

Complaint

91 F.T.C.

IN THE MATTER OF

CAPAX, INC. FORMERLY CONTINENTAL CREDIT
CORPORATION, INC., ET AL.*Docket 9058. Complaint, Sept. 30, 1975—Final Order, May 25, 1978*

This order, among other things, requires a Willingboro, N.J. debt collection company to cease misrepresenting its status, activities or actions; the affect of nonpayment on credit ratings; and the imminency of legal action. The firm is further prohibited from using, or placing in the hands of others, forms and materials which simulate telegrams, or which otherwise misrepresent the nature, urgency and import of communication, to induce payment of delinquent debts.

Appearances

For the Commission: *Alan D. Reffkin, Carthon E. Aldhizer and John F. LeFevre.*

For the respondents: *Robert Field Stockton, David Lyle Segal and Steven A. Segal, Segal & Stockton, Philadelphia, Pa. for Capax, Inc., Continental Credit Corporation, Inc., Joseph V. DeFelice and Arnold Goodman and Barbara Van Horn Colsey, Delanco, N.J. for Norman Bricker.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Capax, Inc., a corporation, formerly Continental Credit Corporation, Inc., a corporation, and Joseph V. DeFelice and Arnold Goodman, individually and as officers of said corporation, and Norman Bricker, individually and as a former officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Capax, Inc., formerly Continental Credit Corporation, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at Route 130 and Beverly-Rancocas Road, Willingboro, New Jersey.

Respondents Joseph V. DeFelice and Arnold Goodman are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent

including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent. [2]

Norman Bricker is an individual and, up to March 1975, was an officer of corporate respondent. Until his resignation, he formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is 504 Route 130 N., Cinnaminson, New Jersey and P.O. Box 123, Delanco, New Jersey.

PAR. 2. Respondents are now, and for some time in the past have been, engaged in advertising, offering for sale and sale of a service to assist in the collection of alleged delinquent debts. This service consists of preparation by respondents of a series of form notices and letters to be mailed to alleged delinquent debtors at regular intervals. Two styles of forms are or have been used in the series: (1) that which is titled LETEGRAM; (2) that which bears the letterhead styled Continental Credit Corporation Credit Control and Collection.

PAR. 3. In the course and conduct of their business, respondents are now, and for some time in the past have been, engaged in sending to and receiving from persons, firms, and corporations located in various States of the United States, by means of the United States mail, letters, notices, forms and other material for use in the collection of alleged delinquent debts. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the payment of alleged delinquent debts, the respondents have mailed or caused to be mailed to alleged delinquent debtors various printed forms, letters and other printed material.

Typical and illustrative, but not necessarily all inclusive of said forms and material, are the following:

(1) a window envelope on which a return address is printed, with no name. The word LETEGRAM is printed in large red type in one location and in large white type in two locations on the face of and the rear side of the envelope.

(2) a printed form styled LETEGRAM, designed to be inserted in the envelope described in subparagraph 1 of this paragraph. [3]

PAR. 5. By and through the use of the envelopes and forms described in subparagraphs 1 and 2 of Paragraph Four, respondents have represented, directly or by implication, that they are telegraphic or other similarly urgent communications.

PAR. 6. In truth and in fact, the envelopes and forms referred to in Paragraphs Four and Five are not telegraphic or other similarly

urgent communications. Rather, they are printed form letters, mailed to alleged delinquent debtors, which forms by their overall appearance, styling, printing and format simulate telegraphic or other similarly urgent communications. By virtue of said simulation, these envelopes and forms mislead the recipient as to their nature, import, purpose and urgency.

Therefore, the use by respondents of said envelopes and forms as set forth in Paragraph Four was and is false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, and for the purpose of inducing the payment of alleged delinquent debts, respondents have mailed, or caused to be mailed to alleged delinquent debtors various printed forms, letters and other printed material containing certain statements in either the English or Spanish language.

Among and typical, but not all inclusive, of such statements are the following:

CONTINENTAL CREDIT CORP. . . . CREDIT CONTROL AND
COLLECTION

* * * * *

COLLECTION DEPARTMENT

* * * * *

YOUR DELINQUENT ACCOUNT WITH [CREDITOR'S NAME] HAS BEEN REFERRED TO CONTINENTAL CREDIT CORPORATION FOR ACTION. . . YOUR CREDITOR HAS REQUESTED THAT YOU BE GIVEN SEVEN DAYS TO SETTLE THIS ACCOUNT. . .

PAID IN FULL WITHIN SEVEN DAYS, THIS ACCOUNT WILL NOT BE SHOWN ON OUR CREDIT RECORDS. . .

* * * * *

UP TO NOW YOUR CREDIT STANDING WITH [CREDITOR'S NAME] HAS BEEN SATISFACTORY. CREDIT IS A PRIVILEGE, NOT A RIGHT. [4] IT IS ALMOST IMPOSSIBLE TO REPLACE. LIKE MOST OTHER PRIVILEGES, YOU ONLY MISS IT WHEN YOU NEED IT. . . LET'S NOT PERMIT THE WORST TO HAPPEN.

* * * * *

STRONG ACTION IS OFTEN NECESSARY TO COLLECT AN ACCOUNT. . . IF YOU CONTINUE TO IGNORE REQUESTS FOR A FRIENDLY DISPOSITION OF THIS CLAIM YOU MUST ACCEPT THE RESPONSIBILITY FOR FUTURE ACTION.

* * * * *

. . . IT IS THE INTENTION OF OUR CLIENT TO EXHAUST EVERY LEGAL

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AVENUE AT THEIR DISPOSAL IN ORDER TO COLLECT THIS CLAIM. IF YOU PERSIST IN NOT FOLLOWING THROUGH YOUR OBLIGATION, WE WILL HAVE TO RECOMMEND A MORE DRASTIC ACTION THAT IN THE END WILL BE MUCH MORE COSTLY TO YOU. IF THIS IS YOUR INTENTION I WOULD RECOMMEND THAT YOU CONTACT YOUR ATTORNEY SO HE MAY ADVISE YOU ON THE LEGAL RAMIFICATIONS YOU MAY BE EXPOSED TO.

* * * * *

IMPERATIVE THAT SATISFACTORY ARRANGEMENTS BE MADE TO AVOID FURTHER ACTION AVAILABLE TO CLAIMANT UNDER PROVISIONS OF STATE STATUTES. . IF SETTLEMENT IS NOT MADE WITHIN 48 HOURS UPON RECEIPT OF THIS LETEGRAM, WE SUGGEST YOU CONTACT YOUR ATTORNEY TO DETERMINE YOUR LEGAL LIABILITY.

* * * * *

YOUR REFUSAL OR NEGLECT TO SATISFY THE ABOVE LIABILITY COMPELS US TO NOTIFY YOU TO PRESENT ANY DEFENSE AGAINST THE VALIDITY OF THIS CLAIM ON FILE. YOU MAY PROTEST SAID CLAIM OR LIST PROPERTY WHICH YOU FEEL MAY BE EXEMPT, IF [CREDITOR'S NAME] OBTAINS A JUDGMENT. . .

* * * * *

[CREDITOR'S NAME] HAS TURNED OVER TO US THEIR CLAIM AGAINST YOU. . .

* * * * *

WE ARE WRITING THIS LETTER TO INFORM YOU OF THE SERIOUSNESS OF YOUR DELINQUENCY AND THE FACT THAT, SHOULD IT CONTINUE ALL POSSIBLE LEGAL MEANS WILL BE TAKEN TO COLLECT IT. [5]

* * * * *

. . . CONTINENTAL CREDIT CORPORATION CAN TAKE NO OTHER POSITION BUT TO RECOMMEND A STRONGER COURSE OF ACTION TO OUR CLIENT. . IF THIS IS DONE THERE MAY BE ADDITIONAL COSTS TO YOU AND YOUR CREDIT STANDING MAY SUFFER.

* * * * *

[CREDITOR'S NAME] IS ABLY REPRESENTED BY LEGAL COUNSEL WHO, IF CALLED UPON WILL PURSUE THE APPROPRIATE LEGAL MEANS TO LIQUIDATE THIS OUTSTANDING DEBT. . SHOULD JUDGMENT BE TAKEN AGAINST YOU, THE COURT MAY CHARGE YOU FOR LEGAL COSTS AND FEES.

YOU ARE HEREBY REQUESTED TO APPEAR BETWEEN THE HOURS OF 10 AM AND 4 PM AT THE CLAIMANTS OFFICE AS SET OUT ABOVE WITHIN THREE DAYS AFTER DELIVERY HEREOF TO PROTEST LIABILITY OF CLAIM ON FILE. . FAILURE TO COMPLY AND APPEAR EITHER IN PERSON OR HAVE LEGAL REPRESENTATIVE ATTEND ON YOUR BEHALF MAY RESULT IN START OF LEGAL ACTION.

PAR. 8. By and through the use of the aforesaid statements, and others of similar import and meaning not expressly set forth herein, including the use of the word "collection" in the corporate letterhead, letters, and envelopes, respondents have represented, directly or by implication, that:

1. Delinquent debtors' accounts have been referred to respondents as an independent debt collection agency which will engage in typical debt collection activities such as making personal demands for payment and/or filing suit.

2. Unless payment is received, steps will be taken to initiate legal action against the alleged debtor.

3. Unless payment is received, respondents will take action to adversely affect the debtor's credit record with a consumer reporting agency.

4. Unless payment is received within the time specified by respondents, immediate action will be taken to collect the debt, such as the filing of suit.

PAR. 9. In truth and in fact:

1. Delinquent debtors' accounts had not been referred to respondents as an independent debt collection [6] agency which would engage in typical debt collection activities such as making personal demands for payment and/or filing suit. In fact, no such action was taken during the course of respondents' form letter service.

2. If payment was not received, steps were not taken to initiate legal action against the alleged debtor; in fact, no action was taken during the form letter series except to send additional form letters to the alleged debtor or to return the uncollected account to the creditor.

3. If payment was not received, respondents took no action to adversely affect the debtor's credit record with a consumer reporting agency.

4. If payment was not received during the time specified by respondents, immediate action was not taken to collect the debt; in fact, the only subsequent action was either the sending of additional form letters to the alleged debtor or returning the uncollected account to the creditor.

Therefore, the statements and representations set forth in Paragraphs Seven and Eight were and are false, misleading and deceptive.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals engaged in providing services of the same general kind and nature as those provided by respondents.

PAR. 11. The use by respondents of the word "collection" in the corporate letterhead, letters, and envelopes, respondents have represented, directly or by implication, that:

forth in Paragraph Four hereof, has had the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that the said envelopes and forms are telegraphic or other similarly urgent communications. Furthermore, the use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had the tendency and capacity to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and to induce the payment of substantial sums of money by reason of said erroneous and mistaken belief. [7]

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY PAUL R. TEETOR, ADMINISTRATIVE LAW
JUDGE

APRIL 22, 1977

[2] I

HISTORY OF THE CASE

A. COMPLAINT

On September 30, 1975, this Commission issued its complaint and notice of proposed order against a New Jersey-based commercial debt dunning, Capax, Inc., (hereafter "Capax"), and certain allegedly dominant figures therein. It recited reason to believe that respondents had been using unfair and deceptive acts and practices in their debt dunning business, in violation of Section 5 of the Federal Trade Commission Act, and reciting further that a proceeding with respect to such possible violation appeared to be in the public interest. There followed the usual allegations concerning the respondents' identities, and responsibilities, engagement in interstate commerce, etc. (Pars. 1-3)

The gist of the complaint is that for a flat fee Capax has been sending the debtors of its clients various series of standardized dunning letters which have tended to deceive these debtors into paying their bills. By using the word "collection" in Capax' corporate letterhead, letters and envelopes and by making or implying various statements in its dunning letters (many illustrated in Complaint Par. 7)

Capax' statements allegedly tended to deceive these delinquent debtors in four ways:

(1) By saying or implying that such debtors were being pursued by an "independent debt collection agency"¹ which would "engage in typical debt collection activities such as making personal demands for payment and/or filing suit." In fact, the complaint alleges no such action was taken while the dunning series took its course. (Complaint Pars. 8.1 and 9.1). [3]

(2) By saying or implying that unless payment were received, steps would be taken [by whom is not specified] to "initiate legal action" against the debtor. In fact, the complaint alleges, the only action taken was to send more dunning letters or return the uncollected account to the creditor. (Complaint Pars. 8.2 and 9.2.)

(3) By saying or implying that unless payment were received, respondents would take action to "adversely affect the debtor's credit record" with a "consumer reporting agency." In fact, the complaint alleges, no such action was ever taken by respondents. (Complaint Pars. 8.3 and 9.3.)

(4) By saying or implying that unless payment were received "within the time specified by respondents" "immediate action" to collect the debt, such as filing suit, would be taken. In fact, the complaint alleges, the only action taken was to send more dunning letters or return the uncollected account to the creditor.

The complaint also charges that Capax sometimes uses for its dunning letters and/or envelopes a so-called LETEGRAM, which in overall appearance, styling, printing and format "simulates telegraphic or other similarly urgent communications," so that "by said simulation" recipients are deceived and misled as to the "nature, import, purpose and urgency" of such dunning messages. (Complaint, Par. 4, 5, 6.)

The texts of Capax' dunning letters collected in Complaint Par. 7 and making the above alleged misrepresentations, whether in LETEGRAM or other form, are claimed to have a tendency and capacity to make debtors pay substantial sums they might not otherwise pay, thus constituting such dunning letters unfair and deceptive commercial practices,² to the prejudice and injury of the public. (Pars. 11 and 12.) [4]

The notice-order would make respondents cease and desist from:

¹ Complaint counsel would define an "independent debt collection agency" as "one which takes an *assignment* of a claim of debt for collection on a *commission basis* and engages in such debt collection activities as making personal demands for payment and/or *filing suit*" [CX 60(e)] (emphasis added) but respondents strenuously denied a request to admit this [CX 61(h)]. The complaint itself attempts no definition.

² The complaint also charges (in Par. 10 and again in Par. 12) that the same practices constitute unfair methods of competition, presumably with other dunnings, but this aspect of the complaint was never pursued and we disregard it.

- (1) misrepresenting its dunning letters as telegrams;
- (2) misrepresenting "the nature, import, purpose or urgency" of any communication, except in the case of a truthful and non-conspicuous reference to or implication of urgency;
- (3) misrepresenting itself to debtors as an "independent debt collection agency" engaged in "typical debt collection activities;" misrepresenting that steps "may or will" be taken to initiate legal action, unless payment is received; misrepresenting that respondents will take action to adversely affect the debtor's credit record with a consumer reporting agency or any third party or "otherwise misrepresent the impact or effect of non-payment upon the debtor's credit record "unless payment be received; misrepresenting that immediate collection action such as filing suit will be taken unless payment be received within the time specified by respondents, or "otherwise misrepresent the imminency of any action that respondents "may or will" take *provided, however*, that factual correctness of a misrepresentation shall be a defense to any charge of violating any of the prohibitions of (3);
- (4) failing to state clearly and conspicuously in any dunning letter that:

*This communication is a reminder of creditor's claim. Capax, Inc. does not take any legal or other action against the debtor during this letter writing series.*³ (emphasis added) [5]

- (5) undermining the affirmative disclosure provision of (4) above by including any negative or inconsistent statement in dunning letters;
- (6) placing in others' hands the means to make any of the representations forbidden in (3) above or to defeat (4) or (5) above;

The proposed order also contains routine provisions for circulation of the order; notification of structural corporate changes by respondent; and notification of changes in individual respondents' employment or business affiliations.

B. JOINT ANSWER

The joint answer of Capax and Messrs. Goodman and DeFelice (hereafter "the joint answer") was filed on 12/18/75, pursuant to two extensions of time beyond the normal 30 days within which to answer. The joint answer admitted most formal matters pleaded in the complaint but took absolute or qualified issue with most of the allegations of substance, including those regarding the LETEGRAM

³ A long and complex proposed proviso would avoid operation of the second sentence of the above disclaimer where suit or other action actually follows threat, in certain circumstances.

(Pars. 4, 5, 6) and the dunning misrepresentations alleged in Pars. 8 and 9, although we note that it admitted the "literal truth" of Par. 7's illustrative excerpts from Capax' dunning letters.

In specific response to the four key charges of Complaint Pars. 8 and 9 and the LETEGRAM allegations of Pars. 4-6, the joint answer elaborated respondents' position as follows.

(1) *"Collection Agency" Image* (re Complaint Pars. 8.1 and 9.1)

It is admitted that Capax is an "independent debt collection agency" in the sense that it is "neither owned nor controlled by any of [its] clients" (which is not, however, the way complaint counsel use the term⁴). It further pleads that it now engages in such "typical debt collection activities" as "making personal demands for payment and/or filing suit." It is only said to [6] have done so, however, since about 5/1/75, when, in response to the Commission's proposed complaint (received 12/31/74), Capax is alleged to have started a "hard core" "collection department" which now makes phone calls and arranges with attorneys to commence litigation in the absence of contrary instructions from the creditor, in order for Capax to become a "full service" collection agency.

(2) *Threats of Suit* (re Complaint Pars. 8.2 and 9.2)

Capax denies representing to delinquent debtors that legal action "will" be taken but pleads that in fact respondents do take steps to see that legal action is initiated, if the debt remains unsatisfied, in the absence of contrary instructions from the creditor. [The actual taking of such steps, however, apparently refers only to the period since about 5/1/75, as explained in the previous paragraph.]

(3) *Threats to Credit Standing* (re Complaint Pars. 8.3 and 9.3)

The joint answer flatly denies ever having referred to any "consumer reporting agency," directly or by implication, in any of its dunning activities, although pleading that it has sometimes mentioned the effect of non-payment on debtors' credit standing" with their own creditor(s)."

(4) *Threats to Enforce Immediate Action* (re Complaint Pars. 8.4 and 9.4)

The joint answer denies that respondents have ever specified periods within which suit "will" be filed.

(5) *Alleged Deceptive Appearance* (Complaint Pars. 4-6)

The joint answer admits mailing various printed materials to delinquent debtors to induce payment of their debts but describes the type of envelope and form labeled LETEGRAM as magenta and gray rather than red and white (the complaint's description). [7] (Par. 4 and Exhibits D-3 and D-4 to joint answer).⁵ It denies any representation, express or implied, that LETEGRAMS are "telegraphic communications" or are "of an urgency on a par with that of a telegram" but pleads that such envelopes and forms "are used to imply urgency" (and, indeed, sometimes say so, as in Exhibit D-4 to the joint answer). The word "urgency" is said to refer to the creditor's need to maintain his working capital and retain his debtor's patronage; the debtor's need to keep up his standing with the creditor; the country's interest in promoting interstate commerce; and the interest of all consumers who pay their bills in not being saddled with the inevitable expense to them when other consumers fail to pay for what they get. (Par. 5). Accordingly the joint answer denies that recipients of Capax' LETEGRAMS are misled as to their "nature, import, purpose and urgency" (Par. 6).

(6) *Deceptiveness and Unfairness* (Complaint Pars. 11-12)

The joint answer flatly denies having taken any action or made any statement with a tendency or capacity to deceive or mislead anyone and asserts that any monies paid by debtors whom Capax may have dunned were paid "because a valid debt was overdue to the named creditor by the recipient of the letter, phone call or legal action." (Par. 11) Finally, it denies: (1) *engagement* in the alleged deceptive acts and practices; (2) *prejudice or injury* resulting from such acts and practices; and (3) *deceptiveness or unfairness* of such acts and practices under Section 5 of the Federal Trade Commission Act. (Par. 12)

C. RESPONDENT BRICKER'S ANSWER

On 12/23/75 individual respondent Norman Bricker filed his own answer to the complaint pursuant to extensions of time granted

⁵ In Par. 6 of the joint answer respondents allege, with details, that the LETEGRAM was "specifically designed so as not to be confused with a telegram."

therefor. Its allegations generally follow those of the joint answer, with minor differences, except for two matters. He consistently denied knowledge of Capax' affairs after 3/18/75, when [8] he left the company, and even as to the period prior thereto he denied that, as charged in Complaint Par. 1, he "formulated, directed and controlled the acts and practices set forth in the complaint." (Bricker's Answer, Par. 1).

D. PRE-TRIAL PROCEEDINGS

(1) *Administrative Law Judge*

This matter was originally assigned on 9/30/75 to Hon. Thomas F. Howder, Administrative Law Judge, for hearing and decision. In view, however, of Judge Howder's opinion that he was disqualified to sit in this matter, it was reassigned on 10/31/75 to Paul R. Teetor, another administrative law judge, who has taken all testimony, received all evidence and performed all other duties provided by law for the hearing and decision of such a matter.

(2) *Service and Appearance of Parties*

Service of the complaint was made on respondents by delivery via registered mail on the following dates:

Capax, Inc.	10/31/75
Joseph DeFelice	10/31/75
Arnold Goodman	10/31/75
Norman Bricker	11/13/75 ⁶

By letter dated 11/11/75, Robert Field Stockton, Esq., renewed an earlier entry of appearance during pre-complaint proceedings by the firm of Segal & Stockton of Philadelphia, Pennsylvania for respondents Capax, Inc., Joseph V. DeFelice and Arnold Goodman in this matter. Other members of that firm who have since appeared with Mr. Stockton are David Lyle Segal, Esq. and Steven A. Segal, Esq. At the same time he (Stockton) withdrew his earlier appearance for respondent Norman Bricker, who thereafter, on 11/21/75 appeared by a different attorney, Barbara Van Horn Colsey, Esq., of Delanco, New Jersey. [9]

Counsel who have appeared in support of the complaint in this matter are Alan D. Reffkin, Esq., Carthon E. Aldhizer, Esq. and John

⁶ Secondary service was made on respondent Bricker because the original service may have been defective.

r. LeFevre, Esq. all of the Commission's Bureau of Consumer Protection.

(3) *Prehearing Conference (12/23/75)*

Following the filing of respondents' Answers on 12/18/75 as noted above, a prehearing conference was convened in Washington, D.C. on 12/23/75 for opening statements by counsel to familiarize the administrative law judge with the parties' positions and for scheduling of further prehearing procedures, both of which were accomplished. For details of discovery schedule see Prehearing Order No. 1, (12/24/75.)

At the conference a motion which had been filed on 12/5/75 by respondents to sever the trial of respondent Norman Bricker from the trial of all other respondents was denied from the bench on the authority of Rule 20(b) of the Federal Rules of Civil Procedure for failure to show likelihood of sufficient delay or prejudice to justify severance.

(4) *Pre-trial Briefs*

Pre-trial briefs for early sharpening of the issues were filed by complaint counsel on 1/9/76, by respondent Bricker on 2/2/76 and by other respondents on 2/3/76.

(5) *Motion for Protective Order*

On 3/15/76 respondents Capax, DeFelice and Goodman moved for a "protective order" appointing an "independent canvassing agent" to determine in advance whether any debtor that complaint counsel wanted to interview really remembered anything about Capax and its activities before being interviewed by counsel. Complaint counsel filed an opposition on 3/17/76 and the motion was denied on 3/22/76.

(6) *Discovery and Turnover Schedule*

By May of 1976 the original schedule for pretrial preparation had fallen badly behind without fault on [10] anyone's part, largely because of a massive canvass by complaint counsel of some two thousand debtors whom Capax had dunned. The schedule for discovery of evidence and turnover of each party's case was accordingly revised in Prehearing Order No. 3 (5/25/76) with the aim of having the case ready for trial by Fall and trial was tentatively set to begin 9/13/76.

(7) *Complaint Counsel's Requests for Admissions*

Complaint counsel on 6/11/76, at the time of turning over their case to respondents, filed requests for both factual and documentary admissions by Capax which requests were answered on 7/13/76 by respondents Capax, Inc., DeFelice and Goodman, who made many of the requested admissions but qualified some and denied others. See CX 60(a)-(r) and CX 61(a)-(i). The substantive admissions were later reviewed and approved individually (with only minor modifications) in open court. See Tr. 225-245. Documentary admissions were generally referred to when the relevant document was offered into evidence. Respondent Bricker's counsel received the same requests, although without illustrative attachments. (Tr. 92.) Although absent when these admissions were reviewed and generally approved in open court on 10/27/76, she assured the court that she felt her client (Bricker) was adequately represented by Capax' attorneys, Messrs. Stockton and Segal, for that session. (Tr. 301.)

(8) *Re-scheduling of Hearings*

On 9/10/76 the hearing originally scheduled for 9/13/76 was rescheduled to begin 10/26/76, in order to extend respondents' time to turnover their case to complaint counsel from 8/20/76 to 9/28/76 and a preclusion order was entered with respect to any such evidence not in complaint counsel's hands by the 28th.

(9) *Respondents' Requests for Admissions*

On 10/4/76 respondents Capax, Inc., DeFelice and Goodman, with the turnover of their case, filed requests for both factual and documentary admissions, which [11] requests were answered on 10/13/76 by complaint counsel, who on 10/13/76 made some admissions but objected to many others. Their answer was never made an exhibit during the later hearing but is on file with the Secretary.

(10) *Motion to Change Venue*

Also on 10/4/76 respondents Capax, Inc., DeFelice and Goodman⁷ filed a motion for a "change of venue" to move the up-coming hearing from Washington, D.C. to Philadelphia, Penn. on the ground that that would be a more convenient location for everyone but complaint counsel. Opposition by complaint counsel was filed on 10/8/76 and on 10/15/76 the motion was denied.

⁷ On 10/12/76 Ms. Colsey filed a "supporting affidavit" for respondent Bricker.

(11) *Motion for Appointment of Expert Witnesses*

Also on 10/4/76 respondents Capax, Inc., DeFelice and Goodman⁸ filed a motion for appointment of expert witnesses for respondents at Commission expense (estimated at about \$5000) and asked incidentally for *in camera* treatment of this and all other pending motions. On 10/6/76 the administrative law judge denied the request for *in camera* treatment, but certified the motion for appointment of expert witnesses to the Commission without recommendation, as a matter of administrative discretion. The Commission did not act on this certification until after the hearings had been held. At the close of the hearings on 11/4/76, respondents voluntarily withdrew this motion, despite an offer by the administrative law judge to hold the record open in case the Commission should decide the motion in favor of said respondents (Tr. 1009, 1014, 1020). On 11/5/76 the Commission was formally notified of said respondents' withdrawal of their motion and on 1/24/77 the Commission, "being satisfied that respondents voluntarily relinquished their request for appointment of expert witnesses," denied the motion as "moot." [12]

(12) *Motion To Disqualify Administrative Law Judge*

Also on 10/4/76 respondents Capax, Inc., DeFelice and Goodman filed a motion asking the administrative law judge to disqualify himself from presiding in this case, on authority of 16 C.F.R. 4.7, on the ground that in July complaint counsel had written one letter to the judge (with carbon copy to opposing counsel) alleging "intimidation" of complaint counsel's witnesses by respondents counsel and in September had written another letter to the Judge (again with carbon copy to respondents' counsel) charging "intimidation and threats to witnesses" in an anonymous phone call which complaint counsel suspected must be attributed to "a representative of Capax." Complaint counsel's opposition was filed on 10/8/76. On 10/14/76 the administrative law judge, having elected not to disqualify himself within 10 days, certified the motion to the Commission as required by Rule 3.42(g)(2), explaining that the communications in question were not *ex parte* and the judge's mind had not been poisoned in any way. On 10/20/76 the Commission affirmed the judge's decision not to disqualify himself, holding that the sending of carbon copies prevented the communications from being *ex parte* and that no showing had been made that the judge's ability to conduct a fair trial had been prejudiced in any way.

⁸ On 10/12/76 Ms. Colsey filed a "supporting affidavit" for respondent Bricker.

Initial Decision

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E. TRIAL

(1) *Witnesses*

Evidentiary hearings in this matter were held in Room 332 of the Federal Trade Commission Building in Washington, D.C. on October 26, 27, 28 and 29 and in Room 7314 of the Old Star Building in Washington, D.C. on November 3 and 4, 1976. Witnesses called by complaint counsel, the dates of their testimony and references to the relevant transcript pages are as follows:

<i>Date</i>	<i>Transcript Start</i>	<i>Name</i>	<i>Home Address</i>
<i>Witnesses called by complaint counsel were as follows:</i>			
10/26/76	p. 116	Peggy Jean Thom	Mill Lane Columbus, N.J.
	p. 146	Charlene Nield	2745 29th St., N.W. Washington, D.C. [13]
10/27/76	p. 245	Rufus Hallett Gardner III	1041 St. Paul St. Baltimore, Md.
	p. 307	Melinda Riegler Gravatt	230 Conwell St. Seaforth, Del.
	p. 351	Jackie Dean Gordon	10351 S.W. 5th St. Miami, Fla.
10/28/76	p. 410	Lawrence Vineburgh	4201 Cathedral Ave. N.W. Washington, D.C.
	p. 447	Rossana Nardizi	Federal Trade Commission Dallas, Texas
	p. 490	Concepcion Viera	1012 W. 24th St. Hialeah, Fla.
	p. 505-A	Virginia Cook	Box 142 Delmar, N.Y.
10/29/76	p. 501	Arnold Goodman	41 Crestview Dr. Willingboro, N.J.
11/3/76	p. 654	Lillian K. Zuccarelli	22 Lenmar Dr. Trenton, N.J.

Witnesses called by respondents were as follows:

11/3/76	p. 742	Arnold Goodman	41 Crestview Dr. Willingboro, N.J.
11/4/76	p. 895	Andrea Absalom	1306 Cooper St. Beverly, N.J.
	p. 962	Anthony V. Pavlovich	413 Stonington Rd. Silver Spring, Md.
	p. 998	Norman Bricker	Millside Manor Delran, N.J.

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Initial Decision

11/4/76

p. 1011

Arnold Goodman

41 Crestview Dr.
Willingboro, N.J.
[14](2) *Evidentiary Rulings*

Most objections to proposed exhibits and testimony were ruled on as soon as made but in one instance the ruling was taken under advisement and must be made now.⁹

Debtor Witness Gordon retained counsel in connection with the underlying dispute which led to his being dunned by Capax and again in connection with Capax' dunning letters. The incident is developed at Tr. 356-372. After receiving Capax' initial mailing Gordon and his lawyer agreed that the lawyer would write Capax a letter warning that this was a disputed claim and that any credit information released by Capax should bear such a notation. See CX 62(b) ident. and Tr. 355, 357-8, 361. The trouble was that complaint counsel had no better copy of the letter than CX 62(b) ident., which was Gordon's unsigned carbon copy of an assumed original letter from the lawyer (one Nelson) to Capax, and they did not want to bring the lawyer all the way from Miami to identify this piece of paper.

CX 62(b) ident. was offered for the twin purposes of corroborating witness Gordon's reaction (fear for his credit standing) when he received Capax' first dunning letter [CX 62(a)] and to show Capax' inaction in response to the lawyer's letter (Tr. 370-371). Respondents objected vigorously that it was hearsay evidence, that a search of their own files led them to doubt that they had ever received the assumed "original" and that they had had inadequate notice of complaint counsel's intent to offer this copy if respondents would not or could not produce an original.

We are satisfied that the circumstances provided good cause for the timing of complaint counsel's offer but we have concluded that in the absence of testimony by Gordon's lawyer as to his actually sending off the letter to Capax, CX 62(b) ident. should be received only for the limited purpose of corroborating the feeling of fear for his credit standing to which Gordon testified on the stand. With that limitation, CX 62(b) is received in evidence *nunc pro tunc* as of 10/27/76. [15]

(3) *Motion for Direct Verdict*

At the close of complaint counsel's case in chief on 11/3/76 respondents moved for a directed verdict, which we treat here as a motion to dismiss the complaint for failure to make a *prima facie* case.

⁹ A recent brief denominated a "motion" opposing admission of CX 62(b) ident. submitted by respondents under date of 4/13/77 has received due consideration, as has complaint counsel's "Response, etc." dated 4/20/77.

Respondents filed a brief thereon and both sides argued the motion orally (Tr. 682-701). By virtue of Rule 3.22(c), we deferred acting on this motion until after the close of the case for the reception of evidence. (Tr. 740.) In view of our disposition of this case, said motion is now dismissed as moot.

F. POST-TRIAL MATTERS

There was some delay in the receipt of transcripts of the hearings and corrections required additional time. On 12/28/76 undersigned issued a formal order closing the record as of 12/13/76 in accordance with earlier informal discussions. On 1/24/77 both complaint counsel and counsel for respondents Capax, Inc., DeFelice and Goodman filed their proposed findings of fact, conclusions of law and order, with supporting briefs. Replies by respondents and complaint counsel were filed on 2/3/77 and 2/4/77 respectively. Counsel for respondent Bricker on 1/4/77 wrote the Commission, adopting his co-respondents' proposed findings with one exception and one addition and we have treated this letter as properly filed. On 3/8/77 the Commission granted the administrative law judge an extension of time until 4/13/77 within which to file this initial decision and on 4/13/77 extended said filing date to 4/22/77.

II

FINDINGS OF FACT

Respondent Capax

1. Respondent Capax, Inc. (hereafter sometimes "Capax"), until 1/21/75 known as Continental Credit Corp. [CX 30(b)], is a corporation organized on 2/2/72 [CX 60(n); CX 61(h)] which is still existent and doing business under and by virtue of the laws of the State of New Jersey, with principal office and [16] place of business at the intersection of Route 130 and Beverly-Rancocas Road, Willingboro, New Jersey. [Complaint ¶ 1; Answers, ¶ 1.] In these findings the name "Capax" is used to denote this corporation at any time of its existence, including the period when it was known as Continental Credit Corp.

Respondent DeFelice

2. Individual respondent Joseph V. DeFelice was a major shareholder of Capax, owning about 31 percent of its shares, [CX 5] until he sold his interest in Capax to respondent Arnold Goodman in July 1976.

from February 1972 to July 19, 1976 [Tr. 502]. From the start of the corporation in February 1972 until said DeFelice's resignation in July 1976 as an officer and director [Tr. 220] he was a principal owner and officer of Capax, who formulated, directed and controlled its acts and practices, including those set forth in this complaint. [Complaint, ¶ 1 and Answers, ¶ 1.] His present association with Capax is that of a vendor of data processing services (Tr. 504).

Respondent Goodman

3. Individual respondent Arnold Goodman has been a major shareholder of Capax since it was organized in February 1972, owning about 31 percent of its shares [CX 5] until he purchased respondent DeFelice's interest in July 1976, thus raising his (Goodman's) holdings to about 62 percent of the corporation's total shares. [Tr. 503-504]. Respondent Goodman has been President of Capax since February 1974 [CX 61(h)]. As a principal owner and officer of Capax he has formulated, directed and controlled its acts and practices, including those set forth in this complaint. [Complaint ¶ 1 and Answers ¶ 1.]

Respondent Bricker

4. Individual respondent Norman Bricker was a major owner of stock (31 percent) [CX 5 and Tr. 1003] and [17] Executive Vice President of Capax from the time of its organization in February 1972 until March 19, 1975, when he terminated his connection with the corporation [CX 6(a) and Tr. 1000]. As a principal owner and officer of Capax he generally participated in the formulation, direction and control of its acts and practices. [Letter of Bricker's counsel to Secretary of Commission, filed 2/4/77, in lieu of formal proposal of findings.]

5. Despite respondent Bricker's denial that he participated in formulating the language used in any of Capax' dunning letters (Tr. 999, 1004) and assertion that he was in charge of selling a service, not letters, except as part of the service (Tr. 1003-1004), there was contrary testimony by respondent Goodman that Bricker was instrumental, with his two "partners" in putting together at least dunning series CX 10 and CX 11 [Tr. 507, 607, 640, 644, 648-9]. We now find that in addition to his overall responsibility as a major owner, Executive Vice President and Sales Manager, respondent Bricker actually participated with other respondents in many of the acts and practices set forth in this complaint.

Capax' Business

6. Since the inception of Capax' business, it has been engaged in

advertising, offering for sale and selling a service to assist creditors in the collection of alleged delinquent debts. [Complaint ¶ 2 and Answers ¶ 2.] This service has consisted primarily (and until about 3/18/78 solely) of a "flat rate" arrangement for mailing by Capax of a series of dunning notices to alleged delinquent debtors at regular intervals [Complaint ¶ 2 and Answers ¶ 2; Tr. 506-7]. The parties have stipulated that a "flat rate debt collection service" involves "a sale at a specified fee (flat rate), non-commission basis of a service constituting (constituted?) in part of the preparation and sequential mailing of a series of notices. There is no legal assignment of the claim of debt by the creditor to the seller of the service during the course of the service." (Tr. 243-4). [18]

7. Capax' authority to act for creditors is not unlimited [Tr. 528]. It is derived from an "Authorization To Start Service" (CX 27) and a "Receipt" (CX 33). It offers clients several different kinds of dunning service. It has long and short versions of a "strong" series, a "diplomatic" series, a "bad check" series and a Spanish language series. See the following series:

- CX 10(a) - "Diplomatic" (long and short)
- CX 11(a) - "Strong" (long and short)
- CX 12(a) - "Spanish Language, Diplomatic" (long and short)
- CX 13(a) - "Spanish Language, Strong" (long and short)
- CX 14(a) - "Special" (bad check; reinstate) (strong and diplomatic)
- CX 15(a) - "Special" (bad check, reinstate) (strong and diplomatic)
- CX 16(a) - "Special" (bad check, reinstate) (strong and diplomatic)
- CX 17(a) - "Diplomatic" (for reinstatement after default)
- CX 18(a) - "Strong" (for reinstatement after default)
- CX 19(a) - "Spanish Language, Diplomatic" (for reinstatement after default)
- CX 20(a) - "Spanish Language, Strong" (for reinstatement after default)
- CX 21(a) - "Bad Check"

Capax' charges were about \$3.84 per series when the business started and later about \$4.25 [Tr. 512, 794-796].

8. Capax sells its dunning service as part of a more comprehensive "credit control system consisting of sending out the letters, generating reports and advice and helping to control the receivables for the individual company" [Tr. 504, *et seq.*]. It advises the creditor concerning the taking of further stronger actions when it returns a list of debtors unsuccessfully dunned. (Tr. 562, 603, 766-8, 798-800, CX 4.) Its "prime function" is to get the money paid to the creditor.

selling letters." [Tr. 513]. [19] Complaint Counsel's Reply Findings [Par. # 6] stress the "self-serving" nature of Capax' testimony about analyzing delinquent accounts receivable and advising creditors how to minimize their losses, etc. However, complaint counsel offered no contrary testimony by creditor-clients or others and we see nothing inherently improbable about the testimony of Mr. Goodman, the principal witness on this subject [Tr. 504-516].

9. Capax is licensed to receive payments in the five or six states where it can do so [Tr. 761] but debtors are always requested, at least in flat-rate dunning, to make payment directly to their creditors [See CX 10 series, *et seq.*] Despite this caution, however, about 2 percent of all collections (about \$20,000 in the 1973 period) (Tr. 241) are usually sent to Capax, which immediately forwards such monies to the creditor-client [Tr. 881-882]. Clients have never objected to getting their money this way [Tr. 529].

10. Since about 5/1/75 Capax has offered an additional and more forceful collection service, which it calls its "second phase" for those "hard core" cases where the flat rate letter writing service has been unsuccessful in effecting collection of a debt. [Tr. 555-578, 790, *et seq.*] As part of "Phase II" dunning, phone calls may be made to the debtor [Tr. 553] and the claim may even be turned over to an attorney for suit, unless the creditor gives Capax specific orders to the contrary [Tr. 555, 802]. "Phase II" also differs from flat-rate dunning in that there is a more expensive, percentage fee for this supplementary service [Tr. 796] and the debtor is asked to pay Capax rather than the creditor [Tr. 556].

11. Even now, however, Capax' contractual arrangements with its creditor-clients do not provide for it to bring suit, either in its own name or the creditor's name [Tr. 530] It has, in fact, never brought such a suit against anyone [CX 60(q)-CX 61(j)]. It is not authorized by law to bring such suits [Tr. 556, 793, 794]. State laws allow only the creditor to sue the debtor [Tr. 793-794] and Capax does not ordinarily take assignments of the debts referred to it [Tr. 824]. [20]

Interstate Commerce

12. All Capax' forms of notices sent to debtors in connection with its flat-rate debt collection service have been mailed from its home office in Willingboro, New Jersey. [CX 60(p) and CX 61(i)]

13. Capax sells and at least since February 1974 has sold its flat rate debt collection service thru its salesmen, all of whom sell on commission (Tr. 779-800), in the States of New Jersey, New York, Pennsylvania, Massachusetts, Vermont, Maryland, Florida, Louisiana, Rhode Island, Michigan, New Hampshire, North Carolina and the

District of Columbia [CX 60(o) and CX 61(i)] and thru so-called "charter agents"¹⁰ in the same states plus Ohio less New Hampshire and Rhode Island [CX 60(p) and CX 61(i)].

14. The approximate dollar volume of sales of Capax' flat rate debt collection service between 2/2/72 and 1/25/75 was not insubstantial [CX 60(p) and CX 61(i)] nor was its dollar volume of sales from 1/26/73 to 6/30/75 [CX 60(p) and CX 61(i)]. Between 1/1/73 and 5/6/74, for example, its dollar volume of sales was about \$700,000 [CX 1(e); CX 3(b)]. Collections realized by creditor-clients were of a higher order: e.g. approximately \$10,000,000 during the 12 months ended October 1973 (Tr. 881-882).

15. Capax' dunning of alleged debtors in many states from its headquarters in New Jersey by use of the U.S. mail constitutes and has constituted at all relevant times a course of trade in and affecting commerce, as "commerce" is defined in the Federal Trade Commission Act [Complaint ¶ 3, Answers ¶ 3].

Alleged Deceptive Appearance

16. From the inception of the business in February 1972 until October 1973 (a little more than three months before receiving notice of the investigation that preceded issuance of this complaint) when an [21] "impact" dunning message seemed called for, Capax used something that looked a great deal like and, indeed was actually captioned a TELEGRAM. This will readily appear from inspection of the initial and certain other letters in each of the CX 17, CX 18, CX 19, CX 20 and CX 21 series as well as from inspection of CX 22(b), a sample of the envelopes in which such letters were sent. All are admitted to be representative samples of forms and envelopes sent to debtors by Capax via the U.S. mail prior to 10/10/73, about which time the use of this TELEGRAM form was abandoned by Capax on advice of counsel as a result of the proposed consent order (later rejected) in the Commission's still pending proceeding in the matter of *Trans American Collections* [CX 60(q) and CX 61(j)].

17. Although none are, in fact, telegraphic communications [CX 60(r) and CX 61(j)] the administrative law judge has little doubt that the word TELEGRAM in large, standout type on a yellow paper (with brown bar across the top), of the size and shape of a Western Union message form, and printed in similar type, would be hard for many people to distinguish from a real telegram. This complaint, however, makes no charge of deception with respect to these "TELEGRAMS," presumably because of the abandonment of their use in October 1973.

18. Since then Capax has used a different appearing form called a LETEGRAM for its "impact" dunning letters. Representative samples of letters sent out by Capax to debtors via the U.S. mail in the course of its flat-rate service since 10/10/73 are found in the initial and other letters of the CX 10, CX 11, CX 12, CX 13, CX 14, CX 15 and CX 16 series of exhibits [CX 60(q) and CX 61(i)] and CX 22(c) is a sample LETEGRAM envelope. [Ibid.]

19. As will readily be seen from visual inspection, the LETEGRAM format constitutes a major change, not only in its very prominent caption — now LETEGRAM instead of TELEGRAM— but in its color scheme: a gray paper with a striking reddish purple bar across the top, which we find would be most unlikely ever to be mistaken for a Western Union telegram. [22]

20. Complaint counsel contend that this LETEGRAM on gray paper with a reddish purple bar is still confusingly similar to a real telegram, because, they claim [CPF 11], 3 of their 9 debtor witnesses testified that they were thus confused and a Massachusetts state official has refused to authorize use of LETEGRAMS in that state as "potentially deceptive" [CX 31(a)]. We start, however, with a contrary view from our own inspection of the documents, fortified by the adverse inference we must draw from Complaint Counsels' failure to ask 6 of their 9 witnesses — sifted from some 2000 prospects [Prehearing Order # 3] — whether they really believed the LETEGRAMS they received from Capax were telegrams.

21. As for complaint counsel's three alleged supporters among the witnesses, the first, Ms. Gravatt, was neither shown nor questioned about a LETEGRAM and, indeed, affirmatively testified that she received a yellow paper captioned TELEGRAM, identifying CX 21(b) and CX 22(b) (both with TELEGRAM format) as similar to what she received [Tr. 310–311]. Of the two other witnesses relied on to establish that some people may confuse LETEGRAMS with TELEGRAMS, one, Ms. Cook, had for 16 years been the manager of a collection agency in Albany [Tr. 505–A] where Capax, too, maintains an office [CX 11(r)] and she stressed her humiliation at getting her first dunning letter from a collection agency [Tr. 513–A], a background we cannot disregard in weighing her testimony that she was "not in the habit of getting telegrams," "didn't notice it said LETEGRAM" and "thought it was a telegram." [Tr. 508–A and 509–A]. The only other supporting witness, Ms. Nield, a student of consumer economics [Tr. 165], testified for the prosecution that she had gotten an "initial impression" that her LETEGRAM "appeared to be a telegram or a Western Union letter or gram or whatever" [Tr. 148–149]. Whether her "initial impression" was more than momentary was not brought out.

22. We find that Capax' LETEGRAM, as distinguished from its earlier TELEGRAM, is unlikely to deceive ordinary debtors into believing they have received a real telegram. Moreover it is unlikely to deceive any [23] debtor more than momentarily and certainly not long enough to affect any action. That the use of LETEGRAMS is viewed as deceptive by a Maine official [CX 31(a)] — although not in any of the dozen other states where Capax operates — cannot control our finding here.

23. Our finding that the ordinary debtor is not likely to be deceived by a LETEGRAM into thinking he has received a real telegraphic message disposes also of the second-step charge of this complaint that an appearance simulating telegraphic or other similarly urgent communications, "*by virtue of said simulation*" tends to mislead the recipient as to its "nature, import, purpose and urgency" (Complaint, ¶ 6). Even though the appearance of a dunning letter may be made similar enough to a telegram to stimulate a conditioned emotional response of urgency and importance, as long as the recipient is mentally aware that he got a gimmick, not a telegram, there is not the deception which turns a Harvard Business School market research problem into a Federal Trade Commission unfair trade practice case. In the absence of a finding of capacity or tendency to deceive, why one method of persuasion is more effective psychologically than another is not a concern of this Commission. Accordingly, we find that the appearance of Capax' LETEGRAM did not tend to *deceive* debtors as to the "nature, import, purpose or urgency" of the message therein.

The "Collection Agency" Image

24. Complaint Pars. 9.1 and 9.2 allege that by styling itself a "collection agency" Capax, a mere dunner, tries to deceive debtors into believing Capax is a full-line¹¹ collection agency which may file [24] collection suits and take other actions Capax does not (or did not) take before 5/75. It is charged, in short, that Capax is a sheep in wolf's clothing.

25. The extracts from its dunning letters alleged to prove that it represents itself as a "collection agency" are found in CPF # 50. Complaint counsel point to the use of the phrase "CREDIT CONTROL AND COLLECTION" in most of Capax' non-TELEGRAM letterheads (See CX 10 series thru CX 21 series) plus use of the words "Collection Dept." under

¹¹ Complaint Par. 8.1 does not use the word "full-line" but seems to use the word "independent" in that sense. Both sides do use the word "independent" but use the word in different senses. The normal meaning, we would think, is respondents' meaning: that Capax is not owned or operated by any creditor, as was the case in *Wm. H. Wise Co., Inc.*, 53 F.T.C. 408 (1956); *affd. per curiam*, *Wm. H. Wise Co., Inc. v. F.T.C.*, 246 F.2d 702 (D.C. Cir., 1957), *cert. den.*, 355 U.S. 856 (1957). By "independent," however, complaint counsel apparently mean an agency to whom a creditor has delegated the maximum possible authority to collect its debts. There was no evidence of industry terminology in this

the signature in various communications [CX 19(g)-(l), CX 11(h)-(j), CX 16(b)-(c), CX 17(g)-(j), CX 18(f)-(h)]. We find these examples clearly establish that Capax represents itself as a "collection agency."

26. On the other hand, we are not convinced that such a representation is false. It all depends on how one defines the word "collection" and the Commission's own definition [16 C.F.R. 237.0(f)] really begs the question. Defined literally, it might include only businesses that receive payments from debtors but Capax would pass that test. Although its dunning letters regularly ask the debtor to make payment directly to the creditor, there are always some debtors who channel payment thru Capax. These receipts amounted to about \$20,000 or .2 percent of all collections in a period of a year. [Tr. 881-882] Capax is officially licensed to receive such payments wherever it can lawfully do so. [Tr. 761] [25]

27. If "collection" must include the bringing of collection suits, then it would have to be acknowledged that Capax has never been a "collection" agency, for it has never brought suits, either for its clients or in its own name [Tr. 530, CX 60(e)-CX 61(j)]. But complaint counsel, on whom always rests the burden of proof, offered none that the bringing of "collection suits" is viewed in the industry or elsewhere as a *sine qua non* for a "collection agency."

28. The significant fact is that Capax' principal activity, dunning debtors (by mail during its entire existence and by telephone since early 1975) is a very important element of the overall "collection process," as it is called by a Maine official in one of complaint counsel's exhibits [CX 31(h)]. Indeed, complaint counsel themselves find it natural enough to refer to Capax' "flat rate debt *collection* service" (emphasis added). [See CPF, p. 7 (heading) and CPF # 24 (last full line).] One of their witnesses, a 16-year veteran of the collection business, called Capax "a collection agency or whatever" (Tr. 513-A). It seems to us that a dunning agency is as much a part of the "collection process" as a collection attorney or others who may perform other of the various functions which make up the whole collection process. Accordingly, we find that simply by styling itself a "collection" agency on letterheads or under signatures Capax did *not* misrepresent the true state of things and therefore deceived no one.

29. Complaint counsel do not, however, rely entirely on Capax' *expressly* styling itself a "collection" agency. In their proposed findings (CPF # 50, 53) they cite extracts from Capax dunning letters which they assert would *imply* to debtor recipients that the alleged debt in each case had been referred to respondent as a third party, totally "independent" of the creditor, which would engage in any action necessary to induce payment of the alleged debt (CPF # 51) or as an

assignee of the account (CPF # 53). We find, however, that the language of the extracts cited in support of this argument was simply a natural introduction and/or explanation of why Capax had to get in touch with the debtor and we find further that it did *not*, in fact, operate to deceive debtors, as Complaint Counsel assert. Indeed, the cited extracts [26] of debtor testimony on which complaint counsel rely to show actual deception (in order to establish a capacity to deceive) affirmatively establish that it was *other* language in the dunning letters than these introductory explanations which allegedly led them to believe they would be sued, etc. Concrete examples will help to make this clear.

30. The testimony of Ms. Thom (Tr. 136) that she was led to fear suit by Capax is cited in support of the deceptive nature of three introductory explanatory passages quoted in CPF # 51:

CX 18(b) et al.: [Creditor] has turned over to us their claim against you for \$9999.99. . .

CX 18(c) et al.: You have failed to discharge the debt submitted to us for action by [Creditor]. . .

CX 18(d) et al.: [Creditor] has charged us with the responsibility of assisting the liquidation of their past due accounts. . .

It is complaint counsel's theory that such introductory explanatory language misled Ms. Thom and other debtors into believing they were being attacked by a full-line collection agency which could bring suit and do other frightening things that Capax could not do. On the witness stand Ms. Thom did, indeed, insist that despite absence of the word "suit" in any of the three dunning letters she somehow got the idea she was going to be sued.

31. When shown such letters, however, the language in which Ms. Thom took refuge was no statement that the claim had been turned over to Capax but that Capax was going to do certain things. In *CX 18(b)*, for example, the language to which she looked was: "If not paid within one week, to liquidate this matter we will be forced to recommend action." (Tr. 128) In *CX 18(c)* she pointed to the language "It is the intention of our client to exhaust every legal means at their disposal." (Tr. 128) In [27] *CX 19(d)* she referred to the language: "And of the fact that should it continue, all possible legal means will be taken to collect it," etc. (Tr. 130). Plainly it was the mention of the creditor's turning the claim over to Capax which led Ms. Thom to believe she was going to be sued.

32. The case of debtor witness Nield is similarly cited. She was shown *CX 14(b)*, which reads in part:

And your account has now been turned over to us for action.

Asked what this meant to her when she received it, Ms. Nield replied: "Just that, that [Capax] was now collecting from me, that Sears had. . . contacted Capax to obtain payment" (Tr. 171). Yet when asked: "Did anything in the communication [CX 14(b)] indicate suit or (adverse effect on) credit which you felt might happen?" (Tr. 150), Ms. Nield did *not* refer to the language about her account now being turned over to Capax for action, but to other language, all in a different paragraph, about "legal ramifications and the exercising of the legal means to recover the loss." (Tr. 151 and 154).

33. Debtor Witness Zuccarrelli received from Capax, a dunning letter [CX 11(c)] with the usual introductory explanation: "[Creditor] has turned over to us their claim against you for \$9999.99. . . ." It went on to say that if this account be not paid within one week Capax would be forced to recommend action, which might mean added costs, etc. Although CX 11(c) refers to the creditor's turning over his claim against Ms. Zuccarrelli to Capax, it was not to that statement but to an entirely different one that Ms. Zuccarrelli twice referred when asked what part of the letter led her to think she was about to be sued:

Q. . . . (W)hat language in that particular letter [CX 11(c)] made you believe you would be sued? [28]

A. "Recommend action which may mean added costs to you." Action, court action, is what I took it for" (Tr. 679)

34. Debtor Gravatt is another witness cited on this point in CPF # 51 and # 54. She had received CX 21(b), a dunning letter which included the words "and your account has now been turned over to us for action." When first questioned about her reaction to the letter on direct examination she testified to feeling that "someone was either going to come to my door and ask me for the money or I would have to go to Court to pay for the (bad) check." (Tr. 311). She gave as her reason for believing she would be taken to court that "it [CX 21(b)] said they had turned (the) account, or whatever, over to [Capax]" (Tr. 311). This testimony, untested, might conceivably support complaint counsel's theory that merely believing Capax to be a full-line collection agency would lead a debtor to expect to be sued, hounded, discredited, etc.

35. Persistent cross-examination, however, obtained a significant reversal of the testimony which young Ms. Gravatt had given in the hands of complaint counsel. She first decided that she would have to say it was "the whole thing" [*i.e.* all of CX 21(b)] that led her to expect either suit or a personal visit from a collector (Tr. 322). Next she conceded that her fear of a visit by someone from Capax was really

related to different words in CX 21(b), to wit, "Our client can exercise all legal means to recover the loss."¹² (Tr. 323). Finally she tied the same passage ("exercise all legal means") to her fear that if she didn't pay, she would have to go to court." (Tr. 346). The truth which emerged on cross-examination, supports the same conclusion as that of the debtor witnesses just reviewed: what concerned these debtors was not the fact of turnover but specific actions thereafter threatened. [29]

36. Witness Gardner assumed that "any action" brought would be instituted, at least, by Capax because Capax had indicated throughout that the claim had been referred to it for action. However, that is quite different from complaint counsel's argument that the recital of referral to Capax would lead a debtor to expect suit. (Tr. 263). Gardner came as close as any witness to adopting complaint counsel's theory when he said "I felt that this letter [CX 29(d)] after all, this letter coming to me from an agency is itself a threat," "Take some kind of action." However, he went on to concede that it was the document's mention of "credit" which led him to assume the threat was going to focus initially on his credit (Tr. 287). Moreover, Gardner's righteous zest for battle with his creditor [Tr. 295-296] had to color all his retrospective analyses of how he felt about Capax' tactics. We find him to be no ordinary debtor.

37. Careful study of the testimony of the few other debtor witnesses cited in CPF # 51 and CPF # 53 reveals mostly confusion, such as witness Gordon's confession that after reading CX 62(a) he was "not sure" what action was going to be taken (Tr. 355). Ms. Cook's conviction, as a professional debt collector that nobody would actually sue her over a \$20 claim [Tr. 516-A] makes her testimony as to whether she might otherwise have expected a law suit pure speculation. [CX 514A, 516A, 517A] In any event the others fail to make the convincing showing which complaint counsel's burden of proof requires.

38. We are satisfied from these illustrations as well as from simple common sense that a mere introductory explanation in Capax' dunning letters that the creditor involved had turned his claim over to Capax for its action in itself had no significant tendency to make debtor recipients assume they must be going to get the full treatment. If such debtors concluded — rightly or wrongly — that they were going to be sued and/or that their credit would be ruined, it was rather on the basis of much more pointed representations in Capax' dunning letters concerning what was going to happen to the debtor and to those more significant representations we now turn. [30]

¹² We quote the witness' version of what CX 21(b) said. The correct wording of the quoted sentence was really:

Accordingly, we think it more profitable to forego further discussion of complaint counsel's exercise in scholastic logic and proceed directly to consideration of those representations which complaint counsel's own debtor witnesses say led them to believe that they would be sued or that their credit would be ruined.

Threats of Suit

39. In proof of complaint Pars. 8.2 and 9.2, which are really the crux of this litigation, complaint counsel first point to 11 examples of texts taken from Capax dunning letters. These, they believe, would give debtors an impression that if payment were not received, suit definitely *would* be filed or some other legal action definitely *would* be taken against the debtor (by whom is not alleged). (CPF, p. 15) Our own inspection of the face of these selected texts indicates that some do and some do not support complaint counsel's assertion.

40. We find that the first half of these extracts, fairly read, made a definite threat of suit (sooner or later), conditional only on non-payment of the debt. These extracts are as follows:

... IT IS THE INTENTION OF OUR CLIENT TO EXHAUST EVERY LEGAL AVENUE AT THEIR DISPOSAL IN ORDER TO COLLECT THIS CLAIM. (sixth, second, eighth and second contacts), respectively, Diplomatic and Strong series, CX 10(i); CX 11(d); CX 17(h); CX 18(c); Spanish series, CX 12(j); CX 13(d);

IF YOU PERSIST IN NOT FOLLOWING THROUGH YOUR OBLIGATION, WE WILL HAVE TO RECOMMEND A MORE DRASTIC ACTION THAT IN THE END WILL BE MUCH MORE COSTLY TO YOU. IF THIS IS YOUR INTENTION, I WOULD RECOMMEND THAT YOU CONTACT YOUR ATTORNEY, SO HE MAY ADVISE YOU ON THE LEGAL RAMIFICATIONS YOU MAY BE EXPOSED TO. (sixth and eighth contacts), Diplomatic series, CX 10(i); CX 17(h); Spanish series, CX 12(j); CX 19(h); [31]

IT IS IMPERATIVE THAT YOU CONTACT YOUR CREDITOR TODAY TO AVOID FURTHER ACTIONS. . . (fifth, sixth and second contacts), respectively, Diplomatic and Strong series, CX 10(g)-(h); CX 17(g); CX 18(c); Spanish series, CX 12(h)-(i); CX 13(d);

... IMPERATIVE THAT SATISFACTORY ARRANGEMENTS BE MADE TO AVOID FURTHER ACTION, AVAILABLE TO CLAIMANT UNDER PROVISIONS OF STATE STATUTES. . . (seventh contact, Diplomatic series, sixth contact, Strong series), respectively, CX 10(j)-(k); CX 11(i)-(j); CX 18(h); Spanish series, CX 12(k)-(l); CX 13(k); CX 19(i); CX 20(h);

... IF YOU WANT TO AVOID UNPLEASANT AND COSTLY ACTION, MAKE IMMEDIATE PAYMENT DIRECTLY TO A-B-C- SUPPLY COMPANY

* * * * *

IT WOULD BE MOST UNFORTUNATE FOR YOU TO MAKE IT NECESSARY FOR

A-B-C- SUPPLY COMPANY TO TAKE MORE FORMAL ACTION, FOR YOU MAY BE OBLIGED TO PAY LEGAL COSTS AND INTEREST CHARGES IN ADDITION TO THE \$9999.99 YOU OWE. . . (eight contact, Diplomatic series, sixth contact, Strong series), respectively, CX 10(l); CX 18(g); Spanish series, CX 13(i); CX 19(j); CX 20(g).

YOUR REFUSAL OR NEGLECT TO SATISFY THE ABOVE LIABILITY COMPEL US TO NOTIFY YOU TO PRESENT ANY DEFENSE AGAINST THE VALIDITY OF THIS CLAIM ON FILE. YOU MAY PROTEST SAID CLAIM OR LIST PROPERTY WHICH YOU FEEL MAY BE EXEMPT, IF A-B-C- SUPPLY COMPANY OBTAIN A JUDGMENT. (ninth contact, Diplomatic and Strong series, tenth contact, Diplomatic and Strong series), respectively, CX 10(m); CX 11(n); CX 17(k); CX 18(k); Spanish series, CX 12(n); CX 13(m)-(n); CX 19(k); CX 20(j); [32]

WE ARE WRITING THIS LETTER TO INFORM YOU OF THE SERIOUSNESS OF YOUR DELINQUENCY AND OF THE FACT THAT, SHOULD IT CONTINUE ALTHOUGH ALL POSSIBLE LEGAL MEANS WILL BE TAKEN TO COLLECT IT. (third contact, Strong series), CX 11(e); CX 18(d); Spanish series, CX 13(e); CX 20(d);

41. We find, however, that the last half of the extracts, fairly read, make no such threat of suit but are only a fair reminder that the creditor *may* have to initiate legal action if payment is not forthcoming. These extracts are as follows:

IF THIS IS NOT DONE CONTINENTAL CREDIT CORPORATION CAN TAKE NO OTHER POSITION BUT TO RECOMMEND A STRONGER COURSE OF ACTION TO OUR CLIENT. . . IF THIS IS DONE THERE MAY BE ADDITIONAL COSTS TO YOU. . . (fourth contact, Strong series), CX 11(f)-(g); CX 18(e); Spanish series, CX 13(f)-(g); CX 20(e);

. . . YOU LEAVE NO OTHER AVENUE OPEN TO US. A-B-C- SUPPLY COMPANY IS ABLY REPRESENTED BY LEGAL COUNSEL WHO, IF CALLED UPON, WILL PURSUE THE APPROPRIATE LEGAL MEANS TO LIQUIDATE THE OUTSTANDING DEBT. . . SHOULD JUDGMENT BE TAKEN AGAINST YOU, THE COURT MAY CHARGE YOU FOR LEGAL COSTS AND FEES. . . (fifth contact, Strong series), CX 11(h); CX 18(f); Spanish series, CX 13(h); CX 20(f);

. . . IF PAYMENT IS NOT RECEIVED IN THE ALLOWED TIME, AND COUNSEL COMMENCES LITIGATION, YOUR CREDITOR MAY ALSO BE AWARDED EXPENSES AND LEGAL COSTS BY THE COURT. (seventh and eighth contact), respectively, Strong series, CX 11(k); CX 18(i); Spanish series, CX 13(l); CX 20(i); [33]

. . . FAILURE TO COMPLY AND APPEAR EITHER IN PERSON OR HAVE A LEGAL REPRESENTATIVE ATTEND ON YOUR BEHALF MAY RESULT IN THE START OF LEGAL ACTION BY A-B-C- SUPPLY COMPANY. . . (eighth and ninth contacts), respectively, Strong series, CX 11(l)-(m); CX 18(j);

IT IS IMPORTANT THAT YOU MAKE YOURSELF AWARE OF THE LEGAL RAMIFICATIONS OF THIS TYPE OF PRACTICE. . . IF YOU DO NOT CORRECT THIS MATTER QUICKLY, WE WILL HAVE TO RECOMMEND THAT OUR CLIENT EXERCISE ALL LEGAL MEANS TO RECOVER THIS LOSS. . . (first contact, Bad check series), CX 14(b)-(c); CX 21(b); Spanish series, CX 14(d)-(e);

42. In addition to examining these texts on their face, we must

consider the testimony of five debtor witnesses presented by complaint counsel concerning their reactions to the same or similar texts. All five claimed that the texts they received definitely threatened suit in the event of non-payment, notwithstanding our reading of four of these texts to warn only of a possibility of suit [Gravatt, Tr. 321-2, re CX 11(b); Nield, Tr. 151, 154, re CX 14(b); Gardner, Tr. 263, re CX 29(q), see equivalent CX 10(m)); Vineburgh, Tr. 437, re CX 11(b)]. In the case of one debtor witness the debtor's reaction was the same as ours (from the face of the documents) that there was a definite threat of suit in the event of non-payment. [Thom, Tr. 128-130, re CX 18(c) and CX 18(d).] Although examination of the face of these dunning letters supports the debtor-witness testimony in only one out of five instances, there is no escaping the fact that half of the texts must be read on their face as definitely threatening suit, unless payment be made.

43. Complaint counsel have thus established a *representation* that Capax' creditor-clients would bring suit if necessary to get their money — but was it a *misrepresentation*? Complaint Par. 9.2 pleads [34] that, in truth and in fact, “if payment was not received, steps were not taken to initiate legal action against the alleged debtor (and) in fact, no action was taken during the form letter series except to send additional form letters to the alleged debtor or to return the uncollected account to the creditor.” The joint answer *denied*¹³ that Capax does *not* “take steps to see that legal action is initiated, provided that the debt remains unsatisfied and no instructions are received from the creditor not to do so at that time.” The *burden of proof* was thus on complaint counsel to establish a negative proposition, to wit, that Capax does *not* take steps to see that legal action is initiated, etc. before Capax' representation could become a misrepresentation.

44. Complaint counsel sought to carry their burden in the following way. Firstly they asserted (CPF # 25) — and we now find — that Capax has never had either right or authority to bring suit against any debtor, either in its own name or in behalf of any other person or corporation, even after 5/75 when it went beyond letter-writing to add a more vigorous “second phase,” which, however, still omits suit. [See Finding # 11.] Respondents do not claim otherwise [RPF # 8]. It is thus clear that Capax itself did not, in fact, bring suits against debtors but there is nothing wrong with that unless there had earlier been a representation that Capax *would* bring such suits.

45. Most of the extracts from dunning letters on which complaint counsel rely to show threats of suit (see above) are plain on their face that they refer to a suit by the creditor, not a suit by Capax. They refer

¹³ The denial is confusingly worded: “admit they do . . . take steps, etc.”; but it is clear that a denial of a negative is intended.

explicitly to the creditor or to the fact that Capax will be making "recommendation" or to some other clear indication that Capax would not be the plaintiff in such a suit. Those rare dunning [35] letters, like CX 11(e), which are silent on who will sue, must be read in light of the rest of the series and the complete absence therein of *any* reference to a suit by Capax. While there was a little testimony by a few debtor witnesses as to some kind of impression that the dunning letters said they would be sued by Capax, we find no ambiguity in the comprehensive documentary evidence which would permit us to refer to such plainly erroneous debtor testimony. A witness cannot make black white just by becoming a debtor. We find that Capax never threatened in its dunning letters that it (as distinguished from its clients) would bring suit to collect a debt. Since it never threatened to bring suit itself, its lack of authority to bring suit becomes academic and the real issue finally emerges: Did Capax in any way misrepresent the likelihood that its *client* would bring suit to collect such debt?

46. Complaint counsel make a simple argument that it has to be misrepresentation for Capax to tell debtors they will definitely be sued in the event of non-payment, because Capax cannot know in advance what a particular client will ultimately do about bringing suit. (CPF # 57.) Indeed, complaint counsel several times extracted an admission from Capax' President Goodman that at the time a dunning letter goes out with a warning that Capax would sue the debtor if payment were not forthcoming Capax could not really say "*for a fact*" that this *particular* creditor would bring suit if the debt went unpaid [Tr. 543, 588, 590].

47. Goodman, on the other hand, claimed that Capax had a reasonable basis for sending such warnings in its broad experience with creditors and debtors generally and the involved creditor in particular. The following extracts from his testimony explain Capax' position.

Q. Now you state [in CX 10(i)] that "It is the intention of our client to exhaust every legal avenue". How did you know at the time you wrote that letter that it was your client's intention to exhaust every legal avenue? [36]

A. I have conversed with, talked with many of our clients as well as our people have (done so too) and *I have yet to find any of our clients that will not or do not want to get the money in and will not pursue it as far as they can to get it in.* Normally, if they would not want to, we would eliminate something like this from their contacts.

Q. But you don't (didn't) know at the time you wrote that [CX 10(i)] what their intent really was, do you? Is it possible for you to know?

A. *Normally we assume they want the money in and will follow through with all of the*

means *they have to do it* or they would not be asking us to do it. (Tr. 567) (emphasis added)

and similarly with reference to CX 11(e):

... How do you know all possible legal means will be taken?

As I stated before, due to the knowledge and contacts of our (creditor) clients, *it is the intention of most of them to take all of the means at their disposal* to receive and get in the money owed to them.

You are very specific when you use the words 'will be taken' and again the question at the time you wrote the letter, did you really know that in fact that will be done?

This is normally implied to us by the creditor, yes, sir. (Tr. 587-588) (emphasis added)

again with reference to the same dunning letter [CX (11)(e)]: [37]

... (Y)ou really don't know whether the *particular* creditor. . . will in fact take every legal means available to him to collect the debt, including suit?

We are under the impression given to us by our (creditor) clients that they would do this when financially feasible to do so.

What information do you have upon which to base this assertion?

Our contacts with our clients.

I just asked you if you had records to indicate that all creditors sue all debtors after expiration of the service?

* * * * *

1. No.

Again let me ask the question: When you write this letter you do not know whether in fact the *particular* creditor will take all possible legal means against the debtor to collect the alleged debt; do you?

*Normally this is implied to us that where it is financially feasible they will do that. This is their intention at the time.*¹⁴ (Tr. 589-590) (emphasis added)

48. Mr. Goodman's qualification as to "financial feasibility" makes the finding as to the operative facts somewhat more difficult, because the record is bereft of testimony as to whether and, if so, under what [38] conditions costs of suit may make it unprofitable to bring a collection suit. CX 4, a sample "done" sheet for an "Elaine Powers Salon," reveals 15 bills ranging from \$26.00 to \$57.00 but there is no

¹⁴ Thereafter complaint counsel again obtained an admission that Goodman did not "know" this about a particular creditor.

way of knowing how typical they are. Of the 9 debtor witnesses who testified here, 5 were dunned for much larger sums,¹⁵ while 4 were dunned for sums comparable to those found in CX 4 or even smaller.¹⁶ In any event the other data needed to estimate what debts, if any, are too small to make suit worthwhile is completely missing from the record. Since the burden of proof is always on complaint counsel, we feel compelled to hold that in the absence of proof as to the magnitude and effect of the "financial feasibility" factor, it must be assumed to be of negligible significance for present purposes.

49. Accordingly, we now find that while Capax did not regularly make inquiry of or obtain knowledge from particular creditors as to their intentions to bring suit against particular debtors if the latter should fail to respond to Capax' dunning letters and while in that sense Capax did not "know" what such creditors would do, it did have a *reasonable basis* for warning debtors to expect suit if they did not pay up, in its knowledge from experience that creditors generally and Capax' clients in particular, almost without exception, want to sue for their money if necessary, assuming a negligible economic feasibility factor. [39]

Threats To Credit Standing

50. In proof of complaint Pars. 8.3 and 9.3, which allege that Capax falsely threatened to adversely affect debtors' credit ratings with consumer reporting agencies, complaint counsel rely on three extracts from Capax dunning letters (See CPF # 58):

PAID IN FULL WITHIN SEVEN DAYS, THIS ACCOUNT WILL NOT BE SHOWN ON OUR CREDIT RECORDS. . . . FORWARD YOUR PAYMENT NOW DIRECTLY TO A-B-C- SUPPLY COMPANY IN ORDER TO RECEIVE PROPER CREDIT. . . (first contact), Diplomatic series, CX 10(b)-(c); CX 17(b); Spanish series, CX 12(b)-(c); CX 19(b);

UP TO NOW YOUR CREDIT STANDING WITH A-B-C- SUPPLY COMPANY HAS BEEN SATISFACTORY. CREDIT IS A PRIVILEGE, NOT A RIGHT. IT IS IMPORTANT TO PROTECT THIS PRIVILEGE, BECAUSE ONCE IT IS LOST IT IS ALMOST IMPOSSIBLE TO REPLACE. LIKE MOST OTHER PRIVILEGES, YOU ONLY MISS IT WHEN YOU NEED IT. (third contact, Diplomatic series, fifth contact, Diplomatic series, second contact, Bad check series), respectively, CX 10(e); CX 17(f); CX 21(c); Spanish series, CX 12(g); CX 19(f);

. . . YOUR CREDIT STANDING MAY SUFFER. . . (fourth contact), Strong series, CX 11(f)-(g); CX 18(e); Spanish series, CX 13(g); CX 20(e);

51. None of these extracts makes any reference to consumer

¹⁵ Vineburgh, \$989.06 (CX 47); Gordon, \$467.50 (CX 43); Zuccarrelli, \$354.18 (CX 44); \$135.00 (CX 46); Gardner, \$129.30 (CX 90/40).

reporting agencies or the credit ratings they dispense. Moreover, the first letter [CX 10(b) et al.] expressly refers to the debtor's account not yet shown on *Capax' own credit records*. The second letter [CX 10(e) et al.] expressly refers to the debtor's credit standing with the *particular creditor involved*. Moreover, subsequent reference therein to [40] the importance of not losing the privilege of credit plainly relates back to the debtor's credit standing with this particular debtor. As for the third letter [CX 11(f) et al.], reference to the full paragraph of which it is a part¹⁷ reveals that the situation contemplated is an adverse effect on the debtor's credit standing *incidental to a lawsuit*.

52. The first two examples plainly do not relate to the debtor's general credit standing and the third, which *may* be read to relate to the debtor's general credit standing (Tr. 595-596), nevertheless does not threaten an active effort to affect the debtor's credit adversely. It is only a proper reminder that, *if* a lawsuit be brought — as is clearly any creditor's right — one of the *incidental* results may be — as clearly it may — that the debtors' credit rating *may* suffer. We find that proof of such a warning has no logical tendency to support the allegation of Complaint Par 8.3 that Capax threatened to adversely affect debtors' credit ratings with consumer reporting agencies.

53. Complaint counsel's further contention that 4 of the 9 debtor witnesses presented by complaint counsel were led to believe their credit records would be adversely affected if they did not pay up is not supported by the evidence. Whether these 4 witnesses even weighed the warning in the balance is really quite unsure because none of them paid up. Two promptly hired lawyers for a good fight on the merits of their disputes with the creditors involved. (Gardner, Tr. 282, 295; Gordon, Tr. 377) A third, an experienced bill collector, always doubted that she would really be sued for \$19.95 (Tr. 516-A). The [41] fourth was assured from the start by her creditor that Capax had made a mistake which she could disregard. (Cook, Tr. 492, 496) Since the whole point of deception evidence is to prove a tendency to deceive, debtors who were not *really* deceived add nothing to the proof of a *tendency* to deceive.

54. Even, however, if all of them had taken Capax' warning to heart — to the exclusion of all other considerations — and had all immediately paid the debts in question, it is hard to see any deception in Capax' persuading them to do so by reciting such a simple truth as that a credit rating *may* suffer *if* a lawsuit has to be brought to collect a debt. Accordingly, we find that even if the warning proved had

¹⁷ "If this (i.e. a satisfactory arrangement for payment) is not done, [Capax] can take no other position but to recommend a stronger course of action to our client. . . . If this is done there may be additional costs to you and your credit standing may suffer."

corresponded more closely to the warning *pleaded*, and even if such warning had had some effect on these debtors' *actions*, there was no tendency for the simple truth stated in these letters to deceive anyone.

Threats To Enforce Prompt Payment

55. In proof of complaint Pars. 8.4 and 9.4, which allege that respondents have falsely represented the immediacy of action, such as suit, to be taken to collect a debt, unless payment be received within a time specified by respondents. Complaint counsel direct our attention to thirteen extracts from Capax' dunning letters (CPF # 60).

56. However, most of these extracts are not relevant to complaint Pars. 8.4 and 9.4. They are simple demands to pay an already overdue debt within a specified time such as "48 hours" [e.g. CX 10(m)] or "five days" [e.g. CX 10(l)] or "at once" [e.g. CX 11(f)] without specifying what would happen if the debtor did not pay within the specified time. The purpose, as Capax' President testified, was simply to fix "a time frame" to get the debtor "off his rump" (Tr. 605-5) and pay up as quickly as possible (Tr. 535). The debtor may or may not meet the demand but the demand, by its very nature, is not a representation capable of being found true or false. Significantly none of complaint counsel's debtor witnesses alleged [42] deception by any of the eight sanctionless demands irrelevantly included in CPF # 60. Accordingly, we now limit our consideration to those 6 of the extracts cited in CPF # 60 which warn the debtor that some sanction, such as suit, will be invoked against him if he does not meet a specific new deadline.

57. The extract of this kind most commonly testified to by debtor witnesses here (Thom, Tr. 128; Gordon, Tr. 355; and Zuccarrelli, Tr. 661-2), reads as follows:

If not paid within one week, to liquidate this matter we will be forced to recommend action which may mean added costs to you. . . Prompt action in this matter is imperative. Make immediate payment directly to [the creditor]. . . [See CX 11(c); CX 18(b) and CX 62(a), *inter alia*]

58. Debtor witness Zuccarrelli, apparently attaching no significance to the word "recommend" testified simply: "Well, from the letter I thought it (suit) would be instituted immediately." (Tr. 662) It does not appear, however, that she was sufficiently concerned to pay the bill. A second recipient (Thom) agreed that "suit" is nowhere mentioned in this letter but thought the statement that "we will be forced to recommend action" was "imperative." (Tr. 128) Nevertheless, she, too, apparently never paid the bill for which Capax dunned her. The third recipient, Gordon, was left unsure about what action was

credit — how soon, however, he did not testify. (Tr. 355) In any event he apparently never paid the bill.

59. Another debtor witness (Gravatt, Tr. 311) received a different extract:

... If you do not correct this matter quickly, we will have to recommend that our client exercise all legal means to recover the loss. [CX 14(b)] [43]

Although this includes no definite deadline and, like the others, speaks only of a recommendation, not a suit, young Ms. Gravatt testified that on receipt of this letter in TELEGRAM format “all I thought was really soon, very soon afterwards.” (Tr. 311) Her mother quickly made good the bad check in question at the young witness’ request. (Tr. 325)

60. Another debtor witness (Viera, Tr. 492–6) received a Spanish language dunning letter [CX 12(c)], an extract from which she translated as follows:

Pay this account completely within 7 days. This account won’t show or appear in your¹⁸ credit register.

Ms. Viera recited this language as explaining her concern about possible injury to her credit record¹⁹ but no mention was made of any reaction to the “7 days” language. (Tr. 492–496) In any event, she was not led to make payment.

61. The last of the 6 debtor witnesses who are cited in CPF # 61 [Gardner, Tr. 250–252] received the CX 29 series of dunning letters, one of which [CX 29(o)] is cited in this connection by complaint counsel. CX 29(o), the next to the last of the series, was stamped “NOTICE” and contained the following extract:

If you want to avoid unpleasant and costly action, make immediate payment. . . . We can wait no more than 5 days to hear from [the creditor] on settlement. Your immediate response is imperative. [CX 29(o)] [44]

62. The last of the series [CX 29(q)] was stamped “FINAL NOTICE” and contained the following extract:

You may immediately register your defense in writing within 48 hours after receipt of this notice. [CX 29(q)]

According to Gardner’s own testimony it was the stamp “FINAL NOTICE” on the last letter [CX 29(q)] — rather than the deadline set in CX 29(o) — which led Gardner to “assume that it (suit) would happen some time in the immediate future.” (Tr. 263)

¹⁸ Although not corrected during the witness’ examination, reference to a Spanish-English dictionary indicates either that Ms. Viera erroneously translated “su” to mean “your” instead of “our” or that the report of the testimony is wrong. 494–5.

¹⁹ Obviously a proper translation would have much lessened even this concern.

63. In summary, of the nine debtor witnesses selected from some 2000 candidates, only six are cited on this point. Of the six only three (Zuccarrelli, Viera and Gravatt) claimed to have been led to believe suit was imminent and of those three debtor witnesses only one (Gravatt) was, in fact, sufficiently concerned to pay the debt (or, in her case, to have her mother pay it.)²⁰ The claim of one young girl to have taken Capax' warnings of immediate action seriously enough to act on them is too slender a reed on which to find that such warnings had a real capacity to deceive the ordinary debtors who received them.

64. We find, rather, that these traditional warnings by creditors or their agents to debtors were recognized as mere bluff or bluster, analogous to "puffing" in merchandising. As Capax' President [45] testified, the failure of a debtor to meet a Capax deadline would normally result only in his getting the next letter of the series [Tr. 562, 579]. The debtor here — like debtors generally — learn that such threats are commonly harmless and may commonly be disregarded — for a long time, at least — with impunity.

65. The evidence here shows clearly how this comes about. Take as an example witness Gardner (drama critic for the Baltimore Sunpapers), who received the CX 29 dunning series. The sequence of this series is as follows. The first [CX 29(d)], dated 1/10/75, tells the debtor that he can keep this claim out of Capax' credit records by settling the account in question within 7 days. The next [CX 29(h)] dated 1/27/75 (or more than 2 weeks later) suggests an "oversight" and advises that payment will still be accepted. The next [CX 29(f)], dated 2/5/75 warns that "little time remains" but "the worst" can still be avoided by reaching an arrangement with the creditor. The next [CX 29(i)], dated 2/19/75, warns that "strong action" is often necessary but "there is still time to avoid the unnecessary consequences of your neglect."

66. The next [CX 29(k)], dated 2/28/75 lays down the law: "It is imperative that you contact your creditor *today* to avoid further action." (emphasis added). Yet two weeks later, on 3/14/75, comes another [CX 29(m)], again asserting that it is "urgent" and "imperative" that satisfactory arrangements be made and "if settlement is not made *within 48 hours* upon receipt of this LETEGRAM, we suggest you contact your attorney to determine your legal liability. . ." (emphasis added) A week later the dunning starts again. On 3/21/75 CX 29(o) (stamped "NOTICE") warns that it would be "most unfortunate" to

²⁰ While young Ms. Gravatt was married by the time of trial she had been living with her parents and attending school in Washington, D.C. in 1973, when the incident occurred. (Tr. 308) She had never received a telegram (Tr. 317) and had never been dunned for a debt (Tr. 320-1). She did not bother to maintain a record of her checks as written (Tr. 344) and had not bothered to look at her monthly bank balance after giving Sears, Roebuck a bad check for \$12 (Tr. 344).

make "more formal action" necessary and lays it on the line: "We can wait no more than 5 days to hear. . . Your immediate response is imperative." (emphasis added) Nearly two weeks later, on 4/2/75 Capax sends a "FINAL NOTICE" which gives witness Gardner "48 hours after receipt of this notice" to "register" his [46] defense, etc. (emphasis added) — but payment will still be accepted, not too surprisingly. [CX 29(q)] Then follows a six months breathing spell, after which, on 10/3/75 a new series starts all over again: "This is your final opportunity. . . ."

67. A review of each series of Capax' dunning letters *in their entirety* convinces us the deadlines and exhortations to urgency found in such letters do *not* convey to the debtor the same serious message that each letter viewed individually might convey to an uninvolved reader. Indeed, it is hard to believe that an ordinary debtor will take a creditor's "5 days-to-pay," "48 hours to pay," "pay at once," etc. any more seriously than a merchandise buyer takes a hawker's "Hurry, hurry, hurry. . . while they last. . ." Sooner or later the constant dunning may stimulate the debtor to begin payment sometime during the series but it seems doubtful that the setting of deadlines plays any significant role in the process, as the almost total ineffectiveness of such "warnings" clearly confirms.

68. We find that Capax' warnings of immediate sanctions if its payment deadlines are not met may be "false" in a literal sense, because Capax is plainly programmed to give the debtor a second chance, third chance, fourth chance, etc., if payment is not made within the stated time. However, we also find that the ordinary debtor would recognize from the repetitive pattern of inconsistent warnings and forgiveness — even if he has not, like most debtors, had similar experience with other dunning agencies — that Capax' exhortations to urgency may be taken with a grain of salt. Like merchants' puffery they lack the capacity to deceive which is the ultimate issue here. They are mere bluff and bluster. [47]

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and personal jurisdiction over all respondents.

Comment: Jurisdiction over the subject matter here is found in Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a). Jurisdiction over the person was obtained by service of the complaint on all respondents and the subsequent general appearance of each respondent by attorney. See page 8 above.

2. The acts and practices charged in the complaint and proved here took place in commerce, within the meaning of the Federal Trade Commission Act, 15 U.S.C. 45(a).

Comment: All respondents concede this and there is no question of collusive jurisdiction. See Findings # 12 thru 15 above.

3. All individual respondents concede that as long as they were active in the affairs of this close corporation they did (and respondent Goodman still does) formulate, direct and control its acts and practices generally. Respondents Goodman and DeFelice further concede that they have formulated, directed and controlled the particular acts and practices which are the subject of this complaint. Respondent DeFelice denies but we now find that he, too, participated personally in various acts and practices which are the subject of this complaint.

Comment: See Findings # 1 thru 5 above. For a holding that domination of corporate affairs generally is sufficient to hold an individual, see *Tractor Training Service, Inc. v. F.T.C.*, 227 F.2d 420 (9th Cir., 1955). For a holding that [48] there must be a further showing that such individual actually participated in the challenged acts and practices. *Coro, Inc., et al. v. F.T.C.*, 338 F.2d 149, 154 (1st Cir., 1964) (*cert. den.*, 380 U.S. 954). We find both tests met here with respect to all individual respondents, including Bricker.

4. The acts and practices of respondents proved in this proceeding do not constitute unfair or deceptive acts or practices in commerce and are therefore not violative of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

Comment: This is primarily a factual case and our resolution of factual issues is already apparent from our findings. It remains only to note the major legal assumptions behind our findings of fact.

A. LETEGRAM

We have found as a fact that the purplish red and gray LETEGRAM format used by Capax since the fall of 1973 is not likely to deceive the ordinary debtor into believing it is really a telegram and not likely to deceive any debtor more than momentarily, certainly not long enough to affect any decision. (Findings # 18-22). While it is clear that the unfair trade practice law is designed to protect the "ordinary purchaser" rather than the common law's "reasonable man" *F.T.C. v. ...*

talk in our cases about protecting "the gullible and credulous" as well as "the cautious and knowledgeable," *Charles of the Ritz v. F.T.C.*, 143 F.2d 676 (2d Cir., 1944), nevertheless ". . . a representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." *Kirchner t/a Universe Co.*, 63 F.T.C. 1282, 1290 (1963). [49]

Here our finding is based not only on our own visual inspection of CX 17(b) but on the adverse inference which we are permitted to draw from complaint counsel's failure to ask 6 of their 9 debtor witnesses whether they really mistook a LETEGRAM for a TELEGRAM; the fact that one of the remainder was testifying about a TELEGRAM instead of a LETEGRAM; and the atypical nature of the other two debtor witnesses, one of whom, incidentally did not assert more than initial confusion.¹⁸

While these matters are not to be decided by a Gallup Poll, the top-heavy support for our conclusion that a LETEGRAM is readily recognizable as a gimmick, not a TELEGRAM, is not to be defeated merely because for a moment a LETEGRAM may be "unreasonably misunderstood by an insignificant and unrepresentative segment" of debtors.

B. "COLLECTION AGENCY" IMAGE

This case was apparently premised on an erroneous theory of law that there is something *per se* deceptive about a debtor-dunning service which does not include all other collection functions as well as dunning. Put simply, Capax' short-line debt collection service (largely just dunning letters) is viewed as inherently [50] deceptive because, by definition, it is not a full-line service (which would apparently have to include such things as regularly receiving payments and bringing suits, as needed). According to Paragraphs 8.1 and 9.1 of the complaint the very use of the word "collection" in Capax' letterhead¹⁹ constituted a misrepresentation that:

delinquent debtors' accounts have been referred to respondents as an independent debt collection agency which will engage in typical debt collection activities such as making personal demands for payment and/or filing suit.

Authority for this position is said to derive from the language of Commissioner Jones in *State Credit Control Board*, 70 F.T.C. 1318 (1966); *affd. sub nom. S. Dean Slough v. F.T.C.*, 396 F.2d 870 (5th Cir.,

¹⁸ We recognize the rule of *Carter Products, Inc. v. F.T.C.*, 186 F.2d 821, 824 (7th Cir., 1951) that even correction of an original misapprehension before action in reliance, as by entering into a contract, may not cure a violation. However, in this case we have found no more than a possible momentary deception, which would be immediately recognizable as an error. This is a horse of a different color (purplish red and gray, of course).

¹⁹ Capax' messages other than "Letegrams" were commonly headed: "Continental Credit Corp . . . Credit Control and Collection."

1968); *cert. den.*, 393 U.S. 980 (1968). That case was primarily concerned with a different problem: stopping the misleading use of a false aura of governmental authority by a private dunning service. With that holding of the case it would be hard to disagree.

However, Commissioner Jones also held (without regard to emulation of governmental authority) that mere use of a third party dunning agent in the circumstances of that case was deceptive:

Third party referral, to the extent it is an effective debt-collection device, is effective because it implies to the debtor that the third party has collection authority or authority to take other legal action. If the third party does not in fact have such authority the mere lending of its name and address to the collection of the debt is wholly grounded in deception (p. 1358) (emphasis added) [51]

And again:

The record demonstrated that use of third-party referrals is important in the collection of delinquent accounts. The evidence clearly indicates that third party referrals have this significance not simply because debtors are more apt to read what is sent by third parties,²⁰ but more importantly because of the debtor's assumption from the fact of such referral that the creditor has placed the delinquent account in the hands of a third party for some affirmative action (transcript citations). Debtors receiving any third-party communications respecting their delinquent accounts are thereby led to believe that their creditors will no longer extend credit and that they probably intend to collect the debt by legal action if necessary. (p. 1357)

If Commissioner Jones' opinion means that any third party referral of a debt which does not confer full authority to receive payment, bring suit, etc. is *per se* deceptive and unfair, there would be no point in pursuing this matter further: indeed, the whole dunning business would be unlawful. We are reasonably sure that *State Credit Control Board* was never intended to abolish the debt dunning business. There are several references in Commissioner Jones' opinion to record sources, such as the respondent's exposition of so-called "third party" psychology, as the basis for her conclusion in *that* situation and under *those* circumstances. Accordingly, we have assumed that it will not be *presumed* but must be *proven* in every case that a referral was made in such a way and under such circumstances as to create a likelihood or fair probability that debtors receiving dunning letters will be deceived to their prejudice. [52]

In Findings 29-38 we have found from the testimony of complaint counsel's own debtor witnesses that they did not, in reality, act the way that complaint counsel's theories presume they should act. It was *not* mere notice that a claim had been turned over to Capax which led most of these debtor witnesses to anticipate that they would be sued or their

credit would be ruined, etc. With no more than one or two possible exceptions, these debtor witnesses all attributed their alleged fears about suit or credit standing to specific language other than a mere announcement that the debt had been turned over to Capax for its action. Such findings confirm our reading of *State* to call for a realistic appraisal of the evidence in each case, not a wooden reliance of an unrealistic presumption which, if rigidly applied, would put the dunning business out of business.

C. THREATS OF SUIT

We have concluded in Finding # 45 that alleged threats of suit in Capax' dunning letters would not deceive an ordinary debtor into believing he was going to be sued by Capax, because most such letters made it quite clear on their face that any suit would be by the creditor (and none were contra). To reach our conclusion it was necessary to disregard contrary testimony by some of complaint counsel's debtor witnesses but that results in no weakness in our conclusion. As the Courts have held, the Commission is not bound in a matter of this kind by statements of witnesses as to whether they were deceived or not. *Double Eagle Lubricants, Inc. v. F.T.C.*, 360 F.2d 268, 270 (10th Cir., 1965). In this case the documentary evidence is all one way. It would be a travesty on justice to believe the contrary testimony of the debtor witnesses.

The ultimate issue on this branch of the case is whether it is deceptive for Capax in some instances to warn debtors that their creditors will sue them, without making specific inquiries of the specific creditors involved, on the basis of Capax' extensive experience with creditors and debtors generally and this creditor in particular. The Commission case law [53] in such situations does not require Capax to be an insurer of the accuracy of its warning but only to have a reasonable basis for its statement. *Pfizer, Inc.*, 81 F.T.C. 23 (1972); *Tashof v. F.T.C.*, 437 F.2d 707 (D.C. Cir., 1970). The extensive background for Capax' warnings, set forth in part in Finding # 47, leaves no question about what would seem highly probable anyway: that creditors almost always bring suit, assuming economic feasibility, for debts that the dunning leaves uncollected.

D. THREATS TO CREDIT STANDING

On this branch complaint counsel's showing is so deficient on the facts that there is little occasion to apply law. Two extracts from complaint counsel's three alleged examples reveal only unexceptionable warnings that the debtor's credit with Capax and/or the creditor

may suffer if he doesn't pay the debt. The third could be read to refer to the debtor's general credit reputation but, again, merely reminds him that if the claim goes to trial "your credit standing may suffer."

It is hard to see how dunning could survive if a dunner could not argue such a simple truism as this. There may be occasions when truth is presented deceptively but that is certainly not the case here; a truer warning can not be imagined. The warning may be *unpleasant* but that is no proper concern of this Commission. As the Commission stated when it was starting down the road of policing deception in debt collection:

. . . (A)ll persons should pay their just debts. Within legal limits, creditors are entitled to pursue their collection methods energetically. *Wm. H. Wise Co., Inc.*, 53 F.T.C. 408, 426 (1956)

It is important to remember that the purpose of the Commission's activity in this field is to prevent deception, not to prevent energetic collection methods. [54]

E. THREATS TO ENFORCE PROMPT PAYMENT

The last legal issue in this case concerns Capax' occasional²¹ setting of early time limits within which debtors are warned to pay up or face the prospect of defending themselves in court or other unpleasant consequence. There is no doubt but that Capax has set such deadlines and yet has regularly given debtors second, third, fourth and more chances to meet new deadlines while the series of dunning letters drags on. The legal issue is not whether the use of a *locus penitentiae* — known to and employed by every lawyer in this country — is fair or unfair in other ways but whether it has a tendency or capacity to deceive — to put it simply: whether anybody really takes those deadlines seriously.

"Puffing" is one of the few defenses from the common law of misrepresentations which has survived into the law of deceptive trade practices, as evolved and administered by this Commission, Kintner, E.W., *A Primer On The Law Of Deceptive Practices* (1971), pp. 7-8, 33, albeit with some restrictions, *e.g. ibid.* p. 319, *et seq.* The "puffing" rule gives merchants some freedom to describe their wares in enthusiastic terms which most people would readily recognize to be exaggerated. See, for example, *H. W. Kirchner, t/a Universe Co.*, 63 F.T.C. 1282 (1963). There the Commission recognized the possibility of a technical violation of the unfair trade practice law when a respondent advertised

²¹ Most of Capax' deadlines, it will be remembered, specified no sanction for failure to perform in time. Such

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as "invisible" a "Swim-Ezy" flotation device worn under a bathing suit which was, in fact, no more than "inconspicuous":

To be sure, "Swim-Ezy" is not invisible or impalpable or dimensionless, and to anyone who so understood the representation, it would be false. (p. 1289) [55]

Nevertheless, Commissioner Elman continued:

It is not likely, however, that many prospective purchasers would take the representation thus in its literal sense. (pp. 1289-90)

And the Commission thereupon dismissed that part of the charge (p. 1291).

What puffery is to a merchant, bluff and bluster are to a debt dunner. "Time frames" come naturally to a dunner in order to get debtors "off their rumps," as Mr. Goodman, Capax' President, put it here (Tr. 604-5). But it is "not likely," to use Commissioner Elman's words, that "many" debtors take those time frames seriously. We are satisfied that an "ordinary"²² debtor would "probably" react in about the same way we do to the continuing parade of ever-new deadlines illustrated in Findings # 65-66 above. That they will not be taken seriously by most debtors is clearly confirmed here by the single instance of success for such methods among complaint counsel's nine debtor witnesses. Such bluff and bluster by debt dunners has no more real capacity to deceive than the merchant's traditional puffery. It would be a serious mistake to treat such warnings with the seriousness reserved for representations with a real capacity to deceive.

5. On consideration of the whole record, including only the reliable, probative and substantial evidence therein contained, it is the initial decision of the administrative law judge, pursuant to the [56] provisions of this Commission's Rule Section 3.51, that the complaint in Matter of Capax, Inc., Dkt. 9058, should be and hereby is DISMISSED.

OPINION OF THE COMMISSION

BY DOLE, *Commissioner*

This matter is before the Commission on an appeal by complaint counsel from an initial decision of the administrative law judge dismissing the complaint. The complaint charged that respondents Capax, Inc., two present officers, and one former officer had violated Section 5 of the Federal Trade Commission Act by making false and misleading representations in form notices and letters sent to debtors to assist in the collection of alleged delinquent debts. After an

²² That the test is the "probable" reaction of an "ordinary" person, see again *F.T.C. v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (1963).

evidentiary hearing, Administrative Law Judge (ALJ) Paul R. Teetor issued his initial decision, which concluded that respondents' practices are neither deceptive nor unfair and therefore do not violate Section 5. [2]

Upon our review of the record, the arguments advanced in the briefs and at oral argument, and the initial decision, we reverse. The ALJ's order dismissing the complaint and his findings of fact and conclusions of law are vacated, and the findings and conclusions set forth in this opinion are substituted in their place, except to the extent that the ALJ's introductory findings of fact¹ are not inconsistent with this opinion.

BACKGROUND

Since its inception in 1972, respondent Capax, Inc. ("Capax") has been engaged in selling a service to assist creditors in various parts of the United States in the collection of alleged delinquent debts. (I.D. 6, 12-15.)² Respondents DeFelice, Goodman, and Bricker are present or former officers and principal owners, all of whom were properly found by the ALJ to have formulated, directed, and controlled the acts and practices of Capax. (I.D. 2-5.) Capax' service has consisted primarily of the preparation and mailing of a series of form letters, purchased by creditors at a flat rate and sent by Capax at regular intervals to alleged delinquent debtors. The service is provided on a non-commissioned basis. (I.D. 6.) [3]

Capax' clients can choose between several different series of dunning letters. There are long and short versions of a "strong" series,³ a "diplomatic" series, a "bad check" series, and various Spanish language series. The charge for the long series was about \$3.84 when the business was formed and later was increased to \$4.25 (I.D. 7); it includes the mailing of a maximum of eleven letters (Tr. 795) over a period of approximately 90 days. (Tr. 801; CX 24(b), RX 91.) The short series consists of fewer letters sent out over a shorter period of time,

¹ I.D. 1-15.

The following abbreviations are used in this opinion:

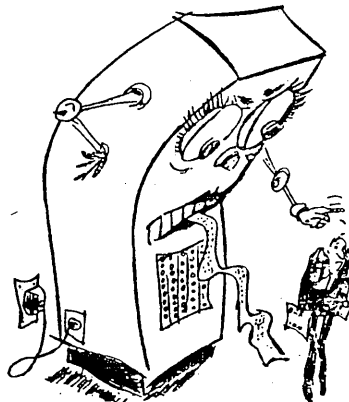
I.D. — Initial Decision (Finding No.);
I.D. p. — Initial Decision (Page No);
Tr. — Transcript of Testimony;
CX — Commission Exhibit;
RX — Respondents' Exhibit;
App. Br. — Complaint Counsel's Appeal Brief;
Ans. Br. — Respondents' Answering Brief;
Rep. Br. — Complaint Counsel's Reply Brief;
TROA — Transcript of Oral Argument before Commission.

² Capax was formed by Continental Credit Corp. and its affiliates in 1972. (I.D. 1.)

and is available to creditors with a high volume of low-balance accounts. (Tr. 883.)

Capax has promoted itself as a "customized, computerized control company" which is "not a collection agency" and which offers "the modern answer to an old problem."⁴ According [4] to Capax' President, Mr. Goodman, the company's dunning letter service is part of a more comprehensive "credit control system consisting of sending out the letters, generating reports and advice and helping to control the receivables for the individual company." (Tr. 504, *et seq.*). In fact, the company's service operates in a rather simple and mechanical manner: a creditor who purchases the flat rate service is provided with several transmittal forms which are used to start the service (CX 33; CX 27; Goodman, Tr. 520-521, 526, 528); to suspend it if payment is received or satisfactory arrangements are made (CX 27; Goodman, Tr. 752-758); and to resume it under certain circumstances.⁵ Capax' letters advise debtors to make payment directly to their creditors; money

⁴ CX 9(a). This exhibit, a promotional circular, provides the following illustration:



THE MODERN ANSWER

To An Old Problem

⁵ The service is resumed if the debtor fails to make a satisfactory payment or if Capax has temporarily suspended the service after contact by a debtor disputing the claim and the creditor requests that it be continued. (CX 27; Goodman, Tr. 758-759, 637-638.)

which is sent to Capax is immediately forwarded to the creditor. (I.D. 9.)⁶

When the flat rate letter writing service fails to result in payment of a debt, Capax advises the creditor of stronger actions which could be taken. (I.D. 8.) Since about May 1975, Capax' clients have been offered a "second phase" collection service for "hard core cases" where the flat rate letter writing service has not induced collection of a debt. (I.D. 10.) Capax' President testified that in "Phase 2" phone calls may be made to the debtor (Tr. 553, 791-792).⁷ [5] Capax charges a fee for this supplementary service based on a percentage of the debt collected. (Tr. 796).⁸

Capax has never had contractual authority from its clients to bring suit against debtors, either in its own or the creditor's name, nor has it ever brought such a suit. (I.D. 11.) In its flat rate service, Capax does not take assignments of the debts referred to it (I.D. 6; Tr. 824; CX 7(a)), and has no knowledge during the course of its letter writing series whether the creditor would take collection action if payment was not received. (Tr. 543, 567, 587-590, 600-601.) Likewise, in conducting its flat rate service, Capax has taken no action to adversely affect the debtor's credit record with a consumer reporting agency (CX 60(o), CX 61(i); Tr. 231, 537-539) and has had no control over or knowledge of whether a creditor would take any such action, if payment was not received. (Tr. 532, 546.)

I. ALLEGED DECEPTIVE APPEARANCE

Prior to October 1973, Capax sent collection notices to debtors which were captioned "Telegram" as part of its various dunning letter series. (See the initial letter and other letters in the CX 17, CX 18, CX 19, CX 20, and CX 21 series). These letters were printed with large type on yellow paper with a brown band across the top; the notations "DAYTIME MESSAGE URGENT" and "NIGHT MESSAGE" appeared adjacent to selection boxes. The forms were mailed in a yellow window envelope with a brown band across the bottom and the word "Telegram" appearing three times on both the front and back. (CX 22(b).) Although none of these were actually telegraphic communications (CX 60(r), 61(j); Tr.

⁶ Between October 18, 1973, and October 10, 1974, payments amounting to approximately \$20,000 were sent by debtors to Capax. (CX 60(r), CX 61(i); Tr. 241.) According to the testimony of Capax' President, this represented about 2 percent of the \$10 million worth of claims collected for clients during this period, which in turn represented 51 percent of the \$20 million of claims submitted by creditors to Capax for its service. (Tr. 881-883).

⁷ The ALJ made the finding that in Phase 2 the claim may be turned over to an attorney for suit, unless the creditor gives Capax specific orders to the contrary. (I.D. 10.) Actually, Mr. Goodman testified that in the second phase a recommendation may be made by Capax to refer the account to an attorney for further action. (Tr. 555, 802.) This

240), they bore a close resemblance to Western Union telegrams (*See, e.g.,* RX 27(a), RX 27(b)).

In October 1973, Capax discontinued its use of the "Telegram" format,⁹ and since that time has used a "Letegram" format. (*See* the initial letter and other letters in the CX 10, CX 11, CX 12, CX 13, CX 14, CX 15, and CX 16 [6] series; CX 60(q) and CX 61(i); *see also* CX 22(c), which is a sample "Letegram" envelope.) The "Letegram" is printed in the same type style as its predecessor, but on gray paper with a magenta band across the top. The caption "Letegram" appears in the band, with the words "URGENT MESSAGE" in the center of the band. The "Letegrams" are sent in gray window envelopes with a magenta band across the bottom and the word "Letegram" appearing three times on both sides of the envelope. Like the "Telegrams" respondents formerly used, the "Letegrams" are not actually telegraphic communications, but are letters sent by United States mail. (CX 60(q), CX 61(j).)

The complaint alleged that these materials simulate telegraphic or similarly urgent communications and thereby mislead recipients as to their nature, import, purpose, and urgency. It is well established that tendency or capacity to deceive, as well as actual deception, falls within the proscription of the FTC Act. *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3rd Cir. 1963); *Goodman v. FTC*, 244 F.2d 584, 604 (9th Cir. 1957). In determining whether material has the capacity to deceive, the Commission may rely on its own evaluation of the evidence, *Carter Products, Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963); *see also* *FTC v. Colgate Palmolive Co.*, 380 U.S. 374, 391-2 (1965). The Commission may interpret the meanings of communications and the "impressions they would likely make upon the viewing public," *Libby-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 417 (6th Cir. 1968), and may look to the overall impact of the material at issue. *Carter Products, Inc. v. FTC*, *supra*. *See Trans World Accounts*, F.T.C. Dkt. 9059, at 3-6 (Oct. 25, 1977) [90 F.T.C. 350], *appeal docketed*, No. 78-1398 (9th Cir. Feb. 21, 1978).

Turning first to the "Letegram," our visual inspection of the "Letegram" letters and envelopes reveals that they sufficiently resemble genuine telegraphic communications to have the tendency and capacity to deceive recipients as to their nature, import, and urgency.¹⁰ Although the simulation of a telegraphic communication is

⁹ However, there may have been some exceptions. One witness, Ms. Gravatt, testified that she received the yellow "Telegram" (CX 21(b)) from Capax in early 1974 (Tr. 310-311, 326), after the date that respondents represent the telegram format was abandoned.

¹⁰ We do not find, however, that the simulation misleads recipients of the "Letegram's" purpose, as the complaint had charged.

less blatant [7] as to the "Letegram" than the earlier "Telegram," the overall appearance of the "Letegram" has the capacity to deceive consumers into believing that it is more urgent and significant than an ordinary letter. Both the name "Letegram" and the format of the communication are susceptible of being confused by members of the public with a telegraphic communication.¹¹ With respect to respondents' earlier "Telegram" format, we agree with the ALJ that there is little doubt that the "Telegram" was virtually indistinguishable from a real telegram—it had the same colors, size, and shape, and similar type.¹² As a result of respondents' simulated telegraphic [8] formats, especially in conjunction with the messages employed, discussed *infra*, the recipient is led to believe that the creditor considers the message so urgent that he went to the trouble and expense of using a telegraphic communication. "The obvious conclusion to be drawn from the receipt of a demand to pay, telegraphically communicated at substantial cost, is that precipitous action may follow if immediate response to the message is not made." *Trans World Accounts, supra* at 4.

The testimony of complaint counsel's witnesses corroborates our view. Ms. Nield testified: "My initial impression upon receiving [the "Letegram"] was that it was a fairly urgent message. It appeared to be a telegram or a Western Union letter, or gram or whatever." (Tr. 148-149.)¹³ Her impression was based upon "the format, the letter, the envelope, the letterhead, the style of print." (Tr. 149). On cross-examination, she reiterated that her impression upon receiving the "Letegram" was that it was an urgent, telegraphic [9] communication. (Tr. 158-159.) Ms. Cook testified that when she received Capax' first

¹¹ We note that although Capax' "gram" is no longer the same color as a Western Union telegram, not all authentic telegraphic communications are yellow and brown. For example, the Western Union Mailgram, a message telegraphically communicated to the general locale of the recipient and mailed from there, is blue and white. (RX 28, 29(a), RX 29(b), RX 30(b).)

¹² Respondents content (Ans. Br. 14) and the ALJ found (I.D. 16) that use of the "Telegram" was abandoned in October 1973. This was prior to the preliminary inquiry letter to Capax, notifying it of a Commission investigation. (CX 1(a), dated January 31, 1974). Although there was some testimony that the "Telegram" format may not have actually been abandoned before initiation of the investigation, *see n. 9 supra*, the weight of the evidence is that Capax did generally abandon that format, as claimed.

Contrary to the ALJ's ruling that the complaint made no charge of deception with respect to the "Telegram," the allegations of the complaint were sufficiently broad to encompass the "Telegram." Paragraph Four of the complaint referred to "various printed forms, letters, and other printed material," with reference to the "Letegram" as "(t)ypical and illustrative, but not necessarily all inclusive of said forms and material."

Whether a claim of discontinuance of early deception is to be accepted is within the discretion of the Commission, *Benrus Watch Co. v. FTC*, 352 F.2d 313, 322 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1969); *Libby-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 418 (6th Cir. 1965). Under the circumstances here, where abandonment of a form of deception was followed by another form of deception, less blatant but still unlawful, we reject the abandonment defense. Discontinuance of an offending practice, particularly under circumstances where there is no assurance that the deception will not be resumed, does not obviate the need for or propriety of an order. *Cotherman v. FTC*, 417 F.2d 587 (5th Cir. 1969); *Libby-Owens-Ford Glass Co. v. FTC, supra*; *Coro, Inc. v. FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

¹³ Ms. Nield's initial impression was fortified when she read the letter: "The impression I had was there was a great sense of urgency in getting the matter resolved. I certainly didn't wish legal action. I would not have wanted a

"Letegram," she thought it was a telegram because of the appearance of the envelope. (Tr. 508 A-509 A). As previously indicated, Ms. Gravatt testified that her impression was that she had received a telegram from Capax. (Tr. 310-311.)¹⁴

The ALJ found that "Capax' LETEGRAM, as distinguished from its earlier TELEGRAM, is unlikely to deceive ordinary debtors into believing they have received a real telegram. Moreover, it is unlikely to deceive any debtor more than momentarily and certainly not long enough to affect any action." (I.D. 22.) The distinction drawn between "ordinary" and "any" debtors is curious, in light of the fact that the FTC Act protects the public at large, including the most credulous. *Charles of the Ritz v. FTC*, 143 F.2d 676, 679-680 (2d Cir. 1944). "The important criterion is the net impression which the [communication] is likely to make upon the general populace." *Id.* Moreover, although the recipients of Capax's dunning material may have "ultimately discerned that the messages were simply debt collection letters in the format of a 'fake' telegram, their initial impression was that they had received a telegram." *Trans World Accounts, supra*, initial decision at 32. The FTC Act is violated if the first contact is secured by deception, even if the consumer becomes aware of the true facts before taking action. *Carter Products, Inc. v. FTC*, 186 F.2d 821, 824 (7th Cir. 1951).

Respondents argue that the "Letegram" is an "impact message" which is a legitimate business technique designed to obtain reader interest and attention, and that the communications are in fact urgent because they concern a past due debt which is urgently in need of attention. (Ans. Br. 7-10.) There is no question that the collection of debts is a legitimate business activity. Many creditors understandably consider the collection of past due debts to be urgent. [10] However, there may be many reasons for non-payment, including a valid defense to a claimed debt or inability to pay for reasons beyond the debtor's control, and payment may not be exacted by deception or other unfair practices.¹⁵ [11]

¹⁴ We note that respondents' counsel, in describing the consumer witnesses who testified in this proceeding, have stated "all were, by their demeanor and testimony, honest citizens" who comprised "a representative sample of the public at large." (Motion for Directed Verdict, 1 and 17.)

¹⁵ The ALJ's general position was that the format and substance of Capax' letters were mere "bluff and bluster"; in his view, they were disregarded by the recipients, as reflected by the fact that most who testified failed to respond to the letters by making payment. While the legitimacy of the claims which Capax attempted to collect is irrelevant to the legitimacy of its tactics, *cf. Trans World Accounts, supra* at 10 n. 7, the circumstances underlying a number of the claims in the record put perspective on his view. Ms. Thom was dunned for a doctor's bill. The doctor had prescribed tranquilizers for a sore throat. According to Ms. Thom, the tranquilizers had done nothing for the sore throat; the infection spread to her right eye and she lost sight in that eye. (Tr. 117-122.) Mr. Vineburgh was dunned for a bill which he claimed was erroneously sent to him through "bad bookkeeping" and was actually owed by a company for which he was a consultant. (Tr. 416-418, 420.) Ms. Viera had been mistakenly billed by a doctor for an expense owed by her insurance company; she stated that the doctor agreed it was a mistake. (Tr. 491-492.) Ms. Zuccarelli testified that she received dunning letters for a repair bill for what she believed to be a defective central air conditioning unit which had gone through eight condensers in a one year period. (Tr. 635-659.) See also Gardner (Tr. 247-248, 288), Gordon (Tr. 353-354, 377-378), Cook (Tr. 506A-507A). Of course, the disputed nature of these bills may not have been representative

(Continued)

Consistent with respondents' argument here, the ALJ stated: "Even though the appearance of a dunning letter may be made similar enough to a telegram to stimulate a conditioned emotional response of urgency and importance, as long as the recipient is aware that he got a gimmick, not a telegram, there is not the deception which turns a Harvard Business School market research problem into a Federal Trade Commission unfair trade practice case." (I.D. 23.) We disagree. There is no evidence that recipients were aware that they had received a gimmick.

In view of the deceptive appearance of its dunning communications, an order provision is necessary to prohibit respondents from using or placing in the hands of others materials which by their appearance misrepresent telegraphic communications. A related order provision is necessary to prevent recurrence in altered form of the violations proven, *Fedders Corp. v. FTC*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). This related provision will prohibit the use or placement in the hands of others of materials which, by simulating telegrams or other methods, forms, or types of communication, misrepresent the nature, import, or urgency of any communication. This remedy is entirely consistent with the Fair Debt Collection Practices Act, Pub. Law 95-109, 15 U.S.C. 1692, which became effective on March 20, 1978. That Act prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." §807, 15 U.S.C. 1692e.

Under this order, respondents may attempt to attract the recipient's attention in their letters to what their clients believe to be a matter deserving serious consideration, as long as they do not misrepresent the significance or urgency of the message.¹⁶ [12]

II. THE FULL-LINE COLLECTION AGENCY IMAGE

The complaint charged that respondents misrepresented, directly or by implication, that delinquent debtors' accounts had been referred to them as an independent debt collection agency which would engage in typical debt collection activities such as making personal demands for payment and/or filing suit.

Upon review of Capax' communications, we find that Capax clearly

of the claims pursued by Capax. However, the circumstances underlying them do indicate that these alleged debtors' refusal to pay after receiving Capax' letters may not have been due to dismissal of the letters as mere "bluff and bluster," as the ALJ assumed. Moreover, all of these consumers took some action in response to Capax' letters to protect or defend themselves. See n. 33, *infra*.

¹⁶ As to their envelopes, respondents are also circumscribed by the Fair Debt Collection Practices Act, which forbids a debt collector from:

Using any language or symbol other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business. 15 U.S.C. 1692e.

did imply that creditors' claims had been assigned to it for necessary collection action, and that Capax had the authority to take action as the moving party, such as by initiating suit, to collect debts. The following are examples of statements made by Capax in its communications:

YOUR DELINQUENT ACCOUNT WITH A-B-C- SUPPLY COMPANY HAS BEEN REFERRED TO CONTINENTAL CREDIT CORPORATION FOR ACTION. . . (first contact, Diplomatic series, CX 10(b-c); CX 17(b); Spanish language series, CX 12(b-c); CX 19(b));

. . . CLAIMANT HAS REQUESTED THAT CONTINENTAL CREDIT CORP. RESUME PROCEDURES TO LIQUIDATE THIS CLAIM IN ORDER TO SATISFY THE LIABILITY FOR \$9999.99 SET FORTH ABOVE. . . (first contact, Reinstate Diplomatic series, CX 16(b-c));

LEGAL ASSIGNMENT OF YOUR DELINQUENT ACCOUNT HAS BEEN TRANSFERRED TO CAPAX, INC., AND DEMAND IS HEREIN MADE FOR PAYMENT DIRECTLY TO THIS OFFICE IN THE AMOUNT OF \$73.50. . . (CX 29(s)).¹⁷ [13]

In assessing the meaning of these communications, we must look to the "impression that is likely to be created," *Kalwajtys v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957). The impression is to be ascertained not by focusing upon the technical interpretation of each phrase, but by considering the "overall impression" likely to be made on the public. *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962). We must also keep in mind that deception may be accomplished by innuendo, rather than by outright false statements. *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3rd Cir. 1963). The impression likely to be conveyed by Capax' letters is that the company was a collection agency which had been assigned creditors' claims and had the authority to take the action necessary to collect them, such as filing suit. The letters convey the threat that dire consequences will befall the recipient who does not respond, with the innuendo that Capax will be taking the "strong action [which] is often necessary to collect an account."

¹⁷ Other examples in Capax' letters are:

"A-B-C- SUPPLY COMPANY HAS TURNED OVER TO US THEIR CLAIM AGAINST YOU FOR \$999.99. . ." (first contact, Strong series, CX 11(b-d); CX 18(b); Spanish language series, CX 13(b-c); CX 20(b));

"STRONG ACTION IS OFTEN NECESSARY TO COLLECT AN ACCOUNT, ACTION WHICH COULD HAVE BEEN AVOIDED WITH THE DEBTORS COOPERATION. IF YOU CONTINUE TO IGNORE REQUESTS FOR A FRIENDLY DISPOSITION OF THIS CLAIM, YOU MUST ACCEPT THE RESPONSIBILITY FOR FUTURE ACTION";

"THERE IS STILL TIME TO AVOID THE UNNECESSARY CONSEQUENCES OF YOUR NEGLIGENCE. . . (fourth contact, Diplomatic series, CX 10(f); CX 17(e); Spanish series, CX 12(f); CX (e));

". . . IT MAKES NO DIFFERENCE TO US WHETHER YOU PAY VOLUNTARILY OR UNDER COMPULSION. . . WE HOWEVER TAKE OUR RESPONSIBILITY TO OUR CLIENT SERIOUSLY. . ."

(fifth contact, Diplomatic series, and seventh contact, Strong series, respectively, CX 10(g-h); CX 11(k); Spanish series, CX 12(h-i); CX 13(l); CX 18(i); CX 19(g); CX 20(i)).

See also CX 10(e), CX 10(l), CX 11(e), CX 11(k).

That recipients of Capax' letters are likely to gain this false impression was borne out by the consumer testimony: [14]

Q. [W]ould you tell us whether you recall having had any impressions upon receiving these [communications from Capax]?

A. I was scared to death, as a matter of fact. I got the feeling that someone was either going to come to my door and ask me for the money or I would have to go to court to pay for the check.

Q. Why did you think you would be taken to Court?

A. Well, it said that they had turned [the] account, or whatever over to the Continental Credit. . .

Q. Who did you understand would take you to Court?

A. Continental Credit. (Gravatt, Tr. 311.)

On cross-examination, when asked which particular part of the letter she received led her to believe that such legal action would be taken, Ms. Gravatt replied, "The whole thing." (Tr. 322.) Mr. Gardner, asked who he thought would institute suit against him for a disputed bill, responded:

A. Capax has indicated throughout this that they were representing [the creditor] and that the claim had been referred to them for action, so I assumed that any action would be instituted, at least, by CAPAX. (Tr. 263.)¹⁸

Likewise, Ms. Thom testified that she got the impression from Capax' letters that it would be the moving party in taking her to court. (Tr. 118.) The other consumer witnesses all stated that the impression made upon them by Capax' letters was that Capax would be filing suit, taking action to adversely affect their credit ratings, or taking some other harsh action to collect a debt allegedly owed. Ms. Nield (Tr. 171), Ms. Zuccarelli (Tr. 677-679), Mr. Gordon (Tr. 355), Ms. Cook (Tr. 516 A-517 A). [15]

The testimony of Capax' President is noteworthy for its assessment of the impression which would likely be conveyed to the recipients of his company's letters. Mr. Goodman was asked what was meant by the phrase "strong action is often necessary to collect an account," and replied: "Well, I think we are all aware of the credit collection field and that there are all types of actions that are taken. . ." (Tr. 550-551.) He stated that these actions include "harassment, by telephone

¹⁸ Mr. Gardner understood "Legal assignment of your delinquent account has been transferred to CAPAX, Inc., and demand is herein made for payment directly to this office in the amount of \$73.50" (CX 23(s)) "to mean that, whereas CAPAX had been acting for Chesapeake [the creditor] up to that point, that now they were acting on their own. In other words, it would be CAPAX who would be suing me rather than Chesapeake." (Tr. 270-271). Mr. Gardner was unaware that Capax did not have the right to sue. (Tr. 271.)

calls, personal calls, and whatever avenue is open to the creditor." (Tr. 549.)¹⁹

Contrary to the impression conveyed, Capax' service consisted of simply the preparation and mailing of form letters on behalf of creditors to alleged delinquent debtors. As discussed above, there was no assignment of debts to Capax. Capax did not have the authority to file suit in its own name or that of the creditor, and has never brought a suit against any debtor. Capax did not even have the authority to make any telephone calls to debtors or to make other personal contact with debtors demanding payment, and made no such calls or contacts, until the advent of "Phase 2." (Goodman, Tr. 553, 768; Pavlo, Tr. 989-990; Absalom, Tr. 933.)²⁰ [16]

Thus, Capax misrepresented its true status and authority.²¹ There can be little doubt that this misrepresentation was a deceptive practice under the Federal Trade Commission Act. As in a prior debt collection practice case,

respondents had no authority to collect the debt but only mailed out the forms which were designed to imply that the debt had been turned over to, and was now in the hands of, the transmitting third party for collection. The Commission found that this lack of authority made the letters "wholly grounded in deception." We think this determination was readily supported, . . . for it is quite obvious that the impression conveyed to the debtor is quite different from the actual state of affairs. *S. Dean Slough v. FTC*, 396 F.2d 870, 872 (5th Cir. 1968).²² [17]

The ALJ dismissed this allegation of the complaint on several grounds. First, although he found that Capax represented itself as a collection agency (I.D. 25), he was not convinced that this representation was false (I.D. 26), since its principal activity, dunning debtors, is

¹⁹ In a similar vein, which asked what was meant by such phrases in Capax' letters as "unnecessary trouble," "embarrassment," and "additional costs," Mr. Goodman candidly testified that "most people have a very poor impression of collection agencies such as 'debt wagons,' people knocking on doors, speaking to neighbors, and causing all kinds of harassment and this would probably be in [the recipients'] minds." (Tr. 592.)

²⁰ In its promotional material, Capax stressed that it is "NOT a collection agency" (CX 9(a)); emphasis in original), that the creditor maintains account control and is paid by the debtor directly (CX 9(a)), and that there is no assignment of accounts. (CX 7(a).)

²¹ Capax also appears to have misrepresented its internal organization in its letters, for the sake of furthering its image of a full-line collection agency with complete authority to collect debts. At the end of the text of each dunning communication there appeared the name of a person identified as the manager or a person associated with the "collection department," (CX 10(i), CX 11(h-j), CX 12(h-m), CX 13(h-k), CX 16(b-e)), the "credit department" (CX 10(e, f), CX 12(d-g)), or the "claims department" (CX 10(b-d, m), CX 11(b-g, k-n), CX 14(b, c), CX 15(b, c)), yet the testimony reflected that there were no such departments. (Tr. 542, 566.)

²² *S. Dean Slough v. FTC*, *supra*, affirmed the Commission's determination in *State Credit Control Board*, 70 F.T.C. 1318 (1966), prohibiting a collection service from misrepresenting that it had official governmental status, that a delinquent account had been referred to it for collection, or that any legal or other action would be instituted to effect collection. There was broad language in the Commission's opinion which could be construed to mean that any third party referral of a debt which does not confer full authority to collect it is *per se* deceptive. The ALJ here discussed that possible interpretation, noting that it would make the entire dunning business unlawful. (I.D., PP. 50-51.) Such an interpretation would be in error. In *State Credit Control Board*, as here, the Commission prohibited the representation that the third party collection service has the authority to take legal or other affirmative collection action, when such is not the case. The Commission's final order established as a defense that respondent has the authority and good faith intent to take any represented action.

an important element of the overall collection process (I.D. 28.) It is true that Capax would be considered a collection agency under the Commission's Guides Against Debt Collection Deception, 16 C.F.R. 237,²³ and the Fair Debt Collection Practices Act, § 803(6), 15 U.S.C. 1672a(6).²⁴ It is also irrefutable that dunning agencies are part of the collection process. However, this misses the point of the allegation; it is not that Capax simply styled itself as a collection agency, but it represented that it had authority to take action which it did not actually possess. Second, the ALJ found that the language of Capax letters did not operate to deceive debtors. (I.D. 29.) This is clearly belied by the record, as discussed *supra*.

Finally, respondents argue that the letters sent to debtors are merely "reminders" of their outstanding bills. (Ans. Br. 23.) There is nothing wrong with mere reminders, but they must accurately portray the situation and not convey a misleading impression, directly or by implication.

To ensure that law violations of the sort found here do not continue, our order will prohibit respondents from misrepresenting their status, activities, or actions. If respondents can establish that such representations are factually correct, that shall serve as a defense. [18]

III. THREATS OF SUIT

According to the complaint, respondents represented that unless payment was received, steps would be taken to initiate legal action against the debtor, but that in fact the only action taken during the form letter series was to send additional letters to the debtor or to return the uncollected account to the creditor. The ALJ found, and the letters introduced in the record clearly demonstrate, that threats of legal action were made. For example,

... IT IS THE INTENTION OF OUR CLIENT TO EXHAUST EVERY LEGAL AVENUE AT THEIR DISPOSAL IN ORDER TO COLLECT THIS CLAIM. (sixth, second, eighth and second contacts, respectively, Diplomatic and Strong series, CX 10(i); CX 11(d); CX 17(h); CX 18(c); Spanish series, CX 12(j); CX 13(d));

... IMPERATIVE THAT SATISFACTORY ARRANGEMENTS BE MADE TO AVOID FURTHER ACTION, AVAILABLE TO CLAIMANT UNDER PROVISIONS OF STATE STATUTES. . . (seventh contact, Diplomatic series, sixth contact, Strong series, respectively, CX 10(j)-(k); CX 11(i)-(j); CX 18(h); Spanish series, CX 12(k)-(l); CX 13(k); CX 19(i); CX 20(h));

²³ Section 237.0(f) defines a "collection agency" as "any . . . corporation . . . which collects money debts for others. Section 237.0(a) defines "industry member" as "any . . . corporation . . . engaged in the practice of collecting or attempting to collect any and all kinds of money debts for itself or others. . . ."

²⁴ "The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mail in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

YOUR REFUSAL OR NEGLECT TO SATISFY THE ABOVE LIABILITY COMPELS US TO NOTIFY YOU TO PRESENT ANY DEFENSE AGAINST THE VALIDITY OF THIS CLAIM ON FILE. YOU MAY PROTEST SAID CLAIM OR LIST PROPERTY WHICH YOU FEEL MAY BE EXEMPT, IF A-B-C- SUPPLY COMPANY OBTAINS A JUDGMENT. (ninth contact, Diplomatic and Strong series, tenth contact, Diplomatic and Strong series, respectively, CX 10(m); CX 11(n); CX 17(k); CX 18(k); Spanish series, CX 12(n); CX 13(m)-(n); CX 19(k); CX 20(j));

WE ARE WRITING THIS LETTER TO INFORM YOU OF THE SERIOUSNESS OF YOUR DELINQUENCY AND OF THE FACT THAT SHOULD IT CONTINUE ALL POSSIBLE LEGAL MEANS WILL BE TAKEN TO COLLECT IT. (third contact, Strong series, CX 11(e); CX 18(d); Spanish series, CX 13(e); CX 20(d)).²⁵

The ALJ concluded, however, that these statements were not deceptive. First, he found that "most" of the statements plainly refer to a suit by the creditor rather than by Capax. (I.D. 45.) However, there are some statements, such as the last, which do not state who will be suing, and carry the innuendo that "we," Capax, will be using all possible legal means to collect the alleged debt. Such statements are patently deceptive, in view of Capax' lack of authority to initiate legal action against a debtor. Those statements threatening legal action by the creditor also have the capacity to deceive, since Capax had no knowledge during the course of its flat [20] rate series whether a creditor actually would take legal action against the particular debtor. (Tr. 543, 567, 587-590, 600-601.) It is a deceptive trade practice for a collection service to threaten the initiation of legal proceedings against a debtor, either by itself or another, where there is in fact no intent to actually initiate such proceedings. *Cf. Trans World Accounts, supra; Wilson Chemical Co.*, 64 F.T.C. 168, 185 (1964); *see also* § 807(5) of the Fair Debt Collection Practices Act, which prohibits the threat to take any action that cannot legally be taken or that is not intended to be taken. 15 U.S.C. 1692e.

The impression of the witnesses who received Capax' communications was that legal action would definitely be commenced unless their alleged debts were paid. (Thom, Tr. 128-130, 142; Nield, Tr. 151, 154; Gardner, Tr. 263; Gravatt, Tr. 321-322; Vineburgh, Tr. 437.) For example, when Ms. Thom was asked what statement in CX 18(c) led her to believe that she would be sued, she replied: "It is the intention of our client to exhaust every legal means at their disposal." (Tr. 128.) She elaborated: "I got the impression that it was Continental Credit

²⁵ Additional examples are:

"... IF YOU WANT TO AVOID UNPLEASANT AND COSTLY ACTION, MAKE IMMEDIATE PAYMENT DIRECTLY TO A-B-C- SUPPLY COMPANY (eighth contact, Diplomatic series, sixth contact, Strong series, respectively, CX 10(l); CX 18(g); Spanish series, CX 13(i); CX 19(j); CX 20(g));

"IT IS IMPERATIVE THAT YOU CONTACT YOUR CREDITOR TODAY TO AVOID FURTHER ACTIONS. . ." (fifth, sixth and second contacts, respectively, Diplomatic and Strong series, CX 10(g)-(h); CX 17(g); CX 18(e); Spanish series, CX 12(h)-(i); CX 13(d).)

See also CX 10(i), CX 11(h), CX 11(k).

Corporation. . .that was going to sue us." (Tr. 128.) "We called Continental Credit Corporation because we sincerely felt they were going to sue us, they were going to take us to court. . ." (Tr. 129.)²⁶ [21]

The ALJ further ruled that while Capax did not know whether particular creditors intended to bring suit against particular debtors, Capax "did have a *reasonable basis* for warning debtors to expect suit if they did not pay up, in its knowledge that creditors generally and Capax' clients in particular, almost without exception, want to sue for their money if necessary, assuming a negligible economic feasibility factor." (I.D. 49.) The ALJ relied heavily on the testimony of Mr. Goodman, Capax' President, for the finding. He acknowledged that Mr. Goodman admitted that when a dunning letter is transmitted with a warning that suit would be brought Capax could not really say "for a fact" whether the particular creditor would sue if the debt went unpaid (Tr. 543, 588, 590); the ALJ concluded, however, that Mr. Goodman's testimony indicated there was a reasonable basis for such warnings. We disagree. After stating generally that he believed his clients intended to exhaust all possible legal means to recover a claimed debt, upon cross-examination he conceded that "we *assume* they want the money in" (Tr. 567, emphasis added), "This is *normally implied* to us by the creditor" (Tr. 588, emphasis added), and "We are under the *impression* given to us by our clients that they would [bring suit] when financially feasible to do so." (Tr. 589, emphasis added). Assumptions, implications, and impressions hardly furnish a reasonable basis. Moreover, nothing in the record provides any grounds for the finding made by the ALJ that creditors generally, and Capax' clients in particular "almost without exception," desire to sue to recover claimed debts "assuming a negligible economic feasibility factor." Assuming that such a feasibility factor exists, the record provides no indication as to whether it is "negligible" and, if so, what that amounts to.

We hold that respondents, as charged in the complaint, falsely threatened that legal action would be initiated unless payment was received. The position of the ALJ and respondents—that the threat of legal action is a "largely reasonable and justifiable prediction" (Ans. Br. 23)—must be rejected, for the net impression of Capax' representa-

²⁶ The ALJ dismissed much of this consumer testimony because he interpreted many of the particular phrases to which the witnesses had referred as warning only of a possibility of suit, and concluded that such a warning was literally true. However, as discussed above, in ascertaining the impression created by communications, the overall impression likely to be made upon the public, not the technical interpretation of each phrase, is crucial. *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962). The meaning conveyed by words often differs from their literal significance; a debt collector may not exploit this disparity to deceive by using words which may be literally true but convey a false message to the reader. *Cf. J. B. Williams Co. v. FTC*, 381 F.2d 884, 889 (6th Cir. 1967). A fair reading of the testimony here reflects that these witnesses, in fact, were testifying as to their overall impressions from Capax'

tions was that legal action definitely would be commenced, and respondents [22] admit they did not know this.²⁷ As the court stated in *S. Dean Slough v. FTC*, *supra* at 872, "the fault with Petitioner's position is his own readily-made admission that the entire collection scheme is designed to collect without the necessity of legal action, and therein lies the deception."

These allegations of the complaint having been sustained, the Commission's order will prohibit respondents from misrepresenting directly or by implication that legal action with respect to an alleged delinquent debt may or will be initiated, or otherwise misrepresenting in any manner the likelihood of legal action. The factual truth of such representation will provide a defense to respondents, but references to legal action in their letter series must be carefully and selectively employed to avoid deception. See *Trans World Accounts*, *supra* at 12-13. Respondents should not represent, directly or by implication, that legal action *will* be taken or *is intended* to be taken unless such action is taken in all cases where the threat of legal action is not met by payment. *Helix Marketing Corporation*, 83 F.T.C. 514 (1973). Furthermore, respondents should not represent, directly or by implication, that legal action *may* be taken unless they can demonstrate from their experience that suit is the *ordinary* response to nonpayment. Cf. Fair Debt Collection Practices Act, § 805(c)(2), 15 U.S.C. 1692c. Suit in more than half the instances of nonpayment will be sufficient to substantiate a claim that legal action may be taken. *Trans World Accounts*, *supra*; *Helix Marketing Corp.*, *supra*. In order to facilitate compliance with the order, respondents might well treat discernible classes of alleged debtors differently, depending upon the likelihood that members of each class will be sued. "Unsatisfied claims of a particular client or clients should not be lumped together for the purpose of establishing that legal action is taken in more than 50 percent of all cases where it is the practice to treat different classes of claims in different ways." *Trans World Accounts*, *supra*. If claims below a certain amount are not ordinarily pursued by some creditors in court, the letters used to collect those claims should not contain references to legal action, except where a decision to sue has been made. [23]

IV. THREATS TO CREDIT STANDING

Capax' dunning letters contained the following statements:

PAID IN FULL WITHIN SEVEN DAYS, THIS ACCOUNT WILL NOT BE SHOWN ON OUR CREDIT RECORDS. . . . FORWARD YOUR PAYMENT NOW DIRECTLY TO A-B-C- SUPPLY COMPANY IN ORDER TO RECEIVE PROPER CREDIT. . .

²⁷ Capax admits that it never even provided any advice with respect to possible legal action until the flat rate letter service had run its course. (Tr. 766-767; 596-601.)

(first contact, Diplomatic series, CX 10(b)-(c); CX 17(b); Spanish series, CX 12(b)-(c); CX 19(b));

UP TO NOW YOUR CREDIT STANDING WITH A-B-C- SUPPLY COMPANY HAS BEEN SATISFACTORY. CREDIT IS A PRIVILEGE, NOT A RIGHT. IT IS IMPORTANT TO PROTECT THIS PRIVILEGE, BECAUSE ONCE IT IS LOST IT IS ALMOST IMPOSSIBLE TO REPLACE. LIKE MOST OTHER PRIVILEGES, YOU ONLY MISS IT WHEN YOU NEED IT. (third contact, Diplomatic series, fifth contact, Diplomatic series, second contact, Bad check series, respectively, CX 10(e); CX 17(f); CX 21(c); Spanish series, CX 12(g); CX 19(f));

IF THIS IS NOT DONE [i.e., making a satisfactory arrangement for payment] CONTINENTAL CREDIT CORPORATION CAN TAKE NO OTHER POSITION BUT TO RECOMMEND A STRONGER COURSE OF ACTION TO OUR CLIENT. . . IF THIS IS DONE THERE MAY BE ADDITIONAL COSTS TO YOU AND YOUR CREDIT STANDING MAY SUFFER. . . . (fourth contact, strong series, CX 11(f-g); CX 18(e); Spanish series, CX 13(g); CX 20(e).)²⁸ [24]

In our judgment, these statements have the capacity to deceive recipients into believing that unless payment is received, respondents will take action to adversely affect the debtor's credit record, as alleged in the complaint. Respondents had no control over or knowledge of whether a creditor would take action to adversely affect the debtor's credit standing if payment was not received, and Capax never took any such action itself.

The ALJ dismissed this allegation of the complaint because he considered the literal meaning of the above-quoted statements to be true: in the first instance, if payment is made, the account will not be shown on Capax' credit record; in the second instance, if payment is not made, the debtor's credit standing with the particular creditor involved will suffer; and in the third instance, nonpayment will have an adverse effect on the debtor's credit standing if a law suit is brought. These are possible meanings, but the statements can also easily be interpreted to mean that failure to make payment will adversely effect the debtor's general credit standing. Representations capable of two meanings, one of which is false, are misleading. *United States v. 95 Barrels of Vinegar*, 265 U.S. 438, 442 (1924); *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *modified on other grounds*, 348 U.S. 970 (1955). Such representations are to be construed against those making them. *United States v. 95 Barrels of Vinegar, supra*; *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962).²⁹ The testimony of the witnesses amply supports our view. [25]

²⁸ Capax' "Telegram" made the following statement:

"IN AN EMERGENCY, WHEN YOU NEED CREDIT WILL YOU BE ABLE TO GET IT OR BE TURNED DOWN BECAUSE OF YOUR PAST EXPERIENCE. . . . THIS IS SOMETHING TO THINK ABOUT. . . . IT IS YOUR CREDIT FUTURE THAT MAY SUFFER" (CX 17(d)).

Capax' President, Mr. Goodman, admitted that the phrase "your credit standing may suffer" could be interpreted to mean that the debtor's general credit standing could be adversely affected. (Tr. 593-596.) This was vividly illustrated by the testimony of the consumers who received Capax' letters. Mr. Gardner interpreted the statements regarding credit records to mean that failure to pay the alleged debt "would affect my credit in a derogatory manner." (Tr. 252; *see generally* Tr. 250-253, 289-294.)³⁰ Mr. Gordon was concerned from Capax' letters that "some action would be taken against my credit rating." (Tr. 355; *see also* Tr. 375-376, 381-385, 398.)³¹ Mr. Vineburgh had the impression from Capax' letters that if he did not pay the bill "they were going to initiate action that would reflect on my credit and I had just gone through a rather traumatic experience a few years previously (from a substantial loss caused by riots in Washington, D.C.) and I didn't want any other reflections on my credit." (Tr. 420-421.) Ms. Viera "had the feeling that my credit was going to be harmed. . . ." (Tr. 493; *see generally* 493-499.)

It is a deceptive practice to falsely represent that a debtor's credit rating will be adversely affected if the debt is not paid. *Cf. Parents' Magazine Enterprises, Inc.*, 68 F.T.C. 980 (1973). Our order will prohibit respondents from representing that action will be taken to adversely affect the debtor's credit record with a consumer reporting agency or any other third party, or otherwise misrepresenting the impact or effect of nonpayment upon the debtor's credit record. [26]

V. THREATS TO ENFORCE PROMPT PAYMENT

The ALJ dismissed the final allegation of the complaint, charging respondents with misrepresenting that unless payment was received within the time specified, immediate action would be taken to collect the debt, such as the filing of suit. The complaint asserted that the only subsequent action was either the sending of additional form letters to the alleged debtor or returning the uncollected account to the creditor. We believe that the evidence amply supports the complaint allegation.

Capax' letters were replete with threats, both explicit and implicit,

or the credit ratings they dispense." (I.D. 51; *see generally* I.D. 54-54.) However, the precise manner in which one's credit standing would be adversely affected—whether due to the action of a consumer reporting agency or otherwise—would probably be irrelevant to most consumers, since it is fair to assume that the general public is not terribly familiar with the manner in which credit ratings are made and the role played by consumer reporting agencies. The FTC Act "was not made for the protection of experts, but for the public." *Charles of the Ritz v. FTC*, *supra* at 679. For those consumers who would relate an adverse effect upon one's credit record to the activities of a consumer reporting agency, the inference could certainly be drawn from Capax' statements that nonpayment would result in respondents' taking action to adversely affect the debtor's credit record with a consumer reporting agency.

³⁰ Mr. Gardner assumed that Capax was possibly "in a position to affect my credit generally." (Tr. 294.) We find that Capax' statements have the capacity to create that assumption.

³¹ Mr. Gordon did not know, of course, that Capax did not take any action to adversely affect a debtor's credit rating. (Tr. 404-405.)

See also CY 10(a)-(b), CY 11(f) - (n), CY 11(b), CY 11(i) - (j), CY 11(m), CY 11(n).

knowledge of or control over any action which might be taken by the creditor to recover an alleged debt. Mr. Goodman, Capax' President, admitted that the only consequence of the debtor's failure to pay before the indicated deadline would be the transmittal of further letters. (Tr. 562, 579.) For example, if the recipient failed to "settle" the account within the seven days specified by letter CX 10(b), "in all probability he would receive another contact." (Tr. 534.) Capax generally never suggested to its clients to stop the mailing of letters until the series had been completed. (Tr. 799-802.) The purpose of the specific deadlines for payment was to establish a "time frame" (Tr. 535) to get the debtor "off his rump" (Tr. 604-605) so that he would pay as soon as possible (Tr. 535). At the oral argument, respondents' counsel conceded that the deadlines imposed by Capax were arbitrary. (TROA 54.)

The ALJ found that Capax' warnings of immediate sanctions if its payment deadlines were not met may be false in "a literal sense," but that the ordinary debtor would recognize them as mere "bluff and bluster," analogous to puffing in merchandising, which can be taken with a "grain of salt." (I.D. 64-68.) He believed that the "debtor here—like debtors generally—learn that such threats are commonly harmless and may commonly be disregarded for a long time, at least—with impunity." (I.D. 64.) Such an approach is unprecedented in Commission annals, and for good reason. There is absolutely no support in the record for the assumptions made by the ALJ. On the contrary, the record reflects that debtors receiving dunning letters demanding payment within a deadline experience great anxiety and apprehension. The testimony of the recipients here indicates that their refusal to pay their debts was frequently due to serious disputes with the creditors or [29] erroneous billing, *see* n. 15 *supra*, rather than disregard of the threats by Capax as harmless. In fact, the general reaction of the dunned consumers was to take some action to protect or defend against the threat of imminent action by Capax.³³ Of course, it is well

³³ Upon receiving Capax' dunning letters specifying deadlines for payments, Ms. Thom took steps to defend herself against anticipated legal action, contacting an attorney. (Tr. 120-122.) She testified that the message contained in letter CX 18(d), which states that "all possible legal means will be taken to collect" the debt and directs that payment be made within the next few days, "strikes terror into your heart." (Tr. 130.) Ms. Zuccarrelli was "shocked" (Tr. 671) and "worried" (Tr. 662) by Capax' letters demanding payment for an air conditioning repair bill which she disputed. She testified that "each and every time I went to Florida [where the house with the air conditioner was located] I called the tax assessor's office to find out if a lien had been put against my property down there and also in New Jersey" (where her permanent residence was located). (Tr. 664.) From Capax' letters, Mr. Gordon feared that some action would be taken against his credit rating and called his attorney, who made the determination to contact Capax' regarding the matter. (Tr. 354-361.) Ms. Nield had the overall impression from Capax' communications that a legal suit would be commenced against her immediately, and contacted the creditor. (Tr. 151-152.) Mr. Gordon "thought some detrimental action was going to be taken, so I forwarded each letter and telegram to my attorney for his recommendation on the answers he saw fit." (Tr. 373-374.) Ms. Viera believed that the dunning letters she received were a mistake because her insurance company owed the medical bill for which she was being dunned, but was afraid that her credit standing would be harmed by Capax and anxiously contacted the doctor. (Tr. 491-496.) Mr. Gardner

(Continued)

established that capacity to deceive rather than actual deception is the standard under Section 5, and that whether or not consumers are misled into making payment or suffering injury is irrelevant if the practices under consideration have the capacity to deceive. *See, e.g. Thiret v. FTC*, 512 F.2d 176, 180 (10th Cir. 1975); *Mohawk Refining Corp. v. FTC*, 263 F.2d 818, 821 (3rd Cir.), *cert. denied*, 361 U.S. 814 (1959); *Goodman v. FTC*, *supra*. [30]

Our order will prohibit Capax from misrepresenting the imminency of any action that may be taken.

VI. AFFIRMATIVE DISCLOSURE

Complaint counsel request that the order require the following type of notice in each communication sent to alleged debtors:

We are an independent company employed by your creditor solely for the purpose of reminding you of your outstanding obligation. We are not authorized to engage in typical debt collection activity, to institute suit or to take any action which may affect your credit rating. (App. Br. 54-55, n. 61.)³⁴

Capax concedes that if its "Telegram" and "Letegram" formats are found deceptive they should be banned, as should the misrepresentations regarding the full-line collection agency image, threats of suit, threats to credit standing, and threats to enforce prompt payment. (Ans. Br. 31-32.) It argues, however, that the notice might suggest to debtors that nothing of importance can be expected from Capax' communications, to their obvious peril if suit is brought by the creditor. [31]

While the Commission's authority to require affirmative disclosure is well established, *see, e.g., Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960), we do not consider the affirmative disclosure sought here by complaint counsel to be necessary, under the circumstances of this case, in light of the order's ample prohibitions on misrepresentations. Moreover, we believe that the proposed disclaimer could lull recipients into a false sense of security by giving them the impression that failure to pay the claimed debt will not result in legal action or harm to their credit standing. Because creditors might pursue an alleged delinquent debt by bringing

interpreted Capax' letters to threaten suit in the immediate future, and contacted his lawyer as well as a state consumer protection office. (Tr. 263-264.) The reactions of the dunned consumers who testified hardly supports the view that they considered Capax' threats to enforce prompt payment as mere bluff and bluster to be disregarded.

³⁴ This is a modification from the proposed affirmative disclosure in the notice order accompanying the complaint.

The proposed affirmative disclosure would not be required where respondents indicate in a particular communication that (1) suit will be filed and it is, unless failure to file suit is due to subsequent bona fide instructions from the creditor or subsequent information from the debtor indicating non-existence of the alleged debt, or (2) some bona fide action against the debtor will be taken (other than filing suit or mailing subsequent requests for payment).

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suit or could report the matter to a consumer reporting agency, debtors who decided not to make payment on the basis of the disclaimer could suffer harm. Therefore, our order will not include the proposed affirmative disclosure.³⁵

For the foregoing reasons, the appeal of complaint counsel is granted, as provided above. The initial decision of the administrative law judge dismissing the complaint will be vacated, and an appropriate order will be entered.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having granted the appeal:

It is ordered, That the initial decision and order of the administrative law judge be, and they hereby are, vacated, except to the extent that the initial decision is consistent with the accompanying opinion of the Commission, and the findings of fact and conclusions of law contained in the opinion be, and they hereby are, adopted as the findings and conclusions of the Commission in this matter.

Accordingly, the following cease and desist order is hereby entered:

ORDER

It is ordered, That respondents Capax, Inc., formerly Continental Credit Corporation, Inc., a corporation, its successors and assigns, and its officers, and Joseph V. DeFelice and Arnold Goodman, individually and as officers of said corporation, and Norman Bricker, individually and as a former officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering for sale, sale, or distribution of any service or printed matter for use in the collection, or attempting to collect, or assisting in the collection of, or inducing or attempting to induce the payment of alleged delinquent debts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

³⁵ As complaint counsel note (App. Br. 59, n. 62), the Commission has previously ordered disclaimers similar to that sought here. *Trans-American Collections, Inc.*, Dkt. 8901, 83 F.T.C. 525 (1973); *United Computer Collections, Inc.*, Dkt. C-2806, 87 F.T.C. 542 (1976); *Trans National Credit Corp.*, Dkt. C-2807, 87 F.T.C. 549 (1976); *Continental Collection Bureau of America, Inc.*, Dkt. C-2808, 87 F.T.C. 557 (1976); *North American Collections, Inc.*, Dkt. C-2809, 87 F.T.C. 566 (1976); *Power's Service, Inc.*, Dkt. C-2810, 87 F.T.C. 574 (1976); *Continental Collection Service*, Dkt. C-2811, 87 F.T.C. 582 (1976). The appropriateness of those disclaimers depends upon the facts of each case, including the prescribed language and the details of the firm's operations and authority. However, we are today issuing orders to show cause why those consent orders should not be modified to delete the mandated affirmative disclosures, pursuant to Commission Rule 3.72(b).

1. Using or placing in the hands of others for use, envelopes letters, forms, or any other materials which by their appearance content, or otherwise, misrepresent that they are telegraphic communications.

2. Using or placing in the hands of others for use, envelopes letters, forms, or any other materials which by simulating telegrams or other methods, forms, or types of communication misrepresent the nature, import, or urgency of any communication.

3. Representing, directly or by implication, that:

(a) Delinquent debtors' accounts have been referred to respondents or another as a debt collection agency with authority to engage in such debt collection activities as making personal demands for payment and/or filing suit; or otherwise misrepresenting respondents' status, activities, or actions.

(b) Unless payment is received, legal action with respect to an alleged delinquent debt may or will be initiated, or otherwise misrepresenting in any manner the likelihood of legal action.

(c) Unless payment is received, action will be taken to adversely affect the debtor's credit record with a consumer reporting agency or any other third party; or otherwise misrepresenting the impact or effect of nonpayment upon the debtor's credit record.

(d) Unless payment is received within the time specified by respondents, immediate action will be taken to collect the debt, such as the filing of suit; or otherwise misrepresenting the imminency of any action that may or will be taken.

Provided, that it shall be a defense in any enforcement proceeding initiated under Paragraph 3 for respondents to establish that such representations are factually correct.

4. Placing in the hands of others the means and instrumentalities to accomplish any of the matters prohibited in this order, or which fail to comply with the requirements of this order.

It is further ordered, That the respondent corporation shall distribute a copy of this order to each of its operating divisions or departments and to each of its present and future officers, agents, representatives, or employees engaged in any aspect of the offering for sale, sale, or distribution of any service or printed matter for use in the collection, or attempting to collect, or assisting in the collection of, or inducing or attempting to induce the payment of alleged delinquent debts, and that said respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent corporation notify the Commission at least thirty (30) days prior to any proposed change in

resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the individual respondents named herein shall promptly notify the Commission of their affiliation with a new business or employment whose principal activities include the offering for sale, sale, or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of alleged delinquent debts, or of their affiliation with a new business or employment in which their duties and responsibilities involve the offering for sale, sale, or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of alleged delinquent debts. Such notice shall include individual respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall, within sixty (60) days from the date this order becomes final, and periodically thereafter as required by the Federal Trade Commission, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

Modifying Order

91 F.T.C.

IN THE MATTER OF

NOSOMA SYSTEMS, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2841. Final Order, Sept. 28, 1976 — Modifying Order, June 12,
1978*

This order modifies an order to cease and desist issued on September 28, 1976, 41 FR 50810, 88 F.T.C. 459, by adding particular language to the fourth paragraph of the original order to prevent conflict with the Fair Debt Collection Practices Act.

ORDER GRANTING PETITION TO REOPEN PROCEEDING AND
MODIFY ORDER TO CEASE AND DESIST

By letter filed on March 27, 1978, petitioners have requested the Commission to modify the consent order to cease and desist. This request is being treated as a petition to reopen the proceeding and modify the order under Rule 3.72(b)(2) of the Commission's Rule of Practice.

Petitioners seek to modify Paragraph Four of the order so that it is not in conflict with the Fair Debt Collection Practices Act. The Bureau of Consumer Protection does not oppose the modification. Therefore,

It is ordered, That the proceeding be reopened for the purpose requested.

It is further ordered, That Paragraph Four be modified by the addition of the following language:

Provided, however, that nothing in this paragraph, shall be interpreted as violating the order when in acquiring location information, as that term is defined in Section 803(f) of the Fair Debt Collection Practices Act, the caller identifies his employer, when expressly requested to do so pursuant to Section 804(1) of said Act.