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Condition and Value of Repossessed Automobiles

Philip Shuchman
CONDITION AND VALUE OF REPOSSESSED AUTOMOBILES

* Philip Shuchman

This Article addresses an aspect of the common situation in which a consumer buys a car at retail on an installment contract: whether, upon default, the car will be resold for a price that will cover only a portion of the debt owed, leaving the consumer owing the deficiency.

Data from files provided by the captive financers of automobile manufacturers to the Federal Trade Commission (FTC) show that the price received when the dealer or financer, as secured party, repossesses and resells a car is usually far less than the retail price given by reliable guidebooks and even below the wholesale value. Most such sales, however, are lawful under the Uniform Commercial Code (UCC). Therefore, the FTC has proposed a rule requiring the repossessor, whether he chooses to resell the car at wholesale or retail, to credit the debtor with the actual fair-market retail value, unless one of the parties can prove the car was in better or worse than average or normal condition.

This Article examines the usual circumstances of a purchase, default, repossession, and then resale, along with the typical remedies available to the secured party for reimbursement for the debt owed on the car loan, which include disposition by resale. Analysis of a sample of the FTC files revealed how often resales were held in a retail and wholesale market and what percentages of the debt and of retail and wholesale values were realized by each type of sale. The conclusions reached after examining these data support the desirability of the FTC's proposed rule, which would set standards for prices with which consumers should be credited on resale of their repossessed cars.

THE LEGAL MODEL

Under the UCC, the retail-installment contract may serve also as
a security agreement,1 with the car as the collateral, classified as consumer goods.2 Most often the secured creditor is a financer that took an assignment of the security agreement as chattel paper from the automobile dealer that sold the car.3 The usual creditors' remedies upon default appear simple and are generally routinized in the interest of efficiency. The car as collateral is repossessed and resold, the resale being the “disposition of the collateral” in UCC jargon.4 The variation in how the proceeds of this sale are distributed is a crucial factor in calculating whether the creditor can get a deficiency judgment against the debtor,5 the consumer who defaulted on his installment payments.

1. The relevant Code sections provide that a security interest can be created in an instrument that serves another purpose as well. “‘Security agreement’ means an agreement which creates or provides for a security interest.” U.C.C. § 9-105(1)(d). The Code says that “[t]his Article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor’s lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security.” U.C.C. § 9-102(2). Therefore, the sale of a car on installments can be covered by a promissory note that serves both to give evidence of the debt and to create a security interest in the car.

2. The Code defines collateral as “the property subject to a security interest.” U.C.C. § 9-105(1)(c). The goods sold that serve as collateral are subject to different treatment if they are classified as consumer goods. The Code explains, “Goods are (1) ‘consumer goods’ if they are used or bought for use primarily for personal, family or household purposes.” U.C.C. § 9-109(1). Thus, most cars sold to individuals will be consumer goods.

3. “‘Chattel paper’ means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. . . . When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper.” U.C.C. § 9-105(1)(b).

4. “A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing.” U.C.C. § 9-504(1).

   Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.

   U.C.C. § 9-504(3).

5. Both remedies, repossession and suit on the obligation, are available to the creditor under the Code for successive use against the same debtor.

   When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this Part [article 9] and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure. . . . The rights and remedies referred to in this subsection are cumulative.

   U.C.C. § 9-501(1).
Over the past several years a few studies of the process have found serious problems in the lawfulness of some aspects of the repossession-resale-deficiency judgment process and have questioned the fairness of the regulative laws, even when the particular practice at issue is lawful.6

A number of variations on the process simpliciter exist, and changes have been made, some by statute, others by case holdings. Some financers have changed their practices in the interests of better public relations. The variations in the system usually depend on the contractual relations between the car dealer and the financer to which the dealer's chattel paper is sold. Sometimes, though not often, the creditworthiness of the retail-installment buyer affects these arrangements. The security agreement may be executed directly to the financer, which then becomes the secured party, with the car as collateral and the consumer-buyer as debtor. Or the customer may sign a security agreement, along with a promissory note, with the dealer-seller itself as the secured party. If the dealer finances the sale, it almost always specifies in the contract that it has the power to assign the security interest and all its attendant rights. The dealer then usually assigns these retail-installment contracts to a financer in the form of chattel paper.7 The terms of the assignment

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7. These assignments are permitted under the Code: “Except as otherwise provided in Section 9-104 on excluded transactions, this Article applies . . . (b) to any sale of accounts or chattel paper.” U.C.C. § 9-102(1)(b). Most such security agreements are prepared by the financers, which provide them for their dealers’ use. They contain the printed form of assignment, which need only be signed by the dealer.

The typical legal contractual setting is described in an “Assurance of Discontinuance,” which is the equivalent of a consent decree, agreed to by GMAC and the Attorney General of New York, Consumer Frauds and Protection Bureau. General Motors Acceptance Corp. p. 2 (Nov. 12, 1976).

Most of the sales in New York to be financed by GMAC are executed on a printed . . . form provided by GMAC, naming the consumer customer as buyer and the dealer as seller. This form indicates that the contract will be assigned to GMAC for value and that the dealer or its assignee reserves a security interest in the vehicle sold. . . .

Id.

Another example is detailed in the Initial Decision in the recent FTC case involving Ford Motor Company, Ford Credit Company, and Francis Ford, Inc., a Portland, Oregon dealer.
may be that the financer has no recourse against the dealer if the customer defaults or full recourse or any other terms falling on the spectrum between the two extremes of full and no recourse. In the full-recourse or full-repurchase arrangement, the dealer is fully responsible for the balance due to the financer upon the default of the consumer-debtor. A no-recourse arrangement means, at least nominally, that after the assignment the dealer has nothing more to do with the two parties to the security agreement, the debtor and the financer, and is not responsible for any loss resulting from the consumer-debtor's default. The particular variations in the terms of the arrangement may depend on historically accepted arrangements; the customs in certain geographical areas; the relative economic leverage of the dealer and financer, such as whether the financer also provides inventory financing for the dealer; and the range of activities of the financer, which may extend to other types of such commerce or be largely restricted to the automotive products of the manufacturer-owner of the financer, as in the cases of the captive financers owned by General Motors, Ford, and Chrysler.

Other practical and financial considerations help determine which version of which arrangement is selected. Several incremental steps from one extreme to the other may be adopted as part of the dealer agreement, which governs the usually ongoing arrangement between dealer and financer. The financer, especially if it does business with many dealers in the same area, is apt to be more efficient in such matters as making credit investigations of the retail customers, giving written notices to many debtors, and repossessing cars if necessary. In contrast, the disposition of the cars as repossessed collateral sometimes is accomplished more easily by the dealer, especially one that also sells used cars.

For conceptual and descriptive purposes, the dealer is best con-

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Ford Motor Co., No. 9073 (F.T.C. Jan. 4, 1979). The administrative judge found:

About 70 percent of Francis Ford's retail sales of motor vehicles are financed in whole or in part. These consumer credit sales are drawn up on retail installment contracts which are pre-printed forms supplied either by Ford Credit or by the United States National Bank of Oregon ("U.S. Bank"). Francis Ford sells, assigns or transfers over half of these contracts to Ford Credit, the remainder to the U.S. Bank.

*Id.*, slip op. § II.C 48 at 7 (citation omitted). The FTC largely upheld the decision of the administrative judge requiring that the dealer give any surplus to the customer after a repossessed car is resold; the decision will apply to 20,000 car dealers throughout the country, once they are notified. Wall St. J., Oct. 10, 1979, at 11, col. 1.
sidered the customer of its financer. Also, the dealer is the salesman of its financer. Not only does the dealer sell, so to speak, the financer's money to finance the sale, but quite often the dealer also sells insurance to the customer. The insurance sold includes collision insurance on the car and, less frequently, liability insurance, as well as insurance on the life, health, and earning ability of the consumer-debtor. Credit life insurance is usually a reducing-term policy available at regulated but high rates, and credit accident and health insurance policies provide for the debtor's installment payments to be made during that individual's illness or other physical inability to work. On all the insurance transactions, the dealer is paid a commission of 30% to 40% of the premium paid by the retail buyer. If the insurance is financed, with the loan for the purchase of the car increased accordingly to pay the insurance premiums, the dealer also may get a commission on the financing, a percentage of the total finance charge, perhaps calculated separately from that for the car-sale financing. The dealer acts as an agent in selling the insurance. The commission on the finance charge is termed a kickback or a reserve rebate, depending on one's point of view. Paid to the dealer by its financer or sometimes by the insurer, this commission is usually the largest and most important source of a dealer's earned income. It is fair to say that, for most car dealers, more money is earned on the financing than on the sale of the car, and without these commissions many dealers could not make enough profit to stay in business.

8. The Deputy Administrator of the Federal Insurance Administration estimated that the "rates for credit insurance are four to 10 times higher than for life or health insurance sold by insurance agents." Jones, Your Money: Credit Insurance Costs at Issue, N.Y. Times, May 19, 1979, at 30, col. 1.


10. The difference between the retail customer's interest rate and that charged to the dealer for purposes of the rebate is usually enough so that the dealer gets 30% or more. Thus, if the total finance charge is, say, 10% add-on to a net loan of $4,000, or $1,200 for a typical three-year loan, the dealer's rebate will be about $400. That is ordinarily much more than the profit on a cash sale. The FTC administrative law judge understated the situation when he commented, "Finance and insurance income may be a major [source of profit] for a dealership." Id., slip op. § II.E at 12 (citation omitted).

Some figures on Francis Ford's operations may be illustrative as they are probably fairly typical of larger automobile dealers.
The retail-installment financing of cars, especially if done in sufficient volume, is a profitable business with a relatively low rate of default. Therefore, manufacturers want not only to sell cars but also to finance the sale of those cars. Dealers need an inventory of cars to display for sale; manufacturers, through their captive financers, provide financing for that inventory.\(^{11}\) Although inventory financing is not as profitable to the automobile manufacturers as retail-sales financing, it is necessary to promote retail sales. The dealer also needs inventory financing to sell cars and insurance by retail-installment sales so that it can earn commissions, which may constitute its largest source of income.

These ends are accomplished by a variety of contractual relationships at or between the extremes of full recourse and no recourse to the dealer by the financer in the event of the consumer-debtor’s default. Although the frequency of default by retail customers is usually less than 3%, the totals are large.\(^{12}\) The amount of fairly short-term automobile consumer credit (36 to 48 months) is so large that even a small percentage amounts to hundreds of millions of dollars.\(^{13}\) Therefore, what happens on default is a significant problem affecting large numbers of individuals.

<table>
<thead>
<tr>
<th>Year</th>
<th>Pretax Profits</th>
<th>Finance and Insurance Commissions</th>
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</thead>
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<tr>
<td>1974</td>
<td>$112,406</td>
<td>$127,827</td>
</tr>
<tr>
<td>1975</td>
<td>$18,934</td>
<td>$124,407</td>
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</table>

\(^{11}\) Id., slip op. §§ II.A at 4, II.E at 12.

\(^{12}\) "Goods are . . . (4) 'inventory' if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in the business." U.C.C. § 9-109(4).

\(^{13}\) The rate of delinquency on consumer credit loans has not exceeded 3% in the postwar years. During most of 1978 about 2.5% of outstanding consumer credit was delinquent for 30 days or more. Wall St. J., July 21, 1978, at 32, col. 2. GMAC, with a default rate of 2.5%, actually repossessed in less than one-half of 1% of its automobile accounts. G.M.A.C., CREDIT PRACTICES COMMENTS: STATEMENT SUBMITTED TO F.T.C. 5 AUGUST 1977, at 5 (1977) [hereinafter cited as G.M.A.C. COMMENTS].

Perhaps a million or more cars a year are repossessed. F.T.C., REPORT OF THE PRESIDING OFFICER ON PROPOSED TRADE REGULATION RULE: CREDIT PRACTICES, § V.A.1 at 206 (1978) [hereinafter cited as REPORT OF PRESIDING OFFICER], citing F.T.C., STAFF REPORT 294 (1975).

\(^{13}\) New auto credit extended in March and April 1979 reached $7.8 and $7.72 billion, respectively. Wall St. J., June 7, 1979, at 4, col. 3.
After default and the usual self-help repossession, all kinds of variations in creditors' remedies are available. Under UCC § 9-504, the secured party or its assignee must give notice to the debtor and accomplish what is termed a reasonable disposition of the car as collateral by some lawful type of sale. If the car is sold for less than the balance due, the creditor is entitled to a deficiency judgment; if the car is sold for more than the balance due on the original installment-sale contract, the consumer-debtor is to be paid that surplus. There is an ongoing dispute regarding the reasonable costs

14. Under the Code, the secured party, upon default, may repossess the car "without judicial process if this can be done without breach of the peace." U.C.C. § 9-503. To avoid breaching the peace when repossessing usually means it must be done by stealth and at night. In the District of Columbia study, it appeared from the police blotter that 95% of the repossessions occurred between midnight and six o'clock in the morning. Comment, Business As Usual, supra note 6, at 532 n.A3. In some areas and perhaps for some secured creditors, voluntary surrender of the car by the debtor is more common than ordinary repossession.

Several constitutional challenges to self-help repossession have been mounted based on an alleged taking of the debtor's property without prior notice and an opportunity to be heard before the repossession. These have been rejected on the ground of lack of state action or significant state involvement. See, e.g., Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1974).

15. See note 4 supra. The Code requires notice to the debtor before the car or other collateral is disposed of, except in certain cases. "[R]easonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor." U.C.C. § 9-504(3).

What is proper notice has been the subject of byzantine analyses in a spate of reported cases. See Siegel, The Commercially Reasonable Disposition of Collateral, 80 COMM. L.J. 67, 68-69 (1975). This seems to be one of the few areas in which judges have been able to seize upon technicalities to help the consumer-debtor without rejecting the UCC out of hand. As fast as the appellate opinions are published, however, lawyers representing dealers and financiers advise their clients of appropriate changes in their forms as well as in their practices of notice and disposition by resale of the motor vehicles as repossessed collateral. Hence, there is apt to be less litigation unless state statutory laws are changed or the proposed F.T.C. Credit Practices Rule is adopted.

In one of several recent articles, the authors state that courts have disagreed on virtually every aspect of repossession and what constitutes a commercially reasonable resale of the collateral. Hudak & Turnbull, The Standard of Reasonableness in the Sale of Repossessed Collateral Under the U.C.C., 4 W. ST. U.L. REV. 22, 23 (1976). See also Reed, Anatomy of a Deficiency Action: A Case History in Recovery of Deficiency Balance After Repossession of an Automobile, 82 COMM. L.J. 37 (1977).

16. "If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, debtor is liable for any deficiency." U.C.C. § 9-504(2). At least two opposing rules of law have grown up as to the creditor's right to a deficiency if he fails to give proper notice. One theory precludes any deficiency judgment, while the other permits a deficiency judgment if the creditor bears the burden of proving that "the fair and reasonable value of the [car] was credited to the debtor's account." Conti
associated with repossessing, storing, and preparing a car for resale and the sales commission to be paid on resale of the repossessed car.\textsuperscript{17}

The FTC has held hearings on a proposed credit practices rule.\textsuperscript{18} Like some state statutes, the rule addresses the problems resulting from the "two-sale" practices of many dealers and financers. The first resale after repossession is in something like a wholesale market.\textsuperscript{19} The buyer, often one of the financer's dealers or the original seller-dealer, pays a price that is usually somewhat less than the wholesale value of the car as given in the standard guidebooks of values. These guidebooks are tables that record thousands of recent sales for use in the trade by dealers and financers as well as by many taxing authorities for assessment of personal property and transfer taxes. Wholesale and retail values of cars appear according to time of year (month or quarter), geographical area, and either condition of the car or mileage, sometimes both. They also allow for optional equipment.\textsuperscript{20}

\begin{footnotes}
\item[17.] Under the Code, the secured creditor may charge "reasonable expenses . . . incurred in the custody, preservation, use or operation of the collateral" when the collateral is in the secured party's possession. U.C.C. § 9-207(2)(a). Once the car is resold, the proceeds of the sale may be kept by the secured party as needed to reimburse himself for "the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the 'secured party.'" U.C.C. § 9-504(1)(a).
\item[18.] The text of Proposed Trade Regulation Rule: Credit Practices is at 40 Fed. Reg. 16,347 (1975). If approved, it will be codified at 16 C.F.R. § 444. See note 35 infra.
\item[19.] Under the Uniform Commercial Code, the private sale of the car by the financer back to the dealer from which it originally took the security agreement by assignment is not a "disposition" of the car when the arrangement specified full recourse. Therefore, when the debtor defaults and the financer sells the car back to the original seller—the dealer—under a full-recourse contract, the Code's provisions as to the reasonableness of the sale do not apply. However, the price received does not affect the customer-debtor anyway because the dealer again becomes the secured party, and it is the price the dealer gets when it resells that will determine the amount with which the customer will be credited. The relevant Code section provides:

A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

U.C.C. § 9-504(5).
\item[20.] The guidebooks are briefly summarized in the \textit{Report of the Presiding Officer}, \textit{supra}
That "sale" ordinarily is a lawful disposition of the collateral within most judicial interpretations of the UCC § 9-504, despite the below-wholesale price paid for the car, which provides the legal basis for a deficiency judgment against the consumer-debtor. The second resale is made by the first "buyer"—usually, as indicated, a dealer with whom the financer does business or the original seller-dealer. Ordinarily, the dealer then sells to a retail buyer at a price that closely approximates the retail value given in the standard guidebooks. Often the first resale from the financer-repossessor to the dealer that originally sold the car is not a sale in the conventional meaning of that term, and the Code does not view it as a sale governed by article 9.\(^2\) If the dealer agreement is with recourse, the dealer is compelled to assume liability to the financer for the balance due on the secured loan. The dealer then resells the car in the usual manner in which used cars are marketed—either on the lot or at public auction.

Dealers and financers claim that part or all of the disparity between the resale prices and the guidebook retail and wholesale values is due to the poor condition of the car at repossession and time of the first sale.\(^2\) The considerable increase in the price at the second resale, relative to the first resale and to the guidebook values of retail prices, is said to be due to repairs and preparation of the car, which enable the car to be resold in the retail market in something like the ordinary course of business for used-car dealers. Whether all these costs exist in fact, how they are calculated, and which are properly chargeable to the second resale of the car are the subject of much disagreement.

Under the Code, the proceeds of the second, or retail, resale may be applied first to the various expenses incurred by the creditor: the reasonable expenses of retaking, holding, preparing for sale, and selling the car, including attorneys' fees and legal expenses. Because all these may be deducted from the gross proceeds of the sale according to § 9-504, even if the second sale is the basis for calculation, a deficiency easily can be created where the consumer-debtor would otherwise not owe anything and even might, in some cases, be entitled to a surplus.

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\(^2\) See note 19 supra.

\(^2\) See REPORT OF THE PRESIDING OFFICER, supra note 12, § V.A.4.2 at 224-27.
This is also true, of course, when the financer, be it a bank or one of the manufacturers' captive finance companies, has no recourse against the dealer and must sell the car itself. Because financers ordinarily do not have used-car lots, they contend that they must, as in fact they usually do, resell the car in a wholesale market. Given that the maximum gross price that can be realized is apt to be the wholesale value of the car, a deficiency almost always is created even before deduction of the legally allowable expenses associated with the repossession and resale.23

Most states do not require that the resale be in the ordinary manner of the retail market, even though the consumer purchased and financed his purchase in the retail market. The resale can be to a wholesale buyer and in a wholesale market provided, in general terms, that the secured party tries to "obtain the best possible price" under the circumstances.24 What that requirement means in a particular transaction can be decided only by a lawsuit, which nearly always costs the consumer-debtor more than he gains.

Several states have a variant on the UCC model termed "election of remedies." Often restricted to consumer transactions, these laws allow the creditor a choice between two exclusive modes: resale after repossession or a suit on the underlying obligation. If the creditor repossesses the car, he cannot obtain a deficiency judgment against the consumer-debtor when the car is resold for less than the balance due. Retaking of the car, which amounts to what is termed "strict foreclosure," is deemed full satisfaction of the debt. In its basic form, an election of remedies statute provides that the secured creditor has the option of retaking the property that secured the loan, thus extinguishing the debt, or suing on the promissory note.25 If the creditor elects to sue the consumer-debtor on the promissory note, which is part of the security agreement, he usually obtains a default

23. However, the costs associated with wholesale resales, at least on a large scale, are apt to be much less than for a retail disposition. See Shuchman, supra note 6, at 46 & n.99.
25. A typical such statute is the Connecticut Retail Installment Sales Financing Act (codified in Conn. Gen. Stat. Ann. § 42-83, et seq. (West 1960 & Supp. 1979)). The holder [creditor] may seek a monetary judgment on the contract against the buyer unless the goods have been repossessed, with or without judicial process. Goods purchased under the contract [security agreement] shall not be executed upon to satisfy such judgment. When such judgment becomes final, the holder's [creditor's] security interest in the goods shall be extinguished. Id. § 42-98 (West Supp. 1979).
Then the creditor may issue a writ of execution and levy on and sell any nonexempt property of the debtor, including execution process against the debtor's wages by garnishment orders entered against the debtor's employer. Under most such laws, however, the judgment creditor who elects to sue on the promissory note cannot have execution against the collateral itself, the car.

From empirical data on some of the practices under these different legal procedures, it appears that the UCC model grinds out deficiencies as the most common, if not routine, result. In contrast, some evidence indicates that reasonably efficient resales in a retail market would result in very few deficiencies and even some surpluses for the debtor. Where election of remedies is the applicable legal doctrine, repossession takes place far more often than suits on the promissory note. Most repossessions under an election of remedies statute end the matter as far as the consumer-debtor is concerned because, if there is a deficiency upon resale, he is not obliged to make it up, and if there is a surplus, he does not get it.

The UCC being the prevailing model, reposessions followed by deficiency judgments are the most common result when a consumer defaults on car payments. The empirical studies cited bear this out. These studies plus several "horribles"—cases in which a court...
of record wrote an opinion based on findings of fact that the resale price was much lower than market value—have led to increased concern that the consumer is not being treated fairly.

The writers conclude that the results are about the same in Connecticut, the District of Columbia, and California: "[A]fter the secured party repossesses the vehicle, the first resale is ordinarily made at a subwholesale price to a dealer," and a deficiency judgment is obtained for the remainder of the debt. Student Symposium on the Proposed F.T.C. Rule on Credit Practices, 8 CONN. L. REV. 457, 459 (1976) [hereinafter cited as Student Symposium].

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<th>State</th>
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<tr>
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<td>As a % of</td>
<td>As a % of</td>
</tr>
<tr>
<td></td>
<td>Retail Price</td>
<td>Wholesale Price</td>
</tr>
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<td>71%</td>
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<tr>
<td>Washington, D.C.</td>
<td>62%</td>
<td>81%</td>
</tr>
<tr>
<td>California</td>
<td>64%</td>
<td>84%</td>
</tr>
</tbody>
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The authors pointed out that, had the first resales, which formed the bases for the deficiency judgments, been at retail, most of the consumer-debtor's obligations would have been satisfied, and possibly even surpluses would have been produced. Id. at 460. This point was perhaps implicitly rejected in Ford Motor Co., No. 9073 (F.T.C. Jan. 4, 1979).

<table>
<thead>
<tr>
<th>State</th>
<th>Percentage of Creditor's Claim Satisfied</th>
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<tr>
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<td>By Actual First Resale</td>
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<tr>
<td>Connecticut</td>
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<tr>
<td>Washington, D.C.</td>
<td>65%</td>
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<tr>
<td>California</td>
<td>72%</td>
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</table>

Student Symposium, supra, at 460.


Various legal-aid groups related examples of unreported "horribles" at the hearing on the proposed FTC rule.

A car was sold on March 7 at a cash price of $1,156. Following repossession in September, it was [re]sold for only $50. A vehicle purchased for $2,572 in June was resold in November for $666. A new car purchased on October 24, 1975, at a deferred payment price of $8,786 was resold on December 17, 1975, following its repossession, for $3,100. A used car was bought on September 20, 1975, for $1,970, repossessed on December 3, 1975, and [re]sold for $330.

REPORT OF THE PRESIDING OFFICER, supra note 12, § V.A.3 at 219 (footnotes omitted).
WHAT EVERY CREDITOR KNOWS: THE "ROUGH" CONDITION OF REPOSSSESSED CARS

The most frequent legal defense, and the strongest response to proposed legislation and rulemaking to ameliorate what seems to be an inequitable legal process, is the argument that repossessed cars are in poor condition. The most recent example is the hearings on the proposed FTC Credit Practices Rule; the transcripts are replete with assertions that repossessed cars are "dogs," fit only for the junkyard or, at best, for a third-rate used-car lot. The persons whose cars are repossessed, it is claimed, failed to maintain them and did not provide the minimum of care, thus "burning them out," in the colorful argot of the business. One is informed in the most graphic manner, sometimes literally so with actual photographs, that repossessed cars are consistently nearly worthless, which accounts for the overwhelming number of deficiencies. The FTC's Proposed Trade Regulation Rule on Credit Practices would require, in part, that a consumer whose car has been repossessed by a financer or dealer be credited with the fair-market retail value of the car. Only

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33. In a study by GMAC of 46 repossessions at 4 locations, insurance adjusters employed by its wholly owned subsidiary insurance company, CIM Insurance Corporation, estimated the values of the 46 repossessed cars. G.M.A.C. Comments, supra note 12, at 13-14. Photographs were provided by GMAC for the FTC of these 46 repossessed cars, as well as a listing of the insurable and noninsurable damage and the reconditioning required. Id. app., Exhibit A-2.

34. See Report of the Presiding Officer, supra note 12, § V.A.4.a at 224-25 & nn.91-100. GMAC claimed:

During the period prior to repossession the car typically is not maintained. It is abused, littered, scratched, stained, torn and often banged up. In many instances, equipment such as radios and stereo units are stripped from the vehicle. Other equipment such as tires and wheels are removed or replaced with inferior equipment.

G.M.A.C. Comments, supra note 12, at 11.

35. Section 444.2(a)(7) of the proposed FTC rule would require:

In connection with the extension of credit to consumers in or affecting commerce, . . . it is an unfair trade act or practice . . . for a lender or retail installment seller directly or indirectly: (a) To take or receive from a consumer an obligation which: . . . (7) Fails to provide that if the creditor retakes encumbered property from the consumer, the fair market retail value of the property so taken will be credited toward the balance due under the obligation; . . .


Some state laws define fair-market value. The Connecticut statute, which is restricted to motor vehicles, creates a presumption that the fair-market value of a repossessed car "shall be one-half of the sum of the average trade-in value [presumably the wholesale value] plus the average retail value of such motor vehicle as stated in the National Automobile Dealers
after that credit has been given is there a basis for determining whether the financer is entitled to make a deficiency claim.

As part of the largely archival research to assay the basis for the defense of consistently poor condition and the probable impact of the proposed rule, random samples of FTC files were examined, which had most of the following items of information: (1) condition of the repossessed car; (2) wholesale value of the car at repossession; (3) balance due on the loan contract; (4) expenses of repossession and resale; (5) type of resale market, wholesale or retail; and (6) dates. Some files had a seventh datum: whether the dealer agreement was with or without recourse.

The findings were that the conditions of the sample sets of cars describe a "normal" curve. About one-half the cars were in fair or normal condition and about a quarter each were in poor and good condition.

**DATA SET A**

The next five sections of this article contain analyses of and commentary on four sets of data based on information taken from the FTC's public records. These data, in the form of computer-generated printings, are available for examination.36

Data Set A consists of a sample of 236 files randomly selected from a larger group provided by General Motors Acceptance Corporation (GMAC) and on record with the FTC's Public Reference office.37 All cars whose condition was noted by the GMAC repossession or other employee are included in this set. These files, from several GMAC branch offices, were created by GMAC during the years 1971-72.38 For Data Set A, we conducted an independent

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36. The computer printouts are available for examination at the William and Mary Law Review.

37. See F.T.C., MEMORANDUM FOR CREDIT PRACTICES, Document XI—167 (Aug. 5, 1977). The FTC document describes most of the creations, origins, and contents of the archives from which we took our sample of files. Data Set A files came from records provided by GMAC directly to the Division of Special Projects, Bureau of Consumer Protection, Federal Trade Commission.

38. The listing of cases in Data Set A identifies each of the GMAC files used by either its
check of the wholesale values listed by the National Association of Automobile Dealers (NADA)\(^3\) to compare with those that had been recorded by GMAC. GMAC used a form entitled “Automotive Retail Repossession Statistics” to record the data. The cars on these forms were fairly well identified for the most part; in a few cases, we assumed the middle range of the make and year. Of these 236 files, 227 provided enough information to enable us to examine the relationship between GMAC’s recorded NADA wholesale values and our independently verified NADA wholesale values. For Data Set A, that relationship is shown in table I. Our independently verified NADA wholesale values, which we used as a benchmark, were only slightly higher than the NADA values noted by GMAC for repossessed cars in all conditions, not a bothersome difference. In fact, the difference which exists between the GMAC’s NADA wholesale values and our benchmark is insignificant when we control for the condition of the car as noted by GMAC.\(^4\)

<table>
<thead>
<tr>
<th>Condition of Car</th>
<th>Mean</th>
<th>Median</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good (N = 58)</td>
<td>99%</td>
<td>101%</td>
</tr>
<tr>
<td>Fair (N = 108)</td>
<td>97%</td>
<td>100%</td>
</tr>
<tr>
<td>Poor (N = 61)</td>
<td>88%</td>
<td>97%</td>
</tr>
<tr>
<td>Total (N = 227/236)</td>
<td>95%</td>
<td>100%</td>
</tr>
</tbody>
</table>

\(^a\) Data Set A.

The computations in table I show the difference between our findings of NADA wholesale value and those recorded by GMAC. The values recorded by GMAC are fairly consistently lower, although typically by a small amount. The mean GMAC-recorded NADA wholesale value is about 95% of our benchmark check in the NADA

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\(^3\) The National Automobile Dealers Association Used Car Guides are published in various editions, such as Eastern Edition, for the different geographic areas.

\(^4\) We assumed that the NADA and Redbook values were for cars in normal condition for that make, model, and year. Because about as many cars were in poor condition (N=63) as in good condition (N=61), that may be considered a washout variance.
books. The fact that the median of the difference is nearly zero—that is, the median GMAC-recorded value is 100% of ours—makes clear that the range of difference is insignificant. Once our general concordance with GMAC as regards NADA wholesale values for cars in good condition was established, we examined the retail values as found in the NADA books for most of the cars in our sample. GMAC did not record the NADA retail values for the automobiles. Nevertheless, given the closeness of the two sets of wholesale values, we have no reason to believe that, had GMAC recorded the NADA retail values, they would have diverged by more than the small amount that the two wholesale values differed.41

The repossessed cars recorded by GMAC in the Data Set A files were all resold after repossession by GMAC itself, rather than by its dealers. This was probably because the chattel paper, establishing the debtor’s obligation and the dealer’s security interest in the car, was assigned to GMAC without recourse. Thus, upon default, GMAC had the burden of disposing of the collateral, the dealer having no further obligation to GMAC for the car or the secured debt. The Code demands that the disposition of a car through resale be conducted in a commercially reasonable manner within the meaning of UCC § 9-507.42 All or nearly all the resales in Data Set A were at wholesale, to others in the business of buying and selling used cars, and not to retail buyers in the usual retail market for used cars.43

The condition of repossessed cars has been a matter of disagreement in the literature and other discussions of the repossession-through-resale process.44 Obviously, the repossession is the only party

41. Calculation of the ratio between NADA wholesale and retail values for 234 files in Data Set A revealed that the mean of NADA wholesale values was about 77% of retail; the median was 81%. These were all repossessed used cars.

42. The Code provides that, if the secured party disposes of the collateral in a manner that is not commercially reasonable or otherwise fails to comply with the provisions of article 9 on disposition of repossessed collateral, the debtor “has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part.” U.C.C. § 9-507(1).

43. If some of these resales were in the retail market, the data that follow suggests that GMAC’s manner of disposition is so inadequate and inefficient as to be more unconscionable than our data indicate.

44. For example, the American Bankers Association criticized the Connecticut study by the author cited in note 6, supra. Several grounds were given for the criticism, two of which, in particular, were later widely repeated by the industry. (1) The sample of 83 complete cases
that can record this information for a set of repossessed cars. Very few courts have directly addressed the condition of the repossessed car, either as a factor in addition to scrutiny of the formalities in determining whether a sale was reasonable or as an entirely separate substantive issue. The crucial matter of the market value of the car is determined by looking at whether the purely formal procedural mechanisms were followed, the result of which is then defined as the market value of the car, that is, what a buyer will actually pay.

The information provided by GMAC on forms given to the FTC can be used as a data base for assaying the actual condition of repossessed cars. These forms contain several important and informative items. In particular, each form has a valuable datum—the "condition of the collateral [i.e., the car] when repossessed," as that was recorded by the GMAC employee or agent who repossessed the car. Our sample, using 236 of the files that contain this datum, revealed that three labels were used to categorize the condition of the repossessed cars: good, fair, and poor. We took "fair" as being equivalent to "average" condition in the NADA guidebook.

<table>
<thead>
<tr>
<th>Condition</th>
<th>Number of Cars</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good</td>
<td>61</td>
</tr>
<tr>
<td>Fair</td>
<td>112</td>
</tr>
<tr>
<td>Poor</td>
<td>63</td>
</tr>
<tr>
<td>Total</td>
<td>236</td>
</tr>
</tbody>
</table>

| Data Set A.

was too small. "The rawest neophite in statistics could only discard such numbers as insufficient to warrant credence." (2) The condition of repossessed cars is very bad. "Another major item that results in lower values is general wear, tear and abuse. Anyone in the automobile finance business will attest that when a man even suspects that he might lose his car by repossession, care and maintenance of the car then becomes a matter of his least concern." *Federal Role in Consumer Affairs: Hearings before the Subcomm. on Executive Reorganization and Government Research of the Senate Comm. on Government Operations, 91st Cong., 2d Sess. 225 (1970).*

45. Some observers believe that only the result of a well-advertised auction sale open to all buyers can determine the fair-market value, retail or wholesale, of any particular car for any purpose. For these observers, the market value can be defined as that price at which a sale is made between informed and willing, not coerced, buyers and sellers. Although in theory this definition holds for any specific transaction, in practice virtually everyone in-
Table II shows how symmetrically these figures are distributed. An important finding is that nearly three-fourths of these cars, that is, 173 of 236, or 73%, were in fair or good condition. Because extremes may be taken as more or less offsetting each other, the fact that equal proportions of cars were in good and poor condition also is significant. In addition, table III shows that, for 56 repossessed cars in Data Set A recorded as in good condition, the resale yielded a mean of 92% and a median of 96% of the wholesale value. However, the resales obviously produced a smaller percentage of the NADA retail value. For example, the resales of the 61 good-condition cars yielded a mean of only 75% of NADA retail value and a median of only 78%.

In any specific litigated case, the factual question of the condition of the car at repossession is often reducible to a conflict in testimony between the consumer-debtor and the repossessor. This is not so in examining a set of repossessed cars. For example, the spread of conditions in Data Set A probably is typical of the distribution of conditions of repossessed cars, thus affording an opportunity to look at the repossession-resale-deficiency process in the mass. In these cases, the repossessor, be it the dealer or financer, is ordinarily the only party with the crucial information about the distribution of conditions of a group of repossessed cars. The dealer is the only party with exclusive access to the information and thus as an interested party is suspect when it claims that most repossessed cars are in terrible condition. The particular importance of Data Set A is that a sample of this size, taken from 117 different dealers in several states, is very apt to be fairly representative of repossessed cars, including those in our other three sets of data. These statistics, then, tend to refute the repeated contention of financers and dealers that repossessed cars are “dogs,” cars in poor condition that have not been well maintained.

When we examined separately the efficiency of the resale process for cars in good, fair, and poor condition, the results, as seen in table III, showed that GMAC did proportionately better by the consumer for cars in good condition than for cars not as well maintained.
### Table III. Relationship of Resale Price to NADA Values, According to Condition of Car

<table>
<thead>
<tr>
<th>Resale Price As a Percentage of ...</th>
<th>Good</th>
<th>Fair</th>
<th>Poor</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>NADA Wholesale Value As Recorded by GMAC</td>
<td>92% [96%]</td>
<td>78% [80%]</td>
<td>67% [65%]</td>
<td>79% [84%]</td>
</tr>
<tr>
<td>(N=56/61) (N=106/112) (N=52/63) (N=214/236)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NADA Retail Value As Independently Verified (Our Benchmark)</td>
<td>75% [78%]</td>
<td>63% [63%]</td>
<td>47% [38%]</td>
<td>63% [65%]</td>
</tr>
<tr>
<td>(N=61/61) (N=101/112) (N=45/63) (N=207/236)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- Mean relationship, in percent, of resale price to NADA prices; medians are in brackets.
- Data Set A.
- Ratio of number of cars in a particular condition for which full information was available so they could be included in this table to total number of cars in that particular condition.

GMAC’s resale process, then, appears to work better proportionately for good-condition cars, its efficiency in some manner related to the condition of the car. The rule seems to be that the better the car, the better the resale price; the worse the car, the relatively worse the resale price. The effect of this on the consumer was direct: He was less likely to owe a deficiency because the resale price of good-condition cars also repossessed represented a higher percentage of the principal balance owed by the consumer to the secured creditor, GMAC. Data Set A shows that the actual resale prices credited to the consumer-debtor by GMAC were substantially lower than the principal balance owed at the time of repossession. The resale price averaged only slightly over half of the balanced owed. The mean was 58% and the median, 59%. For the 213 cars in Data Set A with the necessary information, we conclude that

\[
\frac{\text{Resale Price}}{\text{Principal Balance}} = 58\% \ (N=213/236).
\]

46. “GROSBAL” is our acronym for “gross balance.” It is used by GMAC to stand for the principal balance owed by the consumer. This figure is shown in the upper right-hand corner of the GMAC forms on record with the FTC.
More than half of these sample files showed a resale price ranging between 40% and 70% of the balance owed on the principal. The resale process, then, consistently produced a deficit that was substantial as a percentage of the amount of money owed by the defaulting consumer-debtor. Broken down by condition of car, table IV shows the relationship between the resale price and the principal balance due.  

**Table IV** a Relationship b of Resale Price to Balance Owed on Principal According to Condition of Car c  

<table>
<thead>
<tr>
<th>Good</th>
<th>Fair</th>
<th>Poor</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>67% [66%]</td>
<td>58% [58%]</td>
<td>49% [45%]</td>
<td>58% [59%]</td>
</tr>
<tr>
<td>(N=59/61)</td>
<td>(N=106/112)</td>
<td>(N=48/63)</td>
<td>(N=213/236)</td>
</tr>
</tbody>
</table>

a Variance 22.
b Relationship is shown as percentage representing mean; median is in brackets.
c Data Set A.

Where GMAC had recorded the expenses of repossession and resale, we gathered those data. We eliminated from our calculations all files in which no repossession or resale expenses were incurred or noted. Any cars voluntarily surrendered by being brought into GMAC or a dealership by the debtor, thus entailing no repossession expenses, are not reflected in our calculations. In addition, resales accomplished with no resale expenses to speak of, for example, merely by a few telephone calls to dealers, also were eliminated and therefore are not reflected in our calculations. There may have been an expense in either or both of these steps in some cases, but these cases could not be included in our figures where those expenses were not recorded in the GMAC files. Therefore, our calculations of the expenses of repossession and resale are apt to be higher than they actually are in a sizeable set of routine cases.

For 175 of the 236 files sampled that contained information on the expense of repossession, the mean expense was about $48. The mean of the resale expense in 202 of the 236 cases was about $96. The

47. It is merely an artifact of our data that the figures in table IV for all cars and those for fair-condition cars are almost exactly the same. The closeness of the figures is due to the "normality" of the distribution of conditions of the repossessed cars in our Data Set A sample files.
medians were much lower, $45 and $13, respectively. These figures, as explained, are subject to the qualification that zero values have been eliminated. As table V shows for Data Set A, there is considerable variation according to the condition of the car. The total expenses of resale, whatever they may have included, were apt to be higher for cars in poor condition—a mean of $144 and a median of $70—than for cars in good condition, for which the mean was $99 and the median, $48. The expenses of repossession also were substantially greater for cars in poor condition than for those in good and fair condition.

<table>
<thead>
<tr>
<th>Type of Expenses</th>
<th>Good</th>
<th>Fair</th>
<th>Poor</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(N=54/61)</td>
<td>(N=96/112)</td>
<td>(N=52/64)</td>
<td>(N=202/236)</td>
</tr>
<tr>
<td></td>
<td>(N=42/61)</td>
<td>(N=84/112)</td>
<td>(N=49/63)</td>
<td>(N=175/236)</td>
</tr>
</tbody>
</table>

a The mean expense is given first; the median expense is in brackets.
b Data Set A.
c The first number represents those cars in this particular condition that were included because the relevant expenses were incurred and recorded by GMAC; the second number represents the total number of cars that were in this particular condition.

CONCLUSIONS ON DATA SET A

The process from repossession through disposition of the car as collateral as revealed by tables I through V, can be summarized in the following manner:

First, GMAC recorded the condition of the cars at about the date of repossession.

Second, GMAC recorded the resale price of the car and the NADA wholesale value at the date of resale. (Resale is the disposition of the collateral within the meaning of the Uniform Commercial Code and its various state statutory supplements.)

Third, the length of time between repossession and resale was not so great as to change the NADA wholesale and retail values and thus make the calculated ratios at repossession and resale significantly different. Based on 78 of the 236 files in Data Set A, that is, roughly
every third case, the mean time elapsed between repossession and resale was 38 days. The range was, of course, greater, but most of the resales took place 30 to 50 days after repossession. Even for a car sold new a year before, a delay of a month or so makes little difference in its selling price during the second year of the car's life. The time lapse has even less effect on the price of older cars, which includes cars originally sold and financed as used cars. For nearly all cars, the depreciation is greatest during the first year, less during the second year, and so forth. Presumably, one could do the necessary calculations on a sample of quoted values to describe a general depreciation curve. Absent that approximation, I conjecture that the monthly depreciation rate starts rapidly and then slows up, approaching, but not reaching, a flat curve.

Fourth, GMAC resold the repossessed cars for less than two-thirds of the NADA retail value and for about three-quarters of the NADA wholesale value. This varied somewhat with the condition of the car for some unexplained reason. Repossessed cars in good condition were resold for about nine-tenths, or 92%, of the wholesale value and three-fourths, 75%, of the retail value. In contrast, cars in poor condition were sold for about two-thirds, or 67%, of wholesale value and less than half, or 47%, of retail value.

Fifth, the effect of these practices on consumer-debtors was that they were faced with paying the deficiencies the system ground out, and any possible surpluses that might have been paid to them was eliminated.

With three empirical studies that are generally consistent with these data already published in law journals, the figures no longer are shocking. But the message they carry of basic unfairness to the defaulting consumer-debtor has lost none of its bite.

48. This was done some years back, but it was too long ago and in too limited a manner for present use. The American Bankers Association showed depreciation, or reduction in wholesale value, in a generally concave curve that would be similar to my construct. See CONSUMER CREDIT IN THE UNITED STATES: REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE 275 (1972). The calculations included comprehensive and collision insurance. It is unclear whether their comparison of wholesale value, as it relates to the balance due on principal debt, provided for a down payment.

49. When the car gets old enough, its value may begin to rise for reasons such as the discontinuance of that model—as, for example, the Cadillac convertible—or because the older model does not require equipment needed in later models to conform with emission and safety requirements or because the car is old enough to qualify as an antique.

50. See note 6 supra.
Data Set B

Data Set B consists of 148 files obtained by the FTC for the years 1974 and 1975. These files come from 18 different dealers in widely separated geographic areas, as well as from financers owned by all three major car manufacturers and other financers, including banks. Data Sets B and D both reflect recourse arrangements in which the dealer had to undertake resale of the repossessed cars. This contractual arrangement could account for most of the cars having been sold at retail—123 of 148 cases, or 83%. The dealers probably sold these cars off their used-car lots.

We do not know the conditions of these repossessed cars, but we posited that they were about the same as those in Data Set A. Other information in the Data Set B files, however, enabled us to make most of the same calculations as for Data Set A, although we could not provide separate calculations based on condition at repossession. Thus, we had to treat all 148 files as representing cars in fair condition, which is nearly the exact numerical equivalent of all cars in fair condition in Data Set A.

We know from the files in Data Set B which resales were at wholesale and which at retail—25 and 123, respectively. In Data Set A, however, all resales were at wholesale so far as we know, which is why the financer-repossessor, GMAC, recorded only the NADA wholesale values. The resale prices for Data Set B are shown separately in table VI as functions of the proper respective standards, NADA wholesale and NADA retail values. Just as in Data Set A, we estimated the NADA wholesale and retail values by using information on the make, model, and year of the car, as well as the date of repossession. Hence, we have no reason to think that our NADA figures diverge more from the NADA values noted by the repossession-resellers in Data Set B than the insignificant differences found in Data Set A, in which we had GMAC's recorded NADA wholesale values. Table VI uses the same basis for calculations as was used for the Data Set A tables.
Data Set D

Data Set D consists of a sample similar in scope to Data Set B but slightly larger in numbers. Its 163 files include 118 retail resales, or 72% of the total resales, and 45 wholesale resales, or 28%. The comments on Data Set B also are applicable to D in other respects. The same calculations that were made for Data Set B in table VI appear in table VII for Data Set D. The results are substantially similar.

Most resales in Data Sets B and D were at retail. The results were good for the consumer-debtors, which points up the anticipated
impact of the proposed FTC rule. In 32 known cases from Data Set B, the mean of the proceeds of the sale exceeded the principal balance due. The resale proceeds were equal to 102% of the principal balance owed by the consumer-debtor. In 115 known cases, the resale price was nine-tenths of the NADA retail value. I would guess that the proposed FTC rule would result in figures similar to these. The figures in Data Set D show much the same efficiency, as can be seen in table VII. Of the nearly three-quarters (72%) of the resales that were at retail, an average of 105% of the principal balance was realized, representing more than nine-tenths (91%) of the NADA retail value. The proposed FTC rule is an approximate model of these 235 retail dispositions of repossessed cars (123 in Data Set B and 112 in D). Some surpluses and far fewer deficiencies would have occurred in both Data Sets B and D had the proposed rule been in effect.

DATA SET C

The 63 files that comprise Data Set C came from seven GMAC branch offices located in metropolitan areas in seven states: Atlanta, Baltimore, Chicago, Dallas, Indianapolis, Jacksonville, and Memphis. These files differ from the other data sets in one regard: the cars were slightly newer. Six-tenths of the cars in Data Set C were only two model-years old or less. Nearly all the files were created in 1973.

GMAC’s branch offices recorded what the GMAC forms termed “average wholesale value.” We took that to be the NADA wholesale value, although for these purposes it makes little difference. The results, using GMAC’s “average wholesale value” as recorded, confirmed fairly well the usual and consistent pattern. The type of resale was specified on the GMAC’s forms. Of 63 sales, 7 were retail sales, making up 11% of the total, and 55, or 89%, were wholesale resales.

51. See note 35 supra.
Table VIII. Relationship\(^a\) of Resale Price to “Average Wholesale Value” and Principal Balance Owed, According to Type of Resale\(^b\)

<table>
<thead>
<tr>
<th>Resale Price as a Percentage of . . .</th>
<th>Resales at Retail</th>
<th>Resales at Wholesale</th>
<th>Total Resales</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Average Wholesale Value&quot; As Noted By GMAC</td>
<td>81% (N=55)</td>
<td>81% (N=62)</td>
<td></td>
</tr>
<tr>
<td>Principal Balance Owed</td>
<td>64.5% (N=47)</td>
<td>57% (N=5455)</td>
<td>58% (N=5862)</td>
</tr>
</tbody>
</table>

\(^a\) Mean is expressed as percentage.

\(^b\) Data Set C.

The resale prices as a percentage of average retail values, had these latter been recorded by GMAC, would have been less, of course. Given our estimates, we conclude that

\[
\frac{\text{Resale Price}}{\text{NADA Retail}} = \text{about 62}\%.
\]

Problems with the Uniform Commercial Code

In general, we are not dealing with venal businessmen engaged in unlawful practices. Much of the testimony before the presiding officer during the FTC’s public hearings related to whether financers and dealers as repossessors act lawfully; the testimony indicates that most of them do conform to the applicable law. But that approach is mistaken, for it is in fact the lawful practices permitted, those aspects of resale usually not even addressed by these laws, that are so unfair to the consumer as a debtor in default.

A car purchased and financed at retail, including the financing of several kinds of insurance, can be sold after repossession in a wholesale market because state law and the UCC do not prohibit this explicitly. The retail resale, although it is conducted with rather less than the usual marketplace efficiency, seems to put a lesser burden on the consumer-debtor. GMAC, which is the largest national financer of cars, as repossessor-reseller gets less than even wholesale value, only about four-fifths of NADA wholesale values. It is pointless to speak of litigation on behalf of the consumer as a
protection when litigation is so expensive and the legal setting so biased against the consumer-debtor. Thus, most such repossessions result in no action by the consumer-debtor, not even as a response to a later deficiency-judgment action.

What is "commercially reasonable" in a commercial setting is by no means reasonable for, or even appropriate to, a consumer-credit transaction. The UCC resale provisions address commercial transactions. The mode of disposition of the collateral in a commercial secured transaction is the subject matter of section 9-504 of the Code. Here, however, we are dealing with a particular type of transaction that is so different in kind as to require a different legal model. This transaction nearly always involves a defaulting consumer who is an individual, usually of modest means, not a business firm. Ordinarily, this individual is unaware of his or her rights. Even were he cognizant of the legal requirements of the UCC, it would avail him little, if at all, because the Code is designed for a wholly different species of secured transactions. In addition, the cost to the consumer of litigating a particular case almost always exceeds any recovery.

The Code provides for flexibility because so many types of secured transactions exist, as well as hundreds of common items of collateral in several categories—to name but a few, chattel paper, intangibles, inventory, fixtures, leases, and equipment. The UCC assumption is that, if a particular procedure for disposition of collateral is unreasonable, the debtor can protect himself by, for example, bidding on the collateral and even buying it, litigating to enjoin or upset the sale, or seeking damages in an appropriate case. None of these possible debtor remedies, however, fit the cases of most of the several hundred thousand motor vehicles annually repossessed from defaulting consumer-debtors. Many of these vehicles are resold in manners that, with remarkable consistency, produce returns that are less than the wholesale values of the cars and far less than the retail values. Article 9 of the UCC has been described accurately as a "deficiency judgment machine" in these consumer transactions.52

State and federal judges, on the whole, are bound to apply a commercial code to these noncommercial secured loans. For some time it has been evident that the UCC procedures are so one-sided,

and the legal and economic situation so skewed in favor of financers as secured parties, that the result in the mass of cases is a given: a deficiency judgment is nearly inevitable. Thus, the Code procedures achieve with dramatic consistency the very result the framers of the Code sought to avoid in the commercial setting. Most consumers, then, even if knowledgeable, must surrender to this patently unfair treatment because they are enmeshed in a commercial code that is unfair to them in their transactions and offers little compensation for the cost of litigation even were they likely to succeed. The proposed FTC rule would give these consumers some relief. They would be much less likely to lose their entire investment in a car, as they now do by the hundreds of thousands every year.

CONCLUSIONS: THE PROPOSED FTC RULE AS A SOLUTION

The proposed FTC rule does not require any repossession to give more credit than the actual fair-market retail value of the car.\textsuperscript{53} That value varies with the condition of the car, as well as with its mileage, if higher or lower than normal. High or low mileage now is allowed for in the NADA and Red Book guides, two widely used sources of used-car values.

There is no reason to suppose that a presumption that a car is in fair or average condition and within the bounds of normal mileage will be unfair to the industry. Nothing in the proposed rule prevents a showing by the debtor or creditor that the repossessed car is not in fair or average condition for a car of that make, model, and year. Either party can contend and attempt to prove that the repossessed car was in good or poor condition or that the mileage was above or below the normal range in the guidebooks. Even if, in a specific case, it would be easier or less costly to credit the debtor with fair-market retail value, assuming normal condition, than to litigate the issues of condition or mileage, that is not apt to be true of any sizeable set of such cases. Our direct data from GMAC and my inferences from the records provided by other financers and dealers strongly suggest that most repossessed cars are in conditions ranging from fair, or average, to good, and that the poor-condition cars are almost offset by the number of cars in good condition.

The proposed rule is not complicated. It is simpler and easier for financers and dealers. It also enables the consumer-debtor to deter-

\footnote{53. See note 35 supra.}
mine quickly whether he is apt to be faced with a deficiency claim. He need only check the guidebook of quoted values used in his area at that time. Thus, the consumer-debtor can be more nearly equal in his information, which improves his bargaining power. If it is sometimes necessary, as some financers contend, to resell repossessed cars at wholesale, the proposed rule could be interpreted or, if necessary, amended to accommodate resales that must be made in a wholesale market. If the consumer by then has paid the wholesale value of the car, the resale could be held to discharge his obligation on the security agreement.

The proposed rule, like those of most administrative, legislative, or judicial bodies, is a model that only sets standards. Given the diversity of actions, settings, and parties and the fact that lawyers and financers are ingenious, interpretations of the rule will be necessary if it is adopted by the FTC or any of the states. But judges in administrative and judicial settings at least will know that the standard to be applied to that range of activities is no longer the formalisms of a commercial code. Instead, they will look to the standard of a fair substantive result produced by a relatively routine, repetitive process. The outcomes should approach the standard of crediting the consumer-debtor in default with the fair-market retail value of his repossessed car.