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THE IMPACT OF DENYING SELF-HELP REPOSSESSION OF AUTOMOBILES: A CASE STUDY OF THE WISCONSIN CONSUMER ACT*

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Since the Supreme Court in *Sniadach v. Family Finance Corp.*¹ invalidated Wisconsin's prejudgment wage garnishment statute as violative of due process, there has been general controversy about the constitutionality of creditor remedies in the consumer area. Many frequently used creditor remedies permit a creditor to seize property without first providing the debtor with notice or an opportunity for a hearing into either the merits of the creditor's claim or the propriety of the particular remedy.² Since *Sniadach* the validity of such *ex parte* procedures under the due process clause has been suspect. Simultaneously with these constitutional attacks there have been a number of legislative proposals for substantial change in creditor remedies. The best known proposals have been in the form of model state legislation. The first, the Uniform Consumer Credit Code (hereinafter, the UCCC), originally recommended relatively minor changes in tradi-

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1. 395 U.S. 337 (1969).

2. Debtors nearly always can sue a creditor, postseizure, for conversion and in that way question the validity of the creditor's claim or the propriety of the remedy. The controversy has concerned the debtor's right to a preseizure judicial hearing on these issues.

Prejudgment attachment and mechanic's liens are creditor remedies that in most jurisdictions permit the creditor to preclude the debtor's use of property through *ex parte* procedures, but the creditor's use or disposal of the property is usually permissible only after prior notice to the debtor and an opportunity for a judicial hearing. By depriving the debtor of use of the property, a creditor can greatly enhance its bargaining leverage and prospects for a favorable settlement; in practical impact there may not be substantial difference between an *ex parte* remedy which gives a creditor complete immediate dominion over a debtor's property and one which merely deprives the debtor of use. See generally *Adams v. Dept. of Motor Vehicles*, 113 Cal. Rptr. 145, 520 P.2d 961 (1974).

tional remedies,³ but it was the catalyst for the National Consumer Act—in its most recent version, the Model Consumer Credit Act—which proposes very substantial changes, eliminating a number of important creditor remedies entirely and generally requiring prior notice and an opportunity for a hearing before creditor seizure of debtor property.⁴ The National Commission on Consumer Finance has also made far-reaching recommendations, which generally resemble the National Consumer Act position.⁵ In addition to proposed model state legislation, a number of states have actually enacted changes. Of the various state enactments, the Wisconsin Consumer Act probably goes the farthest in comprehensively restricting traditional creditor remedies.⁶

Of all the creditor remedies engulfed by controversy, one of the most important is the secured creditor's right to repossess collateral, unless it is realty, by self-help means without prior notice or an opportunity for a hearing. This right is codified in the default provisions of Article 9 of the Uniform Commercial Code.⁷ Self-help repossession is generally restricted to situations in which it can be accom-

3. UNIFORM CONSUMER CREDIT CODE (Official text 1968). A more recent redraft of the UCCC proposes more substantial restrictions on creditor remedies. See Miller & Warren, *A Report on the Revision of the Uniform Consumer Credit Code*, 27 OKLA. L. REV. 1 (1974).

4. NATIONAL CONSUMER ACT (First Final Draft 1969); MODEL CONSUMER CREDIT ACT (1973). These model acts were drafted by the National Consumer Law Center, an OEO Legal Services Program "back up" center, largely in response to the perceived inadequacy of the UCCC. Though not adopted in any state, the Acts have effectively highlighted alternatives to the UCCC, and in that way perhaps have retarded the enactment of the UCCC. The latter was recently redrafted to include substantially more restrictions on creditor remedies. See note 3 *supra*.

5. THE NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES (1972) (hereinafter cited as NCCF Report).

6. WIS. STAT. §§ 421.101-428.106 (1973). For general discussion of the Act's provisions, see Heiser, *Wisconsin Consumer Act—A Critical Analysis*, 57 MARQ. L. REV. 389 (1974); Davis, *Legislative Restriction of Creditor Powers and Remedies: A Case Study of the Negotiation and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 3 (1973); Crandall, *The Wisconsin Consumer Act: Wisconsin Consumer Credit Laws Before and After*, 1973 WIS. L. REV. 334.

Other states, like Wisconsin, have adopted specially drafted, comprehensive consumer credit statutes, though none restrict traditional creditor remedies as much as does Wisconsin's legislation. See, e.g., D.C. CODE ANN. § 28-3801 *et seq.* (1973). But the vast majority of states have altered creditor remedies, if at all, on a piecemeal basis. The National Consumer Act, Model Consumer Credit Code, and the recommendations of the National Commission on Consumer Finance have yet to be adopted in their respective entireties in any state. See generally CCH, CONSUMER CREDIT GUIDE.

7. UNIFORM COMMERCIAL CODE § 9-501 *et seq.* The right to repossess by self-help clearly antedated the Code. See generally McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58 (1973). Article 9 did make many detailed but potentially significant changes in the law of many jurisdictions, however. See Clark, *Default, Repossession and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302, 330 n.116a (1972).

plished without committing a breach of peace. Because entry of a debtor's home without permission is usually deemed a breach of the peace,⁸ in the consumer credit area, self-help repossession is used principally to seize motor vehicles.⁹

Like many other important creditor remedies, the constitutionality of self-help repossession¹⁰ of motor vehicles has been attacked following *Sniadach*.¹¹ This litigation has focused on two principal issues. One concerns the meaning of due process in the creditor remedies area. In *Fuentes v. Shevin*¹² the Supreme Court resolved, at least temporarily, questions as to whether *Sniadach* was limited to prehearing seizure of wages;¹³ in that case the Court invalidated, as violative of due process, procedures for seizing secured collateral with the assistance of a sheriff after obtaining an *ex parte* court order. In the more recent decisions in *Mitchell v. W.T. Grant Co.*¹⁴ and *North Georgia Finishing v. Di-Chem*,¹⁵ however, the Court backed away from the apparent implications of *Fuentes* and sanctioned prejudgment seizure of nonwage property without prior notice to the debtor or an opportunity for a hearing, where seizure is preceded by *ex parte* judicial authorization issued after presentation of detailed affidavits alleging facts supporting the creditor's right to the remedy in question.¹⁶ Actually, if applicable to self-help automobile repossession,

8. See White, *Representing the Low Income Consumer in Repossessions, Resales, and Deficiency Judgment Cases*, 64 Nw. U.L. Rev. 808 (1970).

9. Most other collateral securing consumer debts is usually located in the debtor's home and has traditionally been repossessed through procedures provided by replevin and double bonding or claim and delivery statutes. See *Fuentes v. Shevin*, 407 U.S. 67 (1972). These statutes permit a creditor to obtain an *ex parte* judicial order requiring the debtor to relinquish possession, which is then executed by a sheriff.

10. We will frequently use the term "self-help" or "self-help repossession" to refer to repossession without prior notice or opportunity for a hearing. The terminology is somewhat inaccurate, since repossession can be effectuated by self-help even in a system which requires prior notice to the debtor and an opportunity for a judicial hearing. See WIS. STAT. § 425.206; notes 25-32 *infra* and accompanying text.

11. The volume of litigation has been truly enormous, as a glance at the current topical index of CCH, POVERTY LAW REPORTER, at page 145, will readily indicate.

12. 407 U.S. 67 (1972).

13. The question arose because in a passage the significance of which was unclear, Justice Douglas, writing for the Court in *Sniadach*, spoke of wages as "a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340. Although *Fuentes* seemingly made clear that seizure of all types of property is subject to due process restrictions, more recent cases have again raised the question whether wages are entitled to somewhat greater protection. See note 16 *infra*.

14. 416 U.S. 600 (1974).

15. —U.S.—, 95 S. Ct. 719 (1975).

16. The holding in *Mitchell*, largely because the majority attempted to distinguish rather than overrule *Fuentes*, was far from unambiguous in its impact. For example, because of the Court's emphasis on the creditor's competing property interest, it was unclear whether a *Mitchell*-type procedure would satisfy due process if the creditor did not possess a security interest, or something closely akin to it, such as the Lou-

even the holdings in *Mitchell* and *Di-Chem* would require a significant change in existing practices. Instead of simply arranging to seize a vehicle, typically by stealth, a creditor would need to secure prior, though *ex parte*, judicial approval, which may often necessitate the services of a lawyer. As the expense in effecting repossession increased, the utility of this remedy to the creditor would decrease.

The second principal issue has been whether self-help motor vehicle repossession involves state action and is thus subject to constitutional restrictions at all. Although self-help repossession can be accomplished without any direct assistance by a state official,¹⁷ because of the confused status of the state action doctrine, plausible arguments can be made that self-help repossession involves state action.¹⁸ In the past year, however, the Supreme Court has denied certiorari to a ninth circuit decision holding that self-help repossession did not involve state action,¹⁹ and this decision, together with

isiana vendor's lien. The opinions, though not the technical holdings, in *Di-Chem* remove many of these ambiguities. Assuming the Court will not once again distinguish prior cases on exceedingly fine grounds, as in *Mitchell*, it now appears that all creditor remedies will pass muster if they comply with the rigorous procedural technicalities provided by the Louisiana statutes upheld in *Mitchell*. The one exception may be attachment or garnishment of wages, since none of the cases has overruled or disapproved of *Sniadach*; perhaps only prior notice and an opportunity to be heard can legitimate seizure of wages. Although the meaning of due process in the creditor remedy area may now be mostly clear, this is not to say the resolution is altogether logical or wise. See Tushnet, *The Newer Property, The Burger Court and the Due Process*, 1975 S. CT. REV. (forthcoming); Dunham, *Due Process and Commercial Law*, 1972 S. CT. REV. 135.

17. Though this statement is literally correct, typically state officials will be involved in the events following a motor vehicle repossession. First, creditors commonly notify local police of repossessions, so the latter can inform debtors of the repossession when they report their vehicles stolen, as to them they appear to be. We have been told informally that a major reason the Chicago Police Department installed a large computer in the early 1960's was to manage the record-keeping problem of separating repossessions from other reports of stolen vehicles. Secondly, in states which require negotiation of a document of title to effectuate motor vehicle transfers, special procedures exist for effecting transfers where the prior owner's signature cannot practically be obtained—most importantly, repossessions and sales by decedent's estates. The Wisconsin Motor Vehicle Department staffs a special office just to process such involuntary title transfers.

18. The arguments are fully discussed and evaluated in numerous law review articles. See, e.g., Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 47 S. CAL. L. REV. 1 (1973). A principal argument is that the state is "entangled" in or encourages motor vehicle repossession through licensing creditors, adopting enabling statutes such as UNIFORM COMMERCIAL CODE § 9-503, and providing facilitating services such as discussed in note 17 *supra*. Cf. *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Another is that forcible deprivation of property is a "public function" in our system, and if a state empowers a private party to perform that function, the private party is subject to constitutional restrictions. See *Terry v. Adams*, 345 U.S. 461 (1953).

19. *Adams v. Southern California First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3281 (1974).

some consistent decisions from other circuits,²⁰ is generally regarded as having laid the state action issue to rest, at least temporarily.

Though the constitutional attack on self-help repossession seems today to be in remission, legislative proposals for change remain extant. For example, the National Commission on Consumer Finance has recommended that repossession be permitted only after the debtor has had an opportunity to be heard in court on the merits of the creditor's claim of default and on the propriety of repossession as a remedy.²¹ Moreover, a good deal of the law review commentary, though prompted by the constitutional attacks, has focused on the policy wisdom of permitting repossession of motor vehicles only after prior judicial approval.

The continuing debate about the propriety of self-help repossession makes particularly appropriate an inquiry into the impact of the Wisconsin Consumer Act. The Act, *inter alia*, requires notice to the debtor, an opportunity to be heard, and judicial approval before secured creditor repossession of motor vehicles and other kinds of collateral²²—a procedure more or less consistent with the recommendations of the National Commission on Consumer Finance. These provisions place greater restrictions on self-help repossession of motor vehicles than exist in any other state except Louisiana. The Wisconsin Act has been in effect since March 1, 1973, and thus has been in effect for a sufficient time to permit some assessment of its impact.²³

20. See, e.g., *Turner v. Impala Motors*, 503 F.2d 607 (6th Cir. 1974); *Brantley v. Union Bank & Trust Co.*, 498 F.2d 365 (5th Cir. 1974), *cert. denied*, 42 U.S.L.W. 3306 (1974); *Nowlin v. Professional Auto Sales*, 496 F.2d 16 (8th Cir. 1974), *cert. denied*, 42 U.S.L.W. 3281 (1974); *Shirley v. State Nat'l Bank*, 493 F.2d 739 (2nd Cir. 1974); *Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank*, 487 F.2d 906 (8th Cir. 1973). Albeit in dictum, in his opinion for the court in *Mitchell*, Justice White intimated that self-help repossession was not subject to constitutional restrictions. See 416 U.S. at 618-19.

21. NCCF Report, *supra* note 5, at 29. Repossession might not be an appropriate remedy, for example, if the default was technical and quickly cured. Such an extreme remedy in this circumstance might be deemed unconscionable even if authorized by contract. UNIFORM COMMERCIAL CODE § 2-302. As a practical matter, if creditors must seek prior court permission, it is unlikely that they will attempt repossession for minor and already cured defaults.

22. WIS. STAT. §§ 425.203-.206 (1973).

23. The transitional provisions of the Act do not make clear whether the restrictions on self-help repossession apply to repossessions occurring after the effective date of the Act but under contracts consummated prior to that date. Ch. 239, § 38, [1971] Wis. Laws 688. In private letters to creditors, the Commissioner for Banking, the administrator under the Act, has taken the position that the Act's restrictions were immediately effective, and all indications are that creditors generally have abided by this interpretation. The Dane County Circuit Court, in an unpublished opinion, recently upheld this interpretation. *Bailey v. Cuna Credit Union*, Dane County Circuit Court, No. 51-422, March 12, 1975 (ruling on motion for summary judgment).

This article will begin with a description of the provisions of the Wisconsin Consumer Act concerning motor vehicle repossession. We will then review the existing commentary on the policy wisdom of the proposed reforms of self-help repossession. Much of this commentary has focused on whether the economic costs of such reform exceed its benefits.²⁴ We will offer our own theoretical critique of this commentary and identify the hypotheses to be tested with data on the impact of the Wisconsin Consumer Act. We have decided that it would not be fruitful at this time to attempt to assemble data sufficiently rigorous to permit conclusive testing of the all-important hypotheses about the impact of the Act's provisions affecting motor vehicle repossession; instead we have collected whatever information has been readily available to us. This information provides incomplete yet valuable insights about impact; we will explain the limitations as we present our data and conclusions that may be drawn from it.

I. THE PROVISIONS OF THE WISCONSIN CONSUMER ACT

The most important provisions of the Wisconsin Consumer Act for our purposes require a prior court determination, after notice to the debtor and an opportunity for a hearing, that the creditor is entitled to the collateral before forceful repossession.²⁵ To obtain the required court permission, the creditor must bring a replevin action in the Wisconsin small claims court.²⁶ The Act contains a number of special provisions relating to this proceeding. Only the right to possession of the collateral can be determined in this proceeding; any claim for a deficiency or other monetary amount must be made in a separate action.²⁷ The summons must follow a statutory form, which provides the defendant-debtor extensive notice of his right to defend and of the consequences of failing to answer the summons.²⁸ The

24. See Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CAL. L. REV. 82 (1973). See also Dauer & Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson and a Partial Reply*, 47 S. CAL. L. REV. 116 (1973); White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503.

25. WIS. STAT. § 425.206 (1973).

26. Jurisdiction is exclusive in the small claims court. WIS. STAT. § 425.205(1) (1973).

27. *Id.* § 425.205(1)(e). For this reason the argument of some commentators that elimination of self-help repossession will increase the incidence of deficiency judgments, because at little additional cost the creditor could couple a deficiency claim with a claim for possession, is inapplicable to Wisconsin. See White, *supra* note 24, at 524-25. Although a deficiency judgment must be obtained in a separate action, the complaint in the repossession action must state the estimated amount of deficiency claim, if any. WIS. STAT. § 425.205(3)(e) (1973).

28. *Id.* § 425.205(2). The complaint must state with specificity the facts on which the creditor's allegations of debtor default are based, apparently to aid the

action may be initiated by a non-attorney, even if the creditor-plaintiff is a corporation, but the statute is ambiguous as to whether a corporate party must be represented by an attorney on the return date.²⁹ After a judgment establishing the creditor's right to possession, repossession can be effected by self-help, providing no breach of the peace is committed.³⁰ Following repossession there is a period of redemption, during which the creditor must retain the collateral.³¹ Any subsequent sale is governed by the provisions of the Uniform Commercial Code, except that the Act restricts the availability of deficiency judgments.³²

Voluntary debtor surrender of the collateral without prior court proceedings is permissible under the Act, but there are provisions attempting to prevent coercive voluntary surrenders. Thus, a surrender is not voluntary

if it is made pursuant to a request or demand by the merchant for the surrender of the collateral, or if it is made pursuant to a threat, statement or notice by the merchant that [he] intends to take possession of the collateral.³³

This provision has been interpreted as not preventing a merchant from notifying a debtor about his right to surrender the collateral voluntarily.³⁴ Voluntary surrender can benefit the debtor, since if repossession ultimately ensues the debtor will be responsible for court costs,³⁵ and perhaps also for the decline in the value of the collateral

debtor in preparing a pro se defense. *Id.* § 425.205(3). The Act further specifically provides that the debtor may answer the complaint, demur, or counterclaim orally on the return date. *Id.* § 425.205(1)(d). *See also id.* § 425.205(4).

29. *Id.* § 425.205(1)(a). *See also* notes 142-145 *infra* and accompanying text. The return date is provided by the general statutory provisions on small claims court proceedings and is no less than 8 days after service nor more than 17 days after issue of the summons. WIS. STAT. § 299.05(3) (1973). By providing for exclusive jurisdiction in the small claims court, therefore, the Consumer Act effectively expedites actions for repossession.

30. *Id.* § 425.205(5). *See also* note 58 *infra*.

31. *Id.* § 425.208.

32. *Id.* §§ 425.208(6), 425.209, 425.210.

33. *Id.* § 425.204(3). The consequences of a surrender that is not voluntary pursuant to this provision are complicated and a bit unclear. Even though threats, etc., are made, apparently the creditor is not liable for the penalties attaching to self-help repossession without a court order, providing the creditor has notified the debtor of his right to a hearing before repossession. *See* note 60 *infra*. The Commissioner of Banking, who has rulemaking authority under the Act, has indicated, however, that a deficiency judgment is not available if there is a nonvoluntary surrender, providing the transaction is not a direct loan and the amount owing at default is \$1,000 or less. WIS. ADM. CODE, BANKING § 70.70; WIS. STAT. § 425.209 (1973). A deficiency judgment is probably always available in the event of a voluntary surrender. *See* note 36 *infra*.

34. WIS. ADM. CODE, BANKING § 80.67. In practice, of course, creditors also notify debtors of the advantages of voluntary surrender, while still avoiding an actual "request" for voluntary surrender.

35. WIS. STAT. §§ 299.25, 425.205(1) (1973).

between the time voluntary surrender could have occurred and the time forceful repossession in fact occurs.³⁶

The Wisconsin Consumer Act has many other provisions that can have impact on the availability of automobile credit and on credit practices. The most important are provisions defining "default" in a consumer credit transaction and establishing a right-to-cure period. In the typical "closed end" automobile credit transaction, no cause of action (including an action for possession of collateral) accrues until two installments have remained unpaid for ten days.³⁷ Assuming monthly payments, therefore, a cause of action does not accrue for at least 40 days after a missed payment, although nothing in the Act prohibits informal collection efforts during this period. Following this minimum 40-day period, there is an additional 15-day right-to-cure period, commencing when the creditor mails a "right-to-cure" notice to the debtor.³⁸ Thus, assuming monthly payments, a creditor must wait at least 55 days after the first missed payment before he

36. Whether the debtor would be liable for depreciation of the collateral in the event of forceful repossession depends on whether a deficiency judgment would lie. *See id.* § 425.209; note 42 *infra* and accompanying text.

One important advantage of voluntary surrender for a creditor is that it may make available a deficiency judgment where it would be available in the event of forceful repossession. WIS. STAT. § 405.204(2) (1973) provides that in the event of voluntary surrender, the provisions of the Uniform Commercial Code on disposition of collateral shall govern, and these provisions provide for a deficiency judgment. WIS. STAT. § 405.209 (1973) provides, however, if the merchant accepts voluntary surrender, the amount owing at the time of default is \$1,000 or less, and the other conditions of the section are satisfied, then a deficiency judgment is not available. On their face, these provisions are in direct conflict. It seems probable that the latter provision was a drafting mistake and it should be ignored. *See Heiser, supra* note 6, at 462 n.154.

The basic structure of the Act's provisions on deficiency judgments is to provide the creditor a choice, where certain conditions respecting the amount owing and type of loan are met, between suing for a money judgment and repossessing the collateral. WIS. STAT. § 425.203(2) (1973). *Cf. id.* § 425.209(6). Simultaneously the debtor is provided an absolute right to surrender collateral voluntarily, so that the debtor can force the creditor to sell the collateral and apply the proceeds to the debt owing. *Id.* § 425.204(1). In many situations the creditor will be able to realize more on the collateral than can the debtor. It would be inconsistent with the creditor's basic option between suing on the debt and repossessing collateral, however, to permit the debtor to foreclose a deficiency judgment by surrendering the collateral voluntarily.

37. *Id.* § 425.103. A "closed end" transaction is basically one in which a fixed number of payments is to be made on preestablished dates. It is defined in the Act as a "transaction other than one pursuant to an open-end [credit] plan." *Id.* § 421.301(27)(a).

On its face the statute contains a special exception providing that failure to pay the first or last payments is an immediate default, *id.* § 425.103(2)(a)(1), but a regulation indicates that default does not occur until 40 days after a missed first or last payment. WIS. ADM. CODE, BANKING § 80.60. To our knowledge, there has been no challenge of the regulation's validity, despite its seeming inconsistency with the statute's plain meaning; we think creditors are complying with the regulation. *See Heiser, supra* note 6, at 457-58.

38. WIS. STAT. §§ 425.104-105 (1973); WIS. ADM. CODE, BANKING § 80.62.

can repossess the automobile.³⁹

Another important set of provisions restricts operation of the holder in due course doctrine. Under the Act, defenses available to the debtor in an action by the seller are assertable in an action by a good faith assignee if notice of the defense is given the assignee within 12 months after notice of the assignment is mailed to the debtor.⁴⁰ Generally speaking, a creditor who makes a direct loan, enabling the debtor to purchase an automobile is not subject to defenses available against the seller, though there are infrequent exceptions to this principle.⁴¹ If the creditor is a seller or one against whom defenses can be asserted, then after repossession and resale a deficiency judgment will not lie if the amount owing at default was \$1,000 or less.⁴² Finally, the Act has reasonably extensive provisions regulating informal collection conduct, including prohibition of contact with the debtor's employer or other third persons except for certain limited purposes, of communications with the debtor with such frequency or at such unusual hours as to harass, and of threats of legal action unless such action is intended in event of nonpayment.⁴³

II. THE POLICY ISSUES

The desirability of self-help repossession without prior notice or hearing could be judged on the basis of many different value precepts. It might be maintained, for example, that depriving a debtor of possession of property by stealth is such an affront to human dignity that it should not be permitted, regardless of the economic costs of eliminating this creditor remedy. Due process, after all, may foster virtues other than economic efficiency.⁴⁴ The debtor-creditor relationship, however, is importantly an economic one, and thus our analysis will focus primarily on the economic effects of eliminating self-help repossession.

On the basis of welfare economics premises it might be contend-

39. WIS. STAT. § 425.205(6) (1973) permits a secured creditor to commence an action for possession immediately upon default, providing the return date is set after expiration of the right to cure period. So far as we have been able to determine, creditors have not typically exercised this right to expedite repossession proceedings.

40. Technically, the Act prohibits the taking of a negotiable instrument, other than a check, in a consumer credit sale or lease, but a clause waiving defenses against assignees is enforceable except in the circumstances noted in the text. *Id.* §§ 422.406, 422.407, 422.409.

41. The exceptions pertain to "interlocking loans." *Id.* § 422.408.

42. *Id.* § 425.209. Of course, the creditor can elect to waive his security interest and seek a money judgment on the debt, in which event he cannot levy on the collateral. *Id.* §§ 425.203, 425.209(6).

43. *Id.* §§ 427.01 *et seq.*

44. *Cf.* Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954 (1974).

ed that the market will fairly determine the desirability of judicialized repossession—that is, repossession only after prior notice and an opportunity for a judicial hearing. The argument would be: since consumers exercise a choice in entering a credit contract, if many consumers were willing to pay for the extra costs attending judicialized repossession, some creditors would make available contracts prohibiting self-help repossession. The failure of creditors to do so indicates, therefore, that few consumers value the purported benefits of judicialized repossession more than the attendant costs.⁴⁵

There are difficulties with resolving the repossession issue so simply, however. For example, it is often contended that consumers, in terms of their own value structure, overweigh short-term gain and underweigh long-term risk in reaching decisions, basically because it is so difficult for an individual to assess realistically a long-term risk.⁴⁶ If true, and we believe it makes intuitive sense, at the time of contracting, consumers can be expected to discount excessively both the risk of self-help repossession and the costs that its eventuality would impose on them. It seems particularly likely that consumers would underestimate the risk of wrongful self-help repossession, yet it is this cost that judicialized repossession would be most effective in reducing. Consequently, consumers may not be willing to pay as much as self-interest would indicate they should to avoid the risks of self-help repossession, and creditors have a disincentive to offering voluntarily contracts providing for judicialized repossession.

Moreover, not all the costs resulting from self-help repossession are borne by the parties to the contract. The deprivation of a car can cause the consumer to miss work. If employment is lost as a consequence, the consumer may be eligible for public assistance. Upon occasion, repossession can be the “straw that breaks the camel’s back,” sending the consumer into bankruptcy (perhaps in order to discharge, *inter alia*, the inevitably ensuing deficiency claim).⁴⁷ These costs tend to be visited, in part, on persons other than the consumer and creditor—the employer, taxpayers generally, and other creditors of the consumer; stated otherwise, they are externalities of the automobile credit transaction. They are costs that can attend any repossession but it is arguable that, because it is less expected, they more frequently occur in self-help than judicialized repossession. Consequently, even though it may not be in the consumer’s self-interest to

45. Cf. P. McCracken, J. Mao & C. Fricke, CONSUMER INSTALLMENT CREDIT AND PUBLIC POLICY 97-114 (1965); R. Posner, ECONOMIC ANALYSIS OF LAW 53-55 (1972).

46. See, e.g., G. Calabresi, THE COST OF ACCIDENTS (1970).

47. See Schuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969).

pay enough extra for a contract prohibiting self-help repossession to induce creditors to offer them, it may still be in society's interest to prohibit the procedure.

These difficulties in applying the premisses of welfare economics to repossession proposals do not establish the desirability of judicialized repossession.⁴⁸ They only indicate that the automobile credit market, like most markets, is an imperfect one and that in evaluating proposed regulation on the premisses of welfare economics, the difficult problem of the second best must be faced.⁴⁹ The complexity of the second best problem is easily illustrated in the context of self-help repossession. If elimination of self-help were to reduce the incidence of repossession by increasing its cost, the resulting incidence of repossession might approximate the incidence that would result if the costs of the aforementioned externalities of repossession were internalized (that is, borne by the parties to the transaction). At the same time, however, elimination of self-help may increase the price of credit, thereby decreasing its supply, and it is difficult to know whether such a relative decrease in supply is desirable. The consumer credit market is not fully competitive,⁵⁰ which in itself should tend to keep the price of credit higher and supply lower than is optimally desirable according to the precepts of welfare economics.⁵¹ On the other hand, the possible proclivity of many consumers to undervalue the risks of default, making them more willing to enter into credit transactions than they ought to be, may tend to cause more than optimal credit

48. We do not mean to represent that we have identified all the imperfections in the automobile credit market. It is sufficient for our purposes to demonstrate that there are substantial imperfections and that the market will not necessarily indicate correctly whether self-help repossession is desirable.

49. See G. CALABRESI, *supra* note 46 at 85-89; Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956). Stated very generally the theory of the second best, as applied to market economics, provides that when more than one of the conditions for a perfect market is lacking—a perfect market by definition yielding optimal resource allocation—it is not necessarily an improvement to correct less than all of the imperfections. The imperfections may tend to counterbalance each other, such that removal of some will only produce even less optimal results. Unless it is possible to create a perfect market, the “second best” solution to a market failure may be deliberately to create further, counterbalancing imperfections.

Hopefully the subsequent text discussion, by providing concrete examples, will help clarify these rather abstract points.

50. NCCF Report, *supra* note 5, at 109-50. A principal source of the noncompetitiveness is licensing laws, which restrict entry into the consumer credit market, and legal limitations on interest rates. See Warren, *Consumer Credit Law: Rates, Costs and Benefits*, 27 STAN. L. REV. 951 (1975). For a view that merger and other techniques for combining control of financial institutions are a more important source of noncompetitiveness, see Comment, *An Alternative to the UCCC: Publicly Subsidized Consumer Loans*, 4 GOLDEN GATE L. REV. 239, 249-68 (1974).

51. Such was the conclusion of the National Commission on Consumer Finance. NCCF Report, *supra* note 5, at 109-50.

demand given its price. Without some precise knowledge of the sum effect of these influences in creating a deviance from optimal supply and demand levels, any specific suggestions for improving overall allocation (e.g. eliminating self-help, increasing prices, and suppressing demand) cannot possibly be evaluated.⁵²

Given the inability to make a full welfare economic analysis, most commentators have narrowed their focus and attempted simply to assess what changes elimination of self-help repossession is likely to have on the present (rather than on the optimally desirable) cost and availability of credit and on the effects to consumers of repossession.⁵³ On this basis Professor Robert Johnson has made the best known economic argument for retaining self-help. Using data about the self-help automobile repossession practices of three nationwide sales finance companies and five large California banks, Professor Johnson has concluded that abolition would yield few direct benefits to consumers but would impose substantial additional costs on creditors. These costs, in Professor Johnson's view, would be passed on to consumers in some combination of higher interest rates and reduced credit availability. The costs, he predicted, would be disproportionately borne by marginal risk consumers, a group containing a disproportionate number of low income consumers.⁵⁴

A. *Estimated Costs of Judicialized Repossession*

The principal rejoinder to Professor Johnson is not based on different data but argues instead that deficiencies in methodology and interpretation have caused him to overestimate the costs and underestimate the benefits of judicialized repossession.⁵⁵ To estimate costs, Professor Johnson essentially ascertains the frequency of repossession under the current self-help legal regime and multiplies it by his estimate of the extra costs to the creditor of effecting those repossessions judicially. These estimated extra costs have two basic components: (1) lawyer fees and court costs; (2) costs attributable to delay in repossession occasioned by need to obtain prior court approval. These latter costs consist principally of the decline in the value of the

52. For a fuller analysis of the implications of welfare economics for consumer credit reform, see Wallace, *The Logic of Consumer Credit Reform*, 82 *YALE L.J.* 461 (1973). Of course, in a complete analysis account must be taken of legal limitations on interest rates and their tendency to restrict supply and enhance demand.

53. See authorities cited in note 24 *supra*.

54. See Johnson, *supra* note 24.

55. See Dauer & Gilhool, *supra* note 24. Other commentators have accepted Professor Johnson's estimates of "economic" costs and benefits but have argued that elimination of self-help repossession without prior notice or hearing can be supported nevertheless. See, e.g., Yudof, *supra* note 44.

collateral when repossessed⁵⁶ and the opportunity losses caused by the delay in obtaining the money gained by selling the collateral after repossession.

A reasonably persuasive case has been made that Professor Johnson overestimates the size of these extra costs.⁵⁷ Professor Johnson estimates, for example, that lawyer fees and court costs, even if the debtor defaults, would average over \$250 depending somewhat on the jurisdiction. This figure is based in large part on the average cost of hiring a lawyer to prepare and file a complaint in a replevin action.⁵⁸ It fails to account for the ability of at least large creditors to bring judicialized repossession actions on a mass production basis (form complaints, etc.), which reduce fees considerably. He also exaggerates the probable formality of a judicialized repossession system and consequently the need for a lawyer's services. For example, he assumes that a creditor could not properly accept a voluntary surrender of the collateral without first filing a complaint.⁵⁹ This is not the system in Wisconsin and it seems difficult to argue that it should be, providing adequate notice of legal rights is provided the consumer at or before the time of voluntary surrender.⁶⁰ In Wiscon-

56. Professor Johnson does not discount this cost by the value to the debtor of extra use of the automobile. Though appropriate, as he is concerned principally with estimating the cost to the creditor of restricting self-help repossession, he should include this value as a benefit of the proposed reform.

57. See White, *supra* note 24; Dauer & Gilhool, *supra* note 24.

58. See Johnson, *supra* note 24, at 97-100. Johnson also originally assumed that in a judicialized repossession system, the sheriff would have to replevy the vehicle subsequent to a court order authorizing the same. This is not the system in Wisconsin. See WIS. STAT. § 425.205(5) (1973). Johnson has subsequently amended his position on this point. Johnson, *A Response to Dauer and Gilhool: A Defense of Self-Help Repossession*, 47 S. CAL. L. REV. 151, 157 (1973). But his original estimates of costs, which are so frequently cited, are based on this assumption.

59. For Johnson's defense of this assumption, see Johnson, *A Response to Dauer and Gilhool: A Defense of Self-Help Repossession*, 47 S. CAL. L. REV. 151, 157-59 (1973). Basically he argues that there is no other effective way to inform the debtor of his right to contest the issue of default. We find his argument unconvincing.

60. The Wisconsin Consumer Act may be deficient in its provisions for informing a debtor, prior to voluntary surrender, of his right to contest default in court. Under the Act, a surrender of collateral is not a "voluntary surrender" if made pursuant to the creditor's "request or demand." WIS. STAT. § 425.204(3) (1973). See also notes 33-34 *supra* and accompanying text. But there is no provision conditioning the voluntariness of a surrender on the debtor's receipt of notice of the right to contest default. By regulation under the Act, if a surrender is not "voluntary"—because made pursuant to a creditor request or demand—and if the creditor has not clearly informed the debtor of the right to contest default, then the surrender is not a statutory "surrender" at all but an illegal self-help repossession, subjecting the creditor to very substantial penalties. WIS. ADM. CODE, BANKING § 80.68(1); WIS. STAT. §§ 425.206, 425.305 (1973). As a practical matter, because what constitutes a request or demand negating the voluntariness of a surrender is ambiguous, most creditors probably protect against the risk of substantial penalties for illegal self-help repossession by providing clear notice of the right to contest default before accepting a surrender of any type.

sin, as he recognizes, his estimates clearly exaggerate the possible costs, since the Wisconsin Consumer Act authorizes even a corporation to file a complaint, and perhaps even to appear at a court hearing, without being represented by a lawyer.⁶¹

There is also some reason to question Professor Johnson's estimate of the extra costs attributable to delay in effecting repossession. He seems to assume that under a judicialized repossession system a creditor would make a decision to repossess at the same time after initial default that he does under a self-help system. It seems possible, perhaps likely, that a creditor, anticipating the additional time needed to repossess and the attendant costs, would make his determination to repossess more quickly, thereby reducing the extra costs Professor Johnson attributes to delay in repossession.⁶²

Professor Johnson notes that the extra costs discussed above are not the only ones that could result from a change to judicialized repossession, although they are the ones his data permitted him to quantify most easily. For example, he speculates that because under judicialized repossession debtors would receive prior notice of creditors' intentions, there might be more "skips"—that is, debtors who disappear with their vehicle, effectively preventing a repossession at all.⁶³ Another possibility is that creditors' delinquency rates would increase under judicialized repossession. If many debtors realize that repossession cannot be immediate because of necessary court proceedings, it is possible some would be inclined more frequently to make late payments—in effect unilaterally taking short-term loans from the creditor.⁶⁴ Such action would both increase creditors' collection costs and impose opportunity costs (for loss of the use of the payments).⁶⁵

The second part of Professor Johnson's equation for determining the total additional costs of abolition of self-help repossession is his assumption that repossession frequency would remain unchanged. Commentators have said less about this assumption,⁶⁶ but there is

61. WIS. STAT. § 425.205(1)(a) (1973). For a discussion of the ambiguity as to whether a lawyer must appear at the hearing, see notes 142-145 *infra* and accompanying text.

62. Others have foreseen this possibility. See, e.g., Yudof, *supra* note 44, at 967 n.57. Actually in Wisconsin, creditors' ability to respond to judicialized repossession in this fashion is hindered by a mandatory 55-day waiting period after the initial missed payment before legal action can be taken. WIS. STAT. §§ 425.103-.105 (1973). See also notes 37-39 *supra* and accompanying text.

63. Johnson, *supra* note 24, at 104-06.

64. *Id.* Professor Johnson also notes, *inter alia*, that there would be incidental costs—largely employee time—in participating in a hearing and in what he assumes would have to be a sheriff's execution on the vehicle. *Id.*

65. Of course, it would also be an opportunity gain for the debtor, a factor Johnson does not note in his weighing of costs and benefits.

66. Dauer and Gilhool have also argued that under judicialized repossession there

good reason to question it. As Professor Johnson points out, in determining which of several possible responses to make to a delinquent account, a rational creditor must weigh the cost of each response together with the probability that anything will be collected in that manner, the amount likely to be collected, and the time each response will take.⁶⁷ Because even self-help repossession is relatively costly, and rarely returns to the creditor the full amount owing, a creditor almost invariably initially selects some type of informal contact with the debtor.⁶⁸ The purpose of these contacts is to arrange a workout—an arrangement in which the debtor is given an extended period of time to pay in return for a renewed promise to pay, and perhaps an additional finance charge. A workout will usually take one of two forms: an extension agreement in which one or a few payments are postponed, with an understanding that the debtor will bring his payments up to date within a reasonably short time, or a refinancing agreement in which the debtor agrees to pay regular monthly payments of a smaller amount than required originally but over a longer period of time.⁶⁹ At some point, however, a creditor abandons further effort to arrange a workout and repossesses, presumably because it has become reasonably clear either that the debtor is unwilling to agree to a workout or that the prospect for subsequent debtor default of any workout agreement acceptable to the creditor is substantial.⁷⁰

Under judicialized repossession, there is good reason to anticipate greater creditor willingness to enter into workouts, especially refinancing agreements, with a consequent lower rate of repossession as compared to what it would be with self-help repossession and the

should be fewer repossessions and more workouts. Dauer & Gilhool, *supra* note 24, at 138-42.

67. Johnson, *supra* note 24, at 90-93.

68. Of course, if it were regularly possible for the creditor to collect deficiency judgments, together with the costs of collecting same, creditors might be mostly indifferent between repossessions and workouts. The decision to repossess would depend then on whether workouts yielded a higher return than new loans. But deficiency claims cannot be collected with anything near the requisite efficiency.

69. A most common outcome of the initial creditor contacts is simply full payment of arrears (and appropriate delinquency charges) by the debtor. It is unconventional to term such a happening an extension agreement, but if it is understood the creditor will not repossess after payment of the arrears, functionally it is one, with the "agreement" being very informal. This type of extension is, of course, nearly always acceptable to the creditor.

70. Sometimes the creditor acquires information shortly after default indicating that informal contacts are unlikely to be productive, and repossession occurs very quickly. Perhaps, but we do not know, it also occurs quickly when the value of the collateral and the amount owing indicate repossession is likely to be profitable. Although the debtor is entitled to any surplus after resale—UNIFORM COMMERCIAL CODE § 9-504(2)—debtors are probably mostly unaware of this right and many creditors may ignore it as a consequence.

same standards of credit availability.⁷¹ Creditors have discretion in determining what workout terms they will offer or accept. Theoretically, a creditor can be expected to accept a workout where the expected return from it—the amount to be paid discounted by the possibility of default of the workout agreement—exceeds the anticipated return over the same period from reinvestment of funds obtained more quickly by repossession. As the funds realized by repossession decrease because the cost of obtaining them increases, the terms of a workout acceptable to a creditor should become more liberal—that is, providing for a lower effective finance charge—or, more importantly, the range of acceptable risk of default of the workout agreement should increase. Stated more simply, under judicialized repossession, poorer risks should find creditors somewhat more willing to agree to workouts.⁷²

There is a second reason why workout frequency might be expected to increase with judicialized repossession. Informal contacts with the debtor are not costless to the creditor. Consequently, the amount of effort spent to determine whether the debtor is an acceptable workout risk and to persuade the debtor to agree to a workout—accomplished mainly through informal contacts—is a function in part of the attractiveness of the alternatives, principally repossession. As repossession becomes less attractive, therefore, creditors can be expected to spend more on informal contacts,⁷³ assuming, as seems reasonable, that such increased effort will yield increased workouts.⁷⁴

71. Workout and repossession rates are a function, *inter alia*, of the risk quality of the debtor pool. In much of the subsequent text discussion on this point, we will implicitly assume that there would be no significant difference in standards of credit availability under judicialized and self-help repossession. We have previously argued that credit would probably be less available under judicialized repossession. But increasing standards of credit availability should tend to reduce delinquency and repossession rates. Consequently, restriction of credit availability under judicialized repossession should tend to enhance the reduction in repossession frequency that, on other grounds, we predict subsequently in the text could result from judicializing repossession.

72. Creditors frequently argue, in private interviews, that increased workouts should not be expected under judicialized repossession because even under a self-help regime creditors are willing to arrange workouts, including refinancing agreements, with all acceptable risks. Assuming creditors are profit maximizers, this argument could only be valid if there are sharp discontinuities in the risk qualities of debtors in initial default—that is, if there is a group of debtors who are reasonably good risks for a workout, another group who are such bad risks that creditors would not agree to a workout in almost any circumstance, and very few debtors in between these extremes. It seems highly unlikely to us that such discontinuities exist.

73. For reasons indicated earlier, those extra efforts may be collapsed into a shorter period of time, so that a determination to repossess can be made more quickly.

74. For this point we must assume that the creditor's standard for what constitutes an acceptable workout agreement remains unchanged. On that assumption increased informal contacts will yield additional workouts unless either whatever potential in-

If so, the total cost of informal contacts would increase, but not in the same magnitude as costs would increase if the current incidence of repossession were maintained under a judicialized repossession system.

Under a judicialized repossession system we would expect not only increased workouts but also an increase in the average creditor's voluntary surrender to forceful repossession ratio. Even with self-help repossession, it is ordinarily in the creditor's interest to expend some effort to arrange a voluntary surrender; it eliminates the need to hire a private reposessor, and reduces the likelihood, which is limited in any event, of a subsequent damages action for wrongful repossession.⁷⁵ Assuming voluntary surrenders remain possible without prior court approval, under a judicialized repossession system the difference in cost between voluntary surrender and forceful repossession would increase, particularly since a voluntary surrender would often occur more quickly, and we would expect more effort to be expended towards arranging them, no doubt with some success. Professor Johnson, for no very good reason, assumes voluntary surrender without prior court proceedings would not be possible under a judicialized repossession system,⁷⁶ and consequently he does not anticipate this cost saving reaction.

In sum, therefore, it seems likely that Professor Johnson has significantly overestimated the additional costs of credit collection that would be caused by a change to judicialized repossession. More precisely, his estimates of the cost of a judicial repossession are almost certainly higher than they need to be, and it seems probable he erred in assuming implicitly that repossession frequency would be unaffected by the legal change.

Nonetheless, we certainly agree with Professor Johnson that a substantial increase in the costs of credit collection should be expected to result from a change to judicialized repossession. Professor Johnson theorizes about who would ultimately bear those increased costs, and quickly concludes that creditors would not fully absorb them. That conclusion seems unexceptionable. Complete absorption of the

formal contacts have in inducing workouts is essentially exhausted after a few workouts or debtors, aware of the lessened desirability of repossession to the creditor, stiffen their bargaining positions during workout negotiations. The first possibility seems unlikely, if for no other reason than that increased information about the debtor, gained through informal contacts, can permit more refined judgments about which debtors would be acceptable risks for a refinancing agreement. The second possibility also seems unlikely. Although judicializing repossession would make it less attractive to the creditor, it would make it no more attractive as an end point to the debtor, except in those few cases where the debtor has a valid defense. Consequently, even if the debtor were to alter interim bargaining positions, his or her ultimate settlement position should not change dramatically.

75. See White, *supra* note 8.

76. See notes 59-60 *supra* and accompanying text.

extra costs should be anticipated only if the credit industry were characterized, as it is not, by such high profits and elasticity of demand that creditors would suffer a net loss by passing on any of the costs and could withstand a lower return on investment without making other investment opportunities more attractive to at least some of them.⁷⁷

77. Johnson, *supra* note 24, at 109. It seems to be Professor Johnson's position that the increased costs would be fully transferred to consumers. For this purpose he considers, not unrealistically, withdrawal from the automobile credit market in response to judicialized repossession as effectively passing on the costs to consumers. See Johnson, *A Response to Dauer and Gilhool: A Defense of Self-Help Repossession*, 47 S. CAL. L. REV. 151 (1973). Though we agree with Johnson that the extra costs would not be fully absorbed by creditors, for at least two reasons partial absorption is possible.

First, it is very common for purchasers of indirect automobile paper to have arrangements with the selling dealer (who originally negotiates the credit contract) that require the dealer to absorb any losses resulting from a repossession. Consequently, for a majority of indirect financing, the extra costs of judicialized repossession would be initially passed to the dealer. The dealer might, of course, pass on these costs in any of the ways discussed subsequently in the text. In addition, the dealer might pass some of the costs on to cash customers by raising the price of the car, if permitted by conditions in the cash sale automobile market. (If enough dealers were prepared to eschew the credit business and sell just to cash customers, this option would be effectively foreclosed.) But the dealers' ability to pass on the costs might be inhibited by the considerable control automobile manufacturers exert over dealers' selling practices. See S. MACAULAY, *LAW AND THE BALANCE OF POWER* (1967). Alternatively, the manufacturers, who undoubtedly earn supercompetitive rates of return, might absorb some of the costs by adjusting the wholesale price of cars to dealers. As argued below, it might be in the manufacturers' interest to follow one of these courses rather than risk a reduction in the number of new cars sold.

The second qualification stems from the participation in the indirect automobile financing market of sales finance companies, such as General Motors Finance Corporation, that are controlled by the automobile manufacturers. These companies already make a less than average rate of return, largely because they have a disproportionate share of the poorer risks, banks specializing in the better risks. See Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 460-64 (1968). The manufacturers tolerate the situation because by extending credit the captive finance companies support the sale of new cars. For the same reasons, despite the extra costs of judicialized repossession, the manufacturers might decide not to restrict the supply of credit extended by "their" sales finance companies—and even to expand the supply if other creditors partially withdrew from the automobile credit market. Of course, if this happens, the manufacturers would probably pass on some of the finance company losses in the form of higher automobile prices. In effect, cash buyers might end up partially subsidizing judicialized repossession. But the automobile manufacturers would probably absorb some of the finance company losses in reduced oligopolistic profits, since higher automobile prices would mean reduced sales volume and it is not easy for the manufacturers to reduce output and divert investment resources to other industries. In any event, the main point is that automobile credit buyers probably would not absorb *all* the costs of judicialized repossession.

None of the hypotheses generated in this footnote about ultimate absorption of the costs of judicialized repossession by persons or institutions other than credit buyers are testable in Wisconsin with the data available to us. Consequently, in this study we will attempt to determine only whether credit buyers will ultimately bear at least some of the costs.

Anticipating precisely how creditors would seek to avoid the extra costs is more problematic. Johnson guesses, not unreasonably, that few of the costs could be passed on in the form of deficiency judgments to those consumers who caused them—that is, those whose cars are repossessed.⁷⁸ Not only are the transaction costs of maintaining such suits substantial but a very large percentage of such consumers are likely to be effectively judgmentproof. Moreover, increasingly, as in Wisconsin, the legal availability of deficiency judgments is being restricted.⁷⁹ Some of the costs, in Johnson's view, would likely be passed on to credit buyers in the form of higher finance charges.⁸⁰ As long as finance charges are uniform and not differentiated by risk, they would be passed on equally to all credit buyers, and the ability of creditors to follow this course would be limited by fear that some creditors would compete just for the low risk consumer. Consequently, unless interest rates are sharply differentiated by risk, only a limited amount of the extra costs would probably be passed on in higher interest rates. Creditors would therefore be expected to make a greater effort than they do now to reduce default costs by avoiding lending to consumers whose risk of default is substantial. Since low-income persons are generally considered poorer risks, both Johnson and we expect that they would have a more difficult time in obtaining credit under a judicialized repossession system. Moreover, since size of downpayment has historically been inversely correlated with default rate,⁸¹ Johnson anticipates a tendency to require higher downpayments, particularly for poor risks.⁸² Higher downpayments would also reduce the costs of default, since the value of the collateral would more closely approximate the amount outstanding. To compound the problem, higher downpayments would presumably affect the poor most harshly, since they have fewer liquid assets.

In sum, it appears likely that whatever the benefits of judicialized repossession, the costs of obtaining them would be borne disproportionately by the poor. Since the tangible benefits of judicialized repossession will be reaped exclusively by those who miss payments—also most likely the poor disproportionately—income distribution questions aside, this allocation of costs may be appropriate. Nevertheless, in all probability with judicialized repossession lower income persons more often would be unable to obtain automobile credit, and

78. Johnson, *supra* note 24, at 113.

79. Wis. STAT. § 425.209 (1973).

80. Johnson, *supra* note 24, at 109-110. This prediction assumes, of course, that legal rate maximums do not foreclose this option.

81. See G. MOORE & P. KLEIN, *THE QUALITY OF CONSUMER INSTALLMENT CREDIT* 82 (1967).

82. Johnson, *supra* note 24, at 110-11.

when they did get it, they would tend to get less (because downpayments would be higher) and to pay modestly higher interest rates.

For essentially the same reasons it is impossible to determine whether the total supply of automobile credit is greater or less than the optimal amount, it is impossible to determine whether it is socially desirable that it be more difficult for lower income persons to obtain automobile credit. Certainly an automobile can enhance earning capacity, as well as make leisure time more enjoyable. But the costs of credit, particularly when there is a default, are also high. Particularly if there is a tendency to undervalue long-term risks such as default, perhaps the poor would be better off⁸³ if credit were restricted in the way it is likely to be. Many of the poor, for example, may be able to adjust simply by buying cheaper cars, for which their savings will be adequate to meet the higher down payments. Certainly there are disadvantages to being forced to buy a cheaper car—repair costs may be higher, the prestige gained by ownership less—but the risks of default may also be significantly less.

B. *Estimated Benefits of Judicialized Repossession*

Professor Johnson has made less substantial effort to estimate the potential benefits of judicialized repossession, but he and others sympathetic to his position believe there would be few. A common objection to self-help repossession is that it permits the creditor to "cut off" the consumer's potential defenses to the alleged debt; although the consumer can raise these issues in a tort action for conversion, he must initiate that action and undertake the substantial burdens of being a plaintiff. Under judicialized repossession, of course, the consumer could raise these issues as a defendant prior to the repossession. Not only would consumers often find it less expensive to appear as a defendant—for example, it is generally more feasible to defend than to prosecute *pro se*—but they could have their defenses heard and assessed before suffering the uncompensable losses, such as inconvenience, that frequently accompany a repossession.

83. This statement may imply that there is an objective basis for determining when the poor, or anybody for that matter, is "better off," yet it is a basic premise of the liberal state and philosophy that the weighing of various advantages and disadvantages can only be done by the person affected. For example, there can be no objective basis for knowing what weight an individual would or should attach to satisfaction of a desire for social status by buying an expensive car. On the other hand, if it is assumed that consumers undervalue long-term risks such as default—see note 46 *supra* and accompanying text—it may be impossible to avoid making such judgments. Market decisions cannot be adjusted to correct for this undervaluation without knowing what the "proper" valuation of default risks is, and this requires assessing the costs of inconvenience and humiliation that attend default and self-help repossession.

sion.⁸⁴ For a variety of reasons Johnson and his sympathizers doubt consumers would benefit much from being defendants.⁸⁵ First, because numerous informal contacts precede most repossessions, Johnson and others assume few repossessions occur simply because of some simple misunderstanding, such as about whether a payment has in fact been made. Second, they argue that few debtors will be able to defend successfully a judicialized repossession action on the basis of the automobile seller's prior breach of warranty. Frequently, these commentators believe, the warranty problem will be resolved before a suit is filed, since in their view creditors discovering that a warranty problem accounts for a payment failure are likely to try to remedy the warranty breach, as usually a less costly alternative to repossession. Even if not resolved, a warranty defense will often be barred on some technical ground, such as the holder in due course doctrine.⁸⁶ And even if available as a defense, the debtor's setoff for breach of warranty will often be less than the outstanding payments and thus not a complete defense to the repossession action. At least one of these commentators concedes, however, that in this last circumstance a pre-repossession court hearing, with the judge acting as a mediator, could become an efficacious setting for some type of workout, with the total amount owing being reduced and a revised payment schedule arranged.⁸⁷ Finally, and most important, these commentators argue that most debtors, including many with defenses, would simply default in the repossession action; whatever the potential of judicialized repossession to render debtor defenses viable, it could not succeed if the debtor did not appear.⁸⁸

Assumptions underlying this analysis of the benefits of judicial-

84. See generally Dauer & Gilhool, *supra* note 24, at 142-50. It is generally easier to defend than prosecute pro se because, *inter alia*, there is no need to learn the procedural requirements for initiating a lawsuit (service of process, venue, etc.) and there is no need to present proof satisfying all the elements of a cause of action.

Other advantages of being a defendant include the ability to exert leverage by delay, since the defendant can retain the automobile until the suit for repossession is completed. This leverage could affect settlement negotiations looking towards a workout. This advantage to consumers of judicialized repossession is limited in Wisconsin, because of special provisions in the Act providing for expedited handling of a repossession suit. WIS. STAT. § 425.205 (1973). Absent special statutory provisions, the capacity for a defendant to delay litigation in our system is notorious, though it is doubtful that an unrepresented consumer defendant would be aware of techniques. See generally P. SCHRAG, COUNSEL FOR THE DECEIVED (1972).

85. See Johnson, *supra* note 24, at 114; White, *supra* note 24, at 526-30.

86. See Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767, 775-78 (1973). Recall that this doctrine has limited effect in Wisconsin. See notes 40-42 *supra* and accompanying text.

87. White, *supra* note 24, at 527-28.

88. On the propensity of consumer debtors to default, see D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT (1974).

ized repossession are prima facie plausible, although they remain to be empirically tested. As others have pointed out, however, these commentators largely ignore important potential benefits of the elimination of self-help.⁸⁹ One consists simply of greater dignity for consumers—a stronger belief that they are in control of their destiny. Any legal services attorney can testify to the rage and sense of helplessness felt by many consumers when their vehicles are “stolen,” especially when they believe they have a defense to the debt.⁹⁰ An opportunity to present that defense in court, even if it is usually not a valid one, might contribute to a feeling by consumers that they had been treated “justly.”⁹¹

A more fundamental weakness in Johnson's analysis, however, is that it ignores the possibility, developed above, that under judicialized repossession there would be more workouts and a lower incidence of repossession. This effect could have several distinct benefits to consumers. An automobile invariably has a higher value to the consumer than to the creditor, in the sense that it costs the consumer more, in money and inconvenience, to purchase a replacement than the creditor is able to obtain upon resale. In other words, in a repossession, assuming the consumer purchases a replacement vehicle, there are substantial transaction cost losses.⁹² It is this fact that makes the deficiency judgment so common and that makes the threat to repossess such a powerful collection device for the creditor. It is also the principal reason a workout agreement that the consumer completes is usually more beneficial to both creditor and consumer than actual repossession. A workout can also avoid other costs attending a repossession, such as the inability, at least temporarily, to get to work—a cost borne partly by nonparties to the credit transaction. And whereas a workout will usually avoid these costs completely, even voluntary surrender, which should increase under judicialized repossession, can reduce them, for within a reasonable time span the consumer can arrange to give up the vehicle at a convenient time—*e.g.*, after alternative transportation has been arranged.

89. See, *e.g.*, Dauer & Gilhool, *supra* note 24; Yudof, *supra* note 44.

90. Caplovitz reported that over 20% of consumers who defaulted in a collection action believed they had a defense to the debt. D. CAPLOVITZ, *supra* note 88, at 168.

91. This enhanced sense of dignity depends in part, of course, on how consumers would perceive the court processes by which actions for repossession are determined. If these court processes were seen as assembly line operations through which the creditor always wins, there might be little sense of enhanced dignity. See Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

92. See Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 11-12 (1970).

III. THE PRESENT STUDY

The previous analysis has indicated that it is essentially impossible to obtain sufficient data to establish conclusively whether, on welfare economics grounds, it is desirable to require judicialized repossession. Even the limited cost-benefit analysis that has been attempted by many commentators in order to predict some of the consequences of judicialized repossession has had to rely on a large number of empirical guesses. The principal purpose of this article is to reduce the dependence of cost-benefit analysis on these empirical guesses by reporting the results of our limited study of the effects of judicialized repossession in Wisconsin with respect to these matters. More precisely, we have attempted to ascertain the effects of the Wisconsin Consumer Act on three broad aspects of automobile credit:

1. The availability of credit, including number of credit extensions, interest rates, required levels of downpayment, and extent of credit checks;
2. Delinquency rates; and
3. Collection practices and procedures, including relative rates of forceful repossession and voluntary surrender, average time elapsed between initial nonpayment and repossession, creditor legal costs, and frequency of debtor appearance at a repossession hearing.

In assessing the impact of the repossession provisions of the Wisconsin Consumer Act on automobile credit, ideally one would compare credit availability, delinquency experience, and collection practices before and after the Act both in Wisconsin and several demographically similar states. There are so many prospective difficulties in such a study, however, that we have not attempted a rigorous study of that nature. Perhaps the greatest difficulty is that the Wisconsin Consumer Act made so many significant legal changes simultaneously that it would be impossible to separate out precisely the effects of judicialized repossession from the effects of other changes, such as the modification of the holder in due course rule. Also, it is often difficult to get credit institutions to provide the information needed for a fully rigorous study. They often fear that confidential information will come into the hands of competitors, and many credit institutions do not even maintain records about a number of relevant facts—for example, many do not maintain statistics on the number of credit applicants turned down.

Faced with these difficulties we adopted as our research strategy simply gathering whatever relevant information was easily available to us. The result is a body of data that is far from comprehensive and

will not permit us to answer conclusively the empirical questions raised by our policy discussion. However, we will be able to make considerably more educated guesses, and to eliminate a number of hypotheses previously untested. In this spirit, therefore, we acquired information principally from the sources listed below. Limitations on the reliability of the information will be discussed as the information is used in the balance of this article.

1. With the cooperation of the Wisconsin Bankers Association, in the Spring of 1974 we conducted a mail survey of all banks in Wisconsin.
2. From the Wisconsin Motor Vehicle Department we obtained data, for periods both before and after the Act, about the number of vehicle repossessions and the number of liens recorded on motor vehicle certificates of title.
3. From the American Bankers Association we obtained data about delinquency and repossession rates for automobile loans, gathered from a sample of banks in each state, including Wisconsin, for periods both before and after the Act.
4. We compiled our own data about the frequency of debtor appearance in repossession actions in the Dane County (where Madison is located) small claims court for a period since the Act.
5. We conducted intensive interviews with a few automobile credit grantors, including both banks and sale finance companies, and in some instances obtained from them confidential information about their experiences under the Act. We also interviewed a few car dealers.

A. Credit Availability

A major source of our limited information on changes in credit availability since the Act is our survey of Wisconsin banks. Respondents were asked to provide detailed information about various lending practices for two periods: May through August, 1972; and May through August, 1973. The first period came before and the second after the effective date of the Wisconsin Consumer Act, namely, March 1, 1973.⁹³ The same months were chosen for each period to control for seasonal variations.

93. We deliberately selected periods that did not include the first two months after the Act's effective date in order not to confound our results with reports of practices attributable to confusion accompanying initial effectiveness. Although there may well have been such confusion, it should be noted that more than a year ensued be-

This bank survey has a number of limitations that should be mentioned at the outset. The response rate was less than 15 percent, rendering statistical tests of significance essentially meaningless.⁹⁴ No effort has been made to weight answers received by size of bank, and a majority of the respondents were banks of limited assets and participation in the automobile credit market. Moreover, banks are not the only source of automobile credit in Wisconsin; although banks apparently provide a greater proportion of new automobile credit in Wisconsin than in other states, the most recent reliable estimates indicate other credit institutions provide over one-fourth of the new automobile credit.⁹⁵ Finally, and probably most importantly, although the respondent banks generally provided such detailed information as changes in number of loans extended, they were no more able than we are to determine with certainty the extent to which those changes were caused by the repossession provisions of the Wisconsin Consumer Act or by some other factor, such as other provisions of the Act or money market conditions. We ask respondents to indicate reasons for various changes in lending practices, but the answers they provided are only the opinions of reasonably knowledgeable persons.

1. CREDIT VOLUME

Two sources of information indicate that the number of automobile loans has been about the same in the period since the Act as it

tween the Act's enactment and its effective date. Consequently, there was little justification for confusion and we suspect there was less than one might otherwise expect to accompany the effectiveness of such a complicated statute.

Throughout this study we have presumed immediate substantial compliance with the Act. It is both our opinion, gained in our research, and the opinion of those charged with enforcement of the Act that there has been compliance. See *The Wisconsin Consumer Act: One Year Later*, in WISCONSIN INVESTOR, March 1974, at 21, 23. As noted previously, the weight of authority is that the judicialized repossession provisions became immediately applicable, even as to contracts consummated before the effective date. See note 23 *supra*. It is our impression that there has been widespread compliance in this respect as well. Certainly the large automobile creditors with which we have been in direct contact complied immediately with the judicialized repossession provisions.

94. We do not know the reason for the low response rate. The questionnaire was accompanied by a covering letter from the executive director of the Wisconsin Bankers Association, urging cooperation, and respondents were promised the confidentiality of their answers would be respected. Perhaps many banks do not maintain aggregated loan data of the types we requested, and consequently completion of the questionnaire was excessively burdensome. The opportunity to send the questionnaire with the endorsement of the Wisconsin Bankers Association arose very suddenly and we did not have an opportunity to pretest the questions. We did consult with officials of the Bankers Association in preparation of the questionnaire, however.

95. See vol. III THE NATIONAL COMMISSION ON CONSUMER FINANCE, TECHNICAL STUDIES, 44, 46 (1974). We are not aware of any reliable information on the volume of used car credit supplied by banks in Wisconsin, but presumably it is a lesser percentage.

was in a comparable period before the Act. Respondents to the bank survey reported almost exactly the same number of total automobile loans for the two periods.⁹⁶ As a further check on loan volume, we obtained data from the Wisconsin Motor Vehicle Department (hereinafter MVD) about the number of liens recorded on motor vehicle certificates of title. In Wisconsin, as in most states, a creditor with a security interest in a motor vehicle must record his interest on the certificate of title to obtain priority over subsequent lienholders or purchasers.⁹⁷ Unfortunately, MVD does not separate data about liens on automobiles from data about liens on other vehicles for which a certificate of title is required, many of which, such as mobile homes and commercial trucks, are not governed by the Wisconsin Consumer Act.⁹⁸ If we assume, however, that the rate of change in lien recordings for vehicles of the latter type approximates the rate of change in lien recordings for automobiles, the MVD data measure changes in the volume of automobile credit.⁹⁹ The table below reports the changes in the number of liens recorded between March 1st and October 31st for three successive years. The first period preceded the effective date of the Act. By ending each period with October, the results are not seriously confounded by the big slumps in auto sales around the turn of the year in 1973-74 due to the energy crisis and in 1974-75 due to the recession.¹⁰⁰

TABLE 1
Motor Vehicle Liens Recorded at the Wisconsin Motor Vehicle Department

Time period	Number (Monthly Avg.)	As a % of 1972 filings
March - October 1972	271,734 (33,967)	—
March - October 1973	301,930 (37,741)	111%
March - October 1974	282,712 (35,339)	104%

96. The following table shows the precise number of direct and indirect loans reported by our respondents for the two periods. We have no information on dollar volume of loans.

	Loan Volume	
	Direct	Indirect
May-Aug., 1972	7,265	3,609
May-Aug., 1973	7,432	3,617

97. WIS. STAT. § 342.19 (1973).

98. The Act basically extends to transactions with "customers," defined as "a person other than an organization . . . who seeks or acquires real or personal property, services, money or credit for personal, family, household or agricultural purposes." *Id.* § 421.301(17). See Heiser, *supra* note 36, at 391-97.

99. We assume that nearly all grantors of motor vehicle credit take a security interest in the vehicle purchased and record it with MVD.

100. We suggested earlier that data about March and April, 1973 might be unreliable because of confusion accompanying the initial effectiveness of the Act. See

A better measure of the effect of the Wisconsin Consumer Act on credit volume would be the proportion of automobile sales financed by credit.¹⁰¹ Unfortunately, we have been unable to obtain reliable data on the total number of new and used car sales for appropriate periods.¹⁰² One knowledgeable source at MVD estimated that between 1972 and 1973, total sales increased about 4 percent, a figure somewhat less than the increase in recorded liens for that year.

The available evidence, then, indicates with reasonable certainty that the Act's effect on the number of loans, if any, has been modest to date.¹⁰³ It is possible there would have been a tremendous increase in the number of loans if the Act had not been passed, but it seems very unlikely. If there has been any decline in loan volume at all, the MVD data indicates it has been concentrated in the second year of the Act. This may suggest that as creditors gain experience under the Act, they will realize it is more costly to extend credit than anticipated, and consequently restrict availability. It must be emphasized, however, that on the basis of our data any suggestion that loan volume declined in 1974 must be extremely tentative. Moreover, to the extent there was any decline in 1974, it may have been due in large part to conditions in the automobile rather than the credit market.¹⁰⁴

Although the Act has had little detectable effect on overall credit volume, it may have had some effect in reducing the relative proportion of direct and indirect credit. Such an effect should not be unexpected. The Act's changes in both the holder in due course rule and the availability of deficiency judgments affect principally the indirect lender and make it relatively more advantageous for the

note 93 *supra*. An "eyeballing" of the MVD data suggests, however, that whatever the effects of such confusion, if any, it did not affect motor vehicle sales. Accordingly, we use here the March-October period for comparison.

101. Perhaps automobile leasing should be considered as well.

102. MVD maintains statistics on new automobile sales only. The rate of increase in such sales since the Act has been less than the rate of increase in lien recordings.

103. Even if the Act has had little effect on overall volume, it may have caused particular creditors to reduce their participation in or to withdraw from the automobile credit market. We asked banks that reported a decrease in either direct or indirect loan volume to indicate the reasons for the change. The number of banks responding was low and furthermore those that responded knew that the purpose of this study was to assess the impact of the Act's repossession provisions and may have shaded their answers as a result. Consequently, our results may not be very reliable. Nevertheless, the repossession provisions were cited with considerable frequency as an important reason, though not the only one, for reduced participation in the direct and/or indirect automobile credit market. See also notes 106-108 *infra* and accompanying text.

104. By selecting the March-October period for comparison of MVD lien recordings, we tried largely to control for these effects. See text accompanying note 100 *supra*. There were spillovers, however. Thus, the energy crisis' effect on sales appears to have affected the March, 1974 figures, which probably partly accounts for the modest decline in lien recordings during the 1974 period.

creditor who has the choice, as most banks often do, to be a direct lender. The banks responding to our survey reported approximately the same number of direct and indirect loans before and after the Act, but that survey can hardly be considered a conclusive source of information. Interviews with a few independent used car dealers in Milwaukee suggested they have been having considerable difficulty since the Act in getting financial institutions to purchase their paper, which may suggest a reduction in the number of indirect loans. One commentator, though providing no supporting data, has asserted that there has been an overall tendency towards direct financing since the Act, mainly in order to circumvent the holder in due course rules.¹⁰⁵

There is more substantial evidence that since the Act a significant number of lenders have withdrawn or reduced their participation in the indirect market, adversely affecting the competitiveness of that market, even if the overall volume of indirect credit has not changed substantially. In our bank survey, 56 percent (47 of 84) of the banks¹⁰⁶ reported an increase in direct loan volume since the Act, and only 37 percent (31 of 84) reported a decrease. For indirect loans, however, of the banks that had made a loan in at least one time period, only 40 percent (19 of 48) reported a volume increase whereas 50 percent (24 of 48) reported a decrease. This data is consistent with information provided us in interviews with several large credit grantors in the state.

It is more difficult to assign reasons for the apparent reduced participation in the indirect market. In interviews we were told that one large participant in the indirect market decided to withdraw completely about the effective date of the Act, for reasons apparently at least largely independent of the Act, and that this withdrawal had had a substantial effect on the competitiveness of the market. In our survey we asked banks to indicate the reasons for any reduction in indirect loan volume. Not unexpectedly, the Act's holder in due course provisions and restrictions on deficiency judgments were cited with frequency. But so were the repossession provisions.¹⁰⁷ Because survey respondents knew that the purpose of our study was to discover the effect of the repossession provisions, there may be some response bias here.¹⁰⁸ On the other hand, to the extent that the repossession provisions have caused some creditors to limit credit to better

105. *The Wisconsin Consumer Act: One Year Later*, in WISCONSIN INVESTOR, March 1974, at 21.

106. Some banks provided information for only one time period and they were excluded in calculating these statistics.

107. "Conditions in the auto market" was also cited with frequency.

108. It can be assumed the respondents would prefer our study to show that those provisions have had negative effects on consumer welfare.

risks, they may be partly responsible for a shift from indirect to direct credit, since the better risks generally prefer direct loans.

2. INTEREST RATES

Not surprisingly, the vast majority of responding banks reported an increase in rates for both direct and indirect loans. When asked why, conditions in the money market was the most often cited reason, but the Consumer Act's repossession provisions were cited with reasonable frequency.

In the theoretical section of this article, we suggested that it was unlikely creditors would respond to additional repossession costs by raising interest rates significantly so long as they charged uniform rates to all risk classifications.¹⁰⁹ In our personal interviews¹¹⁰ we learned that at least large banks customarily differentiate rates for direct loans based on whether the collateral is a new or used vehicle, and not by risk quality of the borrower. For indirect loans, however, the practices of large lenders make possible higher rates for marginal risks. Within limits, the seller is permitted to negotiate a finance rate with the buyer-borrower, and the financial institution that takes the assignment of the credit contract permits the seller to retain an increased portion of the negotiated rate the higher it is. Competition, of course, would tend to limit the highest rates to borrowers who cannot obtain credit from other sources (*e.g.*, direct loans). If the repossession provisions and other factors have made other sources of credit relatively less available to the more marginal risks, then it seems reasonable to suppose that rates on indirect loans have increased more dramatically for these borrowers than for others. We emphasize, however, that we have no direct evidence of this latter phenomenon.

3. DOWNPAYMENTS

Less than half the banks replying to our survey reported downpayment increases for direct and indirect loans. This is surprising, since on theoretical grounds judicialized repossession might be expected to have its greatest impact on credit availability through increasing downpayments.¹¹¹ Perhaps for many banks judicialized repossession has not sufficiently increased costs to create any need to restrict credit availability. For banks that did report increases in downpayments, 5 to 10 percent of the purchase price was the typical

109. See note 80 *supra* and accompanying text.

110. In our bank survey we did not ask whether respondents differentiated rates by risk.

111. See notes 81-82 *supra* and accompanying text.

reported increase. More consistently with economic theory, over 75 percent of those banks that had increased downpayments cited the repossession provisions of the Act as an important cause of this increase. This reason was cited much more frequently than any other, including the Act's deficiency judgment provisions and changes in the availability of money for lending.¹¹²

More dramatic evidence of the effect of the Act on downpayment size came from interviews we conducted with used car dealers in Milwaukee. They uniformly reported that since the Act it had become much more difficult to arrange financing for their buyers, particularly with respect to low value used cars. The most dramatic effect of this financing difficulty has been to increase the downpayment size, sometimes to as high as 50 percent of the purchase price. Since the Act bars deficiency judgments only if the amount owing at default is \$1,000.00 or less, a bigger jump in downpayments for low value used cars might have been anticipated. The dealers also cited the repossession provisions of the Act as an important cause. It should also be noted that if low income consumers disproportionately purchase low value used cars, these findings support the prediction that the poor will disproportionately bear the burdens of restricted credit availability occasioned by the switch to judicialized repossession.

4. CREDIT CHECKS

We developed no way of measuring objectively the extent of credit checks, but in our bank survey we did ask whether the credit worthiness of prospective borrowers was being checked more carefully since the Act. About two-thirds responding answered affirmatively, with about half of the affirmative responses citing the repossession provisions as an important cause. In our interviews we did not come across any evidence that creditors have developed any dramatic new techniques for assessing creditworthiness; apparently many are simply requiring better evidence of earning capacity, more frequently obtaining reports from a credit reporting agency and so forth.

5. CREDIT AVAILABILITY FOR THE POOR

Professor Johnson and others maintain that judicialized repossession would have its greatest adverse effects on the poor. There is some evidence that the poor are finding it more difficult and costly to find credit in Wisconsin. This evidence comes most importantly from

112. One-half of the indirect lenders that had increased downpayments for that type of loan cited the restrictions on deficiency judgments as an important reason. Direct lenders are not usually subject to the Act's restrictions on deficiency judgments. See WIS. STAT. § 425.209 (1973).

reports by sellers of low value used cars, who presumably sell disproportionately to the poor, and report dramatic increases in downpayment rates. Some further support comes from the reported increases in interest rates and downpayment levels by many of the respondents to our bank survey, since they probably fall most heavily on the poor.¹¹³

One question that arises is how the poor have responded to this decreased credit availability. If the restriction of credit has taken the form primarily of higher downpayments, it is possible many poor have responded by buying cheaper cars, for which their available liquid assets are sufficient to meet the required downpayment. We have been unable to determine certainly whether this has occurred. Interviews with Milwaukee used car dealers indicate that in the past year there has been a substantial increase in consumer demand for low value used cars. Due to difficulty in obtaining indirect financing for such cars, many dealers are now financing their own sales of such cars, requiring downpayments as high as 50 percent of the purchase price in order to minimize their investment and risk. Current economic conditions no doubt partly explain this trend, but the dealers we interviewed believed the Consumer Act was also a cause, though they were unable to distinguish between the impact of the repossession and the other provisions of the Act.

6. SUMMARY

Two limitations on this study merit repetition here. Even though there have been changes in credit availability since the Act became effective, there are too many potential reasons for those changes to permit us to determine objectively whether judicialized repossession was among the major causes of such changes. Basically we can offer only the opinions of knowledgeable persons—primarily bankers—about the effects on credit availability of the Wisconsin Consumer Act's repossession provisions.¹¹⁴ Secondly, even if the repossession

113. In our bank survey we specially asked the respondents whether they believed consumers with an annual income under \$6,000 were having more difficulty obtaining automobile loans than they were before the Act. Nearly 70% responded affirmatively.

114. The bankers, as reported earlier, generally believe the Act's repossession provisions have had significant impact on credit availability. For general discussion of the difficulties in assessing the impact of legal change, see Campbell, *Reforms as Experiments*, 24 AM. PSYCHOL. 409 (1969); Campbell & Ross, *The Connecticut Crack-down on Speeding: Time-Series Data in Quasi-Experimental Analysis*, 3 LAW & SOCIETY REV. 33 (1968). Campbell discusses several techniques for confirming or discounting possible explanations for observed change other than the hypothesized one—in our case, the Act's repossession provisions. Because of the greater availability of data, we have been able to use some of their techniques in analyzing our delinquency and collection practices data, to be discussed subsequently, but we have been unable to do so with regard to the credit availability question.

provisions have had substantial effects, borne principally by the poor, it is not possible to determine, at least according to the precepts of welfare economics, whether those effects are undesirable.

Within these constraints, it is possible to conclude that the Wisconsin Consumer Act, in its entirety, has had impact on credit availability, particularly with regard to indirect loans. The impact seems to have been modest, as is dramatically indicated by the failure of a majority of the banks responding to our survey to increase downpayment levels. Moreover, the data on credit volume suggests that, despite significant changes in money market conditions, nearly all segments of Wisconsin's population formerly able to obtain automobile credit through banks can still get it, although sometimes at higher rates and with higher required downpayments.

B. *Delinquencies*

We speculated that one effect of judicialized repossession could be an increased willingness by some debtors to delay payments, as they realized that creditors could not immediately repossess.¹¹⁵ This effect might seem particularly likely under the Wisconsin Consumer Act, since the Act's definition of "default" and the mandatory right-to-cure period impose effectively a 55-day waiting period before legal action by a creditor.¹¹⁶

We were unable to obtain useful information about delinquencies from our bank survey. Many respondents did not maintain historical records about delinquencies. Others did not use comparable definitions of "delinquency" (*e.g.*, one payment 30 days in arrears).

The most reliable available information on delinquency rates is collected by the American Bankers Association (hereinafter the ABA) which bimonthly publishes 30-59 days, 60-89 days, and 90-day-and-over delinquency rates for both direct and indirect automobile loans. These data are obtained from a sample of banks in each state, with the sample weighted by size of bank. The sample is reasonably large—in Wisconsin, for example, 47 banks are included—and the data consequently are reasonably reliable.¹¹⁷

115. See notes 64-65 *supra* and accompanying text.

116. But see note 39 *supra*.

117. Because the sample is weighted so that the largest banks in a state are almost surely included, changes in a large bank's delinquency rates due to changes in collection practices, accounting procedures, and so forth, can noticeably affect a particular state's bimonthly results. Although we do not have enough information about the sample to permit us to construct confidence tests for our aggregation of the ABA data, we have been assured that the sample is significantly large that substantial changes in delinquency rates—say 5% or more—over longer periods of time are surely significant and attributable to factors other than changes in a particular bank.

We are greatly indebted to Mr. Per Lange, Director, Research and Planning,

Table II below summarizes the ABA delinquency data for Wisconsin, the nation, and the contiguous states of Illinois, Iowa and Minnesota. The time periods chosen for analysis are March 1 - October 31 for 1972, 1973 and 1974. March 1, 1973 was the effective date for the Wisconsin Consumer Act and October, 1974 is the most recent month for which data are available at the time of this writing. Comparing data for the same months in each year controls for seasonal variations. The figures provided indicate the percentage increase or decrease in delinquency rates for the 1973 and 1974 time periods, using the indicated base.

TABLE II

Changes in Automobile Credit Delinquency Rates for March 1-Oct. 31, 1973 and 1974, as a percentage of the March 1-Oct. 31, 1972 rates; and March 1-Oct. 1, 1974 rates as a percentage of March 1-Oct. 1, 1973 rates.

		30-59 day delinquencies		Total delinquencies	
		Direct	Indirect	Direct	Indirect
Wisconsin	1973/1972	+42	+27	+35	+25
	1974/1973	- 5	+17	+ 5	+25
	1974/1972	+35	+48	+42	+56
National	1973/1972	+ 2	+12	+ 7	+16
	1974/1973	+38	+18	+38	+19
	1974/1972	+41	+33	+48	+39
Illinois	1973/1972	0	+12	0	- 4
	1974/1973	+75	+28	+80	+39
	1974/1972	+76	+44	+80	+34
Iowa	1973/1972	+47	+ 3	+26	- 3
	1974/1973	+32	+ 9	+36	+ 9
	1974/1972	+94	+13	+70	+ 6
Minnesota	1973/1972	- 2	- 6	- 1	- 5
	1974/1973	+55	+28	+65	+31
	1974/1972	+53	+20	+63	+25

The data suggest that for the first year or so after the Act's effective date, Wisconsin's delinquency rates rose much more quickly than the national average and the rates in contiguous states. This trend was not maintained in the second year after the Act, however. Wisconsin direct loan delinquency rates remained essentially static in 1974, while rising dramatically nationally and in contiguous states. Delinquency rates for indirect loans continued to increase in 1974, but only at about the rate of increase nationally and in contiguous states. As a result, over the 2-year period direct loan delinquency rates in Wisconsin increased slightly less than they did elsewhere,

American Bankers Association, for providing us with the ABA data and helping us interpret them.

whereas indirect delinquency rates increased slightly more rapidly than elsewhere.

These trends escape easy explanation. One of the major difficulties is presented by the sharply varying delinquency rates in contiguous states. To the best of our knowledge, there have been no legal changes in these states that would readily explain the variations. If local economic conditions or changes in local banking practices account for the variations in contiguous states, the same explanation may account for the variations in the Wisconsin data. Some support for the assumption that the Consumer Act is one important causal explanation of the Wisconsin data comes from the fact that the Wisconsin results are extreme—direct loan delinquencies in Wisconsin rose more quickly in 1973 and less quickly in 1974 than in any of the contiguous states.¹¹⁸

Assuming that the ABA data reflect the impact of the Consumer Act, then the rapid rise in short-term delinquencies during the first year of the Act's operation can be seen as confirmation of our speculation that debtors would be more willing to incur short-term delinquencies. But if this effect is to be a permanent one, absent some unusual economic or other condition local to Wisconsin, the second year delinquency rates should have remained at or above the national average.¹¹⁹ Consequently, it seems likely the variation in the change of delinquency rates reflect mainly creditor rather than debtor response to the Act. For example, when the Act first became effective, many banks may not have substituted aggressive but legal collection procedures for newly outlawed ones, such as quick repossession, with the result that a higher percentage than usual of missed payments became 30-day delinquencies—the first time a missed payment appears in the ABA data. By the second year of the Act, most banks may have adjusted their collection procedures sufficiently to prevent many missed payments from becoming 30-day delinquencies. Support for this explanation comes from our interviews with large creditors. We were told, as will be more fully developed later,¹²⁰ that one creditor response to the Act has been to "tighten up" collection procedures by initiating informal collection activities earlier and continuing them more intensely. Our interviews do not permit us to estimate the extent

118. The problem of sharply varying experiences in contiguous states is a general problem with using ABA data on delinquency and repossession rates. Nonetheless, for the reasons given in the text and because there is little other data available, we will continue to assume that the Consumer Act is an important partial explanation for the Wisconsin experience reflected in the ABA data.

119. One might speculate that more debtors would learn of the availability of relatively riskless short-term delinquencies over time and consequently that the rates should continue to increase at above the national average during the second year.

120. See text following note 139 *infra*.

of the lag between the Act's effective date and the initiation of these "tightened up" procedures, but we are confident there was such a lag. Further support for this explanation is provided by examination of the 60-day-and-over delinquency rates. As will be more fully explained subsequently, although short-term delinquency rates for direct loans declined during the 1974 period, 60-day-and-over delinquency rates continued to increase at close to the national average.¹²¹ An assumption that creditors became more effective in preventing missed payments from becoming 30-day delinquencies would account for this divergence.

One difficulty in constructing any explanation for the change in delinquency rates in the 1974 period is to account for the simultaneous decrease in direct delinquency rates and continued increase in indirect delinquency rates. To the extent creditors have sought to prefer direct to indirect credit—in order to avoid the Act's holder in due course and deficiency judgment provisions¹²²—they may have tended to transfer the best risks from the former market for indirect credit to direct credit, with a consequent reduction in the risk quality of consumers obtaining indirect credit. This could account for the continued rise in indirect delinquency rates, and could occur even if minimal credit availability standards for indirect credit have been rising. Moreover, it probably has always been true that banks and other creditors have tended to use somewhat more stringent collection techniques for indirect than direct credit, since there is often a greater desire and expectation for future dealings with direct customers. Consequently for indirect credit there may have been less possibility to reduce delinquency rates by tightening up collection procedures.

In summary, the many possible partial explanations for the delinquency data prevent us from drawing definite conclusions about the long range effects of the Act. The last explanation offered for the delinquency data does suggest that if the Act has stimulated short-term delinquencies, creditors have reacted so as to prevent most such delinquencies from becoming 30 days old and thus appearing in the available measures of delinquency rates. Any such conclusion must be extremely tentative, however, especially since we are unable to determine the effects of reduced credit availability, if any, and local economic conditions on delinquency rates. To determine more conclusively the effects of the Act on delinquency rates, it will be necessary to study delinquency rates over a longer period of time, probably using sophisticated regression analysis techniques utilizing reliable data about such matters as credit availability and unemployment rates.

121. See notes 138-141 *infra* and accompanying text.

122. See note 105 *supra* and accompanying text.

C. *Collection Practices*

1. REPOSSESSION RATES

On theoretical grounds we predicted that judicialized repossession would tend to increase the ratio of workouts and of voluntary surrenders to forceful surrenders.¹²³ There are two independent sources of reasonably reliable data to test for such an effect.

In addition to delinquency data, the ABA collects information on automobile repossession rates by banks. Repossession for this purpose includes voluntary surrender. The ABA data are provided below for the same time periods covered by the delinquency data.

TABLE III

Changes in Automobile Repossession Rates for March 1-Oct. 31, 1973 and 1974, as a percentage of March 1-Oct. 31, 1972 rates; and March 1-Oct. 31, 1974 as a percentage of March 1-Oct. 31, 1973 rates.

	1973/1972		1974/1973		1974/1972	
	direct credit	indirect credit	direct credit	indirect credit	direct credit	indirect credit
Wisconsin	-36	-22	+61	+45	+ 3	+14
National	+ 8	+ 4	+35	+12	+46	+16
Illinois	+18	+26	-15	+24	0	+56
Iowa	+16	-14	-10	- 4	+ 4	-18
Minnesota	+ 2	-16	+10	+18	+13	- 1

Repossession rates are to a great extent a function of delinquency rates, and consequently Table III should be examined in conjunction with Table II. This examination reveals that for the first time period (1973) after the Act, Wisconsin delinquencies rose and repossessions declined, both disproportionately to the experience nationally and in contiguous states. The inference is almost inescapable that during this time period, at least for banks, the Act caused a substantial reduction in repossessions.¹²⁴ Although we have no explicit data, given the increase in delinquencies there must also have been a substantial increase in workouts. Bank regulators typically require banks to close delinquent accounts after a reasonable period of time—say 100 days—by refinancing, repossession, or writing off as a bad debt. Thus, banks could not just continue delinquent accounts for repossession at a later time. Since it seems unlikely that banks ab-

123. See notes 66-76 *supra* and accompanying text.

124. But see note 118 *supra* and accompanying text. In this instance the variance in Wisconsin repossession rates is so much more extreme than the variance in contiguous states that the inference is very strong that the Consumer Act was a causal influence. This inference is supported by the MVD data discussed subsequently in the text.

sorbed the decline in repossession entirely by increases in bad debts, it follows that many accounts that would have been closed by repossession if delinquent before the Act must have been refinanced.

The ABA data for the 1974 time period does not yield such clear inferences about the Act's impact. Comparing this time period to the 1973 period, delinquency rates leveled off or declined relative to national and contiguous state experience, while repossession rates increased rapidly, both absolutely and relative to national and contiguous state experience. Over the 2-year period, Wisconsin repossession rates increased slightly, less than national rates but roughly on a par with contiguous state experience.

There is one fairly evident partial explanation of the 1974 experience. Just as the relative decline in 1974 delinquency rates can be partially attributed to the development of better collection techniques, it seems likely that after some experience under the Act, banks learned that judicialized repossession was not so expensive or difficult a procedure as they feared and hence used it more, with a consequent drop in the workout rate.¹²⁵ But it is impossible to determine from the ABA data whether this is a sufficient explanation for the variation in 1973 and 1974 experience. As a result, we cannot know whether in the future to expect repossession rates to remain stable, relative to delinquency rates, or whether the 1974 increase is due partly to factors which will cause continued increases in the incidence of repossession.

There is one other available source of statistical data about Wisconsin repossession rates. The Wisconsin Motor Vehicle Department counts involuntary motor vehicle title transfers that must be processed specially due to the unwillingness of the previous owner to sign the necessary documents. MVD statistics, therefore, include most forceful repossessions¹²⁶ but not voluntary surrenders. They include, unfortunately, forceful repossessions of commercial vehicles and mobile homes, neither of which would ordinarily be governed by the Act,¹²⁷ as well as motor vehicle sales resulting from enforcement of mechanic's liens or writs of execution. We have been re-

125. Consistent with this hypothesis, the repossession rates for the months immediately after the Act's effective date were extremely low. These low rates cannot be solely attributed to creditor inexperience with the Act, however. The rates for the two months preceding the Act were quite high. Apparently many creditors made a concerted effort to complete as many repossessions as possible while self-help was still permissible, with a consequent reduction in problem delinquencies in the first months after the Act.

126. In a few instances a repossessing creditor may get a debtor to sign a title transfer, in which event a forceful repossession would not show up in the MVD statistics. We doubt, however, that such occurrences are frequent enough significantly to distort the MVD data.

127. See note 98 *supra*.

liably informed, however, that the number of involuntary transfers of these latter types is small, and there is little reason to suppose that their number has changed markedly in recent years.¹²⁸

The MVD data are reported in Table IV below. Unfortunately it was not feasible to obtain data prior to July, 1972, and consequently impossible to duplicate the time period for which the ABA data were reported. The time periods chosen for this Table are July 1 - January 31 for 1972-73, 1973-74, and 1974-75.¹²⁹

TABLE IV
Motor Vehicle Department Repossession Statistics

Time period	Number	Weekly Average (rounded)	Percent of 1972-73	Percent of 1973-74
Jul. '72-Jan. '73	2639	88	—	—
Jul. '73-Jan. '74	2239	75	85%	—
Jul. '74-Jan. '75	2551	85	97%	114%

In interpreting Table IV, several points must be kept in mind. First, the MVD data pertain to repossessions by all creditors, whereas the ABA data pertain just to banks. Hence, Table IV reflects the experiences of sales finance companies and other financial institutions that cater to the low value used car market, which banks generally do not.¹³⁰ Second, Table IV reports the absolute number of repossessions rather than repossession rates—that is, repossessions as a percentage of loans outstanding—which are reported in Table III. The number of repossessions varies, of course, with the volume of lending. As reported earlier, the best evidence available—motor vehicle liens

128. Transfers of a decedent's motor vehicles must also be processed specially, but MVD maintains a separate count of these transfers and they are not included in the data reported subsequently in the text.

129. Applications for involuntary title transfer are counted at the time they are received by MVD, usually one to three weeks after the actual repossession.

February was not included in the time periods because repossessions were abnormally high in both 1973 and 1975. In 1973 creditors were attempting to complete as many repossessions as possible before the Act became effective—see note 125 *supra*—and in 1975 the current recession was in full bloom.

130. It cannot be determined by comparison of these tables whether nonbank sources of automobile credit have had the same experience as banks, however. Banks provide approximately 75% of all new automobile credit in Wisconsin. See note 95 *supra* and accompanying text. We do not know what percentage of used automobile credit banks provide, although clearly it is less. Given this volume, and assuming the ABA data is correct, the direction of changes in the number of repossessions indicated in Table IV is certainly to be expected. That the percentage changes have been less may indicate that the repossession practices of nonbank creditors have been considerably different. On the other hand, the differences in the rate of change revealed between the two tables may be completely caused by other factors, such as that one includes voluntary surrenders while the other does not, and that one reports repossession rates while the other does not control for changes in lending volume.

recorded with MVD—indicates the volume of lending has increased modestly over the period covered by Table IV.¹³¹ Consequently, repossession rates have probably declined at a greater rate than the decline in the number of repossessions shown in Table IV.

In general, Table IV shows a pattern remarkably similar to that of Table III. The percent of change has not been so great but the changes have been in the same direction. As with the ABA data, it is impossible to know whether the 1974 increase in repossessions reflects a trend that will be continued. Taking the two groups of data together, however, it seems reasonably clear that somewhat contrary to our expectations, in the long run the Act will not occasion a dramatic decrease in the frequency of repossession, though the possibility of a modest long-term decrease, relative to experience elsewhere, cannot be discounted.

There are several possible explanations for the failure of repossession rates to decline more precipitously. As we will document more completely below the costs of judicialized repossession in Wisconsin appear to be far less than critics generally predicted, and consequently there is less incentive to avoid repossession. Second, it is possible that the repossession increase in the second year reflects a creditor response to the rapid increase in delinquencies during the first year of the Act. Although we did not hear such views expressed in our interviews, perhaps creditors have decided that a certain rate of repossession is necessary in order to maintain the credibility of the threat to repossess, in that way deterring missed payments and facilitating quick informal collection when delinquencies do occur.¹³²

There is also one detailed aspect of the Consumer Act that may substantially encourage repossessions. Though the Act is not absolutely clear, it appears that, if a lender concludes a refinancing agreement, the 55-day waiting period before legal action begins anew if the refinancing agreement is breached.¹³³ Consequently, as the 55-day period after the original breach draws to a close, a lender faces a considerable disincentive to enter into a refinancing agreement. The

131. See note 100 *supra* and accompanying text.

132. If this explanation is valid, we would expect considerable fluctuation in repossession rates in the first years of the Act, as creditors experiment with the proper mix of repossession, refinancing agreements, and informal collection.

133. There is no official interpretation to this effect but we draw our conclusion from the face of the statute; Wis. STAT. § 425.103(1) (1973) provides that no cause of action shall accrue "in a . . . transaction," except upon "default," which is defined so as to include the waiting period. "Transaction" is defined as an "agreement." *Id.* § 421.301(44).

Technically repossession proceedings can be initiated after expiration of the 40-day default period, but, as previously noted, there is no evidence creditors are using this right to expedite repossession. See note 39 *supra*.

debtor, after all, is a self-defined high risk, and being required to wait out another 55-day period can be costly to the lender. When we asked, our interviewees refused to acknowledge that this aspect of the Act influenced their decisions about refinancing agreements. Objectively, however, the disincentive is there. Moreover, our interviewees indicated that repossession proceedings are normally initiated shortly after completion of the 55-day period, and further negotiations with the debtor are rarely attempted. If this factor explains in important part the failure of the Wisconsin repossession rates to decline significantly in the two years following the Act, then the Wisconsin experience is not a good predictor of how repossession rates would be affected by different judicialized repossession systems.

We also hypothesized that judicialized repossession would increase the ratio of voluntary to forceful surrenders, but we have been largely unable to find reliable evidence to test this hypothesis.¹³⁴ Responses to our bank survey indicated a wide variation in voluntary surrender/forceful repossession ratios, with a substantial proportion of respondents reporting no voluntary surrenders. We suspect, however, that these results were confounded by confusion among many respondents about the meaning of the term "voluntary surrender," which we did not define in the questionnaire. Large volume lenders responding to our survey, who might be expected to be more familiar with the Act's terminology, tended to report a higher proportion of voluntary surrenders. Our intensive interviews with a few large lenders revealed a keen awareness of the advantages of voluntary surrender;¹³⁵ they made considerable efforts to inform debtors of the option, emphasizing its very real advantages to the debtor¹³⁶ as well as the lender, and, perhaps as a result, the ratio of voluntary surrenders to forceful repossessions for most of our interviewees had increased significantly since the Act became effective.¹³⁷ Large creditors at the time of our research had made the greatest effort to adjust their collection practices in response to the Act, and consequently further increases in voluntary surrender ratios might be expected as other creditors adopt the procedures they have developed.

134. See notes 75-76 *supra* and accompanying text. The MVD data excludes voluntary surrenders while the ABA data includes them, but the two sets of data cannot be meaningfully compared to get an estimate of voluntary surrender frequency, since the MVD data is not expressed as a rate.

135. See text accompanying note 75 *supra*.

136. See notes 35-36 *supra* and accompanying text.

137. The Act and regulations permit a lender to notify a debtor of his right to surrender collateral voluntarily, providing threats are not made and the debtor is also informed of his right to a judicial hearing on any defenses claimed. WIS. STAT. § 425.204(3) (1973); WIS. ADM. CODE, BANKING § 80.67-.68. See also note 60 *supra*.

2. DELAY IN REPOSSESSION

Professor Johnson predicted that one effect of judicialized repossession would be to lengthen, on the average, the time period between the initial missed payment and repossession. This effect might seem particularly likely under the Wisconsin Consumer Act because of the mandatory 55-day waiting period before legal action.¹³⁸ The best available data to measure whether the Act has caused a lengthening of the period before repossession are the ABA's reports on 60-89 day delinquency rates. We ignore delinquencies of more than 90 days, on the theory that if a bank allows a debt to become more than 90 days delinquent, its reason for doing so must usually be something other than legally imposed restrictions on repossession.¹³⁹

There are difficulties in constructing meaningful measures of change in 60-89 day delinquency rates. The rates are very much affected by overall delinquency rates, and consequently change in 60-89 day rates cannot be attributed necessarily to difficulties in effecting repossession in less than 60 days. Comparing the percentage of total delinquencies that are 60-89 days delinquent eliminates the confounding effects of the overall delinquency rate, but there are other difficulties with this measure. For example, we have suggested that banks in Wisconsin may recently have become particularly efficient in preventing missed payments from becoming over-30-day delinquencies.¹⁴⁰ Since only the latter appear in delinquency statistics, the effect would be to magnify unduly the percentage of total delinquencies that are 60-89 days delinquent. In these circumstances, the best solution seems to be to look at both measures, which are reported in the following Table. The figures represent the percentage change in the measures using the indicated bases.

TABLE V

Changes in Automobile Credit 60-89 Day Delinquency Rates for Mar. 1-Oct. 31, 1973 and 1974 as a Percentage of Mar. 1-Oct. 31, 1972; and for Mar. 1-Oct. 31, 1974 as a Percentage of Mar. 1-Oct. 31, 1973

	1973/1972		1974/1973		1974/1972	
	credit direct	credit indirect	credit direct	credit indirect	credit direct	credit indirect
<i>Wisconsin</i>						
change in rate	+11	+ 9	+ 8	+22	+20	+34
change in % of total delinquencies	-17	-13	+ 3	- 2	-15	-14

138. See note 133 *supra*; WIS. STAT. § 425.205(6) (1973).

139. See note 141 *infra*.

140. See notes 120-121 *supra* and accompanying text.

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<i>National</i>						
change in rate	+14	+29	+36	+12	+55	+44
change in % of total delinquencies	+7	+11	-2	-7	+5	+3
<i>Illinois</i>						
change in rate	0	-11	+104	+49	+104	+32
change in % of total delinquencies	0	-7	+13	+7	+13	-1
<i>Iowa</i>						
change in rate	-8	-19	+75	+34	+61	+8
change in % of total delinquencies	-27	-17	+30	+23	-5	+3
<i>Minnesota</i>						
change in rate	-5	+8	+124	+34	+113	+45
change in % of total delinquencies	-4	+12	+36	+3	+31	+16

It can readily be seen that Wisconsin's 60-89 day delinquency rates have not risen as rapidly as they have nationally and are not disproportionate to changes in contiguous states. While 60-89 day rates actually declined in contiguous states during the first time period after the Act, they rose very rapidly in those states during the second time period, whereas in Wisconsin they rose slowly in both periods. Looking at the alternative measure of change, the proportion of total delinquencies that are 60-89 days delinquent, we find that in Wisconsin this proportion has actually declined since the Act, while rising modestly nationally and in most instances in the contiguous states.

As noted earlier, neither measure perfectly tests the effect of the Act on 60-89 day delinquencies, though the confounding factors are different for the two measures. Taken together, however, they strongly suggest that if the Act has caused any increase in 60-89 day delinquencies at all, the increase has been marginal at most. This conclusion alone cannot rebut Professor Johnson's predictions about the effect of judicialized repossession on the average length of time between initial delinquency and repossession. It is possible that the average time period has lengthened, yet both before and after the Act repossession occurred in the vast majority of instances within either the 30-59-day or the 60-89-day periods within which the ABA data draws no distinction. Though we cannot discount this possibility, it should be noted that in interviews we were told, as reported earlier, that at least large creditors have considerably tightened their collection procedures since the Act. It is now quite likely that a large creditor will initiate repossession procedures very shortly after the expiration of the mandatory 55-day waiting period, whereas previously a longer period would sometimes be allowed before repossession.¹⁴¹

141. The table below provides the same measures as reported in Table V for all delinquencies of 60 days or over—including delinquencies of 90 days and over. This table shows long-term delinquencies increasing in Wisconsin at about the national average and in excess of the rate in some contiguous states. A comparison of the two

Consequently, in view of all the available evidence, we doubt the Act has had substantial impact on the average length of time between initial delinquency and repossession.

3. OTHER COLLECTION PRACTICES

We have repeatedly had occasion to note that one effect of the Act reported by nearly all available sources is greater informal effort to collect missed payments and to induce voluntary surrenders. To be more precise, some of the creditors we interviewed now routinely send a right-to-cure notice at the earliest opportunity—that is, as soon as the approximately 40-day default period has expired; others usually send the cure notice at this time but sometimes wait until as long as 60 days after the first missed payment. Repossession proceedings are usually initiated shortly after the cure period expires. Sometimes with the cure notice, and if not then later, creditors remind debtors of the considerable benefits of voluntary surrender. The creditors we interviewed indicated these procedures are stricter and more routinized than before the Act. In the past, individual employee-collectors were

tables suggests that in Wisconsin over-90-day delinquencies have increased at more than the national average. The number of 90-day delinquencies is always quite small and the reliability of the ABA data on this matter is not clear. Assuming the conclusion is correct, however, on the basis of our interviews and survey data we would guess the explanation lies in the practices of small banks, some of which have not yet adapted well to the requirements of the Act and hence avoid repossession.

Changes in Automobile Credit 60-Day-and-Over Delinquency Rates for March 1-Oct. 31, 1973 and 1974, as a Percentage of March 1-Oct. 31, 1972, and for March 1-Oct. 31, 1974 as a Percentage of March 1-October 31, 1973.

	1973/1972		1974/1973		1974/1972	
	direct credit	indirect credit	direct credit	indirect credit	direct credit	indirect credit
Wisconsin						
Change in rate	+21	+22	+30	+42	+58	+73
Change in percent of total delinquencies	- 6	0	+23	+15	+16	+15
National						
Change in rate	+16	+26	+42	+21	+65	+52
Change in percent of total delinquencies	+ 9	+ 7	+ 1	+ 3	+10	+12
Illinois						
Change in rate	0	-29	+91	+66	+91	+19
Change in percent of total delinquencies	0	-25	+ 6	+20	+ 6	-10
Iowa						
Change in rate	+ 3	-12	+41	+ 9	+44	- 4
Change in percent of total delinquencies	-18	- 9	+ 3	0	-16	-10
Minnesota						
Change in rate	0	+ 4	+83	+43	+83	+48
Change in percent of total delinquencies	- 1	+14	+12	+ 5	+10	+20

allowed more discretion in dealing with individual debtors. In part, this new routinization represents an effort to cope with the various waiting periods imposed by the Act, and partly they reflect a belief that such practices are effective in terminating delinquencies without incurring the expense of judicialized repossession. Interestingly, creditors reported that both the right to cure notice and the summons in a repossession proceeding are effective "dunning" devices, apparently because their official appearance and tone persuade many debtors, more effectively than creditors otherwise are able to, of the serious consequences of perpetuating the delinquency.

The major component in Professor Johnson's estimate of the costs of judicialized repossession was the cost of hiring an attorney to initiate and conduct the court proceedings. Under the Wisconsin Consumer Act even a corporation can initiate a repossession proceeding without an attorney, but the Act is unclear as to whether an attorney must represent the creditor at the return date and in any subsequent proceedings.¹⁴² In practice, in the first year of the Act most judges in Milwaukee County were requiring corporate creditors to be represented by an attorney at the return date and thereafter. In many other counties a corporate creditor could appear without attorney at all stages in the proceeding.¹⁴³ Shortly after the Act became effective, the State Bar Association informally took the position that a statute could not authorize a non-attorney to represent a corporation at any stage of legal proceedings. In Wisconsin, as in many states, there is precedent that only the judiciary has the constitutional power to regulate the practice of law.^{143a} More recently, a compromise has been negotiated between the state bar and the Wisconsin Banker's Association, pursuant to which an attorney would not be needed to initiate an action or to take a default judgment at the return date, but would be needed if a trial is required. An amendment to the Consumer Act reflecting this compromise has been prepared, and we understand that in many parts of the state the compromise already is being implemented by judges.¹⁴⁴

142. WIS. STAT. § 425.205(1)(a) (1973). This section reads:

(a) . . . [P]rocess may be issued to, and such action may be commenced by, an officer or agent of a merchant on the merchant's behalf even though such officer or agent is not an attorney authorized to practice law in this state.

143. This information, obtained from our interviews, is confirmed in *The Wisconsin Consumer Act: One Year Later*, in WISCONSIN INVESTOR, March, 1974, at 21, 47.

143a. See *State ex rel. State Bar v. Bonded Collections*, 36 Wis. 2d 643, 154 N.W.2d 250 (1967).

144. In urban areas of the state this procedure is not a radical departure from usual small claims procedures. Typically the proceedings at the return date, called "joinder," are conducted by the court clerk. If the defendant does not appear, a default judgment is immediately entered. If an appearance is made, the defendant's plea is ascertained—the debt may not be contested—and settlement negotiations usu-

A considerable majority of both large and small banks responding to our bank survey indicated that they regularly hired attorneys when repossessing. The amounts these banks reported paying attorneys per repossession varied enormously, ranging from under \$50 to over \$300. This range probably reflects both the unreliability of many of the responses to our survey¹⁴⁵ and the failure of the bar to establish a market price for a repossession proceeding, due to the relative newness of this kind of legal business. Interestingly, the median amount reported was \$100, considerably less than Professor Johnson estimated as probable attorney costs in California.¹⁴⁶

In perceiving how a creditor could reduce the costs of repossession under the Act, more significant than the results of our bank survey is an interview with a large lender which has carefully revised its collection procedures to reflect the exigencies of the Act. At the time of our interview in the summer of 1974 this lender's collection manager completed and filed all complaints in repossession matters. Unless the proceeding was in Milwaukee County or in another county requiring appearance of an attorney, only the manager appeared in court on return day. The lack of an attorney had not produced difficulty; apparently the manager was able to cope with any legal problems that arose.¹⁴⁷ Even in Milwaukee, the collection manager appeared with the attorney on the return date. If the debtor appeared, frequently settlement negotiations ensued, sometimes at the prodding

ally take place. In some counties the clerk takes an active role in these negotiations. If further court proceedings are necessary, they are scheduled at a later date before a judge. At joinder the clerk will commonly try to get the parties to narrow the issues that will be subsequently tried.

In rural counties it is common for joinder and trial to be conducted simultaneously before a judge. A sharp break in past practices would be required, therefore, to implement the recommended procedure for determining a corporation's need for an attorney in repossession proceedings. We do not know to what extent the recommended procedure is being followed in rural counties today. In the early period of the Act, in most rural counties creditors were permitted to appear without attorney at all stages of the proceeding.

145. Unfortunately, our survey questions were not specific enough to distinguish between use of an attorney at the return date only, and use of an attorney for the entire proceeding, including the drafting of the complaint. Even though unnecessary, we know from our interviews that many creditors retain attorneys for the entire proceeding. Differences in retaining attorneys for the entire proceeding or just for the appearance at the return date may partly account for the reported variance in attorney fees.

146. Johnson, *supra* note 24, at 97-100.

147. On their face the Wisconsin Statutes appear to require a prove-up hearing even if the debtor fails to file an answer at or before the return date. WIS. STAT. §§ 299.22(2), 425.205(1) (1973). See Note, *Self-Help Repossession, The Constitutional Attack, the Legislative Response, and the Economic Implications*, 62 GEO. L.J. 273, 315 (1973). In practice, we are informed, so long as the complaint is verified, a prove-up hearing is not conducted. Even when a debtor appears, however, the collection manager believed himself competent to handle any matter that arose.

of a judge or other court official. An attorney seldom knows enough about an account to conduct such negotiations sensibly, and hence the presence of the collection manager permitted these negotiations to be promptly concluded.¹⁴⁸ In sum, this lender had found it efficient to have a responsible collection official present at all stages of a repossession proceeding and to minimize the use of attorneys. We expect that in time nearly all lenders with sufficient volume to justify the training of a lay employee will adopt this practice.

It has often been contended by critics of judicialized repossession that few debtors would appear at a repossession hearing and almost none would present successful defenses. In an effort to test this hypothesis, we examined the records of the small claims court for Dane County, in which Madison is located, for May through December of 1973. We could not obtain all the desired information in every case, but as best we could determine, the debtor appeared in about 25 percent of the automobile repossession cases in which the action was not voluntarily dismissed by the creditor before the return date.¹⁴⁹ When the debtor appeared, it seemed from the records that a successful defense was rarely asserted, but a number of actions were adjourned for settlement negotiations and subsequently dismissed. The collection manager of the large lender discussed above essentially confirmed the conclusions suggested by our search of small claims court records. He estimated the nonappearance rate in automobile repossession actions at about 50 percent outside of Milwaukee County and somewhat higher therein. Although serious substantive defenses were rare in his experience, many debtors indicated in court that they could not afford to pay the arrears but still wanted to keep the vehicle. Negotiations looking towards a workout often ensued, frequently at the court's urging. This lender frequently refused to compromise its position in these negotiations,¹⁵⁰ and then, we were

148. We were informed that although judges frequently urged the lender to negotiate a workout, if the lender refused, judges consistently entered the requested repossession order.

149. A significant number of cases were voluntarily dismissed by creditors before the return date, usually, we suspect, because of a settlement. Possibly many of these cases would have resulted in a repossession absent the requirement of prior judicial authorization. If so, then the Act has had a significant effect in inducing workouts. On the other hand, many of these creditors may have regarded the complaint as a dunning device, essentially a substitute for other informal collection practices used before the Act with the same effect—namely a workout.

150. Technically, the debtor's absolute right to cure a default by tendering unpaid installments and delinquency charges expires 15 days after mailing of the right-to-cure notice, and hence before the return date in a repossession action. WIS. STAT. § 425.105(2) (1973). We expect that an offer to cure made at the return hearing would ordinarily be accepted nonetheless. The question usually facing the creditor, however, is whether to agree to a refinancing agreement, lowering the size of the monthly payments but extending them over a longer period of time.

told, it uniformly was able to obtain a repossession order. But workouts concluded at the small claims court hearing were not uncommon.

Critics of judicialized repossession have also predicted that the frequency of deficiency judgments would increase, since it would be so convenient for a creditor to couple a deficiency claim with its action for repossession.¹⁵¹ Because the Consumer Act provides that the only issue that can be determined in the special repossession action is the right to possession, this particular consequence should not be anticipated in Wisconsin and to the best of our information it has not occurred.¹⁵²

A final matter to be discussed in this section is the concern of some critics of judicialized repossession that the number of "skips" might increase because of the creditor's inability to repossess expeditiously.¹⁵³ Nearly all the creditors we interviewed identified inability to repossess quickly as a major difficulty they face under the Act, but an increase in skips is not considered a major consequence of the difficulty. More serious in the view of creditors is their inability to prevent a decline in the value of the collateral when it appears hopeless that the debtor will ever resume payments, yet a voluntary surrender of the vehicle is not immediately forthcoming.¹⁵⁴

IV. SUMMARY AND CONCLUSIONS

Our main purpose in undertaking this research has been to assess the impact of the repossession provisions in the Wisconsin Consumer Act in order to narrow the range of debate about mainly

151. See, e.g., White, *supra* note 24, at 524-25.

152. WIS. STAT. § 425.205(1)(e) (1973). In our interviews we did hear one interesting account of the implementation of the Consumer Act's provision restricting deficiency judgments for indirect loans in which the amount owing at the time of default is \$1,000 or less. One large creditor has interpreted this provision as prohibiting only the obtaining of a judgment. At the time of our interview, this creditor regularly sought to collect all deficiencies informally, and with some considerable success. We doubt that this practice was intended by the drafters of the Consumer Act. Perhaps the Commissioner of Banking, under his rulemaking authority, should address this matter.

153. See, e.g., Johnson, *supra* note 24, at 105, although Johnson indicates that the net effect of judicialized repossession on the number of skips is difficult to ascertain.

154. The Consumer Act contains the following provision designed to deal with this problem:

Restraining order to protect collateral. If the court finds that the creditor probably will recover possession of the collateral, and that the customer is acting, or is about to act, with respect to the collateral in a manner which substantially impairs the creditor's prospect for realization of his security interest, the court may issue an order . . . restraining the customer from so acting with respect to the collateral, and need not require a bond by the creditor

WIS. STAT. § 425.207 (1973). To our knowledge, this provision has rarely, if ever, been invoked.

empirical issues that has encompassed proposals to eliminate repossession of automobiles except after notice to the debtor and an opportunity for a judicial hearing on the propriety of repossession. Our success has been limited, most importantly because of the limited availability of relevant data. Moreover, most of our data pertain to a 21-month period since the Act became effective, and as our repossession data indicate most dramatically, this period may be too short to permit reliable assessment of long-term impact. We also faced the inherent problem of trying to isolate the effect of particular changes in the repossession laws when numerous other legal changes were being simultaneously initiated by the Wisconsin Consumer Act. Nonetheless, we believe the study makes some contribution.

The major contention of the critics of judicialized repossession has concerned the impact of that legal change on the availability of credit, particularly to the poor. The best data available to us suggest that the number of automobile loans extended has not declined substantially in Wisconsin since the Act, despite tight money conditions for most of the period studied. Because the costs of repossession have indisputably risen significantly, it is likely nonetheless that the Act has had at least marginal impact in restricting credit availability, perhaps primarily by causing an increase in required downpayments. Our informal interviews with low value used car dealers, who presumably sell disproportionately to the poor, suggested there may have been a substantial restriction of credit to their clientele—primarily in the form of higher required down payments.

Even if judicialized repossession has made credit less available, especially to the poor, on the premises of welfare economics it cannot be determined whether this reduced credit availability increases or decreases resource allocation efficiency. The marginal return to society of the most risky automobile credit now extended may not exceed its marginal costs, for example because of the various externalities associated with default and repossession. A similar theoretical conclusion can be drawn about the position of the poor themselves; if there is a proclivity by consumers to undervalue long-term risks, such as those associated with default, the benefits of credit to the highest risk debtor can be less than its costs. The possibility that the poor are "better off" because of reduced credit availability is enhanced if the restriction of credit to the poor has taken the form primarily of higher downpayments, as seems likely. Then, many poor can adapt to this change simply by buying a cheaper car, thereby maintaining mobility but reducing the costs of default, since less is obligated or risked. There is some evidence that any reduced credit availability for the poor has had this effect, for example the MVD data indicating no reduction in the volume of secured credit sales of motor vehicles since

the Consumer Act became effective.¹⁵⁵

The critics of judicialized repossession have not predicted the magnitude and form of the reduction in credit availability in terms that permit us to test whether the magnitude of any reduction in Wisconsin is less than they expected. Nevertheless, they seem to have expected a more substantial reduction than the available data suggest has occurred. It must be noted that most of the critics¹⁵⁶ were concerned with evaluating the impact of litigation challenging the constitutionality of self-help repossession. As a legislative enactment, the Wisconsin Consumer Act could and did adopt a number of cost-saving procedures that could not result directly from a constitutional decision. Chief among these is the provision limiting or dispensing with the need for attorneys in repossession actions.¹⁵⁷ In addition to understandably failing to account for these cost-saving procedures, however, we believe the critics underestimated the ability of creditors to avoid some potential extra costs of judicialized repossession by altering their collection procedures. In particular, since the alternative of repossession is less attractive, on theoretical grounds we would expect creditors to tighten up informal collection practices. We would also expect a reduced rate of repossession and a higher frequency of refinancing agreements.

One of the major objectives of the study was to test our hypothesis that judicializing repossession would tend to increase workouts and reduce repossessions. The hypothesis was beautifully confirmed during the first year of the Act, as the number and the rate of repossessions declined precipitously, both absolutely and relative to the experience elsewhere. During the second year, repossessions rose rapidly. At this time it is impossible to know whether the second year reflects the beginning of a continuous upward trend in repossession rates or simply a correction of creditor overreaction in the first year of the Act to the assumed difficulty of judicialized repossession. If the latter, repossessions can be expected to level off at or somewhat below the rate that would have existed in the absence of the Act, as best as it can be estimated from changes in repossession rates elsewhere. Our theoretical analysis leads us to favor the latter explanation of course—and our personal interviews with the large creditors offered some support for this explanation¹⁵⁸—but only empirical research at a later time can conclusively resolve this issue.

155. See also text following note 113 *supra*. We do not mean to suggest, of course, that the poor do not lose anything by buying cheaper cars. See text following note 83 *supra*. But presuming a tendency to undervalue the risks of default, those losses may be less than the gains.

156. But see White, *supra* note 24.

157. WIS. STAT. § 425.205(1) (1973).

158. The greater efforts at informal collection reported by these creditors can be

Although the ultimate impact of the Act on repossession rates remains unclear, it appears now that the Act has a lesser effect in reducing repossession rates than we expected. We earlier suggested possible explanations for this limited impact, two of which relate to special provisions of the Wisconsin Consumer Act and imply that different systems of judicialized repossession might have more substantial impact on repossession frequency. First, the very obvious efforts by the draftspeople of the Act to minimize the costs of judicialized repossession have reduced the incentives on creditors to avoid that remedy. We hesitate to recommend that the costs of repossession be deliberately increased, since that would most likely reduce credit availability, but we are reasonably confident such action would reduce repossession rates. Secondly, the provisions in the Act that seem to impose a 55-day waiting period before repossession for breach of a refinancing agreement have most likely made refinancing a less attractive alternative to creditors and thus increased repossession frequency. We recommend that the Act be amended to reduce substantially this waiting period for breach of refinancing agreements in order to forestall this effect.¹⁵⁹

As we have repeatedly stated, it is and will remain essentially impossible to determine on welfare economic grounds whether judicialized repossession increases or decreases resource allocation efficiency. In attempting to guess if judicialized repossession is desirable in the absence of such information, the kind of analysis attempted in this study is useful and needed.¹⁶⁰ Our results are hardly conclusive, but we remain impressed nevertheless with the possibility that judicialized repossession can enhance the general welfare by inducing greater creditor efforts at informal collection, including the arrangement of refinancing agreements. A successfully completed workout benefits everybody, largely because the extra use value of the automobile in the debtor's hands is preserved, whereas it is typically destroyed by repossession.¹⁶¹ Informal collection, refinanc-

attributed in part to the current depressed economic conditions and to the rapid rise in delinquencies during the first year of the Act. But we were told the Act was an important consideration as well.

159. We are not recommending that the waiting period be reduced for breach of the original agreement. Though that provision may have some negative impact on credit availability, if it has any impact on repossessions, it should reduce them, since it forecloses the possibility of quick repossessions and thus forces the creditor to consider workouts.

160. It can be argued, we suppose, that due process—defined so as to exclude repossession without notice and hearing—is such an important value that it must be respected no matter what the cost. See Yudof, *supra* note 44. It is just that we would not make the argument.

161. By use value we mean essentially the difference between the amount obtained at a properly conducted postrepossession resale (less the costs of repossession and resale) and the value of vehicle in the debtor's hands—usually somewhat in excess

ing agreements, and to a lesser extent even voluntary surrender, can also avoid other secondary costs typically attending repossession—such as inconvenience and possibly loss of job—costs that might otherwise be borne by parties external to the transaction.

of the cost to the debtor of replacing it with an equivalent vehicle. *See* note 92 *supra* and accompanying text.