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A CASE STUDY OF THE WISCONSIN CONSUMER ACT

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THE IMPACT OF DENYING SELF-HELP REPOSSESSION OF AUTOMOBILES:  
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Since the Supreme Court, in Sniadich v. Family Finance Corp.,<sup>1</sup> 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 prior notice and without an opportunity for a prior hearing into either the merits of the creditor's claim or the propriety of the particular remedy.<sup>2</sup> Since Sniadich 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 for model state legislation. The first, the Uniform Consumer Credit Code (hereinafter, the UCC), originally recommended relatively minor changes in traditional remedies,<sup>3</sup> 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.<sup>4</sup> The National Commission on Consumer Finance has also made far-reaching recommendations, which generally resemble the National Consumer Act position.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> Self-help repossession is generally restricted to situations in which it can be accomplished without committing a breach of the peace. Because entry into a debtor's home without permission is usually deemed a breach of the peace,<sup>8</sup> in the consumer credit area self-help repossession is used principally to seize motor vehicles.<sup>9</sup>

Like many other important creditor remedies, the constitutionality of self-help repossession<sup>10</sup> of motor vehicles has been attacked following Sniadich.<sup>11</sup> This litigation has focused on two principal issues. One concerns the meaning of due process in the creditor remedies area. In Fuentes v. Shevin<sup>12</sup> the Supreme Court laid to rest, temporarily, questions as to whether Sniadich was limited to prehearing seizure of wages;<sup>13</sup> 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.<sup>14</sup> and North Georgia Finishing v. Di-Chem,<sup>15</sup> 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 creditor's right to the remedy in question.<sup>16</sup> Actually, if applicable to self-help automobile repossession, 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 might often necessitate the services of a lawyer. As the expense of effecting repossession increased, the utility of this remedy to the creditor would decrease.

The second principal issue is 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,<sup>17</sup> because of the confused status of the state action doctrine, plausible arguments can be made that self-help repossession involves state action.<sup>18</sup> In the past year, however, the Supreme Court denied certiorari to a Ninth Circuit decision holding that self-help repossession did not involve state action,<sup>19</sup> and this decision, together with some consistent decisions from other circuits,<sup>20</sup> 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.<sup>21</sup> 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. That Act, inter alia, requires prior judicial approval, after notice to the debtor and an opportunity to be heard, before secured creditor repossession of motor vehicles and other kinds of collateral,<sup>22</sup> more or less consistently 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--long enough to permit some assessment of impact.<sup>23</sup>

We will begin this article 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 focuses on whether the economic costs of such reform exceed its benefits.<sup>24</sup> We will offer our own theoretical critique of this commentary and identify the hypotheses we will test with data on the impact of the Wisconsin Consumer Act. Next we will discuss the methodological difficulties we have faced in assembling data on the Act's impact and the sources of information on which we have relied. Briefly, 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

some insights about impact, as we will explain as we present our data and suggest the conclusions that can be drawn from them.

### The Provisions of the Wisconsin Consumer Act

The most important provisions of the Wisconsin Consumer Act for our purposes are those that require a prior court determination that the creditor is entitled to the collateral before forcible repossession.<sup>25</sup> To obtain the required court permission, the creditor must bring a replevin action in the Wisconsin small claims court.<sup>26</sup> 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.<sup>27</sup> The summons must follow a statutory form, which provides the defendant-debtor with extensive notice of his right to defend and of the consequences of failing to answer the summons.<sup>28</sup> The action may be initiated by a nonattorney, even if the creditor-plaintiff is a corporation, but the statute is ambiguous as to whether a corporate party must be represented by attorney on the return date.<sup>29</sup> After a judgment establishing the creditor's right to possession, repossession may be by self-help, providing no breach of the peace is committed.<sup>30</sup> Following repossession there is a period of redemption, during which the creditor must retain the collateral.<sup>31</sup> Any subsequent sale is governed by the provisions of the Uniform Commercial Code, except that the Act restricts the availability of deficiency judgments.<sup>32</sup>

Voluntary debtor surrender of the collateral without prior court proceedings is permissible under the Act, but there are provisions

designed to guard against 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."<sup>33</sup> This provision has been interpreted, however, as not preventing a merchant from notifying a debtor about his right to surrender the collateral voluntarily.<sup>34</sup> Voluntary surrender can benefit the debtor since if repossession ultimately ensues the debtor will be responsible for court costs<sup>35</sup> and perhaps also for the decline in the value of the collateral between the time voluntary surrender could have occurred and the time forcible repossession in fact occurs.<sup>36</sup>

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 of which must be mentioned briefly. One set of provisions defines "default" in a consumer credit transaction and establishes 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 10 days.<sup>37</sup> 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.<sup>38</sup> Thus, assuming monthly payments, a creditor must wait at least 55 days after the first missed payment before he can repossess the automobile.<sup>39</sup>



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.<sup>40</sup> Generally speaking, a creditor making a direct loan, the proceeds of which are used to purchase an automobile, is not subject to defenses available against the seller, though there are infrequent exceptions to this principle.<sup>41</sup> If the creditor is one against whom claims against the seller can be asserted as a defense, then after repossession and resale, a deficiency judgment will not lie if the amount owing at default was \$1000 or less.<sup>42</sup> 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.<sup>43</sup>

#### 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.<sup>44</sup> It is increasingly fashionable to evaluate proposed legal reforms by the premises of welfare economics and its goal of resource allocation efficiency, however, and it is on the basis of the precepts of welfare economics that we undertake our analysis.

It might be contended that we can rely on the market to determine the desirability of repossession only after prior notice and an opportunity for a judicial hearing--what we will hereinafter call judicialized repossession. The argument would be that consumers exercise a choice in entering a credit contract, that if many consumers were willing to pay for the extra costs attending judicialized repossession, some creditors would make available contracts prohibiting self-help repossession, and that the failure of creditors to do so indicates that few consumers value the purported benefits of judicialized repossession more than the attendant costs.<sup>45</sup> 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, overweight 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.<sup>46</sup> If this is 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 its costs. It seems especially 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 offer 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.)<sup>47</sup> These costs tend to be visited, in part, on persons other than consumer and creditor--the employer, taxpayers generally, other creditors of 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 in judicialized repossession. Consequently, even though it may not be in the consumer's self-interest to pay enough extra to induce creditors to offer contracts prohibiting self-help repossession, it may still be in society's interest to prohibit the procedure.

These difficulties in applying the premises of welfare economics to repossession proposals do not establish the desirability of judicialized repossession.<sup>48</sup> They only indicate that the automobile credit market, like most markets, is an imperfect one and that in evaluating proposed regulation on the premises of welfare economics, the difficult problem of the second best must be faced.<sup>49</sup> The complexity of the second best problem is easily illustrated. 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 could be and were internalized (that is, borne by the parties to the transaction) and if debtors, at the time of contract formation, exhibited the proper amount of aversion to creditors who repossess at above-average rates. At the same time, however, elimination of self-help might increase the price of credit, thereby decreasing its supply. It is difficult to know whether a relative decrease in supply is desirable. The consumer credit market is not fully competitive, as was recently documented by the National Commission on Consumer Finance.<sup>50</sup> The less-than-perfect competition among credit grantors should already tend to keep the price of credit higher and the supply lower than, according to the precepts of welfare economics, is optimally desirable.<sup>51</sup> On the other hand, the possible proclivity of many consumers to undervalue the risks of default, making them more willing than they ought to be to enter into credit transactions, may tend to cause more credit demand than is optimally desirable, given its price. Perhaps inducing an increase in price by eliminating self-help repossession, would help counteract this excessive demand, resulting in a level of credit extension that more closely approximated the optimal level. Although a much more extensive analysis could be undertaken,<sup>52</sup> these limited observations are sufficient to demonstrate that a much more sophisticated data base than is practically available is needed before the tools of welfare economics can be applied to permit reliable guesses about whether elimination of self-help will contribute to more efficient resource allocation in the automobile credit market.

Given the inability to make a full welfare economic analysis, most commentators have narrowed their focus and simply attempted 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 of repossession on consumers.<sup>53</sup> 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 his view, would be passed on to consumers in some combination of higher interest rates and reduced credit availability. The costs, he predicts, would be disproportionately borne by marginal-risk consumers, predominantly low-income ones.<sup>54</sup>

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.<sup>55</sup> 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 had two basic components: (1) lawyer fees and court costs, and (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 collateral when repossessed<sup>56</sup> 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 overestimated the size of these extra costs.<sup>57</sup> He estimates, for example, that lawyer fees and court costs, even if the debtor defaulted, 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.<sup>58</sup> 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.), reducing 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.<sup>59</sup> This is not the system in Wisconsin, and it seems difficult to argue that it should be, providing adequate notice of legal rights is given to the consumer at the time of voluntary surrender.<sup>60</sup> In Wisconsin, 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.<sup>61</sup>

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 as 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.<sup>62</sup>

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 permit 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.<sup>63</sup> Another possibility is that creditors' delinquency rates would increase under judicialized repossession. If many debtors realized that repossession could not be immediate, because of necessary court proceedings, it is possible some would be inclined to make late payments more frequently--in effect unilaterally to take out short-term loans from the creditor.<sup>64</sup> Such action would both increase creditors' collection costs and impose opportunity costs (for loss of the use of the payments).<sup>65</sup>

Although Professor Johnson's estimates of the extra costs of a judicialized repossession may be exaggerated, nobody contends that the costs would be insignificant. 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,<sup>66</sup> but there is 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.<sup>67</sup> Because even self-help repossession is relatively costly, and rarely returns to the creditor the full amount owing, initially a creditor almost invariably selects some type of informal contact with the debtor.<sup>68</sup> The purpose of these contracts 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.<sup>69</sup> 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 is substantial for subsequent debtor default of any workout agreement acceptable to the creditor.<sup>70</sup>

Under judicialized repossession, there is good reason to anticipate greater creditor willingness to enter workouts, especially refinancing agreements, with a consequent lower rate of repossession compared to what it would be with self-help repossession and the same standards of credit availability.<sup>71</sup> 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.<sup>72</sup>

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 efforts 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--are 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,<sup>73</sup> assuming, as seems reasonable, that such increased effort would yield more workouts.<sup>74</sup> If creditors did spend more on informal contacts, the cost of informal contacts would increase, as there would be more of them, 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 ratio of voluntary surrender to forceful repossession. 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.<sup>75</sup> Assuming voluntary surrenders remained possible without prior court approval, under a judicialized repossession system the difference in cost between voluntary surrender and forceful repossession would increase, particularly since voluntary surrenders would often occur more quickly, and we would expect more effort to be expended toward arranging them, no doubt with some success. Professor Johnson, for no very good reason, assumes that voluntary surrender without prior court proceedings would not be possible under a judicialized repossession system,<sup>76</sup> and consequently he does not anticipate this cost-saving reaction.

In sum, therefore, it seems likely that Professor Johnson significantly overestimates the additional costs of credit collection that would be caused by a change to judicialized repossession. More precisely, his estimates of the cost of repossessing judicially are almost certainly too high, and it seems probable that he errs 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. He quickly concludes that creditors would not fully absorb them. That conclusion seems unexceptionable. Complete absorption of the 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.<sup>77</sup>

Anticipating precisely how creditors would seek to avoid the 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 were repossessed.<sup>78</sup> Not only are the transaction costs of maintaining such suits substantial but a very large percentage of such consumers are likely to be effectively judgment-proof. Moreover, increasingly, as in Wisconsin, the legal availability of deficiency judgments is being restricted.<sup>79</sup> Some of the costs, in Johnson's view, would be likely to be passed on to credit buyers in the form of higher finance charges.<sup>80</sup> So long as finance charges were uniform and not differentiated by risk, they would be passed on to all credit buyers, and the ability of creditors to follow this course would be limited by fear that some of them, or new entrants, would compete just for the low-risk consumer. Consequently, it can be expected that creditors would make a major effort, more than currently, to reduce default costs by avoiding lending to consumers whose risk of default is substantial. Since low-income persons are generally considered poorer risks, we, like Johnson, expect that they would have a more difficult time in obtaining credit under a judicialized repossession system. Moreover, since size of down payment historically has been inversely correlated with default

rate,<sup>81</sup> Johnson anticipates a tendency to require higher down payments, particularly for poor risks.<sup>82</sup> Higher down payments would also reduce the costs of default, since the value of the collateral would more closely approximate the amount outstanding. Higher down payments 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. The tangible benefits of judicialized repossession would be reaped exclusively by those who missed payments--also most likely the poor disproportionately--and consequently, income distribution questions aside, this allocation of costs may be appropriate. But it probably means that with judicialized repossession lower-income persons more often would be unable to obtain automobile credit and that when they did get it, they would tend to get less (because down payments would be higher) and to pay higher interest rates.

For essentially the same reasons that make it impossible to determine whether the total supply of automobile credit is greater or less than the optimal amount, it is impossible to determine whether or not 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 making 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 off<sup>83</sup> if credit were restricted in the way it is likely to be. Many of the poor, for

example, might be able to adjust simply by buying cheaper cars, for which their savings would 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.

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.<sup>84</sup> For a variety of reasons Johnson and his sympathizers doubt that consumers would benefit much from being defendants.<sup>85</sup> Because numerous informal contacts precede most repossessions, Johnson and others assume that few repossessions occur because of some simple misunderstanding, such as whether a payment has in fact been made. Furthermore, they argue, few debtors would be able successfully to defend a judicialized repossession action on the basis of the automobile seller's prior breach of warranty. If a creditor discovers during informal contacts that a warranty

problem accounts for a payment failure, he is likely, these commentators believe, to try to remedy the warranty breach, as usually a less costly alternative to repossession. Moreover, a warranty defense would often be barred on some technical ground, such as the holder-in-due-course doctrine.<sup>86</sup> Even if a warranty problem were available as a defense, the debtor's setoff would 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 prerepossession 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.<sup>87</sup> Finally, and most importantly, 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 viable debtor defenses, it could not succeed if the debtor did not appear.<sup>88</sup>

Assumptions underlying this analysis of the benefits of judicialized 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.<sup>89</sup> 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;<sup>90</sup> an opportunity to present that defense in court, even if usually it would not be a

valid one, might contribute to a feeling within consumers that they had been treated "justly."<sup>91</sup>

A more fundamental weakness in Johnson's analysis, however, is that it ignores the possibility that under judicialized repossession there would be more workouts and a lower incidence of repossession. This effect could have several distinct benefits to consumers. A repossessed 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 that the consumer purchases a replacement vehicle, there are substantial transaction cost losses.<sup>92</sup> 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 than actual repossession to both creditor and consumer. 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 become more frequent 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--that is, after alternative transportation has been arranged.

The previous analysis has indicated that it is essentially impossible to obtain sufficient data to establish conclusively whether or not, 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. 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 down payment, 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.

#### Sources of Information

In assessing the impact on automobile credit of the repossession provisions of the Wisconsin Consumer Act, ideally one would compare credit availability, delinquency experience, and collection practices before and after the Act both in Wisconsin and in 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 most importantly, the Wisconsin Consumer Act made so many significant legal changes simultaneously that it would be impossible to separate out precisely the effects on, say, credit availability, of judicialized repossession from the effects of other



changes, such as the modification of the holder-in-due-course rule. Moreover, 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, 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 hodgepodge of data that will not permit us to answer conclusively any of the empirical questions about the impact of judicialized repossession but will permit us to make some reasonably educated guesses and to eliminate some hypotheses about impact.

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, we conducted a mail survey of all banks in Wisconsin in the spring of 1974.
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--information 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 sales finance companies, and in some instances obtained from them confidential information about their experiences under the Act. We also interviewed a few car dealers.

#### 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.<sup>93</sup> The same months were chosen for each period to control for seasonal variations.

This survey has many limitations that should be mentioned at the outset. The response rate was less than 15 percent, rendering statistical tests of significance essentially meaningless.<sup>94</sup> No effort has been made to weight answers by size of bank, and a majority of the respondents were banks of limited assets and limited 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 that other credit institutions provide over one-fourth of the new automobile credit.<sup>95</sup> 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 certainly 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 asked respondents to indicate reasons for various changes in lending practices, but the answers they provided are only the opinions of reasonably knowledgeable persons.

#### 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 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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> If we assume, however, that changes in lien recordings for vehicles of the latter type approximate changes in lien recordings for automobiles, the MVD data roughly measure changes in the volume of automobile credit.<sup>99</sup> The table below reports the changes in the number of liens recorded between March 1 and October 31 for three successive years. The first period preceded the effective date of the Act. Because each period ends with October, the results are not seriously confounded by the big slumps in auto sales around the turn of the year in 1973-1974--due to the energy crisis--and in 1974-1975--due to the recession.<sup>100</sup>

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

The available evidence indicates with reasonable certainty that the Act's effect on the number of loans, if any, has been modest to date.<sup>103</sup> It is possible that 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 indicate that it has been concentrated in the second year of the Act. This may suggest that as creditors gain experience under the Act, they realize that it is more costly than anticipated to extend credit, and consequently restrict availability. It must be emphasized, however, that, on the basis of our data, any suggestion that loan volume

Table 1. Motor Vehicle Liens Recorded at the  
Wisconsin Motor Vehicle Department

Time Period	Number (Monthly Average)	As a Percentage 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%

declined in 1974 must be extremely tentative. Moreover, to the extent that there was any decline in 1974, it may have been due in large part to conditions in the automobile market rather than in the credit market.<sup>104</sup>

Although the Act has had no detectable effect on overall credit volume, it may have had some effect in reducing the relative proportions 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 principally affect the indirect lender and make it relatively more advantageous for the creditor who has the choice, as do most banks, 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 that 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 without providing supporting data, has asserted that there has been an overall tendency toward direct financing since the Act, mainly in order to circumvent the holder-in-due-course rules.<sup>105</sup>

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 banks<sup>106</sup> 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 such 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. These data are 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 had decided to withdraw from the market completely at about the effective date of the Act, for reasons apparently 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 reporting a reduction in indirect loan volume the reasons for the reduction. Not unexpectedly, the Act's holder-in-due-course provisions and restrictions on deficiency judgments were cited with frequency. So were the repossession provisions.<sup>107</sup> 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. On the other hand, to the extent that the repossession provisions have caused some creditors to limit credit to better risks, they may be partly responsible for a shift from indirect to direct credit, since the better risks generally prefer direct loans.

#### Interest Rates

Not surprisingly, the vast majority of responding banks reported an increase in rates for both direct and indirect loans. Conditions in the

money market were the reason most often cited, but the Consumer Act's repossession provisions were cited with reasonable frequency.<sup>108</sup>

In the theoretical section of this article, we suggested that it was unlikely that creditors would respond to additional repossession costs by raising interest rates significantly so long as they charged uniform rates to all risk classifications.<sup>109</sup> In our personal interviews<sup>110</sup> we learned that large banks, at least, customarily differentiate rates for direct loans only by 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 given ranges, 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 (such as 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 is 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 such an occurrence.

#### Down Payments

Less than half of the banks responding to our survey reported down payment 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 down payments.<sup>111</sup> 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 down payments, 5 to 10 percent of the purchase price was the typical reported increase. More consistently with economic theory, over 75 percent of those banks that had increased down payments cited the repossession provisions of the Act as important in accounting for the 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.<sup>112</sup>

More dramatic evidence of the effect of the Act on down payment 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 down payment 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 \$1000 or less, a bigger jump in down payments for low-value used cars might have been anticipated. The dealers also cited the repossession provisions of the Act as an important cause. If it is assumed that low-income consumers disproportionately purchase low-value used cars, these findings support the expectation that the poor would feel disproportionately the effects of restricted credit availability occasioned by the switch to judicialized repossession.

### Credit Checks

We developed no way of measuring objectively the extent of credit checks, but in our bank survey we did ask whether the creditworthiness of prospective borrowers was being checked more carefully since the Act. About two-thirds of the respondents 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.

### Credit Availability to 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 reports by sellers of low-value used cars, who presumably sell disproportionately to the poor, and report dramatic increases in down payment rates. Some further support comes from the increases in interest rates and, in some instances, in down payment levels reported by respondents to our bank survey, since these increases probably fall most heavily on the poor.<sup>113</sup>

One issue that arises is how the poor have responded to this decrease in credit availability. If the restriction of credit primarily has taken the form of higher down payments, it is possible that many

poor persons have responded by buying cheaper cars, for which the available liquid assets are sufficient to meet the required down payment. We have been unable to determine certainly whether or not 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 down payments 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 that the Consumer Act is also a cause, though they were unable to distinguish between the impact of the repossession provisions and the impact of the other provisions of the Act.

#### Summary

Two limitations on this study merit repetition here. Even if there have been changes in credit availability since the Act became effective, there are too many potential causes of those changes to permit us to determine objectively whether judicialized repossession is an important cause. 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.<sup>114</sup> Secondly, even if the repossession 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 an 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 bankers responding to our survey to increase down payment levels. Moreover, the data on credit volume suggest that, despite significant changes in money market conditions, nearly all segments of Wisconsin's population who formerly could obtain automobile credit through banks can still get it, although sometimes at higher rates and with higher required down payments.

#### 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.<sup>115</sup> This effect might seem particularly likely under the Wisconsin Consumer Act, since the Act's definition of "default" and mandatory right to cure period effectively impose a 55-day waiting period before legal action by a creditor.<sup>116</sup>

We were unable to obtain useful information about delinquencies from our bank survey. Many respondents did not maintain historical records about delinquencies. Those who did did not use comparable definitions of "delinquency" (for example, 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-day, 60-89-day, and 90-day-and-over delinquency rates for both direct and indirect loans. These data are obtained from a sample of banks in each state 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.<sup>117</sup>

Table 2 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.

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 than the rates in the 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 in the nation and in the contiguous states. As a result, over the two-year period Wisconsin's direct loan delinquency rates increased only at about the rate of increase experienced in the nation and in the contiguous states.

The trends revealed by this data escape easy explanation. One of the major difficulties is presented in the sharply varying delinquency rates in the contiguous states. As far as we have been able to determine, there have not been legal changes in these states that readily explain

Table 2. Changes in Automobile Credit Delinquency Rates for March 1-October 31, 1973 and 1974, As a Percentage of the March 1-October 31, 1972, Rates; and March 1-October 1, 1974, Rates As a Percentage of March 1-October 1, 1973, Rates

	30-59-Day Delinquencies		Total Delinquencies	
	Direct	Indirect	Direct	Indirect
<b>Wisconsin</b>				
1973/1972	+42	+27	+35	+25
1974/1972	+35	+48	+42	+56
1974/1973	-5	+17	+5	+25
<b>United States</b>				
1973/1972	+2	+12	+7	+16
1974/1972	+41	+33	+48	+39
1974/1973	+38	+18	+38	+19
<b>Illinois</b>				
1973/1972	0	+12	0	-4
1974/1972	+76	+47	+81	+34
1974/1973	+75	+30	+80	+39
<b>Iowa</b>				
1973/1972	+47	+3	+26	-3
1974/1972	+94	+13	+70	+6
1974/1973	+32	+9	+36	+9
<b>Minnesota</b>				
1973/1972	-2	-6	-1	-5
1974/1972	+53	+20	+63	+25
1974/1973	+55	+28	+65	+31

the variations. If local economic conditions or changes in local banking practices account for the variations in the contiguous states, the same factors 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 trends comes from the fact that the Wisconsin results are extreme--that is, Wisconsin delinquencies rose more quickly in 1973 and less quickly in 1974 than those in any of the contiguous states.<sup>118</sup>

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, then in the absence of some unusual economic or other condition local to Wisconsin, delinquency rates should have remained at or above the national average during the second year.<sup>119</sup> Consequently, it seems likely that the rapid increase and then relative decrease in delinquency rates reflect creditor rather than debtor response to the Act. For example, after some experience with the Act, creditors may have restricted credit availability, with a consequent better risk pool and lower delinquency rate in 1974.<sup>120</sup> It is more likely, we think, that when the Act first became effective, many banks did not adjust their collection procedures to the new legal requirements, 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,<sup>121</sup> 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 of the lag between the Act's effective date and the initiation of these "tightened up" procedures, but we are confident there was one. 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.<sup>122</sup> An assumption that creditors became more effective in preventing missed payments from becoming 30-day delinquencies would account for this divergence.

The many possible partial explanations for the delinquency data prevent us from drawing definite conclusions about the long-range effects of the Act. This last explanation offered for the delinquency data suggests 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 on delinquency rates of reduced credit availability, if any, and of local economic conditions. 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.

### Collection Practices

#### Repossession Rates

On theoretical grounds, we predicted that judicialized repossession would tend to increase the ratio of both workouts and voluntary surrenders to forceful surrenders.<sup>123</sup> 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 in Table 3 for the same time periods covered by the delinquency data.

Repossession rates are to a great extent a function of delinquency rates, and consequently Table 3 should be examined in conjunction with Table 2. This examination reveals that for the first time period after the Act (1973), Wisconsin delinquencies rose and repossession declined, both disproportionately to the experience in the nation and in the contiguous states. The inference is almost inescapable that during this time period, at least for banks, the Act caused a substantial reduction in repossessions.<sup>124</sup> 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 them off as bad debts. Thus, banks could not just continue delinquent accounts for repossession at a later

Table 3. Changes in Automobile Repossession Rates for March 1-October 31, 1973 and 1974, As a Percentage of March 1-October 31, 1972, Rates, and March 1-October 31, 1974, Rates As a Percentage of March 1-October 31, 1973, Rates

	<u>1973/1972</u>		<u>Direct Credit</u>		<u>Indirect Credit</u>	
	<u>Direct Credit</u>	<u>Indirect Credit</u>	<u>1974/1972</u>	<u>1974/1973</u>	<u>1974/1972</u>	<u>1974/1973</u>
Wisconsin	-36	-21	+3	+61	+14	+45
United States	+8	+4	+46	+35	+16	+12
Illinois	+18	+26	0	-15	+56	+24
Iowa	+15	-14	+4	-18	-10	-4
Minnesota	+2	-16	+13	+10	-1	+18

time. Since it seems unlikely that banks absorbed 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 do not yield such clear inferences about the Act's impact. In this period, compared to the 1973 period, delinquency rates leveled off, and declined relative to those in the nation and in the contiguous states, while repossession rates increased rapidly, both absolutely and relative to those in the nation and in the states. Over the two-year period, Wisconsin repossession rates increased slightly, less than national rates but roughly on a par with rates in the contiguous states.

There is one fairly evident partial explanation of the 1974 experience. Just as the relative decline in 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.<sup>125</sup> But it is impossible to determine from the ABA data whether this is a sufficient explanation for the variation between 1973 and 1974 experience. As a result, we cannot know whether to expect repossession rates in the future to remain stable relative to delinquency rates, or whether the 1974 increase is due partly to factors that 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 repossessions<sup>126</sup> but not voluntary surrenders. They include, unfortunately, repossessions of commercial vehicles and mobile homes, neither of which would ordinarily be governed by the Act,<sup>127</sup> as well as motor vehicle sales resulting from enforcement of mechanic's liens or writs of execution. We have been reliably 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.<sup>128</sup>

The MVD data are reported in Table 4. Unfortunately it was not feasible to obtain data for any period before July 1972, and it was 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 1972-1973, 1973-1974, and 1974-1975.<sup>129</sup>

In interpreting Table 4, 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 4 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.<sup>130</sup> Second, Table 4 reports the absolute number of repossessions rather than the repossession rate--that is, repossessions as a percentage of loans outstanding--that forms the basis for Table 3. The number of repossessions varies, of course, with the volume of lending. As reported earlier, the best evidence available--motor vehicle liens recorded with MVD--indicates that the volume of lending has increased modestly over the period covered by Table 4.<sup>131</sup> Consequently,

Table 4. Motor Vehicle Department Repossession Statistics

Time Period	Number	Weekly Average (rounded)	Percentage of 1972-1973	Percentage of 1973-1974
July 1972-January 1973	2639	88	---	---
July 1973-January 1974	2239	75	85%	---
July 1974-January 1975	2551	85	97%	114%

repossession rates have probably declined at a greater rate than the decline in the number of repossessions shown in Table 4 would indicate.

In general, Table 4 shows a pattern remarkably similar to that of Table 3. The percentage of change has not been as great, but the changes have been in the same direction. On the basis of MVD as well as ABA data it is impossible to know whether the 1974 increase in repossessions reflects a trend that will continue.

From these two sources it seems probable 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. First, as we shortly will document more completely, the costs of judicialized repossession in Wisconsin appear to be far lower than the critics generally predicted, and consequently there is a lesser 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 repossession frequency is necessary in order to maintain the credibility of the threat to repossess, to deter missed payments, and to facilitate quick informal collection when delinquencies occur.<sup>132</sup>

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.<sup>133</sup> Consequently, as the 55-day period after the original breach draws to a close, a lender faces a considerable disincentive to a refinancing agreement. The 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; and after the 55-day period, repossession proceedings are habitually initiated shortly and further negotiations with the debtor rarely attempted. If this factor is an important part of the explanation of 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 hypothesized that judicialized repossession would increase the ratio of voluntary to forceful surrenders, but we were largely unable to find reliable evidence to test this hypothesis.<sup>134</sup> Responses to our bank survey indicated a wide variation in ratios of voluntary surrender to forceful repossession, 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 tended to report a higher proportion of voluntary surrenders. Our intensive interviews with large lenders revealed a keen awareness of the advantages of voluntary surrender; these lenders made considerable efforts to inform debtors of

that option, emphasizing its very real advantages to the debtor as well as the lender, and the ratio of voluntary surrenders to forceful repossessions for most of our interviewees had increased significantly since the Act became effective.<sup>135</sup> This is a trend we would expect to continue; the Act provides considerable incentive for a creditor to encourage voluntary surrender, and it was the large creditors at the time of our research that had devoted the most attention to adjusting their collection practices in response to the Act.

#### Delay in Repossession

Professor Johnson predicted that one effect of judicialized repossession would be to lengthen the average 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.<sup>136</sup> The best available data to measure whether or not 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.<sup>137</sup>

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 percentages of total delinquencies that are 60-89 days delinquent controls for



changes in the overall delinquency rate, but there are other difficulties with this measure. For example, as we have suggested, banks in Wisconsin may recently have become especially efficient in preventing missed payments from becoming over-30-day delinquencies.<sup>138</sup> 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 Table 5. The figures represent the percentage change in the measures using the indicated bases.

It can readily be seen that Wisconsin's 60-89-day delinquency rates have not risen as rapidly as those in the nation and are not disproportionate to changes in contiguous states. While in contiguous states 60-89-day rates actually declined during the first time period after the Act, they rose very rapidly during the second time period, whereas in Wisconsin they rose slowly in both periods. Looking at the alternative measure of change in 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 in the nation 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

Table 5. Changes in Automobile Credit 60-89-Day Delinquency Rates for March 1-October 31, 1973 and 1974, As a Percentage of March 1-October 31, 1972, Rates, and March 1-October 31, 1974, Rates As a Percentage of March 1-October 31, 1973, Rates

	1973/1972		1974/1972		1974/1973	
	Direct Credit	Indirect Credit	Direct Credit	Indirect Credit	Direct Credit	Indirect Credit
<u>Wisconsin</u>						
Change in rate	+11	+9	+20	+34	+8	+22
Change in % of total delinquencies	-17	-13	-15	-14	+3	-2
<u>United States</u>						
Change in rate	+14	+29	+55	+44	+36	+12
Change in % of total delinquencies	+7	+11	+5	+3	-2	-2
<u>Illinois</u>						
Change in rate	0	-11	+104	+32	+104	+49
Change in % of total delinquencies	0	-7	+13	-1	+13	+7
<u>Iowa</u>						
Change in rate	-8	-19	+61	+8	+75	+34
Change in % of total delinquencies	-27	-17	-5	+3	+30	+23
<u>Minnesota</u>						
Change in rate	-5	+1	+13	+36	+24	+34
Change in % of total delinquencies	-4	+6	+31	+9	+36	+3

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 draw no distinction. Though we cannot discount this possibility, it should be noted that in interviews we were told, as reported earlier, that large creditors, at least, 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.<sup>139</sup> Consequently, in view of all the available evidence, we doubt that the Act has had a substantial impact on the average length of time between initial delinquency and repossession.

#### 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 expires; others usually send the cure notice at this time but sometimes wait 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 that these procedures are stricter and more routinized than before the Act, when individual employee-collectors were allowed more discretion in dealing with individual debtors. In part, this routinization represents an effort to cope with the various waiting periods imposed by the Act, and in part it reflects a belief that such practices are effective in terminating delinquencies without incurring the considerable 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 could, 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.<sup>140</sup> In practice, as of the summer of 1974, judges in Milwaukee County were requiring corporate creditors to be represented by an attorney at the return date and subsequently. In most of the rest of the state, a corporate creditor could appear without attorney at all stages in the proceeding.<sup>141</sup> Despite these provisions and practices, however, 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 survey<sup>142</sup> 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.<sup>143</sup>

In revealing 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.<sup>144</sup> Even in Milwaukee, the collection manager appeared with the attorney on the return date. If the debtor appeared, settlement negotiations frequently ensued, sometimes at the prodding of the judge. 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.<sup>145</sup> 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 dismissed before the return date. About an equal number of cases were dismissed before the return date, usually, we think, because of a settlement. It seems from the records that a successful defense was rarely asserted when the debtor appeared, 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 toward a workout often ensued, frequently at the court's urging. This lender frequently refused to compromise its position in these negotiations,<sup>146</sup> and then, we were told, the judge usually issued a repossession order. But workouts concluded at the small claims court hearing were not uncommon.

Critics of judicialized repossession have predicted that the frequency of deficiency judgments would increase, since it would be so

convenient for a creditor to couple a deficiency claim to its action for repossession.<sup>147</sup> 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.<sup>148</sup>

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.<sup>149</sup> 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.<sup>150</sup>

#### Summary and Conclusions

Our main purpose in undertaking this research has been to assess the impact of the repossession provisions of the Wisconsin Consumer Act, in order to narrow the range of empirical debate surrounding proposals to eliminate repossession of automobiles without prior 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. 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 indisputably have risen significantly, it is likely nonetheless that the Act has had at least marginal impact in restricting credit availability. Perhaps the restricted availability primarily has taken the form of higher required down payments. Moreover, we have the least data about the practices of financial institutions, such as sales finance companies, that have previously provided much of the automobile credit to the poor--the very group for whom, theoretically, the greatest restriction of credit should have been expected. Our informal interviews with low-value used car dealers, who presumably sell disproportionately to the poor, suggested that 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 welfare economic grounds 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 primarily has taken the form of higher down payments, as seems likely. Then, many poor persons 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.<sup>151</sup>

The critics of judicialized repossession have not predicted the magnitude and form of the expected 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 critics<sup>152</sup> 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 have resulted directly from a constitutional decision. Chief among these is the provision limiting or dispensing with the need for attorneys in repossession actions.<sup>153</sup> We believe that in addition to understandably failing to account for

these cost-saving procedures, 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 made 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 judicialized 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, however, 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 to the assumed difficulty of judicialized repossession. If it is a correction for creditor overreaction, 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 explanation<sup>154</sup>--but only empirical research at a later time can conclusively resolve this issue.

Although the ultimate impact of the Act on repossession rates remains unclear, it appears now that the Act has had 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 course. We hesitate to recommend that the costs of repossession be deliberately increased, since that would probably reduce credit availability, but we are reasonably confident that such action would reduce repossession rates. Second, the provisions in the Act that seem to impose a 55-day waiting period before repossession for breach of a refinancing agreement have probably 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 in order to forestall this effect.<sup>155</sup>

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.<sup>156</sup> 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.<sup>15,7</sup> Informal collection, refinancing 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. Balanced against these benefits must be the as yet undeterminable effect, if any, of judicialized repossession on credit availability.

## NOTES

We are grateful to the many Wisconsin businessmen who gave generously of their time and advice during the study, and particularly to Mr. Brian Koontz, Executive Director, Wisconsin Bankers Association, who arranged for the bank survey discussed in the article. Professor Neil Komesar offered many helpful comments on an earlier draft, for which we are thankful. The responsibility for errors remains ours, of course.

<sup>1</sup>395 U.S. 337 (1969).

<sup>2</sup>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 mechanics 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 that gives a creditor complete immediate dominion over a debtor's property and one that merely deprives the debtor of use. See generally *Adams v. Dept of Motor Vehicles*, 113 Cal Rptr. 145, 520 P.2d 961 (1974).

<sup>3</sup>Uniform Consumer Credit Code (1968 Official Text). A more recent redraft of 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).

<sup>4</sup>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 more substantial restrictions on creditor remedies. See note 3 supra.

<sup>5</sup>The National Commission on Consumer Finance, Consumer Credit in the United States (1972) (hereinafter cited as NCCF Report).

<sup>6</sup>Wis. Stats. Chs. 421-428 (1973). For general discussion of the Act's provisions, see Heiser, infra note 36; 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.

A number of states have enacted the UCCC in one form or another. Other states, like Wisconsin, have adopted especially drafted, comprehensive consumer credit statutes, though none restricts traditional creditor remedies as much as does Wisconsin's legislation. E.g., D.C. Code §28-3801 et seq. But the vast majority of states have altered creditor remedies, if at all, on a piecemeal basis. The National

<sup>6</sup>(continued)

Consumer Act, the 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 passim.

<sup>7</sup>UCC §§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).

<sup>8</sup>White, Representing the Low Income Consumer in Repossession, Resales, and Deficiency Judgment Cases, 64 Nw. U. L. Rev. 808 (1970).

<sup>9</sup>Other collateral have generally 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, which is then executed by a sheriff, requiring the debtor to relinquish possession.

<sup>10</sup>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 effected by self-help even in a system that requires prior notice to the debtor and an opportunity for a judicial hearing. See Wis. Stats. §425.206; notes 25-32 infra and accompanying text.

<sup>11</sup>The volume of litigation has been truly enormous, as a glance at the current topical index of CCH, Poverty Law Rptr., at 145 will readily indicate.

<sup>12</sup>407 U.S. 67 (1972).

<sup>13</sup>The question arose because, in a passage the significance of which was unclear, Justice Douglas, writing for the Court in Sniadich, spoke of wages as "a specialized type of property presenting district 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 of whether wages are entitled to somewhat greater protection. See note 16 infra.

<sup>14</sup>416 U.S. 600 (1974).

<sup>15</sup>95 S. Ct. 719 (1975).

<sup>16</sup>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 Louisiana 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--but compare Fuentes with Mitchell--it now appears that all creditor remedies will pass muster if they comply with the rigorous



<sup>16</sup>(continued)

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 Sniadich; 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 that 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.

<sup>17</sup>Though this statement is literally correct, state officials typically 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 1960s was to manage the record keeping problem of separating repossessions from other reports of stolen vehicles. Secondly, in states that require negotiation of a document of title to effect motor vehicle transfers, special procedures exist for effecting transfers when 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.

<sup>18</sup>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 UCC §9-503, and providing facilitating services such as those discussed in note 17 supra. Compare Reitman v. Mulkey, 387 U.S. 396 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). Another argument is that forcible deprivation of property is a "public function" in our system, and that if a state empowers a private party to perform that function, the private party is subject to constitutional restrictions. Compare Terry v. Adams, 345 U.S. 461 (1953).

<sup>19</sup>Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973), cert. den. 42 U.S.L. Wk 3281 (1974).

<sup>20</sup>E.g., Shirley v. State Nat'l Bank, 493 F.2d 739 (2nd Cir., 1974); Brantley v. Union Bank & Trust Co., 498 F.2d 365 (5th Cir. 1974) cert. den. 42 U.S.L. Wk 3306 (1974); Gibbs v. Titleman, \_\_\_ F.2d \_\_\_ (3rd Cir. 1974); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Nowlin v. Professional Auto Sales, 496 F.2d 16 (8th Cir., 1974) cert. den. 42 U.S.L. Wk 3281 (1974); Bichel Optical Laboratories, Inc. v. Marquette Nat'l. Bank, 487 F.2d 906 (8th Cir. 1973). Albeit in dicta, in his opinion for the court in Mitchell, Justice White intimated that self-help repossession was not subject to constitutional restrictions. 416 U.S. at 618-19.

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

<sup>22</sup>Wis. Stats. §§425.203-425.206 (1973).

<sup>23</sup>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. Wis. Laws of 1971, ch. 239, §39. 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, Ruling on Motion for Summary Judgment, March 12, 1975.

<sup>24</sup>See especially Johnson, Denial of Self-Help Repossession: An Economic Analysis, 47 S. Cal. L. Rev. 82 (1973); 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.

<sup>25</sup>Wis. Stats. §425.206(1973).

<sup>26</sup>Jurisdiction is apparently exclusive in the small claims court. Wis. Stats. §425.205(1)(1973).

<sup>27</sup>Wis. Stats. §425.205(1)(e)(1973). For this reason the argument of some commentators, that elimination of self-help repossession would 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 19 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. Stats. §425.205(3)(e)(1973).

<sup>28</sup>Wis. Stats. §425.205(2)(1973). The complaint must state specifically the facts on which the creditor's allegations of debtor default are based, apparently to aid the debtor in preparing a pro se defense. Wis. Stats. §425.205(3)(1973). The Act further specifically provides that the debtor may answer the complaint, demur, or counterclaim orally on the return date. Wis. Stats. §425.205(1)(d)(1973). See also Wis. Stats. §425.205(4)(1973).

<sup>29</sup>Wis. Stats. §425.205(1)(a)(1973). See notes 140-41 infra and accompanying text. The return date is provided for 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. Stats. §299.05(3)(1973). By providing for exclusive jurisdiction in the small claims court, therefore, the Consumer Act effectively expedites actions for repossession.

<sup>30</sup>Wis. Stats. §425.205(5)(1973). See note 58 infra.

<sup>31</sup>Wis. Stats. §425.208(1973).

<sup>32</sup>Wis. Stats. §§425.208(6), 425.209, 425.210(1973).

<sup>33</sup>Wis. Stats. §425.204(3)(1973). The consequences of a surrender that is not voluntary pursuant to this provision are complicated and a bit unclear. Even though threats, for example, 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. Note 60 infra. The Commissioner of Banking, who has rule-making 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 \$1000 or less. Wis. Adm. Code, Bkg. §80.70; Wis. Stats. §425.209(1973). A deficiency judgment is probably always available in the event of a voluntary surrender. Note 36 infra.

<sup>34</sup>Wis. Adm. Code, Bkg. §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.

<sup>35</sup>Wis. Stats. §§299.25; 425.205(1) (1973).

<sup>36</sup>Whether the debtor would be liable for depreciation of the collateral in the event of forcible repossession depends on whether a deficiency judgment would lie. See Wis. Stats. §425.209; note 42 infra and accompanying text.

36 (continued)

One important advantage of voluntary surrender for a creditor is that it may make available a deficiency judgment that would not be available in the event of forcible repossession. Wis. Stats. §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. Stats. §405.209(1973) provides, however, that if "the merchant . . . accepts voluntary surrender," the amount owing at the time of default is \$1000 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--see Heiser, Wisconsin Consumer Act - A Critical Analysis, 57 Marq. L. Rev. 389, 462, n. 154 (1974)-- and a good argument can be made that it should be ignored. 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. Stats. §425.203(2) (1973). Cf. Wis. Stats. §425.209(6) (1973). 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. Wis. Stats. §425.204(1) (1973). 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.

<sup>37</sup>Wis. Stats. §425.103(1973). On its face, the statute contains a special exception providing that failure to pay the first or last payments is an immediate default, Id. at §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, Bkg. §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 36, at 457-58.

<sup>38</sup>Wis. Stats. §§425.104-425.105(1973); Wis. Adm. Code, Bkg. §80.62.

<sup>39</sup>Wis. Stats. §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.

<sup>40</sup>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. Wis. Stats. §§422.406, 422.407, 422.409(1973).

<sup>41</sup>The exceptions pertain to "interlocking loans." Wis. Stats. §422.408(1973).

<sup>42</sup>Wis. Stats. §425.209(1973). 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. at §§425.203, 425.209(6).

<sup>43</sup>Wis. Stats. ch. 427 (1973).

<sup>44</sup>Cf. Yodof, Reflections on Private Repossession, Public Policy and the Constitution, 122 U. Pa. L. Rev. 954 (1974).

<sup>45</sup>Cf. R. Posner, Economic Analysis of Law 53-55 (1972); P. McCracken, J. Mao & C. Fricke, Consumer Installment Credit and Public Policy 97-114 (1965).

<sup>46</sup>See, e.g., G. Calabresi, The Cost of Accidents (1970).

<sup>47</sup>See Schuchman, Profit on Default: An Archival Study of Automobile Repossession and Resale, 22 Stan. L. Rev. 20 (1969).

<sup>48</sup>We do not claim to 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.

<sup>49</sup>See Lipsey & Lancaster, The General Theory of Second Best, 24 Rev. Econ. Stud. 11 (1956); G. Calabresi, supra note 46 at 85-89. 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 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.



<sup>49</sup>(continued)

It is hoped that the subsequent text discussion, by providing concrete examples, will help clarify these rather abstract points.

<sup>50</sup>NCCF Report, supra note 5 at 109-50. Principal sources of the noncompetitiveness are 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).

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

<sup>52</sup>See Wallace, The Logic of Consumer Credit Reform, 82 Yale L.J. 461 (1973), for a fuller analysis of the implications of welfare economics for consumer credit reform. 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.

<sup>53</sup>See authorities cited in note 24 supra.

<sup>54</sup>Johnson, supra note 24.

<sup>55</sup>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 on hearing can be supported nevertheless. E.g., Yodof, supra note 44.

<sup>56</sup>Professor Johnson does not discount this cost by the value to the debtor of extra use of the automobile. Though the omission is appropriate, as he is concerned principally with estimating the cost to the

<sup>56</sup>(continued)

creditor of restricting self-help repossession, he should include this value as a benefit of the proposed reform.

<sup>57</sup>See White, supra note 24, Dauer & Gilhool, supra note 24.

<sup>58</sup>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. Wis. Stats. §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.

<sup>59</sup>For Johnson's defense of this assumption, see id. at 157-59. 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 unpersuasive.

<sup>60</sup>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. Stats. §425.204(3)(1973); 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, Bkg. §80.68(1); Wis. Stats. §§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.

<sup>61</sup>Wis. Stats. §425.205(1)(a)(1973). For a discussion of the ambiguity as to whether a lawyer must appear at the hearing, see notes 140-41 infra and accompanying text.

<sup>62</sup>Others have foreseen this possibility. E.g., Yodof, 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. Stats. §§425.103-425.105(1973); see notes 37-39 supra and accompanying text.

<sup>63</sup>Johnson, supra note 24 at 104-06.

<sup>64</sup>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.

<sup>65</sup>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.

<sup>66</sup>Dauer and Gilhool have also argued that under judicialized repossession there should be fewer repossessions and more workouts. Dauer & Gilhool, supra note 24 at 138-42.

<sup>67</sup>Johnson, supra note 24 at 90-93.

<sup>68</sup>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 nearly the requisite efficiency.

<sup>69</sup>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 that 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.

<sup>70</sup>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 that repossession is likely to be profitable.

<sup>70</sup>(continued)

Although the debtor is entitled to any surplus after resale--UCC §9-504 (2)(1972) official text--debtors are probably mostly unaware of this right, and many creditors may ignore it as a consequence.

<sup>71</sup>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 judicialized repossession.

<sup>72</sup>Creditors frequently argue, in private interviews, that more 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. On theoretical grounds, this argument can 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.

<sup>73</sup>For reasons indicated earlier, those extra efforts might be collapsed into a shorter period of time, so that a determination to repossess could be made more quickly. Increased resources for informal contacts need not necessarily mean that there would be more informal contacts. A personal visit to the home, though more costly to the creditor, is generally considered more effective than a mere telephone call.

<sup>74</sup>To illustrate this point, assume that creditors' standards for the acceptability of a workout remain unchanged. Increased resources for informal contacts will then yield additional workouts unless either the potential of informal contacts in inducing workouts is quickly exhausted or debtors, aware of the lessened desirability of repossession to the creditor, stiffen their bargaining positions during workout negotiations. Neither possibility 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.

<sup>75</sup>See White, supra note 8.

<sup>76</sup>See notes 59-60 supra and accompanying text.

<sup>77</sup>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

77 (continued)

effectively passing on the costs to consumers. See Johnson, supra note 58. Though we agree with Johnson that the extra costs would not be fully absorbed by creditors, partial absorption is possible for at least two reasons.

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 super competitive 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.

<sup>77</sup>(continued)

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 happened, 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



<sup>77</sup>(continued)

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 or not credit buyers will ultimately bear at least some of the costs.

<sup>78</sup>Johnson, supra note 24.

<sup>79</sup>Wis. Stats. §425.209(1973).

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

<sup>81</sup>See G. Moore & P. Klein, The Quality of Consumer Installment Credit 82 (1967).

<sup>82</sup>Johnson, supra note 24 at 110-11.

<sup>83</sup>This statement may imply that there is an objective basis for determining when the poor, or anybody for that matter, are "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 are, and this requires assessing

<sup>83</sup>(continued)

the costs of inconvenience and humiliation that attend default and self-help repossession.

<sup>84</sup>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, and so forth) 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. See the subsequent text discussion. 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. Stats. §425.205. In the absence of 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).

<sup>85</sup>Johnson, supra note 24 at 114; White, supra note 24 at 526-30.

<sup>86</sup>See Mentschikoff, Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis, 14 Wm. & Mary L. Rev. 767, 775-78(1973).

<sup>87</sup>White, supra note 24 at 527-28.

<sup>88</sup>On the propensity of consumer debtors to default, see D. Caplovitz, Consumers in Trouble: A Study of Debtors in Default (1974).

<sup>89</sup>E.g., Dauer & Gilhool, supra note 24; Yodof, supra note 44.

<sup>90</sup>Caplovitz reported that over 20 percent of consumers who defaulted in a collection action believed they had a defense to the debt.

D. Caplovitz, supra note 88 at 168.

<sup>91</sup>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).

<sup>92</sup>See Leff, Injury, Ignorance and Spite--The Dynamics of Coercive Collection, 80 Yale L.J. 1, 12 (1970).

<sup>93</sup>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 between the Act's enactment and its effective date. Consequently, there was little justification for confusion, and we suspect that there was less than one might otherwise expect to accompany 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,

<sup>93</sup>(continued)

and the opinion of those charged with enforcement of the Act that there has been compliance. See The Wisconsin Consumer Act: One Year Later, 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. 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.

<sup>94</sup>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 that 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.

<sup>95</sup>See The National Commission on Consumer Finance, Technical Studies, vol 111 at 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 smaller percentage.

<sup>96</sup>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-August 1972	7265	3609
May-August 1973	7432	3617

<sup>97</sup>Wis. Stats. §342.19(1973).

<sup>98</sup>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." Wis. Stats. §421.301(17)(1973). See Heiser, supra note 36, at 391-97.

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

<sup>100</sup>We suggested earlier that data about March and April 1973 might be unreliable because of confusion accompanying the initial effectiveness of the Act. Note 93 supra. An "eyeballing" of the MVD data suggests, however, that the effects of such confusion, if any, did not affect motor vehicle sales. Accordingly, we use here the March-October period for comparison.

<sup>101</sup>Perhaps automobile leasing should be considered as well.

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

<sup>103</sup> 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, both groups of banks cited the repossession provisions with considerable frequency as an important reason, though not the only one, for their reduced participation in the direct and/or indirect automobile credit market. If this is a correct finding and new participants have not been entering the market, then the Act may have had a negative effect on the competitiveness of the automobile loan market.

<sup>104</sup> 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, especially of the energy crisis's effect on sales, into March 1974, which probably partly account for the modest decline in lien recordings during the 1974 period.

<sup>105</sup> The Wisconsin Consumer Act: One Year Later, Wisconsin Investor March 1974 at 21.

<sup>106</sup> Some banks provided information for only one time period; they were excluded in calculating these statistics.

<sup>107</sup>"Conditions in the auto market" were also cited with frequency.

<sup>108</sup>It is worth repeating again that since the respondents knew we were studying the impact of the Act's repossession provisions, any expression of opinion about the impact of the repossession provisions is suspect as biased. It can be assumed the respondents would prefer our study to show that those provisions have had negative effects on consumer welfare.

<sup>109</sup>See note 80 supra and accompanying text.

<sup>110</sup>In our bank survey we did not ask whether or not respondents differentiated rates by risk.

<sup>111</sup>See notes 81-82 supra and accompanying text.

<sup>112</sup>Fifty percent of indirect lenders that had increased down payments 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. WCA §425.209.

<sup>113</sup>In our bank survey we especially asked the respondents whether they believed consumers with an annual income under \$6000 were having more difficulty obtaining automobile loans than they had had before the Act. Nearly 70 percent responded affirmatively.

<sup>114</sup>The bankers, as reported earlier, generally believe that 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 Amer.

114 (continued)

Psychologist 409 (1969); Campbell & Ross, The Connecticut Crackdown 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.

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



<sup>118</sup>The problem of sharply varying experiences in the 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 are few 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.

<sup>119</sup>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.

<sup>120</sup>See note 104 supra and accompanying text. Since there is little evidence of substantial restriction of credit availability, we doubt that it has been a significant influence on delinquency rates. One difficulty in constructing any explanation for the decline in direct delinquency rates in the 1974 period is to account for the simultaneous continued increase in indirect delinquency rates. As reported earlier, our interviews suggested that to the extent that there has been any reduction in credit availability, it probably has affected indirect credit more substantially. See notes 105-06 supra and accompanying text. On the other hand, to the extent that creditors have preferred direct to indirect credit--in order to avoid the Act's holder-in-due-course and deficiency judgment provisions--they may have tended to "cream" the ordinary market for indirect 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 though minimal credit availability standards for

120 (continued)

indirect credit were 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 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.

121 Text following note 139 infra.

122 See notes 136-39 infra and accompanying text.

123 Notes 66-67 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.

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.

<sup>126</sup>In a few instances, a repossessing creditor might 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 to distort significantly the MVD data.

<sup>127</sup>See note 98 supra.

<sup>128</sup>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.

<sup>129</sup>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.

<sup>130</sup>It cannot be determined by comparison of these tables whether or not nonbank sources of automobile credit have had the same experience as banks, however. Banks provide approximately 75 percent of all new automobile credit in Wisconsin. 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 that the ABA data are correct, the direction of changes in the number of repossessions indicated in Table 4 is certainly to be expected. That the percentage changes have been less may indicate that the repossession

<sup>130</sup>(continued)

practices of nonbank creditors have been considerably different. On the other hand, the differences between the two tables in the rate of change revealed may be completely caused by other factors, such as the fact that one includes voluntary surrenders while the other does not and the fact that one reports repossession rates while the other does not control for changes in lending volume.

<sup>131</sup>Note 100 supra and accompanying text.

<sup>132</sup>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.

<sup>133</sup>There is no official interpretation to this effect but we draw our conclusion from the face of the statute, Wis. Stats. §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 that creditors are using this right to expedite repossession. See note 39 supra.

<sup>134</sup>Notes 75-76 supra and accompanying text. The MVD data exclude voluntary surrenders while the ABA data include them, but the two sets

134 (continued)

of data cannot be meaningfully compared to get an estimate of voluntary surrender frequency, since the MVD data are not expressed as a rate.

135 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. Stats. §425.204(3)(1973); Wis. Adm. Code, Bkg. §80.67. See note 60 supra.

136 See note 133 supra.

137 See note 139 infra.

138 See notes 121-22 supra and accompanying text.

139 The table below provides the same measures as reported in Table 5 for all delinquencies of 60 days or over--that is, 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 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 that the conclusion is correct, however, on the basis of our interviews and survey data we would guess that 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.

139 (continued)

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

	<u>1973/1972</u>		<u>1974/1972</u>		<u>1974/1973</u>	
	Direct Credit	Indirect Credit	Direct Credit	Indirect Credit	Direct Credit	Indirect Credit
<u>Wisconsin</u>						
Change in rate	+21	+22	+58	+73	+30	+42
Change in % of total delinquencies	-6	0	+14	+15	+22	+15
<u>United States</u>						
Change in rate	+18	+26	+65	+52	+40	+21
Change in % of total delinquencies	+9	+8	+10	+12	+1	+3
<u>Illinois</u>						
Change in rate	0	-29	+91	+15	+91	+62
Change in % of total delinquencies	+3	-24	+6	-16	+3	+10
<u>Iowa</u>						
Change in rate	+3	-12	+44	-4	+41	+9
Change in % of total delinquencies	-20	-12	-16	-12	+5	0
<u>Minnesota</u>						
Change in rate	0	+4	+83	+48	+83	+43
Change in % of total delinquencies	-1	+14	+12	+23	+12	+8

<sup>140</sup> Wis. Stats. §425.205(1)(a)(1973). This section reads:

"(a) . . . process 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."

<sup>141</sup> This information, obtained from our interviews, is confirmed in The Wisconsin Consumer Act: One Year Later, Wisconsin Investor,

<sup>141</sup>(continued)

March, 1974 at 21, 47. We have been informed that since we conducted our basic research in the summer of 1974, judges in more counties have begun requiring an attorney to be present at the return date. Apparently the Wisconsin Bar Association has been pressing the position that an attorney must be present at this time. Ibid. It would seem desirable that sometime in the near future a uniform statewide policy be adopted, either through amendment of the Act or through action by the Wisconsin Supreme Court, acting in its capacity as administrator of the court system.

<sup>142</sup>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, even in Milwaukee, we know from our interviews that many creditors retain attorneys for the entire proceeding. Differences between retaining attorneys for the entire proceeding and just for the appearance at the return date may partly account for the reported variance in attorney fees.

<sup>143</sup>Johnson, supra note 24 at 97-100.

<sup>144</sup>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. Stats. §§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, as long as the complaint is verified, a prove-up hearing is not conducted. Even when a debtor appeared,

144 (continued)

however, the collection manager believed himself competent to handle any matter that arose.

145. 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.

146. 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. Stats. §425.105 (2)(1973). We expect that an offer to cure made at the return hearing would ordinarily be accepted nevertheless. 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.

147. E.g., White supra note 24 at 524-5.

148. Wis. Stats. §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 \$1000 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 rule making authority, should address this matter.



<sup>149</sup> E.g., Johnson, supra note 24 at 105.

<sup>150</sup> 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. Stats. §425.207(1973). To our knowledge, this provision has rarely, if ever, been invoked.

<sup>151</sup> 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.

<sup>152</sup> But see White, supra note 24.

<sup>153</sup> Wis. Stats. §425.205(1)(1973).

<sup>154</sup> The greater efforts at informal collection reported by these creditors can be 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.

<sup>155</sup> 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 repossession and thus forces the creditor to consider workouts.

<sup>156</sup>It can be argued, we suppose, that due process--defined to exclude repossession without notice and hearing--is such an important value that it must be respected no matter what the cost. See Yodoff, supra note 44. It is just that we would not make the argument.

<sup>157</sup>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 of the cost to the debtor of replacing it with an equivalent vehicle. See note 92 supra and accompanying text.