

CONSUMER REPOSSESSIONS AND DEFICIENCIES: NEW PERSPECTIVES FROM NEW DATA†

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I. INTRODUCTION

Each year in the United States upwards of half a million automobiles are repossessed from consumers who purchased them on credit.¹ Following repossession, these automobiles are ordinarily sold by the repossessing creditor or by a car dealer to whom the creditor has assigned his rights in the collateral.² If the price obtained for the collateral is inadequate to extinguish the purchaser's debt, Article 9 of the Uniform Commercial Code (U.C.C.),³ permits the repossessing creditor, or an assignee of his rights, to collect the resulting deficiency from the debtor.⁴

Between 1969 and 1975, several empirical studies of automobile repossession sales and deficiencies were reported.⁵ These studies were based on court records of lawsuits to recover deficiencies. The studies indicated that deficiencies were often caused by the sale of repossessed automobiles at substantially

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¹ This author estimated the number in 1977 at 650,000. Federal Trade Commission, Bureau of Consumer Protection, STAFF REPORT ON TRADE REGULATION RULE CONCERNING CREDIT PRACTICES (1980) [hereinafter cited as FTC CREDIT PRACTICES STAFF REPORT] at 260 n.25. See also White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503, 514 n.41 (approximately 1,000,000 repossessions per year). The precise number presumably fluctuates from year to year depending on economic conditions.

² See text at notes 28-29 *infra*.

³ Article 9 is the basic law governing security interests in all states except Louisiana. Approximately twenty states have passed laws governing consumer transactions that are more restrictive than the U.C.C. with respect to the rights of the creditor following repossessions. See FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, at 254-57. These laws restrict the creditor's right to a deficiency, discussed below. Most such laws are confined to sales finance, as opposed to loan, transactions. In addition, most of these laws apply only to transactions under a specified dollar value (typically \$1,000), and therefore do not apply to most automobile sales. *Id.*

⁴ U.C.C. § 9-504(2) (1972). See text and notes at notes 10-22 *infra* for a fuller discussion of the law.

⁵ Shuchman, *Profit on Default: An Archival Study of Repossession and Resale*, 22 STAN. L. REV. 20 (1969) [hereinafter cited as Shuchman]; Note, *Business As Usual: An Empirical Study of Automobile Deficiency Judgments Suits in the District of Columbia*, 3 CONN. L. REV. 511 (1971) [hereinafter cited as Firmin & Simpson]; Note, *I Can Get It For You Wholesale: The Lingering Problem of Automobile Deficiency Judgments*, 27 STAN. L. REV. 1081 (1975) [hereinafter cited as Corenswet]; see also Enstrom, *Kill the Automobile Deficiency Judgment*, 56 A.B.A.J. 364 (1970).

less than book wholesale value.⁶ The authors of the studies thus concluded that the U.C.C. did not function satisfactorily in the context of consumer automobile sales.⁷

This article analyzes a new source of data concerning repossession sales, which has become available in connection with the Federal Trade Commission rulemaking proceeding on the Commission's proposed Credit Practices trade regulation rule.⁸ The new data have important advantages over that previously available, and give a more complete picture of the marketing of repossessed vehicles and the factors that determine deficiencies. The new data demonstrate that a distinction must be drawn between repossession sales made directly by creditors and those made by car dealers as a result of recourse arrangements.⁹ The results of the earlier studies are accurate for repossession sales by

⁶ See Table 2 In text or note 51 *infra*.

⁷ Shuchman, *supra* note 5, at 48-57; Firmin & Simpson, *supra* note 5, at 531-32; Corenswet, *supra* note 5, at 1099-1103.

⁸ Proposed 16 C.F.R. Part 444. The data on which this article is based were assembled by the author and his colleagues in connection with the proceeding. During the early 1970's, the FTC undertook a number of investigations of automobile repossession practices. See, e.g., material on record of FTC Credit Practices Rulemaking, Record 215-42 [hereinafter cited as *FTC Credit Practices Record*] at R-XI-70. These investigations led to the incorporation of a provision deficiencies in the Trade Regulation Rule Concerning Credit Practices which the FTC proposed in 1975. Proposed 16 C.F.R. § 444.2(a)(7), 40 Fed. Reg. 16347 (1975). A revised version of the proposed rule can be found in the FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, at Appendix A. As of January, 1982 the FTC had not yet taken final action on the rule. The repossession investigations also led to litigation by the Commission against the three major domestic automobile manufacturers, their finance subsidiaries, and selected automobile dealers. Chrysler Motors Corp., et al., Dkt. 9072; Ford Motor Co., et al., 93 F.T.C. 402 (1979); General Motors Corp., et al., 95 F.T.C. 825 (1980). All but one of the respondents settled with the FTC. Opinions in the remaining suit can be found in Ford Motor Co., et al., 94 F.T.C. 564 (1979), *vacated*, Ford Motor Co. v. FTC, 654 F.2d 599 (9th Cir. 1981). The litigation focused on failure to return surpluses generated when repossessed automobiles were sold for a price greater than the balance owed by the debtor at the time of repossession. The FTC investigations, rulemaking, and litigation generated a large amount of quantitative and other information concerning repossession sales. Much of this information has been placed in the *FTC Credit Practices Record* and serves as the basis for the analysis presented here.

One secondary purpose of this article is to call attention to the *FTC Credit Practices Record* as a source of data for research on many aspects of consumer credit. The proposed Credit Practices rule contains about a dozen provisions dealing with various creditor remedies and collection practices, including confessions of judgment, waivers of property exemptions, wage assignments, blanket security interests in household goods, cross-collateral security interests, late fees, attorneys fee clauses, debt collection contacts with persons other than the delinquent debtor, and the use of cosigners. While the record focuses on these practices, it contains material relevant to many other aspects of the consumer credit industry. An overview of the types of material on the record can be found in FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, at 45-60. The *FTC Credit Practices Record*, *supra*, is available for inspection at the FTC building in Washington, D.C. Written material submitted for the record is referenced by a capital "R" followed by a capitalized Roman numeral, followed by a number: e.g., R-XI-70. Hearing testimony is referenced by a transcript page number: e.g., Tr. 875. Hearing exhibits are referenced by the letters "HX" followed by a number: e.g., HX-204.

⁹ Recourse arrangements are discussed in the text and note at note 29 *infra*. The Corenswet study, see text and notes at notes 40-60 *infra*, foreshadowed some of the results reported here.

creditors. Sales by dealers, however, produce significantly higher prices and smaller deficiencies. The data examined in this article also shed light on a number of other issues not addressed extensively in earlier studies, including the condition of repossessed cars and its effect on sale prices.

This article will begin with a brief overview of the law concerning the disposition of repossessed property set forth in Article 9 of the U.C.C. The article will then describe the market context within which the law governing deficiencies operates. This description will focus on the two major methods used by creditors to handle repossessed automobiles, "recourse" and "non-recourse" disposition, and will conclude with an estimate of their relative importance in the market place. This discussion will provide the background for a later comparison of the effects of different methods of disposition on the amount of deficiencies owed by consumers.

After presenting the legal and economic framework within which deficiencies arise, the article discusses the results and limitations of earlier studies of automobile repossession sales. The article next turns to an analysis of new data on repossession sales, which present a substantially more complete picture of the market than was available previously. The conclusions reached are then tested against those of another recent analysis of similar data.

The concluding section of this article suggests some implications of the empirical results for a number of proposals to reform the U.C.C. deficiency mechanism. The proposal which appears in best light is one which would require deficiencies to be assessed based on the best possible price obtainable for repossessed collateral. "Best possible price" for repossessed automobiles would be rebuttably presumed to be the retail value. The presumption in favor of retail value is supported by a finding that many repossessed automobiles are currently retailed and that retail disposition produces smaller deficiencies than other methods. At the same time, it is not clear that all repossessed automobiles can be retailed, so the presumption should be rebuttable.

While the results presented have policy implications, this article does not attempt a complete legal and economic analysis of the deficiency question. The major purpose of this article is, rather, to present an empirical picture of existing practices under the U.C.C. that is more complete and nuanced than that which appeared previously. Such a picture takes into account both the repossession sales at less than wholesale price reported by earlier studies and the retail sales which occur in a large number of repossessions. Whatever policy conclusions are reached, future consideration of the deficiencies issue should take into account both aspects of the market's response to U.C.C. Article 9.

II. U.C.C. ARTICLE 9 AND THE DISPOSITION OF REPOSSESSED COLLATERAL

The rights of the debtor and creditor following repossession of collateral are governed by sections 9-504 through 9-507 of the U.C.C. This article will not attempt a full discussion of the law governing repossession, a subject which

has been treated extensively elsewhere.¹⁰ A brief outline of the law under the U.C.C. is presented, however, to provide a context for the empirical information on repossession discussed below.

Following repossession, but prior to any resale by the creditor, the debtor has the right to buy back or "redeem" the collateral. U.C.C. section 9-506 gives the debtor the right to do so by "tendering fulfillment of all obligations secured by the collateral . . ." including expenses reasonably incurred by the secured party in connection with the repossession. If the collateral is redeemed, the issue of a deficiency will, of course, not arise. It is commonly assumed, however, that the right to redeem repossessed collateral is rarely exercised in consumer transactions.¹¹ Since credit contracts typically contain acceleration clauses, redemption is likely to require payment of the entire outstanding balance.¹² The occurrence of default and repossession, however, implies that the debtor's resources are inadequate to maintain monthly payments on the debt. It is therefore unlikely that the debtor will be able to pay off the entire balance upon repossession.

In the event that redemption does not occur, U.C.C. sections 9-504 and 9-505 give the creditor two options regarding the disposition of the collateral. Under section 9-504, the creditor is entitled to sell the collateral to satisfy the underlying debt. Section 9-504(1) states that:

... The proceeds of disposition shall be applied in the order following to

- (a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling . . . and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;
- (b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;
- (c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral

If the proceeds from the sale are inadequate both to cover expenses and satisfy the underlying indebtedness, "the debtor is liable for any deficiency."¹³ If the net proceeds more than satisfy the debt, "the secured party must account to the debtor for any surplus"¹⁴ Section 9-504 gives the creditor almost complete freedom to determine how the collateral will be sold, subject to the requirement that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable."¹⁵

¹⁰ E.g., Clark, *Default, Repossession, Foreclosure and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302 (1972). See also note 5 *supra*.

¹¹ *Id.* at 315.

¹² *Id.*

¹³ U.C.C. § 9-504(2). This is true unless the parties agree otherwise. *Id.*

¹⁴ *Id.*

¹⁵ U.C.C. § 9-504(3).

As an alternative to a sale of the collateral pursuant to section 9-504, section 9-505 authorizes the repossessing creditor, with the permission of the debtor, to keep the collateral in full satisfaction of the debt.¹⁶ This approach is often called "strict foreclosure." The repossession is treated as extinguishing all rights and duties of the debtor with regard to the transaction. It is likely that section 9-505 is something of a dead letter in consumer transactions. From the creditor's viewpoint, the only major advantage of section 9-505 over section 9-504 is that under section 9-505 there is no duty to return surpluses.¹⁷ It is commonly assumed, however, that surpluses virtually never appear in consumer repossessions.¹⁸ Creditors are thus unlikely to perceive much advantage in proceeding under section 9-505.

While repossession sales by creditors rarely result in surpluses,¹⁹ repossession sales by car dealers sometimes do result in such a credit being due the debtor.²⁰ When surpluses are obtained, however, they are rarely returned to consumers.²¹ Thus, even when surpluses do result, there is little incentive to make use of the section 9-505 procedure. It is possible that recent FTC litigation concerning surpluses will lead to a greater use of section 9-505, if only by increasing awareness of the existence of surpluses.²²

The U.C.C., then, provides three major alternatives in the event of repossession. First, the debtor has the option, in theory at least, to redeem the property by tendering payment in full of both all obligations secured by the col-

¹⁶ If the collateral is consumer goods and the debtor has paid sixty percent of the cash price of the collateral, or sixty percent of the amount of the secured loan, § 9-505(1) requires sale of the collateral pursuant to § 9-504 unless the creditor, after default, obtains written authorization from the debtor not to do so. In other situations the creditor must merely notify the debtor (and, for collateral that is not consumer goods, other persons with a security interest in the collateral) of his intention to retain the collateral. The creditor may proceed to do this if he has received no written objection within twenty-one days. U.C.C. § 9-505(2).

¹⁷ But see J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 977-98 (1st ed. 1972). These authors suggest that the ability to sell collateral without worry that the sale will be legally challenged by the debtor is an important advantage of § 9-505.

¹⁸ See, e.g., Davis, *Legislative Restriction of Creditor Powers and Remedies: A Case Study of the Negotiation and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 3, 56 (1973); Firmin & Simpson, *supra* note 5, at 514 n.21.

¹⁹ E.g., *Ford Motor Co., et al. (Initial Decision)*, 94 F.T.C. 564, 578 (1979) (summarizing trial testimony by creditors).

²⁰ See text and notes at note 86 *infra*.

²¹ See Complaint Counsel's Trial Brief in *Ford Motor Co., et al.*, 94 F.T.C. 564, 565-66 (1979); and Complaint Counsel's Trial Brief in *General Motors Corp., et al.*, 95 F.T.C. 825, 829 (1980). Allegations in the trial briefs are based on subpoenas of numerous car dealers.

²² This litigation includes *Chrysler Motor Corp.*, F.T.C. Dkt. 9072; *Ford Motor Co., et al.*, 93 F.T.C. 402 (1979); *General Motors Corp., et al.*, 95 F.T.C. 825 (1980). The FTC order in the Ford litigation would restrict the use of § 9-505 by car dealers to limited circumstances, out of concern that § 9-505 otherwise would be used routinely to avoid returning surpluses to consumers. *Ford Motor Co., et al.*, 94 F.T.C. 564, 640. See also Commission's Opinion, *id.* at 625-27. The Commission's decision in the case has been vacated by the Ninth Circuit on other grounds relating to questions of administrative law. *Ford Motor Co. v. FTC*, 654 F.2d 599 (9th Cir. 1981).

lateral, and any reasonable expenses incurred by the creditor in connection with the repossession. In the likely event that redemption does not occur, the creditor may proceed in one of two other ways. Under section 9-504 of the Code, the creditor is entitled to sell the collateral to satisfy the underlying debt. Should the proceeds from the sale prove insufficient to satisfy the indebtedness, the debtor remains liable for the amount of the deficiency. Conversely, should the proceeds from the sale exceed the amount of indebtedness, the Code requires the resulting surplus to be paid to the debtor. Under section 9-505, the creditor, if authorized by the debtor, may keep the collateral in full satisfaction of the debt, with no obligation to return any surplus to the debtor. In practice, however, most creditors proceed under section 9-504 and sell the repossessed property to satisfy the underlying debt. As a result, a typical debtor whose car has been repossessed faces the prospect of a deficiency or surplus based on the outcome of a section 9-504 sale.

III. THE AUTOMOBILE FINANCE MARKET AND ITS EFFECT ON THE DISPOSITION OF REPOSSESSIONS

Credit to finance automobiles accounts for about one-third of all consumer credit.²³ Automobile credit takes two major forms. About 40% is extended in the form of a direct loan to the purchaser.²⁴ The primary sources of such loans are banks and credit unions.²⁵ The other 60% of automobile credit is initially extended by car dealers via retail installment contracts.²⁶ These contracts are then sold either to banks or to a finance company subsidiary of the automobile manufacturer.²⁷ Credit extended by banks or finance companies in this manner is often called "indirect credit."

The form of financing can have an important effect on the disposition of the collateral after repossession. When vehicles are financed by direct loans, the lender ordinarily has responsibility for repossession and sale of collateral. The lender also has the right to a deficiency if one results from the sale. The bank or finance company is similarly responsible for repossession and sale in about half of all indirectly financed transactions. In these transactions, once the installment contract is assigned, the dealer who sold the automobile to the debtor has no further obligations or rights in connection with the credit extension. Such indirectly financed transactions are called "without recourse" or "non-

²³ At the end of 1980, automobile credit outstanding came to \$116 billion. Total consumer installment credit came to \$313 billion. National Consumer Finance Association *1981 Finance Facts Yearbook* [hereinafter cited as *1981 Finance Facts*] at 45. The figures are from the Federal Reserve Board and can also be found in the monthly *Federal Reserve Bulletin* at A42 (Oct., 1981).

²⁴ See Table 1 in text at note 36 *infra*.

²⁵ *Id.*

²⁶ *Id.*

²⁷ The subsidiaries are General Motors Acceptance Corporation, Ford Motor Credit Company, and Chrysler Credit Corporation. These three firms account for the bulk of all automobile financing by finance companies. *1981 Finance Facts*, *supra* note 23, at 56.

recourse" transactions because the assignee has no recourse against the dealer in the event the car buyer defaults.²⁸

The remainder of indirect car finance transactions are on a recourse basis.²⁹ This article will use the term "recourse" to refer to a variety of contractual arrangements under which car dealers agree to compensate indirect creditors for losses suffered when car buyers default on their credit obligations. Under the most common form of such an agreement the dealer is required to "buy back" the contract from the creditor to whom it was assigned should repossession occur.³⁰ The dealer pays the creditor the amount due on the contract and receives possession of the collateral.³¹ In addition, the dealer is responsible for selling the collateral and has the right to collect any resulting deficiency from the debtor, as well as the duty to return any resulting surplus.³² Recourse agreements shift most of the risk of default to the car dealer, and away from the creditor who provides the financing for the dealer's sales. In return for bearing the default risk, recourse dealers generally receive a larger share of the face value of the contracts they sell than do non-recourse dealers.³³

While recourse agreements are contracts between financiers and dealers, not between creditors and consumer debtors, they nevertheless have important implications for such debtors. In repossessions subject to recourse, the sale which determines the debtor's deficiency or surplus is likely to be made by a car dealer.³⁴ In non-recourse repossessions the sale will be made by a bank, finance company, or credit union. As will be discussed in more detail below,³⁵ it is reasonable to suppose that a dealer will do a better job selling the collateral than will a financier. This suggests that in a section 9-504 sale the consumer is

²⁸ M. BURY, *THE AUTOMOBILE DEALER* 111 (5th ed. 1974) [hereinafter cited as BURY]. Bury prefers the term "non-repurchase." *Id.*

²⁹ According to a 1977 American Bankers Association survey, for various size classes of banks the percentage of non-recourse paper varies from 40.3% to 60.8%, with larger banks generally making greater use of non-recourse. American Bankers Association 1977 INSTALLMENT/CONSUMER CREDIT REPORT at 31. About half of the contracts purchased by GMAC are subject to recourse. GMAC, *FTC Credit Practices Record*, *supra* note 8, R-I(a)-812 at 3. In 1974 approximately 44% of FMCC retail paper was non-recourse. Letter from G.V. Burbach of FMCC, dated June 6, 1975, *FTC Credit Practices Record*, *supra* note 8, R-XI-172 at 1.

³⁰ The type of recourse arrangement described in the text is often called a repurchase plan. See generally BURY, *supra* note 28, at 112-113, for a description of this and several other types of recourse arrangements. Examples of recourse agreements can be found in *Chrysler Credit Corporation Operations Manual* in the *FTC Credit Practices Record*, *supra* note 8, at R-XI-168.

³¹ The financier may assume responsibility for certain costs, for example repossession expenses, or the cost of repairing uninsured collision damage. BURY, *supra* note 28, at 112-13.

³² See note 34 *infra*.

³³ BURY, *supra* note 28, at 112-13.

³⁴ See U.C.C. § 9-504(5), which states that a person who is liable to, and receives collateral from, a secured creditor pursuant to a repurchase or similar agreement acquires the rights and duties of the secured party. Section 9-504(5) also states that the transfer from the secured creditor to the dealer pursuant to a repurchase agreement is not a sale for purpose of § 9-504, implying that the subsequent sale by the dealer is the one that will legally determine any deficiency or surplus.

³⁵ See text and notes at notes 76-101 *infra*.

apt to be assessed a smaller deficiency if the dealer is subject to a recourse financing agreement.

As of the end of 1980, outstanding automobile credit in the United States broke down approximately as stated in Table 1:

Table 1³⁶

	<u>Amount in Billion of Dollars Outstanding</u>	<u>Percent of Total</u>
Banks	61.0	52
Direct Loans	26.2	23
Indirect Credit	34.8	30
Credit Unions (direct loans)	21.1	18
Finance Companies (indirect credit)	34.2	29
Total	116.3	100
Direct	47.3	40
Indirect	69.0	60

Since about half of all indirect automobile credit is on a recourse basis³⁷ and 60% of all automobile credit is indirect,³⁸ roughly 30% of automobile credit is likely to be subject to recourse. Recourse transactions probably account for well over 30% of actual repossessions, however, since repossession rates in indirectly financed transactions are several times as high as those for direct loan sales.³⁹ Thus, indirect transactions, which include recourse transactions, account for a disproportionately large share of repossessions.

The above review of the automobile finance market indicates that in something over 30% of all repossessions, the repossessing creditor does not itself sell the collateral. Instead, the repossessed vehicle is turned over to the original dealer for sale, pursuant to a recourse agreement. Thus, in a signifi-

³⁶ 1981 *Finance Facts*, *supra* note 23, at 45 (based on Federal Reserve Board figures).

³⁷ See note 29 *supra*.

³⁸ See Table 1 in text at note 36 *supra*.

³⁹ In the United States during 1969-1977, banks' monthly repossession rates averaged .76 per 1000 loans for direct credit and 2.4 per 1000 for indirect credit. See American Bankers Association Installment Lending Division Bulletins, *Delinquency Rates on Bank Installment Loans* (1969-77). In the FTC Credit Practices Rulemaking, Ford Motor Credit Company stated that about 4% of its customers have their vehicles repossessed each year. *FTC Credit Practices Record*, *supra* note 8, R-1(a)-816 at 48. This translates into a monthly rate of about 3.3. repossessions per 1000 accounts. General Motors Acceptance Corporation estimates that it repossessed something under 5 accounts per 1000 in an average month. *Id.* R-1(a)-812, at 5. Credit unions appear to have repossession rates comparable to or lower than those for bank direct loans, although hard statistics do not appear to be available. See testimony cited in FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, at 262 n.31.

cant fraction of automobile repossessions, the U.C.C. section 9-504 sale is made by a party — the dealer — who is patently well equipped to sell cars. It would seem reasonable to assume that repossession sales by automobile dealers, pursuant to recourse agreements with financiers, will tend to yield higher prices than will sales by financiers themselves. The actual results of repossession sales by both creditors and dealers will now be explored in detail.

IV. EARLIER STUDIES

The original empirical study of deficiencies following automobile repossessions was published in 1969 by Philip Shuchman.⁴⁰ Two later studies, by Firmin and Simpson in 1971⁴¹ and Corenswet in 1975,⁴² followed Shuchman's methodology.⁴³ In addition to records of repossessions and sales, the three studies used published used car price guidebooks to estimate the retail and wholesale value of the vehicles involved. A number of such guidebooks are published by various organizations and are based on surveys of used car sales by dealers or at auctions. Shuchman made use of the so-called *Redbook*;⁴⁴ Firmin and Simpson, the National Automobile Dealers Association (NADA) *Used Car Guide*,⁴⁵ and Corenswet the *Kelley Bluebook*.⁴⁶ All of these guidebooks are used widely in the automobile sales industry.⁴⁷ Information introduced in the FTC Credit Practices Rulemaking suggests that price estimates for a given car as of a given date in most guidebooks are likely to cluster within about 10% of each other.⁴⁸

All three studies compared prices obtained in repossession sales with guidebook prices to evaluate the efficiency of the sales on which deficiencies are based. Both Shuchman and Firmin and Simpson also compared repossession

⁴⁰ Shuchman, *supra* note 5.

⁴¹ Firmin & Simpson, *supra* note 5.

⁴² Corenswet, *supra* note 5.

⁴³ Repossessors ordinarily notify the police when cars are repossessed because surprised repossees often believe their cars to have been stolen and contact the police. Shuchman, *supra* note 5, at 57. Shuchman therefore used police records to identify the most active repossees in the region studied (several areas in Connecticut). Shuchman then reviewed court records of deficiency suits by the repossessing businesses to obtain information on the size of the deficiencies sought. *Id.* at 58. Shuchman also traced the record of the relevant vehicles at the Connecticut Department of Motor Vehicles. The Department files provided information on the price obtained at the first retail sale of the cars following repossession. *Id.* Shuchman found that repossessed cars were ordinarily sold wholesale to a car dealer who then sold them to retail customers. *Id.* at 29.

In their study of District of Columbia repossessions Firmin and Simpson used sources of information similar to those used by Shuchman. Firmin & Simpson, *supra* note 5, at 532-34. The third major early repossession study, by Ellen Corenswet, used court records on deficiency suits in Alameda County, California. Corenswet, *supra* note 5, at 1084-85.

⁴⁴ Shuchman, *supra* note 5, at 27 n.28.

⁴⁵ Firmin & Simpson, *supra* note 5, at 516 n.26.

⁴⁶ Corenswet, *supra* note 5, at 1085 n.17.

⁴⁷ See notes 44-46 *supra*.

⁴⁸ REPORT OF THE PRESIDING OFFICER ON PROPOSED TRADE REGULATION RULE: CREDIT PRACTICES (FTC 1978) at 215.

sale prices with another benchmark, the so-called "second resale" price.⁴⁹ This price is that obtained when a car dealer who purchased a vehicle in a wholesale repossession sale, or "first resale," resells it to a retail customer.⁵⁰ The second resale price is an attractive benchmark because it is a price that was obtained for the particular vehicle under consideration, and not merely a market average like the guidebook price.

The results of the three major early studies of deficiencies are summarized in Table 2.⁵¹ These results indicate that repossessed cars are sold for prices substantially lower than those obtained in other wholesale used car sales. Prices obtained for repossessions in the three studies averaged from 71% to 84% of book wholesale value. The Shuchman and Firmin and Simpson studies also showed that following an initial wholesale sale, repossessions are resold for prices approximating guidebook retail value. The closeness of the second sale price to the guidebook's retail value estimate suggests that there is nothing intrinsic to repossessed cars which prevents them from being sold at prices comparable to those obtained for other used cars.

While Table 2 indicates the major results of the studies, a number of additional details should be pointed out. Shuchman was unable to determine whether the repossessions he studied were recourse transactions. However, in about half of the cases studied, the plaintiff in the deficiency suit was the car dealer, not the financier.⁵² This fact suggests that in these cases some sort of recourse agreement resulting in a transfer of the creditor's rights was in effect, although not necessarily an agreement which called for the dealer to make the sale on which the deficiency was based. In any case, Shuchman observed no clear differences in the results for the defaulting consumer depending on whether the plaintiff was a dealer or financier.⁵³

Like Shuchman, Firmin and Simpson did not indicate whether the repossessions they studied were subject to recourse. They did make the interesting observation that in 71% of the cases studied, the sale which established the deficiency was made by the repossessing financier to the dealer that sold the repossessed car in the first place.⁵⁴ They noted that this statistic raises questions as to the arms length nature of the sales on which deficiency suits are based.⁵⁵

⁴⁹ Shuchman, *supra* note 5, at 32-33; Firman & Simpson, *supra* note 5, at 519-21.

⁵⁰ *Id.*

⁵¹ This table is based in part on a table in Note, *Defaulting Debtors and the Judicial Process — The FTC's Proposed Restriction on Deficiency Judgments: § 444.2(a)(7) of the Rule on Credit Practices*, 8 CONN. L. REV. 457, 459 (1976).

⁵² See Table 4 in Shuchman, *supra* note 5, at 40.

⁵³ *Id.* Contrast Shuchman's Table 4, line 9, with his Table 4, line 7. Shuchman, *supra* note 5, at 40.

⁵⁴ Firmin & Simpson, *supra* note 5, at 517.

⁵⁵ *Id.* In Shuchman's sample, 35% of repossession sales were made to the original dealer. Table 4, lines 3 and 4 in Shuchman, *supra* note 5, at 40.

Table 2

Number of Cases	Average Prices on First Resale* as % of:		Price on Second Resale as % of Guide- book		Ratio of First Resale Price to Second Resale Price*		Percent of Claim Satisfied by:	
	Guidebook		Retail		Retail		First	
	Wholesale	Guidebook	Wholesale	Guidebook	Retail	Resale Price*	Resale	Guidebook Retail
Connecticut Study (Shuchman)	83	71	51	91	.55	51	108	
Washington, D.C. Study (Firmen and Simpson)	106	81	62	110	.56	65	105	
Alameda County, Califor- nia Study (Corenswet)	216	84	64	NA	NA	72	108	

* NOTE: "First Resale" is the sale which establishes the deficiency pursuant to U.C.C. § 9-504.
 "Second Resale" is the sale of collateral by a dealer who purchased it at the first resale.

The Corenswet study is particularly interesting because, in 37% of the cases studied, the repossession sale was a retail sale to an individual, rather than a wholesale sale to a dealer.⁵⁶ Presumably, the retail sales reflect recourse transactions in which the repossessed vehicle was returned to a dealer for resale, although the study, like its predecessors, did explicitly distinguish recourse from non-recourse transactions.⁵⁷ As might be expected, Corenswet found that retail sales produced sharply higher prices than wholesale sales.⁵⁸ For new cars, retail sales produced prices averaging 95% of guidebook retail value compared with 61% of retail value in wholesale sales.⁵⁹ For cars that were originally sold used, retail sales brought 75% of guidebook retail, compared with 50% for wholesale sales.⁶⁰

In summary, the early studies of repossession sales under the U.C.C. reached fairly consistent results. All of them observed a disparity between average prices obtained in section 9-504 sales and the guidebook wholesale value of repossessed automobiles. Shuchman and Firman and Simpson also noted that repossessed cars sold for less than wholesale prices in section 9-504 sales are subsequently resold for prices approximating guidebook retail value. Corenswet observed that some initial repossession sales are made to retail customers and that these sales produce substantially higher prices than other repossession sales. None of the studies, however, permit a clear comparison of the effect of recourse and non-recourse disposition on the ultimate deficiencies paid by consumers. Certain additional limitations of the early studies are discussed below.

V. LIMITATIONS OF EARLIER STUDIES

The major limitation of the studies just described is that they are based on court records, the only source of empirical data on deficiencies publicly available at the time the studies were conducted. The data for the studies were therefore confined to repossessions which led to a lawsuit to recover a deficiency. Such repossessions account for only a minority of repossessions.⁶¹ Use of data from court records thus raises the question of whether repossessions leading to deficiency suits are characteristic of all repossessions. For example,

⁵⁶ Corenswet, *supra* note 5, at 1086.

⁵⁷ Corenswet found that over 90% of deficiency suits in her sample were brought by seven collection agencies. The suits were brought primarily on behalf of three automobile dealers and four finance companies, implying a mix of recourse and non-recourse transactions. *Id.* at 1084.

⁵⁸ *Id.* at 1086-87.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1087.

⁶¹ Firmin and Simpson found that in 1968, 3700 automobile repossessions were recorded with the Washington, D.C. police department. The repossessioners listed with the police brought 600 deficiency suits during the same time period. Firmin & Simpson, *supra* note 5, at 533. It is likely that the Firmin and Simpson figures do not cover all repossessions in Washington, D.C. in the relevant time period since some repossessions take the form of voluntary transfers of the collateral from the debtor to the creditor and would not require notification of the police.

the methodology used in the three studies would not reveal whether some repossessions lead to surpluses. Moreover, small deficiencies might be less likely to result in collection suits than larger deficiencies and might therefore appear less often in court records.⁶² Shuchman attempted to obtain information on non-litigated deficiencies to check the generality of his results. Unfortunately, he was only able to obtain information concerning 11 repossessions from a single financier. Shuchman, considered the results for these repossessions to be consistent with those for litigated deficiencies, although the number was too small for anything more than tentative conclusions.⁶³

A second limitation of the three studies is that they provide little information on the condition of the cars in the samples used.⁶⁴ Creditors frequently argue that repossessed cars bring prices below book value because they are in worse condition than other used cars.⁶⁵ Information on the condition of repossessed cars would therefore be useful for a full evaluation of the results of the three studies.

A third limitation of the studies is that they do not contain information on the investment in sales commissions, repairs, and other costs of selling cars in a retail rather than a wholesale manner. Shuchman and Firmin and Simpson emphasized the contrast between the low prices obtained in repossession sales and the higher prices obtained in retail "second resales."⁶⁶ However, retail sale is likely to involve greater sales expense than wholesale sale. As noted above, U.C.C. section 9-504 permits the creditor to allocate sale proceeds to sale-related expenses. Therefore, information on the investment needed to obtain retail prices is necessary to determine the precise effects the retailing of repossessions would have on deficiencies. That retail second resales of repossessions occur at all, however, implies that higher retail prices more than compensate for the additional sales expense. Otherwise, profit-motivated car dealers would not make such sales. Besides aiding second-resale analysis, information on sales expense would be useful to evaluate the implications of Corenswet's finding that retail first resales of repossessed cars produce higher prices than wholesale sales.

⁶² In the FTC Credit Practices Rulemaking, the Texas Consumer Credit Commissioner expressed the view that banks were likely to write off deficiencies under \$500 but would file suit to collect deficiencies over \$1000 as much as half of the time. *FTC Credit Practices Record*, *supra* note 8, at Tr. 1299.

It should be noted that there are reasons for not bringing a deficiency suit that are independent of the size of the deficiency. For example, the debtor might have paid without suit, the debtor might be judgment proof, or the debtor might not be locatable.

⁶³ Shuchman, *supra* note 5, at 59. Other repossessioners were unwilling to supply Shuchman with information. *Id.*

⁶⁴ Shuchman examined about 20 repossessed automobiles that were not part of his primary study sample. He found that "all could be driven and were in normal condition." *Id.* at 31. Shuchman also noted that where there is serious damage to a repossessed vehicle, the secured party is likely to be reimbursed by collision insurance, which automobile financiers require. *Id.*

⁶⁵ This was one of the points pressed most vigorously by creditors and car dealers during the FTC Credit Practices proceeding. See, e.g., the sources cited in the FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, at 297-98 & n.128, 302-03.

⁶⁶ See text at notes 49-50 *supra*.

Despite the limitations just discussed, the results of the three studies are sufficiently strong to raise serious questions concerning repossession sale practices.⁶⁷ At a minimum they justify further inquiry. The results of such further inquiry will now be presented.

VI. ANALYSIS OF FTC DATA

The information on repossession sales made available by the FTC Credit Practices Rulemaking has a number of important advantages over that which formed the basis of earlier studies. It is not confined to repossessions which resulted in a deficiency suit. It clearly distinguishes non-recourse and recourse repossessions, providing a basis for comparisons of different methods of handling repossessions. It includes information on the condition of repossessions, and on the effect of retail sales on deficiencies taking into account sales and repair costs. The FTC information will be discussed in several contexts.

First, the data will be used to analyze repossession sales made by creditors, including non-recourse indirectly financed repossessions and repossessions resulting from direct loans by financial institutions. This information will be used to determine how repossession sale prices compare with guidebook wholesale value, and how the resulting deficiencies compare with the balance owed before sale. Next, recourse transactions will be examined. It will be shown that repossession sales conducted by dealers differ from those conducted by financial institutions in two ways. First, sales by dealers tend to be retail, not wholesale. Second, the resulting deficiencies represent a smaller proportion of the balance owed before sale. Dealer sales are thus more effective in liquidating the outstanding debt.

After contrasting the methods and results of recourse and non-recourse repossession sales, this section will review data on the condition of repossessed automobiles and the effect of condition on deficiencies. Finally, the conclusions reached by this analysis of the FTC data will be compared with those reached by another recent study based on FTC rulemaking data.

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A. *Repossession Sales By Creditors*

As part of their testimony or written submissions in the Credit Practices proceeding, a number of major banks and finance companies submitted

⁶⁷ The results are particularly strong if the studies are viewed as evaluations of regulation of repossession and deficiencies by the courts. Apart from the statistics on litigated deficiencies described in this article, the studies contain extensive additional information on the role of the courts in deficiency cases. See Shuchman, *supra* note 5, at 34-38; Firmin & Simpson, *supra* note 5, at 521-24.

Table 3

Creditor	Nature of Sample	Number of Cars in Sample	Average Sale Price as		Average Sale Price as Percent of Guidebook Retail	Ratio of Sale Price to Balance Owed		Approximate Ratio of Deficiency to Balance Owed ⁶⁸
			Percent of Guidebook Wholesale	less than 80%		NA	NA	
General Motors Acceptance Corp. ⁶⁹	All repossession sales in 1976	46,000			NA	NA	NA	NA
Ford Motor Credit Company ⁷⁰	All repossession first 6 months of 1977	5,500	82		66	75	25	
Security Pacific Bank ⁷¹	Repossession sold on September 8, 1977	38	77.1 ⁷²		NA	59	41	
Bank of America ⁷³	Repossession sold June-August 1977	approximately 130	79		NA	NA	NA	
Large Banks Responding to American Bankers Association Survey ⁷⁴	224 banks responding to Fall 1977 Survey Concerning Experience in 1976 ⁷⁵	NA	NA		NA	54.2	45.9	

statistics on the repossession sales they make. This material was submitted voluntarily and was not under oath. The statistics cover non-recourse, indirectly financed repossessions and, in the case of banks, repossessions arising out of loan transactions. The creditors generally supplied data on all of their repossession sales within a defined period. The data are therefore not confined to repossessions which gave rise to a suit for a deficiency. The data reported varied from creditor to creditor, but are summarized above in Table 3.

⁶⁸ This figure was calculated by subtracting the Ratio of Sale Price to Balance Owed from 100%. It therefore does not take into account sales and repair expenses and underestimates the true ratio of deficiencies to balance owed. Because creditors usually incur only limited expenses in repossession sales, the approximate ratio reported in Table 3 will be reasonably close to the true ratio. See note 95 *infra*. The approximate ratio was calculated to permit comparisons with equivalent figures for recourse repossession sales.

⁶⁹ *FTC Credit Practices Record*, *supra* note 8, R-5(a)-812 at 9-10.

In addition to supplying information on repossession sales, several creditors also supplied information on their success in collecting deficiencies once they are assessed. Estimated ratios of money collected to the total amount of deficiencies reported in the *FTC Credit Practices Record* include approximately 25% for Ford Motor Credit Corporation, *id.* at R-I(a)-816; approximately 15% for General Motors Acceptance Corporation, *id.* at R-I(a)-812; 18% for Security Pacific National Bank, *id.*, HX-204 at 5; about 6% for the Bank of America, *id.* at Tr. 5668; and approximately 15% for large banks responding to the American Bankers Association Survey, *id.* at Tr. 12208. The 15% figure for large banks was calculated from the average charge-off and deficiency figures in the survey. Some question attaches to this result due to ambiguity in the survey questionnaire. See *id.* at Tr. 12253.

⁷⁰ *Id.* R-I(a)-816, at 30-31.

⁷¹ *Id.* HX-205, Appendix at 1.

⁷² In addition to comparing sale prices for its repossessions with guidebook wholesale value, Security Pacific compared them with what it called the "actual cash value" of the vehicles based on individual appraisals. According to Security Pacific, sales prices averaged 97.8% of actual cash value. *Id.*

⁷³ *Id.*, HX-227 at 6.

⁷⁴ *Id.*, HX-500 at Table 5.

⁷⁵ The survey instrument was sent to a random sample of banks stratified by size. Respondents were asked to supply figures on, *inter alia*, total balance owed on and amount received from sale of repossessions during 1976. Results were reported only for banks with deposits of \$100 million or more due to low response rates for smaller banks. A detailed description of survey methodology and results is attached to HX-500 of the *FTC Credit Practices Record*.

Overall, the figures reported by different creditors in Table 3 are highly consistent, particularly with respect to the comparison of sales price with guidebook wholesale value. Moreover, the results are consistent with the results of the earlier studies of repossession sales, based on court records. For example, repossession sale prices reported by creditors in the FTC proceeding clustered around 80% of guidebook wholesale value. In the earlier studies, average prices ranged from 71% to 84% of guidebook wholesale. The FTC data thus indicate that the results of earlier studies are reasonably accurate for repossession sales by creditors. Results in such sales will now be compared with those in sales by dealers pursuant to recourse agreements.

B. *Repossession Sales by Dealers*

Creditors and car dealers who participated in the Credit Practices Rulemaking supplied little quantitative information on repossession sales in recourse transactions. To fill this gap, the author and his colleagues analyzed a body of data on recourse repossessions obtained by the FTC in connection with litigation the agency was pursuing.⁷⁶ The information takes the form of reports submitted by car dealers on all repossession sales they made during a designated period in the second half of 1974 and first half of 1975.⁷⁷ A description of the sample of dealers, taken from the *FTC Credit Practices Staff Report*, is appended to this article.

The recourse data were first used to establish whether recourse repossessions are in fact handled differently than other repossessions. The data show that a large majority of recourse repossessions are sold retail, not wholesale like most other repossessions. Reports from two different subsamples of car dealers support this conclusion. One subsample consists of all dealers who explicitly reported whether sales were retail or wholesale.⁷⁸ Of the thirteen dealers in this subsample, eleven retailed at least two-thirds of their repossessions.

The second subsample studied consisted of all dealers who submitted information on sales expenses for all of the repossessions they reported. This subsample included seventeen dealers.⁷⁹ These dealers reported on a total of 885 repossession sales. Most of these dealers did not indicate explicitly whether sales were retail or wholesale.⁸⁰ They did indicate, however, whether a sales

⁷⁶ See note 8 *supra*.

⁷⁷ Data from 59 dealers were placed on the *FTC Credit Practices Record*. The precise information supplied varied from dealer to dealer so data from different subsamples of the 59 dealers were used for different analyses.

⁷⁸ This subsample included 13 dealers located in 10 states. Identities of the dealers and the location of their submissions on the *FTC Credit Practices Record* can be found in the FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, Appendix C at 4.

⁷⁹ Identities of the 17 dealers and the location of their submissions on the *FTC Credit Practices Record* can be found in the FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, Appendix C at 5-6.

⁸⁰ There were two exceptions. These two dealers were therefore members of both dealer subsamples studied by the author.

commission was paid on each sale. Such a commission would ordinarily be paid on a retail sale. Sales commissions were reported in approximately 75% of sales (666 of 885), implying that about 75% of sales were retail.

The recourse data thus indicate that recourse reposessions are in fact handled differently than other reposessions. Most of them are sold retail rather than wholesale. This is true despite the absence of a legal requirement that recourse reposessions be retailed.

More importantly, perhaps, the recourse data convey information about the effect of retail sales on deficiencies. Data from the second dealer subsample mentioned above were analyzed for this purpose.⁸¹ The analysis was based on the deficiencies or surpluses reported by the dealers for each of their reposessions, taking into account whatever expenses the dealers saw fit. The accuracy of the analysis is thus influenced by the accuracy with which dealers reported expenses and calculated surpluses and deficiencies. Most dealers in the subsample took into account sales commissions and costs of repair and reconditioning; a few took into account other expenses as well.⁸²

⁸¹ See text at note 79 *supra*.

⁸² The subpoenas sent to the dealers asked for information on repair expenses, sales commissions, and any other expenses the dealer incurred as a result of retaking or selling the repossessed vehicle. Examples of the subpoenas sent to dealers can be found in the *FTC Credit Practices Record*, *supra* note 8, at R-XI-167.

The sales and repair expenses reported by most dealers in the sample are the major expenses directly attributable to the sale of reposessions. See Davisson & Taggart, *Financial and Operating Characteristics of Automobile Dealers and the Franchise System*, TWO STUDIES IN AUTOMOBILE FRANCHISING 161 (1 Mich. Bus. Studies 1974). Courts have historically held that only direct expenses can be counted in calculating deficiencies and surpluses. 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* §§ 44.8, 43.5 (1965). There is some recent controversy, however, about whether a share of dealers' overhead or fixed expenses should be counted in determining deficiencies and surpluses, or in making economic comparisons of different methods of selling repossessed vehicles. *E.g.*, *Ford Motor Co., et al.*, 94 F.T.C. 564, 612-13, 630-34 (1979); J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 1118 (2d ed. 1980). The overhead issue involves subtle economic questions. See 1 A. KAHN, *THE ECONOMICS OF REGULATION* 77-83, 87-103 (1970) (general discussion of allocation of overhead type costs); 94 F.T.C. at 630 (FTC finds strong arguments on both sides of issue). A definitive resolution of the issue requires analysis and research beyond the scope of this article, and may require a more adequate economic theory of security interests than now exists. See generally, Schwartz, *infra* note 115, concerning inadequacies of current theories. Pending a definitive treatment, however, a strong argument can be made that overhead costs should not be counted. Overhead reflects the costs to a dealer of keeping its facilities open for business, independent of costs attributable to any given sale. See Davisson & Taggart, *supra*, at 145 (examples of fixed or overhead expenses). Virtually all car dealers maintain used car sales facilities which can be employed for the retail sale of reposessions. Such facilities would exist regardless of whether reposessions are retailed. Retailing reposessions thus creates little or no new overhead and the true cost of retailing reposessions is confined to direct costs such as sales commissions. Therefore, only such costs should be counted.

While the argument just presented seems persuasive, further research and analysis would be desirable on a number of points. For example, it would be useful to study more closely the relation, if any, between the method of sale of reposessions and the capacity of dealer facilities. See generally Davisson & Taggart, *supra*, at 148 (discussion of size of facilities necessary to support a given volume of sales). It should also be noted that the argument presented applies only to car dealers and not to repossession sales by creditors.

To measure the performance of sales by recourse dealers, the ratio of net deficiencies to amounts owed by debtors at time of repossession was calculated. The ratio was calculated by dividing A/B where:

A = the sum total of all deficiencies less the sum total of all surpluses for all repossessed cars in the sample studied.

B = the sum total of the net amounts owed by the debtors at time of repossession for all repossessed cars in the sample studied.

The dealers in the recourse sample did not directly report the amount owed by the debtors. However, the dealers did report their payoff to the repossessing creditor for each repossession. Under the usual terms of recourse agreements, this payoff amount equals or closely approximates the amount owed by the debtor.⁸³ It was therefore used as a substitute measure of the amount owed.

The ratio of net deficiencies to net balance owed was calculated separately for retail sales, wholesale sales, and all sales by the seventeen dealers in the subsample. The results are reported in Table 4:

Table 4

	Number of Cars	Percent of Sample	Net Deficiencies as Percent of Net Balance Owed at Time of Repossession
Retail Sales	666	75	15
Wholesale Sales	219	25	44
All Sales	885	100	18

The figures in Table 4 indicate that recourse sales produce deficiencies that are significantly smaller, as a percentage of the balance owed, than those in sales by creditors. For all recourse transactions in the sample the ratio of net deficiencies to net balance owed comes to 18%. This result should be compared with equivalent ratios ranging from 25% to over 40% for sales by creditors.⁸⁴ If one focuses on retail sales in recourse transactions, the deficiency ratio averages 15%. The comparison with wholesale sales by creditors is therefore even more striking.⁸⁵

Several other interesting points can be drawn from the data provided by

⁸³ See text at notes 30-31 *supra*.

⁸⁴ See Table 3 in text at note 68 *supra*.

⁸⁵ The 15% figure, however, may not be strictly comparable to the figures reported by creditors. The creditor figures are based on all their repossession sales during the relevant sample periods while the 15% figure is based only on the recourse repossessions which were retailed. Although the retailed repossessions constitute 75% of all sales by the recourse dealers in the subsample, it is possible that the wholesaled cars were in especially poor condition or otherwise below average in intrinsic value.

the seventeen dealers who reported on deficiencies and sales expenses. Surpluses rather than deficiencies were reported in 119 of the 885 sales by these dealers. Surpluses thus appeared in 13% of all sales in the recourse transactions, and in 15% of all retail sales by the recourse dealers.⁸⁶ By contrast, surpluses rarely appear in non-recourse repossession sales.⁸⁷ The 119 surpluses averaged \$254.

Repair costs reported by the dealers averaged \$200 per vehicle for all 885 repossessions in the sample.⁸⁸ This level of average expenditure was sufficient, as of 1974-75, to put 75% of all of their repossessions in good enough condition to be sold to retail customers. Such data, together with information on condition of repossessions discussed below, suggest that reasonable investments in repairs might significantly improve the prices obtained for non-recourse repossessions.

C. Condition of Repossessed Cars and its Effect on Prices Obtained in Sales by Creditors

Repossessing creditors often appraise the cars they repossess, or, at least, make a summary evaluation of their condition.⁸⁹ Such evaluations by creditors were the basis for two analyses of the condition of repossessions made by the author and his colleagues in connection with the Credit Practices Rulemaking.

One of these analyses was based on information contained in some 2,000 repossession reports filed with the Consumer Credit Commission of the State of Maryland, primarily by Ford Motor Credit Company.⁹⁰ The sample includes all reports filed from October 1975 through December 1977. The results can be found in Table 5:

Table 5
Condition of Vehicle
(Percent of total observations)

Area of Vehicle	Good/ clean	Fair/ average	Poor/ rough	Junk/ wreck	Total	Number of Obser- vations
Exterior	28	46	22	4	100	1973
Interior	24	52	20	4	100	1974
Mechanical	29	45	21	4	100	1826

⁸⁶ Virtually all of the surpluses appeared in retail sales.

⁸⁷ See text and note at note 19 *supra*.

⁸⁸ For the 666 repossessions in the subsample which were retailed, sales commissions averaged \$114.

⁸⁹ See, e.g., repossession report forms in Chrysler Credit Corporation Operations Manual, *FTC Credit Practices Record*, *supra* note 8, at R-XI-168, Number 651, Exhibit D; Ford Motor Credit Corporation procedure manuals, *id.* R-XI-169, Number 643 at 1-2.

⁹⁰ This analysis was conducted under the supervision of Eugene Trisko. The data and a description of the analysis can be found in *FTC Credit Practices Record*, *supra* note 8, at R-XIII-6.

A second source of data on the condition of repossessed cars is a set of reports on individual repossessions supplied to the FTC in 1971 by General Motors Acceptance Corporation (GMAC) in response to compulsory process.⁹¹ The reports covered a random sample of repossessions sold by certain specified GMAC offices, primarily in the New York City and Cleveland metropolitan areas.⁹² Information on condition (as rated by GMAC) and deficiencies was analyzed for 381 repossessions sold by seven offices during the period from January 1, 1970 through May 31, 1971.⁹³ Results of the analysis are set forth in Table 6:

Table 6

GMAC Condition Rating	Number of Cars	Percent of Sample	Resale Price as % of NADA Guidebook Wholesale	Deficiency as % of Balance Owed
Good	83	22	95.4	28.6
Fair	141	37	80.8	37
Poor	130	34	56	43
Wreck	27	7	29.2	32
Entire Sample	381	100	74.8	36

The results in Table 6 suggest that the condition of repossessed cars does have an important effect on sales prices received. This is hardly surprising. Whether or not repossessed cars are sold for prices that are excessively low from a legal or policy perspective, a repossession in good condition would still be expected to sell for a higher price than one in bad condition. For this reason, it is also not surprising that deficiencies reported in Table 6 are larger for repossessions in worse condition, with the exception of wrecks. In the latter case, insurance settlements reduce deficiencies.⁹⁴

Sales expenses listed for the 381 repossessions in the sample averaged \$55,

⁹¹ The GMAC submission is described in detail in a document in *FTC Credit Practices Record*, *supra* note 8, at R-XI-70. The repossession reports themselves are in the record at R-XI-70-71.

⁹² *FTC Credit Practices Record*, *supra* note 8, at R-XI-70.

⁹³ The offices were Bayside and Brooklyn, New York; East Orange and Patterson, New Jersey; and Cleveland, Lakewood, and Shaker Heights, Ohio.

⁹⁴ According to the figures in Table 6, deficiencies as a percentage of balance owed are smaller for wrecked cars than for cars in poor, or even fair, condition. This is true despite the much lower sales price obtained for the repossessions classified as wrecks. The reason for this seemingly paradoxical result is that GMAC, like other creditors, requires collision insurance on financed cars. In repossession situations, payments from such insurance serve to reduce the balance owed by the debtor. Of the 27 "totalled" cars in Table 6, the insurance company paid out on 21. These insurance settlements averaged \$960. There were smaller insurance payments on slightly over half of the cars listed as "poor", a third of the "fair" cars, and 12% of the "good" condition cars. These numbers suggest that collision insurance plays an important role in reducing creditor and debtor losses in repossession situations, although it does not eliminate such losses.

apparently including repair and refurbishing, if any. This result suggests that little effort was made to repair vehicles before sale. Other information on the FTC Credit Practices Record also indicates that creditors usually make only a very limited investment in reconditioning before selling repossessed cars.⁹⁵

Since the condition of a repossessed vehicle has an important effect on sales price,⁹⁶ it seems likely that an increased investment in reconditioning would substantially increase the prices obtained for repossessions by creditors. There remains the question, however, of whether the increase would be sufficient to compensate for the added expense. The experience of recourse dealers, described above, suggests that reconditioning beyond the minimal amount now undertaken by creditors might well pay for itself.⁹⁷

D. *Comparison with Results of Another Study Based on the FTC Data*

Professor Shuchman has recently published an article on deficiencies based on FTC rulemaking data similar to that used in this article.⁹⁸ In his study Shuchman used a slightly different selection from the available data, and a somewhat different analytical approach, particularly with respect to recourse repossessions. His results are nevertheless highly consistent with those reported in this article.

Like this article, Shuchman used data from GMAC to study the effect of the condition of repossessions on sales price.⁹⁹ The figures reported are generally within a few percentage points of those reported in Table 6 above.¹⁰⁰ For example, Table 6 reports that GMAC achieved a resale price equal to

⁹⁵ Of a sample of 38 cars sold by Security Pacific Bank on September 8, 1977, reconditioning expenses were incurred on only six, and in two cases the amounts were under \$40. Other expenses (excluding transportation expenses which were incurred for several cars) averaged \$76, most of which went for storage expenses. Calculated from data supplied by Security Pacific Bank in *FTC Credit Practices Record*, *supra* note 8, at HX-204 app.

A review of eight Branch Quality Control Summary Reports from 1970-71 for various Ford Motor Credit Company offices revealed yearly average reconditioning expenses for all repossessions disposed of ranging from one to sixteen dollars. Other expenses averaged from \$22 to \$54. *FTC Credit Practices Record*, *supra* note 8, at R-XI-78.

⁹⁶ See Table 6 in text at note 93 *supra*.

⁹⁷ Recourse dealers were able to put their repossessions in good enough condition so that 75% could be retailed with expenditures of only \$200 per car. See text at note 88 *supra*. However, dealers probably can recondition cars at lower cost than most creditors, who would have to contract for services.

⁹⁸ Shuchman, *Condition and Value of Repossessed Automobiles*, 21 WM. AND MARY L. REV. 15 (1979) [hereinafter cited as Shuchman, 1979]. Shuchman's research was performed pursuant to an FTC contract.

⁹⁹ See note 91, *supra* for a reference to this data. Shuchman's sample includes a total of 236 GMAC repossession reports as compared with 381 analyzed by the author. Shuchman, 1979, *supra* note 98, at 31. Shuchman also apparently excluded cars which were total wrecks from his analysis, presumably because they raise different issues (for example, the effect of collision insurance) than do repossessions which are salable as drivable vehicles.

¹⁰⁰ Table 6 in text at note 93 *supra*; Shuchman, 1979, *supra* note 98, at 33.

95.4% of NADA guidebook wholesale value for cars in good condition, and 80.8% of guidebook value for cars in fair condition. Shuchman's equivalent mean figures were 92% and 78%, respectively. Shuchman reported a smaller percentage of repossessions in poor condition than is reported in Table 6.¹⁰¹ Shuchman also observed a somewhat higher resale price for collateral in poor condition than is reported in Table 6.¹⁰² The differences are not dramatic, however, and can probably be explained by the different data samples used in the two analyses. Overall, Shuchman's results based on the GMAC data are consistent with those reported in this article.¹⁰³

Shuchman studied two sets of data taken from the recourse dealer repossession reports described above.¹⁰⁴ Unlike this article, Shuchman's study did not analyze the deficiencies and surpluses that result from recourse repossessions, or the effect of sales and repair expenses. Instead Shuchman examined resale prices, providing an additional basis for comparing recourse and non-recourse repossessions.¹⁰⁵

Despite the difference in approach and the use of different data sub-samples, Shuchman's results for recourse repossessions are again largely consistent with those reported here. Shuchman found that 77% of the recourse repossessions he studied were sold in a retail manner compared with a figure of 75% reported above.¹⁰⁶ Shuchman also reported that resale prices for repossessions which were retailed averaged slightly over 100% of the principal balance owed.¹⁰⁷ This would seem to imply an average deficiency level of zero. By contrast, in the retailed recourse repossessions analyzed for this article, net deficiencies averaged 15% of the balance owed by debtors.¹⁰⁸ The two figures can be reconciled, however, if one takes into account that sales and repair expenses add to the size of deficiencies and are not included in Shuchman's statistic. It is not surprising that such expenses would be significant in retail sales.

Shuchman's results for wholesale sales of recourse repossessions are more surprising when compared with the results of this study. Resale prices obtained for these repossessions averaged 85% of the balance owed in one of

¹⁰¹ In Table 6, 34% of GMAC repossessions are reported to be in poor condition. Twenty-seven percent of Shuchman's sample is classified as poor. Shuchman, 1979, *supra* note 98, at 31.

¹⁰² Shuchman reports that resale prices averaged 67% of NADA guidebook wholesale value for cars in poor condition. *Id.* at 33. The equivalent Table 6 figure is 56%.

¹⁰³ One additional difference between the two studies is that Table 6 reports figures for deficiencies as a percentage of balance owed while Shuchman reports on resale price as a percentage of balance owed. *Id.* at 34. However, Shuchman's sale price percentage figures are mathematically consistent with the deficiency percentage figures reported in Table 6.

¹⁰⁴ See text at notes 76-77 *supra* for a description of these data. The division of the recourse data studied by Shuchman into two sets was apparently done for practical reasons in the course of the analysis and does not reflect differences in the nature of the data.

¹⁰⁵ Shuchman, 1979, *supra* note 98, at 37-38.

¹⁰⁶ *Id.* at 37, 38. The 77% figure is an average for all cases in both of Shuchman's recourse data sets. See *id.*

¹⁰⁷ *Id.* at 38.

¹⁰⁸ Table 4 in text at note 83 *supra*.

Shuchman's recourse data sets and 80% of the balance owed in the other.¹⁰⁹ By contrast, in the sample of recourse reposessions analyzed for this article, deficiencies averaged 44% of the balance owed. For a given set of reposessions, average deficiencies (expressed as a percent of balance owed) plus average sales price (expressed as a percent of balance owed) equals 100% plus expenses (expressed as a percent of balance owed).¹¹⁰ Shuchman's estimates of price as a percent of balance owed for wholesaled recourse reposessions are therefore consistent with the deficiency figures reported in this article only if recourse dealers incur substantial expenses in disposing of such reposessions.¹¹¹ The conclusion that recourse dealers incur substantial expenses in wholesale repossession sales is a troubling one, however. Recourse dealers might be expected to wholesale precisely those reposessions in which they do not wish to make a major investment. Any inference that recourse dealers incur substantial expenses when they wholesale reposessions should therefore be treated as tentative. The apparent conclusion may merely be an artifact created by the comparison of two studies using different data and analytical approaches.

Shuchman also compared the resale prices obtained in recourse reposessions with NADA guidebook values. For retailed reposessions, prices averaged 90% of guidebook retail value in one of his recourse data sets and 91% of guidebook retail value in the other.¹¹² These figures are consistent with the proposition that recourse dealers retail most of their reposessions in a manner comparable to the way in which they sell other used cars, and with results that are almost as satisfactory.

For recourse reposessions that were wholesaled, prices averaged 80% of NADA guidebook wholesale value in one data set and 74% of guidebook wholesale in the other.¹¹³ These figures are comparable to those reported for wholesale repossession sales by creditors in Table 3 above.¹¹⁴

Overall, Shuchman's results using the new FTC data are highly consistent with those reported here both for wholesale sales by creditors and retail sales by dealers. Some policy implications of those results will now be considered.

¹⁰⁹ Shuchman, 1979, *supra* note 98, at 38 (85% figure for Shuchman's Data Set B and 80% figure for his Data Set D).

¹¹⁰ This formula follows from the rules for the determination of deficiencies set forth in U.C.C. § 9-504(1).

¹¹¹ This is true because 44% (this study's deficiency estimate) + 80% (Shuchman's Data Set D figure for sales prices) = 124%, and 44% (this study's deficiency estimate) + 85% (Shuchman's figure for Data Set B sales prices) = 129%. In accordance with the formula in the text, these figures imply that recourse dealers incur expenses equal to 24% or 29% of the balance owed.

¹¹² Shuchman, 1979, *supra* note 98, at 38 (90% figure for Data Set B, 91% figure for Data Set D).

¹¹³ *Id.* (80% figure for Data Set B and 74% figure for Data Set D).

¹¹⁴ An additional set of data studied by Shuchman consists of 63 files containing information on repossession sales by several GMAC offices. Shuchman, 1979, *supra* note 98, at 39. Results for these sales are consistent with those reported by creditors in Table 3, above. Compare Shuchman, 1979, *supra* note 98, at 40 with Table 3 in text at note 68 *supra*.

VII. POLICY IMPLICATIONS

The results of the early repossession studies convinced the authors of the studies that the Uniform Commercial Code was unsatisfactory as a statute for the regulation of repossession in consumer transactions. The studies indicated that deficiencies were determined based on sales of repossessed vehicles for less than wholesale market value and concluded that the U.C.C. deficiency mechanism allowed consumers to be victimized by the poor sales practices of repossessing creditors.

In one sense, the data reviewed in this article show the U.C.C. approach in a better light. A sizable fraction of repossessions are sold in the retail market for roughly the same prices as other used cars. The result is deficiencies that are modest compared with those revealed by the earlier studies. In a not insignificant number of cases surpluses — previously thought a chimera or a symbol of the unrealism of the U.C.C. — appear.

These happy results, however, are only characteristic of the recourse sector of the repossession market. For other repossessions, the newer data, on the whole, confirm the results of the early studies. Moreover, the successful retail sale of many repossessions makes the results achieved in non-recourse repossession sales appear all the more questionable. The new data raise implications for a number of proposals for reform of the U.C.C.'s deficiency standard.¹¹⁵

Reform proposals can be divided into two broad categories — those that would ban deficiencies altogether, and those that would allow deficiencies, but with greater restrictions that are imposed by the U.C.C. A ban on deficiencies is often called an "election of remedies" requirement because the creditor must choose whether to repossess or to sue for the amount of the debt without retaking the collateral.¹¹⁶ One state, New Mexico, has adopted an election of remedies requirement in all secured consumer credit transactions.¹¹⁷ Washington has a similar requirement, but only in sales finance transactions and not for secured consumer loans.¹¹⁸ About 20 additional states have adopted election of remedies requirements but have drafted them to exclude most or all

¹¹⁵ In drawing policy implications from the empirical data, this article will not attempt a full-scale analysis of the welfare economics of deficiencies. For an introduction to the complexities of the economics of security interests see Schwartz, *Security Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEG. STUDIES 1 (1981). In consumer transactions, security interests probably have some economic functions not dealt with by Schwartz. In particular, it seems likely that in automobile credit the most important function of security interests is reducing the transaction costs involved in collection.

¹¹⁶ Firmin and Simpson, and Shuchman in his 1969 article, favor a more restrictive proposal. The sole remedy they would allow the secured creditor in consumer transactions is strict foreclosure or, in other words, repossession with no further obligation on the part of the debtor. The creditor could not elect to ignore the collateral and sue the debtor. Firmin & Simpson, *supra* note 5, at 530-31. Shuchman, *supra* note 5, at 54-55.

¹¹⁷ N.M. STAT. ANN. § 55-9-504(2) (1978).

¹¹⁸ WASH. REV. CODE ANN. § 62A.9-501(1) (1966).

automobile transactions.¹¹⁹ Typically these statutes apply only to transactions below a specified dollar amount.¹²⁰

Since the Firmin and Simpson study and the original Shuchman study imply that deficiencies are the result of an extremely inefficient sales process, they tend to support an across the board ban on deficiencies in automobile reposessions. The results of the Corenswet study and this article, however, indicate that many deficiencies are assessed based on retail sales by car dealers. The vehicles involved are merchandised as effectively as other used cars. This finding suggests that at least some deficiencies should be permitted on the assumption that an efficient sales process legitimates the deficiency claim.

Advocates of a complete ban on deficiencies point out that any standard allowing deficiencies in selective cases requires detailed policing of deficiencies by the courts to ensure that the standard is met.¹²¹ In practice, it is argued, this policing is unlikely to occur. Most consumers sued for deficiencies are ill-equipped to defend themselves in court and most deficiency suits result in default judgments.¹²² The argument is persuasive, to the extent that it demonstrates that a standard allowing deficiencies in certain cases raises serious problems of enforceability by consumers. Thus, the choice of an election of remedies by a state legislature may be rational even if a more flexible standard is preferable in theory.

Enforceability, however, is only one consideration to be weighed in establishing a legal standard; and reform proposals which allow deficiencies are worth considering despite the enforcement problem. An example of such a proposal is the deficiency provision of the FTC's proposed Credit Practices Trade Regulation Rule.¹²³ This provision would make it an unfair trade practice for a creditor to use a consumer credit contract which: "Fails to provide that if the creditor retakes encumbered property from the consumer, the fair market retail value of the property so taken will be credited toward the balance due under the obligation."¹²⁴ Under this provision, a deficiency would be determined by subtracting the fair market retail value of the collateral from the balance due. The provision is silent as to how fair market retail value is to be determined. Presumably, either the price received at an actual retail sale or an appraised retail value could be used.

The FTC proposal would leave in effect all provisions of the U.C.C. except for the one which allows deficiencies to be determined based on the sale price in a non-retail "commercially reasonable" sale.¹²⁵ Where a non-retail

¹¹⁹ See FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, at 254-57.

¹²⁰ *Id.*

¹²¹ Shuchman, *supra* note 5, at 36-38. Firmin & Simpson, *supra* note 5, at 528-30. See references to consumer groups who participated in FTC Credit Practices Rulemaking cited in FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, at 307 n.156.

¹²² *Id.* This criticism of legal standards which attempt to regulate but not ban deficiencies applies to U.C.C. § 9-504 as well as to proposals to reform the U.C.C. *Id.*

¹²³ Proposed 16 C.F.R. § 444.2(a)(7), 40 Fed. Reg. 16347 (1975).

¹²⁴ *Id.*

¹²⁵ U.C.C. § 9-504(3).

price was obtained, the FTC rule would substitute an appraised retail value for the actual sales price in determining the deficiency. Otherwise the deficiency would be determined in accord with U.C.C. section 9-504. Thus, costs of disposition could still be factored in by the creditor in determining the deficiency or surplus.

Two states have adopted a form of retail value standard for determining deficiencies in automobile repossessions.¹²⁶ To provide a simple method for determining retail value, these states have legislatively authorized the use of price guidebooks. By providing a simple method for determining compliance with the legislated deficiency standard, these states have attempted to deal with the enforcement problem raised by proponents of a complete ban on deficiencies. For example, a Florida statute provides that deficiencies will be determined based on fair market value and that this figure is presumed to be the guidebook retail value.¹²⁷ The Florida statute, however, applies only to licensed small loan companies.¹²⁸ Such companies play a very limited role in the automobile credit market.¹²⁹

A Connecticut statute, not so narrow in its application, covers all credit used to finance automobiles costing over \$2000, and determines deficiencies by subtracting fair market value from the balance owed.¹³⁰ Fair market value is presumed to be the average of the retail value and the trade-in value as stated in the Eastern Edition of the National Automobile Dealers Association *Used Car Guide*.¹³¹ The statutory presumption can be rebutted "only by direct in-court testimony."¹³² By averaging retail and trade-in value Connecticut's deficiency standard takes into account, in a rough way, sales expenses and the often less than perfect condition of repossessed cars, without requiring a specific inquiry into both factors in every case. The statute thus can be viewed as a variation on the basic idea of a retail value standard.

The data reviewed in this article tend to support a retail value standard, if only by showing that retail sale of repossessions occurs frequently and is therefore, plainly, possible. Moreover, the finding that retail sales produce smaller deficiencies than other methods of disposition indicates that retail disposition benefits consumers whose cars have been repossessed. At the same time, the finding that profit motivated car dealers choose retail disposition for most repossessions which are turned over to them indicates that such disposition is consistent with creditor interests as well.¹³³

¹²⁶ These states are Florida, FLA. STAT. ANN. § 516.31(3) (West Supp. 1981) and Connecticut, CONN. GEN. STAT. ANN. § 42-98(g) (West Supp. 1981).

¹²⁷ FLA. STAT. ANN. § 516.31(3) (West Supp. 1981).

¹²⁸ See *id.* at § 516.

¹²⁹ 1981 *Finance Facts*, *supra* note 23, at 56.

¹³⁰ CONN. GEN. STAT. ANN. § 42-98(g) (West Supp. 1981).

¹³¹ *Id.*

¹³² *Id.*

¹³³ The term "creditor interests" in the text includes an element of consumer interest since costs incurred by creditors and car dealers are likely to be passed on to their customers in the form of higher prices and interest rates or more restrictive credit terms.

The satisfactory results of retail disposition, however, are documented only for repossessions that are now handled on a recourse basis. This fact raises the question of whether institutional considerations make it impossible or uneconomic for other repossessions to be retailed.

For non-recourse indirect credit, such considerations may not be very strong. Choice of non-recourse financing appears to be largely a result of regional custom, not economic necessity. For example, in 1977 non-recourse business accounted for under 15% of indirect automobile credit held by banks in the New England and Pacific Census regions, over 83.3% in the East North Central region, and from 43.5% to 60.5% in other regions of the country.¹³⁴ In the FTC Credit Practices Rulemaking, a banker testified at a hearing in Dallas: "Strangely enough Fort Worth, 30 miles to the west of here, is a non-recourse city, and if a lender attempted to set up with recourse finance plan, he would get no business at all. Here in Dallas, it's just the opposite. Why this is, I don't know,"¹³⁵ Another witness in the proceeding testified that in Missouri the urban market was non-recourse while the rural market was on a recourse basis.¹³⁶ Overall, it is difficult to see what economic factors would account for the observed patterns of use of recourse and non-recourse financing. If failure to use recourse is largely a matter of custom, there may be no compelling economic objection to the increased use of recourse agreements in indirect automobile financing. Indirect credit accounts for a large majority of all repossessions,¹³⁷ so it is likely that most repossessions could be retailed with only a modest change in existing institutional arrangements — *i.e.*, wider use of recourse.

Even with increased use of recourse, retail disposition still may not be a satisfactory alternative for all repossessions. About a quarter of recourse repossessions are not currently retailed,¹³⁸ probably for sound economic reasons.¹³⁹ In addition, there is no existing mechanism, such as recourse, by which loan transaction repossessions are customarily retailed. While the possibility of retail disposition in loan transactions should not be dismissed out of hand,¹⁴⁰ there may be repossessions for which retailing is either not possible, or not economically efficient.

If retail disposition is usually, but not always, feasible, there is an attractiveness to a standard which requires deficiencies based on retail value in most instances, but offers some flexibility. One approach to such a standard is of-

¹³⁴ American Bankers Association 1977 INSTALLMENT/CONSUMER CREDIT REPORT, *supra* note 29, at 32.

¹³⁵ *FTC Credit Practices Record*, *supra* note 8, at Tr. 1167-68.

¹³⁶ *Id.* at Tr. 3019.

¹³⁷ See text at notes 38-39 *supra*.

¹³⁸ See text at notes 80-81 *supra*.

¹³⁹ For example, a handbook for car dealers advises that for used cars of all kinds it is a good business practice to turn over inventory within 30 days, if necessary by wholesaling cars that cannot be sold retail within this time period. BURY, *supra* note 28, at 67.

¹⁴⁰ One possibility is that lenders could enter into contractual arrangements with dealers to market repossessions. A number of lenders, for example, have used consignment ar-

ferred by the FTC decision in *Ford Motor Co., et al.*¹⁴¹ The Commission's order required the respondent automobile dealer to "dispose of any repossessed vehicle in a manner designed to obtain the best possible price."¹⁴² The order defined "best possible price" as meaning: "that respondent will exercise every reasonable effort to market the vehicle for the highest possible net return for the debtor's account (in terms of proceeds less allowable expenses)"¹⁴³ In other words, the dealer was required to sell the collateral in a manner calculated to minimize the debtor's deficiency, or maximize the debtor's surplus, as determined under the U.C.C. section 9-504. The Commission took the view that in declaring a best possible price standard it was merely applying existing state law concerning the duties of a repossessing creditor.¹⁴⁴

On appeal, the Ninth Circuit vacated the FTC order.¹⁴⁵ The court ruled that the best possible price standard was a novel interpretation of U.C.C. § 9-504, not a mere restatement of existing law.¹⁴⁶ The court concluded that because the Commission was enunciating a new legal standard of general application it should have proceeded by means of rulemaking rather than adjudication.¹⁴⁷ Whether the Commission or the court is correct about the novelty of best possible price, it seems clear that such a standard is consistent with the U.C.C. commercial reasonableness requirement.¹⁴⁸ It is a standard which

rangements. See FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, at 282.

Direct sales by lenders to consumers may also be feasible in some cases. A number of creditors already sell repossessions to consumers. *Id.* at 282 n.87. In addition, many large lenders now wholesale one hundred or more repossessions each year. This is a volume of business as large as that of a typical used car lot, suggesting that it might be feasible for these dealers to set up a retail sales facility. *Id.* at 282-84.

¹⁴¹ 94 F.T.C. 564 (1979). In this case the FTC initially sued Ford Motor Company, Ford Motor Credit Company, and a representative dealer, Francis Ford. The first two named plaintiffs settled with the FTC, leaving the final litigation against the dealer. *Id.* at 564-65. The primary thrust of the Commission's decision was the enforcement of the U.C.C. imposed duty to return surpluses to consumers when they appear following repossession sales. *Id.* at 607. The decision also addressed a number of other issues, including the question of what expenses are allowable under the U.C.C. in determining surpluses or deficiencies. *Id.* at 612-16.

¹⁴² *Id.* at 640.

¹⁴³ *Id.* at 639.

¹⁴⁴ *Id.* at 609. See Initial Decision of Administrative Law Judge, *id.* at 590-92, for a discussion of relevant state cases.

¹⁴⁵ *Ford Motor Co. v. FTC*, 654 F.2d 599 (9th Cir. 1981). The Commission has petitioned the 9th Circuit for a rehearing *en banc*.

¹⁴⁶ To be precise, the court stated "we have been cited to no case which has interpreted . . . [U.C.C. § 9-504] to require a secured creditor to credit the debtor for the 'best possible price' and not charge him for overhead and lost profits." *Id.* at 601. Taken literally, the court's language states that the novelty was in the combination of the best possible price standard with the Commission's standard for allowable expenses (which excludes overhead and lost profits).

¹⁴⁷ *Id.* at 601-02.

¹⁴⁸ An argument to the contrary, however, can be made based on U.C.C. § 9-507(2) which states, "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner."

However, the quoted sentence is aimed primarily at preventing excessive second guessing concerning the price actually achieved in any given sale. See G. GILMORE, SECURITY IN-

a state supreme court could reasonably adopt as an interpretation of the U.C.C. test (if, *pace* the Ninth Circuit, it has not done so already).¹⁴⁹ Of course, if it is meritorious, the standard might also be enacted legislatively, or by the FTC under the authority to prevent unfair trade practices granted by section 5 of the FTC Act.¹⁵⁰

If the FTC's definition of best possible price becomes the standard by which deficiencies are assessed, enforcement of the standard will require an answer to an empirical question: What method of sale is most likely to minimize deficiencies and maximize surpluses? The results reported in this article indicate that for most recourse repossessions, and probably for most auto repossessions in general, retail sale will be the method likely to obtain the best possible price, even taking into account sales expenses. This finding suggests the possibility of a hybrid standard, combining best possible price with a presumption that the best possible price is a retail price.

Under such a hybrid standard, the creditor in a deficiency suit could rebut the presumption that a retail disposition would have obtained the best possible price for the property by establishing suitable facts concerning the condition of the repossessed vehicle or unique market circumstances.¹⁵¹ In the absence of such evidence, the debtor would be credited with the retail value of the collateral. The FTC Order in *Ford Motor Co., et al.* points in the direction of a rebuttable presumption in favor of retail sale, at least in recourse transactions. As part of the definition of best possible price, the Commission order states that: "For each disposition of a repossessed vehicle by respondent other than by retail sale, respondent shall retain contemporaneous documentation showing with specificity that such manner of disposition could reasonably be expected to produce a greater net return for the debtor's account than would retail sale."¹⁵²

The results of this study lend support to a standard combining best possible price with a rebuttable presumption that retail price is the best price. Under

TERESTS IN PERSONAL PROPERTY § 44.5 at 1237 (1st ed. 1965). By contrast, the FTC's best possible price standard is not tied to the price actually obtained in a particular sale. Rather, it requires sale in "a manner designed to obtain the best possible price." *Ford Motor Co., et al.*, 94 F.T.C. at 640 (emphasis added). Because it focuses on the method of sale, and not the actual price, the FTC standard is consistent with the U.C.C. commercial reasonableness approach.

¹⁴⁹ See 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1232-34 (1965). Even the court in the *Francis Ford* case stated, "It may well be that Oregon courts will interpret U.C.C. § 9-504 in the manner advocated by the F.T.C. if the question is put to them" although this may merely be a rhetorical flourish. 654 F.2d 599, 601.

¹⁵⁰ 15 U.S.C. § 45 (1976).

¹⁵¹ The burden of rebutting the presumption should be placed on the creditor because the creditor will ordinarily have better access to the facts necessary to establish what the best available price is than will a consumer. Courts have usually placed on creditors the burden of establishing that a repossession sale was commercially reasonable under U.C.C. § 9-504. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 1122-23 (2d ed. 1980).

¹⁵² *Ford Motor Co., et al.*, 94 F.T.C. at 639.

U.C.C. section 9-504 the balance owed by or to the debtor following repossession depends on how successfully the reposessing creditor sells the collateral. This fact suggests that the creditor should have a responsibility to sell collateral in a manner that best protects the debtor's interest, taking into account costs to the creditor.¹⁵³ The best possible price standard makes this responsibility explicit. At the same time, the results of this study indicate that retail disposition of repossessions both is possible and reduces deficiencies, at least where recourse arrangements are feasible. These findings suggest that, in applying a best possible price rule, retail disposition should be the standard against which creditor efforts should be measured. The study does not show that retail disposition is always possible, however, so creditors should be allowed to establish that another method of disposition is the best possible in appropriate cases.

VIII. CONCLUSION

The automobile market is characterized by the coexistence of two very different methods of disposition of repossessions — wholesale sales, primarily conducted by creditors, and retail sales, primarily conducted by dealers. In the past, empirical studies have indicated that the U.C.C. allowed creditors to dispose of repossessions in an inefficient manner, resulting in large deficiencies assessed to consumers under U.C.C. section 9-504. Analysis of the new FTC data, however, indicates that many repossessions are retailed, and that retail disposition results in substantially smaller average deficiencies. It appears likely that more repossessions could be retailed than are now, through increased use of recourse agreements.

The efficiency with which repossessions are sold is not the only consideration relevant to the evaluation of U.C.C. section 9-504 or other legal rules concerning deficiencies.¹⁵⁴ It is, however, an important consideration and has been a major focus of policy debate.¹⁵⁵ The results of this study, therefore, have important policy implications. By showing that many repossessions are marketed as effectively as other used cars, the study suggests that the right to a

¹⁵³ See state cases under the U.C.C. cited in *id.* at 591.

A variant of the best possible price standard would allow reposessing creditors to sell collateral in any way they saw fit, so long as the debtor was credited with the best possible price. If the creditor wished to sell collateral in a manner not calculated to produce the highest net return, for example, in order to dispose of collateral quickly, it could do so. Best possible price would then be determined based on an appraisal. This variant gives creditors greater flexibility without, in principle, hurting debtor interests. Estimation of best possible price not based on an actual sale, however, may raise enforcement or other practical problems.

¹⁵⁴ For example, a complete treatment of the deficiencies question would include a discussion of the effect of various legal rules concerning deficiencies on delinquency rates and on the cost of credit. See FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, at 310-15.

¹⁵⁵ See, e.g., policy discussion in articles cited at note 5 *supra*; and creditor arguments concerning their inability to sell repossessions for higher prices than they now do, described in FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, at 296-99, 302-03.

deficiency should not be eliminated across the board.¹⁵⁶ This same finding, that repossessions can be sold successfully in the retail market, suggests that creditors and car dealers should be held to a higher standard than they now are with respect to the disposition of repossessions. In particular, the finding lends support to a requirement that creditors and dealers use methods of sale calculated to obtain the best possible price for collateral taking into account sales costs. The results of this study further suggest that the best possible price usually will be a retail price.

Although this article considers policy implications of the empirical results presented, its major purpose is to present a more complete picture of the existing system of disposition of repossessions than was previously available. This picture shows that the market has responded to the requirements of U.C.C. section 9-504 in two quite different ways — wholesale sale by creditors and retail sale by car dealers. Future legislative and scholarly consideration of the deficiencies issue should take into account both aspects of the market's response.

¹⁵⁶ As mentioned at note 122 *supra*, this judgment may be tempered by practical enforcement considerations.

APPENDIX

Description of FTC Data on Recourse Repossessions Excerpted
from Appendix C of the *FTC Credit Practices Staff Report*.¹⁵⁷

* * *

B. Description of Data

The data placed on the record by the rulemaking staff was a subsample of a larger body of data obtained by the FTC Seattle office in connection with recently completed litigation.⁷ The Seattle data base included information obtained from over 200 General Motors, Ford, and Chrysler dealerships, each of which had a recourse arrangement with one of the finance subsidiaries of the parent manufacturers.

The dealers from whom information was obtained by the Seattle office fall into two groups. Prior to issuance of the complaint in the relevant litigation (February 1976), material was obtained from approximately forty dealers. Following issuance of the complaint, material was obtained from approximately 180 additional dealers. The post complaint dealers included all Ford and Chrysler and a sample of GM dealers who were reported by the auto finance companies to be involved with over 100 repossessions on a recourse basis during a designated one-year period. It also included a random sample of other dealers subject to repurchase or recourse agreements who generated a substantial number (but less than 100) of repossessions. A separate sampling was also drawn of dealers which did a substantial volume of business and in which GM, Ford, or Chrysler had an ownership interest.

Information and documents were obtained from dealers by the Seattle Regional Office pursuant to demand letters and, in many cases, subpoenas. A number of different letters and subpoena specifications were used. A sampling of the demand letters and subpoenas has been placed on the Credit Practices rulemaking record.⁸

The demand letters and subpoenas sent to different dealers were roughly similar although they differed in detail. In virtually all cases the information requested which is most relevant to the proposed Credit Practices Rule took the following form: For all repossessions in a designated time period in late 1974 and early 1975 which were subject to repurchase or recourse agreements with the automobile finance subsidiaries, dealers were directed to indicate

¹⁵⁷ FTC CREDIT PRACTICES STAFF REPORT, *supra* note 1, Appendix C at 2-4.

⁷ Chrysler Motors Corp., Dkt. 9072; Ford Motor Co., Dkt. 9073; General Motors Corp., Dkt. 9074.

⁸ R-XI-167.

the pay-off to the finance company net of rebates or credits and the ultimate resale price.⁹ For transactions where the resale price was greater than the net pay-off amount, dealers were directed to supply information on expenses involved in the repossession and resale, along with information on resulting deficiencies or surpluses. In a number of cases dealers were asked to supply expense and deficiency information with respect to all of their repossessions. Some dealers did this without being required to.

Out of the total Seattle Regional Office sample of over 200 dealers, material from 59 dealers has been put on the Credit Practices record. Dealers were selected from the total Seattle office sample primarily on the basis of whether the dealer had submitted information relevant to the Credit Practices rulemaking in compact and legible form. Some attempt was also made to obtain diversity in terms of geography, state laws concerning deficiencies in consumer transactions, and size of dealership. Formal random selection processes were not used. However, no examination of the statistical content of the documents was made prior to or in the course of the selection. The selection process was therefore "blind" with respect to what the data submitted by any given dealer would demonstrate.

In order to exclude irrelevant material and to keep down the volume of documents, not all of the documents obtained from any given dealer have been placed on the Credit Practices record. Generally speaking, a chart or other summary prepared by the dealer, giving the price and expenses information described in the previous paragraph, was placed on the record. In some instances the summary statistics are accompanied by other documents such as explanatory correspondence between a dealer and the FTC Seattle office. Certain information has been deleted from the documents that have been put on the Credit Practices record, to protect the privacy of individuals or businesses. This information includes names and addresses of defaulting debtors, and, in some instances, names of banks which have financing relationships with dealers.

⁹ Dealers partially owned by one of the parent auto manufacturers were also directed to supply this information for cars financed by institutions other than the finance subsidiaries.