Denver Law Review

Volume 67 | Issue 3 Article 2

February 2021

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I. INTRODUCTION

The traditional conceptual model of an ordinary civil lawsuit is simple. A person who believes that he or she has a legitimate claim can file an action. The defendant is given notice of the claim and an opportunity to be heard, with the help of a lawyer, in the court in which the suit was filed. A neutral judge decides the case, based on the evidence presented. Most cases actually result in negotiated settlements,[1] but these settlements presumably reflect the relative strengths of each side's case as perceived by the parties. By appearing in court or negotiating, defendants participate in the process; relatively few of them lose cases by virtue of not showing up and allowing default judgments to be entered against them.[2]

In 1974, Professor David Caplovitz showed that this model is not an accurate description of what happens to installment plan consumers of goods and services who are sued by their creditors. His book, *Consumers in Trouble*,[3] is primarily a study of why consumers fail to make required payments on installment obligations[4] and what happens to them as a result of subsequent judicial intervention,[5] but Caplovitz devoted an important chapter to the role of courts in the collection process.[6]

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1. In the federal system, only 5% of all civil cases are tried. R. COVER, O. FISS AND J. RESNIK, PROCEDURE 198 (1988).

2. In the Superior Courts of Maine and Delaware, respectively, approximately 3 and 15% of civil cases end in default judgments. STATE OF MAINE, ADMINISTRATIVE OFFICE OF THE COURTS, 1987 ANNUAL REPORT 90 (1988); ADMINISTRATIVE OFFICE OF THE COURTS, 1982 ANNUAL REPORT OF THE DELAWARE JUDICIARY 79 (1983).

3. D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT (1974) [hereinafter CONSUMERS IN TROUBLE].

4. According to Caplovitz' study, the consumers' problems (such as sudden loss of income or major illness) were the primary reason for the default 79% of the time, but 21% of the defaults may have been triggered by some event that implicated the creditor, such as fraud or a payment dispute. *Id.* at 53.

5. The efforts by creditors (including wage garnishment) to collect consumer installment debts often cause the debtors to experience health and marital problems, *id.* at 280-89, and in some cases (about 8%) lead to the loss of a job. *Id.* at 237-42. 15 U.S.C. § 1674 (1988) prohibits firing a worker for a single garnishment, but employees can still be terminated by employers who do not wish to incur the processing costs associated with successive garnishments.

6. *Id.* at 191-224.

Caplovitz' researchers interviewed 1038 consumers who had been sued (in approximately equal numbers) in Chicago, Detroit, and New York.[7] According to the debtors,[8] only 71% of them actually received notice that they were being sued.[9] Among the 71% who received summonses, only a small minority filed the requisite answer to defend against the merchant's complaint: 8 to 9% in Chicago, 7 to 9% in Detroit, and 1 to 8% in New York City.[10] In all of the other cases, the defendants lost judgments by default.

Thus, in cases against consumers, at least in major cities, fewer than 10% of the defendants made an effort to defend themselves. But this fact is not necessarily cause for alarm. It is theoretically possible that most of the consumers who default[11] do so quite deliberately because they know that they lack any valid defenses and would only be wasting their time in court. Indeed, for this very reason "a number of judges in these courts" are not troubled that their tribunals impose default judgments on more than 90% of consumer defendants.[12]

Unfortunately, Caplovitz did not address the question of whether the default rate in consumer cases is merely a manifestation of consumers' accurate understanding that they lacked defenses or whether it represents a failure of justice. An approach to this problem requires analysis of whether the defaulting consumers had defenses to the claims that they waived, knowingly or inadvertently, by failing to appear. But only three of Caplovitz' 164 questions were likely to elicit information about possible defenses.[13] The three pertinent questions were: "1. [w]hat were the main reasons you stopped making payments on the mer-

7. *Id.* at 195, 323-29.

8. The debtors were interviewed long after the court cases against them had been closed; they had little incentive to lie to the interviewers. Much of what they reported is consistent with the findings of other researchers. For example, on the common practice, especially in New York City, of not giving actual notice to consumer defendants, and obtaining default judgments based on perjured affidavits of service, *see* Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847 (1972).

9. There was some variation among the three cities, with 84% and 71% of debtors reporting actual service in Detroit and Chicago (where court officials served process) and only 54% in New York City (where service of process is accomplished by private individuals or companies). CONSUMERS IN TROUBLE, *supra* note 3, at 194-95.

10. In each case, the first figure represents the percentage reported by Caplovitz as filing answers (in all three cities, a prerequisite to avoiding a default), and the second figure represents the percentage reported as outcomes other than default judgments (e.g., voluntary discontinuances). At first blush it is difficult to understand how the number of non-defaults could ever be higher than the number of non-answers, but some of the creditors in the sample may have withdrawn some cases notwithstanding the defendants' defaults. This could have occurred if they did not know about the defaults; settled with the consumers after the defaults and before they registered default judgments; or conscientiously corrected errors that had resulted in filing suits against people who had already paid in full. CONSUMERS IN TROUBLE, *supra* note 3, at 215-21.

11. The word "default" can have two meanings in connection with consumer installment debts. It can refer to a default in payment on the underlying contractual obligation or to a failure to appear in person or through a representative in court. This article uses the term in the latter sense.

12. CONSUMERS IN TROUBLE, *supra* note 3, at 205.

13. *Id.* at 331-47 (survey questionnaire).

chandise [or] loan; 2. [d]id they call or threaten to call any of your friends or relatives about this debt;[14] and 3. [d]o you think there was a *good* reason that you should not have had to pay this debt?" Caplovitz' interviewers were not told what reasons constituted "good" reasons, and since many defenses to creditors' claims are technical,[15] there is no reason to think that the consumers themselves would have known what constituted a good defense.

Although we lacked the means[16] to answer definitively the question that Caplovitz' book raised, we set about to conduct a pilot study, using a small data base, that could help to determine whether a more thorough inquiry would be warranted. Our goal was to construct a sophisticated questionnaire to probe any possible defenses that installment credit consumers might have, and to administer it to consumers against whom default judgments had been entered in small claims cases in the District of Columbia.

Doing research on consumer defaults in the District of Columbia enabled us, fortuitously, to inquire into a second issue raised by Caplovitz' study. In all three cities in which his research was conducted, a consumer was declared in default if he or she failed to appear in person to file an answer to the summons and complaint.[17] Caplovitz hypothesized that some significant fraction of the defaults were attributable to the fact that defendants were required to appear in court on two different occasions, once to file the answer and once for the trial.[18] Not only did this procedure require an employed defendant to miss work twice, but it gave court clerks an opportunity to counsel defendants not to file answers that the clerks believed, accurately or not,[19] to be legally inadequate.[20] Caplovitz also thought that defendants might have had difficulty answering summonses because the language of a summons, explaining the obligation to answer, was inordinately confusing. In New York, for example, the text of the summons consisted of two sentences, respectively 91 and 96 words long.

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14. Collection harassment could warrant a counterclaim in some states. *See generally* NATIONAL CONSUMER LAW CENTER, DEBT COLLECTION HARASSMENT (1982).

15. For example, a consumer has a valid counterclaim against a creditor if the contract does not include, on its face, the annual percentage rate of the finance charge. 15 U.S.C. § 1638 (1988). Some defenses, such as unconscionability, are defined largely by case law and therefore are not described explicitly even in the statute books.

16. Caplovitz' research was made possible by a "generous" grant from the federal Office of Economic Opportunity, which failed to survive the dismantling of President Johnson's war on poverty. Even so, Caplovitz' study "exceeded the limits of the OEO grant" and required a second grant, from the National Institute of Mental Health, for its completion. CONSUMERS IN TROUBLE, *supra* note 3, at xiii.

17. CONSUMERS IN TROUBLE, *supra* note 3, at 201, 215.

18. At the time of his study, defending a case for more than $200 in Chicago could actually require three or four personal appearances.

19. Caplovitz' researchers interviewed some clerks in New York; they did not regard a defense of "the price was too high" to be valid, despite the emerging doctrine of unconscionability based on excessive price. CONSUMERS IN TROUBLE, *supra* note 3, at 202; Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (S.Ct., Nassau Co. 1969).

20. In New York, the clerks discouraged one out of every three or four defendants from filing an answer. CONSUMERS IN TROUBLE, *supra* note 3, at 203.

In the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia, where cases against consumers for less than $2000 are heard, no written answer is required. Unlike the procedure in all three of the cities studied by Caplovitz, the District of Columbia's summonses merely tell a consumer to appear in court on a specific date for the trial of the case. We were curious to know whether this streamlining of the system dramatically reduced the frequency with which consumers suffered default judgments.[21] If it turned out that despite this relatively simple procedural system, consumers continued to default in large numbers, we wanted to know what accounted for their failure to appear for trials.

This article reports our findings. The first section describes our research method and the characteristics of the small sample of consumers in our study. The second section reports what we learned about why those consumers stopped making the payments required by their installment obligations, and why they defaulted in the litigation initiated against them. The third section describes what we learned from these defendants, and in some instances from independent verification, about their possible defenses. The final section summarizes our findings and suggests that if they are confirmed by studies of larger samples of defendants, certain procedural reforms may be warranted. The Appendix includes the text of our questionnaire, which we are putting in the public domain for use by any scholar who wishes to use our questions or a similar set of inquiries to survey another sample of consumers.

II. Research Method and Sample Characteristics

A. *Parameters of the Study*

At the outset, we decided to restrict our study to judgments entered in the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia ("Small Claims Court"), which has jurisdiction over cases not in excess of $2000.[22] Some claims against consumers, particularly those involving large balances on automobile purchases, are processed in the civil division of the superior court, but the Small Claims Court hears the vast majority of such cases. About 80% of the cases in the Small Claims Court are against individual defendants, and about 80% of those defendants are consumers.[23]

21. From our first visit to the court, we suspected that it did not reduce the number of default judgments entered. The daily calendar call consists of well over a hundred cases. In what seems like a majority of them, when the clerk calls the case, an attorney (one of three or four who sit in what seems a privileged area, behind the bar that separates court officials from the public) announces his or her readiness, the clerk pauses to hear whether the defendant is present, the attorney says, "judgment, please" and the clerk enters judgment. But since the court hears small commercial and tort cases as well as cases against consumers, it was not possible without a more careful perusal of court records to determine whether most installment credit collection proceedings ended in default judgments.

22. D.C. Code Ann. § 11-1321 (1981).

23. Telephone interview of Oliver Corbin, Clerk of the Small Claims and Conciliation Branch, by Hillard Sterling (Mar. 21, 1989).

To define a "consumer" defendant more precisely, we limited our sample to cases that were consumer transactions under local law. Each case had to involve a purchase that was "primarily for personal, household, or family use."[24] We excluded several kinds of atypical cases of purchases of consumer services: suits by doctors and hospitals,[25] cases in which the defendant maintained an open account with the plaintiff,[26] and suits by financial institutions other than finance companies.[27]

For our preliminary determination of the percentage of suits against consumers that ended in default judgments, we applied these criteria to a random sample[28] of all 29,100 cases filed in the Small Claims Court during 1988. Two hundred eighty-seven files of suits against consumers were selected.[29] Two hundred thirteen of them (74%) had resulted in default judgments. In another sixty-three cases (22%), the defendant had appeared in court but had consented to pay everything asked for by the plaintiff. In eleven cases (4%), the plaintiff had voluntarily dismissed the case. Of the 287 files sampled, none had resulted in a trial.[30]

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24. D.C. CODE ANN. § 38-3901(a)(2) (1981).

25. It would have required a completely different questionnaire to try to ascertain facts surrounding conflicts about medical practices or billing. Caplovitz' study also excluded suits by hospitals and other health care providers. CONSUMERS IN TROUBLE, *supra* note 3, at 325.

26. Such cases typically involve a series of transactions over a long period of time, rather than a particular sale of merchandise or services. It would have been inordinately difficult for us to have untangled the webs of grievances that could inhere in such disputes. Caplovitz eliminated from his study people who were being sued on "charge accounts" but partially included "department stores such as Macy's and Gimbel's . . . since they offer revolving credit to their customers." *Id.* The distinction between "charge accounts" and department stores' revolving credit is not clear to the authors. In any event, Caplovitz deliberately "undersampled the non-elite department store cases by eliminating half of them." *Id.*

27. Banks and other direct lending institutions were excluded because simple loans of money do not typically implicate particular purchases of goods or services. Finance companies were included, however, because their loans are often intrinsic aspects of particular purchases. Finance companies commonly purchase contracts that have been entered into between merchants and consumers. Finance companies were plaintiffs in 30 of the 72 files examined for the purpose of locating interviewees; the other 42 plaintiffs were retail merchants.

28. Cases are filed sequentially. Every hundredth case was pulled. If it met the criteria, it was included in the sample. If it did not, the prior case was examined, or the one before that, until a case which fit the criteria was found.

29. Four lots of 100 cases included no case that met the criteria. Some large-volume plaintiffs whose suits fell outside of this study (hospitals and open-account plaintiffs) sometimes file dozens or even hundreds of suits on a single day, causing more than 100 files in a row to be ineligible for consideration by this study.

30. The lack of trials is consistent with Caplovitz' study, which concluded that only 7 of the 311 Chicago defendants, at most 11 of the 395 Detroit defendants, and none of the 332 New York defendants had gone to trial. CONSUMERS IN TROUBLE, *supra* note 3, at 216-20. Caplovitz suggests that the reason for the absence of trials is that "when the debtor does appear for a trial, he is usually summoned to the bench by the judge, who is anxious to clear his calendar, and is told to go out into the hall and work out a settlement with the plaintiff's lawyer. In this fashion, even debtors with valid defenses are pressured to make some payment." *Id.* at 218-19. One of us (Schrag) has observed dozens of calendar calls at the Small Claims Court and has observed that they invariably begin with a speech by the judge to the dozens of parties who are personally present. The judge points out that if each of them wanted to have a trial, they could not do so that day, and that many of them would have to come back on one or more successive days; some days, the judge even says

While the default judgment rate was lower than that in other cities, it was still substantial. The more elaborate part of our study required selecting certain files for personal interviews with the defendants. Still applying the definitional criteria of what constitutes a "consumer" case, we applied two additional exclusionary tests in order to draw a sample for interviews. We excluded from the study certain defendants who would be too difficult to contact personally: those who had no telephone listing in the documents that had been filed in court,[31] and the few who lived outside of the District of Columbia.[32] Applying these exclusions, a new sample of seventy-two files was drawn.[33]

It was impossible to reach fifty-two of the seventy-two consumers identified through this process. Many of them had no discoverable telephone number, even when the court files listed numbers that were purportedly theirs. Thirteen of the twenty-eight consumers for whom the court records showed places of employment no longer worked at those jobs, and had not left forwarding addresses. Of the twenty consumers who were found, five refused to be interviewed.

A lengthy questionnaire, reproduced in the Appendix, was administered to each of these fifteen remaining consumers. Eleven of the interviews were conducted in person by one of us (Sterling), and eight of the interviewees agreed to permit a tape recording of the sessions.[34] The average interview lasted approximately fifty minutes.

The questionnaire was designed to incorporate questions testing the applicability to the consumer's transaction of all of the major con-

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that his or her calendar is already full that day, making trials impossible for *anyone* in the room. The calendar call is inevitably followed by dozens of hallway conferences.

31. We determined that visits without prior telephone contact would not be productive. Nevertheless, one of us (Sterling) did try to visit personally 32 of the consumers in the survey who lacked telephones. None of these attempts resulted in an interview. Seventeen of the consumers were not home on more than two occasions, and although a family member took a message for eight of them, none telephoned him in response. The other 15 consumers were said not to be living at the address listed for them in the court files.

By contrast, most consumers who were initially contacted by telephone were willing to be interviewed in person; eleven of the fifteen who were interviewed met with Sterling, and the other four were interviewed entirely by telephone.

It was possible to find telephone numbers for those interviewed in the court records because some creditors attached the original contract papers (sometimes including the consumer's phone number) to the complaint; others wrote a number (taken from the consumer's credit application) on the instructions for service of process which were later filed; and some had, after judgment, obtained orders garnisheeing the wages of the defendant at a place of employment specified on those orders.

32. By definition, we also excluded from the study any consumer against whom a final judgment by default had not been entered.

33. In order to select cases spread over a fairly long period of time (to eliminate aberrations based on filings in a particular month or year), every 552d case out of the 82,800 cases filed in 1986, 1987 and 1988 was examined. As in the other sample, *supra* note 28, if that case did not meet the criteria for study the prior file was examined, and, working backward through the clerk's drawer, the first case in each block meeting the criteria was pulled.

"Pulled" literally describes the process. A practical problem was the sheer physical difficulty of reaching the files and tugging them from shelves that often squeezed them like a vise.

34. The other four interviews were done by telephone.

sumer protection statutes and common law rules of the District of Columbia. It was impossible, of course, to determine whether the defaulting consumers would have won their cases, even if they did have defenses under these laws, but we did want to find out whether they appeared to have had good faith defenses that they did not know about, did not believe would suffice, or waived for other reasons. In addition, the questionnaire was intended to probe why the consumers chose not to go to court.[35]

B. *Qualifications Based on Methodology*

Before we report on what we learned from administration of this questionnaire, a few notes qualifying our results are in order. The authors recognize that this work cannot produce a definitive assessment of the default judgment process. The number of people actually interviewed is too low to support hard conclusions about the entire system. In addition, the exclusion of consumers who lacked discoverable telephone numbers may have biased the survey in favor of relatively wealthier defendants, and the exclusion of defendants with open accounts may have caused our sample to under-represent those with the most relatively stable purchasing habits.[36] Most important, one creditor plaintiff was surely over-represented in the sample by virtue of the fact that its files provided information that better enabled us to find its defendants. Associated Finance Company ("AFC")[37] instituted debt collection actions against consumers on contracts purchased from various merchants. Within its complaints, AFC routinely provides information about the defendant, including home addresses and all known phone numbers. Also, AFC is one of the few plaintiffs that persistently executes on its judgments by seeking wage garnishments. Since the writs of attachment contain the defendants' places of employment, we could easily contact those consumers by calling them at work. Thus, even though no express effort was made to select AFC cases, ten of the fifteen consumers interviewed were sued by AFC. The bias that this over-representation of AFC might introduce is reduced somewhat by the fact that the contracts on which it sued arose from transactions between consumers and five different merchants — four general retailers and one door-to-door seller. On the other hand, as we elaborate below, one of our findings is that defendants sometimes default because the plaintiff advises them not to go to court. Since several consumers reported that AFC gave such advice, and this behavior is unrelated to the identity of the

35. *See* Appendix, questions 122-44.

36. In addition, the fact that the imposition of garnishment orders helped to locate several defendants may have produced a sample of persons with a higher rate of employment than the population of defaulting consumers in general.

37. The name of this company and its attorney have been changed because, although several consumers have independently reported to us essentially the same misleading conduct by its employees, *see infra* notes 48-50 and accompanying text, and the firm's attorney refuses to return our calls, we know of no independent tribunal or agency which has gathered or assessed evidence of the misconduct that the consumers charge.

original seller, the over-representation of AFC may have distorted our study in this respect.

Another possible problem with the study is the potential bias in relying on the consumers' own versions of what happened in their transactions. Many consumers probably were reluctant to give inculpatory answers during their interviews, particularly since the interviewer was an unfamiliar person who did not share the cultural background of most of the respondents.[38] The interviewer tried to limit this bias by verifying facts, such as by examining the merchandise and any available contract documents. But many inquiries, such as why the consumers did not pay their bills or appear in court, were incapable of objective verification.

With all these qualifications, the skeptical reader may wonder what this study could find. Our view is that this study is the second step — after Caplovitz' initial foray — of a larger inquiry into the default judgment process. Our fifteen respondents could not tell us everything about that process, but neither do their responses tell us nothing at all. In fact, what we have learned is disturbing, and we hope to provoke a more systematic survey of possible consumer defenses that never see the light of day.

C. *Social Characteristics of the Consumers Interviewed*

Table I shows, for each of the consumers interviewed, pertinent social characteristics and basic information about the transaction which led to the lawsuit.

As Table I indicates, a large preponderance of those interviewed were women.[39] All but two of the interviewees were black,[40] and all were between the ages of twenty-six and forty-nine. All were employed, which may reflect the reluctance of merchants to extend credit to those without jobs or the difficulty of contacting the unemployed. With two exceptions, they had completed high school.

III. Reasons for Non-Payment and Default

Before analyzing whether these defendants might have fared better in court if they had appeared, we examined why they did not honor their obligations to pay for merchandise they had bought, and why they defaulted in the suits filed against them.

A. *The Failure to Pay*

The consumers gave four reasons for missing payments on their installment obligations; several consumers presented more than one rea-

38. Most of the respondents were black females; the interviewer was a white male.

39. The 72 files from which the interviewees were drawn did not show such a strong predominance of women, and it is difficult to know what accounts for this phenomenon, although it may be that the women among the 72 defendants were less mobile (or, to put it another way, more stable) in their employment and therefore easier to locate.

40. Seventy percent of the District's residents are black. U.S. Dept. of Commerce Bureau of the Census, County and City Data Book 626 (1988).

Table I: The Fifteen Consumers

Consumer	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Sex	F	F	F	M	F	F	F	F	M	F	F	F	F	F	F
Ethnicity	B	B	B	B	W	B	B	W	B	B	B	B	B	B	B
Age	38	29	34	27	37	49	45	30	31	26	33	46	44	35	32
Employment	W	B	W	B	B	B	W	W	B	B	W	W	B	W	W
Income (Thousands)	30+	10-15	15-20	25-30	25-30	15-20	15-20	25-30	20-25	15-20	15-20	30+	15-20	20-25	20-25
Education	H	H	H	G	H	G	H	H	H	H	H	H	H	B	H
Merchant	G	G	G	D	G	G	G	G	A	G	G	G	G	G	G
Plaintiff	F	F	F	F	M	F	F	F	F	M	M	F	F	F	F
$ Judgment	1009	695	799	750	72	702	238	585	1796	914	621	1149	1818	528	871

Abbreviations:
For sex: F = Female; M = Male
For ethnicity: B = Black; W = White
For employment: B = Blue collar; W = White collar
For education: G = Grade school; H = High school; B = Business school
For merchant: G = General retailer; D = Door-to-door seller; A = Auto dealer
For plaintiff: M = Merchant; F = Finance company

son for not paying. Nine of the fifteen consumers conceded that they stopped paying, at least in part, because of their own financial problems, unrelated to the transaction that was the subject matter of the suit.[41] Three believed that they were not obligated to make the payments demanded by the creditor. Psychological difficulties or shortcomings appeared to be the principal factor in four cases. Two consumers said that problems with the merchandise or the creditor caused them to refuse making payments; they believed that withholding money would give them leverage to negotiate successful resolutions of their complaints. Table II summarizes the consumers' asserted reasons for not meeting their contractual obligations:

Table II

	1st Reason	2d Reason
Financial problems	8	1
Not obligated to pay	2	1
Psychological factors	3	1
Leverage for dispute with creditor	2	0

Of course these statistics conceal the human context of the failures to pay, and thereby miss much of the meaning of these events.[42] The interviews produced a fuller portrait of the problems that these consumers faced.

1. Financial Problems

Two of the consumers missed payments because of an unexpected reduction in income. One had purchased a motorcycle while he had been employed as a mechanic, but then experienced unexpected medical problems:

> I had a neck injury, and I was out of work for . . . maybe about 3-4 weeks. And one other time I had jammed my finger on the job, and I think I missed work for about a month then . . . . I paid my health bills up, so I had other bills that were more important than having that bike at that time. But I was never more than two months late [with my payments].

A consumer who, at the time of the interview, was employed as a data entry operator, also had experienced difficulty maintaining a steady income. She had purchased a video recorder and sofa from a Washington furniture dealer.

> When I first purchased from [the merchant], I was working a full-time position. At the time [I stopped paying] I was not earning the money that I was once earning. During the time I was laid off from that job I went for unemployment so I had a lack in salary. So I did not have the money at that time to pay them. That's why I missed the payments.

41. In Caplovitz' study, about 80% of the consumers stopped paying because of their own "mishaps and shortcomings." CONSUMERS IN TROUBLE, *supra* note 3, at 55.

42. *Cf.* J. NOONAN, PERSONS AND MASKS OF THE LAW (1976); R. DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES (1978).

The other consumers who cited their own financial difficulties as their primary reason for failing to pay were not as explicit, even when pressed, about the causes. A typical statement, for example, was that "I was having some money troubles." These consumers were not clear about whether the financial problems were temporary, as in the case of a limited injury, or whether their general financial condition was such that they could not have confidently predicted being able to make steady payments over the life of the consumer obligation.

2. Not Obligated to Pay

Three consumers claimed that they were not obligated to pay what the creditor demanded. These consumers reported that they were able to pay, and (unlike those in our fourth category) they were not refusing to pay in order to force the merchant to negotiate about an underlying dispute. Instead, they believed themselves to be *honoring* the contract as they understood it; it is apparent from the litigation that the merchant thought otherwise.

In one instance, a merchant ordered furniture for a customer and told her that she did not have to begin making her payments until she received the merchandise. The consumer assumed that such an oral promise was part of her contract with the merchant, although the written contract actually required payments to begin at once. The furniture arrived about two months after the contract was signed, and the consumer then began to make the payments. To her surprise, she received a post card stating that she was in default because she had already missed two payments. The finance company required that she mail her late payments with her next payment. She believed, nevertheless, that she had no obligation to send in the missed payments:

> They told me that I would not have to start paying for the furniture until I received the furniture. But the contract says otherwise; they verbally told me [that I could wait], and looking back I should have questioned it more . . . . I had not received anything from the finance company as far as payments, you know, a payment book or payment schedule. Nothing . . . . I wasn't worried at all. On December 15, I received my payment book from [the finance company] and it showed that my first payment was due on October 15. So on December 15 I'm getting a book that says I was already 3 months behind . . . and I did not even receive the furniture until the 26th. I wrote a letter and explained that it was not possible for me to make up three payments immediately. Plus, to be absolutely honest with you, although I say that I couldn't afford it, I could if I really thought that I had to but I didn't think it was fair that I had to. I could have done it but it wouldn't have been easy to do.

3. Psychological Factors

Several of the consumers invoked what we term "psychological reasons" for not paying their creditors. One consumer claimed that her

absent-mindedness was the sole factor that had caused her to stop paying on her contract with a direct seller. After she purchased a living room set, a clock, carpet, a bedroom set, and a mattress and foundation, she had a very hard time remembering to send in her monthly checks. In her words:

> Like a lot of times that I'm supposed to send a payment in or whatever, I have it on time, but somehow or another I would be so busy doing other things that I don't put it in the mail [so] that they get it on time. A lot of times when I remember is when somebody calls or says something about payment or something, and then I say, "Oh my god, I got so-and-so in my pocket and I got to go pay." And then . . . if I'm anywhere near the mail I would go and put it in the mail. I, you know, hate to say I'm absent-minded, but I know I'm supposed to pay something and I don't within a week of time, time just bypasses me and I don't even think about it.

Two defaulting consumers cited deaths in the family as the reason for missing their payments to creditors. We classify these cases as psychological factors rather than financial problems because the core justification stemmed from their depression over the deaths, not their shortage of money. A defendant had lost one of her three sons, and spoke of her grief over his death:

> My son had got killed and I was going through changes. A lot of my bills got behind cause I really wasn't paying them. You know, I wasn't thinking about paying the bills and stuff. I didn't even pay the rent.

4. Leverage for Dispute with Creditor

Two consumers who had grievances against a creditor stopped payment as a means of forcing the creditor to resolve the problem. As one of them explained it:

> Once you pay a person something, that's it. You know, they don't have to deal with you anymore, and that's with anything you do. A little baby is like that, and they ain't got too much sense. You try to get them to take medicine, and they want the juice. If you give them the juice, what makes you think that they're going to take the medicine now?

She described herself as "very angry" at the company from which she had purchased a sofa and set of chairs. The sofa had not been treated to make it spot-proof, as the seller promised it would be. The merchant seemed unconcerned with her complaint, having quickly sold her contract to a finance company.[43] The finance company was equally unresponsive and, to use her metaphor, she stopped giving juice to the

43. Any defenses she had against the merchant could have been interposed in a suit by the finance company. D.C. CODE ANN. § 28-3808 (1981). But this principle of law is enforced only if the parties are aware of it and litigate the issue. It is not clear that it affects creditor behavior in systems in which the overwhelming proportion of litigated disputes end in default judgments.

baby.[44]

B. *The Default*

We are concerned not only with why the consumers stopped paying, but also with why they did not go to court when they were sued. We knew from Caplovitz' study that we should not assume that all of these defaulting consumers would agree that they had in fact defaulted,[45] so we began our study of the reasons for default by asking whether the consumer had gone to court on the date indicated in the summons. Two consumers said that they had indeed gone to court.

One of these consumers stated that the plaintiff's attorney did not show up in court that day, but because of her nervousness, she did not respond when her name was called. Since plaintiffs' attorneys commonly say only one word ("plaintiff") to answer the calendar call, she may well have simply missed hearing the adverse attorney's appearance. If she had simply made her presence known, she would have avoided losing by default.[46] She apparently suffered a default judgment because of her nervousness about being present in the court.

The other consumer who appeared in court was being sued by a finance company for an outstanding balance on a contract arising from his purchase of furniture from a direct seller. When he arrived in court, he waited for the clerk to call his name, but his name was not announced. He thereafter went up to the clerk, who told him that "we don't have this case." He went home, only to find several weeks later that he suffered a default judgment and his wages were being garnisheed. There are two possible explanations for this consumer's default. He may have gone to court on the wrong day. If he was there on the right day, he may have gone to the wrong courtroom.[47]

Aside from these unusual instances, most of the consumers interviewed did not go to court. All of them specified at least one reason for not appearing; several had multiple reasons. The reasons can be divided into five general categories.

First, and most striking, seven consumers (including those who mentioned this as a second or third reason) claimed that they were advised *not* to appear for their hearing. The sources of such advice will be explored below. Second, five consumers said that they could not attend

44. The other consumer who stopped paying in order to pressure the creditor to pay attention to her grievance believed that her $100 down payment had not been credited to her account. *See infra* note 77 and accompanying text.

45. *See* CONSUMERS IN TROUBLE, *supra* note 3, at 203.

46. Indeed, if the creditor's attorney was in fact absent, she could have obtained a judgment of dismissal, D.C. CODE ANN. § 16-3906(c) (1981), and if neither party answered the roll call, the case probably would have been returned to the court's files, and the parties notified of a new court date.

47. Regardless of the actual history of events, the existence of the default judgment may be attributable in part to the consumer's ignorance of his procedural options; he was unaware of the rule permitting judges to set aside default judgments for good cause. Instead, the consumer felt he had to accept having his already meager earnings slashed by about 25% as a result of the garnishment.

their hearing because they could not take the time off work, either because of the nature of their jobs or the adverse economic consequences of missing a day's pay. Third, four of the consumers stated that they never received a summons, and thus were not aware of the impending hearing. A fourth and related reason, stated by three consumers, was that they received the summons, but did not understand its terms or what it meant. Finally, although only one consumer said that she owed the money and did not see any purpose in arguing in court about it, the likelihood of losing the case may have contributed in some degree to other defendants' decisions to default. Table III summarizes the reasons for default.

Table III

	1st Reason	2d Reason	3d Reason
Advised not to go	6	1	0
Could not leave work	3	2	0
Did not receive timely summons	3	0	1
Did not understand summons	1	1	1
No defenses	0	0	1

1. Advised Not to Go

Perhaps the most surprising finding of the study was that so many consumers were advised not to appear in court.[48] Of the seven consumers who were told not to appear, five of them received their advice directly from AFC.[49] The explanations given by these five consumers have some startling similarities. According to the consumers,[50] each of them received the summons and telephoned AFC to negotiate. Upon reaching some sort of compromise, they were told that the court action would be cancelled. But AFC subsequently entered default judgments against them.

An office secretary explained:

> They told me to disregard it. When I called [AFC], I said, "Are you telling me that I do not have to appear in court now," and I asked them that question a few times to make sure, otherwise I would have gone. And he said, "That's right, you don't have to

48. *But see* CONSUMERS IN TROUBLE, *supra* note 3, at 205 (51% of defaulting defendants in Chicago, 47% in Detroit, and 40% in New York City, believed court action had been discontinued after settlement or advised not to go to court by creditors' or own attorney).

49. AFC was over-represented in the study because of the wealth of information its files contained. In some respects, the over-representation of AFC probably does not significantly distort this study. But because AFC (rather than the merchants from which it purchased consumer obligations) gave the advice in question, the unusual number of AFC-initiated cases in this study probably causes the Table to overstate the actual frequency of creditor advice not to appear in court. *See supra* note 37 and accompanying text.

50. One of us (Sterling) called AFC to inquire into its procedures for handling calls from defendants it is suing. The person answering the phone twice stated: "That is information I cannot divulge." When pressed for a comment, AFC directed the author to Ethan Block, its attorney. Mr. Block did not return three telephone calls.

> appear in court. We'll take care of it. We'll notify the attorneys."

A forty-four year old buyer had fallen behind in payments for her dinette set. After she received the summons, she promptly contacted AFC:

> I spoke to the people at Associated Finance and they said everything was O.K., just put a payment in the mail, and that's what I did. I didn't get anything else [from AFC]. When I called I said I got a summons from court about my payments to you, and I said I knew that I'm a month behind, and I said I will make a payment today if that's going to keep this out of court. He said that's fine, just keep your payments up . . . . I never heard anything else from them. Then in June my boss at my job said I have a garnish here. I knew any other way I would have gone down there [to court]. I would have gone. That's the only reason I didn't go.

After learning of the default judgment against her, one of our interviewees did some investigative work:

> Just to see how they run, I had my friend call them and tell them that he had gotten this summons and his check was being attached, and he wanted to make arrangements to get rid of it. And he [the AFC employee] told him, "Just make a payment and send it on in and everything will be taken care of." He didn't even ask him his name, and hung up the phone . . . . That made me very angry, even more angry. When you call [AFC], they say, "We'll transfer you to the legal department." But I'm pretty sure that it wasn't the legal department; it's just somebody who sits there and answers the phone and tells you this and that . . . . I was under the impression that anytime you get a summons and you call the [plaintiff] and you make arrangements, that the lawyer was supposed to return it to files if I'm not mistaken. [When I called], he told me, "Well you're behind, so make two payments and pick up from there, and I'll just drop everything and take care of everything . . . . What they did was make arrangements with me, and still sent the judgment through. He attached it anyway, regardless of whether I paid him or not . . . I'm not mad if they send me a summons because I didn't make the payment. That's not what I'm mad at. I'm mad because they have a lawyer and everything, and they tell me one thing, and I'm doing it, and all of a sudden they're still trying to attack me, that's what I'm mad at.

Another of these interviewees claimed to have spoken not merely to the AFC employee who answers the telephone, but to Ethan Block, the attorney who represents AFC in the Small Claims Court. She asserted that:

> I talked to Mr. Block and he told me that if I had the money there, at his office or to [AFC], that it would be no problem, there would be no judgment against me. This is what he told me and this is the same thing they told me at Associated [Finance] . . . . I guess that's what they do; their person goes to

> court and they tell you not to go there so they can get that [judgment] . . . . Both the attorney and the employee at Associated [Finance] told me . . . . They led me to believe that it was taken care of, and I'm running to get the money in the mail. I was willing to bring the money out there to them.

Confusion about the duty to appear may result from conversations with court officials as well as from those with creditors. A thirty year old legal secretary refrained from appearing on the date listed in the summons after a conversation with a clerk at the Small Claims Court:

> I called the clerk's office and spoke to the clerk. And I also explained to the clerk the trouble I was having with not being able to get in touch with the attorney on the summons, and that [the man] at AFC was very rude and not dealing with me. I said I don't know if there's some kind of record there with my case in it, but if you could make note that not only would I like to change the court date, but that I'm having difficulty with the attorney. I wanted her to note it in the record. [The clerk] didn't say anything about a new date, just that I would be contacted. She didn't act like there was a problem with that. Apparently, . . . the garnishment went in because I did not make the court date, I guess. That was it. My wages were being garnished.

2. Could Not Leave Work

Five consumers cited concern about missing work to explain their failure to show up to court. This reason was especially weighty for those consumers who had lower incomes, probably because they were less likely to be salaried employees, and could not afford to miss a day's pay. For example, a waitress was troubled by the possibility of missing work for the hearing:

> In order to have made it, it would have pushed me. I mean, I would have had to be at work at 11:30. I could have been [in court] at 8:00,[51] but they call your name at random; they go down the list. I would have missed work. At Small Claims Court, god knows, you could be there forever.

Another consumer, a legal secretary, mentioned the difficulty of getting away from work as a strong factor mitigating against a court appearance. For those readers who are familiar with law firms, her explanation will probably provoke some sympathy:

> It was impossible for me to get away from the office that day. Impossible is maybe a bad word. It was not the best time for me to leave the office. If there was a death in the family, or something absolutely urgent, I could have left the office. [The

51. The calendar call at D.C. Small Claims Court actually begins at 9:00. However, this consumer's fear of delay is not unjustified. Voluntary conciliation and hearings on motions by either party take place between 10:00 and early afternoon. If a defendant actually wants a trial, she will have to wait at least until early afternoon, and often until late afternoon or a later day.

> attorney I work for] relies on me a great deal, and we're very busy, and we have to get coverage in advance.

3. No Timely Summons

Four consumers claimed not to have received timely notice of their impending hearings. One consumer, who had stated this as a secondary reason for not appearing, admitted during the interview that she had ten days notice. However, two defendants maintained consistently that they never received a summons, and one reported receiving a summons after the hearing date. Their claims, if true, raise a problem that has plagued court systems in many cities.[52] A thirty-three year old defendant reported:

> I wasn't able to pay the bill on time. Then they closed, and the accounts went over to a law firm . . . . I told the lady who called me that I was willing to pay the bill. At that time they said they were trying to close out all their accounts because by them being out of business they wanted to make sure that everything was clear . . . . Shortly afterwards, I don't know what happened, but I received a letter on my job from Small Claims Court. It was a . . . garnishee order. This came on my job, and they started deducting money from my paycheck to pay that claim, and that's how they got the money. I got a copy of the garnishee order, and called the [law firm] listed on it. They told me that the summons had been sent out to my address, and as I stated to the [attorney's secretary who I spoke with], I work from 8:30 to 5:00; there's no way no one is in my house that can accept the summons for me. You know, the summons should be handed to me in my hand, if that's the way it's supposed to be done. The summons was never issued to me. So [the attorney's secretary] said that right there was irrelevant, it didn't mean anything since the garnishee has been put on my check and I will have to pay it that way.

The affidavit of service in this case claimed that the interviewee was served at her home on a weekday morning. That affidavit contains no description of the defendant's physical characteristics; a large space on the affidavit form is expressly reserved for such information, but it was left blank. As a result, it is impossible to verify either party's version of the facts.

Another interviewee, a forty-nine year old consumer, claimed that she did not receive a summons and only learned from our interview, months later, that she had been sued:

> I know what a summons is, but what I'm saying is I don't remember getting one from them saying that I have to be to court at a particular day. They had no right to sue me because if I was late I always paid late charges. . . . The thing is, I didn't get any letter from them, because if I had, I would have gone, and

52. *See* the discussion of "sewer service" in CONSUMERS IN TROUBLE, *supra* note 3, at 194 nn.5-6 and sources cited therein.

> would have asked for an extended date or something. But I didn't get that [summons].

Once again, the affidavit of service indicated that this consumer was served, but it contained no description of the defendant's physical characteristics. It is possible that she received the summons but did not actually understand its significance. However, the process server's failure to note even a general description of the defendant suggests that this defendant may never have been served.

The consumer who received a summons after the court date said that she then called the court, but she says that the clerk to whom she spoke did not inform her how to move to set aside the judgment.[53] Asked whether she knew she had to go to court, she stated:

> No, I didn't know. If I would have known, I would have did something. You know, I would try to do something. Once you get tangled up in court, I mean somebody's going to pay the court fees; I know that for a fact. So I was trying to stay out of court . . . . Yeah, I got [a summons]. This guy came to my apartment and delivered it. But by the time he delivered it, it was past the date. But what could I do? If they would have called me up and told me if I didn't get my butt down here they would have me in court, I would have set up some type of appointment with them, you know to have a meeting . . . . The summons came two or three weeks after the court date. I called the court up right away, and they told me to call [the plaintiff] in order to straighten it out. [The clerk] said if the bill was paid off, get in contact with the company. I called [the company] up, and they said I would have to pay all the money up in order to be all right with them.

Here, too, the affidavit of service conflicts with this consumer's report; it records that she was served at home nine days before the hearing date.

4. Could Not Understand Summons

A consumer may fail to understand a summons in two ways. First, the consumer may not understand the actual language used on the summons. Second, even a consumer who understands the words on the summons may not realize their significance.

The consumers who reported that they did not understand the summons fell largely into the second category.[54] They were not uneducated; all of them were high school graduates, and one of them had completed about two semesters of college. A thirty-two year old defendant was particularly candid about her inability to comprehend the summons; when asked whether she understood the summons' significance, she declared: "[n]o, no, no I was totally confused . . . . I figured I could

53. A clerk of the Small Claims Branch told one of the authors that defaulting defendants who call claiming they had no notice, which "happens all the time," are told to file a motion to have the judgment vacated, not to call the plaintiff's attorney.

54. One consumer, however, probably experienced the first type of inability to understand the summons. She reported: "No, I don't understand this here on top, the numbers and all that crap. I don't understand none of that."

still like talk to them. Maybe [the summons] was more trying to get my attention, scare you into [paying] more or less. I didn't think there was a court [hearing] on it."

5. No Defense

One consumer felt that the plaintiff's court action was justified, and that she had nothing to argue about in court: "[if] I was a business person I would have done the same thing [they did]. I don't feel like I was right to be defaulting on payments, you know, but I was angry. And there's a difference between being right and being angry." Ironically, this consumer may have had defenses arising out of the circumstances of her purchase.[55] In addition, this consumer was one of those told by AFC not to appear in court, thereby providing her with a potential counterclaim based on the creditor's misleading conduct.[56] Her feelings of hopelessness may have been unwarranted.

To summarize, there were several patterns in these consumers' descriptions of their defaults. Most could not pay because of financial hardship. Nevertheless, they had a right to a day in court. Yet a high proportion of them were advised not to go to court. In addition, several did not receive or understand their summonses. So what? If they had gone to court, could they have won their cases?

IV. Possible Defenses or Counterclaims

Each defendant was asked a series of questions designed to elicit facts pertinent to possible defenses or counterclaims. In addition, eleven of the court files included the underlying contract documents, which enabled us to assess compliance with disclosure legislation. Where possible, we examined the merchandise in question. Even so, our inquiries may not have revealed all possible defenses. Students in the law school consumer protection clinic, in which we have both participated, frequently discover that the facts and theories which win a case often do not appear during an initial interview and may not emerge until the consumer's representative has done weeks of work on a case.

We discovered that the fifteen defendants had four kinds of defenses. Some of them pertained to selling practices, such as the content of the merchant's advertising. Some involved the quality of the merchandise. A third set of possible defenses arose under age-old common law rules or under modern statutes regulating the content or form of agreements between merchants and consumers. Finally, some possible counterclaims related to debt collection practices.

A. *Selling Practices*

The District of Columbia has a particularly strong Consumer Pro-

55. *See infra* note 66 and accompanying text (discussing this consumer's possible defenses arising out of her dissatisfaction with the furniture).

56. *See infra* notes 99-103 (discussing laws prohibiting such deceptive conduct).

tection Procedures Act ("CPPA")[57] as well as other consumer protection statutes.[58] Several interviewees gave us information which suggested that these laws had been violated.

A twenty-nine year old defendant described her purchase of a living room set from a furniture dealer, and although we have no independent verification of her account, it raises the possibility that the merchant violated the CPPA:

> The advertisement said so many pieces of furniture for a certain amount of money, or they had sets of furniture, like bedroom sets and living room sets, and they would give you the credit. It was one of those "never had credit, need credit, need to establish credit" deals, which is the reason I really was interested . . . . Some of the things they showed me that were advertised were worse [than they looked in the ad]. One of the couches was hard as a brick; I was like, you know, you would not want to sit on this. They told me about some more expensive ones. They . . . were always willing to go up [in price].

This account, if true, is a classic example of the "bait and switch" tactic that Caplovitz exposed in an earlier book.[59] A merchant using this device may actually be prepared, if necessary, to sell the advertised merchandise at the advertised price. "What most often happens, however, is that the unsuspecting customer is convinced by the salesman that he doesn't really want the goods advertised . . . and is then persuaded to buy a smaller amount of more expensive goods."[60] The National Advisory Commission on Civil Disorders identified bait-and-switch selling as an "exploitative tactic" which contributed to the urban riots of the late 1960s.[61] The tactic is banned by District of Columbia law.[62]

Similarly, a forty-four year old consumer went to a furniture company in response to a newspaper advertising insert:

> Some of the things in the paper said this is the price, but you go

57. D.C. CODE ANN. § 28-3901 et seq. (1981). Two articles on the statute's legislative history and interpretation have been published. Simon, *A Guide to the D.C. Consumer Protection Act*, DIST. LAW., Fall 1977 at 43; Drymalski, *Consumer Protection: Administrative Decisions Affecting the D.C. Consumer Protection Procedures Act of 1976*, 50 WASH. LAW. (Nov.-Dec. 1987). One section of this statute includes 26 subsections, each of which describes several prohibited practices. It is unlawful, for example, for a merchant to "represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits or quantities that they do not have" D.C. CODE ANN. § 28-3904(a) (1981); "represent that goods or services are of a particular standard, quality, grade, style, or model, if in fact they are of another" *Id.* at § 28-3904(d); or to "advertise or offer goods or services without supplying reasonably expected public demand, unless the advertisement or offer discloses a limitation of quantity . . . ." *Id.* at § 28-3904(i). Violations of any of these provisions can entitle a consumer to recover treble damages, punitive damages, and reasonable attorney fees. *Id.* at § 28-3905(k).

58. *See* D.C. CODE ANN. § 28-3901 et seq. (1981); D.C. MUN. REGS. tit. 16 (Apr. 1984).

59. CAPLOVITZ, THE POOR PAY MORE 29 (1967).

60. *Id.*

61. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (KERNER COMMISSION), REPORT 276 (Bantam ed. 1968).

62. It is unlawful in the District of Columbia for a merchant to "advertise or offer goods or services without the intent to sell them or without the intent to sell them as advertised or offered." D.C. CODE ANN. § 28-3904(h) (1981).

> ahead and they don't even have the set. The set that I wanted was in the paper from [the company], then I went there and they said that set was out of stock, they didn't have any, but it was in the paper. I said, "But it was in your flyer that I received." She said, "Well that was a problem they've had in inconveniencing the customers," that they were sorry . . . . We went really looking for a dinette set, and they was trying to sell us this dinette set for $2400, or whatever it was. I said no, I wasn't going to buy [that] dinette set. We decided to get a bedroom set instead. They said, "Buy this bedroom set because it's not going to be on sale after this week" or this, that, and the other, so we went on and put the deposit on the bedroom set.[63]

B. *The Quality of the Merchandise*

District of Columbia law includes the warranty provisions of the Uniform Commercial Code,[64] modified somewhat to protect consumers from disclaimers of implied warranties.[65] In addition, the CPPA includes unusual provisions, going beyond the unconscionability language of the Uniform Commercial Code, to prohibit unconscionable selling practices.

Several of the defendants whom we contacted might have had defenses under these laws. A forty-six year old interviewee purchased a sofa and a set of chairs from a Washington furniture dealer. She wanted her furniture to be protected from stains, so she contracted with the seller to stain-proof the items before they were delivered. But problems developed after she received the goods:

> They delivered [the furniture]. I was paying the monthly note . . . . It was supposed to have been treated. I paid extra money to have it treated, meaning it resists soil; it's something like a scotch-guard, and it keeps stuff from soaking into it. Then my furniture started turning yellow, and it got real dirty. And I told the people, I said, "I don't think it's been treated." And I asked them to send their inspector out. This started the end of November, first part of December. He came out in January . . . . And he came out, and he tested it. And he said, "No, it had not been treated." So I called 'em all back. I must have called them, between then and April, every week. And they gave me the runaround . . . . I kept telling them that the inspector said that it hadn't been treated. So then I got, you know, sort of angry. So I stopped paying them.

After this consumer stopped paying, she was sued by the finance com-

63. This defendant may have had a claim under D.C. CODE ANN. § 28-3904(i) (1981), *see supra* note 57; as well as a claim under D.C. CODE ANN. § 28-3904(h) (1981). Subsection (i) is apparently a back-up provision making it easier to enforce the prohibition of bait-and-switch tactics in the face of merchants' claims that they subjectively intended to sell the goods advertised.

64. D.C. CODE ANN. § 28:2-312 et seq. (1981).

65. Statements like "as is" are not effective to disclaim implied warranties; the merchant must specify the defects against which he is making no warranty. *Id.* at § 28:2-316.1.

pany and suffered a default judgment.[66] If she had appeared in court, she could have argued that the seller violated his express warranty that the furniture would be treated.[67] She could also have argued that the seller breached the implied warranty of merchantability.[68]

Another consumer was very dissatisfied with a living room set and a coffee table purchased from a Washington furniture dealer. The seller replaced the scarred coffee table but would not resolve her complaints about the living room set. The core of her dissatisfaction with the couch was that the fabric was unravelling, causing the buttons to fall off and the seams to rip apart. She was worried that the couch would rip, as it once had, if anyone sat too near its edge. The merchant had re-sewn one sofa button but we could see that the fabric remained excessively brittle. This defendant, too, might have been able to assert the defense of breach of an implied warranty, but she defaulted in court[69] and at the time of the interview, the judgment was being enforced against her wages under a garnishment order.

A consumer in our survey had twice purchased goods from a door-to-door salesman, and he had suffered two default judgments. His first purchase was a set of bunk beds. He then purchased a television from the same seller. This consumer had complaints concerning both items. The television: "never did play right. The picture don't come out clear. . . . there are them lines in it. [The seller] said that it's electronic and how clear the picture is. [Also], the swivel base of it . . . ain't turning properly unless you put your foot on it." The television did not appear to be of average quality,[70] and it probably was not suitable for the ordinary purposes for which televisions are used.[71]

In another example, bunk beds were improperly installed by the seller:

> The guy who screwed in the bunk beds didn't put any washers on them. So I called them and I say, "Look, the guy's going to have to come back out here and prepare these bunk beds right." He said, "Well, you're a mover, why don't you go handle it for me?" I said, "That ain't no problem, I can handle it, but I'm saying still, I paid my money, it should be put up right." 'Cause I wasn't here at the time; my lady was here, and they just left the empty boxes and all that stuff in the hallway, and the bunk bed ladder wasn't there . . . . He showed me a book [with beds in it], and he showed me it was going to be a

66. This was the one defendant who said that she did not appear in court because she had no defenses. *See supra* note 55 and accompanying text. In our view, she did not know the law and was therefore overly conservative in estimating her chance of success in court.

67. D.C. CODE ANN. § 28:2-313(1)(a) (1981).

68. Furniture that turned yellow in a few months arguably was not fit for the ordinary purposes for which such goods are used, and thus did not comply with the warranty created by D.C. CODE ANN. § 28:2-314(2)(c) (1981).

69. This consumer said that she did not appear in court because of her reluctance to lose a day's wages.

70. The interviewer was able to see for himself that the picture was unclear and composed of many visible, thin lines, and that the swivel base did not rotate properly.

71. D.C. CODE ANN. § 28-2:314 (1981).

> real good deal on the bunk beds and stuff. But it wasn't put up properly as it was in the picture. They didn't put all the screws in properly. The ladder wasn't there. The washers wasn't in there. They screwed the screws into the wood on the bunk bed. When I got home, the bunk bed was like a used bunk bed. It was scratched up, the screws were screwed too tightly into the wood, the bunk bed was really loose. I had to take it all apart again and put it up myself and put some washers in when I got back home from work. It was a new bunk bed, but the damage they did putting it together made it look old. 'Cause, see, I'm a professional mover, and I have to put things together and take things apart, and I know the proper ways of doing that, and they did it a poor-fashioned way . . . . So here are my kids without a bed guard and a ladder to the bunk bed.

This consumer, too, could have asserted defenses. The seller may have breached his express warranty, conveyed by the picture that the consumer was shown,[72] when he delivered a non-conforming bed, and may have further breached it by damaging the bed in the course of installation. In addition, he may have breached the implied warranty of merchantability by failing to supply a ladder and a guard, two items essential for the safe use of the an upper bunk. These breaches might not have voided the contract altogether, but they could have provided offsetting damages in a judgment or settlement. In addition, the consumer may have had defenses under the CPPA, entitling him to a greater measure of damages as a result of essentially the same merchant misconduct. The seller apparently enticed the consumer to purchase the merchandise with a picture of bunk beds with safety guards and ladders, thereby representing that they had accessories that they did not have.[73]

C. *The Content and Form of the Agreements*

Like other jurisdictions, the District of Columbia regulates the content and form of consumer credit contracts. A merchant who refrains from deceptive practices and who honors all warranties, express and implied, must still take care to enter into agreements that are valid under common law contract rules and must refrain from violating a welter of disclosure laws and other legislation designed to improve the ability of consumers to enter into fair agreements. Failure to observe these requirements may provide the consumer with full or partial defenses to the creditor's demand for payment. The consumers in our sample had possible defenses of four types, although the situations they described do not begin to exhaust the ways in which consumer contracts are regulated.[74]

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72. *Id.* at § 28-2:313(1)(b).

73. *Id.* at § 28-3904(a).

74. For example, District of Columbia law forbids rebates to induce consumer credit sales to others, *id.* at § 28-3810 (1981); door-to-door sales unless the buyer is offered a right to cancel, *id.* at § 28-3811; contract sales of health spa services unless certain disclosures are made, *id.* at § 28-3817(b)(4); collection of funds by unlicensed home improve-

1. Payment Disputes

Payment disputes and misunderstandings are common in consumer installment transactions;[75] in addition, payment is a traditional common law defense to a contract action, and partial payment, while not a complete defense to a suit, reduces (to the extent payment has been made) the damages that a creditor can obtain. A merchant who errs in crediting payments is likely to repeat the mistake at the time he or she sends the consumer's file to a lawyer for collection, and the error will then find its way into the lawsuit in the demand for damages in the complaint. If the consumer defaults, that amount will probably be awarded in judgment.[76]

One consumer in our sample claimed a billing error. This consumer had purchased a bedroom set from a Washington furniture dealer. She said that her $100 down payment had never been credited to her account. Eventually, she realized that there was a $100 difference between her own computation of her balance and the seller's record of it. As she stated:

> If I owed them money, I would be more than happy to pay for it. But I mean I don't feel I owe them the money, and I was willing to sit down with them so we can go over these things 'cause I got all my receipts, and [if they can] show me where I owe [them] the $100, we could just square things off . . . . And I got in contact with them, and I told them I wasn't going to [pay the $100], because I got my records, and I could come where they're at, and we could sit down and talk.

Although this consumer appeared sincerely to believe that the creditor had made a mistake, she said that she could not find her receipts at the time of the interview, and we were therefore unable to confirm the accuracy of her claim.[77] If, however, she really had paid $100 that was not credited to her account, she would have had a partial defense to the creditor's suit for $695.

2. Unconscionability

The CPPA includes provisions on unconscionability that are considerably more explicit than the equity doctrine of unconscionability or the

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ment contractors before all work is completed, D.C. MUN. REGS. tit. 16, § 800.1 (Apr. 1984); and sales of motor vehicles by unlicensed dealers, *id.* at § 300.1.

75. In Caplovitz' multi-city study, payment misunderstandings were the primary reason for consumers' failures to continue paying the creditor in 7% of the 1320 cases he examined. CONSUMERS IN TROUBLE, *supra* note 3, at 125-26.

76. If a judge conducts an *ex parte* hearing on damages, he or she may demand to see the creditor's ledgers and may therefore notice arithmetical errors. But the judge is not required to examine the seller's records, and most do not. Furthermore, if the consumer is not present or represented, the chance of such an error being caught is reduced. Furthermore, failures to credit payments in the ledger could not be detected at this stage; only the consumer's receipts will reveal the error.

77. In addition, we are skeptical that any creditor would sue a customer rather than accept her offer to examine receipts jointly in order to resolve a discrepancy.

unconscionability provisions of the Uniform Commercial Code.[78] In the District of Columbia, it is an unlawful trade practice, regardless of whether a consumer is injured, to make or enforce unconscionable terms or provisions of sales.[79] Courts applying this law are directed to consider a series of factors such as knowledge by the seller of the poor credit-worthiness of a consumer to whom credit was extended, the inability of the consumer to benefit from the goods or services being sold, a gross disparity between the price of the goods and their fair market value, and the inability of the consumer reasonably to protect his or her interests by reasons of age, physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement.[80] An unconscionable consumer credit sale may be denied enforcement in whole or part.[81] Essentially, the unconscionability defense is implicated when a merchant, with superior knowledge and control over the drafting of the agreement, is taking advantage of a consumer who is in a weaker bargaining position, disabling him from adequately protecting his interests.[82]

The unconscionability doctrine is still relatively new, and assessing how judges would apply it to particular cases is inevitably speculative.[83] An unconscionability defense could possibly have been made by the consumer who bought the bunk beds and color television from a door-to-door salesman.[84] In addition to the problems involving the quality of the merchandise, there appeared to be considerable disparity between the price he paid and the value of the goods. The price of the television was $940, compared with a typical price between $650 and $700;[85] the bunk beds cost the consumer $699, compared with a price of $299 he said he saw them priced at after the purchase. Other factors, too, could have encouraged a judge to find this agreement unconscionable. This consumer earned only about $20,000. The seller's knowledge of this income, and of the facts that the consumer and his unemployed wife were supporting three children, may have amounted to knowledge that there was little likelihood that the buyer could pay the obligation in full.[86] Furthermore, the consumer had only a tenth grade education and had obvious problems with reading; a judge might have determined that the

78. D.C. CODE ANN. § 28:2-302 (1981).

79. *Id.* at § 28-3904(r) (1981).

80. *Id.*

81. *Id.* at § 28-3812(g) (1981).

82. *See generally* NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (2d ed. 1988).

83. This very fact, however, suggests that to the extent that the vast majority of consumer credit lawsuits are resolved through default judgments, justice may suffer, both because the consumers *might* win their cases with unconscionability defenses and because the default judgments deny the judges opportunities to interpret the statutes.

84. *See supra* notes 71-73 and accompanying text (discussing problems with the merchandise in this case).

85. Sales of this model of television, which he had purchased in 1986, had been discontinued at the time of this study. Interviewer Sterling obtained this quotation from a salesman at the Hoffman Video Center in Washington, D.C., who was familiar with the model at the time of its popularity.

86. *See* D.C. CODE ANN. § 28-3904(r)(1) (1981).

seller knowingly took advantage of the consumer's inability to protect his interests.[87]

3. Contractual Format

The Federal Truth-in-Lending Law[88] imposes some disclosure requirements on consumer credit contracts; in addition, the District of Columbia regulates the form of such contracts in detail. For example, a retail installment contract must be a single document, each page of which must be signed by both the buyer and the seller.[89] At the top of the first page of the agreement, the words "RETAIL INSTALLMENT CONTRACT" must be printed in at least twelve-point extra-bold type.[90] If the printed terms of each contract are contained on both sides of a page, the first page must say, in bold type: "NOTICE: SEE OTHER SIDE FOR IMPORTANT INFORMATION."[91] Furthermore, a retail installment contract must contain "a description of the goods or services purchased, including, where applicable, the trade name, and the model number of the goods."[92]

Five different forms were used in the eleven contracts examined in the course of this study.[93] In all cases, the federal requirements appeared to have been met. But in several cases, we could determine that the District's additional disclosure rules had been violated.[94] Only one of the eleven contracts had the words "RETAIL INSTALLMENT CONTRACT" in twelve-point boldface type at the top of the page. Although each contract had a front and a reverse, none of the contracts complied fully with the law requiring that the front include a boldface notice that the other side also contains important information. Three of the five front sides failed to refer to the reverse side at all. The front sides of the other two forms included references to the reverse, but they did not use the statutorily required language,[95] and on both forms the cross-reference was printed in small letters rather than bold type.

Of the eleven contracts we examined, only four clearly complied with the District's requirements regarding a description of the goods. Two merchants violated the rule by listing only a serial number on the contracts, without any attempt at a description of the merchandise. Six merchants appear to have violated the rule by listing "per invoice" or

87. *See id.* at § 28-3904(r)(5) (1981).

88. Truth in Lending Act, Pub. L. No. 90-321, § 101, 82 Stat. 146 (1978).

89. D.C. MUN. REGS. tit. 16, § 106.1 (Apr. 1984). The D.C. Municipal Regulations codify laws passed in the years preceding D.C. home rule, and they have the same legal force as statutes enacted since 1973 by the elected Council of the District of Columbia.

90. *Id.* at § 106.2.

91. *Id.* at § 106.3.

92. *Id.* at § 105.4.

93. We were able to examine only 11 of the 15 contracts entered into by the interviewees.

94. None of the consumers knew what the District of Columbia's rules were, so none could know of these violations.

95. One form said, "The reverse of this page contains additional terms applicable to this purchase"; the other said "NOTICE TO BUYER: 1. The terms of this contract are contained on both sides of this page. See other side for important information."

"invoice" instead of including a product description on the contract form.[96] On the other hand, the effect of violations of the District's disclosure rules on the rights of the buyer and seller is not clear. The law explicitly provides that any person who violates it shall be subject to a "penalty or a fine" of up to three hundred dollars or imprisonment for up to ten days,[97] but there appear to be no reported decisions regarding whether the "penalty" runs in favor of an affected consumer in private litigation (like punitive damages) or whether it runs only in favor of the government in a separate suit brought by the District. If the word "penalty" implies only a public remedy, a consumer might still have private recourse under a section of the CPPA which provides for judicial awards of treble and punitive damages for violation of any "trade practice in violation of a law of the District of Columbia within the jurisdiction of [the Department of Consumer and Regulatory Affairs]."[98] Until the District of Columbia Court of Appeals rules that disclosure violations cannot be enforced in private litigation, such violations at least give consumer defendants a "bargaining chip" to use in negotiations with creditors and a claim to make to a judge. However, these chips and claims were unwittingly discarded by the defaulting consumers whom we interviewed.

D. *Debt Collection*

Like most jurisdictions, the District of Columbia has legislation prohibiting a variety of debt collection practices.[99] They include using language "intended to unreasonably abuse the hearer or reader,"[100] "placing telephone calls with the intent to harass" any person,[101] and making "any false representation or implication of the . . . status [of a claim] in any legal proceeding."[102] Violations can make a creditor liable for punitive damages.[103]

Associated Finance Company, which appears to have told five of our

96. Contracts sold to a finance company for collection would not necessarily include the invoice, so violation of this law would make it more difficult for a third-party creditor to know what goods were being financed or to be able to communicate meaningfully with a consumer who calls with a problem.

97. D.C. MUN. REGS. tit. 16, § 122.1 (Apr. 1984).

98. D.C. CODE ANN. § 28-3905(k)(1) (1981). Under the CPPA, the Director of the Office of Consumer Protection, which later became the Department of Consumer and Regulatory Affairs, has a duty to investigate every complaint filed and to determine whether the trade practice which occurred violated "any statute, regulation, rule of common law, or other law, of the District of Columbia." The Committee Report which accompanied Council passage of the law said that the phrase "other law" even "includes executive and administrative orders, and common law." REPORT ON BILL 1-253 FROM THE COMMITTEE ON PUBLIC SERVICES AND CONSUMER AFFAIRS, at 19 (Mar. 24, 1976). Furthermore, "the word 'law' in this section means the same as it does . . . throughout the bill," *id.*, suggesting that the use of the word 'law' in the section providing for remedies enforceable in court provides remedies for violations of any consumer protection law, not only prohibitions contained in the CPPA itself.

99. D.C. CODE ANN. § 28-3814 (1981).

100. *Id.* at § 28-3814(d)(1).

101. *Id.* at § 28-3814(d)(2).

102. *Id.* at § 28-3814(f)(5).

103. *Id.* at § 28-3814(j)(2).

interviewees that they need not go to court because the cases against them were being discontinued, may have made false "implication[s] of the . . . status" of legal claims in these cases. In three other cases, collection efforts may have amounted to harassment. One defendant said that "[t]hey harassed me on the phone. They would call, like, within a week they would call four or five times."

Another felt physically endangered by a bill collector's claims that if she didn't send the money, "they [would] be coming over here [to her house]." The third said that the collector "used foul language [although] I don't recall his calling me a name." Of course we do not know whether these consumers could have proved the content of the telephone calls to the satisfaction of a judge, or whether the judge would have regarded the content, even if proved, to be in violation of the statute.

V. CONCLUSION

Table IV summarizes the defenses that may have been available to the fifteen defaulting defendants in our sample, based on the information they provided to us and the eleven contracts that we were able to examine.

It is apparent from this chart that, based on the verifiable formal violations alone, eleven of the fifteen defendants may have had defenses to the litigation. Additionally, if our interviewees are to be believed, eight of the fifteen defendants had good faith defenses *other than formal violations* to their creditors' suits.[104] Indeed, of the fifteen defendants, only three seemed to have no possible defenses. Five had one arguable defense; five had two claims that could have been pressed; one had three possible defenses; and one could have made four different arguments against the creditor's claim.

Perhaps all of the defendants were lying to us. However, deceiving us could not relieve them of their credit obligations or their garnishments, because we told them that we wanted to interview them for research purposes only and that we could not assist them legally. Yet, some of them might have shaded or selectively recalled facts so that we would see them as unwitting victims rather than careless consumers; some might even have come to believe a version of the story that was less than objective. But we doubt that distortion by these defendants could account for all of their apparent defenses. Their narratives were usually detailed and in most cases internally consistent. They seemed willing to be self-critical; for example, nine of them admitted that they

104. This tabulation is somewhat conservative in that it excludes claims that might have been made by five AFC defendants based upon their having been told that the suits against them were being discontinued. Although AFC may have violated the law against misrepresenting the status of a claim in a legal proceeding, *see supra* notes 99-103 and accompanying text, we did not include these five cases in our count because we did not want this summary chart to include possible defenses traceable to the conduct of one particular creditor who was over-represented in our survey. *See supra* note 37 and accompanying text.

Table IV: Possible Defenses

Defendant	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Sales practices		x											x		x
Merchandise problems		x		x								x			
Payment		x													
Unconscionability				x											
Contractual format	x	x	x	x		x		x			x	x	x	x	x
Debt collection abuses			x					x	x						

had stopped paying because of their own financial difficulties, rather than the creditor's transgressions. Furthermore, one of the researchers was able to observe the merchandise in several cases and the contract documents in most cases, and these objective indicators were enough to suggest that the consumers would have had some basis for defending their suits. Let us assume that three-quarters of the twelve respondents with possible defenses could not have prevailed in court because they were lying, because they were telling the truth to us but would not have been credible to a judge, or because their claims, even if proved, would not have entitled them to relief. Even under this drastic assumption, three defendants, one fifth of our sample, would still have defaulted in cases in which they could have obtained whole or partial relief.

It might seem at first blush that the defendants whom we surveyed should have gone to court to defend themselves, but it is not clear that they would have been any more successful. They might have been able to tell the judge about merchandise defects, but they might not have known that a seller's advertising practices could justify relief from a creditor's claim, and they could not have known about how to effectively assert the more technical defenses (such as the formal violations) or the defenses requiring novel legal argument (such as price-based unconscionability). Indeed, we have seen that although the default rate in the District of Columbia is lower than in other cities, most of its consumer defendants who *do* appear consent to judgment in full against themselves,[105] and that the total of the 74% who default and the 22% who consent to judgment in full approximates the default judgment rate in other cities. The District of Columbia's system of not requiring a consumer defendant in a case involving less than $2000 to file a written answer is surely to be applauded, but it does not enable a larger percentage of defendants to prevail.

What is missing from this picture is lawyers. Lawyers are professionally trained to spot defenses, such as those possibly available to these defendants. Lawyers know how to present defenses to opposing counsel in negotiations and to a judge if negotiations fail. None of the fifteen respondents had discussed their cases with an attorney, even though each of them was a party to formal litigation. Six of them had thought of getting an attorney to assist them. Three of them told us that they abandoned the effort because AFC told them that, their cases having been discontinued, obtaining an attorney was not necessary. Two could not take time off from work to locate, consult, and attend court with an attorney. One defendant said that she telephoned an attorney but that he never returned her call. The other nine interviewees did not even think about getting a lawyer. Four thought that they could help themselves, four thought that they didn't have enough money and didn't know about free legal services,[106] and one had no idea how to find out

105. *See supra* note 29 and accompanying text.

106. The District of Columbia has a federally-financed legal services program, but stretching its income eligibility guidelines to the limit, it cannot serve an individual with an

anything about attorneys.

If our results are representative — and here we stress that we would very much like to see our study replicated[107] — our system of justice has failed for this class of litigants.[108] In that event, we can identify two approaches to reform. Both proceed from the assumption that the default rate would drop if consumer defendants with plausible defenses knew that they had a chance in court. Of course, most of our interviewees said that they defaulted for reasons unrelated to the merits, such as being told that the case had been discontinued, or the cost of missing work. But we think that either of our suggested approaches could overcome misleading advice against appearing in court, and we suspect that awareness that it is possible to win one's case would, at least in some cases, overcome the defendant's presumption that his or her economic self-interest lay in a default.

One approach would provide some degree of legal assistance to consumer defendants. The other would attempt to circumvent the need for legal assistance. Under the first approach, a publicly paid official would attempt to contact, educate, and offer to speak for consumer defendants.[109] The official would be a law student or paralegal assis-

income of more than $10,818 or a family of four with an income of more than $21,843. Telephone interview with attorney Stephanie Forrester, District of Columbia Neighborhood Legal Services, by Philip G. Schrag, August 4, 1989. *See* 45 C.F.R. § 1611 (1988). Half of the interviewees had incomes over $20,000, *see* Table I, *supra*, and therefore approximately half of them would not have been eligible for free assistance even if they had known of the existence of the legal services program.

107. Ideally, the study should be replicated by professionally trained interviewers who contact a larger sample of defendants. But as Professor Philip Shuchman has noted, in private correspondence with us, a substantial degree of validation could be obtained if each of several sets of law students, in various cities, administered the questionnaire to 15 or 20 appropriately selected defaulting defendants. These small-scale replications could be sponsored by law school clinics or seminars in social science methodology, municipal departments of consumer affairs, or by the attorney generals of several states. Of course, the questionnaire would have to be modified to reflect the consumer protection law of the jurisdiction in which the survey was being conducted.

108. It could be argued, of course, that there is nothing wrong with systematic failure for a class of litigants, so long as the system as a whole is adequate. For example, the reforms that we propose will cost money. The costs could be borne by the taxpayers, or they could be passed on to creditors through increased filing fees in collection cases, and presumably through them to all buyers of merchandise. Either way, the public would pay more so that consumer defendants had a better chance of invoking the rights available under decisional and statutory law. As supporters of the traditional model of due process, we favor this trade-off, but society may prefer to keep taxes or prices low and to tolerate large numbers of debt collection cases in which the defendants either default or, because they do not know their rights, appear in court but agree to whatever the creditor demands. We suggest that if the public really does not expect defenses such as unconscionability to be raised, it should repeal the consumer protection statutes rather than make a pretense at consumer justice by providing many legal rights that are almost never asserted.

109. If desired, this system could include an initial screening so that only defendants with incomes under a certain level would be assisted. The authors believe, however, that screening is inappropriate because virtually all consumer defendants are indigent in the sense that they cannot obtain legal help with their cases in the ordinary way; few if any lawyers will agree to defend a case involving a few hundred dollars for a fee that is only a fraction of the amount in controversy, and few defendants will be willing to pay a fee of, say, $3000 to defend a $500 case just for the sake of principle.

tant[110] employed by the court itself, a legal services organization, or a government agency independent of the court. The official would begin by using information in the file regarding the defendant's home or work telephone numbers, but if the file did not include such numbers, the creditor would be obligated (perhaps through counsel) to supply the official with any numbers it had on record. If no telephone number could be ascertained, the official would contact the defendant by mail at the address at which service had been made and any other known addresses, and suggest that the defendant call the official.

Once contact was made, the official would explain his or her role in the process. He or she would tell the consumer that collection suits can sometimes be defended and might provide the latest annual statistics on the percentage of litigated non-default cases in which defendants obtained partial or full relief from the creditor's claim. The official would explain to the consumer the kinds of defenses that the law recognizes (including an explanation of plausible types of defenses not yet tested in the courts). By telephone, he or she would administer a questionnaire like ours, in order to help the defendant ascertain whether the case was worth defending. Finally, he or she would offer to help the defendant to marshall evidence; e.g., by looking over the contract documents and receipts, by ordering them properly, by taking photographs of any defects in the merchandise, by presenting documentary and witness evidence in court, by making proper objections to the creditor's testimony, by conducting cross-examination, and, of course, by representing the defendant in any negotiation with the creditor.

Our alternate proposal would dispense with the new personnel; it would aim to educate the defendant to evaluate defenses and to represent himself or herself more effectively in court. Under this plan, every summons served on a consumer defendant would have to have stapled to it a rather lengthy but clearly written brochure explaining the nature of the court in which the proceeding was being brought, the procedure used there, and the law of consumer cases. It would describe, in language understandable to a person who had no more than a high school education, the common defenses such as payment, breaches of warranty, unconscionability, and violations of the local deceptive practices and disclosure laws. It would give the consumer a kind of checklist, so that the transaction in question (and any subsequent debt collection contacts) could be evaluated, and it could encourage the consumer to go to court if the checklist revealed defenses. It might describe some recent precedents in which consumer defendants had prevailed with these defenses. Under this system, judges would have to be more open to informal

110. Under this proposal, most courts would have to modify their rules to permit in-court practice by paralegals or by students working for the court or an agency (as opposed to those in clinical law school courses, for whom most court rules have already been changed). We see no great difficulty with this change in the practice rules, since within days, the paralegals or students would, by dint of repetitive practice, be more expert in these proceedings than most lawyers are, and the court could require that they be adequately supervised by an attorney in the agency through which they are paid.

presentations of evidence, but many judges already allow considerable procedural and evidentiary leeway to *pro se* litigants. This alternative plan might not significantly help consumers with limited ability to read or understand the printed materials, but it would be considerably less expensive than providing personnel to assist each defendant.[111]

Some might think that by telling consumer defendants what facts constitute a legally sufficient defense, we would encourage fabrication of those facts. We do not regard that objection as problematic. Elsewhere in the legal system, we do not regard ignorance of the law as desirable; for example, we do not discourage civil or criminal defendants from consulting lawyers before making statements, nor do we make it unethical for lawyers to explain the law to their clients before learning the facts of their cases. We ordinarily regard the right of opposing parties to testify, the use of cross-examination, and the penalty for perjury as sufficient protections against lying.

We acknowledge that our proposals for increasing defendants' participation rate would alter our conventional model of litigation. We normally regard the acquisition of legal advice as the individual problem of any person affected by the court system. Even when we provide free legal help to people, as in the case of civil legal services for poor people or appointed counsel for indigent criminal defendants, the first move in the direction of obtaining such counsel must come from the litigants, who are expected to seek out legal services or request appointed counsel. We propose to thrust at least some legal information, and perhaps a telephoned offer of help, in the direction of litigants who have not asked for it. This may seem to some a drastic incursion on the freedom of litigants to distance themselves completely from the legal process. In our view, however, there is something quite troubling about a sector of the legal system in which the great majority of defendants lose their cases by default. If it is the case that a significant fraction of these defendants do so out of ignorance that they actually possess legal defenses, modifying our model of connecting litigants to legal advice may be warranted.

111. In another way, having an official reach out to the consumer defendants is also superior to providing information with the summons. Two of our interviewees defaulted because of nervousness in court or because they did not find the right courtroom at the right time. Human assistance would probably have helped these two defendants more than a piece of paper could have. Several defendants were apparently advised by the creditor that the case had been discontinued. Written notice could advise defendants to be wary of such claims, but a professional could verify whether cases had really been withdrawn. Four interviewees claimed never to have received the summons; by definition, advice served with the summons could not have helped them, but a telephone call or letter from an official would be an alternate method by which information is delivered. The defendants who could not understand the significance of a summons would probably be better assisted by an official than by a lengthy legal explanation, however clearly written.

APPENDIX
QUESTIONNAIRE

I. INTRODUCTION

1. Introductory statement
2. Would you let me ask you a few questions?
   — If yes, go to question 3.
   — If no, terminate interview.
3. What did you buy that led to this problem?
4. What was the name of the persons or company you were supposed to make payments to?
5. Are there any papers you have regarding the sale or the suit?
   — May I see them?
6. Did you make several purchases, or just one?
   — If several, were they at different times?

II. PROBLEMS WITH THE MERCHANDISE OR SERVICES

If this concerns at least some merchandise, go to question 7.
If no merchandise is involved, go to question 19.

7. Do you have the merchandise with you?
   — If yes, may I see it?
8. Did the seller make any promises about the merchandise?
   — If yes, ask questions 9 - 13.
   — If no, go to question 14.
9. Did the seller say that the merchandise was new?
   — If yes, do you think it was?
10. Did the seller say the merchandise was being sold at a discount?
    — If yes, do you think it was?
11. Did the seller say it was made in a particular place?
    — If yes, do you think it was made where the seller claimed?
12. Did the seller say that the merchandise had any special features?
    — If yes, do you think it had those features?
13. Did the seller say what the merchandise was made of?
    — If yes, do you think that it was made of that material?
14. Did the seller compare the merchandise with another seller's goods?
    — If yes, do you think that the seller was telling the truth?
15. Did the seller claim to have any special expertise or credentials?
    — If yes, do you think that he/she was telling the truth?
16. Did the seller show you a sample of the product?
    — If yes, what did the sample indicate about the merchandise?
17. Did the seller, in writing, claim that the merchandise may not perform in any particular way?
18. Were you dissatisfied with the merchandise?
    — If yes, what complaints do you have?
    — If the merchandise is available, determine what problems listed above, and what other problems, look like reasonable complaints.

— If no services are involved, go to question 26.

19. Are there any promises that the seller made about the services that he/she did not keep?
— If yes, ask questions 20 - 22.
— If no, go to question 23.
20. Did the seller claim that the services were of a special quality?
— If yes, did they have this quality?
21. Did the seller claim any special expertise to perform the services?
— If yes, did the seller have this expertise?
22. Did the seller compare the services with those of a competitor?
— If yes, were the comparisons accurate?
23. Did the seller say that the services were needed?
— Do you think that the services were needed?
24. Did the seller finish performing the services?
25. Did the seller perform any services that you did not want?
26. In your opinion, did the seller lie to you or mistreat you in any other way?

III. The Seller's Method of Getting the Sale

27. How did you hear about the merchandise or services?
— Note the answer, then ask questions 28 - 29.
28. Have you seen any advertisements by the seller?
— If yes, ask questions 30 - 32.
29. Did a salesman come to your home, and did you agree to buy the merchandise or services at your home?
— If yes, ask questions 33 - 38.

For Advertisements:

30. Did the dealer advertise in any misleading way?
— If yes, explain how.
31. Did the advertising condition the sale upon any requirements?
— If yes, describe the conditions and where they were located.
32. After you went to the seller, did he try to convince you to buy something other than what was advertised?
— If yes, please describe what happened.

For Home Solicitation Sales:

33. Did you ever try to cancel the sale?
— If yes, ask questions 34 - 35.
— If no, go to question 36.
34. How did you try to cancel the sale?
35. Please describe the seller's response to your offer to cancel.
36. Did the seller give you a written agreement?
— If yes, may I see it?
— Ask questions 37 - 38.
— If no, go to question 39.
37. Is there [or do you recall] a statement appearing under the caption "BUYERS RIGHT TO CANCEL"?

38. Is there [or do you recall] a statement reading as follows: If this agreement was solicited at or near your residence and you do not want the goods or services, you may cancel this agreement by mailing a notice to the seller. The notice must say that you do not want the goods or services and must be mailed before midnight of the third business day after you signed this agreement. The notice must be mailed to [name and address of the seller].

IV. THE AGREEMENT

39. Before you bought the item(s) or services, how much did you think it (or they) would cost?
40. How much did the item(s) or services really cost?
41. Have you seen the item(s) or services elsewhere for a lower price?
42. How long did you think you had to pay this amount?
43. How long did you really have to pay this amount?
44. How much were you supposed to pay each month?
45. How much did you end up having to pay each month?
46. What interest rate did the seller say he/she would charge you?
47. What interest rate did you really have to pay?
48. Did you sign a contract?
    - — If yes, ask questions 49 - 55.
    - — If no, go to question 56.
49. Did the seller give you a chance to read the contract before you signed it?
50. How much did the contract say you (or the other) had to pay?
51. How long did the contract give you to pay?
    - — Did you expect to have a longer time? If so, why?
52. May I borrow the contract and return it tomorrow?
    - — If yes, answer the questions later.
    - — If no, answer the following questions now.
        - (a) Describe the schedule of payments.
        - (b) Is there a clause providing for an assignment of earnings?
        - (c) What kind of security interest is given?
        - (d) What kind of attorneys' fees are provided for?
        - (e) Does the contract include name, address, and phone number of both the buyer and seller?
        - (f) Does the contract contain a description of the goods or services purchased, including the trade name and model number?
        - (g) If the goods were used, seconds, or damaged, does the contract so specify?
        - (h) If the seller offered insurance, does the contract specify whether the seller could benefit from the coverage?
        - (i) Is the contract contained in a single document?
        - (j) At the top of the first page, is there, in 12-point ex-

trabold type, the words "RETAIL INSTALLMENT CONTRACT"?

(k) If there is information on both sides of the page, do the words "NOTICE: SEE OTHER SIDE FOR IMPORTANT INFORMATION" appear on the first page in boldface type, and do the words "THE TERMS OF THIS CONTRACT ARE CONTAINED ON MORE THAN ONE PAGE" appear on each page in boldface type?

(l) Does the contract disclose the following:

(1) The cash price of the property or services purchased?

(2) The sum of any amounts credited as down payment (including any trade-in)?

(3) The differences between the cash price (#1 above) and amount credited (#2 above)?

(4) All other charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge?

(5) The total amount to be financed (#3 above + #4 above)?

(6) The amount of the finance charge?

(7) The finance charge expressed as an annual percentage rate?

— Not required where finance charge either (a) doesn't exceed $5 and is applicable to an amount financed lower than $75, or (b) doesn't exceed $7.50 and is applicable to an amount financed higher than $75.

(8) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness?

(9) The default, delinquency, or similar charges payable in case of late payments?

(10) A description of any security interest held by the creditor due to the extension of credit, and a clear identification of the property to which the security interest relates?

53. Did the seller deliver a legible and completed copy of the contract before you got the goods?

54. Did you sign a promissory note in connection with the contract?
— If yes, does the promissory note state on its face that "THIS INSTRUMENT IS SUBJECT TO A RETAIL INSTALLMENT CONTRACT?"

55. Did you make any cash payments?
— If yes, did you receive receipts for your payments?

56. Are there any other documents you signed?
— If yes, and if you can see them:
(a) Describe the documents and ask to borrow them.

(b) Ask questions 57 - 64, then go to question 66.

— If no, or if they are unavailable, go to question 65.

57. If any of the disclosures inquired about in #52(1) were not made, were those disclosures made in any of the other documents?
    — If yes, describe the document and when it was received by the consumer.
58. Is there any schedule of payments under which any installment, except the down payment, is not equal or substantially equal, or under which the intervals differ substantially?
    — If yes, describe the schedule of payments.
59. Is there an acceleration provision?
    — If yes, describe the grounds for acceleration.
60. Is there any provision where the buyer agrees not to assert a claim or defense arising from the sale?
61. Is there a provision where the buyer allows the seller to enter on his/her premises to repossess the collateral?
62. Is there a provision where the buyer waives a right of action regarding illegal acts in collecting payments or repossessing the goods?
63. Is there a provision regarding collecting attorneys' fees incurred in collecting the debt?
    — If yes, describe the provision.
64. Is there a provision allowing seller to take possession of the goods upon default without a provision waiving a deficiency judgment?
    — If yes, was this a sale of an automobile?
65. What do you remember about the other documents?
66. Every six months, did the seller send you a statement of accounts listing the interest rate, amounts unpaid, charges, and the dollar amount still to be paid?
    — If no, was this an open-end credit plan?
67. Did the seller offer you money, rebates, or discounts if you would help him/her find other buyers.
    — If yes, please describe what the seller offered.
68. Did the seller require you to get property insurance before he/she would give you credit?
69. Was this an open-end credit plan (was the answer to question 6 "several")?
    — If yes, ask questions 70 - 71.
    — If no, go to question 72.
70. Did the seller disclose the following:
    (a) If the goods were used, seconds, or damaged, did the seller disclose this at the time of sale on a receipt?
    (b) The conditions under which a finance charge may be imposed?
    (c) The method of determining the balance upon which a finance charge will be imposed?

(d) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed?
(e) If periodic rates are imposed, did the seller disclose each rate, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate?
(f) The average effective annual percentage rate of return, or a projected rate of return?
(g) The conditions under which any other charges may be imposed, and the methods by which they are determined?
(h) The conditions under which the creditor may take a security interest, and a description of the interest?
(i) If the seller provided for insurance coverage, did the seller disclose that he/she may benefit from the coverage?

71. For each billing cycle, where there's an outstanding balance or a finance charge imposed, did the creditor transmit a statement setting forth each of the following items to the extent applicable:
(a) The outstanding balance in the account at the beginning of the statement period?
(b) The amount and date of each extension of credit during the period, and, if a purchase was involved, a brief identification (unless previously furnished) of the goods or services purchased?
(c) The total amount credited to the account during the period?
(d) The amount of any finance charge added to the account during the period, itemized to show the amounts (if any) due to the application of percentage rates and the amount (if any) imposed as a minimum or fixed charge?
(e) If periodic rates are used to compute the finance charge, each rate, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate?
(f) Where the total finance charge exceeds 50 cents per month or period longer than a month, the annual percentage rate?
(g) The average effective annual percentage rate of return?
(h) The balance upon which the finance charge was computed and a statement of how the balance was determined?
(i) The outstanding balance in the account at the end of the period?
(j) The date by which, or the period within which, payment must be made to avoid additional finance charges?

V. Missed Payments

72. Did you miss any payments?
— If yes, ask questions 73 - 75.
— If no, go to question 76.

73. Why did you miss any payment or payments?
— List all reasons personal to the consumer, and all reasons relating to distress about the transaction.

74. Within thirty days after you failed to pay, did the seller:
    (a) Require the entire balance to be paid?
    (b) Bring an action against you?
    (c) Try to get any collateral?
75. Within thirty days after you failed to pay, did you try to make your payment?
    — If yes, describe the seller's response.

VI. Collecting the Debt

76. Other than by suing you, did the seller make any efforts to collect the money?
    — If yes, ask questions 77 - 81.
    — If no, go to question 82.
77. Did the seller or someone acting on the seller's behalf try to coerce or threaten you in any way?
    — If yes, please describe what he/she did.
78. Did the seller or someone acting on the seller's behalf unreasonably oppress, harass, or abuse anybody?
    — If yes, please describe what he/she did.
79. Did the seller or someone acting on the seller's behalf unreasonably publicize information about you or your debts?
    — If yes, please describe what he/she did.
80. Did the seller or someone acting on the seller's behalf use any fraudulent, deceptive, or misleading methods to collect the debt or get information?
    — If yes, please describe what he/she did.
81. In your opinion, did the seller or someone acting on the seller's behalf collect or use any other unfair methods to collect the debt?
    — If yes, please describe what he/she did.

VII. Lay Away Plans

82. Did you buy the goods on lay away?
    — If yes, ask questions 83 - 90.
    — If no, go to question 91.
83. Did the seller, clearly and in writing, state the schedule of payments?
84. Did the seller, clearly and in writing, state that the goods will be held by seller and returned to you within 14 days of final payment?
85. Did the seller, clearly and in writing, state all refund and exchange policies?
86. Did the seller, clearly and in writing, state his right to deduct late charges?
87. Did the seller, clearly and in writing, state that you will receive a written statement and receipts regarding all payments you make?
88. Did you try to cancel the lay away plan within two weeks of the sale?

— If yes, what was the seller's response?

89. Was the seller unable to give you the goods or their exact duplicate?
— If yes, what did the seller do?
90. What kind of fees did the seller charge you?

VIII. Specific Questions for Motor Vehicle Transactions

If the transaction did not involve a motor vehicle, go to question 122.

91. Did you receive a contract or invoice?
— If yes, ask questions 92 - 102.
— If no, go to question 103.
92. What kind of information was itemized on the first page of the contract, and how are the captions laid out and typed?
93. Does the contract or invoice bear the certification that all required information is true?
94. Do the last name and license numbers of each salesperson involved in the sale appear on the contract or invoice?
95. Does the first page of the contract have space for the signatures of the buyer and seller?
96. Are the printed portions in 8-point type?
97. On the first page of the contract, is the following notice printed or typed in boldface no smaller than 14-point on the first page: NOTICE TO PURCHASER: IT IS AGAINST THE LAW FOR THE SELLER TO PERMIT OR REQUEST YOU TO SIGN THIS DOCUMENT BEFORE ALL BLANKS ABOVE HAVE BEEN FILLED IN BY THE SELLER AND HE HAS SIGNED THIS PAPER CERTIFYING THAT THE ABOVE INFORMATION IS CORRECT.
98. Describe any statement of insurance coverage.
99. Was the original invoice delivered at the time of the sale?
100. Was a copy of the contract given to you when you signed the security agreement?
101. Did the seller request any amounts in excess of the amounts in the contract?
102. Describe any waiver provisions in the contract.
103. Did the seller require you to buy insurance?
— If yes, describe the coverage and the payments required.
104. How much was the finance charge?
105. Describe the schedule of payments.
106. Did the seller charge you for a warranty or a guarantee?
107. Did you receive receipts for all your cash payments?
108. Did the seller take the car away?
— If yes, ask questions 109 - 119.
— If no, go to question 120.
109. Did you try to get the car back by paying for it?
— If yes, ask questions 110 - 111.

— If no, go to question 112.
110. When did you try to get it back?
111. What did you try to pay the seller for the car?
112. Describe how the seller got the car.
113. If the cash price of the car was $2000 or less, did the seller try to get the unpaid balance after he/she took the property?
114. How much do you think you could have sold the car for?
115. Did you damage the car in any way?
116. Did you refuse to give the seller the car?
117. Did the seller indicate that failure to make payment could result in harm to yourself or your property?
118. Within 5 days of the repossession, did you get a notice?
— If yes, what did the notice contain?
119. Did you try to get the car back?
120. Did the salesperson show you an identification card?
121. Did you ever try to pay the balance early?
— If yes, please describe your efforts.

IX. THE DEFAULT

122. Did you know that you were being sued before the case came up in court?
— If yes, ask questions 123 - 140.
— If no, go to question 141.
123. How did you find out?
124. Note whether the answer to question 123 differs from the affidavit of service in the file.
125. What did you think was happening to you?
126. Did you go to court on the day specified in the court paper?
— If yes, ask question 127 and go to question 140.
— If no, go to question 128.
127. Tell me what happened in court.
128. Please tell me all your reasons for not showing up to court.
129. Did you think that the court action was cancelled?
— If yes, ask questions 130 - 132.
— If no, go to question 133.
130. Did you think that you settled the case?
131. Were you advised by anybody not to go to court?
— If yes, who told you that?
132. What else made you think that the court action was cancelled?
133. Were you unable to go because of illness?
134. Were you reluctant to lose a day's pay from work?
135. Did you forget about going to court?
136. Did you think that you had no defenses?
137. Did you receive the summons too late to go to court?
138. Were you afraid to go to court?
139. Would it have been too difficult to travel to the court building?
140. Could you read and understand the summons?

141. Do you think that the seller had a right to bring a court action against you and ask for money from you?
— If no, why not?
142. Do you think that you lost in court?
143. Did you ever think that you might have won in court?
144. Did you ever think about getting a lawyer to help you?
— If yes, why didn't you?
— If no, why not?

X. Characteristics of Consumer

145. Note obvious characteristics of consumer.
(a) Note ethnicity.
(b) Note gender.
(c) Note any language difficulty.
(d) Note any obvious infirmity.
146. How old are you?
147. Are you employed?
— If so, what is your job and employer?
148. In which of the following ranges does your annual income fall?
(a) 0 - 5,000.
(b) 5,000 - 10,000.
(c) 10,000 - 15,000.
(d) 15,000 - 20,000.
(e) 20,000 - 25,000.
(f) 25,000 - 30,000.
(g) over 30,000.
149. What grade did you complete in school?
(a) 5th grade or below.
(b) 6th - 8th grade.
(c) 9th - 12th grade.
(d) College graduate.
(e) Graduate or professional school.
150. How many people are in your household?
— How old are they?
— Are any of them working?
151. Is there a phone number I can reach you at in case I have any further questions?