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THE IMPROVIDENT EXTENSION OF CREDIT AS AN UNCONSCIONABLE CONTRACT

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Special thanks are due and owing to Mr. John H. Robb, President of the Credit Bureau of Des Moines, and Mr. Bryan H. Hall, Manpower Coordinator for the City of Des Moines, and their respective staffs, for their cooperation and assistance in the preparation of this article. The author also expresses appreciation to Ms. Elizabeth Kluender, Deputy Clerk, and Ms. Kathleen Shinstine, Associate Clerk, of the Polk County District Court, for their kindness and assistance in the researching of court records.

The survey referred to herein as the *D.M. Study* was designed and data interpreted by the writer. The conclusions drawn and the views expressed are the writer's, and are not necessarily those of the *Review*.—Ed.

INTRODUCTION

> [D]efendant argues that plaintiff failed to acquire both credit reports and financial statements covering [plaintiff's transferee's] financial status; that this failure to investigate [that transferee's] credit constituted negligence on plaintiff's part and estops it from holding itself out as a holder in due course. * * *
>
> In neither of [the cases cited by defendant] do the courts indicate that a bank or anyone else, for that matter, must investigate the credit of one from whom it purchases negotiable paper. It may well be that prudent business practices would dictate the utilization of such investigations, but we fail to find such a duty pronounced by the jurisprudence of this state.[1]

Most lawyers have at one time or another performed that kind of legal service usually referred to as "collection work." Except as conducted on a large scale, however, it is non-remunerative for most lawyers and law firms, usually personally unrewarding in any event, and particularly in the case of consumer credit collection work, considered by most firms as relatively insignificant legal business suitable only as a learning tool for inexperienced young lawyers. Indeed, it is not unusual for a lawyer or firm to turn away collection matters involving less than one thousand dollars, for example, thus eliminating a large portion of non-commercial, consumer credit collection work. Other factors are at work which explain the small role played by the bar in the consumer collection area, including the understandable desire of creditors to reduce collection expenses by utilizing "in house" collection agents or by referral to collection agencies in the non-legal sector. That segment of the bar regularly dealing with the collection of consumer credit, then, is relatively small and the importance of such work to the individual members of the bar is likewise small. By virtue of recent attention focused on consumer credit matters via new legislation and court rulings[2] the trend will continue, for if a law-

1. First National Bank v. Romero, 150 So. 2d 640 (La. App. 1963).

2. See a previous article by the author, *Representing the Creditor: A Guide to the New Ground Rules of Extending and Collecting Credit*, 21 DRAKE L. REV. 381 (1972).

yer is to ably serve his clients that extend consumer credit, he will have to be, or become, an expert in that field in the purest sense of the word.

All of which is to say that from the standpoint of the bar and the public at large, consumers are individually an anonymous lot. As reflectors of the attitudes of the public at large, lawyers tend to have little understanding of or sympathy for (or reason for such) the individual circumstances, needs, and problems of consumers. Those consumers who meet their credit obligations no doubt prefer that anonymous status. But a curious thing happens to those who default in their obligations—their anonymity increases in a very real sense as they encounter the legal process, and with it what must seem to them a bewildering set of legal consequences. For consumers in default, Ms. Justice wears a blindfold to be sure—the question is whether her scales require periodic calibration. To the relatively few lawyers who represent both consumers in default and those who are accused of a crime the thought must have occurred that the former would be better off, *viz-a-viz* the legal process, if they were in the latter's shoes. The accused is more or less guaranteed a lawyer, a trial on the merits, review of an adverse decision, and, upon conviction, a theoretical resolution by society of rehabilitation. The analogy is not intended to be taken literally, but rather to point out an interesting and ironic contrast.

If there is a common thread running through the new consumer-oriented statutes and court decisions, it is a recognition of the fact that the consumer—particularly the consumer-defendant—is an *individual* whose contractual entanglements are not necessarily solved satisfactorily by the existing legal framework. This article is an extension of that point of view, but its purpose is to explore the efficacy of the existing legal framework as it affects what is by far the most significant point of the consumer credit transaction: the *decision* by a creditor to extend credit to an individual consumer. The excerpt with which this section was prefaced is thought to represent the currently prevailing view of the courts on the issue of the duty of the creditor to investigate the credit worthiness of the debtor. The National Commission on Consumer Finance[3] in its recent report, "Consumer Credt in the United States"[4] has, however, made various recommendations having potentially far-reaching effects on the extension and collection of consumer credit, including the recommendation that deficiency judgments in most consumer credit transactions and the doctrine of holder in due course in *all* consumer credit transactions be abolished.

3. The Commission [hereinafter referred to and cited as "*NCCF*"] was established pursuant to the mandate of Title IV of the Consumer Credit Protection Act (15 U.S.C. § 1601 *et seq.*, 1970). The Commission, a bipartisan body, is composed of nine members, three of whom are members of the Senate, three of the House of Representatives, and three are nongovernment-employed. The express duties of the Commission were to study and appraise the functioning and structure of the consumer finance industry, as well as consumer credit transactions generally.

4. Stock Number 5200-00005, U.S. Government Printing Office, Washington, D.C. (December, 1972). [Hereinafter referred to and cited as "*NCCF Report*"]. *See also* 5. U.C.C.L.J. 319 (1973).

5. The Council [hereinafter referred to and cited as "*NBCCA*"] was created by Executive Order of the President in August of 1971 and is composed of a group of one hundred business persons whose task it was to identify consumer problems and offer solutions

These and other of the recommendations of the *NCCF* and of the National Business Council for Consumer Affairs[5] will perhaps cause renewed attention by creditors to the role of credit information in the credit extension decision. That this was intended by the *NCCF* is evident from the fact that the Commission takes the view of the drafters of the UCCC, that the "improvident" extension of credit—the granting of credit when there is no reasonable expectation of ability to repay—is unconscionable.[6] The present effort is to demonstrate why this view should be adopted. To that end, the writer conducted a study of slightly over two hundred deficiency judgment suits filed in the Polk County District Court and in Municipal Court of the City of Des Moines between January 1, 1969 and July 1, 1973. All of the cases surveyed involved defaulted automobile purchase contracts.[7] The automobile purchase was chosen for a number of reasons. The automobile is an almost universally sought after and acquired consumer product, and typically the most expensive; being an integral feature of the consumer credit field in general, it should be a reliable barometer; it has a well-documented history, having evolved from a questionable luxury item for most consumers, to an unquestionable necessity for some, to what some now feel is once again a questionable luxury—at least in some quarters where breathing is preferred over commuting. In short, the automobile is the obvious starting point.

In order to place in perspective the results of the *D.M. Study,* and the conclusions and proposals made, some preliminary inquiries became necessary: who defaults on automobile purchases, what causes contributed to the default, how does our existing legal framework handle those who do default, and are there any safeguards built into that framework and our economic system that tend to prevent such defaults? Reference will be made to various studies and reports in this preliminary undertaking.

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therefor. One of the Subcouncils (On Credit and Related Terms of Sale) has released a report entitled "Financing the American Consumer" which contains various proposals discussed at a later point in this article. The report is referred to hereinafter as "*NBCCA Report,*" and is obtainable through the U.S. Government Printing Office, Stock Number 5274-00004.

6. The *NCCF*'s recommendations in this regard relate to the power of a bankruptcy court to refuse the claims of creditors in such circumstances. *See* discussion in text accompanying note 299, *infra.*

7. The 201 cases in the study [hereinafter cited and referred to as the *DM Study*] represent suits for deficiency judgments filed by the three major "captive" finance companies, FMCC, CCC, and GMAC; which companies nationally hold about 25% of all outstanding automobile paper (Fed. Res. Bull. A56-57, Nov., 1972) and suits by Rosenfeld Used Cars, Inc., and by Carter's Used Cars, both local used car dealers. In 88 of the cases, the debtor signed a used car purchase contract, while new car contracts were signed in 55 cases. The remaining 58 cases involved the execution of a promissory note. Cases involving sales to buyers residing outside the Des Moines area were omitted. Bank-financed automobile purchases, which account for more than 50% of all automobile financing nationwide, (*see* note 24, *infra*) were omitted from the study due to the difficulty of identifying automobile financing from that of other consumer goods financing. Use of promissory notes accounted in part for this difficulty. The "captive" finance companies, however, were thought to be representative of an institutional approach to credit granting, and all Des Moines area banks were surveyed concerning their credit granting procedures and the default experiences (*see* Table A, Appendix).

A questionnaire (*see* Appendix A-3) was sent to seventeen banks in the Des Moines area and to FMCC, CCC, GMAC, and to Rosenfeld Used Cars, Inc. Four banks responded, two of which provided data in response to items 1, 2, and 3. The data are as follows:

I. The Debtor in Default: A Perspective

A. *A Short History of Consumer Credit*

> The image of the sturdy, self-reliant, resourceful pioneer who always paid cash for his staples and his tools may be the one imparted by some accounts of early colonial life, but it is not entirely accurate.[8]

As pointed out by the *NCCF Report*, consumer credit has always been a feature of the American economy. Purchasers of household goods such as furniture were not really a different species than their modern day counterparts: they purchased goods on credit, "pledging," in a sense, their expected future return on crops or other fruits of their labor. This observation may be mildly surprising, but as noted by the *Report*, the "sturdy, self-reliant, resourceful pioneer" did not always pay cash for his staples and his tools—often as not he used credit.[9] It remains true, though, that the widespread use and importance of consumer credit is a relatively recent thing. Installment credit, other than real estate mortgages, rose from one billion dollars at the end of World War I to forty-eight billion in 1962.[10] The increase during the 1950's was particularly remarkable. Stated otherwise, per capita consumer credit in the United States reportedly rose from $99 per person in 1948

	Bank 1				Bank 2			
	1969	1970	1971	1972	1969	1970	1971	1972
1. Number of extensions of auto installment credit	503	528	614	533	1045	1066	1182	1165
2. Defaults	2	3	2	4	10	11	5	6
3. "Charged off"	1	1	0	2	10	11	5	6

Three of the responding institutions responded to item 4 indicating credit inquiries were made in 90%, 90%, and 50-60% of all cases. The responses to item 5 indicated that checks were made with the Credit Bureau of Des Moines, other lending institutions, or with the institutions own files on previous accounts.

Four institutions responded to item 6 and indicated the following as major reasons for default: (1) overextension of credit, (2) unforeseen expenses, e.g., medical, loss of employment, (3) marital problems, and (4) fraud in obtaining credit, i.e., not divulging all other debts. Compare discussion in text accompanying notes 47-49, *infra.*

FMCC, CCC, GMAC, and Rosenfeld Used Cars, Inc., did not respond to the questionnaire.

8. *NCCF Report, supra* note 4, at 5.

9. As a matter of fact, the *NBCCA Report, supra* note 5, at 1, points out that delayed payment was a feature of Babylonian commerce over 4,000 years ago.

10. This rapid rise merits graphic treatment:

year	installment credit (billions of dollars)
1920	3.2
1939	4.5
1950	14.7
1959	39.2
1962	48.2
1965	68.5

The figures are taken from the January 1967 Fed. Res. Bull. 132, and from Neth, *Repossession of Consumer Goods: Due Process for the Consumer: What's Due for the Creditor,* 24 Case West. Res. L. Rev. 7, 8 n.3 (1972).

to $556 per person in 1968.[11] By May of 1972, consumer credit outstanding in the United States was $112 billion,[12] still more than $500 for every man, woman and child in the country.

Automobile installment credit sales can be viewed as the catalyst for the great increase of consumer credit since the post-World War I era.[13] Even though our colonial ancestors purchased furniture, food, tools and other necessities on credit, it was not until the middle class purchased the automobile that installment buying became a "respectable" practice. With the arrival on the scene of the middle class installment purchaser, this aspect of the previously low-income-dominated consumer market place experienced tremendous growth in the 1920's, aided and abetted, of course, by the neverfailing ability of the automobile industry to spot potentially profitable markets. A survey by the Federal Reserve System in the mid-fifties disclosed that a median of 22% of the disposable income of all consumers was allocated to the purchase of new cars.[14] Census data also indicates that as of March, 1969, 38% of the $89.7 billion total for all outstanding retail installment credit—some $34 billion—was represented by automobile consumer paper.[15] Automobile installment credit, then, is the largest portion of consumer installment credit, the latter comprising about 80% of all consumer credit outstanding in the United States as of the end of 1970.[16]

In the view of the *NCCF*, the reasons for the increased use of consumer credit may be found "in that natural adaptation of consumer and business to changes in the ability and willingness of consumers to incur debt, as well as to a continued shift towards the ownership of assets."[17] The ability to incur debt results from increased personal income, so that consumers have more and more of what the Commission refers to as "discretionary income"—income left over after the payment of amounts required for food, clothing and shelter. Such discretionary income no doubt strongly affects credit decisions by consumers from the standpoint of affordable downpayments and monthly payments and possibly the decision to incur indebtedness as well. The trend to unemployment benefits, employer-provided health and accident insurance adds to the increasing family income as does the continuing trend toward the working woman. Increased ability to incur debt has also been accompanied by a

11. Enstrom, *Kill the Automobile Deficiency Judgment*, 56 A.B.A.J. 364, 366 (1970) [hereinafter referred to as Enstrom].

12. 58 Fed. Res. Bull. A56 (1972).

13. *NCCF Report, supra* note 4, at 5.

14. 4 Nat'l. Bureau of Econ. Research, Board of Governors of the Federal Reserve System, Consumer Installment Credit 87-88 (1957).

15. U.S. Bureau of the Census, Department of Commerce, Statistical Abstract of the United States 460 (chart 664) (1969).

16. *NCCF Report, supra* note 4, at 8. According to the *Report*, the total figure for consumer credit outstanding at the end of 1971 was 137.2 billion dollars. The *NBCCA Report* observes that consumers account for nearly 70% of total national income expenditures, and that "the level of consumer credit available to facilitate these purchases affects operation of the entire economy." *NBCCA Report, supra* note 5, at 3.

17. *NCCF Report, supra* note 4, at 5. *See* note 19, *infra*.

changing attitude toward credit. Although the Commission does point out that the image of the cash-paying pioneer is not entirely accurate,[18] it is not inaccurate. In any event, societal views toward credit, particularly those of the middle class, have changed over the years. As the population became more urbanized, as its age distribution moved downward, a traditional and more constant factor was emphasized—the young married consumers' heavy need for numerous products that is far in excess of their financial ability. Credit has been and is the answer. The increasing proportion of young persons in the general population perhaps also explains in part the greater acceptance of credit as a usable economic tool.

The credit industry, of course, did not fail to observe the profit potential of this increasing ability and willingness to incur debt. The numbers and selection of durable, but increasingly expensive consumer goods reflects that well enough.[19] Obviously, all the factors mentioned as underlying the rise in use of consumer credit are related. The Commission observes, for example, that the trend toward working women not only provides more family income but brings a demand for labor-saving devices, which once acquired, produce more family leisure time. But acquiring automatic washing machines, dryers, dishwashers, self-timing ovens, self-defrosting refrigerators as well as leisure time items such as boats and sporting goods of all types not only increases the trend of asset ownership—it requires credit.[20]

B. *The Psychology of Automobile Buying*

> Fascinated by a rising standard of living offered them on every hand on the installment plan, they [the working class] do not readily segregate themselves from the rest of the city. They want what Middletown wants, so long as it gives them their great symbol of advancement—an automobile. Car ownership stands to them for a large share of the "American dream;" they cling to it as they cling to self respect. . . .[21]

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18. *Id.*

19. In addition, the decade of the 1940's witnessed increasing acceptance by creditors of revolving charge accounts, while the 1950's brought the dawn of the age of consumer credit cards. Liberalized rates of charges on consumer credit loans and sales was an important factor as well. The *NBCCA Report* lists the following as among the many factors contributing to the growth of consumer credit: higher incomes, increased standard of living, increase in number and variety of consumer goods, increased acceptance of installment credit, decrease in required downpayments, increased leisure time, increased home ownership, changing age patterns in the population, and innovations such as credit cards. *See NBCCA Report*, *supra* note 5, at 3, 4.

20. *NCCF Report*, *supra* note 4, at 6, 7. The *Report* observes that the shift to "asset ownership" is one somewhat disturbing by-product of the accommodation between consumers and credit grantors. Increased home ownership with the accompanying "need" for the traditional line of household products and appliances accounts in part for the shift to asset ownership. But asset ownership "reflects a decision by consumers to substitute the use of consumer-owned capital goods for the use of commercially-owned capital goods. Thus the purchase of an automobile substituted, perhaps unfortunately, for daily fares on street cars and buses . . . ." *Id.* at 6.

21. ROBERT S. LYND & HELEN MERRILL LYND, MIDDLETOWN IN TRANSITION 26 (1937).

United States Department of Commerce statistics indicate that since about 1960 the proportion of Americans owning *two or more* automobiles[22] increased from about 16% to just under 30%.[23] Many factors account for the second-car market, including the movement of the population first to the urban center then to the suburban fringes, the breakdown of mass transit, and the working woman. Slightly over one-half of all automobiles are sold on credit,[24] and particularly in the instance of new or newer-used car purchases, it is the most important credit purchase of consumer goods one can make, in terms of initial price, credit expenses, and related expenses such as licensing, insurance, and maintenance. But the automobile, it so happens, is much more than simply a major credit purchase: it is an ego trip, a status symbol, a masculinity prop, a mode of transportation, of course, and, a toy. In many respects it is an outward manifestation of the inner self—or more precisely, of that inner self we would like to project.[25] In the study by David Caplovitz of low-income consumers,[26] discussed in detail hereinbelow,[27] the author in his concluding remarks observes:

> [C]onsumption in our society . . . is more than a matter of getting and having material conveniences. Equally important, Americans in all walks of life are trained to consume in order to win the respect of others and to maintain their self respect. These social pressures to consume are perhaps inevitable in a society characterized by a rising standard of living.[28]

This pressure exerted by the rising standard of living is compounded by certain features inherent in the system. Eli Chinoy for example, found in his study[29] of the aspirations of a group of automobile workers that as they were confronted with the inability of movement into the ranks of management, and "with their wants constantly stimulated by high powered advertising," they tended to shift their aspirations from the occupational sphere, to the consumption sphere, measuring and projecting their success in terms of what they were able to buy.[30] Perhaps with respect to no other consumer product is Chinoy's observation more true than with the automobile. Ralph Nader, one of the co-authors of *What to Do With Your Bad Car*,[31] puts this thought into focus:

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22. Surely the true Vanishing American is he who for no apparent disqualifying reason does not own or lease an automobile.

23. UNITED STATES DEPT. OF COMMERCE, CONSUMER BUYING INDICATORS (Series P—65, No. 40), May, 1972, p. 8.

24. U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 460 (Chart 565) (1969). The *NCCF Report* observes that commercial banks have assumed a dominant role in the installlment financing of automobiles, holding over 56% of the total outstanding at the end of 1970. *NCCF Report, supra* note 4, at 12.

25. ROSENBAUM, IS YOUR VW A SEX SYMBOL? (1972).

26. CAPLOVITZ, THE POOR PAY MORE (1963) [hereinafter cited and referred to as CAPLOVITZ].

27. *See* text accompanying notes 50-88, *infra*.

28. CAPLOVITZ, *supra* note 26, at 180.

29. Chinoy, *Aspirations of Automobile Workers*, AMERICAN JOURNAL OF SOCIOLOGY 57, 453-59 (1952).

30. *Id.*

31. NADER, DODGE & HOTCHKISS, WHAT TO DO WITH YOUR BAD CAR (1971).

"Buying a car is an easy thing. Before you go to the dealer, Detroit attempts to saturate you with images of the perfect car to match your character. The dealer tries to reinforce the image and brings forth a car not only as virile, or lush, or demure as you had imagined but even a little better, and costing only a little more."[32] No doubt everyone has experienced an automobile purchase situation, particularly that of a new car, in which the rational, well-thought out pre-negotiation price or monthly payment figure initially in mind underwent an expansive metamorphosis by the time the dotted line was filled in. The expansion usually comes from at least two directions: higher priced makes and/or models, and "optional" accessories.

Even against a background of all these pressures: societal, self-image reinforcement, and salesmanship; the fact remains that most consumers are willing and able to pay for their automobiles as well as other consumer debts.[33] What features, then, distinguish that minority of consumers who default on their obligations? Who are they, what factors contributed to their default, what are the consequences of the default, and could the default have been prevented? These questions and the issues related thereto comprise the major portion of the remainder of this article, together with an analysis of the role of credit information, the existing legal framework, and existing and proposed remedies.

C. *Who Defaults? A Sociological Overview*

> The plaintiff offered to show the financial condition of the defendant at or about the time the goods were sold to him, as bearing upon the improbabilities of giving time upon the purchase of the bill of goods in question, and the testimony was refused. We think it should have been allowed. Sales are not usually made to irresponsible parties on long time . . . .[34]

The introductory quote, now eighty-five years old, conveys the then-current judicial understanding of the circumstances under which credit was usually granted. It also conveys the thought that creditors routinely "screened" those whom they would favor by the extension of credit. Whether a similar approach is a part of today's consumer credit market is a relevant inquiry, the first step in the answering of which is the identification of the debtor in default.

The addresses of the 201 primary defendants[35] in the *D.M. Study* of deficiency judgment suits were taken from the court files[36] and plotted on a map of the City of Des Moines. As revealed by Exhibit M-A, 176 of the 201

32. *Id.* at 5, 6.
33. *NCCF Report, supra* note 4, at 13.
34. Julius King Optical Co. v. Treat, 40 N.W. 913 (Mich. 1888).
35. The existence of co-purchasers (co-signors) was not made a factor in the *DM Study*, since most instances of co-purchasers involved the spouse.
36. Usually taken from the automobile sales contract itself. Occasionally the address of a defendant was revealed by the Return of Service, but in either case, the address thus disclosed was checked against date-of-transaction information obtained from the appropriate issues of the Credit Guide (Bluebook) and the City Directory.

EXHIBIT M-A

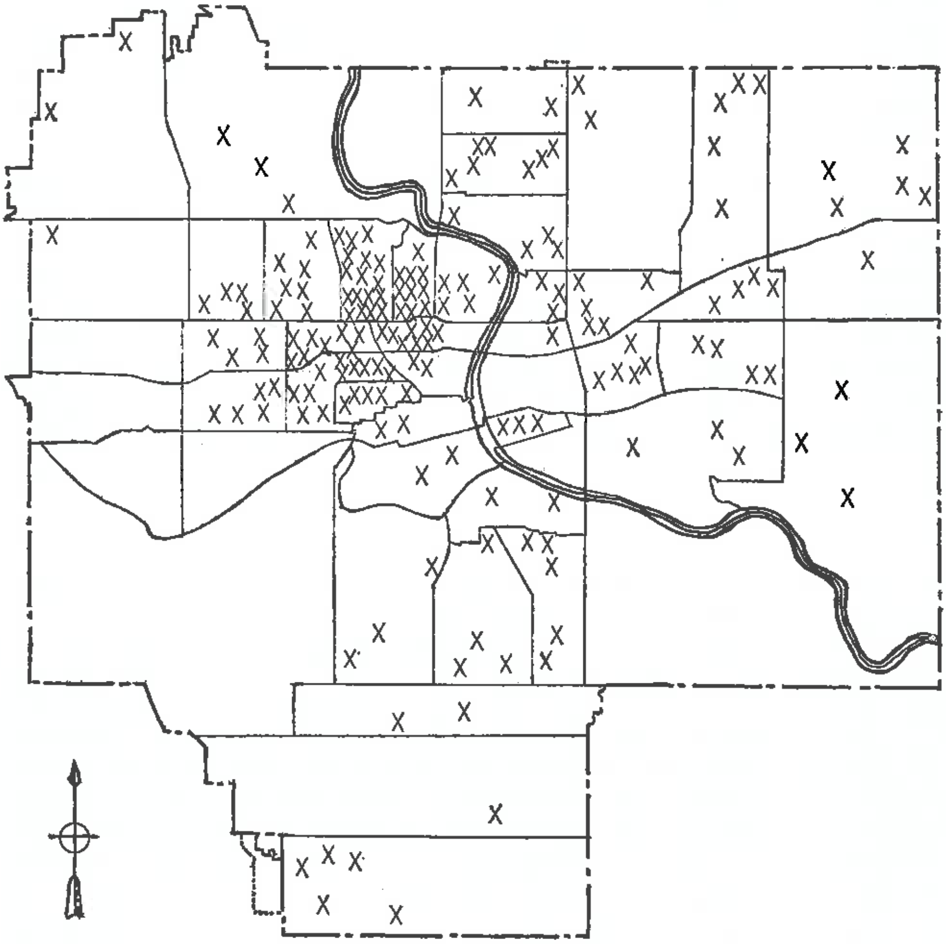
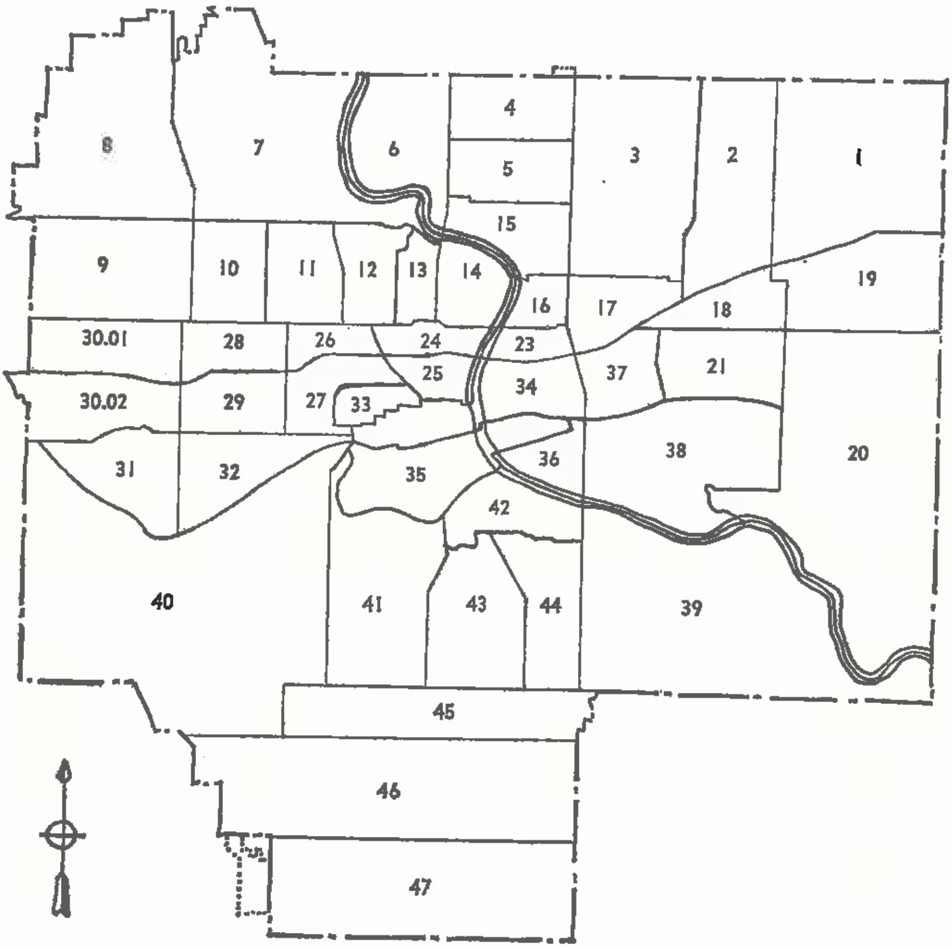


EXHIBIT M-B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addresses (88%) were located within the corporate limits of the city. When this map is compared to a map of census tracts in the city (Exhibit M-B), a clustering of cases appear to fall within a 19-tract area (tracts 5, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 24, 25, 26, 27, 28, 29, 33, and 37), which area accounts for 119, or 59% of the 201 cases.[37] While census data for this "default zone" as set forth in Table 1 reveals that the zone represents only 33% of the total Des Moines population, it is rather heavily populated by blacks. The State of Iowa is shown by census data to have a total population of 2,824,376, 1.2% of which is black.[38] Polk County had a population of 286,101, 4.1% of which is black, and the City of Des Moines had a population of 200,587, 5.7% of which was black (11,433).[39] Ninety-one percent of the black population of Des Moines live in the 19-tract "default zone."

The 19 tracts in this "default zone" then, represent 33% of the population of Des Moines, but 59% of the instances of default in the study, and are 16% black. Moreover, as shown in Table 1, the 7 tracts in which are found the heaviest concentration of defaults (5, 11, 12, 13, 24, 26, and 27) represent 14% of the population of the city but 35% of the instances of default. This 7-tract "heavy default zone" is 25% black and is the area of residence of 63% (7,237 of 11,433) of the blacks in Des Moines. The seven tracts containing the highest per tract number of blacks (11, 12, 13, 17, 24, 26, and 27) represent 68 of the 201 defaults or 34%, yet that 7-tract "black zone" represents only 14% of the total Des Moines population and is 35% black, with 77% of the total black population of Des Moines residing therein.

TABLE 1

The Default Zones—DM Study

area	population*	% of total population	# of blacks	% black	% of total black population	# of defaults	% of total defaults (201)
City wide	200,587	100%	11,433	5.7%	100%	176	88%
19-tract default zone	66,576	33%	10,402	15.6%	91%	119	59%
7-tract heavy default zone	28,521	14%	7,237	25.3%	63%	70	35%
7-tract black zone	25,583	13%	8,881	34.7%	77%	68	34%

* All population figures are taken from census tract data. See Appendix A-2, *infra*.

Table 2 matches these zones against unemployment rates and participation of males over 16 years of age in the civilian labor force, as revealed by census data.[40]

37. A complete tabulation of the 201 cases appears in the Appendix in Table A-1.
38. Census data appears in more detail in the Appendix in Table A-2.
39. *Id.*
40. *Id.*

TABLE 2

Zonal Unemployment Rate—DM Study

area	# civilians 16+ years	overall unemployment rate	black unemployment rate	% participation of males 16+ years in civilian labor force
City-wide (47 tracts)	86,802	3.0	6.2	77.0%
19-tract default zone	30,022	3.9	4.6*	72.8%
7-tract heavy default zone	11,938	5.5	8.5*	70.4%
7-tract black zone	10,522	5.3	8.6*	69.9%

* Average of per-tract census figures.

The seven tracts with the heaviest per tract unemployment rate (12, 13, 14, 18, 24, 27, and 34) accounted for 57 of the 201 cases, or 28%. Black unemployment in this "heavy overall unemployment" zone averages 6.6 per tract. But the seven tracts with the highest per tract *black* unemployment rates (10, 11, 13, 24, 37, 34, and 36) averaged 5.6 overall, and 12.2 black, unemployment rate per tract, while accounting for 44 of the 201 cases, or 22%. If tracts 12 and 26, with the eighth and ninth highest black unemployment rates are combined with this 7-tract "heavy black unemployment" zone, the resulting 9-tract heavy black unemployment zone accounts for 34% of the instances of default, as shown in Table 3.

TABLE 3

Unemployment Zoning—DM Study

area	population	% of total population	% black	% of total black population	overall unemployment rate*	black unemployment rate*	# of defaults	% of defaults
7-tract heavy overall unemployment zone	22,122	11%	30%	59%	6.1	6.6	57	28%
7-tract black heavy unemployment zone	24,351	12%	19%	40%	5.6	12.2	44	22%
9-tract black heavy unemployment zone	31,966	16%	23%	64%	5.5	11.1	69	34%

* average of per tract figures

Tables 4 and 5 relate census data regarding median family income for the tracts to the various zones of default and unemployment.

TABLE 4

Low Median Family Income Zone—DM Study

tract	median family income (1969)	% of total population in tract	% black	% of total black population	% of families below poverty level	# of defaults	% of defaults
13	5447	2.1%	27.9%	10.2%	26.1%	10	4.9%
25	5500	0.3%	19.4%	1.1%	11.9%	2	1.0%
36	5622	0.5%	16.2%	1.5%	18.1%	0	0.0%
33	5928	1.5%	2.6%	0.7%	23.3%	5	2.5%
27	5931	1.5%	51.9%	14.5%	19.1%	11	5.4%
14	6018	1.2%	7.6%	1.7%	23.5%	5	2.5%
38	6148	0.7%	18.6%	2.3%	20.1%	3	1.5%
34	6630	1.3%	6.8%	1.5%	8.1%	2	1.0%
24	6878	1.0%	54.2%	9.5%	18.1%	8	3.9%
12	7118	2.4%	46.1%	19.9%	19.2%	17	8.4%
totals	61220	12.5	251.3	62.5	187.5	63	31%
per tract average	6122	1.3%	25.1%	6.2%	18.7%	6.3	3.1%

TABLE 5

Zonal Income—DM Study

area	per tract median family income (1969)	population	% of total population	% black	% of total black population	# of defaults	% of defaults
City-wide	9,473*	200,587	100%	5.7%	100%	176	88%
19-tract default zone	7,750	66,576	33%	16.0%	91%	119	59%
7-tract heavy default zone	7,143	28,521	14%	25.0%	63%	70	35%
7-tract black zone	7,011	25,583	13%	35.0%	77%	68	34%
7-tract heavy unemployment zone	6,652	22,122	11%	30.0%	59%	57	28%
7-tract heavy black unemployment zone	7,160	24,351	12%	19.0%	40%	44	22%
9-tract heavy black unemployment zone	7,182	31,966	16%	23.0%	64%	69	34%
10-tract low income zone	6,122	25,317	13%	25.0%	62%	63	31%

* per tract, average.

Black unemployment seems to yield the highest correlation to default. Table 4, for example, reveals that tract 13 has the lowest median family income ($5447), contains 2.7% of the city's population, is 27.9% black, a 6.9 overall unemployment rate, a black unemployment rate of 11.5, and accounts for 10 defaults. Tracts 25 and 38, with similar income and population figures, account for 2 and 3 defaults, respectively, but have black unemployment rates of 0 and 4.6 respectively. Tract 17, not shown in Table 4, is 72% black, but has a black unemployment rate of only 2.1 and accounts for only 5 defaults.

The relationship between low-income, unemployment, and default is shown by the comparison set out in Table 6.

TABLE 6

Income, Black Unemployment, and Default—DM Study

tract	median family income	% black	black unemployment rate	overall unemployment	# of defaults		
*12	7,118	46.1%	7.3	(5.2)	17	"black" zone	
26	7,400	14.3%	7.4	(4.9)	8	"black" zone	
17	7,493	71.0%	2.1	(1.5)	5	"black" zone	
*27	5,931	51.9%	10.7	(8.5)	11	"black" zone	"heavy black unemploy-ment" zone
*24	6,878	54.2%	9.0	(5.3)	8	"black" zone	"heavy black unemploy-ment" zone
11	8,811	5.4%	12.2	(4.8)	9	"black" zone	"heavy black unemploy-ment" zone
*13	5,447	27.9%	11.5	(6.9)	10	"black" zone	"heavy black unemploy-ment" zone
*34	6,630	6.8%	7.7	(6.2)	2		"heavy black unemploy-ment" zone
36	5,622	16.2%	13.2	(4.4)	0		"heavy black unemploy-ment" zone
10	10,802	0.6%	21.4	(3.2)	4		"heavy black unemploy-ment" zone
*14	6,018	7.6%	0.0	(5.3)	5		
*18	8,544	6.5%	0.0	(5.4)	4		
total		309.4	102.5	61.6	83		
average		25.8	8.5	5.1	6.9		

* These seven tracts represent the "heavy overall unemployment" zone.

The 7-tract "heavy overall unemployment" zone accounts for 57 defaults, the "black" zone for 68 and the "heavy black unemployment" zone for 44. With the addition of tracts 12 and 26 to constitute the "9-tract heavy black unemployment" zone, that zone accounts for 69 of the defaults. The 10 tract "low income" zone, accounted for 63 of the defaults (Table 5), and from Table 6 it can be observed that the income figures bear no necessary relation to defaults (tracts 27 and 13 have 11 and 10 defaults, respectively, while 36 and 14 have 0 and 5 respectively). With the exception of tract 17, unemployment seems to be related to default, and with the separate exception of tracts 14 and 18, the relationship between default and *black* unemployment appears even greater.

The overall relationship of the variables is also shown in Table 7.

TABLE 7

Zonal Inter-Relationships—DM Study

zones	5	10	11	12	13	14	15	16	17	18	21	24	25	26	27	28	29	33	37
	Tracts in the "default zone"																		
black zone			X	X	X				X			X		X	X				
heavy unemployment zone				X	X	X				X		X			X				
heavy black unemployment zone		X	X		X							X			X				
low income zone				X	X	X						X	X		X				

The "constant" tracts are 13, 24, and 27. An analysis of these three tracts is set out in Table 8.

TABLE 8

Tracts 13, 24, 27—DM Study

tract	population	% of total population	% black	% of total black	overall unemployment rate	black unemployment	participation rate of males over 16 in civilian labor force	median family income (1969)	% families below poverty level	# defaults	% defaults
13	4,195	2.1	27.9	10.2	6.9	11.5	69.0	5,447	26.1	10	5.0
24	2,012	1.0	54.2	9.5	5.3	9.0	69.3	6,878	18.1	8	4.0
27	3,091	1.5	51.9	14.0	8.5	10.7	74.3	5,931	19.1	11	5.5
totals	9,298	4.6	134.0	33.7	20.7	31.2	212.6	18,256	63.3	29	14.5
average	3,099	1.5	44.6	11.2	6.9	10.4	70.9	6,085	21.1	9.7	4.8
city-wide	200,587	100	5.7	100	3.0	6.2	77.0*	9,473*	9.4*	176	88.0

* per tract average

These three tracts represent 4.6% of the total population, are about 45% black (11.2% of the black population residing therein), they have unemployment rates which approximately double the city-wide rate for overall, and black, unemployment respectively, with a black unemployment rate over three times as high as the overall city-wide rate. This 4.6% segment of the Des Moines population accounted for almost 15% of the 201 defaults. Median family income is markedly below the city-wide average, as is the percentage of participation in the labor force. The percentage of families below the poverty level is almost 2½ times the city-wide rate.

When this census data "overlay" map, representing the racial, economic, and inferentially the educational make-up of Des Moines is superimposed on Exhibit M-A, it is clear that the answer to the question "who defaults" is that it is predominantly those on the margin of or outside of the labor force, having low income and educational achievement, and disproportionately it is the black. A smaller part of the picture obviously includes those who though able to pay, refuse to do so because of disgruntlement ("lemon" owners), or because they lacked the intent to repay in the first place ("deadbeats"). These instances of default are not so clearly associated with low income, educational achievement, or racial background. Certainly no race, or income or educational level has a monopoly on "deadbeats" or "lemon" owners.[41] These default situations are probably inherent in the system and unpreventable as such.[42] Hopefully, that is not true with respect to the problems of the low-income purchaser.

While the middle class use of installment credit over the last fifty years has made it the "American" way of acquiring goods, low-income consumers have always depended on credit, traditionally for the purchase of necessities such as groceries and rent.[43] Advertising and other cultural pressures to consume, including a rising standard of living certainly reach the low-income family as well as the middle-income family. But consumption may in many ways have more significance for low-income familes than for those at higher income levels. Since many low-income families have little prospect or opportunity to improve their low social standing through occupational mobility and hence little opportunity to base their self-respect and the respect granted to them by others by virtue of occupational, educational, or other accomplishments, they are likely to react or compensate in the manner of Chinoy's auto workers[44]—by turning to consumption "as at least one sphere in which they can make some progress toward the American dream of success."[45]

Putting aside the obvious response that inability to pay is the major reason for default—which is akin to saying that heart failure is the major cause of all deaths—what accounts for the inability to pay? Was the purchase simply improvident, or was a Nova affordable but a Caprice purchased ("sold")? Are most of those who defaulted simply parasites on the system whose foibles make automobile and other consumer goods financing more expensive for those who do not default? The following section attempts to answer these questions.

D. *The "Why": Reasons For Default*

As the statistical portrait of the sample indicates, these consumers are for the most part products of a comparatively traditional culture. Their place of origin, their race and ethnicity, and their level

41. No doubt educational attainment would influence the "lemon" owner's actions. Those with greater educational background are more likely to understand, for example, the meaning in this context of "holder in due course" and deficiency judgments, and of the desirability of seeking legal assistance. Compare, however, the Caplovitz findings, discussed in text accompanying notes 50-88, *infra*.

42. Mr. Nader and his co-authors do offer, in WHAT TO DO WITH YOUR BAD CAR, *supra* note 31, an "action manual" for "lemon" owners.

43. CAPLOVITZ, *supra* note 26, at 1.

44. *See* note 29, *supra*.

45. CAPLOVITZ, *supra* note 26, at 13. Racial and ethnic prejudice at all levels no doubt aggravates the pressures to engage in "compensatory consumption."

> Apart from the unscrupulous practices of merchants, many of . . . [the] incidents [of default, delivery of inferior foods, etc.] show the ineffectiveness of these families as consumers. Some are gullible to an extraordinary degree, susceptible to the appeal of easy credit, ready to assume heavy installment debt provided the payments are small, and completely lacking in foresight and resources. When emergencies arise, such families become hopelessly trapped in debt.[65]

In more specific terms Caplovitz observed:

> They tend to lack the information and training needed to be effective consumers in a bureaucratic society. Partly because of their limited education and partly because . . . they are unfamiliar with urban culture, they are not apt . . . to engage in comparative shopping . . . [or] to know how to evaluate the advice of salesmen—practices necessary for some degree of sophistication in the realm of consumption.[66]

A significant related factor disclosed by the *Caplovitz* study is that many of the consumers in the sample had almost no idea of the complex set of legal conditions embodied in the contracts they signed.[67] Caplovitz took the view that the problem was not so much rooted in a failure of the legal structure to *establish* their rights as in the failure of the consumers to *understand* and to *exercise* their legal rights. One could conceivably express less than total agreement with Caplovitz on that point, finding some ammunition for disagreement with it in the changes in the *legal framework*, both legislatively and as administered by the courts in the ten years which have passed since *The Poor Pay More* was published.[68] On the other hand, the Caplovitz view finds support in the fact that the major Congressional renovation in the consumer credit field has been aimed at imparting credit information fairly and correctly.[69] Given the enactment of Federal Truth in Lending and in deference to the testimony supportive of the need for disclosure, however, Caplovitz was unquestionably correct when he concluded that the legal structure is based on a model of the "sophisticated" consumer, and not that of the "traditional" consumer which he found to be prevalent among low-income families.[70] Unfortunately, Truth-In-Lending, which may or may not benefit middle- and upper-income consumers, probably provides no real protection or assistance to the low-income consum-

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65. Caplovitz, *supra* note 26, at 165.
66. *Id.* at 14.
67. *Id.* at 155. *See also* Note, *Consumer Legislation and the Poor,* 76 Yale L.J. 745, 752-53 (1967).
68. Legislative inroads have been made in the area of home solicitation sales, referral sales, "pyramid" sales, consumer fraud statutes, rights of cancellation such as afforded under truth in lending, preservation of defenses and claims against holders in due course, and deceptive acts and practices legislation. Courts also have made inroads, most notably under UCC § 2-302 (discussed in text accompanying notes 262-98 *infra*), in the area of holder in due course, and in the area of procedural due process. *See* note 2, *supra.*
69. *See* the Consumer Credit Protection Act, 15 U.S.C. §§ 1601 *et seq.* (1970), in particular Titles I and VI (Truth in Lending, and the Fair Credit Reporting Act).
70. Caplovitz, *supra* note 26, at 188-89. *See also* Note, *Consumer Legislation and the Poor,* 76 Yale L.J. 745 (1967).

ers[71]—at least not those described by Caplovitz.[72] The legal framework *does* assume, for example, that the consumer understands the conditions to which he is agreeing when he signs the dotted line. Yet Caplovitz reports instance after instance wherein this assumption just didn't hold true for the consumers in his sample. Some had no understanding of the principles of a chattel mortgage. Some had no understanding of their obligation to pay interest on unpaid debts.[73] Another confusing legal area for them was the doctrine of holder in due course. The result of assignment of their contracts not only insulated the holders from claims and defense, but the merchant was often freed of his obligations to the consumer—not because the law gives him this insulation—but because these consumers simply misunderstood what had happened.[74]

The real test of consumer sophistication *viz-a-viz* legal rights was shown in a subsequent Caplovitz study of debtors in default in Chicago, New York and Detroit[75] to be a misunderstanding of the legal remedy of repossession. Surprisingly, repossession was not prevalent in non-automobile cases in the Caplovitz *Poor Pay More* study. His interviews with merchants disclosed that it was used only infrequently because of the usually worthless condition of the goods sold after a relatively short time.[76] But when repossession was used, a punitive aspect was normally present.[77] In the study of debtors in Detroit, New York and Chicago, Caplovitz's interviews disclosed that 54% of the 218 debtors who did experience repossession believed that they were thereafter *exonerated* from further obligation.[78] Breaking this phenomenon down by educational attainment, Caplovitz found that 49% of those who had *never* graduated from high school understood that repossession did not end their obligation, while only 45% of high school graduates understood this, and only 45% of the few who had attended college understood it.[79] Caplovitz characterized this finding as further documentation of the inequality in the creditor-debtor relationship, not only in terms of an inequality of power, but also of knowledge.[80] Income was significantly related to understanding repossession: the lower the debtor's income, the more likely he was to look upon repossession as absolving

71. Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 746-54 (1967).

72. The consumer prototype presented by Caplovitz would probably not be aided by the "disclose the cost of credit" approach of Truth in Lending, since the orientation of such consumers was not one of comparative shopping but rather one of monthly payments. *See* discussion in text accompanying notes 63-64, *supra*. *See also* Note, *The Impact of Truth in Lending on Automobile Financing—An Empirical Study*, 4 U.C.D.L. REV. 179 (1971).

73. CAPLOVITZ, *supra* note 26, at 188-89.

74. *Id.* at 189.

75. CAPLOVITZ, DEBTORS IN DEFAULT (Bureau of Applied Social Research, Columbia University, 1971) [hereinafter cited and referred to as DEBTORS IN DEFAULT].

76. CAPLOVITZ, *supra* note 26, at 21. Fairness, however, dictates mention of the fact that a substantial portion of such goods were probably best described as "shoddy" to begin with.

77. CAPLOVITZ, *supra* note 26, at 21.

78. DEBTORS IN DEFAULT, *supra* note 75, at 10-33.

79. *Id.* at 10-34.

80. *Id.* at 10-41.

him of any further obligation.[81] Sixty-seven percent of those with income under $4,000 thought repossession absolved them, 52% of those between $4,000 and $7,999 thought so, and 42% of those in the $8,000 and over category held that belief.[82] Among the poor, whites were found to be more likely than blacks to think that the repossession ended the debt, but among the more well-to-do, the reverse was true.[83] Although more whites than blacks in the *Debtors in Default* study had experienced repossession, Caplovitz felt that this was largely explained by the fact that whites tended to be in trouble more often because of automobile purchases.[84] Whites were on the whole somewhat more likely than blacks to know that having their *car* repossessed did not mean the end of their obligation. But with respect to purchases of furniture and appliances, blacks were found to more clearly understand the import of repossession than their white counterparts.[85] When automobile repossessions were isolated, once again income was found to be negatively related to an understanding of repossession: 63% of automobile purchasers with income under $4,000 thought repossession settled the debt, 51% in the $4,000-$7,999 range thought so, while only 38% of those in the $8,000 and up category thought so.[86]

Interviews with low-income area merchants in the *Poor Pay More* study led Caplovitz to conclude that they perceived their customers as unsophisticated shoppers, not "price and quality conscious," and not used to "shopping."[87] These findings give some support to Caplovitz's general conclusion that failure to maintain monthly payments does not always stem from an inability to pay—it may often result from a failure or refusal of a more knowledgeable and sophisticated merchant to live up to *his* obligations.[88] Withholding payments, however, makes little sense if the consumer has bargained away this right in a one-sided contract or if that contract is in the hands of a holder in due course of other third-party who is insulated from claims and defenses.

In its Report, the *NCCF* generally takes the view that credit is not necessarily used excessively, pointing out, for example, that creditors hesitate to grant credit if there is doubt concerning the ability of the consumer to repay and that those below the $5,000 level used installment credit much less fre-

81. *Id.* at 10-35.
82. *Id.*
83. Caplovitz presents these figures under the heading "belief that repossession ends debt:"

income	whites	blacks
under $4.000	77%	67%
4,000-7,999	54%	50%
8,000 and up	33%	46%

See Debtors in Default, *supra* note 75, at 10-35.
84. Debtors in Default, *supra* note 75, at 10-41.
85. *Id.* at 10-37.
86. *Id.* at 10-38.
87. Caplovitz, *supra* note 26, at 19. Two of every five consumers interviewed by Caplovitz said that they had at sometime been cheated by a merchant. *Id.* at 137. *See also* Note, *Consumer Legislation and the Poor*, 76 Yale L.J. 745, 749-52 (1967).
88. Caplovitz, *supra* note 26, at 157.

quently than those in the $7,500 to $15,000 ranges.[89] But the Commission's conclusions in this regard are admittedly drawn from an analysis of the consumer sector as a whole, the Commission recognizing that there may exist on the fringe of the consumer credit market suppliers of credit who encourage marginal borrowers who cannot obtain credit elsewhere to become over-extended—and often as not for the purpose of acquiring low quality goods at high prices.[90] The Commission observed that those who *were* overindebted were found to be the unmarried (especially those separated, divorced, and widowed), the poor, and those under 25 or over age 65.[91] Households *without* children—at both ends of the life cycle—were more likely to be overindebted than those with children. Debt troubles decreased the longer a household head had been married, but households headed by women were more likely to have debt troubles. Education was found to be inversely related to debt troubles (being a correlative of income). About 40% of single-person households and Negro households were, by Ryan and Maynes' definitions, in "deep trouble."[92] The 1970 *Survey of Consumer Finances*[93] not unsurprisingly disclosed that low-income families were more likely than others to get behind in their payments, although over 70% of those in the $3,000-$7,499 annual disposable family income range paid as scheduled, as opposed to a 10% portion in that range who got behind. Even 62% of those in the $3,000 and under range paid as scheduled.[94] The *Survey* also provides a good overall index of debt problems: 5.4% of all families in the *Survey* reported rescheduling debt payments during 1968.[95] Clearly, a small portion of the consuming public has overindebtedness problems. This is in essence an admission of what is an underlying theme of Caplovitz's studies:

> In the "normal" market, competition between merchants keeps price somewhat in line with quality, but not so in low-income areas: in order to protect themselves against the risks of their credit extensions, low quality goods are "marked-up."
>
> It is apparent that these merchants do not see themselves competing with stores outside the neighborhood.[96]

This aspect of the *Caplovitz* study may be less relevant in less urbanized areas,[97] and may also be less relevant in the generally competitive automobile

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89. *NCCF Report, supra* note 4, at 12. The *NCCF* concludes that low-income consumers either exercised restraint or were unable to obtain credit. *See* note 64, *supra.*

90. *NCCF Report, supra* note 4, at 17. The Commission's observations are not, of course, addressed to the installment purchasing of automobiles with its attendant psychology.

91. The *NCCF* cites Ryan & Maynes, *The Excessively Indebted: Who and Why,* J. CONS. AFF. (1968) at 107-26.

92. *Id.* at 117.

93. Katona, Mandell & Schmiedeskamp, *1970 Survey of Consumer Finances* (Ann Arbor, Michigan: Survey Research Center, University of Michigan, 1971).

94. *Id.* at 33.

95. *Id.*

96. CAPLOVITZ, *supra* note 4, at 18-19.

97. Low-income groups have the most need for and make the most use of installment credit. A FTC report on retail sales revealed that installment credit transactions accounted for 92.7% of the total sales of eighteen low-income-market retailers in

market. But there is unquestionably an imbalance of bargaining positions between automobile makers and sellers, on the one hand, and buyers, on the other. Use of standardized "take-or-leave-it" purchase agreements, for one thing, deprive the buyer of most of the rights and powers he would otherwise have.[98] In addition, Mr. Nader points out that almost any other product one purchases must work or it can be returned. Not so with an automobile. This imbalance in bargaining power is accentuated by the fact that almost all of the ways of checking on the mechanical condition of a car are simply not open to the consumer, and by the fact that even well-intentioned dealers often find it difficult at best to remedy automobile defects due to crowded repair shop schedules, mechanics who are inadequate both in numbers and skills, and by the fact that there are some defects which simply elude diagnosis, or are unrepairable and which are usually reflected by the disclaimer offered by mechanics to frustrated owners: "all (you-name-its) are that way."[99] Some understanding is thus imparted regarding a decision (often improvident, as it turns out) to withhold payment.[100]

Caplovitz also noted that while there are a number of consumer programs, most of them reflect the overall legal framework in that they are primarily oriented toward middle-class families, and not particularly towards low-income families even though the latter make up a very large portion of the total population.[101] Even this arguably correct assessment of the situation does not tell the whole story, for Caplovitz found that most families in his study were totally ignorant of the community agencies that can help them with their consumer problems—including Legal Aid Societies, Attorney General's Office, and the Small Claims Courts.[102] Consumer programs, agencies, and legislation fail to aid the low-income consumer because they often presuppose certain values, motivations and knowledge that are actually foreign to such people:

Washington, D. C., while such credit accounted for only 26.5% of the total sales of general-market retailers selling primarily to middle- and high-income groups. U.S. FEDERAL TRADE COMMISSION REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS 5, 7 (1968).

98. NADER, DODGE & HOTCHKISS, WHAT TO DO WITH YOUR BAD CAR 13 (1971).

99. *Id.* at 17.

100. Nader's point has not gone without notice: in a significant decision for automobile purchasers, the New Jersey Superior Court in *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968), conceding that "[f]or a majority of people the purchase of a new car is a major investment, rationalized by the peace of mind that flows from its dependability and safety. Once their faith is shaken, the vehicle loses not only real value in their eyes, but becomes an instrument whose integrity is substantially impaired and whose operation is fraught with apprehension," held that contract language purporting to exclude or modify the implied warranties and placed in fine print on the reverse side of an automobile sales contract was not "conspicuous" and therefore ineffective as a disclaimer of those warranties.

101. At the time of the Caplovitz study, it was estimated that about 34 million Americans live in families having a total income of under $4,000. CAPLOVITZ, *supra* note 26, at vii. *See also* Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967).

102. CAPLOVITZ, *supra* note 26, at 183-84; Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 753 (1967). In his "action manual" for purchasers of "lemons," Nader recommends that new car buyers should travel to a nearby small town dealership where the form contracts are often much less onerous than those used by large city dealerships and where customers can perhaps anticipate more personalized treatment. One wonders

> A low income consumer is profoundly different from a middle income consumer who awoke one day ill-housed, ill-clothed, ill-fed and ill-informed. Underlying his problems and essential to any discussion of remedies is a crucial lack of motivation. Many of the poor who do have a conscious desire to get more goods and services for their money have failed so often in attempting to do so that they no longer regard the attempt as worthwhile. For anyone living in poverty an effort to change his condition involves a recognition that the condition *can* be changed, and the acceptance of at least partial responsibility inasmuch as those efforts have failed or met with only limited success. Undoubtedly many low income consumers pass through several stages as their exploitation continues; their attitude degenerates from frustration to bewilderment to resignation to an abandonment of responsibility.[103]

The portrait of the typical low income consumer is thus completed: he "is not a hardened penny pincher employing all his skill and ingenuity to stretch his meager income as far as he can. He is an increasingly frustrated and embittered man, with $10,000 desires, $5,000 essential needs, and $2,000 income, alternately groping for a standard of living he cannot possibly afford and resignedly paying exorbitant prices for his daily essentials."[104] Caplovitz concluded as to the families in the *Poor Pay More* study that "society now virtually presents the very poor risks with twin options: of foregoing major purchases or of being exploited."[105]

Any analysis of the Caplovitz proposition must be made with the portrait of the defaulting consumer presented in this section in mind. But a conclusion at this point is premature, for contrary to the understanding of the majority of the debtors in Caplovitz's *Debtors in Default* study, the exploitation—or misfortune depending on the viewpoint—continues after default. To many, the post-default consequences are by far the more harsh.

II. The Consequences of Default: The Deficiency Judgment

A. *The Debtor in Default and The Legal System*

> Plaintiff's representative . . . determined that said Buick should be repossessed. On the morning of March 19, 1969, [he] contacted defendant's wife and so advised her. [He] had sets of keys made for the Buick and on the afternoon of March 19th went to defendant's residence . . . and took possession of said Buick automobile, driving the Buick to plaintiff's parking lot . . . . The personal property in the Buick subsequently was returned to defendant's residence.[106]

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what relevance this rather sage bit of advice has for low-income consumers, and how practical it would be for them in any event.

103. Note, *Consumer Legislation and the Poor*, 76 Yale L.J. 745, 753-54 (1967); and *see* Comment, 114 U. Pa. L. Rev. 395 (1966).

104. *Id.* at 754.

105. Caplovitz, *supra* note 26, at 180.

106. General Motors Acceptance Corp. v. Wilson, No. 93059 (Polk County Dist. Court, Iowa, December 11, 1969).

Several studies have recently been conducted with a focus on the automobile default—repossession—first-resale—second-resale syndrome. The best known of these is the *Shuchman Study*,[107] the results of which are matched quite closely by three other studies: the *Washington D.C. Study*,[108] the *San Diego Study*,[109] and the *Santa Clara Study*.[110] In addition, David Caplovitz's second major study, *Debtors in Default*[111] will be relevant in the analysis of the post-default area. The results of the *D.M. Study* will be contrasted with those of the other studies whenever appropriate.

The average defaulting signer of a contract for the purchase of a new car in the *D.M. Study* of 201 default cases had agreed to the following terms:[112] a $3551 price tag, a cash downpayment of $273, trade-in allowance of $301, a finance charge of $605, credit insurance charges of $130, and a "total of payments" of $3788, payable over a period of thirty-six months at the rate of $105 per month. Upon subsequent default in payment, the car was repossessed and resold and suit brought for a deficiency balance of $951. The average defaulting signer of a contract for the purchase of a used car[113] fared even worse: a price of $1911, cash downpayment of $195, trade-in allowance of $124, finance charges of $367, insurance charges of $68, for a "total of payments" of $2042, payable over a period of twenty-six months at the rate of $75 per month. Upon default, the average deficiency balance which remained for these used car buyers after repossession and resale was $709. Those defaulting buyers who had signed a promissory note[114] for the purchase of the vehicle rather than signing a retail automobile installment contract, agreed to an average amount payable (total of payments) of $1812, over a period of twenty-three months at the rate of $71 per month, and were sued for a deficiency judgment of $559. Viewing the entire 201 cases in the study, the average figures are as shown in Table 9.

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107. Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969) [hereinafter referred to and cited as the Shuchman Study]. A study of eighty-three litigated cases involving defaulted automobile purchases was made, emphasizing the differences between the first (wholesale) resale of the repossessed vehicle in each case, and the second (retail) resale of the vehicle, with attention to the "Book" value of each individual vehicle at the time of each sale.

108. Note, *Business As Usual: An Empirical Study of Automobile Deficiency Judgment Suits In The District of Columbia*, 3 CONN. L. REV. 511 (1971) [hereinafter referred to and cited as DC Study]. Modeled on the Shuchman study, this study involved 106 cases of automobile repossessions in Washington, D.C.

109. Enstrom, 56 A.B.A.J. 364 (1970) [hereinafter referred to and cited as the San Diego Study]. The study was conducted by the Legal Aid Society of San Diego.

110. A study conducted by the Legal Aid Society in Santa Clara. An unpublished report resides in the Stanford Law School Legal Aid Society Library. *See* Note, *California's Automobile Deficiency Judgment Problem*, 4 U.C.D.L. REV. 91, 99 n.68 (1971) [hereinafter referred to and cited as the Santa Clara Study].

111. *See* note 75 *supra*.

112. The figures are rounded to nearest dollar. *See* Table A-1 in the Appendix for figures on each of the 201 cases in the study.

113. New car contracts cases comprise 55 of the 201 cases. Used car contracts were involved in 88 of the cases.

114. Promissory notes were involved in 58 of the 201 cases.

TABLE 9

Average Terms of
Automobile Contracts—DM Study

terms	new car sales contracts (55)	used car sales contracts (88)	new and used car sales contract cases-combined (143)	promissory note cases (58)	# total cases (201)
Price	$3551	1911	2542	——*	2542 (143)
Cash downpayment	$ 273	263	266	——*	266 (143)
Average downpayment of those who paid cash	$ 384 (39)	340 (68)	356	——*	356 (107)
Trade-in	$ 301	124	192	——*	192 (143)
Average of those who made trade-in	$ 436 (38)	302 (36)	371	——*	371 (74)
Total downpayment	$ 573	387	458	——*	458 (143)
Finance Charges	$ 605	367	458	——*	458 (143)
Credit Insurances Charges	$ 130	68	92	——*	92 (143)
Total of Payments	$3788	2043	2714	1812	2453 (201)
Payment Schedule	35.9	26.3 (87)	30.0 (142)	23.2 (56)	28.1 (198)
Monthly payments	$ 105	75 (87)	87 (142)	71 (56)	82 (198)
Deficiency	$ 951	709 (85)	804 (140)	559	733 (198)

* Information not available in files

The *Shuchman Study* revealed that the average time between initial sale and repossession was 356 days, the first resale occurring about 32 days after repossession.[115] Of the 87 automobile deficiency judgment cases forming the basis of the *Shuchman Study*, 74, or about 85% resulted in default judgment for lack of an appearance.[116] In the *San Diego Study* of 137 automobile deficiency judgment cases, 52, or about 38% resulted in default judgments of record.[117] When the entered default judgments are combined with 17 "confessed" and 7 "stipulated" judgments entered against defendants,[118] the "non-contested" cases become 76 out of 137, or about 56%. Finally, it must be mentioned that 33 of the 137 suits in the *San Diego Study* were "not settled" at the time of the study, and therefore the non-contested disposition ratio of the known disposition cases is 76 out of 104, or 73%. Caplovitz's tri-city *Debtors in Default* study of 1023 consumer cases filed in Chicago, Detroit and New York City, revealed that 91% resulted in default judgments.[119] Part of the difference between the 73% "non-contested" figure in the *San Diego Study* and the 91% figure in Caplovitz's tri-city study may be found in the fact that consumer-defendants are more likely to contest the larger deficiencies

115. Shuchman Study, *supra* note 107, at 28. But the first resale usually occurred within the first few days following the time after which the car could lawfully be sold.
116. Shuchman Study, *supra* note 107, at 36.
117. San Diego Study, *supra* note 109, at 365.
118. *Id.*
119. DEBTORS IN DEFAULT, *supra* note 75, at 11-66.

which usually result in automobile repossession cases than those which result in cases involving defaulted contracts for the purchase of furniture, appliances, or other consumer goods. Caplovitz's findings support this view, but also suggest another possible explanation as well:

> It has often been claimed that courts have been co-opted by creditors and serve merely as their collection agencies. Our examination of the legal process in consumer actions in three of the largest cities of America shows that there is much justification to this accusation.*** Whereas 84% of the Detroit debtors claimed they were notified of the legal action against them, only 54 per cent of New York debtors made this claim.[120]

The Detroit response of 84% is probably more nearly relevant to the Iowa situation, but in any event 117 of the 201 suits in the *D.M. Study* (62%) resulted in default judgments (See Table 10). Though a few judgments were entered subsequent to an appearance—as well as a few dismissals by plaintiffs and a few confessed or stipulated judgments—judgment by default for want of an appearance was by far the normal disposition of the 201 cases.

TABLE 10

Disposition of Cases (201)—DM Study

	default judgment entered (no appearance)	stipulated judgment (no appearance)	dismissed without appearance	dismissed after appearance	judgment entered after appearance	appearance filed but outcome undetermined ("pending")	undetermined ("pending")*
# of cases	117	3	3	7	8	5	58
% of total	58.2	1.5	1.5	3.5	4.0	2.5	28.8%

* no appearance—probably no personal jurisdiction obtained.

Similar to other studies discussed above, appearances were filed in only 20 (9.9%) of the 201 cases. If the 58 "undetermined" cases filed are assumed to involve lack of personal jurisdiction, and if the 3 cases dismissed without appearance are assumed to involve either payment, bankruptcy or other similar non-contesting circumstances, the "contested" ratio is only 20 of 140 or 14.2%.

Tables 11 and 12 show the relationship between amount involved and the decision to contest the deficiency judgment suit.

120. *Id.* at 11-74.

TABLE 11

Relation Between Amount Involved and Decision to Contest Suit—DM Study

	average amount involved (deficiency sought)	number of cases	defense raised
Contested cases	$839	20	11
Non-contested cases (default judgment)	$508*	117	—
Other (dismissed without appearance; stipulated judgment)	$828	6	—
Undetermined	$664**	58	—

* based on 115 discernible amounts

** based on 57 discernible amounts

TABLE 12

Amount Involved in Contested Cases—DM Study

amount involved (deficiency sought)	# of suits filed in range	# appearances filed	%
$100 or less	2	0	0.0
100 - 199	17	0	0.0
200 - 499	58	5	8.6
500 - 999	84	8	9.5
1000 - 1499	26	5	19.2
1500 - 1999	7	2	28.6
2000 - 2499	2	0	0.0
2500 - over	3	0	0.0

Lack of personal jurisdiction, which probably accounts for the majority of the 58 "undetermined" cases, of course qualifies the reliability of the total number of appearances shown in Tables 11 and 12, but assuming that the inability of the plaintiff and the process-server to serve notice knows no money limitation, the conclusions to be drawn from the figures and percentages shown in Tables 11 and 12 would be unaffected.

The other studies revealed quite similar results. Shuchman found that in only 1 of 150 total automobile default judgment cases surveyed did the consumer retain counsel.[121] Debtors in the *D.C. Study* obtained an attorney in only 8 of 284 cases surveyed, or about 5%. In the remaining 276 cases, judgments were obtained by default.[122] On a broader basis, an *NCCF* survey disclosed that in over 60% of *all* cases, the consumer failed to appear and judgment was entered by default.[123] Caplovitz found a correlation between retaining counsel and both income and amount involved: 16% of the 334 debtors in the $4000 and under income range obtained a lawyer; 23% of 659 debtors in the $4000-7999 range did so, while 26% of the 268 debtors in the $8000 and over range obtained a lawyer;[124] in terms of amount involved, 10% of 156

121. Shuchman Study, *supra* note 107, at 36.
122. D.C. Study, *supra* note 108, at 522.
123. *NCCF Report*, *supra* note 4, at 30.
124. Debtors in Default, *supra* note 75, at 11-70.

debtors involved in a claim of $100 or less obtained a lawyer and 11% of 251 involved in a claim of $100-199 did so. When the claim reached the $200-499 range 21% of 386 debtors obtained counsel, while 28% of 280 did so with respect to claims falling in the $500-999 range and 36% of 200 debtors obtained a lawyer concerning claims of $1000 or more.[125] Caplovitz summarizes these statistics by observing that of the one in five debtors who turned to lawyers for help, the amount involved had an impact *regardless* of whether the debtor believed he was "in the right" or not. Even those who were ready to admit their fault were still much more apt to seek legal assistance when the stakes were high.[126] At the same time, debtors in the tri-city study were more likely to see a lawyer when they believed they were in the right. But even among those who so believed, 46% of those who were sued for amounts in excess of $1000 went without legal assistance.[127] The decision to seek legal help —made by only about one in every five debtors in the Debtors in Default Study and one in every seven debtors in the *D.M. Study*—was related, then to their income level, and to their belief that payment had been withheld for a good reason, but it was even more related to the amount of money at stake.[128] This finding is clearly reflective of the fact that it often costs more to hire a lawyer than is warranted in prudence by the amount in dispute. Thus says Caplovitz, "many consumers grimly accept losses of moderate sums, for the system does not now provide them with any recourse."[129] Based on these data Caplovitz concludes that such represent a failure of the function of both bench and bar, and he issues this challenge: No one can seriously claim that the judicial process is in any real sense involved in these disputes. Rather it merely sanctions the creditor's claim over the debtor, giving legal authority to what might well be serious miscarriages of justice."[130] While it may well be true—as found by the *D.C. Study*—that the presence of a lawyer usually means dismissal of the action or a judgment or other disposition more favorable to the consumer than the amount sought,[131] there are a couple of reasons why the "shoe" of obvious conclusions from the Caplovitz and D.M. Studies fits the legal system rather than the legal profession. In the first place, the amounts involved do present a problem, for even if hourly rates are adjusted downward so as to more accurately reflect ability to pay, claims of $300-1000 cannot usually be carried to trial profitably from the client's viewpoint, and it is of course imperative that the lawyer's advice so points out. This is a matter well-understood by lawyers and probably needs no additional proof, but as shown in Table 13, the four cases in the *D.M. Study* in which "Certificates of Readiness for Trial" were filed, the *plaintiff* appears to have called off the hunt in two of them. In the

125. *Id.* at 11-71.
126. *Id.* at 11-72.
127. *Id.* (Table 11.28).
128. *Id.* at 11-71.
129. *Id.* at 11-74.
130. *Id.* at 11-75.
131. D.C. Study, *supra* note 108, at 522 n.60. One could add "satisfactory compromise" to the list of retention of counsel consequences.

second place, lawyers are not a cure-all.[132] Given a legal system which sanctions the holder in due course doctrine with respect to consumer paper, "agreements" not to assert claims and defenses, and one-sided contracts resulting from an imbalance in bargaining power, the lawyer's role is too often reduced to that of a mere functionary—hardly an incentive for either lawyer or client in these cases. Many low-income consumers in default are not, then, "having their day in court," in the sense of having a trial or having their case heard before a judge. The *San Diego Study* of 137 deficiency cases revealed, for instance, one that went to trial;[133] and only 2 of 1023 cases in the Caplovitz *Debtors in Default* study went to trial.[134] Two of eighty-seven defendants in the *Shuchman Study* interposed a defense.[135] Though only one of the contested cases in the *D.M. Study* actually went to trial (Table 13), trial was set in one other and defenses were raised in 12 of the 20 contested cases. However, the appearance of counsel in these twenty cases can be categorized as having had a "probably favorable" effect for 13 of the defendants in terms of cases dismissed or left pending. Presence of lawyers in the other 7 cases did not prevent the entry of a judgment.

TABLE 13

Outcome of Contested Cases—DM Study

Stage 1			Stage 2					Stage 3			Stage 4					
Entry Number	Amount Involved	Dismissed After Appearance	Judgment After Appearance	Answer Filed	Dismissal After Answer	Defense Raised	Judgment After Answer	Certificate of Readiness for Trial Filed	Judgment After Certificate Filed	Dismissal After Certificate Filed	Trial Set	Dismissal Prior to Trial	Judgment Prior to Trial	Judgment For Plaintiff at Trial	Judgment For Defendant at Trial	Status Undetermined ("pending")
10A	$ 402			X		X		X		X						
32A	221	X														
35A	329	X														
41A	426	X														
44A	205			X	X	X										
86A	842			X		X	X									
10B	1127			X		X										X
15B	1331			X		X[1]										X

132. *See* White, *Representing The Low Income Consumer In Repossessions, Resales and Deficiency Judgment Cases,* 64 Nw. U.L. Rev. 808 (1970). *See also* Table 13 *infra.*
133. San Diego Study, *supra* note 109, at 366.
134. Debtors in Default, *supra* note 75, at 11-60-75.
135. Schuchman Study, *supra* note 107, at 36.

	27B	1504		X												X
	33B	677		X		X		X		X						
	39B	549		X		X[1]										X[4]
	50B	869		X			X									
	52B	593		X		X		X			X			X		
	54B	1080		X		X										X
	21C	818		X				X			X		X[3]			
	28C	1480		X			X									
	34C	655		X	X	X										
	42C	583		X		X	X[2]									
	45C	1887		X			X									
	55C	1210		X		X[1]										X
totals	20	$16,788	3	17	2	12	5	3	0	2	1	0	1	1	0	6
		$ 839	15.7 %	85 %	12 %	70 %	29 %	18 %	0 %	12.8 %	6.8 %	0 %	6 %	0 %	0 %	35 %

1. Bankruptcy
2. Counterclaim raised
3. Defendant failed to appear at trial
4. Judgment entered against co-signer

B. *The Deficiency Judgment in Focus*

The sequence of events is familiar: default, followed in short order by repossession, resale, and suit for the remaining balance. But an automobile purchased in the *retail* market for a retail price is usually re-sold after repossession in the *wholesale* market for a wholesale price. And, since many defaults and repossessions occur shortly after purchase—and before much of the debt has been repaid, but after the goods have changed from "new" to "used", or have become another model-year older—the difference in prices between the wholesale and the retail market can be great.[136] The *Shuchman Study* revealed that the price obtained in the *first* resale averaged only 51% of *Redbook*[137] retail price on the date of repossession, and only 71% of *Redbook wholesale* price on that date (Table 14).[138] Sellers and financers, then, did not do well in terms of the wholesale market. And, even if resales at full *Redbook wholesale* is all that one demands at the first resale, 77% of the repossessor's total claim in the *Shuchman Study* would have been the result—as compared to the 51% of net claim actually produced by the proceeds of the first (wholesale) resale (Table 15).[139]

Shuchman found that the *second* resale, usually taking place no more than 3-5 months after repossession, yielded prices which averaged 92% of *Redbook* retail on the date of the *second* sale—versus first (wholesale) resale prices averaging 51% of *Redbook* retail and 71% of *Redbook* wholesale (Table 16).[140] The effect on the consumer is seen in the fact that *Redbook* retail value on the date of repossession was 108% of the average claim in the *Shuchman Study*, and

136. *NCCF Report*, *supra* note 4, at 28.
137. *Redbook* is published eight times a year by the National Automotive Publishers. Geared to geographical areas of the country, *Redbook* lists by model and year the retail, wholesale and the finance value prices for all automobiles.
138. Shuchman Study, *supra* note 107, at 31.
139. *Id.* at 32.
140. *Id.* at 33.

it was still 97% of the average claim by the date of the second resale![141] In terms of actual prices received at the *second* resale, those averaged 86% of the creditor's claim, as opposed to a 51% figure received at the date of the first resale—a difference of 35% of the claim.[142] Shuchman concluded, therefore, that the difference between the proceeds of the *first* resale and the proceeds of the *second* resale (the first on the retail market) would have yielded *full satisfaction* on the subsequent deficiency judgment is nearly *one-half* the cases studied, while 108% of the repossessor's net claim would have been yielded by a first resale at *Redbook* retail.[143] In the *D.M. Study*, the average deficiency sought in 201 cases ($733) was 30% of the average total of payments ($2453), and 29% of the average price ($2542), indicating that first resales after repossession in these cases tend to fit the general stance presented in the *Shuchman Study*. Shuchman's work also tends to put a dent in one common explanation for low resale prices—the condition of the repossessed car. Shuchman surveyed nearly 150 cars, only two of which were "junked" after repossession—and concluded that in general the low resale prices found in his study were not related to the condition of the cars, since badly damaged cars were not usually repossessed, and if they were, reimbursement for any loss usually came from a policy of collision insurance required by the terms of the retail installment sales contract.[144]

The *D.C. Study*, conducted to test the validity of the *Shuchman Study* in light of the debate which followed Shuchman's conclusions,[145] covered 106 automobile deficiency suits in the D.C. courts.[146] The *D.C. Study* clearly verifies the *Shuchman Study*: first resales for the 106 cases averaged 81% of NADA[147] wholesale, and 62% of NADA retail, and only 65% of the balance due on the debt.[148] Similar to Shuchman's results, the *D.C. Study* revealed that had NADA wholesale prices been realized at the first (wholesale) resale, the average creditor's claim of $1528 would have been 81% satisfied, while 108% of that average claim would have been satisfied had NADA *retail* been realized at the first resale.[149] Again similar to the Shuchman results, the second resale yielded 110% of NADA retail, versus 62% of NADA retail at first resale, and

141. *Id.*
142. *Id.*
143. *Id.* at 32.
144. *Id.* at 31.
145. D.C. Study, *supra* note 108, at 511-12 n.6.
146. The suits and the sales after repossession covered 34 dealers, 9 finance companies, and 5 banks in the D.C. area. Two hundred and eighty-four deficiency judgment suits were studied, but only 106 cars were traceable through the second resale. D.C. Study, *supra* note 108, at 513 n.8.
147. Similar to *Redbook*, NADA automobile values are published monthly by the National Automobile Dealers Association. NADA guidebooks provide average retail values and wholesale values for all makes of cars on the market. Wholesale values are primarily based on reports of prices obtained in intra-dealer sales; retail values are based exclusively on dealer reports of retail sales. The publication is broken down and the reports compiled on the basis of geographic regions. *See* D.C. Study, *supra* note 108, at 516 n.26.
148. D.C. Study, *supra* note 108, at 518.
149. *Id.* at 519.

81% of NADA wholesale.[150] Had the debtors in the *D.C. Study* been credited with the proceeds of the second resales, instead of the first, 64% of the deficiency judgment suits could not have been brought—indeed, a surplus of 13% would have been realized in those cases.[151] Translated into dollars, these percentages mean that the average debtor would have owed $236 less if credited only with NADA wholesale price, and $677 less if credited with the proceeds of the second resale.[152]

TABLE 14

Efficiency of First ("Wholesale") Resale (Price vs "book" value)

		% of retail Redbook or NADA	% of wholesale Redbook or NADA
Shuchman (Redbook)	median	54%	75%
	average	51%	71%
D.C. Study (NADA)	median	60%	82%
	average	62%	81%

TABLE 15

Satisfaction of Creditor's Claim

		First resale vs claim	Wholesale "book" value at first resale vs claim	Retail "book" value at first resale vs claim
Shuchman (Redbook)	median	52%	73%	100%
	average	51%	77%	108%
D.C. Study (NADA)	median	65%	81%	108%
	average	65%	81%	105%

TABLE 16

Efficiency of Second ("Retail") Resale

		% of retail book value obtained by 2d resale	% of claim 2d resale would have satisfied	% of claim vs retail "book"
Shuchman (Redbook)	median	100%	87%	94%
	average	92%	86%	97%
D.C. Study (NADA)	median	113%	113%	103%
	average	110%	110%	99%

150. *Id.*
151. *Id.* at 520-21.
152. *Id.* at 521. The Santa Clara Study found that the first resale price averaged only 73% of *Redbook* on the day of repossession.

Consideration of section 2-302 aside, UCC guidelines do sanction the "two-step" or wholesale auction sales,[153] since a foreclosure sale is not considered as lacking in commercial reasonableness merely because a better price could have been obtained at a sale at a different time or in a different method from that selected by the secured party, even though, as pointed out in the *NCCF Report*, what might be considered "commercially reasonable" as between a commercial creditor and a commercial debtor might not be "reasonable" for a consumer debtor.[154] The Commission admits that by approving the wholesale auction sale the UCC "virtually guarantees" that a defaulting debtor will be subject to a deficiency.[155] Thus the *NCCF Report* recognizes and confirms the *Shuchman Study*. But the Report also states: "It seems illogical to contend . . . that creditors gear their operations to repossess and then get the 'benefit' of the deficiency judgment. An *NCCF Study* indicates that except for a few 'sharp' dealers this is not the case."[156] This is another way of asking a very pertinent question: do deficiency judgment cases represent a loss for the repossessor, or does the wholesale action resale-deficiency judgment somehow enable the repossessor to break even? Some of the studies in this field would not necessarily support the Commission viewpoint. Shuchman found that in more than one-half of the deficiency judgment cases the secured party or his assignee appeared to recover his "paper" loss by wage garnishment or other execution process.[157] The *San Diego Study* apparently revealed a rather high rate of recovery of deficiency judgments.[158] To borrow one writer's summary of the position of the various parties to the original sale following the first resale-second resale occurrences:

> [T]he credit grantor has realized his *entire profit* on the original sale of the car. He has also gained the favor of the car dealer purchasing on resale, who, by being able to buy the car cheaply, and thereby to make a handsome profit on it, will in the future, undoubtedly repay him in kind. The buyer . . . on the other hand, has gained nothing. Not only has he paid out [downpayment and monthly payments ($1300 in the *San Diego Study*)] for the mere use of the car for ten months, having been deprived of its ownership now, but he also must still pay [a deficiency judgment].[159]

That writer also concludes that "through mutual backscratching, many secured automobile creditors *are* reaping extra profits from defaulting consumers,"[160] adding that the desire to maintain such a "plush" position has, in turn caused

153. UCC §§ 9-503, 9-507.
154. The *NCCF* feels, though, that the latitude which the UCC allows the secured party in conducting foreclosure sales is excessive in consumer transactions. *NCCF Report, supra* note 4, at 28.
155. *NCCF Report, supra* note 4, at 28.
156. *Id.*
157. Shuchman Study, *supra* note 107, at 38.
158. San Diego Study, *supra* note 109, at 366.
159. Note, *California's Automobile Deficiency Judgment Problem*, 4 U.C.D.L. Rev. 91, 101 (1971).
160. *Id.* at 103.

these creditors to rely on a default-oriented business:[161]

> The first manifestation of this reliance is the overextension of credit. Because they want to sell as many automobiles as possible in an inflationary, tight-monied, and therefore extra competitive market, and because they know they can always repossess and sue for a deficiency, automobile financiers are extending easy credit to poor credit risks. These buyers are lured into deals by the popular gimmicks of low or no downpayments, no credit checks, and long term credit financing.[162]

Whether the creditors being described in these terms are those which the *NCCF Report* described as "a few 'sharp' dealers" is not clear, though the Commission's admission that its conclusions will not necessarily fit a "marginal" or "fringe" market may well apply to the "luring of poor credit risks into deals by gimmicks of low or no downpayment, no credit checks and long-term financing" described by the *San Diego Study* commentator.[163] That this may be the case is also demonstrated by the contrasting conclusion of the two regarding overextension of credit: while the Commission's general conclusion that credit is not used excessively in the United States expressly carves out therefrom the fringe or marginal market situation,[164] the *San Diego Study* commentator concludes that the study "clearly substantiates the claim that many vehicles are being sold at higher prices and with much more extension of credit than warranted and that this is demonstrated first by the statistical relation between the low downpayment with respect to the total purchase price, and second by the high cost of financing with relation to the purchase price."[165]

Complementing the ability to collect on a deficiency judgment are several satellite factors which tend to make the repossession-wholesale (auction) sale-deficiency-judgment system "work" for repossessors. The mutual "back-scratching" among sellers and financers has previously been mentioned. The "churning" process—selling the same car repeatedly—was also found in the *D.C. Study*. For example, one 1964 model car was found to have yielded a profit to the dealer of $1080 on the second and third sales *in addition to* the profit realized on the original sale.[166] Another "profit" factor is the failure to credit the buyer with a rebate of unearned finance charges. Some jurisdictions, including the District of Columbia, only require such rebates in cases of prepayment—not where the buyer has defaulted.[167] However, prepayment seems

161. *Id.* The same conclusion can be drawn from the results of the Shuchman and D.C. Studies.
162. *Id.*
163. *Id.*
164. *NCCF Report, supra* note 4, at 17.
165. Note, *California's Automobile Deficiency Judgment Problem*, 4 U.C.D.L. Rev. 91, 103 (1971). Compare Table 9, *supra*.
166. D.C. Study, *supra* note 108, at 518 n.37.
167. D.C. Study, *supra* note 108, at 523 n.65. The *NCCF* recommends that before a specific sum is assessed, in a default judgment case the court should hold a hearing to establish the amount of the debt the creditor is lawfully entitled to recover. Under such a recommendation, the court's attention could be directed to required rebates, unreasonable charges and unreasonable resale procedures and proceeds. The Commission also recom-

hardly distinguishable on any meaningful basis from the default case in which the downpayment, the trade-in, and the payments made are all retained while the buyer is charged with the deficiency. Profit is most probably made on trade-ins, also, the buyer being given trade-in allowance reflective of wholesale valuation, while the vehicle is ultimately sold in the retail market. Even if the trade-in allowance approaches retail value, the "price" of the vehicle being purchased will probably be adjusted accordingly. Attorneys fees and court costs are usually made a part of the deficiency judgment also.[168]

The results of the *D.M. Study* by contrast lead to the conclusion that deficiency judgments are not being satisfied. Of the 128 judgments shown by court records, only 19 are shown by Credit Bureau records[169] to have been satisfied (Table 17) a satisfaction rate of 14.8%. Since information in the credit files regarding judgments satisfied only reflects that of the court files and records, there is margin for error. Attorneys for judgment creditors, for example, may neglect to file "Satisfactions of Judgment," and judgment debtors may neglect to insist that this be done. In addition, judgments are granted relatively long life and can be satisfied when the debtor acquires or sells real estate, or by the persistence and diligence of the judgment creditor's attorney.

TABLE 17

Satisfaction of Indebtedness—DM Study

disposition	number (201 total)	average amount involved	shown as satisfied by Credit Bureau	satisfaction rate	average amount satisfied claims	number shown as unsatisfied or undetermined
default judgment	117	$508	17	14.5	$685 (11,651)	—
stipulated judgment	3	465	0	0.0	—	—
judgment after appearance	8	962	2	25.0	1149 (2298)	—
no judgment, dismissed or "pending	73	1057*	0	0.0	—	
total	201	145,036	19	—		182
overall average	—	$733	—	9.5%		91.5%

* based on 70 known entries

mends that the consumer should be entitled to the same rebate of unearned interest when he defaults that would have been payable if payment in full had been made on the date judgment was entered or the sale of the secured property occurred. The Rule of 78's is offered as one permissible method of computing that rebate. *NCCF Report, supra* note 4, at 40.

168. D.C. Study, *supra* note 108, at 523. The study disclosed that a 15% attorneys fee, based on the deficiency claim, was imposed "almost without exception" in the 284 cases surveyed.

169. Compliance with the Fair Credit Reporting Act (15 U.S.C. §§ 1681-81t) required

Even taking into consideration neglect to file Satisfactions of Judgment, the rate of satisfied deficiency judgments seems unquestionably low. Since 1970, Truth-in-Lending restrictions on garnishment and on creditor-to-employer-to-debtor harassment[170] may help to explain this low rate of satisfaction. And, if those who suffer the entry of deficiency judgments are assumed to generally fit the stereotype presented by Caplovitz in *The Poor Pay More,* wage garnishment appears to be virtually the sole method of collecting such judgments.[171] But this appearance may be deceptive, for while low-income debtors were shown by Caplovitz to be for the most part lacking in leviable assets, having little savings, and little by way of personal property worth seizing, they also were shown to be on the margin of the labor market. So, while Caplovitz relates in his tri-city study, *Debtors in Default,* the more-or-less predictable finding that poor people in general and blacks in particular were more likely to be garnished than the not-so-poor and the whites, and that wage garnishment has a certain self-defeating aspect in that 19% of those garnished lost their jobs,[172] he labels "striking" the finding that:

> regardless of reason for default, a majority in all but one category, "marital instability" (where the rate fell slightly below 50 per cent), did resume payments. When those no longer in the labor force are separated from the others, a clear majority of the employed in each reason category resumed payments; when this group was subdivided according to garnishment, even among those who were *not* garnished, a majority of the employed in each reason category save one, "fraud" (where the figure falls to 48 per cent), resumed payments.[173]

Thus, not only did garnishment exert a powerful influence on the debtor to resume payments, the threat of garnishment or even the very knowledge[174] that one's wages may possibly be garnished exerted great influence even on those who felt victimized by fraud. The impact of this and other incidents of the debt problem on various aspects of the debtor's life was also the subject of

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the following procedure: data sheets were compiled from the court files for each individual primary defendant, on which were listed the relevant data concerning the transaction; the individual's name and address were listed at the top of each sheet; the 201 data sheets were then submitted to the Credit Bureau of Des Moines and the Bureau listed on the reverse side of the data sheets the date of sale Bluebook entries and significant file information for each named individual, but reported so as to avoid identifying the individual in question; prior to returning the data sheets to the writer, the upper portion of the sheet was cut off so as to remove the name and address, and a random number was assigned to each sheet. Thus the information provided by the Credit Bureau of Des Moines fell outside of the definition of a "consumer report," since it was not "information . . . bearing on [any identifiable] consumer's credit worthiness" under the Act.

170. *See* 15 U.S.C. §§ 1671-77 (1970).

171. The D.C. Study reported that wage garnishment was utilized in 37% of the cases surveyed. D.C. Study, *supra* note 108, at 524.

172. Debtors in Default, *supra* note 75, at 12-68.

173. *Id.* at 12-70.

174. Caplovitz found in his *Poor Pay More* Study that almost all of the families interviewed were familiar with the word "garnishee," while only 8% had actually been subjected to a garnishment, and only 10% had been threatened with its use. Caplovitz, *supra* note 26, at 7, 138.

examination in *Debtors in Default*, and Caplovitz takes the view that the findings in this regard suggest that the current legal system of resolving disputes between creditors and debtors is "far too costly both to the debtors and society at large":

> The impact of the debt problem on various aspects of the debtor's life has been examined. We have seen that this problem—whether it stemmed from shortcomings of the debtor or from mishaps and dishonesty on the part of the seller, and which seldom involved sums in excess of $1000, nonetheless took considerable toll on the life of the debtor. His very livelihood was often placed in jeopardy. Many debtors worried about losing their jobs and lost time from work because of the debt problem. For many, the debt problem resulted in a health problem, in part because of unscrupulous harassment techniques employed by the creditor. In addition, the debt problem often created marital strain, causing some marriages to break up. The creditor's tactics of harassment often exacerbated the marital stress.[175]

While the Truth-in-Lending restrictions on the garnishment-related "firing" of employees may have taken some of the "sting" out of the threat of garnishment, Caplovitz's conclusion probably retains its validity.

III. The Role of Credit Information

A. *Theoretical Usefulness*

> Defendant paid the monthly installment due January 10, 1969, but did not pay the installments due February 10 and March 10, 1969 * * * These delinquent installments plus a collection charge were in the neighborhood of $290.00. Plaintiff's representative . . . determined that defendant had obtained a $400.00 loan from a third party to apply on the downpayment for [the] Buick . . . [and he] further determined that defendant's ability to pay had been overestimated at the time of purchase. . . .[176]

It has been the intent of the preceding discussion to point out how defaulting debtors fare under the current legal framework and to focus on them in an effort to shed light on who they are, what their background is, what motivations may lead them to enter into an installment credit agreement, why they default, what the legal consequences of that default are, and what effect it has on their personal lives. In this section the attention is focused on the current role of credit information in the overall picture of the debtor in default. While conclusions drawn from the various studies presented above must not be over-generalized, at least this much is true: most instances of consumer default are, from the standpoint of debtor and creditor alike, the result of an "improvident" extension of credit. Implicit in this use of the label "improvident" is a strong element of hindsight, and this in the case of an extension of

175. Debtors in Default, *supra* note 75, at 11-37, -38.

176. General Motors Acceptance Corp. v. Wilson, No. 93059 (Polk County Dist. Court, Iowa, December 11, 1969). *See also* note 195, *infra.*

credit means point-of-transaction credit information available to the creditor in making the credit extension decision. While various pressures are at work on the debtor, impelling him to buy on credit, and few pressures tending to compel him to be prudent, the inverse may be true for the creditor, in that the pressures are to sell, with few pressures or checks built into the system tending to compel him to be prudent. Particularly is this true in the case of the automobile sale.

It is a standard gospel in the credit textbooks that:

> There is a proper basis for retail credit from the creditor's standpoint when the [credit] investigation has disclosed a satisfactory record, when the buyer's financial integrity and resources seem to conform to his mode of living, and when his history or record has disclosed his intentions and habits of meeting his obligations[177] . . .

and that nonusers of the Credit Bureau services have much heavier credit losses than users. There is a disagreement, to be sure, among legal commentators about the role of credit information, which disagreement arises in the context of certain hereinafter discussed proposed limitations on traditional creditors' remedies.[178] Jordan and Warren, for example, prophesized in 1967 that:

> It is becoming increasingly doubtful whether many of the traditional creditor remedies are needed by legitimate creditors. With the use of computers and other sophisticated information systems, creditors will soon have the ability to make very accurate determinations of the credit worthiness of the applicant. The consumer today is very dependent upon credit, and, if his ability to get credit depends upon his paying his bills, he will pay them without the coercion of the state.[179]

In 1968 Professor Kripke countered:

> The bulk of the default problem arises not from overextension of credit or other over-reaching, but from the debtor's change of circumstances. The simple fact is that the typical consumer, even in middle-class situations, is not a balance sheet risk. He has no significant assets. His only significant "asset" which makes him credit worthy is a job, that is, his future earning power. [Jordan and Warren are therefore wrong in thinking that modern informational services can enable a creditor to pass sound credits. * * * Information can verify the existence of a job, but not its future continuance. It can verify existing monthly payment demands, but not those the debtor will acquire voluntarily in the future by other purchases, or involuntarily by illness or other misfortune].[180]

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177. Chapin & Hassett, Credit and Collection Principles and Practice 199-200 (7th ed. 1960). *See also* Ison, *Small Claims*, 35 Modern L. Rev. 18, 25 (1972).

178. Particularly the elimination of deficiency judgments. *See* discussion in text accompanying notes 205, 234-51, *infra*.

179. Jordan and Warren, *A Proposed Uniform Code For Consumer Credit*, 8 B.C. Ind. & Com. L. Rev. 441, 457 (1967) [hereinafter cited as Jordan and Warren].

180. Kripke, *supra* note 47, at 480. [The portion of the quote appearing in brackets is taken from note 100, p. 480 of the Kripke article]. Kripke does not seemingly take issue with the proposition that credit information should be utilized.

The two views expressed are not really opposing in a sense, and in fact, both views are most likely correct. Kripke's point is well taken and the Caplovitz *Poor Pay More Study* tends to lend support—debtors in default usually were marginal credit risks, being under-educated, under-skilled, unprotected in their jobs, ill-prepared to meet emergencies which draw on their resources, and very ineffective as consumers. But credit information is not thereby made of little worth, because the Caplovitz study also supports the Jordan and Warren theory that increased emphasis on credit information, the importance of which most consumers now appreciate,[181] will lead to increased payment of obligations. At this point, however, the balance again shifts to Kripke, since unanticipated emergencies or financial reversal do leave consumers no choice. On the other hand, creditors can and probably will demand of credit bureaus access to information bearing on the "emergency preparedness" picture of the debtor, including government, employment, and insurance benefits for which he is eligible. Armed with this information, the creditor would then have basically the mirror image of the consumer's choice: use (extend) credit or forego the transaction. If the former route is chosen, the creditor would have the further choice of taking his customer as he finds him and taking his chances, or of supplementing the consumer's credit worthiness or emergency preparedness picture with various forms of required credit insurance such as credit life, health, disability and other forms of "income disruption" insurance. Conceivably, computerized credit information could also provide a "balance sheet" view of the debtor, including current indebtedness, current employment, wages, likelihood of advancement, education, training, and a host of other information.

Whether the argument between the referred-to commentators really has any relevance to the automobile market is put into issue by the *Shuchman Study*, for just as Shuchman found that successful recouping of "paper" losses by wage garnishment and other execution process provided little incentive for the seller or financer of an automobile to resell repossessed vehicles at the highest obtainable price,[182] he also found very little reason for the seller to be concerned with the potentiality for default:

> If our data are at all reliable, the dealer or financer has little reason to be discouraged in his business affairs by the likelihood of default. In that event, he is apt to be fully compensated for the time

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181. Caplovitz, *supra* note 26, at 23. Chapin and Hassett have some pertinent comments in this regard:

> The average individual is honest, and he pays promptly. Furthermore, he knows that, if he does not pay promptly, his credit privilege will be impaired and may well be denied him. The inherent honesty of people plus the system whereby merchants and businessmen report all slow accounts to a bureau, where the record becomes available to all, has resulted in a promptness of payment which is gratifying and a low bad-debt loss that can be termed as astonishing.

Chapin and Hassett, Credit and Collection Principles and Practice 201 (7th ed. 1960).

182. Shuchman Study, *supra* note 107, at 38.

> and trouble of repossession and resale. For there certainly *appears* to be some substance to the claims of additional profits on resales following repossession.[183]

Although most of the merchants interviewed in the Caplovitz study said that they always consulted the "skip lists" of their associations before extending credit to a *new* customer,[184] that prudent habit may well have been more closely related to the fact that those merchants were not selling goods of the nature that make repossession-resale-deficiency judgment worthwhile, and since they were found not to be competing for the dollars of the general consuming public, no doubt the credit reports on their customers would have made for repetitive reading anyway. The consumers in the Caplovitz *Poor Pay More Study* were aware, however, of the need to build or restore their credit rating, some even mentioning this factor as the reason for paying off debts despite a belief of having been cheated in the transaction.[185] In enacting the Fair Credit Reporting Act,[186] Congress expressly found that the banking system is dependent upon fair and accurate credit reporting, and that inaccurate credit reports directly impair the efficiency of that system.[187] It then legislated new safeguards and procedures to insure accurate credit reporting.[188] But all of this presupposes that credit information fairly and accurately reported will be *used* by credit grantors, something that is clearly put into issue by the *Shuchman Study* and those that followed it, of the automobile installment credit grantor.

B. *Creditor Access to Credit Information*

There are two readily accessible means of promptly obtaining relatively up-to-date credit information. The first is the "Credit Guide," sometimes referred to as the "Bluebook," issued by the Credit Bureau. This is a sophisticated "skip sheet" in a way, being an alphabetized listing of individuals following the names of which appear coded letters, numbers, or symbols providing a thumb-nail sketch or "rating" of each individual's past experiences in using credit as reported to the Credit Bureau by those among the 1500 or so creditor-members who have in the past extended credit to him. Many of the coded symbols used in the Credit Guide are intended to encourage the user to contact the Credit Bureau for additional information or explanation. Second, a more complete picture of the debtor-to-be can be obtained by seeking an oral telephone report from the Bureau. Both the Credit Guide and the oral report are short form versions of the full, written "credit report."

A major purpose of the *D.M. Study* was to determine, first, the extent to which the sellers in the study or their financers made a timely inquiry to the Credit Bureau in an effort to determine the buyer's credit worthiness, and what items of significant information such an inquiry would thereby have disclosed

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183. *Id.* at 40, 41. *Compare* Kripke, *supra* note 47, at 448-49.
184. CAPLOVITZ, *supra* note 26, at 23.
185. *Id.*
186. 15 U.S.C. §§ 1681 *et seq.* (1970).
187. 15 U.S.C. § 1681(a)(1) (1970).
188. 21 DRAKE L. REV. 381, 385-93 (1972).

as of the date of sale; second, to determine the extent to which the Credit Guide or Bluebook was used, either in lieu of, or as a "red flag" for determining the need to contact the Credit Bureau. The issue, then, is whether and if so, to what extent, the creditors in the *D.M. Study* made "improvident" extensions of credit. Three possibilities existed: if the two main and readily accessible sources of credit information were *not* used (nonuse), would such use have led to significant credit data; if these sources of information were widely used, to what extent was known credit information misused; the third possibility was, of course, that no definite statement as to nonuse or misuse could be made. Since oral inquiries are routinely noted by the Bureau in each consumer's file,[189] this part of the study was relatively simple. Resort by creditors to the Bluebook, however, can only be gauged—with somewhat less precision—by using as an index those buyers in the study whose coded entries in the Bluebook meant "contact the Credit Bureau for information," and then cross-referencing inquiries made to the Bureau.

C. *The Consumer Credit File*

Prior to presentation and analysis of the results of this phase of the study, two probably common misconceptions should be dispelled: most consumers do not have a true "credit rating" as such, and the Credit Bureau of Des Moines, like most credit bureaus, does not "rate" individuals in the same way that Dun & Bradstreet rates business organizations. Instead, it, like most bureaus, is no more than a repository of information which is available to local creditors, each of whom then interprets the file information and determines its own rating system. Input information on individuals comes to the Credit Bureau from area creditors who have previously or currently extended credit to them, from public records such as judgments entered, tax liens filed, dissolutions of marriage, or bankruptcies filed, and occasionally from investigations such as interviews with neighbors, friends and employers. For the most part, negative information is the key, so that from the consumer's standpoint, "no news is good news."[190]

When credit bureaus adopt procedures designed to insure accuracy, such as using judgments filed rather than petitions filed as input items,[191] individual consumers can really blame only themselves for inaccurate credit information in their files, since they now have the right under the Fair Credit Reporting Act to have ther credit files explained to them and to dispute information they consider inaccurate, and in some cases, have such information deleted from their files.[192]

Among the items of information that can lead to a "poor credit risk" picture are: a constant change of jobs or residence; lack of a savings account

189. *See* note 169 *supra.*
190. *How's Your Credit Rating?* BETTER HOMES AND GARDENS, February, 1967.
191. The Credit Bureau of Des Moines adopts this approach, disregarding petitions filed as being unrelated to credit-worthiness. In general, this is a good practice, but the expense incident to a successful defense of even a spurious lawsuit could have an adverse effect on the ability of the defendant to meet other obligations.
192. *See* 15 U.S.C. §§ 1681d, 1681g-1681j (1970).

or assets; a fluctuating income; non-timely payment of accounts; accounts placed in the collection process; and of course, judgment and similar lien-creating occurrences. In effect, then, the Credit Bureau does not "rate" individuals. It does, however, report what is in essence the input ratings ascribed to individuals by member creditors. Creditors have so "rated" their customers according to both a letter rating system ("PMSLR") and more recently a digital system ("1,2,3,4,5,6,9"). Both systems are similar, the key to rating code being set forth in Table 18.

TABLE 18

Credit "Rating" Symbols—Credit Bureau of Des Moines

Symbol	Meaning
1 or P	Subject pays or paid his accounts as agreed.
2 or M	Subject takes or took more than 30 days to pay, but not more than 60 days.
3	Subject pays or paid in more than 60 days, but not more than 90 days.
4	Subject pays or paid in more than 90 days, but not more than 120 days.
S	Subject allowed his account to run 90 to 180 days past due before paying.
L	Subject has allowed accounts to run 180 days or more before paying.
5	Subject pays or paid in 120 days or more, or had account "charged off".
R	Subject's account closed to further charges with delinquent balance owing on date rating was made. Includes accounts in the hands of attorneys, or collection agencies (other than the Collection Department of the Credit Bureau).
6* or C*	Subject has unpaid account not more than 5 years old in Credit Bureau *collection* files. The Bureau should be contacted for further information regarding present status of account or possible disputes concerning the account.
A*	Used only in rating accounts where *unusual circumstances* prevail, making it impractical to rate on a *time* basis; does not indicate that a person has a good or bad rating (frequently used by the Bureau to indicate that information—favorable or unfavorable—requiring explanation is on file and that the Bureau should be contacted). This "rating" is similar to entries 2, 4, and 5 in the "9" column.
B*	Bankruptcy or Wage Earner Plan (now shown by an "1" in the "9" column).
★*	A judgment has been entered against subject. Bureau should be contacted regarding satisfaction of the judgment (now shown by a "3" in the "9" column).
9*	If one of the following numbers appears in this "9" column, it indicates: 1=bankruptcy or a Chapter 13 Wage Earner Plan ("B")** 2=debt management of pooled arrangement 3=judgment or judgments filed 4=domestic difficulties, divorce petitions, non-responsibility notices 5=state or federal tax liens filed 6=repossessions 7=information from news sources 8=newcomer

* The Bureau should be contacted.
** Example: a #1 in the "9" column indicates a bankruptcy or Wage Earner Plan. (Shown in Tables in text and in Appendix as "1/9").

The Credit Bureau encourages its members (subscribing creditors) to avoid favoring an individual with a better rating than is deserved, such as failing to turn in an adverse rating where the person currently carries, for example, an all "1" or "P" (prompt) rating. In fact, if one "2" or "M", for example, is reported on an individual carrying a "10P" or "10/1" rating or better (entry # 45B in the Appendix is an example of such a Bluebook rating), that "M" or "2" entry will not be in the next edition of the Bluebook.[193] If two or more "M's" or "2's" are reported, or if an "M" and either an "S," "L," or "R" or their current-day numerical counterparts are reported, the Bureau does make a change from the all "P" rating. Furthermore, if the Bureau receives just one "S," "L," or "R" on a person carrying a "10P" rating or better, it re-checks with the member so reporting prior to including that information in the Bluebook rating.

With the exception of the coded entries pertaining to judgments ("3" in the "9" column, or "★"), unusual information or information requiring explanation ("A" and some entries in the "9" column), and unpaid accounts placed with the Bureau's collection department ("C" or an entry in the "6" column), the reports are compiled from information furnished for the most part by Bureau members or subscribers and not by the Bureau itself. Finally, the Bureau expressly advises its Bluebook subscribers that it is impossible to report in such a publication all of the information contained in the Bureau's files.

D. *Nonuse and Misuse of Credit Information*

Considering the amount of credit involved—an average "total of payments" of $2453—in the 201 transactions surveyed in the *D.M. Study* the number of timely inquiries by sellers or financers was found to be incredibly small, as shown in Table 19.

TABLE 19

Inquiries To The Credit Bureau—DM Study

	creditor made a timely inquiry*	%	average amount involved	timely inquiry not made	%	average amount involved	inquiry undetermined**	%	average amount involved
used car cases (88)	32	36.4	$2224	46	52.3	$1899	10	11.4	$2023
new car cases (55)	17	30.9	$3781	24	43.7	$4034	14	25.4	$3375
promissory notes (58)	3	5.2	$4222	42	72.4	$1617	13	22.4	$1733
total cases (201)	52	25.9	$2867	112	55.7	$2269	37	18.4	$2487

* on or shortly before date of sale

** credit bureau files do not in all instances reflect the status of inquiries prior to 1965

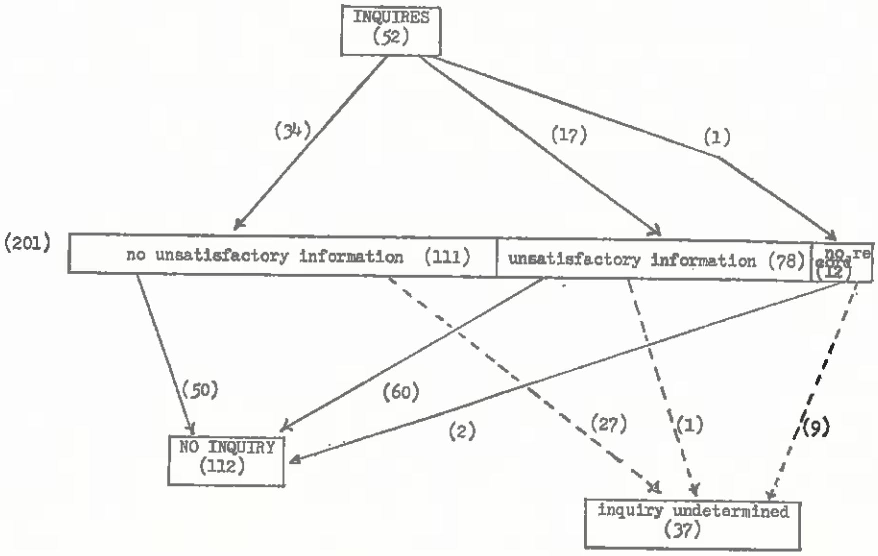
193. The total of all ratings shown on any name in the Bluebook is limited to 25. During the first year "in file," for example, only all "prompt" ratings received are carried up to "3P"; after the first year, 3 to 5 "prompts" gives a "1P", 6 to 11 "prompts" gives one a "2P" and more than 11 "prompts" gives a "3P."

Based on 164 usable entries (81% of the 201 cases), inquiries were made in only 32% of the cases (52 of 164). The inquiry rate for the "new car cases" was identical to that of the "used car cases" (32 of 78 used and 17 of 41 new), but the inquiry rate for promissory note cases was only 3 of 45, or 7%. While an inquiry pattern seems to be revealed with respect to the cases involving promissory notes ($4222 vs. $1617), no clear pattern emerges with respect to the cases involving new and used car contracts. And, while one can surmise, based on the figures disclosed, that the thirteen instances of unknown inquiry status in the promissory note category probably fall into the "no inquiry" column, thus making the true inquiry rate for this category 3 of 58 or 5%, the same cannot be said with respect to the new and used car contract "inquiry undetermined" categories, nor can any projections be made on an overall basis as to the thirty-seven total instances of "inquiry undetermined." Given a relatively low inquiry expense, the rule of thumb for these creditors may well be, "If the customer is black, call the Credit Bureau."

Of the 52 timely inquiries made, 34 revealed no unsatisfactory[194] information in the file of the debtor-to-be, and one disclosed no record on the inquired-of individual. Unsatisfactory information was revealed in 17 instances of creditor inquiry. The Credit Bureau had 189 of the 201 primary defendants "in file" on the date of sale, 111 of whom had no unsatisfactory information in their files. Unsatisfactory information resided in the files of the remaining 78 primary defendants.

Of the 112 instances of no timely inquiry, the files of 60 or 54% would have revealed unsatisfactory information, while in 50 instances, an inquiry would have disclosed no unsatisfactory information. Only 2 of these 112 defendants were not "in file" on the date of sale. Finally, the fact of inquiry could not be determined from Credit Bureau records in 37 of the cases, due primarily to the fact that inquiries dating back to 1965 are no longer available in all cases. The overall inquiry picture is shown in the following graph.

194. Such as judgments and collections against, long-overdue accounts, past bankruptcies, tax liens, and accounts "charged off."



Thus, of the 78 debtors in the study in whose credit files resided unsatisfactory information, 60 of them were extended credit in an average amount of $2454, repayable at the rate of $82 per month, without the benefit of a phone call to the Credit Bureau.[195]

It seems beyond dispute that the overall inquiry rate of 32% as disclosed in the study, reflects an intolerable and unconscionable approach to the extension of such large amounts of consumer credit. Table 20, however, does reveal that in 14 of the 17 cases of inquiry, creditors were perhaps responding to the coded Bluebook entries which meant "contact the Credit Bureau."[196]

195. Chrysler Credit Corporation, having made 29 of the 52 total known inquiries, deserves the "Curious Creditor" trophy, and since it is won almost by default, so to speak, Chrysler Credit should be permitted permanently to retire it.

The defendant in *GMAC v. Wilson*, from which case the introductory excerpt in this section was taken, was one of the 78 debtors in whose file resided unsatisfactory information. No inquiry was made in the process of "overestimating" his ability to repay.

196. Entries in the "6" or "9" columns, or no information in the Bluebook on the debtor, unquestionably carry this message to creditors, and an entry in the "5" column arguably does also.

In only five of the seventeen instances of inquiry did the Bluebook not reflect unsatisfactory information in the consumer's file (numbers 37A, 61A, 85A, 17B and 49C).

TABLE 20

Inquiring Creditors—Unsatisfactory Information—DM Study

The 17 instances in which inquiring creditors found unsatisfactory information (entry number)	Price	Total of payments	Total downpayment	*Bluebook symbol	**Information in file on date of sale	Credit insurance premiums	Monthly payments	Creditor inquiring
17-A	800	920	$ 50	7/1, 1/6	2 collections (amount undetermined	N	$ 51	FMCC
23-A	1100	1110	$ 202	3/9	1 judgment against, of $129	$ 8	$ 46	FMCC
37-A	2795	2878	$ 500	UL	1 judgment against, of $294	N	$ 80	CCC
40-A	1195	1582	<$ 90>	1/9	prior bankruptcy	N	$ 62	CCC
43-A	2195	2530	$ 300[1]	2/6	2 collections ($126)	$ 63	$ 84	ROS.
46-A	495	388	$ 150	1/5, 5/6 3/9	2 judgments against, of $398, 5 collections ($1626)	$106	$129	ROS.
53-A	3358	3815	$ 583	1/9	prior bankr. (liabilities of $14,019); 1 judgment against of $25; 5 collections (amt. undetermined)	$229	$106	CCC
60-A	2200	2396	$ 500	X/9	prior bankr. (liabilities of $9596)	$151	$ 80	GMAC
61-A	3395	3222	$ 795[1]	1/1	2 collections (amt. undetermined)	$ 97	$ 90	CCC
73-A	2595	2596	$ 845[1]	X/9	1 judgment against, of $665	$164	$ 87	CCC
85-A	1851	1790	$ 651[1]	UL	3 collections (amt. undetermined)	$232	$ 60	CCC
17-B	3680	4366	$ 500	UL	1 judgment against, of $130	$290	$119	CCC
34-B	3507	3444	$ 993[2]	1/2, 1/6	1 judgment of $20, satisfied	$207	$ 96	CCC
35-B	4281	4532	$1100[1]	5/1, 3/9	3 judgments against, of $817	$308	$126	FMCC
53-B	3558	3540	$ 558	X/9	2 judgments against, of $456; 3 collections ($53)	N	$ 98	CCC
55-B	3574	3289	$ 980[1]	X/9	2 collections ($170)	$ 99	$ 91	CCC
49-C	Und.[3]	4373	Und.[3]	2/1, 1/2	2 collections (amt. undetermined)	Und.[3]	$121	CCC

(See page 273 for footnotes)

It was theoretically possible, then, that the 112 instances of non-inquiry involved debtors whose coded Bluebook entries did not convey the "contact the Bureau" red flag. The results obtained in the study as shown in Table 21, however, overwhelmingly refute this idea.

TABLE 21

Relationship Between Non-inquired-of debtors and Most Adverse Then-current Bluebook Coded Information (112 cases)—DM Study

Bluebook Symbols	1 or P	2 or M	3	4	S	L*	5*	R*	6* or C*	A*	★ *	B*	9*	subject not in Bluebook*
cases having Bluebook entries in	14	1	0	0	2	0	1	0	12	1	5	3	42	31

* Reasonable credit extension policy calls for Bureau contact. See Table 18, *supra*.

Reliance on lack of adverse or suspicious Bluebook entries is quite clearly *not* the explanation for the lack of Bureau inquiries by creditors in these 112 cases. Arguably, the Bluebook message in 95 of the 112 cases was "contact the Bureau." That unquestionably was the message in 82 of the 112 cases.

If the 17 instances set forth in Table 20, in which credit was extended to a debtor following a Credit Bureau inquiry disclosing unsatisfactory information are taken as a guide, the situation is indescribably deplorable. Four of the 17 debtors are shown by Credit Bureau records at the time of sale to have had judgments and collections against them totaling more than $300; five had one or more judgments totaling $300 or less; and of the remaining eight, two had prior bankruptices and the other six had one or more collections against them. While the outstanding indebtedness owed by some of these 17 debtors was relatively small in comparison to the total amount of credit being extended, it is the relationship between that outstanding indebtedness and the monthly payments which makes these extensions of credit questionable. For example, an outstanding judgment of $150 is not an earth-shaking amount of money, but it does represent two average monthly payments of $75. By virtue of garnishment of wages (with the resulting potential of lost employment, the Consumer Credit Protection Act notwithstanding) and of savings, a third-party holder of a $300 judgment has the undeniable capability of causing a default in monthly payments by a debtor who by all accounts was at best a marginal credit risk to begin with. The same may be said with respect to similar amounts represented by unpaid accounts in collection, for if the results of this and other studies are reliable, an

* 1/6, for example, means there was an entry in the "6" column after debtor's name in Bluebook; a "9" denominator refers to the "9" column in the Bluebook; "UL" means unlisted.

** Various entries reveal collections with amount undetermined. These amounts are "in file", but were not entered on the fact sheets.

1. Amount includes a trade-in allowance.

2. Downpayment consists solely of trade-in allowance.

3. Information undeterminable from file.

unpaid account is simply an inchoate judgment requiring only about twenty to thirty days before being afforded the legal tools of seizure, garnishment, and—under color of law—harassment. Further, if the supposition be entertained that the creditors involved in the 112 instances of no Credit Bureau inquiry did in fact consult the Bluebook prior to extending credit, one can similarly pass the "judgment" as to at least 82 of those instances that these creditors had no concern whatever for the built-in potential for—indeed, the probability of—default by the debtor.

Finally, though the data is too meager for prognosis, it appears from Table 22 that the creditors in the study may be on their way to an almost incredibly incomprehensible reaction to the assurance of more accurate credit information and the increased emphasis on the importance of credit information brought about by the Fair Credit Reporting Act.

TABLE 22

Effect of Enactment of the Fair Credit Reporting Act—DM Study

	prior to April 25, 1971*	after April 25, 1971
164 known cases	144	20
inquiries	47	5
inquiry rate	33%	25%

* effective date of the Fair Credit Reporting Act.

IV. Building Incentives To Avoid The Improvident Extension Of Credit: Proposed Changes In Creditors Remedies, Collection Practices, and Approach To Credit Granting

> It is instructive to contrast the legal machinery dealing with the consumer defendant with that dealing with the juvenile defendant. Enlightened public opinion has led to the emergence of legal arrangements for juvenile offenders which, if biased at all, favor the defendant rather than the plaintiff. The juvenile defendant is regarded as not fully responsible for his actions. The environmental pressures which shape his behavior are taken into account when his behavior is assessed. * * * The findings of this study suggest that some of the general assumptions made about the juvenile defendant also apply to many low-income consumers. They, too, are not fully responsible for their actions. Poorly educated, intimidated by complex urban society, bombarded with "bait advertising," they are no match for high-pressure salesmen urging heavy burdens of debt upon them. Perhaps legal machinery can be instituted, which takes these facts about low-income consumers into account.[197]

A. *The Recommendations of the National Commission On Consumer Finance and the National Business Council For Consumer Affairs*

The National Commission On Consumer Finance, in its report "Consumer

197. Caplovitz, *supra* note 26, at 190.

Credit In The United States,"[198] has made numerous recommendations for change in the existing legal framework, which changes if adopted would directly or indirectly provide incentives for creditors to more closely scrutinize the credit information available on individual consumers. Also, in the summer of 1971, the President created the National Business Council for Consumer Affairs, a group of one hundred business persons whose purpose it was to report on and offer solutions for consumer problems. A number of recommendations have been made by one of the subcouncils in a report entitled "Financing The American Consumer"[199] which recommendations would have a similar effect on the "front-end" of the credit transaction. Together the recommendations call for far-reaching changes in the relationship between creditors and consumer-debtors:

a. *abolition of:*
   1. the holder in due course doctrine (*NCCF*)[200]
   2. waiver of defenses clause (*NCCF*)
   3. confessed judgments without prior notice and opportunity to enter a defense (*NCCF*)
   4. prejudgment garnishment—even of non-resident debtors (*NCCF*)
   5. wage assignments or other compensation deduction schemes where the amount financed was more than $300 (*NCCF*)
   6. non-purchase money security interests in household goods (*NCCF*)[201]
   7. security interests in goods or property of the consumer which are not the subject of the sale (*NCCF*)[202]
   8. prejudgment "possession-divesting" personal property liens (*NCCF*)[203]
   9. acceleration of maturity of any part of the amount owing in the absence of a contractually specified default (*NCCF*)

b. *require that:*
   1. where default occurs on a secured consumer credit sale in which the original sales prices (or if a loan, the amount financed) was $1,765 or less, the creditors elect remedies—either repossess the collateral in full satisfaction of the debt, or sue for a personal judgment on the obligation without recourse to the collateral (*NCCF*)[204]

198. *See* notes 3 and 4, *supra.*

199. *See* note 5, *supra.*

200. *See* discussion in text accompanying notes 225-33, *infra.* Under this recommendation, notes executed in connection with consumer credit transactions would not be negotiable, bearing the legend "Consumer Note—Not Negotiable," clearly and conspicuously printed on the face. Holders of such notes, and holders of evidences of consumer credit indebtedness other than notes would be subject to all claims and defenses of the consumer, any agreement to the contrary notwithstanding.

201. The *NCCF* takes the view that non-purchase-money-related repossession of such goods, or its threat, has too great a disruptive impact on the debtor to be in the public interest.

202. Abolishes "cross-collateralization."

203. If the court finds that the creditor will "probably recover" in the action, *and* that the debtor's actions, past, present, or apparent future will impair the creditor's right to satisfy the judgment out of the goods upon which a lien has been established, it can issue a restraining order.

204. *See* discussion in text accompanying notes 234-52, *infra.*

2. post-judgment garnishment be limited to the guidelines of the Consumer Credit Protection Act (*NCCF*)[205]
3. a consumer may not be discharged or suspended solely because of any number of garnishments or attempted garnishments (*NCCF*)[206]
4. contracts in consumer credit transactions may provide for a reasonable attorney's fee on default payable by the debtor, but the amount may not exceed 15% of the outstanding balance (*NCCF*)[207]
5. when judgment in a consumer credit transaction arises from a non-purchase money security interest, there should be exempt from levy, in addition to the standard items of property so exempt, any property which the court may deem necessary for the maintenance of a "moderate standard of living" for the debtor, spouse, and dependents (*NCCF*)[208]
6. a consumer always be allowed to prepay in full the unpaid balance of any consumer credit obligation at any time without penalty (*NCCF*)
7. a consumer have the right to refinance the amount of any scheduled payment which is more than twice as large as the average of earlier scheduled payments (balloon payment), at the time it is due, without penalty, and on no less favorable terms to the consumer than are the terms of the original transaction (*NCCF*)
8. following an acceleration of maturity, the commencement of any action, demand, or repossession can only occur if the debtor receives fourteen day's prior written notice setting forth the alleged default, the amount of the delinquency (including late charges), any performance in addition to payment required to cure the default, and of the debtor's right to cure the default (*NCCF*)[209]

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205. *See* 15 U.S.C. §§ 1671-77 (1970).

206. An enlargement of the protection under 15 U.S.C. § 1674(a) (1970). Wage assignments are permissible where the amount financed was less than $300, if the creditor has no security interest in *any* of the debtor's property, but the amount accruing to the creditor can not exceed the garnishment guidelines of the Consumer Credit Protection Act.

207. The attorney paid must not be a salaried employee of the creditor, and any such attorney's fee provision must stipulate that if in a suit by the creditor the court finds in favor of the consumer, the creditor will be liable for the debtor's attorney's fee. The court would under this recommendation determine the amount, but it would not be determined by the amount of the recovery. The 15% limit was considered a good one in view of the finding of the *NCCF Survey* that the *major* reasons for default stem from situations beyond the control of the debtor.

The UCCC provides in § 2.413 an alternative section prohibiting attorney's fees.

208. *See* IOWA CODE ANN. §§ 627.6, 561.16-.20, 511.37 (Supp. 1973).

209. The debtor then may cure the alleged default by tendering any performance necessary to cure it, and if the alleged default is nonpayment, by tendering the amount of all unpaid installments which are then due (disregarding any purported acceleration of indebtedness) plus any unpaid delinquency charges.

Acceleration clauses after default are seen by the Commission as permissible and "essential to effective remedial action by the creditor since it would be unduly onerous, inequitable, and expensive to require the creditor to sue for each installment of the contract as it becomes due after the initial default." The Commission notes, however, that it is equally onerous and inequitable to place on the consumer the burden of proving a creditor's bad faith in invoking acceleration solely on the basis of insecurity. The Commission states that "perhaps nowhere is [the right to repossess collateral] more important than

9. after curing a default, the debtor should be restored to all his rights with respect to the obligation as though no default had occurred (*NCCF*)[210]
10. banks, finance companies, and other financing institutions avoid financing unethical merchants whose products and/or services give rise to a disproportionate number of colorable consumer complaints (*NBCCA*)[211]

c. *specific legislation:*

1. to permit "small, small" loans to low-income consumers from regulated licensed lenders (*NCCF*)
2. to insure that each consumer's complaint is promptly acknowledged by the creditor, and to insure that during the interval between acknowledgement and action to resolve the problem, the consumer will be free of harassment to pay the disputed amount, and to insure that penalties for failure to comply therewith are sufficiently severe to prompt compliance (*NCCF, NBCCA*)

d. *in general:*

1. credit grantors should use ability to repay and willingness to repay as the principal determining factors in the decision to extend credit (*NBCCA*)[212]
2. credit rating systems should not discriminate unfairly among types of incomes of those who have the ability and willing-

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in the automobile credit market where the value of collateral is so important," but since the Survey disclosed an average grace period prior to declaring an account delinquent to be about 14 days, grace periods in the automobile credit market included, that credit market was included in the recommendation.

While the UCC permits acceleration upon default or breach, it also allows acceleration when the creditor deems himself "insecure." The Commission would require an actual default, not just a *feeling* of insecurity or of impairment of payment prospects, but actual default would mean something more substantial than technical violations of minor contract terms or from violations of terms unrelated to ensuring payment of the debt or maintaining the reasonable value of the security.

Whether such a recommendation actually adds anything to the UCC is arguable in view of the good faith requirement of § 1-208, a carry-over from common law. *See* 6 WILLISTON, CONTRACTS § 1696 (rev. ed. 1938).

210. A debtor would be able to cure no more than three defaults during the term of the contract.

211. *Compare* LA. REV. STAT. 9:3534(3)(a) (1973):

> An assignee or transferee does not acquire a consumer's contract in good faith if the assignee or transferee has knowledge of substantial complaints by other consumers of the extender of credit's failure or refusal to perform his contracts with them and of the extender of credit's failure to remedy his defaults within a reasonable time after the assignee or transferee notifies him of the complaints.

212. Willingness to repay would be indicated by the debtor's past payment record, as shown in his credit file. If considered at all, factors such as race, sex, and marital status would, under this recommendation, be at most satellite factors going more to the cost of credit than to the credit extension decision itself—except insofar as such factors affect ability to repay. Race is difficult to imagine as a factor affecting the ability of an individual to repay in any event, but both sex and marital status may in some cases affect ability to repay. Employers may require their female employees to take forced vacations during the latter months of pregnancy and the early months after child birth. Whether here employer's reasons for doing so are defensible or not, her ability to repay certainly may thereby be affected. And, it is true that the divorced and remarried male who is supporting two families may well have quite a different ability to repay than his neighbor who supports a more conventional number of families.

ness to repay and who otherwise meet the creditor's criteria for credit extension (*NBCCA*)[213]
3. creditors should fully explain to their customers the terms of the credit transaction (*NBCCA*)
4. creditors should apprise debtors of the seriousness of delinquent payments and of the relatively limited options default in payment leaves the creditor (*NBCCA*)[214]
5. creditors should adopt a more liberal approach to refinancing or extending payments as to those customers who demonstrate a sincere desire to pay (*NBCCA*)
6. collection procedures and practices ought to be based on the presumption that every debtor intends to repay or would repay if able (*NBCCA*)
7. collection costs relating to defaulting debtors should not be borne indirectly by other customers of the creditor in the form of higher rates of charge to cover higher overhead (*NCCF*)[215]
8. there should be increased emphasis on consumer education and counseling (*NCCF, NBCCA*)[216]

These recommendations call for legislative response, judicial response, and for a re-evaluation by the credit industry of the very day-to-day operation of the consumer credit market. If such recommendations or even a few of the more far-reaching of them are adopted, a renovation of the law of consumer credit would be the obvious result. This is clearly the thrust of the report of both the National Commission and the President's Council. As such, these reports can now in context be viewed as a response to Caplovitz's indictment of the legal structure in *The Poor Pay More:*

> The present legal structure . . . falls short of its goals because its image of the low-income consumer is not correct. As a result, it

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213. A person who has a *regular* source of income, it is recommended, should obtain credit even though the source of income is welfare, unemployment compensation, or alimony. Improvement of one's credit rating would be one goal of this recommendation.

The *NBCCA* also recommends that credit grantors update their customers' credit ratings on a regular basis or on request, in part to give such customers the benefit of a recently improved credit rating.

214. Caplovitz demonstrates the lack of consumer sophistication. *See* discussion in text accompanying notes 65-86, *supra.*

215. The *NBCCA* has a similar recommendation: that default expenses be borne only by those customers who use credit.

216. The Commission recommends:
1. that Congress support the development of improved curricula to prepare consumers for participation in the consumer credit marketplace, with adequate attention to consumer credit as one aspect of family budgeting.
2. that appropriate federal and state agencies should continue their emphasis on adult education for low income consumers and try to reach more of them.
3. that federal resources be used to encourage expanded research and pilot projects to generate and test new ideas in adult consumer education.
4. that business organizations support and encourage nonprofit credit counseling, provided that it not serve primarily as a collection agency, and that *if* private debt adjusting services are allowed to continue, that their activities be strictly regulated and supervised, including their fees and advertising.
5. that counseling be made a mandatory requirement for obtaining a discharge in both straight and chapter 13 bankruptcy, the bankruptcy courts providing additional staff to serve as counselors to debtors.

> unwittingly favors the interests of the merchant over those of the consumer by permitting deviant practices which take advantage of the consumer's ignorance.[217]

Further, they are a recognition that "it no longer is an answer to say that the low-income person, whose bargaining position cannot be equated with that of a businessman, should have avoided the purchase."[218] Rather, as pointed out by Jordan and Warren: "If the marginal consumer cannot be relied upon to avoid bad bargains, a more fruitful approach may be to take away from the creditor some of the weapons that make it possible for him to profit at the expense of the unwary."[219] A simplistic but probably incisive way of looking at these reports, particularly that of the National Commission, is that while most of the recommendations would probably have little direct effect on most consumers —those who do not default in their obligations—nevertheless the consuming public in general and the low-income consumer in particular suffer from a great disparity of bargaining power between debtor and creditor, and that the public interest dictates that this disparity be attacked on several fronts, including drastic changes in various traditional but heretofore unscrutinized creditors' remedies, and in forcing greater care in the granting of credit, while at the same time promoting multi-channeled consumer education at all levels. The Commission, in fact, takes the view that consumer credit contracts are *contracts of adhesion* resulting from this disparity in bargaining power, which itself results at least in part from the use of standard forms:

> It has been traditional for limitations on methods of collection to be left for the parties to work out in the contract. But the time has come to recognize that in consumer credit transactions the creditor's ability to use a full range of collection devices is not a matter for creditor-debtor negotiation but a set of contractual conditions imposed by the creditor on a "take-it-or-leave-it" basis.[220]

Consumer education is obviously an integral part of the Commission's "package":

> A hallmark of the American economic system is that consumers have choices in the acquisitions of goods and services—cars, refrigerators, canned soup, credit, whatever—which are offered in the marketplace in wide array.
>
> The system will not work as it should if large numbers of consumers lack the judgment to make intelligent decisions in purchases to serve their needs. They should know what they are doing, and why, when they cast their dollar ballots in the economic democracy of the market. They should be educated consumers, and too often they are not.[221]

The Commission is not unmindful of the relationship between remedies and

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217. CAPLOVITZ, *supra* note 26, at 189.
218. San Diego Study, *supra* note 109, at 364, 367.
219. Jordan and Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285, 1321 (1966).
220. *NCCF Report*, *supra* note 4, at 23.
221. *Id.* at 200.

availability of credit, and between rates and remedies—that is, the lower the rates, the greater the need for remedies and *vice versa*, and that the more restrictive the remedies the less available becomes the credit unless rates are liberal.[222] The Commission feels that lowering the rate ceilings on consumer credit would not help cure the problem of overextension of credit. Rather, the thrust of the Commission's recommendations puts emphasis on providing creditors with *incentives* to avoid overburdening consumers, by limiting creditors' remedies and prohibiting harsh collection practices.[223]

B. *Deficiency Judgments and Holders in Due Course*

Any equalizing of bargaining power in the consumer credit field of necessity revolves around the remedies of the creditor. The Commission's recommendations in this regard are more or less aimed at those remedies and collection practices "which, in view of the major reasons for default, are likely to cause undue hardship."[224] Viewed in these terms, the abolition of the holder in due course doctrine[225] and the deficiency judgment, seems on balance to be dictated by the public interest. Because these two recommendations are the most far-reaching generally, and so closely related to providing incentives for creditors to avoid the improvident extension of credit, they merit additional commentary.

The negotiability of paper evolved from the English Law Merchant primarily, if not exclusively, to facilitate the movement of *commercial* paper among businessmen, the intent being that such paper would flow in commerce as freely as money. The only way this scheme could work was to protect good faith third-party purchasers of such paper from claims and defenses of the maker which related to the underlying transaction. This was accomplished by ascribing to such purchasers the protected status of "holder in due course." But the Law Merchant governed only *merchantile* practices. The paper with which it was almost wholly concerned was commercial paper; the makers or drawers were business persons or merchants having equal bargaining power with respect to the payee. If able via bargaining power, makers and drawers *could* issue non-negotiable paper and avoid the holder in due course problem altogether. The Law Merchant thus never intended that the doctrine apply to paper issued by individual consumers, who are typically in an inferior bargaining position with respect to the merchant-payee and the payee's assignee-financer. This was not, of course, a necessarily intentional decision of exclusion, since consumer paper was relatively rare. The doctrine was nevertheless applied to consumer paper, primarily by the rigid application of Law Merchant principles in the courts. The result was, in far too many instances, an inequitable one for

222. *Id.* at 24.
223. *Id.* at 99-102.
224. *Id.* at 24.
225. The *NBCCA Report* recommends greater emphasis on the "weeding out" of unethical assignors rather than abolition of the doctrine itself.

consumers of defective or misrepresented goods or services. The doctrine of holder in due course and its relative, the waiver of defenses clause, have been on the way out for some time as courts and legislatures began to doubt the validity of such devices in the consumer credit arena.[226]

The relationship between the recommended reforms and the extension of credit was clear to the National Commission:

> In recommending abolition of [holder in due course] and waiver of defenses clauses in consumer credit transactions, the Commission recognizes that it is placing the burden of policing consumer transactions on the financing institutions which purchase consumer paper. The Commission believes those financial institutions are in a much better position to control credit practices of retail suppliers of consumer goods and services than are consumers. They can choose the retailers and suppliers with whom they will do business. If a financial institution is subject to consumers' defenses . . . it will discontinue purchase of paper from those merchants who cause trouble thereby forcing the many merchants who desire to stay in business but [who need financing for] their consumer credit paper to "now react responsibly to consumer complaints in order to keep the avenue of credit open."[227]

The Commission finds what it refers to as the best rationale for abolition of the holder in due course doctrine in certain arguments put forth by Kripke:

> Looking at the matter legislatively, we may ask who, as between the consumer and financer, ought to bear the risk of the merchant's breach of warranty or delivery of shoddy goods? The consumer sues the merchant only once or episodically. The financer, even though it does not control the merchant or participate in the breach of warranty, ordinarily has a continuing relationship with him and some experience of his performance of warranties. The financer is certainly better equipped with staff to check the merchant's reputation for reliability and fair dealing. It is submitted that the risk of cases of legitimate customer dissatisfaction should be thrown on the financer. The financer is best able to force redress by maintaining an action over against the merchant or by charging withheld amounts in the financer's hands, even where his basic purchase of the obligation from the merchant was without recourse. The financial institution always protects itself by warranties from the merchant as to freedom of the obligation from customer defenses. Moreover, such a rule would cut off the sources of credit of a merchant with repeated bad warranty relations with his creditors.

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226. *See, e.g.*, Jones v. Approved Bankcredit Corp., — Del. —, 256 A.2d 739 (1969); Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967); American Plan Corp. v. Woods, 16 Ohio App. 2d 1, 240 N.E.2d 886 (1968) (all denying holder in due course status to lenders in "too close connection" with sellers of consumer goods). Some states have prohibited use of negotiable instruments in retail installment sales of "service." *See, e.g.*, Mass. Gen. Law Ann. ch. 255, § 12c, ch. 255D, § 10(6) (Supp. 1972); N.Y. Pers. Prop. Law §§ 403(1), 401(7) (McKinney 1971); Utah Code Ann. § 70B-2-404 (Supp. 1971).

227. *NCCF Report, supra* note 4, at 36.

> The clinching argument is the contrast between the legal relationships in consumer financing and the legal relationships in the financing of commercial accounts receivable. In that field the financing institutions, many of which are also engaged in the consumer field, have never sought to extend to the commercial field their assertion that they are entitled to freedom from customer defenses. There is one simple reason for this: the commercial buyers would not stand for it, for the purchase contracts in the commercial field are not contracts of adhesion. What then happens to the question of freedom from defenses in the commercial field? The financer as part of its credit determination studies the experience of the seller in respect to customer complaints and returned goods, and if the percentage is too high, refuses to do business with that merchant. The same type of credit thinking would provide the answer in the consumer field.[228]

The Commission is also well aware that the effect will be higher costs to consumers:

> With abolition of cutoff devices, it is only logical to assume that the financing institutions would probably protect themselves by increasing the dealer reserve (the percentage of each contract price retained by the financial institution as a fund against which to charge bad debts and other credit losses of that particular dealer) or by decreasing the dealer's participation (the dealer's share of the finance charge) in each consumer credit transaction. In either case, the ultimate burden of increased costs to dealers would likely be passed on to the consumer in the form of higher cash prices for the goods or services or in the form of higher finance charges, or both.[229]

Spreading the cost to consumers, however, is seen as "more than counter-balanced" by the benefit to the public in terms of better goods and services:

> Any attempt to deal with third party cutoff devices such as HIDC and waiver of defense clauses involves a question of balance. The needs of small business men to obtain capital to enter and remain in the market serving marginal risk consumers must be weighed against the protection of all consumers. The balance is sometimes a delicate one. In this case it is not. The Commission firmly believes that consumers have an absolute right to receive fair value in the purchase of goods and services. One way to help achieve this goal is to abolish the HIDC doctrine and waiver of defense clauses. The inevitable reduction in availability of consumer credit in some markets will be more than offset by increased consumer confidence in the market as a whole.[230]

Reputable merchants would not necessarily be adversely affected[231] by the abolition of holder in due course in consumer transactions, since if it be assumed that such merchants provide only valuable consumer goods and services in return for the paper—thereby thwarting possibilities of later consumer defenses of

228. *Id.* at 36, 37 (citing Kripke, at 472).
229. *Id.* at 37.
230. *Id.* at 38.
231. Some made this prediction. *See* Cohen, *The Uniform Consumer Credit Code—A Design For Disaster*, 23 PERS. FIN. L.Q. 10 (1968).

inequity and failure of consideration—such non-negotiable paper would be just as good as though negotiable in the eyes of third-party assignees. Reputable merchants, selling reputable goods, financed by reputable financers, have no need for freedom from defenses. Such insulation from defenses is in Kripke's view "statistically unnecessary . . . [and] it's time has run out."[232]

Forcing an election of remedies is not a new idea, of course. It was an earlier feature of the law of many states. Creditors could sue on the contract *or* repossess the collateral.[233] Sellers, however, began to expressly reserve the right to recover deficiencies remaining after repossession and resale, circumventing the election of remedies requirement.[234] Legislatures also began to move away from the notion of election of remedies through express authorization of deficiency judgments.[235] Since automobiles were the first major items of consumer goods sold on installment credit, the rights and remedies of buyers and sellers of automobiles are typically set forth by statute in every state.[236] The arguments for the deficiency judgment are: (1) it is a deterrent to default and the abuse of collateral; (2) it permits wider credit availability to poor credit risks and lowers the cost to good credit risks; and (3) it protects against high depreciation losses.[237] The arguments against deficiency judgments are: (1) the abuse of it by creditors as shown, for example, by the *Shuchman Study*; (2) the bad social and personal effects of garnishments, increased bankruptcies, marital breakups, and the engendering of disrespect of the legal proc-

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232. Kripke, *supra* note 47, at 473.

The Federal Trade Commission, which has long felt that it was unfair and deceptive to fail to warn consumer-makers that their paper would be sold to third parties, has also indicated an intent to aid consumers in the preservation of claims and defenses. The FTC has proposed a Rule providing that *any* purchaser of a consumer promissory note or sales contract must be subject to the same claims and defenses that the consumer would have against the seller. *See* 38 Fed. Reg. 892 (1973), and *see* Note, *The FTC Proposed Rule and the Holder In Due Course*, 18 S. DAK. L. REV. 516 (1973). *See also Hidalgo v. Surety Sav. & Loan Ass'n.*, 481 S.W.2d 208 (Tex. Ct. Civ. App. 1972) in which a consumer-marker raised a due process argument with respect to holder in due course status.

233. Warren, *Statutory Damages and the Conditional Sale*, 20 OHIO ST. L.J. 289, 289-95 (1959).

234. *Id.* at 298. Freedom of contract was the deifying agent.

235. *Id.* at 300. This was theoretically defensible, since the election of remedies doctrine was premised upon the concept of title (repossession, being a rescission of the sale, precludes a contract action since title can no longer pass to the buyer, while suing for the price is an affirmation of the contract, does pass title, and thereby prevents repossession) which has questionable relevance in conditional sales cases. Ultimately, the UCC, through § 9-504 permitted deficiency judgments.

236. For a classification of the retail installment statutes across the country (all "goods," "motor vehicles," or both) *see* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 254-55 (1965).

237. *See also* Felsenfeld, *Some Ruminations About Remedies in Consumer Credit Transactions,* 8 B.C. IND. & COM. L. REV. 535, 556-62 (1967).

These arguments are set forth in greater detail, along with a rebuttal as to each, in Note, *California's Automobile Deficiency Judgment Problem,* 4 U.C.D.L. REV. 91, 109-14 (1971).

Another argument that may have occurred to some is that since sellers could always elect to sue for the entire price, they ought to be able to recover and resell the goods as an aid to recovery of that full contract price, since such a move not only mitigates the resulting contract damages, it also allows what is perhaps an inevitable retaking through the judgment-execution process to occur at a much earlier point in the depreciation cycle.

ess; and (3) that it is unnecessary as a prevention of loss to sellers via depreciation, since resales *could* occur at retail.[238]

The National Commission had at least the following alternatives from which to choose: (1) credit the defaulting buyer with the reasonable value *or* the resale price, whichever is higher; (2) no deficiency judgment at all; (3) deficiency judgments in automobile cases only; (4) eliminate deficiency judgments in cases in which the buyer has paid a high percentage of the contract price;[239] (5) the dollar limit of UCCC section 5.103;[240] or (6) the status quo. The recommendation made by the Commission is a modified version of the UCCC approach. Thus the election of remedies idea is revived to a degree. But rescission in the traditional sense is not the basis of the UCCC section 5.103, for the buyer is not entitled to a return of payments made nor credit from a subsequent sale of the repossessed merchandise at a profit. Consumers would get the benefit of the departure from the UCC approach, and the UCCC approach is not really unfair as concerns rescission since first resales of repossessed automobiles are not usually profitable anyway,[241] and because payments made prior to default could be viewed as a "fair rental" sort of expense.[242]

The Commission is also well aware that restriction of the deficiency judgment remedy might substantially increase the rate of charge for credit and severely curtail its availability. But there is also little doubt that the recommendation of election of remedies when default occurs in a secured consumer credit sale in which the original sales price or loan amount financed was $1765 or less was aimed directly at the used car market,[243] the Commission stating

238. These arguments are also set forth and discussed in 4 U.C.D.L. REV. 91, 101-09 (1971).

239. 60% for example. *See* N.J. STAT. ANN. § 12A:9-505(1) (Supp. 1973).

240. *See* Comment 2 CONN. L. REV. 202 (1969). Seven states (Colorado, Idaho, Indiana, Oklahoma, Utah, Wisconsin and Wyoming) have now adopted the UCCC § 5.103(2) of which provides that the buyer is relieved from the so-called deficiency by the seller's act of repossession or acceptance of surrender of goods having a contract price of $1000 or less. Thus, the seller must elect repossession or personal suit. Section 5.103(6) prevents a seller who has sued on the contract from repossessing after judgment or resorting to the goods by execution to satisfy that judgment if the seller would have been unable initially to have sued for a post-repossession deficiency under § 5.103(2).

The National Consumer Act (NCA) also restricts deficiency judgments, but the limitation is based on unpaid balance rather than on original price. *See* NCA § 5.211. The NCA also permits the debtor to "force the hand" of the creditor by tendering back the goods, at which point repossession becomes the sole remedy regardless of values questions. NCA § 5.205. And, repossession can be halted by tender of overdue installments, since acceleration clauses are restricted. NCA § 5.207.

241. Shuchman Study, *supra* note 107, at 31-32. One writer advances the suspicion that the amount of actual collections of deficiency judgments in cases involving original cash prices less than $1000 is negligible. *See* Robertson, *Consumer Protection Under the Uniform Consumer Credit Code*, 41 MISS. L.J. 36, 69 (1969). While this would seemingly depend on several factors, not the least of which is the perservance of the seller's collection agent, the cases surveyed in the *D.M. Study* tend to bear out that suspicion. *See* discussion in text accompanying notes 170, 171 *supra*. Rigorous collection policy is shown in Johnson, *The Uniform Consumer Credit Code and the Credit Problems of Low-Income Consumers*, 37 GEO. WASH. L. REV. 1117, 1122-23 (1969).

242. *See* note 260, *infra*.

243. The $1765 figure came from a study of Washington, D.C. repossessions and from Commission hearings, both of which highlighted problems with deficiency judgments in the used car market particularly. This market was isolated by determining the point in

that this recommendation was made "despite the probability of increased rates of charge on such transactions and reduced availability. But the Commission believes that implementation of that recommendation would afford consumers protection in areas particularly susceptible of abuse by exempting most household goods purchases from deficiency judgments and putting an end to deficiency judgment abuses found in some used car markets."[244] It has also been argued that another effect of elimination of deficiency judgments may be to tie the price of property sold more closely to its fair market value, since overpriced property would be more difficult to finance if the only recourse is to the property.[245]

C. *Abolition of Deficiency Judgments in Focus*

If the $1000 limitation of UCCC section 5.103 had been in effect in Iowa with respect to the 201 cases in the *D.M. Study,* 39 or 19% of them (none of which were in the "new car" category) would have been affected,[246] with almost $10,700 of deficiencies "lost" by sellers of financers by the limited remedy of repossession, and 72 or 36% affected and almost $28,500 "lost" had the broader *NCCF* limitation of $1765 been in effect. But the real effect of limitations on deficiency judgments must be gauged in light of the number of cases in which the *satisfied* deficiency judgment would have been eliminated. Of the 72 "affected" cases under the *NCCF* limit, deficiency judgments were entered in about 62% of them, while only five, or 7% were revealed by Credit Bureau information to have been satisfied.

To the extent that deficiency judgments are no more than so much paper shuffling by lawyers, the loss to the creditor under an election of remedies ap-

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1972 at which new and used car markets were no longer in competition. The *Report* then describes the process:

> Aware that the average automobile loan approaches 100 per cent of dealer cost, the Commission ascertained dealer cost of the *lowest priced* passenger cars made by each U.S. automobile manufacturer and computed an average of $1765. Automobile credit higher than that figure would more likely be extended to buy a new rather than a used car. So it was at the figure of $1765 or less that the Commission determined the 1972 new car market was not in substantial competition with the used car market.

NCCF Report, supra note 4, at 30-31. The Commission recommends that the $1765 figure should be recomputed annually using average prices of the least expensive American-made passenger cars.

Setting the limiting figure at $1000 can be viewed as evidencing an intent by the drafters of the UCCC to exclude automobiles from the coverage of § 5.103. On the other hand, the section, like the UCCC generally, is aimed at *abuses* in the low-income, low-priced consumer product market, while proceeding upon the assumption that most debtors will honor their obligations. *See* Comment, *Repossession and Deficiency Judgments—Will the Consumer Credit Code Aid the Consumer or Vendor?*, 2 Conn. L. Rev. 202, 206-07 (1969), and Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions,* 8 B.C. Ind. & Com. L. Rev. 535 (1967).

244. *NCCF Report, supra* note 4, at 30.

245. This may be the case in California, where deficiency judgments are prohibited in sales of residential real estate. Cal. Code Civ. Proc. § 580(b) (Supp. 1973). As a matter of fact, deficiency judgments are prohibited in all consumer goods sales except automobiles in California. *Id.*, § 1812.5.

246. Original sale price under $1000.

proach such as that of the *NCCF* or of UCCC section 5.103 seems more than evenly balanced by the alleviation of harassment of the debtor and of the long-range effect that deficiency judgments can have on the debtor, his credit rating, and on his personal and family life. Perhaps most creditors would elect repossession under such a limitation[247] though they obviously could "play" the market. If, however, the consumer product is overpriced to begin with, and also has a relatively low resale value, the creditor will have little incentive to repossess, particularly when earnings—the only real asset of the low-income consumer—are reachable by garnishment.[248]

The *NCCF* combines with the deficiency judgment recommendation a proposal for a right to "cure" defaults prior to acceleration of maturity.[249] This redemption notion has been suggested also as a particularly appropriate amendment to UCCC section 5.103 since the consumer in default typically is least able to afford a forfeiture of equity in the collateral.[250] This may be a meaningless protection[251] as such, but it seems reasonable to conclude that many sellers and financers might begin to permit a de facto redemption or cure along the lines of a refinancing of the obligation, should the deficiency judgment limitations of the *NCCF* or of section 5.103 be adopted, particularly in light of the track record of *satisfied* deficiency judgments disclosed in the *D.M. Study*, and in light of the declining nature of the automobile market.

V. The Misuse or Nonuse of Credit Information As Unconscionable Conduct

A. *The Current State of the Case Law*

> It is contended that the contract is so harsh and unconscionable that a court of equity should not decree specific performance. The contract proved in the long run to be improvident, but a court of equity cannot relieve competent parties who enter into contracts that are not tainted by fraud, from the legal effects thereof, because such contracts may be ill-advised or prove to be unprofitable or disadvantageous.[252]

The basic question underlying any evaluation of consumer credit in the United States is: "[A]re low-income consumers, who *are* greater risks, to

247. *See* Robertson, *Consumer Protections Under The Uniform Consumer Credit Code,* 41 Miss. L.J. 36, 70 (1969).

248. *See* Johnson, *The Uniform Consumer Credit Code and the Credit Problems of Low-Income Consumers,* 37 Geo. Wash. L. Rev. 1117, 1124 (1969).

249. *See* notes 210-11, *supra.*

250. Comment, 2 Conn. L. Rev. 202, 210-11 (1969).

251. The D.C. Code allows redemption within 15 days after repossession, but the requirements are said to be stringent—consumers in default must pay the total balance due on the contract plus storage fees, repossession expense and default charges. *See* DC Study, *supra* note 108, at 513.

The California Rees-Levering Motor Vehicle Sales and Finance Act (Cal. Civ. Code § 2981 *et seq.*, West Supp. 1971) provides the right of redemption at any time prior to disposition of the collateral. The burden of redemption is made apparent by the DC Study: the net total claim that would have to have been paid in the 106 cases in the study was $1,528.

252. Carson v. Mikel, 205 Iowa 657, 216 N.W. 60 (1927).

be admitted on any meaningful basis to the consumer credit market, or are they not entitled to the use of credit and hence access to, in most cases, 'luxury' items, and even in some cases, items of necessity?"[253] Perhaps the only way a society through its legislative structure can avoid involvement in class legislation is to seek the solution of that question indirectly by the remedies it allows to be imposed. The UCCC, and for the most part the recommendations of the *NCCF*, represent a decision that low-income consumers should be admitted to the credit market and that creditors' remedies are to be limited in order to prevent abuses without unduly hampering the ability of private enterprise to make credit available to such consumers.[254]

The net effect of UCCC section 5.103, like that of restricting garnishment or of lowering the rates of charges for credit, is to force creditors to more effectively "screen" those to whom credit will be granted.[255] Thus, more emphasis is placed on the use of credit information. Attempting to curb the abuse of over-extension of credit by restricting creditors' remedies is criticized by Kripke as overly broad.[256] For example, Kripke points out that setting low rate ceilings can, while giving lip service to protecting consumers, actually force low-income consumers out of the credit market.[257] But excluding marginal credit risks can be viewed as the cost to society and perhaps to the economy of limiting the remedies of creditors.[258] As one argues for more stringent limitations on remedies, however, the more one must be prepared to respond to Kripke's argument:

> A realistic test of the merits of restriction of deficiency judgments would go beyond pin-pricking proposals which merely put the creditor to an election of remedies between the personal obligation and the collateral. Why not abolish the personal obligation in installment sales altogether, leaving the creditor only the remedy of repossession? At a stroke this would eliminate the evils of the "overreaching creditor," the evil of sharp practices in establishing deficiencies by sales for inadequate prices, the devastation of the debtor by large deficiencies, and collection abuses by garnishment and similar means. Installment sales would then become leases binding on the creditor but terminable at the will of the debtor. The fact that the resale market in many goods is very poor would then become exclusively the creditor's, not the debtor's concern. Are we really prepared to pay the price of this simple and effective solution to the problem of over-

253. Johnson, *The Uniform Consumer Credit Code and the Credit Problems of Low-Income Consumers*, 37 GEO. WASH. L. REV. 1117 (1967).

254. The *NCCF* expressly states that it "fails to see why every citizen of the United States is not entitled to qualify for participation in some part of the credit system *herein* advocated." *NCCF Report, supra* note 4, at 4.

255. Section 5.103, however, is deficient in one important aspect—it only applies to consumer credit sales of goods or services. A consumer who obtained a loan for the purpose of purchasing goods costing less than $1000 does not receive the protection of § 5.103, even though he obviously has the same need of it, particularly since most paper emanating from consumer credit sales winds up in the hands of financing institutions anyway.

256. Kripke, *supra* note 47, at 478.

257. *Id.* at 479.

258. Johnson, *The Uniform Consumer Credit Code and the Credit Problems of Low-Income Consumers*, 37 GEO. WASH. L. REV. 1117, 1125 (1967).

> selling and of deficiency judgments and garnishments? Would our economy survive if the creditor no longer extended credit against the debtor's future earning power, but increased the down payment requirement and shortened the term until his debt was safe solely on a collateral-secured basis? Would our economy survive the drastic reduction of credit extension on furniture, appliances, jewelry and the like? If we are not prepared to eliminate reliance on future earning power and resort thereto, more hard-headed thinking is required about restricting remedies.[259]

Kripke seems to focus a good deal of his concern on the fact that the UCCC makes inroads (as would the recommendations of the *NCCF*) on the access of creditors to the typical defaulting debtor's future earnings power—his sole asset from the creditor's standpoint—which Kripke finds a harsh result, particularly in light of his lack of enamorment with the role credit information might play in this area. It can be observed, however, that the *NCCF* had access to Kripke's arguments[260] while basically resolving the issue the other way.

Kripke did, however, put his finger on one alternative answer of some merit: the doctrine of unconscionability.[261] As an alternative to the specific limitations of remedies recommended by the *NCCF* and/or found in the UCCC, section 2-302 of the Uniform Commercial Code (UCC) would be a

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259. Kripke, *supra* note 47, at 481. Professor Kripke adds this footnote discussion:

> Law students and graduate lawyers working with me on problems in this field have recently told me that in their opinion the above terminable lease idea is substantially the conception of an installment purchase obligation actually held by many of their contemporaries, even college graduates working for professional degrees in other fields. Such persons, I am told, simply have no conception of the fact that if they buy a color TV on time, they have a legal obligation beyond giving it back when they are tired of paying. If so, the situation is indeed alarming. One's first reaction is that the situation among the urban uneducated poor must be that much worse, but on reflection this is probably not so. The sheltered middle-class college student may never have had to think about the problem, while there probably is no member of the urban poor who has not heard a sad story about garnishments. In any event, the question sharply arises whether the law and the economy can afford to see this point in the consumer perspective and make the law conform to this kind of expectation. The fact is that a buyer is committing his future earning power by installment buying just as realistically as he does under present New York law by notification of an assignment of wages (N.Y. Pers. Prop. Law §§ 46-49b (McKinney Supp. 1967)). This is the present foundation of consumer credit, and the question is whether the foundation can be removed.
>
> I have spent some anxious moments considering whether in this thinking I am merely spouting the conventional wisdom. That California functions with no apparent ill effects on the extension of credit under a rule which bars deficiency judgments except for motor vehicles—a rule basically similar to § 5.103—proves nothing except that creditors can live with an election of remedies doctrine. The harder question is whether creditors can live with a system of law which precludes resort to future earnings by omission of any provisions for wage assignments or garnishments.

Id. at 481 n. 100.

260. The *NCCF Report* cites the Kripke "Creditor Viewpoint" article several times. *See* note 47, *supra*.

261. Kripke, *supra* note 47, at 483. A number of excellent articles on the subject are found in the legal journals. *See, e.g.*, Spanogle, *Analyzing Unconscionability Problems*, 117 U. Pa. L. Rev. 931 (1969); Murray, *Unconscionability: Unconscionability*, 31 U. Pitt. L. Rev. 1 (1969); Braucher, *The Unconscionable Contract or Term*, 31 U. Pitt. L. Rev. 337 (1970). Application of the principle to consumer matters is treated in Leff, *Unconscionability and the Crowd, Consumers and the Common Law Tradition*, 31 U. Pitt. L. Rev. 349 (1970), and Spardel, *Unconscionability, Assent and Consumer Protection*, 31 U. Pitt. L. Rev. 359 (1970).

viable starting point for judicial curbing of the oppression of an over-reaching creditor. It has, in fact, done so in many cases.[262] But as will be seen, section 2-302 is not perhaps the answer to the improvident extension of credit. Ironically, the doctrine of unconscionability as embodied in the UCCC may, in light of the *NCCF* recommendations, be more appropriately a part of the credit extension issue than Kripke might prefer.

Section 2-302 does not necessarily represent a radical departure from the principle that competent parties are bound by their agreements made. That section can, in fact, be viewed as a codification of what has been recognized in the United States Supreme Court as an inherent equitable power to refuse to enforce agreements which are harsh to the point of shocking the conscience of the court:

> It is said that familiar principles would be outraged if . . . recovery is [denied] on these contracts. But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequality and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?
>
> These principles are not foreign to the law of contracts. Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a "bargain" in which one party has unjustly taken advantage of the economic necessities of the other.[263]

As a codification of this inherent equity power, section 2-302 "permits a court to accomplish directly what heretofore was often accomplished by construction of language, manipulations of fluid rules of contract law and determinations based upon a presumed public policy."[264]

Section 2-302 is not then a consumer protection enactment. Since there must be a transaction in "goods" as that term is defined under the UCC[265] to bring the Code into play, consumer loans, consumer leases, or the sale of consumer services or land would not be covered.[266] However, given a sale of goods, the courts are empowered by section 2-302 to "police" the transaction by refusing

262. *See* Note, *UCC Section 2-302 and the Pricing of Goods: Are the Courts More Than the Market Will Bear?*, 33 U. Pitt. L. Rev. 589 (1972); Mindell, *The Unconscionability Doctrine and Consumer Protection in New York*, 161 N.Y.L.J. 1 (1969). The cases are collected in 1 ULA-UCC § 2-302.

263. United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, Dissenting Opinion). In *Scott v. United States*, 79 U.S. 443 (1970) the Court states at page 445 of the report: "[I]f a contract be unreasonable . . . but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitable entitled to." *See also* Hume v. United States, 132 U.S. 406 (1889) and Younger, *A Judge's View of Unconscionability*, 5 U.C.C.L.J. 348 (1973).

264. Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969). Younger, *A Judge's View of Unconscionability*, 5 U.C.C.L.J. 348 (1973).

265. UCC § 2-102.

266. The UCCC, in § 5.108, does apply the doctrine to consumer loans and leases.

to enforce unconscionable contracts or clauses or by enforcing such contracts or clauses in such a way that any unconscionable result is avoided.[267] The basis test of unconscionability is stated to be, "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are *so one-sided* as to be unconscionable under the circumstances existing at the time of the making of the contract. . . ."[268] The principle is stated to be one "of the prevention of oppression and unfair surprise" rather than one of disturbing the allocation of risks because of superior bargaining power.[269] Under this test, courts are permitted great latitude in avoiding contracts or contract terms which are not oppressive or unfairly surprising. The courts have in fact applied the doctrine to consumer transactions quite frequently. And, while it is clear that the standard of permissible conduct under section 2-302 of the UCC is relaxed in cases involving merchants or other non-consumer parties sophisticated or experienced in the ways of business, decisions in such cases can be viewed as persuasive. In general, any conduct deemed unconscionable as between two merchants would be unconscionable in cases in which a consumer is the affected party.

The UCC does not define the term "unconscionable." The term can only be defined by reference to the case law. In *Toker v. Westerman,*[270] a New Jersey District Court defined an unconscionable contract as:

> One such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other. To what extent inadequacy of consideration must go to make a contract unconscionable is difficult to state, except in abstract terms, which gives but little practical help. It has been said that there must be an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it.[271]

The United States Court of Appeals for the District of Columbia Circuit offered some pertinent observations on the doctrine of unconscionability in *Williams v. Walker-Thomas Furniture Co.*[272] The case arose prior to the adoption of the UCC in that jurisdiction, but the court relied upon the rationale of the cases cited in the Comments to section 2-302 as the source of the rule, most notable *Henningsen v. Bloomfield Motors Inc.,*[273] in resolving this question by adopting a rule of unconscionability similar to the UCC, in the exercise of its powers to develop the common law of the District of Columbia:

> Unconscionability has generally been recognized to include the *absence of meaningful choice* on the part of one of the parties *together with contract terms* which are *unreasonably favorable* to the

267. *See* UCC § 2-302, comment 1.
268. *Id.* (emphasis added).
269. *Id.*
270. 113 N.J. Super 452, 274 A.2d 78 (1970).
271. *Id.* at 80. The origin of the definition appears to be the 1750 case of *Earl of Chesterfield v. Janssen,* 28 Eng. Rep. 82 (1750). *See* Hume v. United States, 132 U.S. 406 (1889).
272. 350 F.2d 445 (D.C. Cir. 1965).
273. 32 N.J. 358, 161 A.2d 69 (1960).

other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little choice, signs a *commercially unreasonable* contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

In determining reasonableness or fairness, the *primary concern must be with the terms* of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case." Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." * * * We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract.[274]

Perhaps the best working definition of the term is supplied by the Supreme Court of New Jersey in *Kugler v. Romain:*[275]

[3] Unconscionability . . . is an amorphous concept obviously designed to establish a broad business ethic. The framers of the Code naturally expected the courts to interpret it liberally so as to effectuate the public purpose, and to pour content into it on a case-by-case basis. In that way a substantial measure of predictability will be achieved and professional sellers of consumer goods as well as draftsmen of contracts for their sale to ordinary consumers will become aware of the abuses the courts have declared unacceptable and will avoid them. The intent of the clause is not to erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion.[276]

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274. 350 F.2d 445, 449-50 (D.C. Cir. 1965) (emphasis added).
275. 58 N.J. 522, 279 A.2d 640 (1971).
276. *Id.* at 651-52. The case involved a class action by the New Jersey Attorney General under a consumer fraud statute. UCC § 2-302 was involved only by inference. The court adds a footnote regarding caselaw development of the doctrine which is relevant to § 2-302:

This approach to the definition of "unconscionability" parallels that employed in developing the definition of fraud. Thus, one commentator has observed:

"Unconscionability," then, is what the courts say it is. From this perspective, the concept of unconscionability contains both a procedural element and a substantive element. Substantive unconscionability refers to the *terms* of the contract: inflated prices,[277] unfair disclaimers of warranty,[278] clauses providing unreasonably large liquidated damages,[279] and agreements not to assert claims and defenses.[280] Procedural unconscionability involves the contract formation process, including misrepresentation and fraud on the part of the seller, use of high-pressure sales tactics,[281] failure to disclose contract terms, refusal to bargain on crucial terms, fine print clauses, and unequal bargaining power aggravated by the consumer's lack of commercial sophistication or education in general—in some instances his inability to read or speak English.[282]

Misuse and nonuse of credit information fall within the procedural unconscionability category. The bulk of the section 2-302 case law, however, has been addressed to the substantive element of unconscionability, particularly as applied to price or other contract terms, and the role of credit information has not received significant judicial attention. In *Jones v. Star Credit Corp.*,[283] the court found unconscionable a sale to welfare recipients of a freezer unit, having an actual value of $300, for a total price, including sales tax and credit

> The Courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety. The fertility of man's invention in devising new schemes of fraud is so great, that the Courts have always declined to define it, or to define undue influence, which is one of its many varieties, reserving to themselves the liberty to deal with it under whatever form it may present itself. Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered as fraud. Kerr, Fraud and Mistake, 1 (7th ed. 1952).

Id. n.4.

277. Note, *UCC Section 2-302 and the Pricing of Goods: Are the Courts More Than the Market Will Bear?*, 33 U. PITT. L. REV. 589 (1972).

278. Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (N.Y.C. Civ. Ct. 1969).

279. Denkin v. Sterner, 10 Pa. D. & C.2d 203 (1956); Nu Dimensions Figure Salons v. Becerra, 73 Misc. 2d 140, 340 N.Y.S.2d 268 (1973).

280. Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).

281. Nu Dimensions Figure Salons v. Becerra, 73 Misc. 2d 140, 340 N.Y.S.2d 268, 272 (1973).

282. Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (N.Y.C. Civ. Ct. 1969). *See generally*, Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969).

283. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969). The court is correct in its analysis, but the courts do seem to rely on some outside measure in determining whether the price is unconscionable. *Id.*

See also American Home Improvements, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964) (price vs. value as measured by usefulness); Toker v. Pearl, 103 N.J. Super. 500, 247 A.2d 701 (1968); Kupler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971) (contract price vs. fair market value as shown by maximum retail prices); Frostifresh Corp. v. Reynoso, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967) (credit charges vs. wholesale cost; State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966) (retail price vs. unit cost to seller).

None of these measures are necessarily relevant to the improvident extension of credit.

charges, of $1440. Credit charges alone exceeded by $100 the retail value of the freezer, which fact itself was felt by the court to be sufficient to sustain the decision. The court added: "[A] caveat is warranted lest we reduce the impact of Section 2-302 solely to a mathematical ratio formula. It may, at times, be that; yet it may also be much more. The very limited financial resources of the purchaser, known to the sellers at the time of sale, is entitled to weight in the balance."[284]

A review of the case under section 2-302 reveals a willingness on the part of the courts to strike a new balance in consumer credit transactions: on the one hand a departure from the *caveat emptor* tradition:

> [W]e have reached the point where "Let the buyer beware" is a poor business philosophy for a social order allegedly based upon man's respect for his fellow man. Let the seller beware, too! A free enterprise system not founded upon personal morality will ultimately lose freedom. . . [285]

at the same time recognizing that persons should not be unnecessarily restricted in their freedom to contract:

> It is apparent that the court should not allow the statutory provision in question to be used as a manipulative tool to allow a purchaser to avoid the consequences of a bargain which he later finds to be unfavorable. The doctrine of unconscionability is not a charter of economic anarchy. Contracts still bind and debts are still payable. A promisor can be relieved of his obligation, of course, but only when the transaction affronts the sense of decency without which business is mere predation and the administration of justice an exercise in bookkeeping.[286]

The courts have demonstrated considerably less hesitancy to invoke section 2-302 when substantive unconscionability is found, particularly in the area of inflated prices. This and other terms of the contract usually speak for themselves and tend to be "constants"—that is, the circumstances peculiar to the buyer, while perhaps a factor in the decision, may not be necessary to it. When the inquiry relates to procedural unconscionability in the formation of the contract, the peculiar circumstances of the buyer take on more importance.[287] Contract terms may be unconscionable only where there is a disparity

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284. 59 Misc. 2d 189, 192, 298 N.Y.S.2d 264, 267 (1969). The consumer's poor credit rating was obviously known to the seller and the assignee in *Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (N.Y.C. Civ. Ct. 1969), the court finding unconscionable a waiver of implied warranties and an agreement not to assert defenses by a consumer possessing only a "sketchy" knowledge of English. Knowledge of the buyer's welfare status was also imputable to the seller in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), discussed in text accompanying notes 308, 314, *infra*.

285. State v. ITM, Inc., 52 Misc. 2d 39, 58, 275 N.Y.S.2d 303, 321 (1966). *See also* Nu Dimension Figure Salons v. Becerra, 73 Misc. 2d 140, 340 N.Y.S.2d 268 (1973) ("the term 'caveat emptor' has been eroded by the Code. No longer can a seller hide behind it when acting in an unconscionable manner").

286. Adopted from Toker v. Westerman, 113 N.J. Super. 452, 274 A.2d 78, 80 (1970), and Gimbel Bros., Inc. v. Swift, 62 Misc. 2d 156, 307 N.Y.S.2d 952 (1970).

287. Virtually all of the cases involving price unconscionability do, however, present some evidence of procedural unconscionability, such as a lack of sophistication on the part of the consumer which inferentially, at least, the creditor has taken advantage of. Un-

of bargaining power or of commercial sophistication, or where misrepresentation, fraud, or other overreaching is shown. Thus, if a buyer is sold an automobile at a fair price considering the make, year and model, under a contract calling for payments of, say, $100 per month, neither that contract nor such terms are likely to be found unconscionable in the absence of overreaching.[288] Yet, the circumstances of the buyer may include a credit worthiness, income capability and emergency preparedness picture clearly compelling the conclusion that the payment schedule is unlikely to be met. For a creditor who is quite obviously a "merchant" holding himself out as having knowledge or skill peculiar to the installment credit selling of automobiles[289] to permit consumation of such a sale is no less unconscionable than such overreaching tactics as misrepresentation, fraud, over-pricing and oppressive disclaimers or limitations of remedies. The passive stance of the creditor, however, will most probably protect him under the current state of the case law under section 2-302. Furthermore, if *Patterson v. Walker-Thomas Furniture Co.*[290] is an indication the tide may be taking a conservative turn, the court there holding that merely alleging over-pricing is not sufficient *either* to establish unconscionability *or* to invoke discovery processes on the seller's pricing policies in the absence of sufficient allegation of the particulars of the two essential elements of unconscionability: absence of meaningful choice and contract terms unreasonably favorable to the seller.

Even taking the conclusions of the *Caplovitz Studies* as a background it is clear that cases involving inflated prices and unfairly oppressive contract terms aside, courts are perhaps unlikely to find a contract unconscionable *solely* in light of what the creditor knew or should have known about the debtor's ability to pay. Nothing in section 2-302 and the balancing process necessarily involved seemingly precludes such a ruling, but the common denominator discernible from the case law—absence of meaningful choice, (lack of true bargaining) plus terms which are unreasonably favorable *to the creditor*, or oppressive as unfairly surprising, when viewed in the light of the general *commercial background* and the *commercial needs* of the particular trade or case—does not so easily transform the transaction which is merely improvident into one that is unconscionable.[291] Yet, when a court rules unconscionable as a matter of law a contract calling for a total of payments of $1440 for a freezer having a retail value of $300,[292] allowing the creditor to collect only his cost, overhead,

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conscionability depends on all the circumstances, so the procedural and substantive elements are inseparable except for purposes of analysis.

288. *Compare* Central Budget Corp. v. Thomas, 4 CCH CONS. CRED. GUIDE ¶ 99,719 (1970). Judge Irving Younger of the Civil Court of New York City states: "If the terms of the bargain are not unfair, I usually go no further: the unconscionability is then and there rejected." *See* Younger, *A Judge's View of Unconscionability*, 5 U.C.C.L.J. 348, 349 (1973).

289. IOWA CODE ANN. § 554.2104(1) (Supp. 1973).

290. 277 A.2d 111 (D.C. Ct. App. 1971). *See* Zuckman, *Walker-Thomas Strikes Back: Comment on the Pleading and Proof of Price Unconscionability*, 30 FED. B.J. 308 (1971).

291. *See* Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111 (D.C. Ct. App. 1971); Morris v. Capitol Furniture & Appliance Co., 280 A.2d 775 (D.C. Ct. App. 1971).

292. *See, e.g.*, Toker v. Westerman, 113 N.J. Super. 452, 274 A.2d 78 (1970); Jones

and a *reasonable* profit and finance charge,[293] that court in essence is saying to that creditor: "If you cannot avoid the guidelines thus drawn in extending credit, your alternative must be to forego such extensions of credit." That is precisely the thrust of a rule which would personalize the extension of consumer credit by requiring the utilization of readily available credit information.

While the terms of the contracts in most of the section 2-302 cases do speak for themselves, that is, it is "impossible to state it to a man of common sense without producing an exclamation at the inequality . . . ,"[294] the courts reacting thereto by refusing to enforce such terms or by limiting their application so as to avoid an unconscionable result, the unconscionability which results from misuse or nonuse of credit information does not necessarily have reference to the terms of the contract. Terms which appear to be extremely harsh might become less so, given an extremely poor credit rating, while terms considerably less harsh at first glance might seem unfair in terms of the over-extended debtor.

In summary, it seems unlikely that a court would base a ruling of unconscionability under UCC section 2-302 solely on the fact that the creditor *knew* of various facts about the credit worthiness of the debtor. In light of *Jones v. Star Credit Corp.*,[295] and *Williams v. Walker-Thomas Furniture Co.*[296] such knowledge would be at most a supportive factor in the overall decision. It is even less likely that courts would so interpret section 2-302 as to make the failure of the creditor to avail himself of such credit information a factor in that decision.[297]

Finally, regardless of the scope of section 2-302, or of the willingness of some courts to expand it, the protection afforded the consumer is in the nature of an affirmative defense. The available evidence compels the conclusion that the protection simply will not be utilized.

B. *A Proposed Approach*

> The possession of automobiles, color T.V. sets, freezers, stereo record players and the like have in and of themselves become the status symbols of success and the urgent need to protect the heedless seekers of these symbols from the few unscrupulous merchants who prey upon them has been acknowledged.
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> . . . .

v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); Frostifresh Corp. v. Reynoso, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

293. *See* Frostifresh Corp. v. Reynoso, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

294. Toker v. Westerman, 113 N.J. Super. 452, 454, 274 A.2d 78, 80 (1970).

295. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

296. 350 F.2d 445 (D.C. Cir. 1965). *See also*, Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (N.Y.C. Civ. Ct. 1969), and Frostifresh Corp. v. Reynoso, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

297. The UCC does impose an obligation of good faith on the seller, defining it to mean "honesty in fact," but the requirement is keyed to the *performance or enforcement* of a contract, not to its formation. UCC §§ 1-203, 1-201(19). And, it has been interpreted to mean the absence of bad faith. Riley v. First State Bank, 469 S.W.2d 812 (Tex. Civ. App. 1971). *Cf.* Theodore Hamm Brewing Co. v. First Trust & Savings Bank, 242 N.E.2d 911 (Ill. App. 1968).

> The establishment of the many departments of consumer affairs and consumer protection bureaus as official agencies of our City, State and Federal government and the enactment of truth in lending and truth in advertising legislation is proof, if there need be any, of the recognition of the need to protect consumers, even against their own improvidence.[298]

The result of adoption of various of the recommendations of the *NCCF* and of the *NBCCA*, particularly with respect to deficiency judgments and the holder in due course doctrine, could and should be the elevation of the role of credit information in the consumer credit extension process. Given those changes in the system, little outside incentive would seemingly be required to achieve that goal. There is, however, a certain potential for circumvention. The automobile is the one commodity that almost always has some resale value. If, for example, sellers of used cars will face a "loss" of "profit" on automobiles priced at $1765 and less, because they can no longer repossess, resell, and seek deficiency judgments, and if the sale of their commercial paper becomes less profitable due to abolition of the holder in due course doctrine, a price increase might be the result. For instance, a dealer willing to sell a used car for $1500, allowing a trade-in of $300, might raise the price to $1800 and credit the buyer with a $600 trade-in, thus avoiding the potential of lost profit under the election of remedies proposal. Further, only 72 of the 201 cases in the *D.M. Study* would have been affected by a forced election of remedies at the $1765 level, and only 39 affected by an election at the $1000 level. As in the case of section 2-302, the *potential* of the election of remedies approach as an appropriate legislative answer to misuse and nonuse of credit information is there, but is most likely to fall short of actually curbing this kind of creditor abuse. And, the likelihood of legislative action on this *NCCF* recommendation in the near future is probably small.

The *NCCF* recommends that bankruptcy courts disallow creditors' claims that arise from "unconscionable" transactions, and that in determining whether a consumer credit transaction is unconscionable, the bankruptcy court, in addition to considering the case law, should consider whether the transaction entailed an improvident extension of credit, that is, the court should consider whether the creditor made "an extension of credit to a debtor where it cannot be reasonably expected that the debtor can repay the debt in full in view of the circumstances of the debtor *as known to the creditor* and of such circumstances as would have been revealed to him upon *reasonable inquiry* prior to the credit extension."[299] The *NCCF* feels that the extension of consumer credit in the light of known credit information, as well as in the case of extension of credit *sans* inquiry, requires bankruptcy courts to have the "polic-

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298. Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (N.Y.C. Civ. Ct. 1969).

299. *NCCF Report, supra* note 4, at 42 (emphasis added). UCCC § 5.103 can be viewed as a proscription of one kind of unconscionable result, as can the *NCCF* recommendation for elections of remedies.

ing" power given to courts of general jurisdiction under the unconscionability provisions of the UCC and UCCC. In light of the results of the *D.M. Study*, this approach seems warranted currently in *all* instances of consumer credit extensions of significant amounts. This increasingly becomes the case as adoption of various of the recommendations of the *NCCF* and *NBCCA* begin to force creditor attention on credit information. The concern would, in that case, be on the misuse of known credit information. If these recommendations are not adopted, the *D.M. Study* fairly leads to the conclusion that nonuse of available credit information ought to come within the "policing" powers of the courts also.

Adoption of UCCC section 5.108, with certain amendments and supportive provisions,[300] would provide a workable response to the problem, whether or not the *NCCF-NBCCA* proposals are adopted. That section, as it is herein proposed, could be separately adopted, incorporated by amendment into UCC section 2-302, or enacted as a part of the general enactment of the UCCC.[301] It would read as follows:

> Section 5.108 [Unconscionability]
>
> (1) With respect to a consumer credit sale, consumer lease, or consumer loan, if the court as a matter of law finds the agreement or any clause of the agreement to have been unconscionable at the time it was made the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause, or it may so limit *the enforcement of the agreement or* the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination.
>
> (3) For the purpose of this section, a charge or practice expressly permitted by this Act is not in itself unconscionable.[302]

The Official Comment to section 5.108 would be adopted virtually verbatim, but with the addition of the essence of the *NCCF* recommendation regarding improvident extensions of credit.

While section 5.108 in present form basically adopts the language of section 2-302 of the UCC, the UCCC now applies the doctrine to a much broader

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300. Primarily important are §§ 6.111 and 4.106, set forth in notes 311 and 319, *infra*.

301. The adoption of the entire UCCC as a starting point is called for by both the *NCCF* and the *NBCCA*, the former by implication, the latter expressly so. *NBCCA Report*, *supra* note 5, at 15. A unified enactment seems preferable to a piece-meal approach. *See generally* Jordan & Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. IND. & COM. L. REV. 441 (1967); Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387 (1965); Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445 (1968).

302. Proposed amendments to § 5.108 are italicized. Subsection (3) would be retained if proposed § 5.108 is adopted separately or as a part of the UCCC. If the essence of the proposal is amended into IOWA CODE ANN. § 554.2303, subsection (3) would be amended or dispensed with depending upon the legislative response to the proposals of the *NCCF* and of the *NBCCA*.

scope of *consumer* transactions. Comment 1 to section 5.108 expresses the difference:

> The omission of the adjective "commercial" from the provision in sub-section (2) [of section 5.108] concerning the presentation of evidence as to the contract's "setting, purpose and effect" is deliberate. Unlike the UCC, this section is concerned only with transactions involving consumers, and the relevant standard of conduct for purposes of this section is not that which might be acceptable as between knowledgeable merchants but rather that which measures acceptable conduct on the part of a businessman toward a consumer.[303]

Like the drafters of the UCC, the drafters of the UCCC express in Comment 1 to section 5.108 the intent to permit the courts to "police" contracts or clauses which are found to be unconscionable, but unlike section 2-302, Comment 2 to section 5.108 states that the basic test of unconscionability under the UCCC is:

> whether, in the light of the background and setting of the market, the commercial needs of the particular trade or case, *and the condition of the particular parties to the contract*, the contract or clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.[304]

Also omitted from Comment 2 to section 5.108 is the statement found in Comment 1 to section 2-302 that "the principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power." Rather, Comment 2 to section 5.108 emphasizes that the *particular* facts in each case are of utmost importance since certain contracts or provisions may be unconscionable in some situations but not in others. Finally, Comment 2 lists *Henningsen v. Bloomfield Motors, Inc.*,[305] and *Williams v. Walker-Thomas Furniture Co.*[306] as illustrative of cases applying the doctrine of unconscionability as it is contemplated in the UCCC.[307] In the *Henningsen* case, the Supreme Court of New Jersey noted the absence of any real choice on the part of an automobile purchaser with respect to warranty protection, and refused to enforce the seller's provisions purporting to limit the buyers' warranty protection and remedies. In *Williams v. Walker-Thomas Furniture Co.*, the seller was aware of the fact that the buyer's principal source of income was a $218 per month welfare check, that she had seven children and herself to support on this amount, and that she owed a previous account balance to the seller of $164. Nevertheless, she was sold a $514 stereo. The court's discus-

303. One commentator suggests that the omission was perhaps unnecessary since courts could view the "commercial setting" as involving transactions between a businessman and a consumer. *See* Comment, *Enforcement Under The UCCC*, 55 MINN. L. REV. 572, 577 (1971).

Section 5.108, of course, applies to consumer loans and leases, both of which fall outside the scope of UCC § 2-302 for want of a sale of goods.

304. The portion of the excerpt to which emphasis has been added points out the difference in approach between the comments to UCC § 2-302 and UCCC § 5.108.

In applying § 5.108, the courts will be influenced by the specific factors contained in §§ 6.111 and 4.106. *See* notes 311, 319, *infra*.

305. 32 N.J. 358, 161 A.2d 69 (1960).

306. 350 F.2d 445 (D.C. Cir. 1965).

307. No cases construing UCCC §§ 5.108, 6.111 or 4.106 have been found, due mainly to the relative newness of the law in the seven enacting states.

sion of unconscionability has since been widely commented on, even though the ruling of the court was to remand the case, and even though section 2-302 was not involved. The discussion by the court does perhaps point out the difference between section 2-302 and section 5.108, since the court was willing to look into the possibility of unconscionable conduct in the absence of any evidence of overreaching, or of one-sideness, oppression or unfair surprise, particularly as such factors are viewed against the *commercial* setting and background. Under present section 5.108 it is considerably more likely that such a sale could be found unconscionable under the particular facts involved and the "condition of the particular parties to the contract," notwithstanding that the item was fairly priced in terms of the overall market.

The approach of section 5.108 is thus more personalized than is that of section 2-302, and it is concerned less with market and commercial needs. The version of section 5.108 proposed herein is designed to afford even greater flexibility in the area of misuse and nonuse of credit information, permitting the court to limit enforceability of the agreement as a whole in order to avoid *any* unconscionable result, as opposed to the current scope of both sections 2-302 and 5.108 by which avoidance of unconscionable results is accomplished only by limiting the application of any unconscionable clauses, or enforcing the contract without the offending clauses, or refusing to enforce the entire agreement—none of which options necessarily fit the improvident extension of credit.

C. *Enforcement*

> In a complex society which includes large numbers of people helpless to protect themselves from the rapacity of others and folly of their own, is it not well that somewhere in the system sits a man or woman empowered by the system to say, "It is not right that you have your bargain off your brother, and so you shall not."?[308]

Among the inadequacies of the UCC approach to unconscionable consumer contracts in section 2-302 is the fact that it gives rise to no cause of action for damages.[309] It is a defense to be raised in an adversary proceeding. Since few consumer defendants carry the fight that far anyway, either because of ignorance, expense or other reasons, it is unlikely that a cause of action for damages would provide any practical solution for recipients of improvident extensions of credit. Creditors generally possess the wherewithal to fight such actions in any event, the expense thereof perhaps passed on in one form or another to the general consuming public. The UCCC solves this problem in section 6.111(1), providing in pertinent part that the Administrator "may bring a civil action to restrain a creditor or a person acting in his behalf from engaging in a course of (a) *making* . . . unconscionable terms or provisions of

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308. Younger, *A Judge's View of Unconscionability*, 5 U.C.C.L.J. 348, 352 (1973).

309. *See* Pearson v. National Budgeting Systems, Inc., 31 App. Div. 2d 792, 297 N.Y.S.2d 59 (1969). UCCC § 5.108 does provide a private remedy for unconscionable consumer credit transactions. *See* comment 1, § 6.111. While a failure of the debtor to abide by his contract or statutory requirements usually can be translated into an ascertainable money loss to the creditor, the economic effect on debtors of credit failure in such circumstances is more difficult to measure. *See* Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions*, 8 B.C. Ind. & Com. L. Rev. 535 (1967).

consumer credit sales, . . . leases, or . . . loans; (b) . . . unconscionable conduct in *inducing* debtors to enter into consumer credit sales, . . . leases or . . . loans . . ."[310] subsection (3) provides that in applying section 6.111 "consideration shall be given to each of the following factors, *among others*: (a) belief by the creditor at the time [of the making of the agreement] that there was no reasonable probability of payment in full of the obligation by the debtor,* * * (e) the fact that the [creditor] has knowingly taken advantage of the inability of the debtor to protect his interests by reason of . . . ignorance, illiteracy . . . or similar factors."[311]

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310. UCCC §§ 6.101-.115. *See* Jordan & Warren, *A Proposed Uniform Code For Consumer Credit*, 8 B.C. IND. & COM. L. REV. 441, 458-59 (1967); Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 417-41 (1965).

The Administrator has, in addition to the injunctive power under § 6.110, the power to issue "cease and desist" orders under § 6.108. Among his other powers are:

(a) receive and act on complaints, take action designed to obtain voluntary compliance with this Act, or commence proceedings on his own initiative;

(b) counsel persons and groups on their rights and duties under this Act;

(c) establish programs for the education of consumers with respect to credit practices and problems;

(d) make studies appropriate to effectuate the purposes and policies of this Act and make the results available to the public; [and]

(e) adopt, amend, and repeal substantive rules when specifically authorized by this Act, and adopt, amend, and repeal procedural rules to carry out the provisions of this Act;

(f) investigation of possible violations (including subpoena power);

(g) accept assurance in writing that a person alleged to be in violation of the Act will not engage in the conduct in the future;

(h) civil actions.

The administrative action under UCCC § 6.111 is in addition to the *private* remedy for unconscionable consumer credit transactions. *See* Comment 1, § 6.111. All of the Administrator's powers could of course be vested in the Attorney General.

311. Marginal employment, lack of emergency preparedness, and similar facts should come within both subsection (3)(a) and (b). On the other hand, extensions of extremely small amounts of credit are unlikely to be affected except in extreme circumstances.

Section 6.111 states in full:

[Injunctions Against Unconscionable Agreements and Fraudulent or Unconscionable Conduct]

(1) The Administrator may bring a civil action to restrain a creditor or a person acting in his behalf from engaging in a course of

(a) making or enforcing unconscionable terms or provisions of consumer credit sales, consumer leases, or consumer loans;

(b) fraudulent or unconscionable conduct in inducing debtors to enter into consumer credit sales, consumer leases, or consumer loans; or

(c) fraudulent or unconscionable conduct in the collection of debts arising from consumer credit sales, consumer leases, or consumer loans.

(2) In an action brought pursuant to this section the court may grant relief only if it finds

(a) that the respondent has made unconscionable agreements or has engaged or is likely to engage in a course of fraudulent or unconscionable conduct;

(b) that the agreements or conduct of the respondent has caused or is likely to cause injury to consumers; and

(c) that the respondent has been able to cause or will be able to cause the injury primarily because the transactions involved are credit transactions.

(3) In applying this section, consideration shall be given to each of the following factors, among others:

(a) belief by the creditor at the time consumer credit sales, consumer leases, or consumer loans are made that there was no reasonable probabil-

While Official Comment 3 indicates that under section 6.111(3)(a) the Administrator would be entitled to injunctive relief where for example goods are sold to a low-income consumer "without expectation of payment but with the expectation of repossessing the goods sold and reselling them at a profit," the emphasis in subsection (3)(a) seems far too subjective to afford significant enforcement of section 5.108 and hence little protection for the public in general.[312] Accordingly, the following additive amendment to section 6.111(3)(a) is suggested: "or the existence of accessible credit information tending to negate any reasonable probability of payment in full of the obligation by the debtor." In addition to *Williams v. Walker-Thomas Furniture Co.*,[313] three cases found in the section 2-302 case law exemplify the coverage under UCCC sections 5.108, and 6.111(3)(a) and should be set forth in the Official Comments as illustrative of cases applying those sections. In *Jones v. Star Credit Inc.*,[314] as in *Williams*, credit was extended to a known welfare recipient. In *Frostifresh Corp. v. Reynoso*,[315] the debtor told the refrigerator salesman that he had but one week left on his job and that he could not afford to buy the appliance. The poor credit rating of the debtor in *Jefferson Credit Corp. v. Marcano*[316] was known by the seller's assignee—and reflected by adjustments in the reserve account between the seller and the assignee—and most likely known also to the seller.

Of the 201 extensions of credit in the *D.M. Study*, the approach proposed herein would have affected 78 of them—17 instances in which an inquiry disclosed unsatisfactory information, and 68 instances where an inquiry *would* have disclosed unsatisfactory information. Since the overall view of UCCC

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ity of payment in full of the obligation by the debtor;

(b) in the case of consumer credit sales or consumer leases, knowledge by the seller or lessor at the time of the sale or lease of the inability of the buyer or lessee to receive substantial benefits from the property or services sold or leased;

(c) in the case of consumer credit sales or consumer leases, gross disparity between the price of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in credit transactions by like buyers or lessees;

(d) the fact that the creditor contracted for or received separate charges for insurance with respect to consumer credit sales or consumer loans with the effect of making the sales or loans, considered as a whole, unconscionable; and

(e) the fact that the respondent has knowingly taken advantage of the inability of the debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

(4) In an action brought pursuant to this section, a charge or practice expressly permitted by this Act is not in itself unconscionable.

312. *See* Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971) and State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966), both involving class actions by state Attorneys General.

313. 350 F.2d 445 (D.C. Cir. 1965).

314. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

315. 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

316. 60 Misc. 2d 138, 302 N.Y.S.2d 390 (N.Y.C. Civ. Ct. 1969). The Official Comment should also mention *Williams v. Walker-Thomas*, *Marcano*, *Reynoso*, and *Jones v. Star Credit* as cases exemplifying section 6-111(3)(a).

section 5.108 is that "the particular facts of each case are of utmost importance," and that certain contracts may be unconscionable in some situations but not in others, it is difficult to predict just where a court would draw the line as between those credit "pictures" which trigger sections 5.108 and 6.111 and those that do not. Obviously, not all items of adverse credit information carry the same potentiality for default. Prior bankruptcies, for example, might be reasonably approached as indicative of poor credit management and lack of emergency preparedness, but a debtor recently discharged in bankruptcy is arguably a good credit risk, at least from the standpoint of overall indebtedness. The same is arguably true as regards small judgments or collections. Perhaps the appropriate response by affected creditors would be to tailor the transaction to the credit picture they find, such as by expressly reserving to the debtor the right to refinance,[317] or the right to defer ("skip") a number of payments commensurate with the debtor's credit picture, including garnishable judgments and inchoate judgment-collections, or the right to "cure" a default, and by requiring credit and income-disruption insurance,[318] all commensurate with the credit worthiness and emergency preparedness picture. If such an approach were taken, such creditors could arguably avoid section 5.108 and 6.111. If not, they have no less than assumed a known risk. Those creditors "caught" by section 5.108 do not evoke great sympathy in view of the satisfaction of indebtedness rate disclosed in the *D.M. Study* and in view of the accessibility of credit information with respect to which the extension of credit can be structured (or foregone) accordingly. If the section 2-302 case law is taken as a

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317. *The NBCCA Report, supra* note 5, recommends greater use of the right of consumers to refinance. *Id.* at 39.

In *Blout v. Westinghouse Credit Corp.*, 432 S.W.2d 549 (Tex. Civ. App. 1968), the creditor's reaction to the debtor's lack of credit standing seems to have influenced the court's decision in holding a guaranty contract not unconscionable under UCC § 2-302.

318. UCCC § 4.106 states:

[Unconscionability]

(1) In applying the provisions of this Act on unconscionability (Sections 5.108 and 6.111) to a separate charge for insurance, consideration shall be given, among other factors, to

(a) potential benefits to the debtor including the satisfaction of his obligations;

(b) the creditor's need for the protection provided by the insurance; and

(c) the relation between the amount and terms of credit granted and the insurance benefits provided.

(2) If consumer credit insurance otherwise complies with this Article and other applicable law, neither the amount nor the term of the insurance nor the amount of a charge therefor is in itself unconscionable.

It may be shown that an agreement about insurance, like other terms of a consumer credit contract, is unconscionable, and the effects are those specified in Sections 5.108 and 6.111. However, it is the intent of this section that the issue be judged in relation to the particular risks insured. The section lists only some of the factors to be considered, and indicates that a balancing of benefits, needs, and costs is required. In general, the creditor's need for insurance protection and the debtor's potential benefit are more patent in connection with extensions of credit that are substantial as to amounts and periods; the expense of providing exceptional coverages is suspect in relation to relatively small extensions of credit. The relation between the credit terms and the insurance terms must be taken into account in applying this section.

guide, these creditors would be limited to a "reasonable" return on their extension of credit. Absent election of remedies legislation, the creditor might be limited to repossession[319] as the measure under section 5.108. If such legislation is enacted, those creditors *electing* suit on the obligation and those extensions of credit falling outside of the limits of the legislation might be held to a "but for" test keyed to foreseeable risks. If the emergency preparedness picture of the debtor was known to be weak at the time of the extension of credit and if emergency financial circumstances were in part a cause of the default, the creditor could be limited to the downpayment plus payments made. These creditors, then, would be deemed to "take the debtor as they find him." The particular circumstances of each case would control, but if inquiring or non-inquiring creditors are simply "taking their chances," they at least ought to get what they bargain for.

VI. Conclusion

> Unconscionability . . . is an amorphous concept obviously designed to establish a broad business ethic. . . . [F]reedom to contract survives, but marketers of consumer goods are brought to an awareness that the restraint of unconscionability is always hovering over their operations and that courts will employ it to balance the interests of the consumer public and those of the sellers.
>
> The standard of conduct contemplated by the unconscionability clause is good faith, honesty in fact and observance of fair dealing. The need for application of the standard is most acute when the professional seller is seeking the trade of those most subject to exploitation—the uneducated, the inexperienced and the people of low incomes. In such a context, a material departure from the standard puts a badge of fraud on the transaction and here the concept of fraud and unconscionability are interchangeable.[320]

One fact which inescapably surfaces in the face of the studies and reports referred to in this article is that for the consumer who has defaulted, the legal system has little to offer. Inappropriate, but presently sanctioned concepts such as holder in due course, and the "commercially reasonable" resale at wholesale, borrowed from the law of commerce, are applied to consumer transactions with often harsh results, particularly so since the consumer's plight won't necessarily be relieved by the presence of the lawyer—that he can't afford to hire anyway. The overall picture is made even less tolerable by the absence of a recognized duty on the part of creditors to seek credit information—even though that is arguably a "commercially reasonable" approach to credit extension. Some inroads have been made, most notably the application of unfair or deceptive practice acts or consumer fraud acts to "bait advertising," and the expanding doctrine of unconscionable contracts under section 2-302 of the UCC, particularly as applied to *price* unconscionability. These inroads aside, the tra-

319. *Compare* Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (N.Y.C. Civ. Ct. 1969).
320. Kugler v. Romain, 58 N.J. 522, 534, 279 A.2d 640, 651-52 (1971).

ditional view of courts, legislatures, and most likely, of society as a whole remains in force: that each individual is the master of his own credit destiny, and as such quite capable of making a bad bargain as well as a good one, and that it is not the role of courts to step in and relieve him of his bad bargains. Under this view, *overreaching* may in some exceptional circumstances catch the court's attention, but by and large the current legal system has little sympathy for the individual who has signed a contract outwardly fair in its terms, but which all agree, given the individual's own peculiar circumstances, he, the creditor, or both, should have foregone.[321] The system, however, seems destined to change, the import of a great deal of which change will be increased importance and use of credit information. When these changes do come about, the misuse of known credit information will become an increasingly appropriate matter for judicial inquiry, and judicial inquiry ("policing") seems best suited for the fact-oriented approach of the version of UCCC sections 5.108 and 6.111 proposed herein. Until such changes are implemented, the inquiry for the courts should be focused on nonuse of credit information as well as its misuse.

The issue for the creditor under such a proposal as herein set forth is not whether the purchase or loan in question pertains to the acquisition of an unnecessary or frivolous purchase, but rather "is there a *reasonable* probability that the debtor has the ability to repay the indebtedness?" Resolution of this issue requires no more than utilization and analysis of information already available and readily accessible. If such information can be made to include the emergency preparedness picture of the debtor, the creditor's further obligation will be to structure the credit extension appropriately, with due regard for the particular circumstances of the debtor, such as his apparent ability to absorb future judicial levies on current judgments and collections, and other foreseeable future interruptions of income. Creditors should not be placed in the position of second-guessing the appropriateness of the extension of credit from any other vantage point. If there is under the circumstances no reasonable probability that the indebtedness will not be repaid, the frivolous purchase should not be affected.[322] Professor Kripke's point regarding the problem of subsequent in-

321. Caplovitz concluded in THE POOR PAY MORE, *supra* note 26, that:

> Of course, the poor risks are always free to do without the goods that are available to them. . . . But . . . consumption in our society . . . is more than a matter of getting and having material conveniences. Equally important, Americans in all walks of life are trained to consume in order to win the respect of others and to maintain their self-respect. These social pressures to consume are perhaps inevitable in a society characterized by a rising standard of living.

Id. at 180. This being the case, the admonition of Chapin and Hassett takes on particular meaning:

> Searching for and avoiding the dishonest debtors is not the creditor's only task. He must also seek to protect the prospective debtor as well as himself from the debtor's imprudence.

CHAPIN & HASSETT, CREDIT AND COLLECTION PRINCIPLES AND PRACTICE 47 (7th ed. 1960).

322. *But see* § 6.111(3)(b):

> consideration shall be given to . . . the following factors, and among others:
>
> * * *
>
> (b) . . . knowledge by the seller . . . at the time of the sale . . . of the inability of the buyer . . . to receive substantial benefits from the property . . . sold

debtedness can be answered by observing that under the proposal herein made, subsequent credit purchases or loans become the sole problem of the subsequent credit grantor.

The burden imposed on creditors by the proposal is not thought to be an undue one. Creditors are *merchants*, and those affected by the proposal are those who deal with consumer transactions, which by definition involves credit. They are fairly required under the proposal to exercise that quality of knowledge or skill peculiar to their credit-oriented trade which makes them merchants.[323]

A proposal such as presented in this article raises at once several related questions: Why protect a consumer from his own improvidence? Must certain credit extensions be foregone entirely? Won't some other creditor extend to the consumer the same credit already refused? The broad answer to these questions is found in a changed emphasis on consumer credit from a bureaucratic, impersonal approach to a more personalized (and realistic) approach. In more specific terms, enactment of the proposal would embody a public policy decision that consumers do need restraints imposed from without, and imposed on them indirectly through sanctions on those who extend credit. That same policy decision underlies legislation pertaining to "bait and switch advertising."[324] home solicitation sales, referral or "pyramid" sales schemes, truth-in-lending, and the oldest consumer protective enactment, usury. It undoubtedly is true that the buyer whose wants exceed what is reasonably viewed as his ability to repay may either find his wants satisfied by another creditor or will be forced to review those wants or even forego them, but that transaction nevertheless must be foregone by the creditor. The argument that some other furniture dealer would have "ripped off" Mrs. Williams had Walker-Thomas not done so was inherently present in the *Williams* case—the transaction was unconscionable nevertheless.[325] In addition, the "wants" of consumers are to a large degree artificially created by creditors through advertising and selling techniques and it is creditors who are in a position to police the extensions of credit designed to satisfy those wants.

The "needs" of poor credit risk consumers deserve specialized treatment, and the *NCCF* recommendation for small, small loan legislation seems to be appropriately geared to the private competition, free enterprise financing of such consumers, and on a profitable basis to such lenders.[326] Such legisla-

. . . .

Comment 3 to the section describes as illustrative of subsection (b) "a sale to a Spanish speaking laborer-bachelor of an English language encyclopedia set, or the sale of two vacuum cleaners to poor families sharing the same apartment and one rug."

323. *Cf.* Seabrook v. Commuter Housing Co., Inc., 328 N.Y.S.2d 67, 69 (1972); and Giacona v. Bradstreet, 20 So. 706, 707 (La. 1896).

324. *See* Annot., 50 A.L.R.3d 1008 (1973), and Annot., 65 A.L.R.2d 225 (1959). *See also* Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Jurisdiction Problems,* 48 B.U.L. Rev. 559 (1968).

325. *But see* Morris v. Capitol Furniture & Appliance Co., 280 A.2d 775 (D.C. App. 1971).

326. *See* notes 213-15, *supra*. The *NCCF* recommends this in *NCCF Report, supra* note 4, at 160, and cites the states of Alabama, Alaska, Mississippi, Montana, North Caro-

tion helps to answer one of two assertions—applicable to the unconscionability proposal—made with respect to restriction of creditors' remedies: that credit will be under-extended, thereby shutting out the poorest risks (those who need credit and use credit the most) and that nothing will remain in the system as an incentive to debtors to perform their obligations. The importance that a favorable credit "rating" will take on is also a partial answer, so that performance of an obligation will assume great importance.[327] Another part of the answer may lie in the flexibility of the doctrine itself. The importance of the individual facts and circumstances of each case may result in a case-by-case development of broad guidelines rather than true precedents. *Jones v. Star Credit Corp.*[328] typifies this flexibility. There the sale of a freezer unit worth about $300 for a total price of almost $1450 was held violative of the "moral sense of the community" which section 2-302 enacts into the law of commercial transactions.[329] But in rendering this decision the court was not unmindful of the circumstances of the parties in such cases:

> There is no question about the necessity and even the desirability of installment sales and the extension of credit. Indeed, there are many, including welfare recipients, who would be deprived of even the most basic conveniences without the use of these devices. Similarily, the retail merchant selling on installment or extending credit is expected to establish a pricing factor which will afford a degree of protection commensurate with the risk of selling to those who might be default prone.[330]

Requiring creditors to seek and make meaningful use of credit information does no more than to emphasize the definition of an unconscionable contract: "One such as no man in his senses and not under a delusion would make on the one hand, and as no *honest and fair would accept* on the other."[331]

Undoubtedly, those who are poor credit risks because of outstanding judgments, collections, liens, unpaid accounts and other reasons, and who cannot improve that rating, will have a difficult time obtaining credit.[332] If small,

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lina, Oklahoma, South Carolina, and Texas as having successfully implemented small loan legislation as an alternative to loan sharks.

327. This, of course, is the Jordan and Warren theory. *See* discussion in text accompanying notes 178-82, *supra*.

328. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

329. *Id.* at 191, 298 N.Y.S.2d at 266.

330. *Id.* at 192, 298 N.Y.S.2d at 267. The court concluded, however, that neither of these accepted premises could "clothe the sale of *this* freezer with respectability."

Fear of inundation of unconscionability cases is probably ill-founded. Section 2-302 has been in force for five years in 49 states and for ten years in 14 states, and it has a progeny of fewer than 50 cases reported.

331. *See* notes 263, 271 and accompanying text, *supra*.

332. Caplovitz suggested in THE POOR PAY MORE, *supra* note 26, that one solution would be to establish by law minimum credit requirements that must be met by all consumers. *Id.* at 191. It is difficult to see how such a law would be feasible or even desirable. Caplovitz admits that "it is possible . . . that even if such laws were feasible, they would not fully accomplish their intended objectives," since instead of compelling a curtailment in consumption in light of a refusal of credit, the poor credit risk would find other sources such as peddlers against whom enforcement of such laws is extremely difficult. These families might also turn to loan sharks for financing. In the final analysis, says Caplovitz, until society raises the educational level, occupational opportunities, and income of such consumers, and reduces the discrimination against them, only limited solutions to their problems as consumers can be found.

small-loan legislation cannot provide relief, then society has already presented an alternative—bankruptcy or wage-earner plans. For the majority of those whose credit rating is somewhat better, though still marginal, the answer may be found in lower-priced models, more informative and less stimulating advertising, greater emphasis on credit counseling and education—in short, in that "natural adaptation of consumer and business to changes in the *ability* . . . of consumers to incur debt."[333]

TABLE A-1

Column Headings

1 Assigned number[334]
2 Type of purchase agreement (new or used car, or promissory note)
3 Cash price
4 Cash downpayment
5 Trade-in downpayment (net)
6 Total downpayment
7 Finance charge
8 Credit insurance charges
9 Length of contract (months)[335]
10 Monthly payments[336]
11 Total of payments[337]
12 Deficiency sought?
13 Appearance filed?
14 Answer filed?
15 Default judgment entered?
16 Defense raised?
17 Counterclaim raised?
18 Credit Bureau show this—indebtedness?
19 Credit Bureau show entry of judgment?
20 Credit Bureau show satisfaction of indebtedness?
21 Was subject (defendant) "in file" on date of sale?
22 Credit Guide (Bluebook) rating on date of sale?
23 Did seller or plaintiff inquire on or before date of sale?
24 Information in subjects file on date of sale?
25 Date of sale
26 Automobile description
27 Financer or seller[338]

333. *NCCF Report*, *supra* note 4, at 5 (emphasis added). *See also* Jordan & Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. IND. & COM. L. REV. 441, 461 (1967).

334. *See* footnote 169 *supra*.

335. Weekly or semi-weekly schedules are converted into fractions of months.

336. "Pickup" and "balloon" payments are treated as monthly payments, *e.g.*, 35 x 100 + 1 of 150 = 36.50 x $100.

337. Total of payments does not necessarily equal monthly payment x length. *See* footnote 3, *supra*.

338. Rosenfeld (R), FMCC(F), GMAC(G), CCC(C), Carter's (Ca).

TABLE A-1A

1 Assigned Number	2 New, Used or Prom. Note	3 Cash Price	4 Cash Down	5 Trade-in	6 Total Down	7 Finance Charge	8 Credit Insurance	9 Contracts (months)	10 Monthly Payments	11 Total Payments	12 Deficiency Sought?	13 Appear. Filed?	14 Answer Filed?	15 Default Judgm. Enf.?	16 Defense Raised?	17 Ctrclaim Raised?	18 C. B. Indebt. Shown?	19 C. B. Judgment Shown?	20 C. B. Satisf. Shown?	21 Was Sub. "In File"?
1-A	u	995	280	—	280	76	8	12	69	833	175	N	—	P	—	—	N	N	N	Y
2-A	u	2673	320	—	320	756	164	24	136	3276	1179	N	—	P	—	—	N	N	N	Y
3-A	u	500	200	—	200	49	4	12	31	372	216	N	—	P	—	—	N	N	N	Y
4-A	u	655	255	—	255	107	9	21	25	516	122	N	—	P	—	—	N	N	N	Y
5-A	u	800	200	—	200	120	9	15	50	757	661	N	—	Y	—	—	Y	Y	N	Y
6-A	u	1775	—	—	0	242	17	30	61	2033	619	N	—	Y	—	—	Y	Y	N	Y
7-A	u	600	100	—	100	74	16	15	41	614	480	N	—	P	—	—	N	N	N	Y
8-A	u	995	128	195	323	109	18	12	70	836	626	N	—	Y	—	—	N	N	N	Y
9-A	u	3900	199	700	899	770	285	36	117	4198	2383	N	—	P	—	—	N	N	N	Y
10-A	u	2699	—	499	499	548	85	36	79	2833	402	Y	Y	Dsm.	Y	—	N	N	N	Y
11-A	u	900	—	—	0	182	8	12	45	1097	294	N	—	Ystp.	—	—	Y	Y	N	Y
12-A	u	3193	500	—	500	553	100	36	93	3346	116	N	—	P	—	—	N	N	N	Y
13-A	u	1499	354	245	599	166	22	24	45	1087	351	N	—	P	—	—	N	N	N	N
14-A	u	1499	—	145	145	277	33	26	69	1664	366	N	—	Y	—	—	Y	Y	Y	Y
15-A	u	1042	—	245	245	181	60	24	50	1189	350	N	—	Y	—	—	Y	Y	N	Y
16-A	u	2300	200	—	200	378	64	30	85	2742	609	N	—	P	—	—	N	N	N	Y
17-A	u	800	50	—	50	169	—	18	51	920	423	N	—	Y	—	—	Y	Y	N	Y
18-A	u	1795	1	360	361	443	55	30	74	2213	336	N	—	P	—	—	N	N	N	Y
19-A	u	1795	400	—	400	513	140	30	74	2223	473	N	—	P	—	—	N	N	N	Y
20-A	u	1135	35	—	35	161	—	24	55	1314	672	N	—	Y	—	—	Y	Y	Y	Y
21-A	u	1934	—	—	0	292	23	30	75	2250	1280	N	—	P	—	—	N	—	—	Y
22-A	u	2895	500	—	500	471	62	24	128	3083	683	N	—	Y	—	—	Y	Y	N	Y
23-A	u	1100	202	—	202	200	8	24	46	1110	725	N	—	Y	—	—	Y	Y	N	Y
24-A	u	1599	—	396	396	152	18	18	74	1375	532	N	—	Y	—	—	Y	Y	N	Y
25-A	u	1904	—	154	154	314	—	48	43	2064	1723	N	—	Y	—	—	N	—	N	Y
26-A	u	2500	40	—	40	425	26	36	68	2451	494	N	—	Y	—	—	Y	Y	Y	Y
27-A	u	1195	200	—	200	237	19	18	71	1292	613	N	—	Y	—	—	Y	Y	N	Y
28-A	u	1957	557	100	657	242	81	30	54	1622	339	N	—	Y	—	—	Y	Y	Y	Y
29-A	u	1795	102	—	102	404	35	24	73	1749	881	N	—	Y	—	—	Y	Y	N	Y
30-A	u	1860	—	75	75	695	64	30	85	2548	564	N	—	P	—	—	N	—	—	Y
31-A	u	2700	507	—	507	633	138	32.5	100	3086	1679	N	—	Y	—	—	Y	Y	N	Y
32-A	u	1495	300	245	545	329	90	30	48	1423	221	Y	—	Dsm.	—	—	N	—	—	Y
33-A	u	5350	502	816	1318	878	152	36	141	5064	919	N	—	Y	—	—	Y	Y	N	Y
34-A	u	2199	300	195	495	432	155	30	82	2466	642	N	—	P	—	—	N	—	—	Y
35-A	u	1895	—	395	395	521	139	30	74	2211	329	Y	—	Dsm.	—	—	N	—	—	Y

TABLE A-1A

1 Assigned Number	22 Credit Bureau Bluebook Rating?	23 Was Inquiry Made On or Before Sale?	24 Information In Subjects File On Date of Sale?	25 Date of Sale	26 Automobile Description	27 Financer or Seller
1-A	3/9	N	2 judgm., $5681 total	8- 9-71	65 Chev. 2-dr.	R
2-A	2/1 4/9	N	No unsat. info.	5- 2-70	66 Bu. Riv.	R
3-A	1/9	N	Prior banker (liab. of 6204); 2 collections	9-16-71	63 Cad. 4-dr.	R
4-A	P	?	No unsat. info.	1-18-65	59 Fd. Gal.	F
5-A	1/1 1/2 1/6 2/3 1/5	N	2 judgm., $740 total	3-24-72	66 Olds. 2-dr.	R
6-A	—	?	No unsat. info.	11-28-65	64 Fd. Gal.	F
7-A	1/6 8/9	N	3 judgm. = 310; 13 collect. = 1887	3-30-72	65 Fd. Gal.	R
8-A	4/6 8/9	N	1 judgm. = 380; 4 collect. = 283	10-11-71	66 Bu. 2-dr.	R
9-A	—	Y	No unsat. info.	6-24-69	69 Dod. Conv.	C
10-A	1/1	N	No unsat. info.	6- 8-68	67 Fd. Gal.	F
11-A	A-3ml	?	No unsat. info.	11- 3-65	61 Fd. Ranchwgn.	F
12-A	25p	N	No unsat. info.	2-23-67	66 Dod. 2-dr.	C
13-A	—	Y	————	3- 1-68	64 Fd. Gal.	F
14-A	1/1	Y	No unsat. info.	5-31-68	65 Falc. Wgn.	F
15-A	x/9	Y	No unsat. info.	5- 3-69	65 Int. PU	F
16-A	A-p25	N	No unsat. info.	11-11-64	62 T-Bd.	F
17-A	7/1 1/6	Y	2 collect.	7- 7-69	64 Fd. XL	F
18-A	1/1 1/2 1/4 1/6	N	1 judgm. = 495; 2 collect. = 233	12- 1-70	69 Chev. Trk.	R
19-A	—	Y	No unsat. info.	3-26-68	65 Chev. Imp.	C
20-A	—	N	No unsat. info.	7-20-68	64 Chevelle Sp. Cp.	C
21-A	x/9	N	2 collect. 1 judgm. = $45	12-17-68	65 Olds. 88	C
22-A	8/1 8/9	N	2 judgm. = 5848 num. st. & fed. tax liens	5- 6-72	68 Cad. 4-dr.	R
23-A	8/9	Y	1 judgm. = $129	3-12-70	66 Olds. 88	F
24-A	10pmr	Y	No unsat. info.	2-22-67	69 Pon. Sp. Cp.	F
25-A	8/1	N	No unsat. info.	11-18-68	66 Pon. Cat.	R
26-A	2pm	Y	No unsat. info.	6- 9-64	63 Fd. XL	F
27-A	1/6	N	No unsat. info.	8-27-71	67 Olds.	R
28-A	—	Y	No unsat. info.	5-31-68	65 Fd. Must.	F
29-A	4/6	N	Wage earner bank. 1 judgm.	1- 5-71	65 Fd. Must. Conv.	R
30-A	x/9	N	4 judgm. = 1215 (unsat.) 1 judgm. = 129 (sat.)	11-26-69	66 Fd. Conv. & 65 Merc.	R
31-A	x/9	N	3 judgm. = 400	1-20-69	67 Olds. 88	R
32-A	1/1 4/9	N	No unsat. info.	1- 6-69	64 Olds. 88	C
33-A	3/1 8/9	Y	No unsat. info.	7-30-70	70 Chry. 300	C
34-A	—	Y	No unsat. info.	5-16-69	67 Dod. Dart	C
35-A	—	Y	No unsat. info.	12-17-69	67 Pon. GTO	C

TABLE A-1A (cont.)

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
Assigned Number	New, Used or Prom. Note	Cash Price	Cash Down	Trade-in	Total Down	Finance Charge	Credit Insurance	Contracts (months)	Monthly Payments	Total Payments	Deficiency Sought?	Appear. Filed?	Answer Filed?	Default Judgm. Ent.?	Defense Raised?	Ctrclaim Raised?	C. B. Indebt. Shown?	C. B. Judgment Shown?	C. B. Satisf. Shown?	Was Sub. "in File"?
36-A	u	3098	500	180	680	530	91	36	84	3039	294	N	—	Y	—	—	Y	Y	Y	Y
37-A	u	2795	500	—	500	498	—	36	80	2878	335	N	—	Y	—	—	Y	Y	N	Y
38-A	u	3230	1000	—	1000	726	189	36	87	3144	570	N	—	Y	—	—	Y	Y	N	Y
39-A	u	1495	200	295	495	203	81	30	43	1283	821	N	—	Y	—	—	Y	Y	N	Y
40-A	u	1195	150	(240)	(90)	295	—	24	62	1582	403	N	—	Y	—	—	Y	Y	N	Y
41-A	u	1403	303	—	303	225	27	24	56	1352	426	Y	—	Dsm.	—	—	N	—	—	Y
42-A	u	150	25	—	25	5	—	3+	50	157	100	N	—	Y	—	—	Y	Y	N	Y
43-A	u	2195	200	100	300	507	63	30	84	2530	1319	N	—	P	—	—	N	—	—	Y
44-A	u	1119	204	15	219	192	—	19.5	56	1092	205	Y	Y	Dsm.	Y	—	N	—	—	Y
45-A	u	1441	350	—	350	136	17	15	90	1345	836	N	—	P	—	—	N	—	—	Y
46-A	u	495	150	—	150	14	106	3	129	388	241	N	—	Y	—	—	Y	Y	N	Y
47-A	u	3638	800	—	800	466	68	24	141	3379	2197	N	—	P	—	—	N	—	—	Y
48-A	u	1598	250	—	250	419	45	30	60	1814	603	N	—	Y	—	—	Y	Y	N	Y
49-A	u	1395	200	—	200	215	—	23.5	60	1413	1143	N	—	Y	—	—	Y	Y	N	Y
50-A	u	1553	—	—	0	320	48	30	64	1921	815	N	—	P	—	—	N	—	—	Y
51-A	u	1950	200	—	200	404	61	?	?	2426	895	N	—	Y	—	—	Y	Y	N	Y
52-A	u	895	200	—	200	139	32	12	84	1002	455	N	—	Y	—	—	Y	Y	N	Y
53-A	u	3358	583	—	583	811	229	36	106	3815	2800	N	repl.	Dsm.	—	—	N	—	—	Y
54-A	u	2398	—	376	376	633	90	36	83	2988	890	N	—	Y	—	—	Y	Y	N	Y
55-A	u	1400	502	—	502	160	44	24	46	1104	683	N	—	Y	—	—	Y	Y	N	Y
56-A	u	1100	300	—	300	114	43	18	53	957	513	N	—	Ystip.	—	—	N	—	—	Y
57-A	u	3028	128	400	528	935	176	36	113	4055	1550	N	—	Y	—	—	Y	Y	N	Y
58-A	u	2295	—	335	335	449	23	36	68	2432	455 dams.	N	—	Y	—	—	Y	Y	N	Y
59-A	u	4608	1000	—	1000	786	136	36	126	4530	500	N	—	Y	—	—	Y	Y	N	Y
60-A	u	2200	500	—	500	379	151	30	80	2396	568	N	—	Ystip.	—	—	N	—	—	Y
61-A	u	3395	57	738	795	526	97	36	90	3222	906	N	—	Y	—	—	Y	Y	N	Y
62-A	u	1899	—	205	205	482	55	30	74	2231	707	N	—	Y	—	—	Y	Y	Y	Y
63-A	u	2600	500	161	661	600	207	36	84	3037	855	N	—	P	—	—	N	—	—	Y
64-A	u	2497	—	632	632	474	—	36	65	2339	681	N	—	P	—	—	N	—	—	Y
65-A	u	1052	252	—	252	154	30	18	56	999	678	N	—	Y	—	—	Y	Y	N	Y
66-A	u	3250	300	350	650	526	—	36	90	3222	566 repl.	N	—	Y	—	—	Y	Y	N	Y
67-A	u	3550	—	1250	1250	561	192	30	102	3053	2239	N	—	Y	—	—	Y	Y	N	Y
68-A	u	1397	—	(791)	(791)	468	—	30	91	2739	1265	N	—	Y	—	—	Y	Y	N	Y
69-A	u	3675	600	—	600	798	117	30	133	3989	890	N	—	Y	—	—	Y	Y	N	Y
70-A	u	1750	500	—	500	285	—	30	52	1550	repl.	N	—	Y	—	—	Y	Y	N	Y

TABLE A-1A (cont.)

1	22	23	24	25	26	27
Assigned Number	Credit Bureau Bluebook Rating?	Was Inquiry Made On or Before Sale?	Information In Subjects File On Date of Sale	Date of Sale	Automobile Description	Financer or Seller
36-A	2P	?	No unsat. info.	10-11-66	65 Pon. Cat. Conv.	G
37-A	—	Y	1 judgm. = 294 (36A)	5-26-70	69 Dod. Chr.	C
38-A	1/1 1/8 1/6	Y	No unsat. info.	3-23-70	68 Bu. 4-dr.	G
39-A	x/9	Y	No unsat. info.	8-16-68	64 Bu. 4-dr.	G
40-A	1/9	Y	Bankruptcy!	8- 5-70	65 Olds 88	C
41-A	—	Y	No unsat.	9-26-69	66 Dod. Chr.	C
42-A	x/9	N	3 collec. = $62	11- 1-68	60 Val.	Ca
43-A	2/8	Y	2 collec. = $146	5-11-71	68 Pon. Bon.	R
44-A	x/9	N	2 collec. = $49	11-13-68	64 Fd. PU	R
45-A	1/8 3/9	N	1 judgm. = 321; 1 ch. off = 1244	3-28-72	67 Fd. 2-dr.	R
46-A	1/1 5/8 8/9	Y	2 judgm. = 398; 5 collec. = $1626	4-21-72	64 Olds	R
47-A	8/1 1/6 2/8 8/9	N	4 unsat. judgm. = 806; 1 collec. = 130 + St. & Fed. Tax	7-30-71	67 Olds & 69 Olds.	R
48-A	—	N	1 judgm. = $245 st. tax lien	11- 4-70	67 Bu. Wldct.	R
49-A	*-pr-c	N	1 judgm. = 73	8-12-66	62 Chev. Conv.	R
50-A	—	N	No unsat. info.	12- 6-69	67 Pon.	R
51-A	"B"	?	No unsat. info.	11-28-66	64 Pon. Bon.	G
52-A	—	N	Criminal charges (narcotics)	1-13-70	65 Fd. Ec. Van	C
53-A	1/9	Y	66 Bankr. w/liab. = $14,019; 1 judgm. = 25; 5 collec.	10-25-72	72 Ply. Sat. Seb.	C
54-A	—	Y	No unsat. unfo.	7-15-71	69 Fd. Must. M-I	G
55-A	1/1	N	No unsat. info.	7- 8-69	65 Ply. Fury	C
56-A	—	N	No unsat. info.	1-26-70	65 Pon. Spt. Cp.	G
57-A	—	Y	No unsat. info.	11- 7-68	68 Dod. RIT	C
58-A	2p	?	No unsat. info.	9-19-67	66 Bu. Sp.	G
59-A	3/9	N	No unsatis. info.	2-16-70	69 Bu. Conv.	G
60-A	x/9	Y	65 Bankr. (liab. = $9596)	10- 5-68	67 Pon. GTO	G
61-A	1/1	Y	2 collec.	6-26-68	68 Fd. Tor.	C
62-A	1/1	Y	No unsat. info.	6- 4-69	67 Fd. Fair	C
63-A	2/8	N	2 unpd. collec.	9-23-71	68 Dod. Coro.	C
64-A	—	N	1 collec. = $118	4- 9-69	68 Olds Cut.	G
65-A	—	Y	No unsat. info.	5-12-69	64 Pon. Bon. Conv.	G
66-A	—	Y	No unsat. info.	3- 2-70	69 Bu. Spt. Cp.	G
67-A	2/1	N	No unsat. info.	5- 7-71	69 Olds 4-Dr.	G
68-A	—	N	2 judgm. = 446	6- 5-70	66 Chev. Capr.	C
69-A	3/9	N	3 judgm. = 844	10- 8-71	70 Olds. 98	G
70-A	3/6 8/9	N	No unsat. info.	1-15-71	67 Dod. PU	C

TABLE A-1A (cont.)

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
Assigned Number	New, Used or Prom. Note	Cash Price	Cash Down	Trade-In	Total Down	Finance Charge	Credit Insurance	Contracts (months)	Monthly Payments	Total Payments	Deficiency Sought?	Appear. Filed?	Answer Filed?	Default Judgm. Ent.?	Defense Raised?	Ctrclaim Raised?	C. B. Indebt. Shown?	C. B. Judgment Shown?	C. B. Satisf. Shown?	Was Sub. "In File"?
71-A	u	2700	402	—	402	427	144	30	96	2871	1147	N	—	Y	—	—	Y	Y	N	Y
72-A	u	300	113	—	113	15	1	6	37	221	191	N	—	Y	—	—	Y	Y	N	Y
73-A	u	2595	700	145	845	433	164	30	87	2596	826	N	—	Y	—	—	Y	Y	Y	Y
74-A	u	2400	60	195	255	571	137	36	97	3480	487	N	—	Y	—	—	Y	Y	N	Y
75-A	u	995	—	145	145	221	54	18	67	1200	650	N	—	Y	—	—	Y	Y	N	Y
76-A	u	650	237	—	237	121	—	18	52	931	364	N	—	Y	—	—	Y	Y	Y	Y
77-A	u	1997	546	—	546	466	77	30	103	3087	941	N	—	Y	—	—	Y	Y	Y	Y
78-A	u	2607	950	—	950	765	162	36	66	2384	441	N	—	Y	—	—	Y	Y	N	Y
79-A	u	995	200	100	300	173	42	18	52	940	317	N	—	Y	—	—	Y	Y	N	Y
80-A	u	2371	321	—	321	473	—	24	108	2610	917	N	—	Y	—	—	—	—	—	N
81-A	u	1851	—	595	595	293	44	30	59	1755	599	N	—	Y	—	—	—	—	—	N
82-A	u	2595	600	—	600	416	80	30	86	2595	repl.	N	—	P	—	—	N	—	—	Y
83-A	u	170	—	—	0	17	—	23	80	187	157	N	—	P	—	—	N	—	—	Y
84-A	u	1795	501	—	501	348	44	30	58	1742	361	N	—	P	—	—	N	—	—	Y
85-A	u	1851	281	370	651	358	232	30	60	1790	400	N	—	P	—	—	N	—	—	Y
86-A	u	1780	410	—	410	246	115	30	58	1731	842	Y	Y	Y	Y	—	Y	Y	N_B	Y
87-A	u	125	40	—	40	9	—	1	116	116	111	N	—	Y	—	—	Y	Y	Y	Y
88-A	u	2350	300	—	300	469	184	36	75	2703	883	N	—	Y	—	—	Y	Y	N	Y

TABLE A-1A (cont.)

1 Assigned Number	22 Credit Bureau Bluebook Rating?	23 Was Inquiry Made On or Before Sale?	24 Information In Subjects File On Date of Sale?	25 Date of Sale	26 Automobile Description	27 Financer or Seller
71-A	—	N	1 judgm. = 78	8- 8-69	68 Dod. Coro.	C
72-A	1/6	N	69 bankr. (liab. = 3862) 4 judgm. = 1119; 10 collec.	12- 2-71	63 Olds. Cut.	R
73-A	x/6	Y	1 judgm. = 665	9-27-68	67 Dod. Coro.	C
74-A	—	N	No unsat. info.	6-27-69	68 Ply. Fury	F
75-A	—	Y	None	7-15-68	63 Dod.	C
76-A	C	N	None	6-20-65	59 Merc. & 59 Chev.	F
77-A	—	N	None	2-26-68	65 Chev. 2-dr.	G
78-A	8/1	Y	None	5-17-71	70 Ply. RR	C
79-A	2/1 1/2 1/6 1/6	N	2 collec.—unpd.	3- 9-70	65 Valiant	C
80-A	—	?	————	3-31-69	68 Olds Cut.	C
81-A	1/1	?	————	4- 4-69	67 Dod. Pol.	C
82-A	—	?	None	9-15-67	64 Cad. Conv.	R
83-A	x/6	N	Judgm. = 246; 3 collec.	12-26-67	59 Fd.	Ca
84-A	—	N	None	11- 3-70	68 Fd. Must.	R
85-A	—	Y	3 collec.	6-22-69	66 Dod. Pol.	C
86-A	—	?	None	5-23-67	64 Merc. Wg.	C
87-A	—	N	None	4- 9-70	63 Fd. Conv.	R
88-A	x/6	N	1 judgm. = 17; 1 collec.	3- 9-69	67 Fd. XL	F

TABLE A-1B

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
Assigned Number	New, Used or Prom. Note	Cash Price	Cash Down	Trade-In	Total Down	Finance Charge	Credit Insurance	Contracts (months)	Monthly Payments	Total Payments	Deficiency Sought?	Appear. Filed?	Answer Filed?	Default Judgm. Ent.?	Defense Raised?	Ctrclaim Raised?	C. B. Indebt. Shown?	C. B. Judgment Shown?	C. B. Satisf. Shown?	Was Sub. "In File"?
1-B	n	2761	259	—	259	601	232	36	95	3420	523	N	—	P	—	—	—	—	—	N
2-B	n	3473	300	300	600	646	45	36	103	3708	1328	N	—	P	—	—	Y	N	N	Y
3-B	n	3926	—	127	127	555	—	36	121	4353	272	N	—	Y	—	—	Y	Y	N	Y
4-B	n	3210	100	589	689	481	150	36	88	3152	500	N	—	Y	—	—	N	—	—	Y
5-B	n	3789	150	566	716	592	436	36	107	4101	933	N	—	Y	—	—	Y	Y	N	Y
6-B	n	3253	119	613	732	492	—	36	84	3014	150	N	—	Y	—	—	Y	Y	N	Y
7-B	n	3035	400	—	400	517	183	36	92	3325	907	N	—	P	—	—	N	—	N_B	Y
8-B	n	3635	—	440	440	602	117	36	109	3914	438	N	—	Y	—	—	Y	Y	Y	Y
9-B	n	3518	600	—	600	707	277	36	113	4071	920	N	—	P	—	—	N	—	—	Y
10-B	n	3293	300	—	300	573	112	36	104	3749	1127	Y	Y	P	Y	—	N	—	—	Y
11-B	n	4911	350	697	1047	728	—	36	133	4771	1217	N	—	Y	—	—	Y	Y	N	Y
12-B	n	7110	—	2760	2760	960	73	36	154	5533	3396	N	—	P	—	—	N	—	—	Y
13-B	n	2700	500	—	500	386	150	36	76	2736	480	N	—	Y	—	—	Y	Y	N	Y
14-B	n	3857	800	120	920	544	118	36	105	3762	1142	N	—	Y	—	—	Y	Y	N	Y
15-B	n	3357	905	(1036)	(131)	697	306	36	125	4490	1331	Y	Y	P	Y	—	Y	N	N_B	Y
16-B	n	3037	300	—	300	575	—	36	92	3312	1032	N	—	Y	—	—	Y	Y	N	
17-B	n	3680	300	—	300	696	290	36	119	4366	755	N	—	Y	—	—	Y	Y	N	Y
18-B	n	2829	575	(146)	429	432	—	36	79	2832	743	N	—	Y	—	—	Y	Y	N	Y
19-B	n	3533	455	—	455	749	—	36	106	3078	883	N	—	Y	—	—	Y	Y	N	Y
20-B	n	3534	—	(178)	(178)	770	138	36	128	4621	1365	N	—	Y	—	—	Y	Y	N	Y
21-B	n	2329	—	300	300	348	—	36	68	2450	548	N	—	P	—	—	N	—	—	N
22-B	n	3103	—	225	225	561	37	36	97	3703	435	N	—	P	—	—	N	—	—	Y
23-B	n	3187	450	—	450	512	96	36	93	3346	331	N	—	P	—	—	N	—	—	Y
24-B	n	3525	444	—	444	672	247	36	114	4119	711	N	—	P	—	—	N	—	—	N
25-B	n	3528	315	428	743	541	106	36	99	3547	430	N	—	P	—	—	N	—	—	Y
26-B	n	3520	—	659	659	498	50	36	89	3444	526	N	—	Y	—	—	N	—	N_B	Y
27-B	n	3647	—	713	713	613	87	36	108	3879	1504	Y	Y	P	—	—	N	—	—	Y
28-B	n	3590	310	480	790	591	211	36	104	3844	808	N	—	P	—	—	N	—	—	Y
29-B	n	2078	178	—	178	375	25	36	64	2300	379	N	—	Y	—	—	Y	Y	N	Y
30-B	n	2616	—	400	400	408	—	36	73	2624	440	N	—	P	—	—	N	—	—	Y
31-B	n	3449	500	—	500	647	112	36	104	3729	1018	N	—	Y	—	—	Y	Y	N	Y
32-B	n	3019	—	519	519	412	—	36	88	3157	624	N	—	P	—	—	N	—	—	Y
33-B	n	2723	400	561	961	440	174	36	73	2618	677	Y	Y	Dsm.	Y	—	N	—	—	Y
34-B	n	3507	—	993	993	597	207	36	96	3444	436	N	—	P	—	—	N	—	—	Y
35-B	n	4281	100	1000	1100	877	308	36	126	4532	1331	N	—	Y	—	—	Y	Y	Y	Y

TABLE A-1B

1 Assigned Number	22 Credit Bureau Bluebook Rating?	23 Was Inquiry Made On or Before Sale?	24 Information In Subjects File On Date of Sale?	25 Date of Sale	26 Automobile Description	27 Financer or Seller
1-B	—	?	———	7-18-67	67 Dod. 2-dr.	C
2-B	1/8	Y10	None	12-18-67	68 Dod. 2-dr.	C
3-B	5/1 1/8 1/4 1/6 5/6 8/6	N	8 Judgm. = 1568; 6 collec. = 325	3-23-70	70 Pon. 4-dr.	G
4-B	2*3P2 R-3C	?	Bankr.	11-17-67	68 Chev. PU	G
5-B	R-C	?	None	6-27-67	67 Pon. F.Bd.	G
6-B	x/9	N	1 judgm. for $431	3-10-69	69 Fd. PU	F
7-B	—	N	None	6- 6-68	68 Chev. II	G
8-B	2P	?	None	6- 3-67	67 Pon. F.Bd.	G
9-B	7/1 1/2	N	None	1- 9-68	68 Dod. XP	C
10-B	8P	N	None	1-12-68	68 Dod. 2-dr.	C
11-B	—	Y	None	4-16-71	71 Chev. MC	G
12-B	7/1 1/2 2/8 1/6 5/6	N	St. tax lien = 441	9-28-71	72 T-Bird	G
13-B	x/9	N	1 judgm. = 74; st. tax lien = 51	3-26-68	68 Camaro	G
14-B	—	Y	None	1-29-70	70 Dod. Sup. Bee	C
15-B	—	N	None	10-15-68	68 Dod. Pol.	C
16-B	P2ms	N	None	7-11-67	67 Dod. 4-dr.	C
17-B	—	Y	1 judgm. = $130	3-25-69	69 Dod. Chrg.	C
18-B	4/1	Y	None	12- 9-67	68 Fd. Must.	F
19-B	C	N	None	2-27-67	67 Fd. Gal. Conv.	F
20-B	1/8 1/6 5/6	N	None	6- 2-69	69 Dod. Coro.	C
21-B	—	N	———	10-16-68	68 Bu. Opel	G
22-B	—	N	1 judgm. = 94; 2 coll. = 176	10-28-68	68 Fd. 2-dr.	F
23-B	6pm	?	None	5- 4-63	63 Fd. 2-dr.	F
24-B	8/1 5/6	?	———	10-27-69	69 Ply. Fury	C
25-B	—	N	None	11-10-69	70 Ply. B'cuda	C
26-B	—	N	None	6-18-68	68 Chev. 4-dr.	G
27-B	—	?	None	9-13-66	66 Merc.	F
28-B	—	Y	None	10-18-68	68 Chev.	G
29-B	2P-C	?	None	10- 4-66	67 Fd. PU	F
30-B	x/9	?	None	5- 2-68	68 Dod. 2-dr.	C
31-B	2/6 5/6	Y	None	8-18-69	69 Dod. Sup. Bee	C
32-B	PR-3C	?	None	5-27-63	63 Falcon Conv.	F
33-B	—	Y	None	10- 7-68	68 Dod. Coro.	C
34-B	1/2 1/6	Y	1 judgm. = 20 (satisf'd.)	8-12-69	69 Ply. R/R	C
35-B	5/1 3/6	Y	3 judgm. = 817	12-12-69	70 Fd. Ran.	F

TABLE A-1B (cont.)

1 Assigned Number	2 New, Used or Prom. Note	3 Cash Price	4 Cash Down	5 Trade-in	6 Total Down	7 Finance Charge	8 Credit Insurance	9 Contracts (months)	10 Monthly Payments	11 Total Payments	12 Deficiency Sought?	13 Appear. Filed?	14 Answer Filed?	15 Default Judgm. Ent.?	16 Defense Raised?	17 Ctrclaim Raised?	18 C. B. Indebt. Shown?	19 C. B. Judgment Shown?	20 C. B. Satisf. Shown?	21 Was Sub. "In File"?
36-B	n	3507	500	229	729	541	106	36	99	3547	830	N	—	Y	—	—	Y	Y	N	Y
37-B	n	4794	—	680	680	727	150	36	139	4990	653	N	—	Y	—	—	Y	Y	N	Y
38-B	n	3500	500	—	500	854	279	36	129	4654	978	N	—	Y	—	—	Y	Y	Y	Y
39-B	n	3228	80	348	428	522	103	36	95	3425	549	Y	Y	Yd2	—	—	Y	Y	N_B	Y
40-B	n	4765	—	749	749	808	360	35	147	5294	5294	N	—	Y	—	—	Y	Y	N	Y
41-B	n	2759	159	—	159	546	—	36	87	3146	1430	N	—	Y	—	—	Y	Y	N_B	Y
42-B	n	3477	250	—	250	845	297	36	121	4368	795	N	—	Y	—	—	—	—	—	N
43-B	n	4062	125	382	507	463	88	30	117	4105	654	N	—	Y	—	—	Y	Y	N	Y
44-B	n	3440	300	319	619	783	276	36	112	4046	1332	N	—	Y	—	—	Y	Y	N_B	Y
45-B	n	3184	400	—	400	544	243	36	99	3571	109	N	—	Dsm.	—	—	N	—	—	Y
46-B	n	3835	—	(358)	(358)	737	—	36	142	4739	1443	N	—	Y	—	—	Y	Y	Y	Y
47-B	n	3768	—	782	782	544	38	36	99	3568	291	N	—	P	—	—	N	—	—	Y
48-B	n	3105	—	375	375	623	245	36	100	3598	510	N	—	Y	—	—	Y	Y	N	Y
49-B	n	3150	305	—	305	619	228	36	105	3797	1370	N	—	Y	—	—	Y	Y	N_B	Y
50-B	n	5223	500	359	859	890	—	36	156	5627	869	Y	Y	Y	—	—	Y	Y	N	Y
51-B	n	2680	—	412	412	420	80	36	77	2768	1938	N	—	Y	—	—	N	—	—	Y
52-B	n	5544	600	711	1311	838	—	36	141	5071	593	Y	Y	Y	Y	—	Y	Y	N	Y
53-B	n	3558	558	—	558	540	—	36	98	3540	452	N	—	Y	—	—	Y	Y	N	Y
54-B	n	3606	700	(45)	655	550	276	36	113	4153	1080	Y	Y	P	Y	—	Y	N	N	Y
55-B	n	3574	501	479	980	465	99	36	91	3289	531	N	—	Y	—	—	Y	Y	N	Y

TABLE A-1B (cont.)

1 Assigned Number	22 Credit Bureau Bluebook Rating?	23 Was Inquiry Made On or Before Sale?	24 Information In Subjects File On Date of Sale?	25 Date of Sale	26 Automobile Description	27 Financer or Seller
36-B	—	Y	None	9- 2-69	69 Ply. R/R	C
37-B	4/1	Y	None	6-21-68	68 Bu. 4-dr.	G
38-B	x/9	N	None	7-31-69	69 Ply.	C
39-B	—	N	None	5-29-67	67 Must.	F
40-B	8/1	N	None	12- 9-72	73 Fd. Tor. Wgn.	F
41-B	9/1	Y	None	10-1-68	69 Falc. 2-dr.	F
42-B	—	?	———	3-13-69	69 Dd. Sup. Bee	C
43-B	6/1 1/2	Y	None	1-18-68	68 Cam. Cp.	G
44-B	8/8	Y	None	2-28-68	68 Dod. GTS	C
45-B	2SP	?	None	4-10-67	67 Dod. 4-dr.	C
46-B	8/1	N	None	1-29-70	70 Dod. Pol.	C
47-B	9PM2 SLR-C	?	None	4- 8-63	63 Fd. Gal.	F
48-B	x/9	N	1 judgm. = 710	9-12-69	69 Dod. Van	C
49-B	6/1 1/6	N	None	10-17-69	69 Ply	C
50-B	12/1 1/2 1/8	?	None	4-18-68	68 Chryl. NY	C
51-B	—	N	None	10- 5-66	66 Falcon	F
52-B	x/9	N	64 Bankr. (liab. = 1719); 1 judgm. = 38	11-26-68	68 Bu. Elec.	G
53-B	x/9	Y	2 judgm. = 456; 3 collec. = 53	2- 3-68	68 Dod. 2-dr.	C
54-B	—	N	None	5-29-70	70 Dod. Sup. Bee	C
55-B	x/9	Y	2 collec. = 170	6- 2-69	69 Ply. R/R	C

TABLE A-1C

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
Assigned Number	New, Used or Prom. Note	Cash Price	Cash Down	Trade-in	Total Down	Finance Charge	Credit Insurance	Contracts (months)	Monthly Payments	Total Payments	Deficiency Sought?	Appear. Filed?	Answer Filed?	Default Judgm. Ent.?	Defense Raised?	Ctrclaim Raised?	C. B. Indebt. Shown?	C. B. Judgment Shown?	C. B. Satisf. Shown?	Was Sub. "In File"?
1-C	pn	—	—	—	—	—	—	29.25	60	1755	334	N	—	P	—	—	N	—	—	Y
2-C	pn	—	—	—	—	—	—	15	48	720	480	N	—	P	—	—	N	—	—	Y
3-C	pn	—	—	—	—	—	—	7	7	267	178	N	—	Y	—	—	Y	Y	N	Y
4-C	pn	—	25	—	25	—	—	3.25	80	260	200	N	—	Y	—	—	Y	Y	N	Y
5-C	pn	—	—	—	—	—	—	29	75	2230	584	N	—	P	—	—	N	—	—	Y
6-C	pn	—	—	—	—	—	—	7	40	285	104	N	—	P	—	—	N	—	—	Y
7-C	pn	—	—	—	—	—	—	29.75	68	2020	521	N	—	P	—	—	N	—	N_B	Y
8-C	pn	—	—	—	—	—	—	36	112	4050	1186	N	—	Y	—	—	Y	Y	Y	Y
9-C	pn	—	—	—	—	—	—	2.75	40	111	147	N	—	P	—	—	N	—	—	Y
10-C	pn	—	—	—	—	—	—	19	70	1344	933	N	—	Y	—	—	Y	Y	N	Y
11-C	pn	—	—	—	—	—	—	36	92	3403	1786	N	—	Y	—	—	Y	N	N	N
12-C	pn	—	—	—	—	—	—	4.5	60	265	250	N	—	Y	—	—	Y	Y	N	Y
13-C	pn	—	—	—	—	—	—	28.25	68	1921	354	N	—	P	—	—	N	—	—	Y
14-C	pn	—	—	—	—	—	—	36	112	4018	870	N	—	Y	—	—	Y	Y	N_B	Y
15-C	pn	—	—	—	—	—	—	10.5	50	525	526	N	—	Y	—	—	Y	Y	N	Y
16-C	pn	—	—	—	—	—	—	25	80	2000	933	N	—	P	—	—	N	—	—	Y
17-C	pn	—	—	—	—	—	—	36	87	3136	834	N	—	Y	—	—	N	—	—	Y
18-C	pn	—	—	—	—	—	—	30	48	1753	306	N	—	Y	—	—	Y	Y	N_B	Y
19-C	pn	—	—	—	—	—	—	16.5	20	380	296	N	—	Y	—	—	Y	Y	N	Y
20-C	pn	—	—	—	—	—	—	3.75	40	150	120	N	—	Y	—	—	Y	Y	N	Y
21-C	pn	—	—	—	—	—	—	36	114	4104	818	Y	Y	Y	—	—	Y	Y	Y	Y
22-C	pn	—	—	—	—	—	—	26	60	1560	551	N	—	Y	—	—	Y	Y	N_B	Y
23-C	pn	—	—	—	—	—	—	15	40	600	232	N	—	Y	—	—	Y	Y	N	Y
24-C	pn	—	—	—	—	—	—	24.25	50	1218	227	N	—	Y	—	—	Y	Y	N	Y
25-C	pn	—	100	—	100	—	—	24	56	1444	188	N	—	P	—	—	N	—	—	Y
26-C	pn	—	—	—	—	—	—	20.5	62	1267	230	N	—	Y	—	—	Y	Y	N	Y
27-C	pn	—	2	—	2	—	—	7	30	206	206	N	—	Y	—	—	Y	Y	N	Y
28-C	pn	—	—	—	—	—	—	36	131	4698	1480	Y	Y	Y	—	—	Y	Y	Y	Y
29-C	pn	—	—	—	—	—	—	36	111	3991	619	N	—	Y	—	—	Y	Y	N	Y
30-C	pn	—	—	—	—	—	—	32	72	2327	281	N	—	P	—	—	N	—	—	Y
31-C	pn	—	—	—	—	—	—	13	28	364	318	N	—	Y	—	—	Y	Y	N	Y
32-C	pn	—	100	—	100	—	—	60	7.5	452	195	N	—	Y	—	—	Y	Y	N	Y
33-C	pn	—	—	—	—	—	—	13	57	728	197	N	—	P	—	—	N	—	—	Y
34-C	pn	—	—	—	—	—	—	24	49	1174	655	Y	Y	Y	Y	Y	Y	Y	N bankr.	Y
35-C	pn	—	—	—	—	—	—	30	46	1380	238	N	—	P	—	—	N	—	N	Y

TABLE A-1C

1 Assigned Number	22 Credit Bureau Bluebook Rating?	23 Was Inquiry Made On or Before Sale?	24 Information In Subjects File On Date of Sale?	25 Date of Sale	26 Automobile Description	27 Financer or Seller
1-C	—	?	None	9-25-67	———	R
2-C	—	N	None	9-24-69	———	R
3-C	4C	?	None	2-27-65	———	R
4-C	—	N	1 collec. = 19	2- 7-70	59 Chev.	Ca
5-C	x/6	N	2 judgm. = 569; 2 collec. = 32	2-26-68	———	R
6-C	2*-		2 judgm. = 123; 1 collec. = 45	9- 1-67	———	R
7-C	1/6 3/6	N	3 judgm. = 1742; st. tax liens = 86	3-12-69	———	R
8-C	2/1	N	None	3-21-69	———	C
9-C	S	N	None	3- 9-65	———	R
10-C	x/6	N	2 judgm. = 1602; 4 collec. unpd.	4-26-68	———	R
11-C	—	N	———	9-22-67	———	C
12-C	1/1 2/1 3/6	N	2 judgm. = 824; 2 collec. = 149	12-31-68	52 Dod.	Ca
13-C	1/6	N	Bankr. (liab. = 4358); 2 judgm. = 253; 3 collec. unpd.	3-21-69	———	R
14-C	2/1	N	None	2-26-68	———	C
15-C	x/6	N	2 judgm. = 374	2- 2-68	———	R
16-C	C	?	None	8-18-67	———	R
17-C	x/6	?	None	7-27-68	———	C
18-C	—	N	None	7-22-67	———	C
19-C	x/6	N	1 judgm. = 473	8-14-68	———	R
20-C	—	N	2 judgm. = 125; 7 collec. unpd.	8-14-68	———	R
21-C	3/1	N	None	2-28-69	———	C
22-C	—	N	None	11-25-68	———	R
23-C	PR	?	None	11- 2-67	———	R
24-C	M-C	N	3 st. tax liens	9-11-64	———	R
25-C	x/6	N	1 judgm. = 203; 4 collec. unpd.	4-11-69	———	R
26-C	B	N	66 bankr. (liab. = 2589)	8- 5-67	———	R
27-C	1/6	N	4 unpd. collec.	12-23-68	58 Merc.	Ca
28-C	2/1	Y	None	6-10-69	———	C
29-C	—	?	None	6- 7-69	———	C
30-C	*CB	N	Wage earners bankr. filed (liab. = 2963); 1 judgm. = 898	11-27-64	———	R
31-C	8/1	N	One collec.	3- 7-69	———	R
32-C	x/6	N	3 judgm. = 471	1- 2-69	61 Pon.	Ca
33-C	—	N	None	5- 6-69	———	R
34-C	x/6	N	1 judgm. = 256	1-20-68	63 Olds	C
35-C	PS2R-2C	N	None	1-11-67	———	C

TABLE A-IC (cont.)

1 Assigned Number	2 New, Used or Prom. Note	3 Cash Price	4 Cash Down	5 Trade-in	6 Total Down	7 Finance Charge	8 Credit Insurance	9 Contracts (months)	10 Monthly Payments	11 Total Payments	12 Deficiency Sought?	13 Appear. Filed?	14 Answer Filed?	15 Default Judgm. Ent.?	16 Defense Raised?	17 Ctrclaim Raised?	18 C. B. Indebt. Shown?	19 C. B. Judgment Shown?	20 C. B. Satisf. Shown?	21 Was Sub. "in File"?
36-C	pn	—	—	—	—	—	—	11	60	665	523	N	—	Y	—	—	Y	Y	N	Y
37-C	pn	—	—	—	—	—	—	10	20	200	152	N	—	P	—	—	N	—	—	Y
38-C	pn	—	—	—	—	—	—	32.5	80	2600	683	N	—	Dsm.	—	—	N	—	—	Y
39-C	pn	—	—	—	—	—	—	78	48	864	336	N	—	P	—	—	N	—	—	Y
40-C	pn	—	—	—	—	—	—	27.5	80	2200	569	N	—	Y	—	—	Y	Y	Y	Y
41-C	pn	—	—	—	—	—	—	18.5	40	737	647	N	—	P	—	—	N	—	—	N
42-C	pn	—	—	—	—	—	—	26	96	2485	583	Y	Y	Dsm.	Y	—	N	—	—	N
43-C	pn	—	—	—	—	—	—	30	106	3197	1106	N	—	P	—	—	N	—	—	N
44-C	pn	—	—	—	—	—	—	26	52	1349	432	N	—	P	—	—	N	—	—	Y
45-C	pn	—	—	—	—	—	—	36	85	3058	1887	Y	Y	Y	—	—	Y	Y	N	Y
46-C	pn	—	—	—	—	—	—	36	90	3222	568	N	—	P	—	—	N	—	—	N
47-C	pn	—	—	—	—	—	—	19.25	60	1150	604	N	—	Y	—	—	N	—	—	Y
48-C	pn	—	—	—	—	—	—	24.5	25	2447	506	N	—	Y	—	—	Y	Y	N	Y
49-C	pn	—	—	—	—	—	—	36	121	4373	1259	N	—	Y	—	—	N	—	—	Y
50-C	pn	—	—	—	—	—	—	36	108	3887	1149	N	—	Y	—	—	Y	Y	N	Y
51-C	pn	—	—	—	—	—	—	36	89	3192	738	N	—	Y	—	—	N	—	—	Y
52-C	pn	—	—	—	—	—	—	36	100	3596	899	N	—	Y	—	—	Y	Y	N	Y
53-C	pn	—	—	—	—	—	—	?	?	292	100	N	—	Y	—	—	Y	Y	N	Y
54-C	pn	—	25	—	25	—	—	5.75	50	288	263	N	—	Y	—	—	Y	Y	N	Y
55-C	pn	—	—	—	—	—	—	36	165	5932	1210	Y	Y	P	Y	—	N	—	Bankr. N	Y
56-C	pn	—	—	—	—	—	—	26.25	64	1683	341	N	—	P	—	—	N	—	—	Y
57-C	pn	—	—	—	—	—	—	23	60	1375	592	N	—	Y	—	—	Y	Y	Y	Y
58-C	pn	—	13	—	13	—	—	2.6	80	208	185	N	—	Y	—	—	Y	Y	N	Y

TABLE A-1C (cont.)

1 Assigned Number	22 Credit Bureau Bluebook Rating?	23 Was Inquiry Made On or Before Sale?	24 Information In Subjects File On Date of Sale?	25 Date of Sale	26 Automobile Description	27 Financer or Seller
36-C	B	N	None	1- 8-63	—	R
37-C	x/9	N	1 collec. = 107	7-17-68	—	R
38-C	8/1	N	1 judgm. = 551	4-19-69	—	R
39-C	—	N	None	1-16-69	—	R
40-C	1/9	N	68 bankr. (liab. = 7915)	2-22-69	—	R
41-C	—	?	—	5-21-65	—	R
42-C	—	?	—	11- 4-68	—	R
43-C	—	?	—	7-24-68	—	C
44-C	—	N	None	12-2-63	—	R
45-C	11/1	N	None	10- 4-67	—	C
46-C	1/4	?	—	11- 6-68	—	C
47-C	R	?	None	2-20-65	—	R
48-C	B	N	64 bankr. (liab. = 8097) 2 st. tax liens	11-12-65	—	R
49-C	2/1 1/2	Y	2 collec.	4-17-69	—	C
50-C	x/9	N	4 judgm. = 832; 1 fed. tax lien	5- 2-68	—	R
51-C	C	N	None	9-28-67	—	C
52-C	—	Y	None	6-18-69	—	C
53-C	—	?	None	7-18-69	60 Ramb. & 60 Chev.	Ca
54-C	x/9	N	1 judgm. = 130; 2 collec.	12-15-68	60 Fd.	Ca
55-C	3*4P	N	3 fed., 1 st. tax liens	1-27-68	—	C
56-C	—	?	None	9-15-65	—	R
57-C	5*4P-2C	N	6 judgm. = 1195	4-26-66	—	R
58-C	—	N	None	7- 8-70	56 Chev.	Ca

TABLE A-2

Column Headings

(1) Area

(2)- (5) Population

- (2) Total Number
- (3) Percentage Black
- (4) Percentage Spanish American
- (5) Percentage Other Races

(6) Employment—Number Civilians 16 + Years

(7)-(14) Unemployment 16 Years and Over

- (7) Total Number
- (8) Total Rate
- (9) Black Number
- (10) Black Rate
- (11) Spanish American Number
- (12) Spanish American Rate
- (13) Other Races Number
- (14) Other Races Rate

(15) Civilian Labor Force 16 Years and Over—Number

(17) Experienced Unemployed—Last Occupation Farm Worker—Number

(18) Population 16-21 Not in School, Unemployed or Not in Labor Force—Number

(19) Civilian Labor Force Participation Rate—Males 16 and Over—Percent

(20) Workers Working in County of Residence—Percent

(21) Median Family Income 1969—Dollars

(22) Families Below Poverty Level—Percent

(23) Unemployed Civilian Male Heads Below Poverty Level—Number

(24) Families With Public Assistance Income—Number

(25) Vietnam Veterans—Number

(26) Defaults

(27) % of Defaults

TABLE A-2

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
1.00	9069	.4	.9	.0	3577	113	3.1	0	0.	0	0.	0	0.
2.00	7518	0.	0.	.2	3347	87	2.5	0*	0. *	0*	0. *	0*	0. *
3.00	4025	2.7	0.	.2	1830	76	4.0	0	0.	0*	0. *	0	0.
4.00	5427	0.	.9	.3	2480	54	2.1	0*	0. *	0	0.	0*	0. *
5.00	5632	5.2	1.1	.4	2433	77	3.1	2	1.3	0	0.	0	0.
6.00	4697	0.	0.	.9	2115	43	2.0	0*	0. *	0	0.	0*	0. *
7.00	14163	1.4	.4	.2	6418	101	1.5	0	0.	0	0.	0	0.
8.00	12412	0.	1.1	.2	5595	91	1.6	0*	0. *	8	11.0	0*	0. *
9.00	8566	.7	1.3	.3	4075	67	2.1	0	0.	0	0.	0	0.
10.00	5485	.6	0.	.7	2655	87	3.2	3	21.4	0*	0. *	0	0.
11.00	5976	5.4	1.7	.9	2578	131	4.8	18	12.2	7	12.1	5	15.6
12.00	4928	46.1	1.2	.1	1856	102	5.2	59	7.3	5	21.7	0	0.
13.00	4195	27.9	.9	.7	1586	117	6.9	45	11.5	0	0.	0	0.
14.00	2510	7.6	0.	.8	1079	60	5.3	0	0.	0*	0. *	0	0.
15.00	3284	1.1	3.3	0.	1385	12	.9	0	0.	0	0.	0	0.
16.00	2262	0.	4.4	1.1	864	24	2.7	0*	0. *	0	0.	0*	0. *
17.00	2894	71.9	0.	1.8	1017	15	1.5	15	2.1	0	0. *	0	0.
18.00	2828	6.5	0.	.3	1134	65	5.4	0	0.	0*	0. *	0	0.
19.00	4637	0.	0.	.1	1734	77	4.3	0	0.	0	0.	0	0.
20.00	1687	0.	0.	0.	582	18	3.0	0	0.	0*	0. *	0	0.
21.00	5696	.4	.6	.1	2326	69	2.9	0	0.	0	0.	0	0.
23.00	1454	5.3	0.	0.	613	32	5.0	0	0.	0	0.	0	0.
24.00	2012	54.2	1.8	1.2	962	54	5.3	42	9.0	0	0.	0	0.
25.00	647	19.4	0.	.6	316	11	3.4	0	0.	0*	0. *	0	0.
26.00	2687	14.3	0.	.2	1357	70	4.9	15	7.4	0*	0. *	0	0.
27.00	3091	51.9	0.	1.0	1166	109	8.5	63	10.7	0	0.	0	0.
28.00	4437	2.9	.8	.7	2219	44	1.9	0	0.	0	0.	0	0.
29.00	4712	2.9	.8	.3	2261	43	1.9	0	0.	0	0.	0	0.
30.01	2667	0.	0.	.3	1199	33	2.7	0*	0. *	0*	0. *	0	0. *
30.02	4208	0.	0.	.3	1766	29	1.6	0	0.	0	0.	0	0.
31.00	2239	0.	0.	1.0	911	36	3.8	0*	0. *	0*	0. *	0*	0. *
32.00	2573	0.	0.	.7	1051	5	.5	0*	0. *	0*	0. *	0*	0. *
33.00	2949	2.5	1.6	.4	1579	70	4.2	0	0.	0	0.	0	0.
34.00	2558	6.8	0.	.9	1397	93	6.2	6	7.7	0*	0. *	0	0.
35.00	53	0.	0.	5.2	50	0	0.	0*	0. *	0	0.	0	0.
36.00	1034	16.2	27.2	0.	326	15	4.4	7	13.2	0	0.	0	0.
37.00	3204	6.1	4.1	0.	1249	39	3.0	5	6.4	0	0.	0	0.
38.00	1393	18.6	0.	0.	394	15	3.7	5	4.6	0	0.	0	0.
39.00	1524	0.	0.	.7	632	20	3.1	0	0.	0*	0. *	0	0.
40.00	3694	1.0	3.1	.1	1574	29	1.8	0	0.	0	0.	0	0.
41.00	3661	0.	1.8	.2	1727	46	2.6	0	0.	0	0.	0	0.
42.00	2396	0.	4.1	.6	843	41	4.6	0*	0. *	6	9.1	0*	0. *
43.00	6674	0.	2.7	.1	2745	59	2.1	0	0.	0	0.	0	0.
44.00	4102	0.	5.0	.7	1774	46	2.5	0*	0. *	6	12.8	0*	0. *
45.00	6351	1.3	2.3	.3	2687	93	3.3	0	0.	0	0.	0	0.
46.00	8240	.6	1.2	.1	3402	106	3.0	0	0.	0	0.	0	0.
47.00	4934	0.	0.	.5	2017	32	1.6	0*	0. *	0	0.	0*	0. *

TABLE A-2

(1)	(15)	(17)	(18)	(19)	(20)	(21)	(22)	(23)	(24)	(25)	(26)	(27)
1.00	3690	0	116	86.3	80.4	11160	3.8	7	78	220	5	2.5
2.00	3434	0	80	88.8	94.0	11602	2.1	0	56	140	5	2.5
3.00	1908	6	63	79.1	95.1	10293	5.9	0	30	76	2	1.0
4.00	2534	0	56	81.0	95.1	10153	6.2	0	29	134	2	1.0
5.00	2510	0	32	77.1	94.4	8847	8.4	6	89	152	7	3.5
6.00	2158	0	51	82.0	91.1	9726	3.9	0	52	82	0	0.0
7.00	8519	4	131	83.8	92.1	12840	2.9	0	18	320	3	1.5
8.00	5686	0	90	86.2	81.2	11695	2.6	0	39	225	2	1.0
9.00	4162	4	100	82.4	93.7	12372	1.3	4	23	135	1	1.5
10.00	2742	0	56	81.3	87.5	10802	3.4	0	34	93	4	2.0
11.00	2709	0	146	62.3	87.7	3811	7.4	0	59	163	9	4.5
12.00	1958	0	121	68.2	86.9	7118	19.2	7	214	78	17	8.4
13.00	1703	0	88	69.3	78.5	5447	26.1	5	213	145	10	4.9
14.00	1139	0	93	72.5	90.8	6018	23.5	10	106	69	5	2.5
15.00	1397	0	20	73.8	86.0	10136	8.3	7	38	84	3	2.0
16.00	858	0	112	69.2	98.4	7217	12.8	0	44	65	3	1.5
17.00	1032	0	45	73.3	81.7	7493	17.8	0	70	55	5	2.5
18.00	1199	0	62	82.2	88.7	8544	7.9	0	34	77	4	2.0
19.00	1811	0	118	74.2	82.3	9365	8.5	6	65	128	1	.5
20.00	600	0	22	77.5	96.0	9471	8.8	5	31	15	3	1.5
21.00	2395	4	95	78.2	91.9	8418	7.5	5	96	111	4	2.0
23.00	645	0	34	70.3	94.3	7741	13.3	0	34	43	1	.5
24.00	1016	0	31	69.3	82.1	6878	18.1	0	101	30	8	4.0
25.00	327	0	11	58.6	96.5	5500	26.0	0	13	28	2	1.0
26.00	1427	6	57	70.8	88.2	7400	11.9	0	61	100	8	4.0
27.00	1275	0	101	74.3	71.6	5931	19.1	0	190	45	11	5.5
28.00	2263	0	40	75.5	90.7	9335	8.3	0	20	128	4	2.0
29.00	2304	0	30	76.7	92.4	10306	6.2	0	44	180	4	2.0
30.01	1232	0	3	84.3	89.6	14449	2.4	0	7	87	0	0.0
30.02	1785	0	8	83.6	88.4	18876	.4	0	6	75	0	0.0
31.00	947	0	11	84.7	92.9	17739	3.8	0	0	37	0	0.0
32.00	1056	0	12	80.6	93.3	19051	3.2	0	0	46	0	0.0
33.00	1649	6	86	76.1	75.8	5928	23.3	0	53	163	5	2.5
34.00	1490	0	132	64.1	87.4	6630	8.1	0	21	149	2	1.0
35.00	50	0	0	84.0	100.0	0	0.	0	0	0	5	2.5
36.00	341	0	38	57.9	90.3	5622	18.1	0	41	15	0	0.0
37.00	1288	0	113	73.0	89.5	7127	16.5	0	97	81	5	2.5
38.00	409	0	52	60.5	94.7	6148	20.1	0	49	25	3	1.5
39.00	652	0	30	82.4	95.5	3948	9.1	0	20	91	0	0.0
40.00	1603	0	33	87.6	89.9	13161	4.9	0	17	68	0	0.0
41.00	1773	0	45	82.6	93.6	10794	6.6	0	38	96	3	1.5
42.00	384	4	39	74.3	92.8	8075	10.0	0	49	34	2	1.0
43.00	2804	0	140	81.2	92.2	10514	5.2	0	49	151	4	2.0
44.00	1820	0	76	79.8	87.8	10241	5.6	0	53	66	5	2.5
45.00	2760	0	127	85.8	95.9	10446	3.3	0	73	187	2	1.0
46.00	3508	0	137	82.2	93.5	10299	4.5	10	63	257	1	.5
47.00	2049	0	85	86.9	92.4	10553	5.1	0	37	176	5	2.5

APPENDIX A-3

QUESTIONNAIRE

'69 '70 '71 '72

1. For the years listed at the right, please indicate the number of extensions of automobile install-credit your institution made. ___ ___ ___ ___

2. Of those extensions of automobile credit indicated, how many resulted in default by the debtor? ___ ___ ___ ___

3. Of the defaults indicated, how many were "charged off" or "written off" (i.e. were unsatisfied, either by resumed payments, successful refinancing, compromise, collection efforts or judicial execution)? ___ ___ ___ ___

4. With reference to the number of extensions of credit indicated in answer to question #1, in how many instances was an inquiry made to a credit information agency, such as the Credit Bureau of Des Moines, regarding the debtor, on or shortly prior to the date of sale? (You may estimate—see question #5) ____________

5. Does your institution routinely make credit information inquiries on all extensions of automobile (consumer) credit, and if not, upon what basis or criteria are such inquiries made and to whom are they made?

6. In order of importance, what in the view of your institution are the major reasons for default by debtors to whom you have extended automobile installment (consumer) credit?