 225 N.C. 700, 36 S.E.2d 276 (1945); Ellis v. Wellons, 224 N.C. 269, 29 S.E.2d 884 (1944) (dissenting opinion).

The debtor may be able to recover from persons other than the creditor. The judge who issues the writ may lose his immunity to civil liability for judicial acts if he acts without jurisdiction or if he has knowledge of the abuse. Kitchens v. Barlow, 250 Miss. 121, 164 So. 2d 745 (1964); Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947). The law enforcement official who serves the writ may be liable if he knows the writ is being abused but serves it anyway or if he fails to obey the command of the writ and follows the directions of the creditor. McGann v. Allen, 134 A. 811 (Conn. 1926); Hoppe v. Klapperich, *supra*. Similarly, the creditor's attorney may be liable if he acts with knowledge of the abuse. Hoppe v. Klapperich, *supra*.

*Compare* FLA. STAT. § 713.58 (Supp. 1970), making it a misdemeanor to fraudulently remove property upon which a possessory lien has accrued without first making full payment. Section 713.58(3) provides that stopping payment on a check is *prima facie* proof of fraudulent intent. This statute is noted in Note, 23 U. FLA. L. REV. 802 (1971).

84. White v. International Text-Book Co., 156 Iowa 210, 136 N.W. 121 (1912); Curley v. Automobile Fin. Co., 343 Pa. 280, 23 A.2d 48 (1941). *See generally* PROSSER § 119. For cases applying the malicious prosecution theory to debt collection tactics, see Cline v. Flagler Sales Corp., 207 So. 2d 709 (Fla. Ct. App. 1968); White v. Parks, 93 Ga. 633, 20 S.E. 78 (1894); Grist v. White, 14 Ga. App. 147,



debtor and society, in preventing the use of judicial process that does not lie in a particular case. Insofar as the proceedings against the plaintiff consist of a suit to collect a debt, the theory provides limited protection of the debtor's interest in not paying amounts that are not owed. It does not consider any of the other interests present in the collection of alleged indebtedness.

#### *F. Others*

Numerous other theories have been asserted in debt collection cases. None of them is capable of considering more than a few of the numerous relevant interests. Thus, assault, battery, and false imprisonment focus on the debtor's interest in the integrity of his body and, to a lesser extent, his personality.<sup>85</sup> They ignore his interests in

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80 S.E. 519 (1914); *March v. Cacioppo*, 37 Ill. App. 2d 235, 185 N.E.2d 397 (1962); *Ammons v. Jet Credit Sales*, 34 Ill. App. 2d 456, 181 N.E.2d 601 (1962); *McCormick v. Louis Weber & Co.*, 187 Ill. App. 290 (1914); *Wood v. Bailey*, 144 Mass. 365, 11 N.E. 567 (1887); *Landavazo v. Credit Bureau*, 72 N.M. 456, 384 P.2d 891 (1963); *Johnson v. Walker-Smith Co.*, 47 N.M. 310, 142 P.2d 546 (1943); *Curley v. Automobile Fin. Co.*, 343 Pa. 280, 23 A.2d 48 (1941); *Meadows v. First Nat'l Bank*, 149 S.W.2d 591 (Tex. Civ. App. 1941).

85. For cases in which assault or battery has been alleged, see *Deevy v. Tassi*, 21 Cal. 2d 109, 130 P.2d 388 (1942); *Dieas v. Associates Loan Co.*, 99 So. 2d 279 (Fla. 1957); *Reece v. Ebersbach*, 9 So. 2d 805 (Fla. 1942); *Goodyear Tire & Rubber Co. v. Paddock*, 219 Ind. 672, 40 N.E.2d 697 (1942); *Moskins Stores v. DeHart*, 217 Ind. 622, 29 N.E.2d 948 (1940); *Kastrup v. Yellow Cab & Baggage Co.*, 129 Kan. 398, 282 P. 742 (1929); *Harris v. Highland Mtge. Corp.*, 160 So. 2d 596 (La. Ct. App. 1963); *Moffitt v. White Sewing Mach. Co.*, 214 Mich. 496, 183 N.W. 198 (1921); *Reed v. Ponton*, 15 Mich. App. 423, 166 N.W.2d 629 (1969); *Clemmons v. Life Ins. Co.*, 274 N.C. 416, 163 S.E.2d 761 (1968); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959); *General Motors Acc. Corp. v. Cornelius*, 424 S.W.2d 498 (Tex. Civ. App. 1968); *Davidson v. Lee*, 139 S.W. 904 (Tex. Civ. App. 1911); *Barney v. Jewel Tea Co.*, 139 P.2d 878 (Utah 1943); *Felvey v. Shaffer*, 186 Va. 419, 42 S.E.2d 860 (1947). See also *American Fin. & Loan Corp. v. Coots*, 105 Ga. App. 849, 125 S.E.2d 689 (1962); *Atlanta Hub Co. v. Jones*, 47 Ga. App. 778, 171 S.E. 470 (1933), both of which also involved the display of guns and threats to use them, but were litigated under a theory of intentional infliction of emotional distress, rather than assault and battery.

For cases in which the alleged debtor asserted false imprisonment, see *Gore v. Gorman's, Inc.*, 148 F. Supp. 241 (W.D. Mo. 1956); *McGann v. Allen*, 134 A. 811 (Conn. 1926); *Cline v. Flagler Sales Corp.*, 207 So. 2d 709 (Fla. Ct. App. 1968); *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780 (1947); *Kitchens v. Barlow*, 250 Miss. 121, 164 So. 2d 745 (1964); *Warren v. Parrish*, 436 S.W.2d 670 (Mo. 1969); *Vail v. Pennsylvania R.R.*, 103 N.J.L. 213, 136 A. 425 (1927); *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884 (1944); *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967); *Davidson v. Lee*, 139 S.W. 904 (Tex. Civ. App. 1911); *Salisbury v. Poulson*, 51 Utah 552, 172 P. 315 (1918); *Mullins v. Sanders*, 189 Va. 624, 54 S.E.2d

maintaining the privacy of private facts and maintaining existing relations with others. They also seem to ignore his interests in preserving an opportunity to assert defenses and not paying debts that are not owed, inasmuch as the existence of any of those causes of action is independent of whether the debt is actually due. They also are incapable of considering the employer's interests.

A small number of cases have permitted debtors to recover on theories of fraud and extortion.<sup>86</sup> These theories consider the debtor's in-

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116 (1949). Confinement of the debtor's person is required. *Warrem v. Parrish*, 436 S.W.2d 670 (Mo. 1969) (detention of automobile insufficient); *Davidson v. Lee*, 139 S.W. 904 (Tex. Civ. App. 1911) (locking debtor in defendant's room sufficient); *Salisbury v. Poulson*, 51 Utah 552, 172 P. 315 (1918) (locking debtor in room with creditor sufficient). The confinement need not be in a jail, *Cline v. Flagler Sales Corp.*, 207 So. 2d 709 (Fla. Ct. App. 1968) (confinement in creditor's car sufficient), but the confinement must be against the plaintiff's will, so if the debtor voluntarily accompanies a creditor's agent to the creditor's place of business, there has been no false imprisonment. *Vail v. Pennsylvania R.R.*, 103 N.J.L. 213, 136 A. 425 (1927). If the confinement is pursuant to a valid arrest warrant, the debtor has not been falsely imprisoned, even though ultimately he is released, unless there was no probable cause for the arrest. *Gore v. Gorman's, Inc.*, 148 F. Supp. 241 (W.D. Mo. 1956) (dictum). If there was no probable cause, the debtor may also have an action for malicious prosecution.

86. Thus, in a case in which a creditor who previously had settled with the plaintiff's husband nevertheless induced the plaintiff to pay still more, the plaintiff was granted recovery for actual and exemplary damages for the fraud. *Dennis v. Dial Fin. & Thrift Co.*, 401 S.W.2d 803 (Tex. 1966). *Cf.* *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1961), in which the trial court held an allegation of conspiracy to cause termination of the plaintiff's employment insufficient for failing to allege fraud.

Debtors have recovered for extortion when the alleged creditor presented the alleged debtor's employer with an invalid wage assignment. *Suarez v. McFall Bros.*, 87 S.W.2d 744 (Tex. Civ. App. 1905). *See also* *Scott v. Prudential Outfitting Co.*, 92 Misc. 195, 155 N.Y.S. 497 (Sup. Ct. App. Div. 1915) (false representation that defendant held a wage assignment from plaintiff). *But see* *Barteck v. Personal Fin. Co.*, 60 Ohio App. 197, 20 N.E.2d 259 (1938), in which the creditor allegedly served a false wage assignment on the employer and refused to withdraw it, and the court denied recovery for extortion by reasoning that since the assignment was not valid, service of it on the employer could not be coercive.

Extortion was also the theory of recovery in *John Brenner Brewing Co. v. McGill*, 23 Ky. L. Rptr. 212, 62 S.W. 722 (1901), in which the creditor refused to withdraw notice of an alleged delinquency to a trade association, with the result that plaintiff was unable to purchase supplies from any member of the association. *See also* *Marlatte v. Weickgenant*, 110 N.W. 1061 (Mich. 1907), in which the court indicated that plaintiff could recover for abusive use of an arrest warrant also on a theory of assumpsit for the duress and extortion; *Hightower v. Thompson*, 231 N.C. 491, 57 S.E.2d 763 (1950), in which a bondsman extorted more than the amount of the bond at a time when the bond had not even been forfeited and his own liability could not have exceeded half the amount of the bond. *Cf.* *Tuyes v. Chambers*, 144 La. 723,

terest in not being coerced into paying debts that are not owed and his interest in freedom from intrusion, but are incapable of considering any of the other relevant interests.<sup>87</sup>

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81 So. 265 (1919), in which the court said that a threat to publish plaintiff's name on a deadbeat list violated the blackmail statute and that plaintiff could have a civil remedy.

87. Two other theories that occasionally have been asserted are trespass and negligence. The trespass cases include *New Morgan County Bldg. & Loan Ass'n v. Plemmons*, 210 Ala. 286, 98 So. 12 (1923) (defendant came to plaintiff's home and refused to leave); *Engle v. Simmons*, 148 Ala. 92, 41 So. 1023 (1906) (no label mentioned by the court, but recovery permitted for unlawful entry or invasion of the home that produced physical injury, either as a result of direct personal violence or through nervous excitement); *Dieas v. Associates Loan Co.*, 99 So. 2d 279 (Fla. 1957) (trespass and assault); *American Security Co. v. Cook*, 49 Ga. App. 723, 176 S.E. 798 (1934); *Brownback v. Frailey*, 78 Ill. App. 262 (1898); *Patapsco Loan Co. v. Hobbs*, 129 Md. 9, 98 A. 239 (1916) (trespass and intentional infliction of emotional distress; court cites trespass ab initio for defendant's barging into plaintiff's sickroom); *Warrem v. Parrish*, 436 S.W.2d 670 (Mo. 1969) (intentional infliction of emotional distress, but the court says that plaintiff could have asserted trespass to personal property for defendant's wrongful detention of plaintiff's automobile); *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936) (trespass to the person when physical injury results from verbal abuse). The negligence cases include *Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A.2d 292 (1952) (mistaken belief that debtor was delinquent); *Kitchens v. Barlow*, 250 Miss. 121, 164 So. 2d 745 (1964) (mistaken identity). Lack of foreseeability of injury usually prevents recovery. *First Nat'l City Bank v. Gonzalez*, 293 F.2d 919 (1st Cir. 1961); *Interstate Life & Acc. Co. v. Brewer*, 50 Ga. 599, 193 S.E. 458 (1937); *Atlanta Hub Co. v. Jones*, 47 Ga. App. 778, 171 S.E. 470 (1933); *Braun v. Craven*, 175 Ill. 401, 51 N.E. 657 (1898); *Brownback v. Frailey*, 78 Ill. App. 262 (1898); *Oehler v. L. Bamberger & Co.*, 4 N.J. Misc. 1003, 135 A. 71 (Sup. Ct. 1926); *Garrison v. Sun Printing & Pub. Ass'n*, 207 N.Y. 1, 100 N.E. 430 (1912); *Barteck v. Personal Fin. Co.*, 60 Ohio App. 197, 20 N.E.2d 259 (1938); *Carrigan v. Henderson*, 192 Okla. 413, 135 P.2d 330 (1943); *Levine v. Trammell*, 41 S.W.2d 335 (Tex. Civ. App. 1931). See generally *Borda, One's Right to Enjoy Mental Peace and Tranquility*, 28 GEORGETOWN L.J. 55 (1939).

A host of other theories have been asserted in isolated cases. These include wrongful service of wage assignments, *Hudson v. Slack Furn. Co.*, 318 Ill. App. 15, 47 N.E.2d 502 (1943) (cause of action recognized); *Haines v. M.S. Welker & Co.*, 182 Iowa 431, 165 N.W. 1027 (1918) (cause of action rejected); *Barteck v. Personal Fin. Co.*, 60 Ohio App. 197, 20 N.E.2d 259 (1938) (cause of action denied, though the court spoke in terms of negligence, libel, and coercion). See also *City Purchasing Co. v. Clough*, 38 Ga. App. 53, 142 S.E. 469 (1928) (complaint held to state cause of action for malicious service of wage assignment known to be void, knowing that the plaintiff would be discharged; voidness of purported assignment is essential); *Askins, Inc. v. Sparks*, 56 S.W.2d 279 (Tex. Civ. App. 1933) (forged wage assignment, lack of knowledge of discharge rule held irrelevant, in view of the defendant's malice).

Abusive language: *Ex parte Hammett*, 259 Ala. 240, 66 So. 2d 600 (1953) (no recovery); *Maze v. Employees' Loan Soc'y*, 217 Ala. 44, 114 So. 574 (1927) (no cause of action in the absence of assault or slander); *New Morgan County Bldg. & Loan Ass'n v. Plemmons*, 210 Ala. 286, 98 So. 12 (1923) (trespass also present); *Brownback v. Frailey*, 78 Ill. App. 262 (1898) (similar to or part of negligence); *Botkin v.*

#### IV. ANALYSIS OF THE CASES BY TACTICS

An analysis of the theories employed to redress excessive collection tactics makes it clear that no theory is capable of considering all the

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Cassady, 106 Iowa 334, 76 N.W. 722 (1898) (threat to have plaintiff's husband imprisoned actionable if it caused physical injury); Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935) (no cause of action for insulting words in the absence of assault); Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936) (cause of action for trespass to the person when physical injury results from verbal abuse); National Life & Acc. Ins. Co. v. Anderson, 187 Okla. 180, 102 P.2d 141 (1940) (elements are wrongful language, personal injury to the plaintiff, intent to injure, knowledge of plaintiff's condition, and action in wilful disregard of plaintiff's condition and of the possibility of injury or action with malice); Felvey v. Shaffer, 186 Va. 419, 42 S.E.2d 860 (1947) (implicit recognition of cause of action for insulting words, but assault also present). The abusive language cases may have been the forerunners of the intentional infliction of emotional distress cases. *See, e.g.*, National Life & Acc. Ins. Co. v. Anderson, 187 Okla. 180, 102 P.2d 141 (1940); Peoples Fin. & Thrift Co. v. Harwell, 183 Okla. 413, 82 P.2d 994 (1938) (recognizes cause of action for physical injury caused by mental suffering brought about by threats and verbal abuse).

Wrongful attachment: Yates v. District Credit Clothing, 241 A.2d 596 (D.C. Ct. App. 1968); Ammons v. Jet Credit Sales, 34 Ill. App. 2d 456, 181 N.E.2d 601 (1962); Henderson v. Weidman, 88 Neb. 813, 130 N.W. 579 (1911).

Conversion: Whitby v. Associates Discount Corp., 207 N.E.2d 482 (Ill. Ct. App. 1965); Stone v. C.I.T. Corp., 122 Pa. Super. 71, 184 A. 674 (1936); Kroger Food Co. v. Singletary, 438 S.W.2d 621 (Tex. Civ. App. 1969).

Conspiracy to injure credit: Masters v. Lee, 39 Neb. 574, 58 N.W. 222 (1894).

Collection or attempted collection of usury: Harned v. E-Z Fin. Co., 151 Tex. 641, 254 S.W.2d 81 (1953) (cause of action rejected).

Nuisance: Wiggins v. Moskins Credit Clothing Store, 137 F. Supp. 764 (E.D.S.C. 1956) (repeated phone calls).

Breach of the peace: Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892 (Mo. 1959); Levine v. Trammell, 41 S.W.2d 335 (Tex. Civ. App. 1931) (question not decided in either case).

Wrongful death: State *ex rel.* Richardson v. Edgeworth, 214 So. 2d 579 (Miss. 1968) (suicide as a result of abuse of process in the course of debt collection, held error to have directed verdict for defendant).

Assumpsit: Marlatte v. Weickgenant, 147 Mich. 266, 110 N.W. 1061 (1907).

In several cases, statutes created special theories of recovery. Utery v. Chicago Live Stock Exch., 54 Ill. App. 233 (1894) (statute making it unlawful to post or distribute any notice with malicious intent, wrongfully and wickedly to injure the person, character, business, employment, or property of another); Hartnett v. Plumbers' Supply Ass'n, 169 Mass. 229, 47 N.E. 1002 (1897) (statute giving relief to any person whose private right or interest has been injured by the exercise by any private corporation of a franchise or privilege not conferred by law); Salvo v. Edens, 237 Miss. 734, 116 So. 2d 220 (1959) (actionable word statute making words actionable if they are insulting and calculated to lead to breach of the peace). *See also* 121½ ILL. REV. STAT. ANN. § 262L (Supp. 1971) (creating a cause of action in a debtor against a creditor who contacts the debtor's employer in an attempt to collect, without following the requisite statutory procedure); N.Y. CIV. PRAC. L. § 5252 (Supp. 1970-71) (giving

interests of the debtor, the creditor, third parties, and society that are present in the debt collection context. No single remedy is adequate to

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the debtor a cause of action against his employer who discharges him because of service of an income execution against his wages); UNIFORM CONSUMER CREDIT CODE § 5.202(6) (same).

If the debtor can find no other theory, he may be able to use the theory of prima facie tort. To do so, however, he must show that the defendant intended to commit the harm or damage to him, as opposed to intent to commit the act that causes the harm. Any interest on the part of the defendant will constitute sufficient justification to defeat the right of recovery, so the theory is of little use to debtors. *But see* Christenson v. Swedish Hosp., 59 Wash. 2d 545, 368 P.2d 897 (1962), in which this may have been the court's theory. One of the elements of the cause of action is that no other cause of action be available. *Alpert v. Gordon*, 15 App. Div. 2d 673, 224 N.Y.S.2d 119 (1962). *See generally* Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465 (1957); Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U.L. REV. 563 (1959); Comment, *Creditor's Pre-Judgment Communication to Debtor's Employer: An Evaluation*, 36 BROOKLYN L. REV. 95 (1969).

Abusive collection tactics also may be redressed through discipline of attorneys and through the criminal law. Thus, attorneys have been suspended from practice. *In re Dows*, 168 Minn. 6, 209 N.W. 627 (1926) (deceptive practices, suspension for six months); *In re Swihart & Branson*, 42 S.D. 628, 177 N.W. 364 (1920) (coercive and deceptive practices, suspension for six months); *see* N.Y. City Bar Ass'n Committees on Grievances & Legal Assistance, *Improper Collection Practices*, 23 RECORD OF N.Y.C.B.A. 441 (1968). And creditors have been prosecuted for

Assault with intent to rob: *Barton v. State*, 88 Tex. Crim. 368, 227 S.W. 317 (1921) (not guilty if defendant acted under a bona fide belief that the victim owed the money and for the sole purpose of collecting the debt).

Robbery: *State v. Hollyway*, 41 Iowa 200 (1875) (if defendant acts in good faith to collect a debt, felonious intent is lacking); *Fannin v. State*, 51 Tex. Crim. 41 (1907) (dictum) (robbery to collect by the use of force, in this case, a gun).

Criminal libel: *State v. Armstrong*, 106 Mo. 395, 16 S.W. 604 (1891) (letter sent to debtor at place of employment, others saw return address, conviction affirmed); *Green v. Minnes*, 22 Ont. Rep. 177 (1891) (truth is no defense) (dictum).

Criminal conspiracy: *Commonwealth v. Donoghue*, 250 Ky. 343, 63 S.W.2d 3 (1933) (conspiracy to operate loan shark racket, demurrer should have been overruled).

Extortion and blackmail: *State v. Hammond*, 80 Ind. 80 (1881) (purpose of threat to collect debt good defense, information quashed); *State v. Hollyway*, 41 Iowa 200 (1875) (use of pistol to collect debt would be a criminal offense) (dictum); *State v. Logan*, 104 La. 760, 29 So. 336 (1901) (fact of indebtedness no defense); *State v. Bruce*, 24 Me. 71 (1844) (threat to prosecute for theft not sufficient to constitute extortion when party has grounds to believe he was guilty); *Commonwealth v. Coolidge*, 128 Mass. 55 (1880) (threatening criminal prosecution, conviction affirmed); *People v. Maranian*, 359 Mich. 361, 102 N.W.2d 568 (1960) (threat of physical violence, conviction affirmed); *Cohen v. State*, 37 Tex. Crim. 146, 38 S.W. 1005 (1897) (letter threatening criminal prosecution, conviction affirmed); *State v. Richards*, 97 Wash. 587, 167 P. 47 (1917) (fact of indebtedness no defense, conviction affirmed); *Judevine v. Benzies-Montanye Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936) (extortion statute does not include threats to injure reputation)

check excessive tactics. Nevertheless, it may be that the totality of remedies is adequate and that if a particular theory does not apply in a

(dictum); *Regina v. Coughlan*, 176 Eng. Rep. 581 (1865).

Operating a disorderly house for the habitual charging of usurious interest; *Commonwealth v. Mutual Loan & Trust Soc'y*, 156 Ky. 299, 160 S.W. 1042 (1913) (demurrer sustained); *State v. Martin*, 77 N.J.L. 652, 73 A. 548 (1909) (conviction affirmed); *State v. Dimant*, 73 N.J.L. 131, 62 A. 286 (1905) (motion to quash indictment denied). See also *State v. Basham*, 70 P.2d 24 (Kan. 1937) (injunction against conducting business in flagrant violation of usury statute); *State v. McMahon*, 280 P. 906 (Kan. 1929) (same).

Collecting debts on government property: *United States v. Sipple*, Crim. No. 4634-55 (D.C. Mun. Ct. 1955), cited in 10 CONS. FIN. L. BULL. 7 (1956).

Disturbing the peace: *Birkhead*, *Collection Tactics of Illegal Lenders*, 8 L. & CONTEMP. PROB. 78, 85, (1941) (citing conviction of a creditor who made so many telephone calls to the debtor at his place of employment that he was discharged).

Sending through the mails matter that is calculated to reflect injuriously on the debtor's character or conduct: *In re Barber*, 75 F. 980 (E.D. Wis. 1896) (return address, habeas corpus petition granted); *United States v. Burnell*, 75 F. 824 (S.D. Iowa 1896) (skip-tracing magazine, convicted); *United States v. Dodge*, 70 F. 235 (E.D. Pa. 1895) (color-coded envelopes); *United States v. Simmons*, 61 F. 640 (D. Conn. 1894) (postcards, demurrer overruled); *United States v. Elliott*, 51 F. 807 (D. Ky. 1892) (postcard, convicted); *Ex parte Doran*, 32 F. 76 (D. Minn. 1887) (postcard and return address, habeas corpus petition granted) (decided before statute was amended to proscribe sending matter intended to reflect on character or conduct). The statute as originally enacted was 25 Stat. 496 (1888); in its present form, it is 18 U.S.C. § 1718 (Supp. 1971).

Use of the mails to promote fraud: *United States v. Zalewski*, 29 F. Supp. 755 (W.D. Ky. 1939) (double payment on promissory notes, demurrer overruled). See also 18 U.S.C. § 1341 (1970).

Sending a letter with intent to cause annoyance: *People v. Loveless*, 84 N.Y.S. 1114 (Ct. Spec. Sess. of 1st Div. of City of N.Y. 1903).

Sending a letter threatening to injure the person or property of another: *State v. Barr & Widen*, 28 Mo. App. 84 (1887) (conviction reversed, injury to reputation not included in statute that mentions injury to person or property); *State v. McCabe*, 135 Mo. 450, 37 S.W. 123 (1896) (statute amended to include reputation, quashing of indictment reversed).

Other criminal statutes that can be invoked against excessive collection tactics include those proscribing the detention of a corpse because of a debt or demand, WASH. REM. COMP. STAT. § 2492 (1922), cited in *Gadbury v. Bleitz*, 133 Wash. 134, 138, 233 P. 299, 300 (1925); any implication that the collector is affiliated with the Federal Government, 18 U.S.C. § 712 (1970); extortionate means to collect debts, 18 U.S.C. §§ 891-96 (1970) (also extortionate extensions of credit); WIS. STAT. ANN. § 943.28 (Supp. 1970-71); ILL. CRIM. CODE § 39A-1 (1970); assault and battery for the purpose of collecting a loan, R.I. GEN. LAWS § 11-5-6 (Supp. 1970); contacting the debtor's spouse or employer, 121½ ILL. REV. STAT. § 262H-1 (Supp. 1971) (unless specified conditions have been met); sending matter that simulates legal process, MICH. STAT. ANN. § 28.600 (1954); and use of the telephone to make indecent comments or repeated calls for the purpose of annoying, molesting, or harassing, IND. ANN. STAT. § 10-4944 (Supp. 1970).

given case, some other theory will. In order to determine if this is true, this section of the article will analyze the debt collection cases in

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Fraud and deception in the collection of overdue indebtedness also has been redressed by action of the Federal Trade Commission. *E.g.*, *United States Ass'n of Credit Bureaus v. Federal Trade Comm'n*, 299 F.2d 220 (7th Cir. 1962) (communications designed to lead the debtor to believe a collection agency was contacting him); *In re Wm. H. Wise Co.*, 53 F.T.C. 408 (1955) (same); *In re New Standard Pub. Co.*, 47 F.T.C. 1350 (1951) (same); *In re Norman Co.*, 40 F.T.C. 296 (1945) (same); *In re National Remedy Co.*, 8 F.T.C. 437 (1925) (same); *Dejay Stores v. Federal Trade Comm'n*, 200 F.2d 865 (2d Cir. 1952) (deceptive communications designed to locate the debtor); *Rothschild v. Federal Trade Comm'n*, 200 F.2d 39 (7th Cir. 1952) (same); *Silverman v. Federal Trade Comm'n*, 145 F.2d 751 (9th Cir. 1944) (same); *In re Pratt & Pomars Associates*, 47 F.T.C. 1323 (1951) (same); *In re Bentley Stores Corp.*, 47 F.T.C. 177 (1950) (same). See 16 C.F.R. Part 237 (1971), *Guides Against Debt Collection Deception*; MASS. ANN. LAWS ch. 93, § 49 (Supp. 1970) (prohibiting unfair, deceptive, and unreasonable means of debt collection).

In addition, collection agencies are regulated in most states and are subject to criminal sanction and/or loss of license for these practices, among others:

Use of abusive language: ARK. STAT. ANN. § 71-2008(11) (Supp. 1969).

Communications to a debtor at his place of employment: ARK. STAT. ANN. § 71-2008(12) (Supp. 1969) (unless no response to mail sent to debtor's home).

Violence or the threat of violence: ARK. STAT. ANN. § 71-2008(13) (Supp. 1969); CONN. GEN. STAT. ANN. § 42-131(c) (1958); ME. REV. STAT. ANN. tit. 32, § 576 (Supp. 1970-71) (loss of license only).

Violation of postal laws or regulations: ARK. STAT. ANN. § 71-2008(6) (Supp. 1969); CONN. GEN. STAT. ANN. § 42-131(i) (1958); ME. REV. STAT. ANN. tit. 32, § 576 (Supp. 1970-71) (loss of license only); N.M. STAT. ANN. § 67-15-78(C) (1953).

Use of matter that simulates legal process: ARK. STAT. ANN. § 71-2008(8) (Supp. 1969); CONN. GEN. STAT. ANN. § 42-131(g) (1958); IND. ANN. STAT. § 10-5008 (b)(1) (Supp. 1971); ME. REV. STAT. ANN. tit. 32, § 576 (Supp. 1970-71) (loss of license only); N.C. GEN. STAT. § 66-41 (Supp. 1971) and N.C. Dep't of Ins., Collection Agencies Rules & Regs., Reg. 7(7)(d). See *Commonwealth v. Axe*, 51 Lanc. Rep. 359, 11 Monroe L. Rep. 112, 63 York 113 (Lancaster County Ct. Quarter Sess. 1949); *Commonwealth v. Tucker*, 187 Pa. Super. 61, 142 A.2d 786 (1958) (in which the court held that the statute also covered the use of valid process to collect debts, in effect creating a criminal sanction for abuse of process).

Publication or threatened publication of deadbeat lists: ARK. STAT. ANN. § 71-2008 (5) (Supp. 1969); COLO. REV. STAT. ANN. § 27-1-25(3) (1963); CONN. GEN. STAT. ANN. § 42-131(j) (1958); ME. REV. STAT. ANN. tit. 32, § 576 (Supp. 1970-71) (loss of license only); N.M. STAT. ANN. § 67-15-78(B) (1953).

Threats to advertise a claim for sale: ARK. STAT. ANN. § 71-2008(9) (Supp. 1969); COLO. REV. STAT. ANN. § 27-1-25(2) (1967) (loss of license only); CONN. GEN. STAT. ANN. § 42-131(n) (1958); ME. REV. STAT. ANN. tit. 32, § 576 (Supp. 1970-71) (loss of license only); N.M. STAT. ANN. § 67-15-77 (1953).

Use of fictitious names or other means with intent to deceive: COLO. REV. STAT. ANN. § 27-1-2(2)(b) (1967) (loss of license only); IND. ANN. STAT. § 10-5008(b) (2) (Supp. 1971); ME. REV. STAT. ANN. tit. 32, § 576 (Supp. 1970-71) (loss of license only); N.C. GEN. STAT. §§ 66-41 (Supp. 1971) and N.C. Dep't of Ins., Collection Agencies Rules & Regs., Reg. 7(4).

Use of collect telephone calls and telegrams to a debtor: ME. REV. STAT. ANN.

terms of the tactics that have been employed. An effort also will be made to determine the legal limits on extrajudicial tactics employed in debt collection. The emphasis will be on the tactics themselves, and not on the legal theories employed to redress excessive conduct. The primary classification will focus on whom the creditor contacts, whether it be the debtor, the debtor's employer, his family, his friends and associates, his other creditors, or others. Within each class there will be a secondary classification based on the medium used, viz., letter, telephone, telegraph, or personal visit, and a further classification based on the content or quality of the contact, e.g., abusive language or manner, deception, threats of physical violence, threats of legal action, other threats, or actual physical force. With respect to each tactic, the relevant interests will be identified, and an attempt will be made to determine if all these interests are being considered.

A major difficulty in using this sort of analysis to determine the limits of extrajudicial tactics is that most often more than one type of collection tactic is used.<sup>88</sup> The analysis is further impeded because the official reports frequently do not contain the exact content of the contact. Nevertheless, it may be possible to determine the extent to which a creditor's liability for excessive collection tactics depends upon the person contacted, the medium employed, and the quality of the contact.

### A. Debtor Contact

The most obvious debt collection tactics, and the ones most frequently employed, consist of contacting the debtor himself. When the tactics consist of some form of contact to the debtor, most of the interests discussed in Part II are present. Thus, the debtor's interests in freedom from intrusion, harassment, and assaults on his dignity and self respect are present. Similarly, his interests in paying just

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tit. 32, § 576 (Supp. 1970-71) (loss of license only, but applies to repeated or harassing communications, also); N.C. GEN. STAT. §§ 66-41 (Supp. 1971) and N.C. Dep't of Ins., Collection Agencies Rules & Regs., Reg. 7(1); Ore. Admin. Rules Comp. § 20-240(1)(e) (Collection Agency Rules).

See also Nat'l Conf. of Lawyers & Collection Agencies, *A Model Act to License and Regulate Collection Agencies*, 70 COM. L.J. 38 (1965).

88. Thus, when asked exactly what it was that caused his injuries, one debtor answered, "It was just a blanket operation. . . . It is like a buzz saw that hits a fellow. Could you tell which tooth bit into you? It is the same proposition." *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857 (Tex. Civ. App. 1957).



debts, but not debts that are not owed, and in preserving the ability to assert defenses are present. On the other hand, his interests in maintaining privacy of private facts and maintaining existing relations with others ordinarily would not be present. If, however, the contact takes the form of threatening to disclose the alleged indebtedness to third parties, then these interests also might be present. The creditor's interests in prompt payment of the debt at little expense to him clearly are present.

Even parties who do not know of the contact have interests that perhaps should be considered. The interests of the employer in the qualification and efficiency of the debtor-employee are present even if the employer does not know of the indebtedness. So is his interest in being spared the expense and inconvenience of collection efforts directed at him, since if the debtor fails to pay in response to contacts to him, then contacts may be directed to the employer. True, this interest of the employer will not be invaded until and unless the creditor actually contacts him, but the interest in avoiding the contact is present even before the contact is made. In the same sense, the interests of friends, relatives, associates, and neighbors may be present even though only the debtor has been contacted. Thus, their interests in maintaining their own privacy may be present, since if the debtor fails to pay, they may be contacted next. Other creditors and credit associations have an interest in knowing of the debtor's failure to pay, but they are not receiving notice of that fact. Also present is society's interest in payment of debts, but only debts that are justly due. Finally, society's interest in reducing court congestion is present, but so is its interest in preserving the debtor's opportunity to assert good defenses to the claim. These, then, are the relevant interests when a creditor contacts an alleged debtor in order to collect an alleged debt. Consideration now will be turned to an analysis of the media and contents of those contacts.

### (1) Personal Visit

During the course of a personal visit to the debtor, the creditor may employ verbal or physical communications. Clearly, the use of physical force to effect collection is not permitted,<sup>89</sup> but cases in which the

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89. *Deevy v. Tassi*, 21 Cal. 2d 109, 130 P.2d 389 (1942); *see Harris v. Highland Mtge. Corp.*, 160 So. 2d 596 (La. Ct. App. 1963) (no liability, where jury evidently found no battery).

creditor personally commits a battery are extremely rare.<sup>90</sup> The creditor may stop short of using actual force, but may threaten the debtor with physical violence. If he does, he is likely to incur liability for assault<sup>91</sup> or for intentional infliction of emotional distress.<sup>92</sup> Threats

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90. In most of the cases in which physical contact occurred, the alleged battery was committed by a collector, or agent, of the creditor. These cases generally turn on the question of the creditor's liability for the acts of his agent. Unquestionably, the creditor is liable for those acts of his agent that are committed in the course of his employment. *Moffit v. White Sewing Mach. Co.*, 214 Mich. 496, 183 N.W. 198 (1921); *Clemmons v. Life Ins. Co.*, 274 N.C. 416, 163 S.E.2d 761 (1968); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959); *General Motors Acc. Corp. v. Cornelius*, 424 S.W.2d 498 (Tex. Civ. App. 1968).

A number of cases, however, require not only that the assault occur at a time when the collector is formally on the job, but also that the act of the collector be committed in furtherance of the employer's interest or that the employment be such that the use of force could be contemplated in its accomplishment. *Dieas v. Associates Loan Co.*, 99 So. 2d 279 (Fla. 1959) (jury question); *Moskins Stores v. DeHart*, 217 Ind. 622, 29 N.E.2d 948 (1940) (creditor liable only if he had reasonable cause to know collector was the type of person likely to resort to force); *Goodyear Tire & Rubber Co. v. Paddock*, 219 Ind. 672, 40 N.E.2d 697 (1942) (store manager distinguished from mere collector); *Barney v. Jewel Tea Co.*, 104 Utah 292, 139 P.2d 878 (1943) (nothing inherent in duties of collector that contemplates the use of force). Thus the collector who is antagonized by a debtor's obstinance may be found to have departed from his employment and to have committed the assault in an effort to vindicate his own personal interests. *Reece v. Ebersbach*, 9 So. 2d 805 (Fla. 1942) (wrongful death); *Moffit v. White Sewing Mach. Co.*, 214 Mich. 496, 183 N.W. 198 (1921) (purpose of assault is jury question); *Clemmons v. Life Ins. Co.*, 274 N.C. 416, 163 S.E.2d 761 (1968) (threat of violence, court distinguishes between assault resulting from quarrel originating out of attempt to collect and assault committed in attempt to collect, purpose of assault is jury question). *Cf. New Morgan County Bldg. & Loan Ass'n v. Plemmons*, 210 Ala. 286, 98 So. 12 (1923) (threatened only legal action). The collector, of course, is liable even if the creditor is not, and the creditor may also be liable if he ratifies or affirms the collector's act. *Reece v. Ebersbach*, 9 So. 2d 805 (Fla. 1942); *Kastrup v. Yellow Cab & Baggage Co.*, 129 Kan. 398, 282 P. 742 (1929). Ratification, however, is not to be inferred from the employer's failure to discharge the agent. *Kastrup v. Yellow Cab & Baggage Co.*, *supra*.

91. *American Fin. & Loan Corp. v. Coots*, 105 Ga. App. 849, 125 S.E.2d 689 (1962) (gun); *Atlanta Hub Co. v. Jones*, 47 Ga. App. 778, 171 S.E. 470 (1933) (gun, "Now, by God, I am going to have the money or else"); *Levine v. Trammell*, 41 S.W.2d 335 (Tex. Civ. App. 1931) (knife, recovery for mental and physical pain caused by fright and shock, provided that defendant's act was the proximate cause of the injury and the injury, a miscarriage, ought to have been foreseen as a natural and probable consequence); *Davidson v. Lee*, 139 S.W. 904 (Tex. Civ. App. 1911).

92. *Vargas v. Ruggiero*, 197 Cal. App. 2d 709, 17 Cal. Rptr. 568 (1961) (defendant informed plaintiff that he had come "to talk about the ranch, one way or the other, they were going to fix that difficulty up one way or the other"); *Whitsell v. Watts*, 98 Kan. 508, 159 P. 401 (1916) (swearing and shaking fist in close proximity to plaintiff); *Harris v. Highland Mtge. Corp.*, 160 So. 2d 596 (La. Ct. App. 1963) (threat to kill plaintiff's husband, who was not present at the time, jury found for defendant).

of violence, however, are relatively rare, especially in the more recent cases, in which the creditor is more likely to threaten nonviolent action. Thus, creditors have threatened to evict delinquent tenants,<sup>93</sup> to have the plaintiff's husband arrested,<sup>94</sup> and to take the plaintiff's furniture.<sup>95</sup> They also have threatened non-legal action, *e.g.*, to cause the debtor's discharge from employment,<sup>96</sup> to report the indebtedness to a credit association,<sup>97</sup> and to lapse an insurance policy.<sup>98</sup> In all but

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*Cf.* *Brownback v. Frailey*, 78 Ill. App. 262 (1898) (verbal abuse while flourishing a whip, liable for foreseeable consequences, if natural and proximate, theory unspecified) (dictum); *Clemmons v. Life Ins. Co.*, 274 N.C. 416, 163 S.E.2d 761 (1968) (gun, "You don't talk to me like that, woman, I will shoot you," theory unspecified).

93. *New Morgan County Bldg. & Loan Ass'n v. Plemmons*, 210 Ala. 286, 98 So. 12 (1923) (threat to drive plaintiff and her husband from the house, also verbal abuse and continuing presence in plaintiff's house after she requested him to leave, liability recognized); *Levine v. Trammell*, 41 S.W.2d 335 (Tex. Civ. App. 1931) (threat to throw plaintiff, her four children, and her furniture out into the street, also brandished knife, recovery for mental and physical pain caused by fright and shock, provided defendant's act is the proximate cause and the injury, miscarriage, ought to have been foreseen).

94. *New Morgan County Bldg. & Loan Ass'n v. Plemmons*, 210 Ala. 286, 98 So. 12 (1923) (liability recognized); *Brownback v. Frailey*, 78 Ill. App. 262 (1898) (also flourished whip, liability recognized); *Botkin v. Cassidy*, 106 Iowa 334, 76 N.W. 722 (1898) (liability recognized); *Hightower v. Thompson*, 231 N.C. 491, 57 S.E.2d 763 (1950) (recovery for extortion); *Carrigan v. Henderson*, 192 Okla. 413, 135 P.2d 330 (1943) (also abusive language and threat of violence, no liability for threatening to take steps creditor is legally entitled to take).

95. *New Morgan County Bldg. & Loan Ass'n v. Plemmons*, 210 Ala. 286, 98 So. 12 (1923) (also defendant's continuing presence in plaintiff's home after being requested to leave, liability recognized); *Brownback v. Frailey*, 78 Ill. App. 262 (1898) (threat to attach all plaintiff's property and send her husband to jail, also flourishing whip, liability recognized); *United Fin. & Thrift Corp. v. Smith*, 387 S.W.2d 752 (Tex. Civ. App. 1965) (on one occasion a truck even came to pick up the furniture, but debtor refused to let them take it); *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645 (Tex. Civ. App. 1962). *See also* *Stockwell v. Gee*, 12 Okla. 207, 249 P. 389 (1926) (threat to repossess cattle, abusive language, recovery for intentional infliction of mental distress).

96. *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959) (harassment at place of employment, right to recover for invasion of right of privacy recognized); *Warschauser v. Brooklyn Furn. Co.*, 159 App. Div. 81, 144 N.Y.S. 257 (1913) (creditor carried out threat, right to recover for interference recognized).

97. *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645 (Tex. Civ. App. 1962).

98. *Clemmons v. Life Ins. Co.*, 274 N.C. 416, 163 S.E.2d 761 (1968). In several cases the threats are not specified. *E.g.*, *Vargas v. Ruggiero*, 197 Cal. App. 2d 709, 17 Cal. Rptr. 568 (1961); *Industrial Fin. Serv. v. Riley*, 157 Tex. 306, 302 S.W.2d 659 (1957); *General Motors Acc. Corp. v. Cornelius*, 424 S.W.2d 498 (Tex. Civ. App. 1968). In *Fennell v. G.A.C. Corp.*, 242 Md. 209, 218 A.2d 492 (1966), the collector threatened "to take care of" the debtor.

two of these cases, however, other tactics were used in addition to threats.<sup>99</sup> And although the court in one of these two cases implicitly recognized the creditor's liability, it did not speak directly to the issue of liability for threats.<sup>100</sup> The courts that have spoken to that issue hold that it is not tortious for a creditor to threaten to take steps he is legally entitled to take.<sup>101</sup> This position may be sound, since it permits the creditor to inform the debtor in a forceful manner of the consequences of nonpayment and gives the debtor an opportunity to discharge the debt before any further action is taken. It is not clear, however, that all threats of action that the creditor is entitled to take should be permitted. For example, a creditor might be entitled to have the debtor criminally prosecuted for writing a bad check or for wrongfully removing collateral from the jurisdiction. This does not necessarily mean that he therefore should be entitled to threaten the prosecution as a means of collecting the debt. If he actually does initiate the prosecution for that purpose, he may be liable for abuse of process. It might be argued, therefore, that he should not be permitted to threaten criminal proceedings when his real motive is collection of the debt and not the redressing of a criminal act. The cases, however, have not accepted this reasoning, and, as a practical matter, the difficulty of proving the creditor's motive may be insuperable.<sup>102</sup>

In a large number of cases containing personal visits, the creditors used abusive, though not necessarily threatening, language or conduct. In some the language is described as profane or vulgar,<sup>103</sup> but in most

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99. The two exceptions are *Botkin v. Cassady*, 106 Iowa 334, 76 N.W. 722 (1898); and *Hightower v. Thompson*, 231 N.C. 491, 57 S.E.2d 763 (1950) (bail bondsman threatened to have plaintiff arrested, extortion).

100. *Botkin v. Cassady*, 106 Iowa 334, 76 N.W. 722 (1898) (judgment for the debtor reversed because of errors in the conduct of the trial).

101. *Carrigan v. Henderson*, 192 Okla. 413, 135 P.2d 330 (1943) (other conduct was present, in addition to threat of legal action, though the court denied the right to recover for that conduct, too); *Peoples Fin. & Thrift Co. v. Harwell*, 183 Okla. 413, 82 P.2d 994 (1938). Cf. *Hightower v. Thompson*, 231 N.C. 491, 57 S.E.2d 763 (1950) (in which the creditor was not legally entitled to have the plaintiff arrested).

102. *But see* FTC News, Sept. 28, 1971 (consent order in a case in which the complaint alleged as deceptive practices the creditor's threats to garnish the wages of delinquent customers and to institute criminal proceedings against delinquent customers, when actually defendant intended to do neither). See also N.Y. DEPT. OF CONSUMER AFFAIRS, CONSUMER PROTECTION LAW Reg. 11 (1971) (prohibits the threatening of any action that the creditor does not actually take in the usual course of his business, unless he can show that he actually intended to take the threatened action in that particular case).

103. *B-W Acc. Corp. v. Callaway*, 224 Ga. 367, 162 S.E.2d 430 (1968) (also

it is described only as loud or abusive.<sup>104</sup> Unless the creditor's conduct is proved to have been undertaken for the purpose of inflicting injury, he is free to employ vulgar, abusive, and loud language. In several cases the language or conduct that is described defies classification. For example, one creditor told a female debtor that if he

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campaign of harassment, liability recognized for invasion of right of privacy); *American Fin. & Loan Corp. v. Coots*, 105 Ga. App. 849, 125 S.E.2d 689 (1962) (also threat with gun, right to recover for shock and physical injuries recognized); *American Security Co. v. Cook*, 49 Ga. App. 723, 176 S.E. 798 (1934) (liability for intentional infliction of emotional distress recognized); *Ringgold v. Land*, 212 N.C. 369, 193 S.E. 267 (1937) (not slander per se and no special damages alleged); *Bartow v. Smith*, 149 Ohio St. 301, 78 N.E.2d 735 (1948) (cause of action for intentional infliction of emotional distress rejected, even though defendant knew plaintiff was pregnant); *Levine v. Trammell*, 41 S.W.2d 335 (Tex. Civ. App. 1931) (also threats of violence, recovery for injuries resulting from shock and fright).

104. *New Morgan County Bldg. & Loan Ass'n v. Plemmons*, 210 Ala. 286, 98 So. 12 (1923) (right to recover recognized); *Interstate Life & Acc. Co. v. Brewer*, 56 Ga. App. 599, 193 S.E. 458 (1937) (invasion of plaintiff's sickroom and ignoring requests to leave, liability for intentional infliction of emotional distress recognized); *Atlanta Hub Co. v. Jones*, 47 Ga. App. 778, 171 S.E. 470 (1933) (also threat of violence, right to recover for shock even if no physical injury); *Braun v. Craven*, 175 Ill. 401, 51 N.E. 657 (1898) (recovery denied because injury not foreseeable); *Brownback v. Frailey*, 78 Ill. App. 262 (1898) (also threats, liable only if injury was foreseeable); *Whitsel v. Watts*, 98 Kan. 508, 159 P. 401 (1916) (recovery for miscarriage resulting from abusive language and threatening manner); *Moffit v. White Sewing Mach. Co.*, 214 Mich. 496, 183 N.W. 198 (1921) (recovery for assault); *Carrigan v. Henderson*, 192 Okla. 254, 135 P.2d 330 (1943) (right to recover rejected unless defendant had knowledge of plaintiff's special physical condition so that the injury would have been foreseeable or unless defendant acted with intent to injure or with a malicious intent); *National Life & Acc. Ins. Co. v. Anderson*, 187 Okla. 180, 102 P.2d 141 (1940) (plaintiff in sickbed, defendant liable for wrongful language resulting in personal injuries if defendant had intent to injure or should have foreseen injury); *Stockwell v. Gee*, 121 Okla. 207, 249 P. 389 (1926) (recovery for physical injury resulting from emotional injury intentionally inflicted, plaintiff was pregnant); *Industrial Fin. Serv. v. Riley*, 157 Tex. 306, 302 S.W.2d 659 (1957) (campaign of harassment, recovery for unreasonable collection efforts); *United Fin. & Thrift Corp. v. Bain*, 393 S.W.2d 429 (Tex. Civ. App. 1965), *writ ref'd, n.r.e.*, 400 S.W.2d 302 (1966) (per curiam) (same); *United Fin. & Thrift Corp. v. Smith*, 387 S.W.2d 752 (Tex. Civ. App. 1965) (same); *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645 (Tex. Civ. App. 1962) (same) (for discussion of the Texas cases, see notes 234-42 *infra* and accompanying text); *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963) (liability for intentional infliction of emotional distress recognized, but recovery denied because defendant was only unreasonable, not extreme and outrageous). See also *Stavnezer v. Sage-Allen & Co.*, 146 Conn. 460, 152 A.2d 312 (1959) (no slander, no cause of action for intentional or negligent misconduct, no reasoning given); *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959) (in which creditor followed debtor, who worked as a waitress, around the restaurant, harassing her, recovery for invasion of right of privacy recognized); *General Motors Acc. Corp. v. Cornelius*, 424 S.W.2d 498 (Tex. Civ. App. 1968) (also battery).

could not get the money any other way, he would take it out in trade.<sup>105</sup> In most cases in which recovery is permitted, however, conduct in addition to offensive language is present. Thus, another creditor boarded up his debtor's house while the debtor and his wife were still in it.<sup>106</sup> Presumably, the creditor's conduct may become actionable by reason of frequency or persistency of his visits, but no such case was found. Also presumably, the intrusion branch of invasion of the right of privacy might be invoked, with its standard of reasonableness rather than outrageousness, but no right of privacy case containing only personal visits to the debtor was found. Thus the only discovered limits on creditor conduct in this area are the use or threat of physical violence and the use of outrageous language.

## (2) Letters

Virtually every collection attempt commences with a letter informing the debtor of the indebtedness and demanding payment. If the debtor does not respond adequately, further letters may follow, typically increasing in nastiness of language and tone.<sup>107</sup> Although no cases were found in which collectors threatened in writing to use violence in order to coerce payment, a number contained threats of other sorts. Thus, debtors have been told that their debts would be turned over to a collection agency or an attorney for further proceedings,<sup>108</sup>

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105. *Digsby v. Carroll Baking Co.*, 76 Ga. App. 656, 47 S.E.2d 203 (1948) (liability for intentional infliction of emotional distress recognized). See also *Vargas v. Ruggiero*, 197 Cal. App. 2d 709, 17 Cal. Rptr. 568 (1961) (creditor stated that he "had come to talk about the ranch, one way or the other, they were going to fix that difficulty up one way or the other," recovery for intentional infliction of emotional distress resulting in miscarriage).

106. *Duncan v. Donnell*, 12 S.W.2d 811 (Tex. Civ. App. 1928) (recovery permitted for miscarriage resulting from fright). See also *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952) (landlord and his wife invaded debtor's home and camped in the living room for 17 days, landlord's wife was lame and did not bother going to the bathroom before relieving herself, recovery for invasion of privacy); *Birkhead, Collection Tactics of Illegal Lenders*, 8 L. & CONTEMP. PROB. 78, 83 (1941) (citing example of a creditor's hiring an attractive blonde to visit a debtor at his place of employment).

107. See PART I *supra*. See also *Birkhead, Collection Tactics of Illegal Lenders*, 8 L. & CONTEMP. PROB. 78 (1941); Comment, *Creditor's Pre-Judgment Communication to Debtor's Employer: An Evaluation*, 36 BROOKLYN L. REV. 95 (1969).

108. *Christenson v. Swedish Hospital*, 59 Wash. 2d 545, 368 P.2d 897 (1962); *In re Wm. H. Wise Co.*, 53 F.T.C. 408 (1955) ("about as unpleasant thing as we can think of," cease and desist order issued); *In re Norman Co.*, 40 F.T.C. 296 (1945) (cease and desist order issued); *United States v. Bayle*, 40 F. 664 (E.D. Mo. 1889) (violates nonmailability statute, even though defendant threatened to do only something

that legal action would be taken,<sup>109</sup> that the debtor would be criminally prosecuted,<sup>110</sup> and that his furniture would be taken.<sup>111</sup> Threats of nonjudicial action include threats to notify the debtor's employer,<sup>112</sup> to cause his discharge,<sup>113</sup> to injure his credit rating,<sup>114</sup> to place his name on a list of delinquent debtors,<sup>115</sup> and to publicize the indebted-

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it had a legal right to do, since the statute was designed to deal with creditors who used the mails to humiliate and injure the reputations of the addressees, and such communications must be in sealed envelopes). *Contra*, United States v. Elliott, 51 F. 807 (D. Ky. 1892).

109. Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939) (also threat to injure credit rating, states cause of action for intentional infliction of emotional distress); United States v. Prendergast, 237 F. 410 (D. Ore. 1916) (conviction for violation of nonmailability statute); Hamby v. Edmunds Motor Co., 80 Ga. App. 209, 55 S.E.2d 743 (1949) (complaint for emotional injury resulting from fright dismissed because no foreseeability, reckless disregard of consequences, or malice); McCravy v. Schneer's, 47 Ga. App. 703, 171 S.E. 391 (1933) (complaint for libel dismissed because no publication); Barnett v. Collection Serv. Co., 214 Iowa 1303, 242 N.W. 25 (1932) (also threat to contact employer and to "tie up" the debtor "tighter than a drum," recovery for intentional infliction of emotional distress); Booty v. American Fin. Corp., 224 So. 2d 512 (La. Ct. App. 1969) (also letters to employer, which probably were determinative, recovery for invasion of right of privacy); Commonwealth v. Axe, 51 Lanc. Rep. 359, 11 Monroe L. Rep. 112, 63 York 113 (Lancaster County Ct. Quarter Sess. 1949) (conviction for violation of statute prohibiting collection agencies from using matter that simulates legal process); Riley v. Askin & Marine Co., 134 S.C. 198, 132 S.E. 584 (1926) (also imputation of intentional nonpayment of debts, complaint dismissed because no publication).

110. State v. Hammond, 80 Ind. 80 (1881) (no violation of blackmail statute to make threat in order to collect debt if creditor honestly believed the debt was due); Williamson v. Askin & Marine Co., 138 S.C. 47, 136 S.E. 21 (1926) (may be tantamount to accusation, so complaint states cause of action for libel).

111. United Fin. & Thrift Corp. v. Bain, 393 S.W.2d 429 (Tex. Civ. App. 1965), writ *ref'd*, *n.r.e.*, 400 S.W.2d 302 (1966) (special delivery letter, campaign of harassment, recovery for unreasonable collection efforts). See also B-W Acc. Corp. v. Callaway, 224 Ga. 367, 162 S.E.2d 430 (1968) (where the nature of the threats was not specified; also phone calls and personal visits, harassment, held to state cause of action for invasion of right of privacy).

112. Barnett v. Collection Serv. Co., 214 Iowa 1303, 242 N.W. 25 (1932) (also threats to sue and to cause the debtor's discharge); First Nat'l Bank v. Bragdon, 84 S.D. 89, 167 N.W.2d 381 (1969) (also threats to sue, states cause of action); *In re* New Standard Publishing Co., 47 F.T.C. 1350 (1951).

113. Barnett v. Collection Serv. Co., 214 Iowa 1303, 242 N.W. 25 (1932); Western Guar. Loan Co. v. Dean, 309 S.W.2d 857 (Tex. Civ. App. 1957) (also campaign of harassment, liability recognized).

114. Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939) (also threat to sue, states cause of action for intentional infliction of emotional distress); Pioneer Fin. & Thrift Corp. v. Adams, 426 S.W.2d 317 (Tex. Civ. App. 1968) (also campaign of harassment, recovery for unreasonable collection efforts).

115. *Ex parte* Doran, 32 F. 76 (D. Minn. 1887) (no violation of nonmailability statute, before it was amended in 1888); Sicard v. Roca, 43 La. App. 842, 9 So. 629

ness.<sup>116</sup> The results reached in these cases are similar to those in cases containing threats made in the course of a personal visit to the debtor: the creditor is not liable unless he acts out of malice or unless the letter is outrageous. The creditor may, however, incur liability for written communications that would not be actionable if they were made orally. This is the consequence of various state and federal criminal statutes declaring specified matter to be nonmailable.<sup>117</sup> In contrast to holdings of no civil liability for oral communications, it is not a defense under these criminal statutes that the creditor only threatens to take action that he has a legal right to take.<sup>118</sup>

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(1891) (recovery for libel denied because no publication); *Weston v. Barnicoat*, 175 Mass. 454, 56 N.E. 619 (1900) (in which creditor threatened and then did report the debtor's name to an association whose members then were prohibited from selling to the debtor, recovery for libel); *Masters v. Lee*, 39 Neb. 574, 58 N.W. 222 (1894) (same, except members were prohibited only from extending credit to the debtor, cause of action for conspiracy to injure credit stated); *People v. Loveless*, 84 N.Y.S. 1114 (N.Y. City Ct. Spec. Sessions 1903) (conviction for violation of statute prohibiting the sending of a letter threatening to do an unlawful injury to the person or property of another or sending of any letter with intent to cause annoyance to any person); *Muetze v. Tuteur*, 77 Wis. 236, 46 N.W. 123 (1890) (credit denied, recovery for libel). See also *B-W Acc. Corp. v. Callaway*, 224 Ga. 367, 162 S.E.2d 430 (1968).

116. *State v. McCabe*, 135 Mo. 450, 37 S.W. 123 (1896) (conviction for violating a statute prohibiting the sending of any writing threatening to do any injury to the person, property, credit, or reputation of another); *State v. Barr & Widen*, 28 Mo. App. 84 (1887) (*contra*, decided under the same statute before it was amended to include injury to reputation and credit, holding that reputation was not included within the terms "person or property"); *Salisbury v. Budich*, 172 Misc. 201, 14 N.Y.S.2d 320 (Sup. Ct. 1939).

This tactic is not of merely historical interest, as the author observed the following sign in a window of a bar in Springfield, Illinois, on November 6, 1971:

ANYONE  
HAVING A BAD CHECK HERE  
OR  
HAVING A LOAN FROM HERE  
PAY NOW OR  
YOUR NAME AND AMOUNT WILL  
APPEAR IN FRONT WINDOW  
NOV. 15TH

117. 18 U.S.C. § 1718 (Supp. 1971) (prohibits the appearance, on the outside of anything sent through the mails, of any matter "obviously intended to reflect injuriously upon the character or conduct of another"). State statutes regulating collection agencies typically prohibit violation of postal laws or regulations. *E.g.*, ARK. STAT. ANN. § 71-2008(6) (Supp. 1969); CONN. GEN. STAT. ANN. § 42-131(L) (1958); ME. REV. STAT. ANN. tit. 32, § 576 (Supp. 1970-71); N.M. STAT. ANN. § 67-15-78(c) (1953).

118. In some quarters the practice . . . of sending communications through the mail that were both calculated and intended to humiliate, and injure the persons addressed in the public estimation, had become one of the recognized



Collectors have also employed deception in collection letters. The purpose is either to deceive the debtor into believing that a collection agency is contacting him<sup>119</sup> or to induce the addressee to furnish information that will enable the creditor to locate the debtor. The deceptive means employed to locate the debtor, a practice known as skip-tracing, are limited only by the creditor's imagination. Among the schemes employed are representations that the sender has a package for the debtor, to be sent when the sender receives specified information from the addressee;<sup>120</sup> that the sender is holding a small sum of money for the debtor;<sup>121</sup> that the sender has a free pen for the debtor, but that in order to avoid sending free pens to more than one employee of the same employer the debtor must supply specified information about his employment;<sup>122</sup> and that the sender is conducting a manpower evaluation survey<sup>123</sup> or an employment bureau.<sup>124</sup> The only remedy that has been asserted in these cases of deception is a cease and desist order against continuing the practices. The Federal Trade Commission is empowered to seek cease and desist orders to prevent

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methods of compelling the payment of debts. Congress evidently intended . . . to utterly suppress the practice in question. . . . Henceforth persons writing such demands and threats must inclose them in sealed envelopes, or subject themselves to criminal prosecution.

United States v. Bayle, 40 F. 664, 665-66 (E.D. Mo. 1889).

119. *In re Wm. H. Wise Co.*, 53 F.T.C. 408 (1955) (cease and desist order issued); *In re New Standard Publishing Co.*, 47 F.T.C. 1350 (1951) (cease and desist order issued, vacated on appeal, on other grounds); *In re Norman Co.*, 40 F.T.C. 296 (1945) (cease and desist order issued); *In re National Remedy Co.*, 8 F.T.C. 437 (1925) (same).

120. *Dejay Stores v. Federal Trade Comm'n*, 200 F.2d 865 (2nd Cir. 1952); *Rothschild v. Federal Trade Comm'n*, 200 F.2d 39 (7th Cir. 1952); *Silverman v. Federal Trade Comm'n*, 145 F.2d 751 (9th Cir. 1944); *In re Bentley Stores Corp.*, 47 F.T.C. 177 (1950). In each of these cases the package consisted of pen points, and in each of them the F.T.C. issued cease and desist orders. In *Dejay* the creditor also sent similar letters to the references supplied by the debtor at the time credit was extended.

121. *E.g.*, *Rothschild v. Federal Trade Comm'n*, 200 F.2d 39 (7th Cir. 1952) (issuance of cease and desist order affirmed). Typically, the amount sent in response to the debtor's response is 3¢ or 10¢.

122. *Silverman v. Federal Trade Comm'n*, 145 F.2d 751 (9th Cir. 1944) (issuance of cease and desist order affirmed); *In re Bentley Stores Corp.*, 47 F.T.C. 177 (1950) (cease and desist order issued).

123. *Rothschild v. Federal Trade Comm'n*, 200 F.2d 39 (7th Cir. 1952) (issuance of cease and desist order affirmed).

124. *Dejay Stores v. Federal Trade Comm'n*, 200 F.2d 865 (2nd Cir. 1952) (issuance of cease and desist order affirmed). *See also In re Bentley Stores Corp.*, 47 F.T.C. 177 (1950), in which the letter was sent to the employer or other reference supplied by the debtor.

the employment of false, misleading, and deceptive practices, even if no one actually has been deceived or injured.<sup>125</sup> This remedy, however, is obviously of little help to a debtor who already has been injured by the deception.<sup>126</sup>

In addition to employing threats or deception, the collector also may be generally abusive in his collection letters, as by disparaging the character of the debtor and expressing hope that members of his family will lose all respect for him,<sup>127</sup> by implying that the debtor evades payment of his just debts,<sup>128</sup> or by sending so many letters that the sheer number makes them abusive.<sup>129</sup> These letters generally are within the limits of permissible creditor conduct. Apart from those cases involving deception that the Federal Trade Commission litigated, very few cases have held the mere sending to the debtor of a letter, regardless of its contents, to be actionable.<sup>130</sup> Most of the cases in which liability has been found included the publication of the matter to others than the debtor,<sup>131</sup> a large number of letters sent to the

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125. *Silverman v. Federal Trade Comm'n*, 145 F.2d 751 (9th Cir. 1944), *citing* *Federal Trade Comm'n v. Algoma Lumber Co.*, 291 U.S. 67 (1934).

126. For a discussion of other relief within the power of the FTC, see Comment, "Corrective Advertising" Orders of the Federal Trade Commission, 85 HARV. L. REV. 477, 488 *et seq.* (1971).

127. *Boudreaux v. Allstate Fin. Corp.*, 217 So. 2d 439 (La. Ct. App. 1968) (also campaign of harassment, recovery granted).

128. *Miller v. Friedman's Jewelers, Inc.*, 107 Ga. App. 841, 131 S.E.2d 663 (1963) (also personal visit, no recovery, so letter alone clearly not actionable).

129. *United Fin. & Thrift Corp. v. Smith*, 387 S.W.2d 752 (Tex. Civ. App. 1965) (also campaign of harassment, recovery); *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645 (Tex. Civ. App. 1962); *Advance Loan Serv. v. Mandik*, 306 S.W.2d 754 (Tex. Civ. App. 1957) (over 100 letters); *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954) (debtor was barraged with letters, cards, and telegrams at home and at work, states cause of action). *See also* *State v. Armstrong*, 106 Mo. 395, 16 S.W. 604 (1891) (letters sent in care of the debtor's employer, with return address: "Bad Debt Collection Agency," conviction for criminal libel); *Cyran v. Finlay Straus, Inc.*, 302 N.Y. 486, 99 N.E.2d 298 (1951) (letters sent to the debtor in care of numerous friends and relatives, each of whom read the letter, states cause of action for libel).

130. The only case found was *Christenson v. Swedish Hospital*, 59 Wash. 2d 545, 368 P.2d 897 (1962). *See* *Salvo v. Edens*, 116 So. 2d 220 (Miss. 1959), in which a derogatory letter was held not to violate the actionable words statute because that statute provides relief only if the words used are insulting and calculated to lead to a breach of the peace. Several cases have granted recovery when the creditor sent numerous letters. *E.g.*, *Clark v. Associated Retail Credit Men*, 105 F.2d 62 (D.C. Cir. 1939); *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 242 N.W. 25 (1932).

131. *E.g.*, *Weston v. Barnicoat*, 175 Mass. 454, 56 N.E. 619 (1900); *Masters v. Lee*, 39 Neb. 574, 58 N.W. 222 (1894); *Salisbury v. Budich*, 172 Misc. 201, 14

debtor,<sup>132</sup> or other harassing conduct in addition to collection letters.<sup>133</sup>

### (3) Telephone and Telegraph

Letters often are accompanied by telephone calls, and the calls follow the same pattern as the letters: the initial call is courteous, informative, and conciliatory; but as the debtor continues to fail to respond satisfactorily, the tone becomes harsher and more abusive. The calls may also become more frequent and more intrusive (e.g., calls at the debtor's place of employment) and may cause the debtor expense.<sup>134</sup> Since there usually is no written record of telephone calls, there is somewhat less description of them in the cases than there is of letters. Nevertheless, telephone calls have played a prominent role in a large number of collection cases.

Only one instance of a threat of violence was found,<sup>135</sup> and relatively few reports mentioned specific threats of nonviolent action. Among those mentioned were threats to ruin the debtor's credit,<sup>136</sup>

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N.Y.S.2d 320 (Sup. Ct. 1939); *Muetze v. Tuteur*, 77 Wis. 236, 46 N.W. 123 (1890). Even the convictions for violation of the nonmailability statute are premised on publication to others, since liability attaches only if the objectionable matter appears on the outside of the envelope or wrapper. *Contra*, *State v. McCabe*, 135 Mo. 450, 37 S.W. 123 (1896) (state statute). *See also* *Cyran v. Finlay Straus, Inc.*, 302 N.Y. 486, 99 N.E.2d 298 (1951); *State v. Armstrong*, 106 Mo. 395, 16 S.W. 604 (1891) (in each case letters addressed to the debtor were sent in care of third persons).

132. *E.g.*, *see* cases cited in note 129 *supra*. *But see* *Williamson v. Askin & Marine Co.*, 138 S.C. 47, 48, 136 S.E. 21, 22 (1926), where the court said that the first 22 collection letters, although "not always of a mild and gentle nature," were not actionable and held that only the last letter, which implied that the debtor was a criminal, was actionable.

133. *B-W Acc. Corp. v. Callaway*, 224 Ga. 367, 162 S.E.2d 430 (1968); *Boudreaux v. Allstate Fin. Corp.*, 217 So. 2d 439 (La. Ct. App. 1968); *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954). *See also* cases cited in notes 237-38 *infra*.

134. Some states have prohibited collection agencies from sending collect wires or phone calls. N.C. Dept. of Ins., *Collection Agencies Rules & Regs.*, Reg. 7; Oregon Administrative Rules Comp. § 20-240(e) (1961). *See also* IND. ANN. STAT. § 10-4944 (Supp. 1970), making it a misdemeanor to telephone another repeatedly for the purpose of harassing him).

135. *People v. Maranian*, 359 Mich. 361, 102 N.W.2d 568 (1960) (threat to bomb plaintiff's property and person, conviction for extortion); *compare* *Pioneer Fin. & Thrift Corp. v. Adams*, 426 S.W.2d 317, 319 (Tex. Civ. App. 1968), in which the defendant said, "You're nothing but a deadbeat and I should come and clean the whole town up with your hide."

136. *Household Fin. Co. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969); *Pioneer Fin. & Thrift Corp. v. Adams*, 426 S.W.2d 317 (Tex. Civ. App. 1968).

to garnish his wages,<sup>137</sup> to cause him to lose his job,<sup>138</sup> and to cause him to be arrested.<sup>139</sup> In most of the cases, however, the phone calls were not threatening, but rather were abusive, either because of their content or their frequency and timing, or both. No case was found in which the content of a single call was sufficient to result in liability,<sup>140</sup> and only one case was found in which the timing of a single call was sufficient.<sup>141</sup> Most cases have contained large numbers of calls to the debtor and his wife either at home or at their places of employment. Thus, creditors have phoned debtors at home from one to five times a week for seven months,<sup>142</sup> phoned them thirty times per week for over two weeks,<sup>143</sup> and phoned them "daily."<sup>144</sup> Cases containing large numbers of calls typically also involve abusive language or tone,<sup>145</sup>

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137. *Zimmerman v. Associates Discount Corp.*, 444 S.W.2d 396 (Mo. 1969); *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954).

138. *Household Fin. Co. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969); *Zimmerman v. Associates Discount Corp.*, 444 S.W.2d 396 (Mo. 1969); *Neigel v. Seaboard Fin. Co.*, 68 N.J. Super. 542, 173 A.2d 300 (1961); *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954); *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953); *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857 (Tex. Civ. App. 1957).

139. *Household Fin. Co. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969).

140. *But see Curnett v. Wolf*, 244 Iowa 683, 57 N.W.2d 915 (1953) (former employer advised former employee to drop suit for back wages and he would write a good letter of recommendation, held to state cause of action for intentional infliction of emotional distress).

141. *Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 216 P.2d 571 (1950) (call for debtor at neighbor's house, neighbors overheard debtor's end of the conversation, recovery for intentional infliction of emotional distress); *cf. Boudreaux v. Allstate Fin. Corp.*, 217 So. 2d 439 (La. Ct. App. 1968) (several calls to the debtor's neighbors, debtor summoned, and neighbors overheard debtor's explanation of delinquency, recovery granted).

142. *Marshall v. United Fin. & Thrift Corp.*, 347 S.W.2d 623 (Tex. Civ. App. 1961) (recovery).

143. *Pioneer Fin. & Thrift Corp. v. Adams*, 426 S.W.2d 317 (Tex. Civ. App. 1968) (also threats to ruin credit, clean the town up with the debtor's hide, recovery granted).

144. *Zimmerman v. Associates Discount Corp.*, 444 S.W.2d 396 (Mo. 1969) (no invasion of privacy because no publicity, but court remanded to permit plaintiff to amend his petition to plead a cause of action for intentional infliction of emotional distress). *See also Carey v. Statewide Fin. Co.*, 3 Conn. Cir. 716, 223 A.2d 405 (1966) ("numerous" phone calls and personal visits, recovery granted); *Guthridge v. Pen-Mod., Inc.*, 239 A.2d 709 (Del. Super. Ct. 1967) (numerous calls, also 5 letters, no recovery); *Fraser v. Morrison*, 39 Hawaii 370 (1952) (creditor called the wrong person "numerous" times, no recovery); *Whatley v. K-Mart Discount Stores*, 451 S.W.2d 568 (Tex. Civ. App. 1970) (mistaken identity, several calls, no recovery).

145. *Wiggins v. Moskins Credit Clothing Store*, 137 F. Supp. 764 (E.D.S.C. 1956) (numerous calls to debtor's landlord over 3-month period, recovery for landlord for

presumably because even the most polite creditor soon tires of merely informing the debtor that the debt is due and requesting payment. Calls at work may be more injurious than calls at home, since they have the effect of publicizing the existence of the indebtedness to the debtor's employer. Thus, in one case the debtor was telephoned at work three times in one fifteen-minute period, causing her employer to threaten to fire her.<sup>146</sup> Although recovery was granted in that case, it was denied in another case in which the creditor phoned the debtor at work at least thirteen times in one month.<sup>147</sup> Several cases have contained frequent calls both at home and at work.<sup>148</sup> No particular number has been fixed upon as the permissible limit of phone calls by a creditor. Rather, the limit on the number of telephone calls is determined by a standard of reasonableness. Even a large number of calls may be reasonable, but when the large number is compressed into a relatively short period of time or when the calls occur at times known by the creditor to be inconvenient to the debtor, the creditor is engaging in harassment and is no longer acting reasonably.<sup>149</sup>

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nuisance); *Household Fin. Co. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969) (6 calls, including threats, but spread over 11 months, no recovery); *Industrial Fin. Serv. v. Riley*, 157 Tex. 306, 302 S.W.2d 659 (1957) (calls at all hours; also personal visits; nasty, harsh, loud language; recovery); *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954) (daily calls; harsh, loud, insinuating voice; also letters, cards, telegrams; liability recognized); *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953) (abusive and intimidating calls, but no recovery because no physical injury); *Signature Indorsement Co. v. Wilson*, 392 S.W.2d 484 (Tex. Civ. App. 1965) (4-6 calls per week; harsh, loud, rough voice; recovery); *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645 (Tex. Civ. App. 1962); *Advance Loan Serv. v. Mandik*, 306 S.W.2d 754 (Tex. Civ. App. 1957) (barrage of calls, domineering voice; over 100 letters; recovery).

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

147. *Beneficial Fin. Co. v. Lamos*, 179 N.W.2d 573 (Iowa 1970). See also *Harrison v. Humble Oil & Refining Co.*, 264 F. Supp. 89 (D.S.C. 1967) (single call, informing employer of debt and asking to speak to the debtor, no invasion of the right of privacy). But see *Neigel v. Seaboard Fin. Co.*, 68 N.J. Super. 542, 173 A.2d 300 (1961) (creditor continued to call the debtor even after being requested not to call him at work, also threatened to procure discharge and contacted the employer, liability for defamation recognized); *Birkhead, Collection Tactics of Illegal Lenders*, 8 L. & CONTEMP. PROB. 78, 85 n.14 (1941) (citing the conviction of a collector for disturbing the peace when he called a debtor so frequently that the debtor was discharged).

148. *E.g.*, *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (numerous calls at work, on one occasion 3 calls in 5 minutes, and at home, 8-9 per day for 2 weeks; also calls to supervisor and landlord; recovery for invasion of right of privacy); *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857 (Tex. Civ. App. 1957) (constant calls at home and at work, also flood of letters and employer contact, liability recognized).

149. If the calls are viewed solely in terms of their content, they will not be ac-

### B. *Employer Contact*

Instances of personal visits by a creditor to his debtor's employer are infrequent in the reported decisions.<sup>150</sup> Much more frequent are cases in which the creditor or collector contacts the employer by letter or telephone. The contact, which obviously is for the purpose of obtaining payment of the debt, may have one (or more) of several avowed purposes. Most innocuously, the creditor may inform the employer that an employee is indebted to him and state that the information is being supplied for whatever use the employer may wish to make of it.<sup>151</sup> Or the creditor may contact the employer for the avowed purpose of permitting the employer to avoid entanglement in the employee's troubles. Thus, in one case the creditor informed the employer that he was writing the letter because other employers asked to be contacted before their employees were subjected to garnishment.<sup>152</sup> In most of these cases, there is an implicit appeal to the employer for assistance, as in the case of a letter informing the employer of a debt and giving him a chance to avoid having his employee lose time from the job to appear in court.<sup>153</sup>

In most employer contact cases, however, the creditor either makes a direct request for assistance in collecting the debt or attempts to pres-

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tionable unless they are outrageous. When a relatively large number of calls is made, however, then it may be that the content, as well as the number, of the calls is considered relevant to determining reasonableness in order to determine whether there has been an actionable invasion of privacy.

150. *Hollenbeck v. Ristine*, 114 Iowa 358, 86 N.W. 377 (1901); *Fennell v. G.A.C. Corp.*, 242 Md. 209, 218 A.2d 492 (1966); *Warschauser v. Brooklyn Furn. Co.*, 159 App. Div. 81, 144 N.Y.S. 257 (Sup. Ct. App. Div. 1913); *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App.), *writ ref'd, n.r.e.*, 362 S.W.2d 298 (1962).

151. *Stickle v. Trimmer*, 50 N.J. Super. 518, 143 A.2d 1 (1958) (employer notified the debtor that he would not consider fit an employee who refuses to pay his just debts and that plaintiff would be dismissed if he did not pay).

152. *Estes v. Sterchi Bros. Stores*, 50 Ga. App. 619, 179 S.E. 222 (1935) (no recovery for libel). The reason for the employers' desire for this information obviously is to enable them to persuade their employees to pay the debts before the employers were put to the expense and inconvenience of garnishment. See text accompanying note 27 *supra*. See also *Winstanley v. Bampton*, [1943] 1 K.B. 319 (letter to army officer's superior); *Speake v. Hughes*, [1904] 1 K.B. 138.

153. *Stannard v. Wilcox & Gibbs Sewing Mach. Co.*, 118 Md. 151, 84 A. 335 (1912) (no recovery for libel). See also *Holt v. Boyle Bros.*, 217 F.2d 16 (D.C. Cir. 1954); *Peterson v. Idaho First Nat'l Bank*, 83 Ida. 578, 367 P.2d 284 (1961) (letter sent at employer's request); *Lucas v. Moskins Stores*, 262 S.W.2d 679 (Ky. 1953); *Cyran v. Finlay Straus, Inc.*, 302 N.Y. 486, 99 N.E.2d 298 (1951); *McClain v. Reliance Life Ins. Co.*, 150 S.C. 459, 148 S.E. 478 (1929).

sure the employer into cooperating. Sometimes the request for assistance will be coupled with the coercive statement that if payment is not forthcoming, the creditor will institute garnishment proceedings. No liability seems to attach by reason of the threat of garnishment.<sup>154</sup> The creditor may also attempt to deceive the employer into assisting him collect a debt, but the most common application of this would seem to be in connection with merely locating the debtor.<sup>155</sup>

The traditional theories of action most commonly asserted in litigation over creditors' requests for assistance have been defamation and invasion of the right of privacy.<sup>156</sup> One creditor who sought assistance in collecting the amount of a train ticket allegedly owed by the employee-debtor incurred liability for libel per se for having charged the employee with a crime, since there was a statute prohibiting anyone from riding a train without paying.<sup>157</sup> Most cases litigated on a theory of libel have revolved around the per se-per quod distinction and the question whether special damages need be alleged and proved. Most of the cases have held that falsely informing an employer that one of his employees is indebted is not libelous per se, because the statement does not relate to the debtor's trade or business.<sup>158</sup> Unless special

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154. *Estes v. Sterchi Bros. Stores*, 50 Ga. App. 619, 179 S.E. 222 (1935); *Passman v. Commercial Credit Plan, Inc.*, 220 So. 2d 758 (La. Ct. App.), *cert. den.*, 254 La. 287, 223 So. 2d 410 (1969); *Columbia Fin. Corp. v. Robitcheck*, 243 La. App. 1084, 150 So. 2d 23 (1963); *Hawley v. Professional Credit Bureau*, 345 Mich. 500, 76 N.W.2d 835 (1956); *Neaton v. Lewis Apparel Stores*, 267 App. Div. 728, 48 N.Y.S.2d 492 (1944); *Lewis v. Physicians & Dentists Credit Bureau*, 27 Wash. 2d 267, 177 P.2d 896 (1947). *But see* *United States v. Zalewski*, 29 F. Supp. 755 (W.D. Ky. 1939) (garnishment threatened after note had been paid, demurrer to indictment for using the mails to promote fraud overruled); note 102 *supra*.

155. *E.g.*, *In re Bentley Stores Corp.*, 47 F.T.C. 277 (1950) (creditor sent cards to employers implying that it was an employment bureau requesting information about specified individuals, cease and desist order issued).

156. *E.g.*, *Harrison v. Humble Oil & Ref. Co.*, 264 F. Supp. 89 (D.S.C. 1967); *Timperley v. Chase Collection Serv.*, 272 Cal. App. 2d 697, 77 Cal. Rptr. 782 (1969); *Yoder v. Smith*, 253 Iowa 505, 112 N.W.2d 862 (1962); *Pack v. Wise*, 245 La. 84, 155 So. 2d 909 (1963) (all asserting invasion of right of privacy); *Ragland v. Household Fin. Corp.*, 254 Iowa 976, 119 N.W.2d 788 (1963); *Neigel v. Seaboard Fin. Co.*, 68 N.J. Super. 542, 173 A.2d 300 (1961); *Employees Loan Soc'y v. Reynolds*, 57 S.W.2d 860 (Tex. Civ. App. 1933) (all asserting libel).

157. *Vail v. Pennsylvania R.R.*, 103 N.J.L. 213, 136 A. 425 (1927).

158. *E.g.*, *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E.2d 286 (1959); *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948); *Ragland v. Household Fin. Corp.*, 254 Iowa 976, 119 N.W.2d 788 (1963); *Stannard v. Wilcox & Gibbs Sewing Mach. Co.*, 118 Md. 151, 84 A. 335 (1912); *Weaver v. Beneficial Fin. Co.*, 200 Va. 572, 106 S.E.2d 620 (1959).

damages are proved, these courts deny recovery, but in several cases notification of the employer has been held libelous per se, when the courts found not only a mere statement of indebtedness, but also a charge that the employee evades payment of his debts<sup>160</sup> or that the pressure of indebtedness might cause him to embezzle the employer's funds.<sup>160</sup> Courts that have rejected the per se-per quod distinction have held that a statement that a debtor refuses to pay his just debts is libelous because it necessarily injures his reputation in the eyes of his employer.<sup>161</sup>

The decisions in cases litigating invasion of the right to privacy seem to depend upon the court's view of the extent to which a debtor is entitled to have his indebtedness remain private. Most cases hold that the right of privacy does not include the right not to have one's debts communicated to his employer, either because the communication of the private information must be to the public generally before it is actionable<sup>162</sup> or because it is not unreasonable for a creditor to inform and seek assistance from a debtor's employer.<sup>163</sup>

The real problem in both defamation and right of privacy cases is balancing the interests of the employer in the indebtedness of his employees generally or in a particular indebtedness of one of his employees, the interests of the debtor in not having the existence of indebtedness communicated to his employer, and the interests of the creditor in

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159. *E.g.*, *Cohen v. Marx Jewelry Co.*, 67 App. D.C. 347, 92 F.2d 498 (1937). See note 39 *supra*.

160. *Fennell v. G.A.C. Corp.*, 242 Md. 209, 218 A.2d 492 (1966).

161. *E.g.*, *Holt v. Boyle Bros.*, 217 F.2d 16 (D.C. Cir. 1954); *Neaton v. Lewis Apparel Stores*, 267 App. Div. 728, 48 N.Y.S.2d 492 (1944).

162. *Timperley v. Chase Collection Serv.*, 272 Cal. App. 2d 697, 77 Cal. Rptr. 782 (1969); *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948); *Yoder v. Smith*, 253 Iowa 502, 112 N.W.2d 862 (1962); *Hawley v. Professional Credit Bureau*, 345 Mich. 500, 76 N.W.2d 835 (1956); *Zimmerman v. Associates Discount Corp.*, 444 S.W.2d 396 (Mo. 1969).

163. *Harrison v. Humble Oil & Ref. Co.*, 264 F. Supp. 89 (D.S.C. 1967); *Timperley v. Chase Collection Serv.*, 272 Cal. App. 2d 697, 77 Cal. Rptr. 782 (1969); *Gouldman-Taber Pontiac v. Zerst*, 213 Ga. 682, 100 S.E.2d 881 (1957); *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E.2d 286 (1959) (but actionable if the creditor knew that the contents of the letter were untrue and wrote the false statements for the purpose of injuring the debtor); *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948); *Lucas v. Moskins Stores*, 262 S.W.2d 679 (Ky. 1953); *Pack v. Wise*, 245 La. 84, 155 So. 2d 909 (1963) (*semble*); *Booty v. American Fin. Corp.*, 224 So. 2d 512 (La. Ct. App. 1969) (*dictum*); *Hawley v. Professional Credit Bureau*, 345 Mich. 500, 76 N.W.2d 835 (1956). *Contra*, *Countee v. Bond Stores*, No. B177500 (Los Angeles Small Claims Ct. 1966), reported in 20 PERS. FIN. Q. REP. 67 (Spring 1966).



collecting the debt. If the interests of the employer and the creditor are sufficient, an otherwise libelous communication should be privileged and an otherwise actionable invasion of privacy should not be unreasonable.

The relevant interests already have been described in Part II. These interests of the employer generally have been held sufficient to make communication to him of the fact of indebtedness not an invasion of the debtor's right of privacy.<sup>164</sup> Thus the debtor initially has no right of privacy against disclosure of his debts to his employer. If the creditor's contacts continue, however, at some point they will become unreasonable, and the debtor may be able to recover for invasion of privacy.<sup>165</sup>

The interests of the employer generally have been held not sufficient to confer a privilege on the creditor for a defamatory communication of the existence of a debt of an employee.<sup>166</sup> For the privilege to exist, there must be a communication in good faith about a matter of mutual concern to the speaker and the auditor. Not all courts agree that there is a matter of mutual concern,<sup>167</sup> though this position seems untenable. Even those courts that do find the subject matter of mutual concern hold that the privilege will be lost if the creditor acts out of malice, which will be the case when his motive is to coerce payment of a disputed debt, to procure discharge of the debtor, or to injure or spite the debtor.<sup>168</sup>

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164. See cases cited in note 163 *supra*. See also *In re D.M. Watkins Co. & Local 596*, 14 Lab. Arb. 787 (1950) (Healy, Arbitrator); Note, *Wage Garnishment as a Collection Device*, 1967 Wis. L. REV. 759 (wage garnishment is regarded as an unmitigated nuisance). But see *Hawley v. Professional Credit Bureau*, 345 Mich. 500, 507, 76 N.W.2d 835, 843 (1956) (dissenting opinion):

The argument proves too much. A love-sick employee also is far from efficient. Should we call upon the boss to scotch romance? What we are looking at, in essence, is simply a matter of human dignity, the right to live our own lives without the meddlesome interference of others, the simple right to be let alone.

165. *E.g.*, *Booty v. American Fin. Corp.*, 224 So. 2d 512 (La. Ct. App. 1969) (numerous letters and calls); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (also harassment). But see *Household Fin. Co. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969) (held not excessive or unreasonable).

166. See cases cited in note 43 *supra*.

167. *E.g.*, *Neigel v. Seaboard Fin. Co.*, 68 N.J. Super. 542, 173 A.2d 300 (1961).

168. *Gouldman-Taber Pontiac v. Zerbst*, 96 Ga. App. 48, 99 S.E.2d 475 (1957) (coercion prevents debtors from having defenses tried out in court), *rev'd*, 213 Ga. 682, 100 S.E.2d 881 (1957); *Hollenbeck v. Ristine*, 114 Iowa 358, 86 N.W. 377 (1901) (creditor acted with intent to induce payment or procure discharge, so no privilege);

Courts in these cases appear to pay inadequate attention to the interests of the debtor. Even when they allow recovery, as in some of the defamation cases, they focus on a perceived lack of interest in the creditor or the employer rather than on a greater interest of the debtor. Clearly, the creditor and the employer do have interests, but two interests of the debtor deserve special attention: his interest in maintaining his employment relation and his interest in not paying amounts that are not actually owed.

In numerous cases, informing an employer of an employee's indebtedness resulted in the employee's discharge. In some of them, the frequency of the contacts may have caused the discharge;<sup>169</sup> in others, the leverage that the particular creditor had over the employer may have been the cause.<sup>170</sup> In many cases, however, one or only a few contacts, with no exertion of pressure on the employer, resulted in discharge.<sup>171</sup> In other cases the alleged debtor was not discharged but

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Hanschke v. Merchant's Credit Bureau, 256 Mich. 272, 239 N.W. 318 (1931); McClain v. Reliance Life Ins. Co., 150 S.C. 459, 148 S.E. 478 (1929) (creditor's coercive purpose constituted malice); cf. Hawley v. Professional Credit Bureau, 345 Mich. 500, 508, 76 N.W.2d 835, 838 (1956) (dissenting opinion focuses on creditor's motive being not employer assistance or common decency, but rather coercion of payment; but he urges this as a reason to view the communication as an invasion of privacy, whereas cases that focus on the creditor's purpose do so to destroy privilege in defamation cases). See also Comment, *Creditor's Pre-Judgment Communication to Debtor's Employer: An Evaluation*, 36 BROOKLYN L. REV. 95 (1969) (interest in avoiding garnishment is not sufficient to justify the pressure, coercion, or discharge that results—this is a perversion of the legislative intent in creating the garnishment remedy); Comment, 6 U.C.L.A. L. REV. 343 (1959), noting *Stickle v. Trimmer*, 50 N.J. Super. 518, 143 A.2d 1 (1958) (publication to employer is made not to further employer's interest, but rather to coerce payment, so privilege should not exist).

169. *E.g.*, Crapanzano v. Uneeda Credit Clothing Stores, 32 N.Y.S.2d 269 (Brooklyn Mun. Ct. 1941); *United Fin. & Thrift Corp. v. Smith*, 387 S.W.2d 752 (Tex. Civ. App. 1956); Birkhead, *Collection Tactics of Illegal Lenders*, 8 L. & CONTEMP. PROB. 78, 85 n.14 (1941), citing example of creditor who was convicted of disturbing the peace when his continuous phone calls caused the debtor's discharge.

170. *American Surety Co. v. Schottenbauer*, 257 F.2d 6 (8th Cir. 1958) (workmen's compensation insurer informed employer it would terminate policy unless plaintiff were fired; recovery for interference with contractual relations); *Huskie v. Griffin*, 75 N.H. 345, 74 A. 595 (1909) (former employer contacted plaintiff's prospective employer, causing refusal to employ plaintiff, liability for interference with contractual relations recognized); *Carmen v. Fox Film Corp.*, 204 App. Div. 776, 198 N.Y.S. 766 (1923) (same, also threat to prevent new employer from gaining benefit of plaintiff's services, liability for interference with contractual relations recognized); *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 167 A.2d 472 (1960) (threat to stop doing business with the employer unless the employee was fired, liability for interference and slander recognized).

171. *Pack v. Wise*, 245 La. 84, 155 So. 2d 909 (1963) (3 contacts, recovery);

his employment relation nevertheless was damaged, either by demotion,<sup>172</sup> contraction of responsibility,<sup>173</sup> impairment of possibilities of advancement,<sup>174</sup> or threatened dismissal.<sup>175</sup>

Because garnishment may place special burdens on an employer, many employers who might not take adverse action if they merely were informed of an employee's indebtedness have promulgated rules requiring discharge of any employee whose wages are garnished. Some of these rules require discharge for any garnishment, but most would not authorize discharge until a second or third garnishment.<sup>176</sup> Debtors have been discharged pursuant to these rules,<sup>177</sup> and they have been

*Warschauer v. Brooklyn Furn. Co.*, 159 App. Div. 81, 144 N.Y.S. 257 (1913) (one visit, liability for interference with contractual relations recognized); *Employees' Loan Soc'y v. Reynolds*, 57 S.W.2d 860 (Tex. Civ. App. 1933) (two letters and a visit, recovery for libel).

172. *M. Rosenberg & Sons v. Craft*, 182 Va. 512, 29 S.E.2d 375 (1944).

173. *Evans v. Swaim*, 245 Ala. 641, 18 So. 2d 400 (1944).

174. *Holt v. Boyle Bros.*, 217 F.2d 16, 17 (D.C. Cir. 1954) (employer informed debtor that letters from creditors were placed in his suitability file and "inevitably served as part of the total record considered when personnel actions of vital importance to you are taken. . . . If as a result of failure to meet your obligations, evidence is accumulated reflecting upon your suitability for continued employment, your removal may be effected"); *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E.2d 286 (1959) (but allegation of detriment to advancement was not shown to result in any damages, so no recovery for libel); *Neigel v. Seaboard Fin. Co.*, 68 N.J. Super. 542, 173 A.2d 300 (1961).

175. *Holt v. Boyle Bros.*, 217 F.2d 16 (D.C. Cir. 1954); *Stickle v. Trimmer*, 50 N.J. Super. 518, 148 A.2d 1 (1958) (employer informed employee that it would not consider fit an employee who contracts a debt and without sufficient cause refuses or neglects to make payment and that he would be dismissed if payment were not made); *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857 (Tex. Civ. App. 1957) (employee warned that he would be discharged if the contacts continued).

176. *E.g.*, *State v. McMahon*, 280 P. 906 (Kan. 1929) (second garnishment) (injunction against charging usurious interest granted); *Passman v. Commercial Credit Plan, Inc.*, 220 So. 2d 758 (La. Ct. App.), *cert. den.*, 254 La. 287, 223 So. 2d 410 (1969) (for second garnishment); *In re Borg-Warner Corp. v. Local 255*, 14 Lab. Arb. 745 (1950) (Updegraff, Arbitrator) (arbitrator upheld discharge in the case before him, but expressed doubt whether a blanket rule against garnishment that permitted dismissal even when the debt is not owed, was valid under an employment contract that permitted dismissal only for just cause). Collective bargaining agreements typically permit discharge for just cause, which includes violation of reasonable company rules. Rules requiring discharge for garnishment generally are held to be reasonable when they require at least three garnishments. *See* CCH HANDBOOK ON ASSIGNMENT AND GARNISHMENT OF WAGES ¶ 9 (1966).

177. *E.g.*, *Johnson v. Pike Corp. of America*, 332 F. Supp. 490 (C.D. Cal. 1971) (discharge for several garnishments pursuant to company policy held to violate Title VII of the Civil Rights Act of 1964 because garnishments are obtained against a disproportionate number of blacks); *In re International Harvester Co. & Local 226*, 21

discharged even in the absence of any general rule.<sup>178</sup> Similar rules and practices exist among employers with respect to wage assignments. Thus, some employers have rules requiring discharge of any employee who makes an assignment of his wages;<sup>179</sup> and debtors have been discharged pursuant to these rules,<sup>180</sup> as well as in the absence of any fixed rule.<sup>181</sup> Thus whether the employer contact takes the form of a

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Lab. Arb. 709 (1953) (Cole, Arbitrator) (pursuant to rule requiring discharge upon third garnishment, discharge upheld because rule is reasonable, in light of debt counselling that is made available by employer and because of warnings given prior to discharge).

178. *E.g.*, *In re Moccasin Bushing Co. & Lodge* 56, 14 Lab. Arb. 380 (1950) (Forrester, Arbitrator) (discharge upheld, evidence showed that his work was adversely affected).

179. *E.g.*, *Hudson v. Slack Furn. Co.*, 318 Ill. App. 15, 47 N.E.2d 502 (1943) (for second assignment); cases cited in note 180 *infra*.

180. *City Purchasing Co. v. Clough*, 38 Ga. App. 53, 142 S.E. 469 (1928); *Haines v. M.S. Welker & Co.*, 182 Iowa 431, 165 N.W. 1027 (1918); *Doucette v. Sallinger*, 228 Mass. 444, 117 N.E. 897 (1917); *Cotton v. Cooper*, 209 S.W. 135 (Tex. Comm'n App., opinion adopted by Tex. Sup. Ct. 1919); *Askins, Inc. v. Sparks*, 56 S.W.2d 279 (Tex. Civ. App. 1933); *Evans v. McKay*, 212 S.W. 680 (Tex. Civ. App. 1919); *Suarez v. McFall Bros.*, 87 S.W. 744 (Tex. Civ. App. 1905).

181. *Kennedy v. Hub Mfg. Co.*, 221 Mass. 136, 108 N.E. 932 (1915); *Lopes v. Connolly*, 210 Mass. 487, 97 N.E. 80 (1912); *Messina v. Continental Purchasing Co.*, 272 N.Y. 125, 5 N.E.2d 62 (1936); *Scott v. Prudential Outfitting Co.*, 92 Misc. 195, 155 N.Y.S. 497 (Sup. Ct. App. Div. 1915).

Recovery against the creditor in these wage assignment cases has been limited primarily to situations in which the purported assignment is void, either because it is forged, because the debt has been repaid prior to service of the assignment on the employer, or because the creditor had made a mistake in identity and the employee was never indebted to him. *Doucette v. Sallinger*, 228 Mass. 444, 117 N.E. 897 (1917) (mistaken identity); *Lopes v. Connolly*, 210 Mass. 487, 97 N.E. 80 (1912) (same); *Cotton v. Cooper*, 209 S.W. 135 (Tex. Comm'n App., opinion adopted by Tex. Sup. Ct. 1919) (debt already repaid); *Askins, Inc. v. Sparks*, 56 S.W.2d 279 (Tex. Civ. App. 1933) (forgery); *Evans v. McKay*, 212 S.W. 680 (Tex. Civ. App. 1919) (debt repaid); *Suarez v. McFall Bros.*, 87 S.W. 744 (Tex. Civ. App. 1905) (same). Recovery also has been permitted in cases in which the creditor falsely represented to the employer that a wage assignment had been executed and in cases in which the assignment was sent out of the jurisdiction and then served on the employer in an attempt to defeat the state's exemption statute. *Southern Fin. Co. v. Foster*, 19 Ala. App. 109, 95 So. 338, *cert. denied*, 209 Ala. 113, 95 So. 340 (1923) (*per curiam*) (false representation); *Scott v. Prudential Outfitting Co.*, 92 Misc. 195, 155 N.Y.S. 497 (Sup. Ct. App. Div. 1915) (same); *Haines v. M.S. Welker & Co.*, 182 Iowa 431, 165 N.W. 1027 (1918) (attempt to evade exemption statute). When, however, the wage assignment is valid, the creditor will incur no liability merely for serving it on the employer, even if this results in discharge of the employee. *Messina v. Continental Purchasing Co.*, 272 N.Y. 125, 5 N.E.2d 62 (1936); *City Purchasing Co. v. Clough*, 38 Ga. App. 53, 142 S.E. 469 (1928) (*dictum*); *Evans v. McKay*, 212 S.W. 680 (Tex. Civ. App. 1919) (*dictum*). It would be anomalous to make the creditor-assignee liable for en-

letter or of a garnishment or wage assignment (which may be valid or invalid), contact by the creditor to his debtor's employer subjects the debtor to a substantial risk of losing his job.

Perhaps even more important than his interest in not losing his job for activities not related to his performance on the job, however, is the debtor's interest in having an opportunity to assert defenses in order to avoid paying amounts that are not actually owed. Exertion of pressure by the employer may induce the employee to pay, even if he has a good defense to the claim.<sup>182</sup> Moreover, if the employee believes that his employer will exert pressure on him or that the contact by the creditor will adversely affect his employment relation, he may be induced to pay the alleged indebtedness, even if not due, in order to avoid notification to the employer.<sup>183</sup> The creditor who informs an employer of the indebtedness of his employee solely to benefit the employer probably is extremely rare. Thus the creditor's primary, and perhaps his only, reason for informing an employer is to exert pressure on the debtor. The exertion of that pressure may result in the debtor's failure to assert valid defenses. If there is no possibility that pressure will be exerted on the debtor, the creditor will have little reason to notify the employer. So if employer contact is to be permitted, it must be with the understanding that its primary purpose is to coerce the debtor to pay a debt—sometimes one that is not legally owed—and that its effect will be the payment of some alleged debts that are not actually owed.

In recognition of the interest of the debtor in maintaining his employment relation, Congress and a number of states have placed limits on the power of an employer to discharge an employee merely because

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forcing a valid assignment in exactly the manner contemplated by the debtor at the time he executed it. Whether wage assignments should be enforced at all, because of the possibilities of adhesion and unconscionability, is a different matter. See UNIFORM CONSUMER CREDIT CODE § 3.403. Compare the invalidation of confession of judgment notes in *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970), *aff'd*, 92 S. Ct. 767 (1972).

182. *Gouldman-Taber Pontiac v. Zerst*, 96 Ga. App. 48, 99 S.E.2d 475 (1957), *rev'd*, 213 Ga. 682, 100 S.E.2d 881 (1957); *Hawley v. Professional Credit Bureau*, 345 Mich. 500, 508, 76 N.W.2d 835, 838 (1956) (dissenting opinion); D. CAPLOVITZ, *THE POOR PAY MORE* 21, 150 (1963); Birkhead, *Collection Tactics of Illegal Lenders*, 8 L. & CONTEMP. PROB. 78 (1941).

183. See D. CAPLOVITZ, *THE POOR PAY MORE* 21 (1963): "[S]ince the customer knows he may lose his job if he is garnished, the mere threat of garnishment is sometimes enough to insure the regularity of payments." See also *id.* at 150.

his wages have been garnished.<sup>184</sup> Some states have also prohibited discharge solely because the employer is served with a wage assignment, at least in the limited situation of judicially decreed assignment of wages in connection with a child support order.<sup>185</sup> No statutory limits, however, have been placed on the employer's right to discharge an employee or to take other reprisals against him for other kinds of contact by creditors of the employee. Yet, the employer's interest clearly is greatest in the garnishment situation. If the debtor is protected against the consequences of garnishment, he should also be protected against the consequences of other communications to his employer, since his interests in retaining his employment and asserting defenses to a disputed claim, as well as the other interests discussed in Part II, clearly outweigh the interests of the employer or the creditor.

Protection of the debtor's interests could be accomplished either by placing restrictions on permissible employer action or by imposing restraints on creditors. Restraints on creditors could include the elimination of any privilege the creditor may have to inform the employer of the debts of an employee, the extension of the right of privacy to include the right not to have one's debt's communicated to his employer, or the enactment of statutes prohibiting employer contact and conferring either criminal or civil liability on a creditor who violates the

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184. Consumer Credit & Protection Act, 15 U.S.C. § 1674 (1970) (no discharge for garnishment for any one indebtedness); N.Y. CIV. PRAC. L. § 5252 (Supp. 1970-71) (for any one garnishment); VT. STAT. ANN. tit. 12, § 3165 (Supp. 1970) (for the first four separate indebtednesses); CONN. GEN. STAT. § 52-361 (Supp. 1969) (for the first seven garnishments in any 12-month period); HAWAII REV. STAT. § 378-32 (Supp. 1971) (prohibits suspension as well as discharge); UNIFORM CONSUMER CREDIT CODE § 5.106 (for any garnishment). See also KAN. STAT. ANN. § 60-2310(d) (1967) (deprives collection agencies of the benefits of the garnishment statute). Prior to enactment of the CCPA, the Department of Labor had estimated that 100,000-300,000 workers per year lost their jobs as a result of garnishment. TIME, June 20, 1969, at 61.

185. E.g., MICH. STAT. ANN. § 27.3178 (598.18b) (Supp. 1971); WIS. STAT. ANN. §§ 52.055, 247.265 (Supp. 1970-71). Prohibition of discharge because of a wage assignment is less common than prohibition of discharge because of garnishment.

See Smith and Straske, *Collection Procedures and Right of Privacy*, 36 FLA. B.J. 1085, 1089 n.39 (1962), citing a Florida statute providing that an employer is not bound to recognize wage assignments. A distinction between assignments and garnishments is that theoretically the former is within the control of the debtor since he can refuse to execute them, while garnishment is wholly within the control of the creditor. See Haines v. M.S. Welker & Co., 182 Iowa 431, 165 N.W. 1027 (1918); *In re Borg-Warner Corp. & Local 255*, 14 Lab. Arb. 745 (1950) (Updegraff, Arbitrator). As a practical matter, however, the necessitous borrower may have very little choice in the matter.

statute.<sup>186</sup> In any event, the different treatment of the privilege to communicate otherwise actionable defamatory matter and of the scope of the right of privacy does not seem warranted. The factor that determines the existence of privilege is the identity of interest in the subject matter of the communication. This same factor is determinative of the scope of the right of privacy. Moreover, both the existence of privilege and the scope of the right of privacy should depend also on the interests of the debtor and of society that are present when a creditor communicates with the debtor's employer.

### C. Others Contacted

#### (1) Credit Associations and Trade Associations

In order to collect a debt, a creditor may resort to reporting the indebtedness to a credit reporting association organized for the purpose of disseminating information primarily to those who extend credit. If the debtor actually owes the debt, the creditor should incur no liability for reporting that fact to the agency. The interest of the association in protecting its members against unwise extensions of credit outweighs the debtor's interest in privacy of private facts. On the other hand, if the creditor errs in reporting the debt or if the association classifies the debtor wrongly, the creditor may incur liability for libel. Thus debtors have recovered for libel per se<sup>187</sup> and for libel per quod upon

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186. *E.g.*, MASS. ANN. LAWS ch. 93, § 49 (Supp. 1970) (prohibits communicating or threatening to communicate the fact of indebtedness to a person other than a person who might reasonably be expected to be liable for it, except with written permission of the alleged debtor); N.Y. DEPT. OF CONSUMER AFFAIRS, CONSUMER PROTECTION LAW Reg. 4 (1970) (one of the avowed reasons for this prohibition of employer contact prior to judgment was that such contact provided a means of evading the statute prohibiting discharge for garnishment); NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMER ACT § 7.204(1) (prohibits employer contact). *See also* the proposal in Comment, *Effectively Regulating Extrajudicial Collection of Debts*, 20 MAINE L. REV. 261, 279 (1968) (employer contact prohibited unless certain conditions exist); *cf.* Comment, *Creditor's Pre-Judgment Communication to Debtor's Employer: An Evaluation*, 36 BROOKLYN L. REV. 95, 113 (1969). Compare the restrictions placed on collection agencies by some state statutes: ARK. STAT. ANN. § 71-2008(12) (Supp. 1969) (prohibits contacting debtor at place of employment unless a good faith attempt to contact him at home has been made); COLO. REV. STAT. § 27-1-25(e) (Supp. 1967) (harassment of the employer of a debtor shall be considered an invasion of privacy, and a civil action may be brought thereon); ME. REV. STAT. ANN. tit. 32, § 576 (Supp. 1971) (prohibited practices include repeated or harassing communications to employers).

187. *Turner v. Brien*, 184 Iowa 320, 167 N.W. 584 (1918), *overruled by Ragland v.*

proving special damages.<sup>188</sup> More numerous, however, are the cases holding that the publication is not libelous per se and that the plaintiff has failed to allege or prove special damages.<sup>189</sup> Even if the debtor establishes a prima facie right to recover, however, he may be denied recovery because the communication may be privileged.<sup>190</sup> Organization of a group to facilitate dissemination of information bearing on the credit-worthiness of potential customers has been recognized as legitimate, and dissemination of that information, even if false, is privileged. Because the privilege is conditioned on the absence of malice, however, it may be lost if the creditor does not act in good faith or if his purpose is not to assist others in determining credit-worthiness but rather is to collect the alleged debt.<sup>191</sup> Since it is likely that many creditors report indebtedness primarily as a means to collect and not as an assistance to other potential creditors of the alleged debtor, the upholding of the privilege by most courts may mean that courts are reluctant to accept wrongful purpose for the exercise of the privilege as a ground for denying its availability.<sup>192</sup>

Alternatively, a creditor may report an alleged debt to a trade association, which differs from a credit association in that the rules of a trade association prohibit its members either from doing business with anyone who is reported to the association or from extending credit to anyone so reported. Most cases have permitted recovery

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Household Fin. Corp., 254 Iowa 976, 119 N.W.2d 788 (1963); Ideal Motor Co. v. Warfield, 211 Ky. 576, 277 S.W. 862 (1925) (but reversed and remanded to give defendant an opportunity to prove that the statement was true); Traynor v. Seiloff, 62 Minn. 420, 64 N.W. 915 (1895); Cleveland Retail Grocers' Ass'n v. Exton, 18 Ohio C.C. 321, 10 Ohio C.D. 145 (Cir. Ct. 1899); Nettles v. Somervell, 6 Tex. Civ. App. 627, 25 S.W. 658 (1894) (but reversed and remanded to give defendant an opportunity to prove that the statement was true).

188. Harrison v. Burger, 212 Ala. 670, 103 So. 842 (1925) (inability to obtain credit at other stores); Muetze v. Tuteur, 77 Wis. 236, 46 N.W. 123 (1890) (same).

189. Reese v. Haywood, 235 Ark. 442, 360 S.W.2d 488 (1962); Whitby v. Associates Discount Corp., 59 Ill. App. 2d 337, 207 N.E.2d 482 (1965); McDermott v. Union Credit Co., 76 Minn. 84, 78 N.W. 967, *reh.*, 76 Minn. 84, 79 N.W. 673 (1899); Porak v. Sweitzer's, Inc., 87 Mont. 331, 287 P. 633 (1930); Thomas v. Frost, 79 N.M. 125, 440 P.2d 800 (1968); Hudson v. Pioneer Serv. Co., 218 Or. 561, 346 P.2d 123 (1959), *overruled by* Hinkle v. Alexander, 244 Or. 267, 417 P.2d 586 (1966); McDonald v. Lee, 246 Pa. 253, 92 A. 135 (1914); Fry v. McCord, 95 Tenn. 678, 33 S.W. 568 (1895); Denney v. Northwestern Credit Ass'n, 55 Wash. 331, 104 P. 769 (1909).

190. See notes 42 & 45 *supra*.

191. *E.g.*, Traynor v. Seiloff, 62 Minn. 420, 64 N.W. 915 (1895).

192. Conceivably, it may mean only that the debtor is unable to prove the creditor's purpose.



for libel if a name is wrongly reported,<sup>193</sup> but a few courts have denied recovery because no damages were proved or because falsity of the statement was not proved.<sup>194</sup> The purpose of reporting debts to trade associations clearly is debt collection and not the mere dissemination of credit information that will enable each member to determine whether he should extend credit. Consequently, while a few courts have held the communication to be privileged,<sup>195</sup> most have rejected the claim of privilege,<sup>196</sup> and the no-trade or no-credit rules of these associations are held to justify imposing a higher standard of conduct on their members.<sup>197</sup> Recovery has been granted also on theories

193. *Werner v. Vogeli*, 10 Kan. App. 536, 63 P. 607 (1901); *Weston v. Barnicoat*, 175 Mass. 454, 56 N.E. 619 (1900); *J. Hartman & Co. v. Hyman*, 287 Pa. 78, 134 A. 486 (1926); *McIntyre v. Weinert*, 195 Pa. 52, 45 A. 666 (1900); *Diamond v. Krasnow*, 136 Pa. Super. 68, 7 A.2d 65 (1939).

194. *Ulery v. Chicago Live Stock Exch.*, 54 Ill. App. 233 (1894); *Hartnett v. Goddard*, 176 Mass. 326, 57 N.E. 677 (1900); *Woodhouse v. Powles*, 43 Wash. 617, 86 P. 1063 (1906).

195. *E.g.*, *Putnal v. Inman*, 76 Fla. 553, 80 So. 316 (1918).

196. *Weston v. Barnicoat*, 175 Mass. 454, 56 N.E. 619 (1900); *J. Hartman & Co. v. Hyman*, 287 Pa. 78, 134 A. 486 (1926) (defendant had no reasonable cause to believe plaintiff was delinquent); *McIntyre v. Weinert*, 195 Pa. 52, 45 A. 666 (1900); *Diamond v. Krasnow*, 136 Pa. Super. 68, 7 A.2d 65 (1939) (debt was disputed, defendant knew plaintiff's defense but failed to resort to courts and attempted to cut off plaintiff's sources of supply). See also *Hartnett v. Goddard*, 176 Mass. 326, 57 N.E. 677 (1900); *Woodhouse v. Powles*, 43 Wash. 617, 86 P. 1063 (1906).

197. He who knowingly deals with an agency which may cause harm to others, unless care is exercised, must answer for the results which flow from a negligent failure to exercise such care; and the extent of the care is proportioned to the likelihood of harm flowing from a failure to exercise it.

*J. Hartman & Co. v. Hyman*, 287 Pa. 78, 86, 134 A. 486, 489 (1926);

[The jury] might have found that the whole organization was a mere scheme to oust the courts of their jurisdiction, and to enforce colorable claims of the members by a boycott intended to take the place of legal process, and that there was no pretense of any duty about the matter. Indeed, it is hard to see how the by-laws, or any understanding of the defendant about the by-laws, could have afforded him a justification, as the by-laws merely expressed the terms on which he saw fit to enter into a voluntary organization. A man cannot justify a libel by proving that he has contracted to libel. More specifically, a false statement of a kind manifestly hurtful to a man in his credit and business, and intended to be so, is not privileged because made in obedience to the requirements of a voluntary association got up for the purpose of compelling by a boycott the satisfaction of its members' claims to the exclusion of a resort to the courts.

*Weston v. Barnicoat*, 175 Mass. 454, 458, 56 N.E. 619, 620 (1900).

Compare *Western Union Tel. Co. v. Pritchett*, 108 Ga. 411, 34 S.E. 216 (1899), in which two telegraph companies had an arrangement similar to that of a trade association. The court granted recovery for libel, denying the existence of privilege for the reason that the only purpose of the communication was to coerce payment.

of extortion<sup>198</sup> and conspiracy to injure credit<sup>199</sup> and under a statute giving relief to any person whose private right has been injured by the exercise by any private corporation of a franchise or privilege not conferred by law.<sup>200</sup>

## (2) Family, Friends, Neighbors, and Others

The creditor may attempt to collect by seeking payment from persons who have some special relationship with the debtor or by trying to induce those persons to pressure the debtor himself into paying. Communication with the debtor's spouse is not infrequent, even though the spouse may not be liable for the debt. In perhaps the most outrageous case, the creditor hired a woman to phone the debtor's wife and state that she was "in trouble" and trying to locate the debtor.<sup>201</sup> Recovery was granted in that case for the unreasonable invasion of the debtor's privacy, but recovery for communications to members of the debtor's family ordinarily will be granted only if the communication is false or if the conduct of the creditor can be characterized as outrageous. Under these standards, recovery has been granted for communications to the debtor's wife,<sup>202</sup> his parents,<sup>203</sup> his brother or sister,<sup>204</sup> his child,<sup>205</sup> and unspecified relatives.<sup>206</sup>

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198. *John Brenner Brewing Co. v. McGill*, 23 Ky. L. Rptr. 212, 62 S.W. 722 (1901).

199. *Masters v. Lee*, 39 Neb. 574, 58 N.W. 222 (1894). This theory would seem to be available even if the communication of existence of indebtedness is truthful.

200. *Hartnett v. Plumbers' Supply Ass'n*, 169 Mass. 229, 47 N.E. 1002 (1897).

201. *Norris v. Moskin Stores*, 272 Ala. 174, 132 So. 2d 321 (1961).

202. *Vargas v. Ruggiero*, 197 Cal. App. 2d 709, 17 Cal. Rptr. 568 (1961) (abusive language and conduct); *Personal Fin. Co. v. Loggins*, 50 Ga. App. 562, 179 S.E. 162 (1935) (threats of garnishment and foreclosure, also abusive language); *Atlanta Hub Co. v. Jones*, 47 Ga. App. 778, 171 S.E. 470 (1933) (threat of physical injury); *Botkin v. Cassady*, 106 Iowa 334, 76 N.W. 722 (1898) (threat of imprisonment of husband); *Zier v. Hoflin*, 33 Minn. 66, 21 N.W. 862 (1885) (newspaper clipping sent to debtor's fiancée); *Zimmerman v. Associates Discount Corp.*, 444 S.W.2d 396 (Mo. 1969) (persistent calls demanding payment); *Signature Indorsement Co. v. Wilson*, 392 S.W.2d 484 (Tex. Civ. App. 1965) (abusive voice, harassment). *Contra*, *Tollefson v. Safeway Stores*, 142 Colo. 442, 351 P.2d 274 (1960) (threat to procure husband's discharge, also employer contact); *Hawley v. Professional Credit Bureau*, 345 Mich. 500, 76 N.W.2d 835 (1956) (also employer contact).

203. *Miller v. Howe*, 245 Ky. 568, 53 S.W.2d 938 (1932) (told mother that her daughter's debt was for an abortion); *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So. 2d 154 (1963) (vulgar and abusive call to debtor's mother, mother's right to recover recognized); *Montgomery Ward v. Larragoite*, 81 N.M. 383, 467 P.2d 399 (1970) (mother). *Contra*, *Household Fin. Co. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969) (5 phone calls to debtor's father).

204. *Norris v. Moskin Stores*, 272 Ala. 174, 132 So. 2d 321 (1961) (call to sister-

At least one state has made it unlawful for a creditor to attempt to collect a debt from the spouse of a debtor unless specified conditions exist.<sup>207</sup> A statute of this type may be helpful, but it fails to prohibit contacting a spouse in order to put pressure on the debtor to pay, and it fails to prohibit contacting any other person for that purpose or for the purpose of influencing that other person to pay the debt. Failure to prohibit these contacts constitutes a lack of protection of all the interests of the debtor. The statute provides protection only for the interests of the spouse, and very limited protection at that, since one of the conditions justifying contact of the spouse is delinquency for thirty days. Thus the statute merely postpones the contact and does not eliminate it. The statute therefore actually fails to protect the spouse's interest in freedom from intrusion into his or her solitude.<sup>208</sup>

Creditors also have contacted friends<sup>209</sup> and neighbors of the debtor.

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in-law telling her caller was "in trouble" and looking for debtor); *Montgomery Ward v. Larragoite*, 81 N.M. 383, 467 P.2d 399 (1970) (creditor telephoned debtor's brother, recovery for invasion of right of privacy); *Marshall v. United Fin. & Thrift Corp.*, 347 S.W.2d 623 (Tex. Civ. App. 1961) (brother answered phone and was abused, court recognizes that brother may have a cause of action).

205. *Delta Fin. Co. v. Ganakas*, 93 Ga. App. 297, 91 S.E.2d 383 (1956) (threat to imprison 11-year-old daughter, daughter recovers); *Tuyes v. Chambers*, 144 La. 723, 81 So. 265 (1919) (told daughter that her mother was a deadbeat, mother recovers).

206. *Rothschild v. Federal Trade Comm'n*, 200 F.2d 39 (7th Cir. 1952) (skip-tracing, free package device, issuance of cease and desist order affirmed); *Cyran v. Finlay Straus, Inc.*, 302 N.Y. 486, 99 N.E.2d 298 (1951) (letters to plaintiff in care of relatives in unsealed envelopes).

207. 121½ ILL. REV. STAT. ANN. § 262H (Supp. 1971):

No person may make any attempt, whether by mail, telephone, personal contact, court action, or by any other means to collect an obligation from the spouse of the obligor unless the spouse cosigned the instrument evidencing the obligation or unless the obligation is in default at least 30 days, or unless the spouse would be liable for the debt under common law or statute.

Cf. NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMER ACT § 7.204(2) (1970):

No debt collector shall unreasonably publicize information relating to any alleged indebtedness or debtor. . . . [T]he following conduct is deemed to violate this Section:

(2) The disclosure, publication, or communication of information relating to a consumer's indebtedness to any relative or family member of the consumer, except through proper legal action or process or at the express and unsolicited request of the relative or family member.

208. Compare NATIONAL CONSUMER ACT § 7.204(2), which gives fuller protection to the interests of the debtor, his spouse, and the other members of his family.

209. *Dejay Stores v. Federal Trade Comm'n*, 200 F.2d 865 (2nd Cir. 1952) (letter to references supplied by debtor, informing them of a letter for the debtor and requesting them to supply his address, issuance of cease and desist order affirmed); *Rothschild v. Federal Trade Comm'n*, 200 F.2d 39 (7th Cir. 1952) (skip-tracing, free package device, issuance of cease and desist order affirmed).

Two types of contacts with neighbors have been especially outrageous. In one, the creditor knocks on the neighbor's door, berates him for not paying the debt, apologizes profusely when the mistake in identity is pointed out to him, and proceeds promptly to carry out the act with another neighbor.<sup>210</sup> No case litigating this tactic was found, but the interests of the debtor and of the neighbor should make the creditor's conduct an unreasonable invasion of the debtor's right of privacy. In the other outrageous type of contact, the creditor telephones the neighbor and asks to speak to the debtor, who does not have a phone of his own. When the debtor picks up the phone, he is berated and called upon to explain why he has not paid, thereby exposing the situation to the neighbor, who is in the room with the debtor.<sup>211</sup> A related tactic consists of telephoning the neighbor and seeking his assistance. Many states have enacted statutes prohibiting the making of telephone calls to annoy, molest, or harass the person called,<sup>212</sup> but these statutes have rarely been invoked in connection with debt collection.<sup>213</sup> In addition to personal visits and telephone calls, the creditor may write the neighbor, informing him of the debt and requesting assistance.<sup>214</sup> The list of persons creditors have contacted is almost limitless. It

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210. Lefkowitz, *New York Attorney General Proposes the Licensing of Collection Agencies*, 16 PERS. FIN. Q. REP. 36 (1962); 18 AM. JUR. PROOF OF FACTS, ACTIONABLE PRACTICES IN DEBT COLLECTION 59 (1967).

211. Bowden v. Spiegel, Inc., 96 Cal. App. 2d 793, 216 P.2d 571 (1950) (one such call, recovery for intentional infliction of emotional distress, liability for invasion of right of privacy also recognized); Boudreaux v. Allstate Fin. Corp., 217 So. 2d 439 (La. Ct. App. 1968); United Fin. & Thrift Corp. v. Bain, 393 S.W.2d 429 (Tex. Civ. App. 1965), *writ ref'd, n.r.e.*, 400 S.W.2d 302 (1966).

212. *E.g.*, IND. ANN. STAT. § 10-4944 (Supp. 1970), which makes it a misdemeanor to make repeated phone calls for the purpose of annoying, molesting, or harassing. For a collection of these statutes, see Comment, *Unwanted Telephone Calls—A Legal Remedy?* 1967 UTAH L. REV. 379, 404-407.

213. See COLO. REV. STAT. ANN. § 40-4-23 (1963), which prohibits annoying calls but exempts calls made for the purpose of collecting debts. This exemption is not present in most statutes. The Federal Communications Commission recently has called attention to the use of the telephone to collect debts. The FCC noted that since the tariffs of the telephone companies forbid use of the telephone to abuse or harass, telephone service could be discontinued and the collector could be enjoined from making abusive or harassing calls. FCC Public Notice 70-609, 35 Fed. Reg. 9873 (1970). See Communications Act §§ 203, 401, 47 U.S.C. §§ 203, 401 (1962).

214. LaSalle Extension Univ. v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934) (also harassing letters to debtor). See also Birkhead, *Collection Tactics of Illegal Lenders*, 8 L. & CONTEMP. PROB. 78, 84 (1941); Lefkowitz, *New York Attorney General Proposes the Licensing of Collection Agencies*, 16 PERS. FIN. Q. REP. 36 (1962).

includes fellow employees of the debtor,<sup>215</sup> other creditors,<sup>216</sup> the debtor's landlord,<sup>217</sup> his doctor,<sup>218</sup> his banker,<sup>219</sup> his customers,<sup>220</sup> a regulatory agency with powers of supervision over him,<sup>221</sup> the Federal Housing Authority,<sup>222</sup> and the public at large.<sup>223</sup> The debtor may be able to recover for defamation or for invasion of the right of privacy, but not enough courts have spoken specifically to each of these contacts, with the exception of communication to the public at large, to permit any conclusions about creditor liability to be drawn.<sup>224</sup>

215. *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954) (berated the debtor to fellow employees); *Marshall v. United Fin. & Thrift Corp.*, 347 S.W.2d 623 (Tex. Civ. App. 1961) (phone call to debtor at work in which creditor spoke so loudly that people standing nearby could hear what he said).

216. *Caldwell v. Personal Fin. Co.*, 46 So. 2d 726 (Fla. 1950) (liability for libel recognized, privilege lost because defendant knew statement was false and he therefore was not acting in good faith); *Marshall v. United Fin. & Thrift Corp.*, 347 S.W.2d 623 (Tex. Civ. App. 1961) (told finance company investigator that plaintiff had stolen money from defendant finance company, states cause of action for libel); *Southern Surety Co. v. Davis*, 296 S.W. 616 (Tex. Civ. App. 1927) (libelous but privileged, so no recovery); *Saunders v. Edmonson*, 56 S.W. 611 (Tex. Civ. App. 1900) (not libelous); *Sanders v. Hall*, 22 Tex. Civ. App. 282, 55 S.W. 594 (1899) (libelous).

217. *Wiggins v. Moskins Credit Clothing Store*, 137 F. Supp. 764 (E.D.S.C. 1956) (numerous calls, landlord recovered for nuisance); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

218. *Cunningham v. Securities Inv. Co.*, 278 F.2d 600 (5th Cir. 1960) (no recovery for invasion of right of privacy because not unreasonable, creditor called doctor merely to see when he could see the debtor).

219. *Ferdon v. Dickens*, 161 Ala. 181, 49 So. 888 (1909) (libel).

220. *Cooper v. Steen*, 318 S.W.2d 750 (Tex. Civ. App. 1958) (liability for interference with contractual relations recognized).

221. *Brown v. National Home Ins. Co.*, 239 S.C. 488, 123 S.E.2d 850 (1962) (debtor was an insurance agent; creditor contacted insurance commissioner; no recovery for libel because no special damages were shown). *See also Mell v. Edge*, 68 Ga. App. 314, 22 S.E.2d 738 (1942), in which the creditor contacted the debtor's Congressman, who had the power to cause his discharge from the railway mail service (no recovery for libel because no special damages shown).

222. *Medlin v. Allied Inv. Co.*, 398 S.W.2d 270 (Tenn. 1966) (causing the FHA to foreclose, no recovery for intentional infliction of emotional distress).

223. *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927) (invasion of right of privacy); *Zier v. Hoflin*, 33 Minn. 66, 21 N.W. 862 (1885) (libel); *Davis v. Weltner* (N.Y. City Ct. 1889), *cited in* J. TOWNSHEND, *LIBEL AND SLANDER* 11 n.1 (4th ed. 1890); *Getchall v. Merchant Tailors' Exchange*, 11 Ohio Dec. Rep. 390, 26 W.L. Bull. 233 (Super. Ct. 1891) (liability for libel recognized). *See also* cases cited in note 16 *supra*.

224. Section 7.204 of the NATIONAL CONSUMER ACT arguably would prevent contact of any person other than the debtor. *See* note 207 *supra*. The question in each case would be the reasonableness of the publicity.

## V. A DEBT COLLECTION TORT?

It is apparent from a reading of the cases that a creditor is permitted to go to considerable lengths to collect a debt (or alleged debt) by extrajudicial means. This permissiveness may be a result of applying to debt collection cases theories that were developed in other contexts. One consequence of this development is that the debtor's remedy depends on the particular interest that has been invaded and the particular injury that has been sustained. A single tactic, *e.g.*, a letter to the debtor's employer, may be actionable under four different theories, depending on the interest that has been invaded. If the injury is the disclosure of private facts, he must assert invasion of the right of privacy. If the injury is a false imputation that the alleged debtor is a deadbeat, the proper action is defamation. If the debtor suffers emotional disturbance, then he asserts intentional infliction of emotional distress. And finally, if the debtor loses his job, he may assert interference with contractual relations. Each of the theories discussed in this article focuses on one interest of the debtor, even though more than one may be present in a given case, and none of the theories is capable of considering all the relevant interests.

One interest in particular frequently is ignored and deserves emphasis at this point. Perhaps the most outrageous aspect of extrajudicial collection tactics is that they may have the effect of forcing the alleged debtor to pay an amount that is not actually owed. In many debt collection cases, the existence of indebtedness is not questioned. In numerous others, however, the existence of delinquency of a debt has been disputed, and in some of them the dispute was or would have been resolved in favor of the alleged debtor, either because the debt already had been paid, because there was a defect in the goods sold, because the debt was owed only by the spouse of the alleged debtor, or because the creditor simply made a mistake in identity. Therefore, it is useful to consider the extent to which the nonexistence of any indebtedness and the existence of a bona fide dispute as to liability are relevant to the theories of action traditionally applied to debt collection.

The nonexistence of an alleged indebtedness is, of course, critical if the plaintiff is asserting libel as his theory of recovery, since one of the elements of the cause of action is the falsity of the statement.<sup>225</sup>

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225. See notes 38, 40, 187, 188, & 223 *supra*. The reason for the falsity, however, is not relevant to this element of the tort. Thus, liability will attach whether

At the same time, however, a false statement of indebtedness may be neither necessary nor sufficient for liability. It may not be necessary because the falsity requirement may be satisfied by a false imputation of general nonpayment of debts; it may not be sufficient, in those jurisdictions adhering to the *per se-per quod* distinction, because it may not result in the necessary injury.<sup>226</sup>

In right of privacy cases, the relevance of nonexistence of any indebtedness appears to depend upon the reason for the lack of indebtedness. Thus, courts have held there was no invasion of the right of privacy when a creditor dunned one who already had paid the debt.<sup>227</sup>

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the debtor is merely not delinquent or the creditor has made a mistake in identity. *Holt v. Boyle Bros.*, 217 F.2d 16 (D.C. Cir. 1954); *Cohen v. Marx Jewelry Co.*, 67 App. D.C. 347, 92 F.2d 498 (1937); *Harrison v. Burger*, 212 Ala. 670, 103 So. 842 (1925); *Hanschke v. Merchant's Credit Bureau*, 256 Mich. 272, 239 N.W. 318 (1931); *Hinkle v. Alexander*, 244 Or. 271, 417 P.2d 586 (1966); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959) (slander). *Cf. M. Rosenberg & Sons v. Craft*, 182 Va. 512, 29 S.E.2d 375 (1944).

226. *Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A.2d 292 (1952); *Davis v. General Fin. & Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950); *Whitby v. Associates Discount Corp.*, 59 Ill. App. 2d 337, 207 N.E.2d 482 (1965); *Columbia Fin. Corp. v. Robitcheck*, 243 La. App. 1084, 150 So. 2d 23 (1963).

Moreover, a creditor may avoid falsity problems altogether by disclosing not only that an alleged indebtedness exists, but also that the alleged debtor disputes it or has a defense to it. In exceptional circumstances the creditor may be able to exert considerable pressure on the debtor without incurring liability for libel. Thus, it has been held not libelous to publish that one is indebted but has successfully asserted the "unjust liquor laws," which made the debt uncollectable, as a defense to an action on the debt. *Homer v. Englehardt*, 117 Mass. 539 (1875).

It will be recalled that even if the plaintiff in a libel action proves the falsity of the statement and actual damages, the defendant nevertheless may escape liability because the communication may have been privileged. *See* notes 42-47 *supra* and accompanying text. If, however, the creditor knows that the debt is not owed, whatever privilege may exist will be lost, since he cannot be acting in good faith. *Caldwell v. Personal Fin. Co.*, 46 So. 2d 726 (Fla. 1950). The privilege also may be lost even if the creditor knows only that the debt is disputed but fails to include that fact in his allegedly libelous communication, since the concealment of the dispute may indicate that the communication was actuated by malice. *Diamond v. Krasnow*, 136 Pa. Super. 68, 7 A.2d 65 (1939). *See also* *Western Union Tel. Co. v. Pritchett*, 108 Ga. 411, 34 S.E. 216 (1899); *Werner v. Vogeli*, 10 Kan. App. 536, 63 P. 607 (1901).

227. *Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A.2d 292 (1952); *Davis v. General Fin. & Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950); *cf. Maze v. Employees' Loan Soc'y*, 217 Ala. 44, 114 So. 574 (1927) (continual demands for payment, prior to recognition of invasion of right of privacy, no recovery); *Mills v. First Nat'l Credit Bureau*, 192 N.E.2d 511 (Ohio Ct. App. 1963) (alleged debtor recovered, but lack of indebtedness was not discussed); *Lewis v. Physicians & Dentists Credit Bureau*, 27 Wash. 2d 267, 177 P.2d 896 (1947) (court implied that lack of indebtedness would be relevant).

Recovery has been denied also when the plaintiff owed no debt because only his spouse was liable or because of some other defense to the claim.<sup>228</sup> These cases may mean, however, only that nonexistence of any debt is not sufficient by itself to make a creditor contact actionable. This interpretation is supported by the position taken by other courts that the creditor's mistake in the identity of his debtor is relevant to the reasonableness of the creditor's conduct.<sup>229</sup>

The absence of any indebtedness has been recognized as both relevant<sup>230</sup> and irrelevant<sup>231</sup> to a determination of whether conduct constitutes an intentional infliction of emotional distress. In any event, that factor is not by itself sufficient to create liability. The standard of conduct in that tort is outrageousness, and it has been held that the mere lack of delinquency does not make the creditor's conduct outrageous.<sup>232</sup> It may be justifiable to conclude as a matter of law

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228. *Carey v. Statewide Fin. Co.*, 3 Conn. Cir. 716, 223 A.2d 405 (1966) (owed by spouse only, no discussion of relevance of lack of liability on the note, but recovery granted because creditor used unreasonable methods); *Zimmerman v. Associates Discount Corp.*, 444 S.W.2d 396 (Mo. 1969) (owed by spouse only, no discussion of lack of liability).

229. *Montgomery Ward v. Larragoite*, 81 N.M. 383, 467 P.2d 399 (1970); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959); *cf. Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 216 P.2d 571 (1950) (recovery for intentional infliction of emotional distress, but liability for invasion of privacy also recognized).

Absence of actual indebtedness would appear to be relevant also to the issue of malice, both in those jurisdictions where malice is an element of actionable invasion of privacy and in those jurisdictions where malice will increase the damages that may be recovered. *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E.2d 286 (1959) (mere absence of indebtedness not sufficient to create liability); *Tollefson v. Price*, 247 Ore. 398, 430 P.2d 990 (1967) (en banc) (relevant to questions of malice, reasonableness, and good faith). Existence of a bona fide dispute, however, tends to remove the implication of malice or bad faith, although it may be indicative of malice for a creditor to inform an employer of a debt without informing him that the employee disputes the claim of indebtedness. *Lucas v. Moskins Stores*, 262 S.W.2d 679 (Ky. 1953); *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959).

230. *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So. 2d 154 (1963); *LaSalle Extension Univ. v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934); *Turner v. ABC Jalousie Co.*, 251 S.C. 921, 160 S.E.2d 528 (1968). *See Clark v. Associated Retail Credit Men*, 105 F.2d 62 (D.C. Cir. 1939) (implication that existence of dispute is relevant to outrageousness).

231. *Medlin v. Allied Inv. Co.*, 398 S.W.2d 270 (Tenn. 1966); *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963). *See Oehler v. L. Bamberger & Co.*, 4 N.J. Misc. 1003, 135 A. 71 (Sup. Ct. 1926) (existence of dispute not relevant).

232. *Miller v. Friedman's Jewelers, Inc.*, 107 Ga. App. 841, 131 S.E.2d 663 (1963) (by implication); *Medlin v. Allied Inv. Co.*, 398 S.W.2d 270 (Tenn. 1966); *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953). *See also Maze v. Employees' Loan Soc'y*, 217 Ala. 44, 114 So. 574 (1927) (prior to recognition of cause of



that nonexistence of a debt does not by itself make all creditor conduct outrageous; but if the creditor knows that no debt is owed or that a good defense exists, then any attempt to collect is not only unreasonable but also outrageous. Arguably, it might also be outrageous even when the creditor only has reason to know that no debt is owed or that a good defense exists. Furthermore, knowledge by the creditor that the debtor has a good defense to the claim is relevant to a determination of whether the creditor acted out of malice and whether the creditor's conduct was intentional.<sup>233</sup>

In view of the inadequacy of existing theories to give proper consideration to all the relevant interests, it might be suggested that a new tort theory be developed. At least one state, Texas, already has created a separate tort to redress extreme conduct by creditors who attempt to collect debts. Recovery first was permitted under the rubric of intentional infliction of emotional distress,<sup>234</sup> with the requirement that the plaintiff have sustained physical injuries.<sup>235</sup> Physical injury continues to be required,<sup>236</sup> but recovery is permitted upon a finding of unreasonable collection efforts,<sup>237</sup> rather than upon the finding of out-

action for intentional infliction of emotional injury); *Oehler v. L. Bamberger & Co.*, 4 N.J. Misc. 1003, 135 A. 71 (Sup. Ct. 1926).

233. *Clark v. Associated Retail Credit Men*, 105 F.2d 62 (D.C. Cir. 1939) (by implication); *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950) (en banc); *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So. 2d 154 (1963); *LaSalle Extension Univ. v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934); *National Life & Acc. Ins. Co. v. Anderson*, 187 Okla. 180, 102 P.2d 141 (1940); *Turner v. ABC Jalousie Co.*, 251 S.C. 921, 160 S.E.2d 528 (1968). *Contra*, *Oehler v. L. Bamberger & Co.*, 4 N.J. Misc. 1003, 135 A. 71 (Sup. Ct. 1926).

234. *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954). See generally *Martin, A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. TEXAS L.J. 127 (1967); Comment, *Recovery for Creditor Harassment*, 46 TEXAS L. REV. 950 (1968).

235. *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954). The earlier case of *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953), in which recovery had been denied, was distinguished by the court in *Duty* on the ground that no physical injuries were sustained. In *Duty* the court suggested that perhaps "injury to property, or other elements of actual damages" would suffice. 154 Tex. at 17, 273 S.W. 2d at 65. The debtor in *Duty* alleged physical injury, loss of employment, slander, and mental anguish.

236. *United Fin. & Thrift Corp. v. Smith*, 387 S.W.2d 752 (Tex. Civ. App. 1965); *Houston-American Fin. Corp. v. Travis*, 343 S.W.2d 323 (Tex. Civ. App. 1960) (in which the court held that the statute of limitations starts running when the cause of action accrues and that the cause of action accrues when physical injury occurs).

237. *Whatley v. K-Mart Discount Stores*, 451 S.W.2d 568 (Tex. Civ. App. 1970); *United Fin. & Thrift Corp. v. Bain*, 393 S.W.2d 429 (Tex. Civ. App. 1965), *writ ref'd, n.r.c.*, 400 S.W.2d 302 (1966) (per curiam); *Signature Indorsement Co. v. Wilson*,

rageous conduct that is required for recovery for intentional infliction of emotional distress.

The most commonly stated definition of unreasonable collection efforts is efforts that a person of ordinary care and prudence would not have used under the same or similar circumstances.<sup>238</sup> Wilfulness and malice are not required for recovery of actual damages,<sup>239</sup> but are required for recovery of exemplary damages unless there is reckless disregard for the consequences of the conduct.<sup>240</sup> The definition has never been before the Texas Supreme Court for decision,<sup>241</sup> and courts in two of the more recent cases seem to be retreating from this position by defining unreasonable collection efforts as a course of harassment that is wilful, wanton, and malicious, and is intended to inflict mental anguish and resulting bodily harm.<sup>242</sup>

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392 S.W.2d 484 (Tex. Civ. App. 1965); *United Fin. & Thrift Corp. v. Smith*, 387 S.W.2d 752 (Tex. Civ. App. 1965); *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App.), *writ ref'd, n.r.e.*, 362 S.W.2d 298 (1962) (per curiam), in which the court rejected defendant's claim that a creditor has a right to be unreasonable so long as he is not outrageous); *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857 (Tex. Civ. App. 1957). In dictum, the Texas Supreme Court indicated that the test was unreasonableness and not negligence. *Moore v. Savage*, 362 S.W.2d 298 (1962) (per curiam). One lower court required unreasonable efforts with reckless disregard for plaintiff's health and welfare. *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857 (Tex. Civ. App. 1957). Other lower courts, however, have not insisted on reckless disregard for plaintiffs health and welfare.

238. *Pioneer Fin. & Thrift Corp. v. Adams*, 426 S.W.2d 317 (Tex. Civ. App. 1968); *United Fin. & Thrift Corp. v. Bain*, 393 S.W.2d 429 (Tex. Civ. App. 1965), *writ ref'd, n.r.e.*, 400 S.W.2d 302 (1966) (per curiam); *Employee Fin. Co. v. Lathram*, 363 S.W.2d 899 (Tex. Civ. App. 1963); *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App.), *writ ref'd, n.r.e.*, 362 S.W.2d 298 (1962) (per curiam).

239. *United Fin. & Thrift Corp. v. Bain*, 393 S.W.2d 429 (Tex. Civ. App. 1965), *writ ref'd, n.r.e.*, 400 S.W.2d 302 (1966); *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App.), *writ ref'd, n.r.e.*, 362 S.W.2d 298 (1962) (per curiam); *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857 (Tex. Civ. App. 1957).

240. *Kroger Food Co. v. Singletary*, 438 S.W.2d 621 (Tex. Civ. App. 1969); *United Fin. & Thrift Corp. v. Bain*, 393 S.W.2d 429 (Tex. Civ. App. 1965), *writ ref'd, n.r.e.*, 400 S.W.2d 302 (1966); *Ware v. Paxton*, 359 S.W.2d 897 (Tex. 1962); *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App.), *writ ref'd, n.r.e.*, 362 S.W.2d 298 (1962) (per curiam).

241. *United Fin. & Thrift Corp. v. Bain*, 400 S.W.2d 302 (Tex. 1966) (per curiam); *Moore v. Savage*, 362 S.W.2d 298 (Tex. 1962) (per curiam).

242. *Whatley v. K-Mart Discount Stores*, 451 S.W.2d 568 (Tex. Civ. App. 1970); *Montgomery Ward & Co. v. Brewer*, 416 S.W.2d 837 (Tex. Civ. App. 1967). Intent to injure has been specifically rejected as an element of the tort by other courts. *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App.), *writ ref'd, n.r.e.*, 362 S.W.2d 298 (1962) (per curiam); *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857 (Tex. Civ. App. 1957).

Louisiana also may have embraced the unreasonable collection efforts theory.<sup>243</sup> The Louisiana courts have not put a label on the theory under which the debtors in these cases have recovered, but in at least one case have spoken in terms of a creditor's right to employ collection tactics only so long as he does not exceed the bounds of reason that are to be observed in debt collection.<sup>244</sup>

The development of a separate collection tort is desirable, because a standard of reasonableness would make it possible, if not necessary, to consider all the relevant interests in every case. For example, non-existence of any debt could be explicitly considered, since it is less reasonable to attempt to collect an amount that is not owed than it is to attempt to collect an amount that is owed.<sup>245</sup> Further, the reason

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243. *Pack v. Wise*, 245 La. 84, 155 So. 2d 909 (1963); *Everett v. Community Credit Co.*, 224 So. 2d 145 (La. Ct. App. 1969); *Boudreaux v. Allstate Fin. Corp.*, 217 So. 2d 439 (La. Ct. App. 1968); *Quina v. Robert's*, 16 So. 2d 558 (La. Ct. App. 1944). *But see* *Campbell v. Parker*, 209 So. 2d 337 (La. Ct. App. 1968), in which the court seems to be insisting on a standard of outrageousness.

244. *Boudreaux v. Allstate Fin. Corp.*, 217 So. 2d 439, 444 (La. Ct. App. 1968). South Dakota, too, may embrace a separate tort for unreasonable collection efforts. In *First Nat'l Bank v. Bragdon*, 84 S.D. 89, 167 N.W.2d 381 (1969), the court recognized a right to recover for intentional acts, undertaken for the purpose of producing mental pain and anguish in an attempt to collect a debt, that are unreasonable and that the actor should recognize as likely to result in illness. The court did not insist on outrageous conduct, but the requirement that the acts be undertaken for the purpose of producing mental pain and anguish may make the standard of reasonableness virtually identical to outrageousness. If so, then the court's theory probably would be classified as intentional infliction of emotional distress. On the other hand, since every collection tactic is undertaken at least in part for the purpose of inflicting some mental anguish and since the court referred specifically to unreasonable acts and to debt collection, the decision may indicate a willingness on the part of the court to create a separate tort.

245. Relevance of nonexistence of any debt, for whatever reason, has received greatest recognition in the unreasonable collection efforts cases, in which the standard of the creditor's conduct is reasonableness. *Salazar v. Bond Fin. Co.*, 410 S.W.2d 839 (Tex. Civ. App. 1966); *Signature Indorsement Co. v. Wilson*, 392 S.W.2d 484 (Tex. Civ. App. 1965); *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App.), *writ ref'd*, *n.r.e.*, 362 S.W.2d 298 (1962) (per curiam); *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645 (Tex. Civ. App. 1962); *Ware v. Paxton*, 352 S.W.2d 520 (Tex. Civ. App. 1961), *aff'd in part, rev'd in part*, 359 S.W.2d 897 (Tex. 1962). Thus, whether the reason for no indebtedness is that usurious interest is held to have discharged the principal or that there is some other defense to the claim, it is less reasonable to attempt to collect a debt that is not due than it is to attempt to collect one that is due. *Moore v. Savage*, 359 S.W.2d 95, 96 (Tex. Civ. App.), *writ ref'd*, *n.r.e.*, 362 S.W.2d 298 (1962) (per curiam). *See also* *Salazar v. Bond Fin. Co.*, 410 S.W.2d 839 (Tex. Civ. App. 1966); *Signature Indorsement Co. v. Wilson*, 392 S.W.2d 484 (Tex. Civ. App. 1965); *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645 (Tex. Civ. App. 1962).

for nonexistence of an alleged debt could be considered, since the reasonableness of the creditor's acts should depend at least in part on whether the creditor has made a mistake in identity; whether he knew or should have known that the debtor already had paid the debt or had some other defense to the claim; and whether he knew that the claim was honestly disputed. Explicit consideration of these facts would permit the courts to face up to the difficult question of how much pressure a creditor should be able to exert on a person—who ultimately might be found not to be indebted to the creditor—to induce him to pay an alleged debt.

Even if the debt is honestly disputed, it probably should not be unreasonable for the creditor to make some attempt to collect by contacting the debtor. Contacts to others, however, such as the alleged debtor's employer, might always be unreasonable, at least unless the creditor disclosed not only that the debtor refused to pay, but also that he disputed the indebtedness or the delinquency of the indebtedness. This approach, focusing on the existence of a bona fide dispute as to the existence of an alleged indebtedness might require the court to decide whether an alleged debt was actually owed, even though the creditor was not trying to recover judgment on it at that time. Although theoretically all that would be necessary would be a determination whether the dispute was in good faith or whether the creditor should have known the plaintiff was not indebted to him,<sup>246</sup> as a practical matter this determination may not be possible without a full examination of the merits of the creditor's claim that a debt was due.<sup>247</sup> This approach, however, would permit the courts to confront

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246. See *Beneficial Fin. Co. v. Lamos*, 179 N.W.2d 573, 583-84 (Iowa 1970): [The debtor says] the legitimacy and collectibility of the debt is of prime importance in determining reasonableness of the collection activity; the character of the obligation, whether it is undisputed or not, does reflect and taint the reasonableness of practices used to collect it. If there is an undisputed amount owed and the debtor refuses to pay, tactics used to collect might well be more drastic than those permissible where no debt is owed or its existence is disputed.

Of course, reasonableness of the dispute would have some bearing on the issue.

247. Compare the similar problem the courts will have in connection with providing a hearing in prejudgment garnishment cases, as required by *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). See Comment, *Prejudgment Wage Garnishment: Notice and Hearing Requirements Under Sniadach v. Family Finance Corp.*, 11 B.C. IND. & COM. L. REV. 462, 471-73 (1970). See also *Goldberg v. Kelly*, 397 U.S. 254 (1970); Comment, *Expanding Limitations on Prejudgment Attachment: Reverberations of Sniadach v. Family Finance Corp.*, 12 B.C. IND. & COM. L. REV. 700, 708-09 (1971);

the problem of a debtor's paying an alleged debt merely to stop harassment by an alleged creditor, to prevent notification to his employer, or to put an end to the exertion of pressure by his employer.

The standard of reasonableness would permit a consideration of the employer's interests in the debt activities of his employees. If the employer really has an interest, it might not be unreasonable for a creditor to notify him of an indebtedness, even if that notification results in termination of the debtor's employment. On the other hand, if the employer's interest is not substantial, then it might be unreasonable to involve him in the collection effort.<sup>248</sup> Protection of the employer's interests, however, necessarily would be indirect and imperfect. Since the action sounds in tort and the standard of the creditor's conduct is reasonableness, the court's focus would have to be not on the employer's actual interest, but rather on the creditor's actual or imputed knowledge of the employer's interests. His liability would have to depend, in part, on what he knew or should have known to have been the employer's interests.<sup>249</sup> Of course, courts may develop the principle that the average creditor should be chargeable with accurate knowledge of what the courts conclude to be the interests of employers in the indebtedness of their employees. Since the creditor's imputed knowl-

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Comment, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942 (1970); Comment, *The Supreme Court 1968 Term*, 83 HARV. L. REV. 7, 115 (1969). In *Beneficial Fin. Co. v. Lamos*, 179 N.W.2d 573 (Iowa 1970), the suit was brought by the creditor to recover the alleged debt, and the debtor counterclaimed for tortious collection efforts. Consequently, the merits of the claim of indebtedness were directly before the court for decision.

248. Indeed, in one case an employer recovered for a creditor's use of excessive tactics in an attempt to collect a debt from an employee who allegedly was indebted to the creditor. *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App.), *writ ref'd, n.r.e.*, 362 S.W.2d 298 (1962) (per curiam).

249. Thus, if it were determined, after the fact, that the employer actually had no interest in learning of the debtor's indebtedness or delinquency but the creditor reasonably believed the employer had an interest, the case would have to be viewed as though the employer actually had that interest. This could produce protection where no protection is necessary or desirable. At the same time, however, the creditor perhaps should reasonably have known also of the employer's interest in not being subjected to the expense and inconvenience of communications about employee indebtedness.

Conversely, if the employer actually does have an interest but the creditor does not know that he does, then potential tort liability might deter the creditor from contacting the employer. In this situation, existence of the remedy for excessive collection tactics might be said to have deprived the employer's interest of protection. But query whether the lack of protection is because of the existence of the remedy or because of the creditor's lack of knowledge of the employer's interest.

edge and the employer's actual interests then would coincide, this development would tend to make protection of the employer's interests more direct and perfect.

The creditor's interests would by no means be ignored by this new theory. On the contrary, it would be possible to make a hard-nosed determination of exactly how substantial his interests are. If a debt is undisputed by the debtor, it may well be reasonable for the creditor to take "drastic" measures.<sup>250</sup>

Throughout this discussion it has been assumed that the standard against which to measure the creditor's conduct is unreasonableness, and not outrageousness. It must be recognized, however, that the interests to be considered in defining the limits of permissible conduct would be the same under either standard. Similarly, the facts relevant to determining unreasonableness would be the same as the facts relevant to determining outrageousness. The difference between the two standards lies in the amount—both quantitative and qualitative—of objectionable conduct that will be permitted. Although this is a difference only of degree and not of kind, it is a significant difference. Clearly, some conduct should be permitted by a creditor that would not be permitted by a complete stranger. This may be one justification for a standard of outrageousness; but it would be better to define the bounds of permissible conduct in terms of reasonableness, while taking into account the existence of the debtor-creditor relationship in the course of determining what is reasonable. The standard of conduct generally applied to individuals in our society is reasonableness. Since that standard is fully capable of recognizing the relationship that exists between debtor and creditor, there is no good reason why creditors should not be held to the same standard of conduct as everyone else.

Finally, the debtor should be able to recover all damages that he can prove he sustained. Thus recovery should not be limited to those cases in which the debtor suffers physical injury, since that would preclude recovery for loss of employment, thereby preventing consideration of one of the interests of the debtor. Similarly, recovery should not be

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250. *Beneficial Fin. Co. v. Lamos*, 179 N.W.2d 573 (Iowa 1970). This theory permits consideration of the interests of others, too. For example, under the Texas theory a debtor's brother was permitted to assert unreasonable collection efforts for a creditor's attempts to involve him in the collection effort. *Marshall v. United Fin. & Thrift Corp.*, 347 S.W.2d 623 (Tex. Civ. App. 1961).

limited to cases of physical or pecuniary injury, since that limitation would preclude consideration of the debtor's interests in reputation, dignity, and privacy. Only if the debtor is permitted to recover for any foreseeable injury actually sustained, whatever its nature, will the theory be able to consider all the relevant interests of all the parties.