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# Constitutional Law -- Debtor-Creditor Relations -- Fuentes v. Shevin: Due Process for Debtors

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# NOTES

## Constitutional Law—Debtor-Creditor Relations—Fuentes v. Shevin: Due Process for Debtors

In most states prior to June 12, 1972,[1] any person could avail himself of a statutory summary procedure known variously as "replevin,"[2] "claim and delivery,"[3] "detinue,"[4] and "sequestration"[5] to seize property in the hands of another by the simple expedient of alleging a right to possession and posting bond. A writ of possession would issue, usually conditioned upon the claimant's initiating a later court action to determine the rights of the respective parties to the property.[6] A defendant's bond provision was available in most states to enable the defendant to recover the disputed property pending the outcome of litigation on the issue of right to possession.[7] There was, however, no notice and no opportunity for the dispossessed party to challenge the claimant's right to possession before seizure of the property.[8]

These summary prejudgment replevin statutes have had a long and curious history. One of their ancestors was the writ of replevin, developed in England over 700 years ago to correct abuses that accompanied the widespread use of "distress," a self-help device by means of which a powerful creditor (usually a feudal baron) appropriated chattels of a debtor (usually his tenant) to compel payment of a debt of money or service.[9] Replevin permitted the alleged debtor to recover his property pending adjudication of the underlying dispute. The writ of replevin was thus, at early common law, a remedy for the debtor, rather than for the creditor.[10]

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[1]This was the date the Supreme Court's decision in *Fuentes v. Shevin* was handed down. 92 S. Ct. 1983 (1972).

[2]*See, e.g.*, ILL. ANN. STAT. ch. 119, §§ 1-27 (Smith-Hurd 1954).

[3]*See, e.g.*, MINN. STAT. ANN. §§ 565.01-.11 (1947).

[4]*See, e.g.*, VA. CODE ANN. §§ 8-586 to -595 (1957).

[5]*See, e.g.*, TEX. REV. CIV. STAT. ANN. arts. 6840, 6844-48, 6858 (1960).

[6]*See, e.g.*, CONN. GEN. STAT. ANN. § 52-518 (1960).

[7]*See, e.g.*, CAL. CIV. PRO. CODE § 514 (West 1954).

[8]The National Legal Aid and Defender Association, in its Amicus Curiae Brief for Fuentes v. Shevin, 92 S. Ct. 1983 (1972), undertook a comprehensive survey of the prejudgment replevin statutes of all the states. The results are tabulated in Appendix A of the brief. Typical replevin procedures are described in greater detail in Comment, *Laprease and Fuentes: Replevin Reconsidered*, 71 COLUM. L. REV. 886, 888-90 (1971) [hereinafter cited as *Replevin Reconsidered*].

[9]J. COBBEY, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN 1, 22-23 (1890).

[10]*Replevin Reconsidered* 887; *see* Abbott & Peters, *Fuentes v. Shevin: A Narrative of Federal*

Another ancient ancestor of the modern statutes was the writ of detinue. This remedy differed from replevin in that detinue was used where chattels were wrongfully withheld, rather than wrongfully taken.[11] Further, there was no recovery of the property by the plaintiff until final adjudication. The defendant was rather commanded to appear and show why the property should not be delivered to the plaintiff.[12]

The modern replevin statutes were a merger of aspects of both writs, providing the prejudgment recovery of the property whether alleged to have been wrongfully taken in the first instance or only wrongfully withheld.[13] The modern statutes have become a creditor's remedy,[14] used typically by a secured seller of goods summarily to recover his merchandise upon default of payments by the purchaser.

Until recently, there had been notable absence of constitutional challenge to these time-honored procedures.[15] But in 1969, a landmark decision, *Sniadach v. Family Finance Corp.*,[16] cast considerable doubt on the constitutionality of summary prejudgment creditors' remedies. *Sniadach* involved a Wisconsin wage garnishment statute[17] which permitted a general creditor to garnish the wages of anyone he claimed was indebted to him by having summons issued pursuant to an action to adjudicate the debt and paying a token clerk's fee and suit tax. The Supreme Court held that in "extraordinary situations" such a procedure might be constitutional,[18] but absent such circumstances procedural due process was not met where one's wages were frozen without notice and an opportunity to be heard.[19] Mr. Justice Harlan, in a separate concur-

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*Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955, 963 (1972) [hereinafter cited as Abbott & Peters].

[11]*Replevin Reconsidered* 888.

[12]Brief for Appellant at 15, Fuentes v. Shevin, 92 S. Ct. 1983 (1972); Abbott & Peters 164.

[13]Brief for Appellant at 16, Fuentes v. Shevin, 92 S. Ct. 1983 (1972); *Replevin Reconsidered* 888.

[14]Abbott & Peters 963; *Replevin Reconsidered* 887.

[15]Recent Decisions, *Constitutional Law—Fourth and Fourteenth Amendments—New York Civil Practice Law and Rules, Article Seventy-One—Prejudgment Seizure Of Chattels in a Replevin Action Without an Order by a Judge Or of a Court of Competent Jurisdiction Is Unconstitutional*, 35 ALBANY L. REV. 370 (1971), suggests two possible reasons for this singular absence of challenge: the weight gathered from years of use and the fact that "most actions involving prejudgment seizures of chattels involved the poor who were not able to muster enough backing to fight such a procedure." *Id.* at 377.

[16]395 U.S. 337 (1969).

[17]WIS. STAT. ANN. §§ 267.01-.22 (1957).

[18]395 U.S. at 339.

[19]*Id.* at 339, 342.

ring opinion, questioned the constitutionality of even temporary deprivation of petitioner's wages without the kind of notice and hearing "aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use."[20] For Justice Harlan, even temporary seizure of a property interest that "cannot be characterized as *de minimis*" must be predicated on "the usual requisites of procedural due process."[21]

*Sniadach* stressed the importance of the subject matter of the suit—the fact that the petitioner's earnings were being subjected to summary seizure. "We deal here with wages—a specialized type of property presenting distinct problems in our economic system."[22] The decision was thus open to differing interpretation as to whether it applied only to wage garnishment actions (or at least actions subjecting the "necessities" of life to summary prejudgment seizure)[23] or whether it should be interpreted broadly to apply the requirements of procedural due process to "the entire domain of prejudgment remedies."[24] The Supreme Court's own reading of *Sniadach* was less than clear as to its intended sweep.[25]

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[20]*Id.* at 342-43 (emphasis by the Court).

[21]*Id.* at 342.

[22]*Id.* at 340.

[23]For a painstaking examination of this question *see* Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335, 1341-48 (E.D. Pa. 1971). For cases limiting *Sniadach* narrowly to its facts *see, e.g.*, Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971); Termplan v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969).

[24]Randone v. Appellate Dept., 5 Cal. 3d 536, 547, 488 P.2d 13, 19, 96 Cal. Rptr. 709, 715 (1971) (quoted with approval in *Fuentes*. For other cases construing *Sniadach* broadly *see, e.g.*, Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

[25]Two cases seemed to invoke *Sniadach* only for its special treatment of wages as a uniquely important form of property interest: Lines v. Frederick, 400 U.S. 18 (1970) (bankrupt's accrued vacation pay a "specialized type of property," which did not pass to the trustee in bankruptcy); Goldberg v. Kelly, 397 U.S. 254 (1970) (summary prejudgment termination of welfare benefits an unconstitutional denial of procedural due process). Other cases seemed to make the constitutional requirement of procedural due process turn on the importance of the property interest, although clearly extending *Sniadach* to interests less vital than wages. Bell v. Burson, 402 U.S. 535 (1971), cited *Sniadach* for the proposition that state action which adjudicated "important interests" of an individual require the safeguards of procedural due process and found that suspension of a driver's license was state action of this nature. *Id.* at 539-40. Wisconsin v. Constantineau, 400 U.S. 433 (1971), spoke of "the line" which divides protected and non-protected property interests and held that reputation interests affected by the Wisconsin procedure permitting "posting" to prohibit sale of liquor to any individual believed to be an excessive drinker fell on the protected side of the line. *Id.* at 436-37.

The scope of *Sniadach* was clarified, however, by the recent Supreme Court holding in *Fuentes v. Shevin.*[26] *Fuentes* and *Parham v. Cortese* (decided together) held the prejudgment replevin statutes of Florida and Pennsylvania unconstitutional as permitting repossession of goods under a conditional sales contract without prior notice and opportunity for a hearing. In *Fuentes,* petitioner-appellant Margarita Fuentes had purchased a gas stove and service policy and a stereo phonograph from Firestone Tire and Rubber Company. Alleging default under the provisions of the contract, Firestone instituted a small claims action, concurrently obtaining a writ of replevin through which the disputed goods were seized by the sheriff. Mrs. Fuentes then brought suit in federal district court, challenging the constitutionality of the Florida procedure under the due process clause of the fourteenth amendment.[27] The district court, in *Fuentes v. Faircloth,*[28] followed the minority of jurisdictions that had interpreted *Sniadach* as limited to its own facts. It specifically followed the interpretation of *Brunswick Corp. v. J & P, Inc.*,[29] which stated that *Sniadach* "was a unique case involving, [*sic*] 'a specialized type of property presenting distinct problems in our economic system.' "[30] It emphasized the recovery provision of the conditional sales contract as sufficient to authorize prejudgment replevin of a creditor's security interest without the necessity of a prior hearing.[31]

The Supreme Court in *Fuentes v. Shevin* rejected a narrow reading of *Sniadach* and instead approved the interpretation that had been given that case in *Randone v. Appellate Department.*[32] There the court stated, "*Sniadach* does not mark a radical departure in constitutional adjudication. It is not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court."[33]

If the requirements of *Sniadach* were not limited to wage garnishment actions, neither were they confined to deprivations of other "specialized" forms of property. *Fuentes* made it clear that "[t]he Fourteenth Amendment speaks of 'property' generally. . . . It is not the

[26] 92 S. Ct. 1983 (1972).

[27] *Id.* at 1989.

[28] 317 F. Supp. 954 (S.D. Fla. 1970), *rev'd sub nom.* Fuentes v. Shevin, 92 S. Ct. 1983 (1972).

[29] 424 F.2d 100 (10th Cir. 1970).

[30] *Id.* at 105.

[31] 317 F. Supp. at 958.

[32] 5 Cal. 3d 536, 488 P. 2d 13, 96 Cal. Rptr. 709 (1971).

[33] *Id.* at 550, 488 P.2d at 22, 96 Cal. Rptr. at 718, *quoted,* 92 S. Ct. at 1998 n.22.

business of a court adjudicating due process rights to make its own critical evaluation of [property interests] and protect only the ones that, by its own lights, are 'necessary.' "[34] The Court adopted the broader view of Justice Harlan's concurring opinion in *Sniadach* requiring effective procedural due process before deprivation of any property interest that is not de minimis.[35] The "specialized type of property" language of *Sniadach,* which had formed the nucleus of controversy among the lower courts, was explained to be only an expression of emphasis not intended to limit the procedural due process requirement to deprivations of the necessities of life.[36]

In reversing the lower court and holding *Sniadach* controlling, the Supreme Court nevertheless restated its earlier pronouncements that "[t]here are 'extraordinary situations' that justify postponing notice and opportunity for a hearing."[37] At the same time, the Court was careful to exclude state goals of mere judicial economy or economic efficiency as justification for such delay.[38] The Court examined some "extraordinary situations" in which it had allowed seizure of property without tpportunity for prior hearing "to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated foods."[39] In each instance it found crucial common elements:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[40]

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[34] 92 S. Ct. at 1999.

[35] 395 U.S. at 342-44; *see* 92 S. Ct. at 1999 n.21, 2002-03.

[36] 92 S. Ct. at 1998.

[37] *Id.* at 1999, *citing* Boddie v. Connecticut, 401 U.S. 371, 379 (1971). *See* Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969); Phillips v. Commissioner, 283 U.S. 589, 597 (1931).

[38] 92 S. Ct. at 1999 n.22. The court in Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), *rev'd sub nom.* Parham v. Cortese, 92 S. Ct. 1983 (1972), had balanced these interests of the state in conserving its financial resources and administrative time together with the security interests of the creditor and had found them to outweigh the buyer's right not to be deprived temporarily of property before a hearing.

[39] 92 S. Ct. at 2000 (citations omitted).

[40] *Id.*

The Court denounced summary seizure "when no more than private gain is directly at stake. The replevin of chattels, as in the present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health."[41]

In addition to outright seizures, however, the Court noted cases permitting *attachment* of property without prior notice and opportunity to be heard, and observed that these cases also required an important public interest.[42] Attachment was thus classed with seizure as requiring a "truly unusual" and "extraordinary" situation before the constitutional requirement of procedural due process could be dispensed with. The Court cited *Ownbey v. Morgan*,[43] and commented that "attachment necessary to secure jurisdiction in state court" was "clearly a most basic and important public interest."[44] The inclusion of *Ownbey* suggests, nonetheless, approval of attachment (and by analogy, seizure) prior to notice and hearing to serve interests that are not altogether public. The basis for permitting such seizure is the need for a state to protect the interests of its citizens in obligations owed them by nonresidents.[45] It is readily apparent that the primary interest involved is not that of the state but that of its citizens—private individuals. This type of interest is easily distinguishable from the kinds of "governmental" and "general public" interests otherwise adverted to by the Court.

The Court implied that certain situations involving only private interests may fall within the category of "extraordinary circumstances" justifying summary prejudgment seizure of property: "There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."[46] Since *Fuentes* did not present the issue, the Court did not say directly what would be the creditor's prerogative should the statute require a showing of such danger of destruction or concealment and should he be able to make such a showing. In the Court's observation of what was lacking in the statutes, however, there is the strong suggestion that if the missing elements were supplied, the law might be acceptable.[47]

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[41]*Id.*

[42]*Id.* at 1999 n.23.

[43]256 U.S. 94 (1921).

[44]92 S. Ct. at 1999 n.23.

[45]Pennoyer v. Neff, 95 U.S. 714, 723 (1878).

[46]92 S. Ct. at 2000-01.

[47]*Id.* at 2000. In *Sniadach*, too, the Court made a similar implication when it stated that

The case for the creditor in *Fuentes* was a strong one.[48] In addition to the weight of years of unchallenged use of summary prejudgment replevin, there were several specific factors that weighed in favor of permitting summary seizure: (1) The creditor had retained title and had, at the time of repossession, a substantial security interest in the merchandise; (2) the dispossession was only temporary, pending litigation, which the replevying party was required by law to initiate and prosecute promptly;[49] (3) Florida required the party invoking its replevin law to post bond of at least double the value of the goods;[50] (4) the statute provided for recovery of the property by the party replevied against upon posting of a counterbond;[51] and (5) the conditional sales contract under which the stove and stereo were purchased provided that the seller at his option could repossess the goods upon default of any payment. Each of these factors was noted and argued persuasively in the brief for the appellee,[52] but each was answered and disposed of by the Court.

The protection afforded by the fourteenth amendment is not reserved exclusively for interests of legal ownership, but extends as well to possessory interests.[53] The Court noted that Mrs. Fuentes had acquired the right to possession and use of the disputed goods, which was a property interest "sufficient to invoke the protection of the Due Process Clause."[54] Although this right to possession was conditioned upon continued payment of installments toward purchase, there might have been some defense to non-payment. But even if there were obvious default without apparent excuse, the right to prior notice and opportun-

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garnishment might be constitutional "in extraordinary situations [citing *Ownbey, inter alia*]. But in the present case no situation requiring special protection to a state or *creditor* interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition." 395 U.S. at 339 (emphasis added). The Court seems to suggest, though, that the only creditor interest sufficient to remove the need for prior hearing is an interest in obtaining jurisdiction to adjudicate his claim. *Id.* Despite the vagueness of both *Sniadach* and *Fuentes* on this point, it seems likely that a narrowly drawn provision limiting seizure without notice or opportunity for hearing to those "extraordinary situations" in which it could be demonstrated to the satisfaction of an appropriate state official that the creditor's security interests were indeed in danger of destruction or concealment would not be found unconstitutional.

[48]The following analysis refers only to the dispute between Mrs. Fuentes and Firestone.

[49]FLA. STAT. ANN. § 78.07 (1964).

[50]*Id.*

[51]*Id.* § 78.13 (1964). "Counterbond" is the Supreme Court's term. 92 S. Ct. at 1993.

[52]Brief for Appellee Firestone Tire & Rubber Co. at 44-51, Fuentes v. Shevin, 92 S. Ct. 1983 (1972).

[53]92 S. Ct. at 1997.

[54]*Id.*

ity for a hearing would not be obviated.[55] The dissent accused the majority of ignoring "the creditor's interest in preventing further use and deterioration of the property in which he has substantial interest."[56] It might be observed, however, that the creditor's security interest, like the continued possessory interest of the purchaser, was contingent. Both interests turned upon default of the purchaser without defense, which could only be determined at an evidentiary hearing.

The Court noted the temporary nature of the summary dispossession under the Florida statute, but refused to draw a distinction between permanent and "temporary, nonfinal" deprivations for purposes of procedural due process:[57] "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause."[58]

The Court quickly disposed of the appellee's argument that the bonding requirements of Florida's replevin law, together with available legal remedies for abuse of process, wrongful attachment, and malicious prosecution, served to protect the replevin defendant against frivolous dispossession[59] by noting simply that these "less effective" safeguards were "no substitute for an informed evaluation by a neutral official."[60] Not only are these deterrents uncertain,[61] but "as a matter of constitutional principle," they are no substitute for the affirmative constitutional right to a prior hearing, which is "the only truly effective safeguard against arbitrary deprivation of property."[62]

The counterbond provision suffers as a safeguard from the same deficiencies as the bond provision, with the additional defect that the typical replevin defendant will seldom be able to afford it.[63] The Court

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[55]*Id.*

[56]*Id.* at 2005.

[57]*Id.* at 1996.

[58]*Id.* at 1997.

[59]Brief for Appellee Firestone Tire & Rubber Co. at 46-47, Fuentes v. Shevin, 92 S. Ct. 1983 (1972).

[60]92 S. Ct. at 1996.

[61]The bad faith creditor can gamble that the alleged debtor will not know of the remedies available to him, or knowing of them, will not elect to pursue them. Another real problem is that the debtor, often impecunious, may not have the resources to pursue his remedies. Further, the replevin plaintiff knows he will recover his bond if the defendant fails to appear to litigate, or appearing, is unable effectively to present his defenses. *See id.* at 1995 n.13.

[62]*Id.* at 1996.

[63]For a discussion of the inequities of these bonding provisions in the context of attachment, see Alexander, *Wrongful Attachment Damages Must be Fixed in the Original Suit,* 4 U.S.F.L.

noted that the Wisconsin garnishment statute in *Sniadach* had a similar counterbond recovery provision,[64] and yet there Justice Harlan, in his concurring opinion, stated that the requirements of notice and hearing were not satisfied "by the fact that relief from the garnishment may have been available in the interim under less than clear circumstances."[65]

The last major issue dealt with by the Court was the issue of whether the replevin defendants waived their procedural due process rights by signing the conditional sales contract providing for repossession in the event of default of payments. While agreeing that this right could be contractually waived, the Court held that there was no such waiver under the facts of *Fuentes*.[66] The Court relied on its recent decision in *D.H. Overmyer Co. v. Frick Co.*,[67] which outlined the requirements for a valid contractual waiver of due process rights. In *Overmyer* the Court upheld such a waiver provision but stated that if it were part of an adhesion contract and no consideration were given for the waiver, "other legal consequences may ensue."[68] The suggestion by the Court is clear that the "purported waiver provision" in *Fuentes* was part of a contract of adhesion.[69] Aside from the adhesion contract problem, however, the Court found that the purported waiver was not in fact a waiver, since it provided only that the seller, upon default of payments by the buyer, could repossess. "The contracts included nothing about the waiver of a prior hearing."[70] Indeed, there was no clear statement of the process by which the goods would be repossessed.[71]

The Supreme Court gave the due process clause of the fourteenth

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REV. 38, 39-42 (1969). *See* Brief for Appellant at 22, Fuentes v. Shevin, 92 S. Ct. 1983 (1972).

[64]92 S. Ct. at 1996 n.15.

[65]395 U.S. at 343.

[66]92 S. Ct. at 2001-02.

[67]92 S. Ct. 775 (1972).

[68]*Id.* at 783. In *Overmyer,* two corporations, negotiating through their respective lawyers, executed a cognovit note. The Court found that Overmyer had "voluntarily, intelligently and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing." *Id.* In invoking the standard of waiver applicable to a criminal proceeding, the Court did not impose this standard upon cases involving only property rights but merely noted that *if* such standard applied, it was met in the *Overmyer* case. *Id.* at 782. It might not be too much to speculate in this era of concern for consumer rights, however, that the "voluntary, intelligent and knowing" standard for waiver of constitutional rights in a criminal proceeding may be adopted for protection of property rights. *Cf.* Swarb v. Lennox, 92 S. Ct. 767 (1972).

[69]92 S. Ct. at 2002.

[70]*Id.*

[71]*Id.*

amendment a broad reading in *Fuentes*. It held that except in "extraordinary situations" or where there has been a valid waiver, notice and an opportunity to be heard must precede the deprivation of any property interest that cannot be characterized as de minimis. Even a temporary, nonfinal deprivation of nonessential property to which the possessor has only possessory rights is not a de minimis property interest. Although this procedural due process right can be waived, it will admit of no substitute. Bond and counterbond provisions and civil remedies are "lesser safeguards" that will not suffice to replace the provisions of the fourteenth amendment.

Following *Sniadach*, but before *Fuentes*, it was suggested that general creditor attachment would be unconstitutional, except in situations involving purely commercial interests or where there is demonstrated danger of destruction or concealment of the object of attachment.[72] Since the general creditor, unlike the seller on conditional contract, has no specific property interest in the property to be attached, it would seem more clear after *Fuentes* that summary general creditor attachment will be unable to withstand constitutional attack, at least where the action is against a resident debtor and there is no demonstrated danger of destruction or concealment of the property.[73]

What recourse remains for the secured creditor after *Fuentes*? Claim and delivery as it has been practiced is clearly no longer possible.[74] Legislative change is required for the North Carolina claim and delivery statute.[75]

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[72]Comment, *The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A.L. REV. 837, 845-49 (1970).

[73]Like the attachment laws of most states, the North Carolina law in this area appears to be drawn narrowly. *See* N.C. GEN. STAT. § 1-440.3(4), (5) (1969). If danger of concealment or destruction is within the "exceptional circumstance" exception of *Fuentes*, it would seem that this North Carolina law is constitutional. The continuing validity of *Ownbey* supports the use of attachment to secure quasi in rem jurisdiction over foreign debtors. *Cf.* N.C. GEN. STAT. § 1-440.3(1)-(3) (1969).

[74]Immediately after the *Fuentes* decision was handed down, a memorandum issued from the North Carolina Administrative Office of the Courts to the North Carolina judiciary, advising that the North Carolina claim and delivery provisions were unconstitutional. Memorandum from Taylor McMillan to Chief District Judges, June 15, 1972.

[75]The North Carolina claim and delivery statute is found in N.C. GEN. STAT. §§ 1-472 to -484 (1969). In advance of legislative change by the General Assembly, procedure has been judicially established for Mecklenburg County in Campbell v. Wofford, No. 72-CvD-8375 (Mecklenburg County Dist. Ct. Aug. 8, 1972), for the use of claim and delivery with appended *Fuentes* safeguards. This procedure includes provision for notice and hearing before the Clerk or Assistant Clerk of Superior Court, except where an "extraordinary situation" (defined as immediate danger to the security interests of the plaintiff) is found by the clerk to exist, or where the clerk finds a valid

A primary requisite for a constitutional claim and delivery statute is a provision for notice and opportunity for hearing prior to issuance of the claim and delivery order, except where there is a valid waiver, or where there are "exceptional circumstances." However, *Fuentes* emphasizes that the hearing for which opportunity must be given the defendant need not be a formal one. The scheduling, nature, and form of the hearing may depend upon "the simplicity of the issues,"[76] the relative importance of the property interest involved,[77] and even the apparent likelihood of the defendant's succeeding on the merits.[78] The Court stated that "the nature and form of such prior hearings . . . are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication."[79]

There may be room under *Fuentes* for a narrow provision permitting claim and delivery prior to notice and hearing where the plaintiff can present evidence that destruction or concealment by defendant is likely.[80] Presumably, the requirements for this provision are analogous to those for a temporary restraining order, another ex parte proceeding. If so, likelihood of irreparable harm to the plaintiff would justify the interposition of the court.[81]

It is emphasized by *Fuentes* that only an "opportunity" for hearing is required. A hearing need not be held if the defendant, having been given notice of his opportunity to be heard, elects not to appear to present his defenses.[82] Accordingly, for convenience of the parties and to conserve judicial time, provision could be made for a waiver[83] of this hearing, executed in writing before an officer of the court.[84]

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contractual waiver, together with a finding of probability that the defendant "voluntarily, intelligently and knowingly" made such a waiver.

[76]92 S. Ct. at 1998 n.18.

[77]*Id.* at 1999 n.21.

[78]*Id.* at 2002 n.33.

[79]*Id.* at 2002.

[80]Compare requirements for attachment in N.C. GEN. STAT. § 1-440.3(5) (1969).

[81]*Cf.* FED. R. CIV. P. 65; N.C.R. CIV. P. 65(b).

[82]92 S. Ct. at 2000 n.29.

[83]This waiver of the right to a hearing after notice has been provided should not be confused with a contractual waiver of the right to notice and hearing discussed below. The difficulties which attend the latter are much less troublesome where the waiver comes after notice when the replevin defendant is more likely to be aware of the significance of this act.

[84]A recent undated memorandum prepared by Roger Hendrix for Wachovia-American Credit Corp. outlined suggested legislative action for the 1973 North Carolina General Assembly to conform North Carolina law to the requirements of *Fuentes*. An appendix to this memorandum includes a suggested waiver form.

In addition to statutory remedy, it may be possible for a purchaser under a conditional sales contract to waive his procedural due process rights contractually within the bounds of *Fuentes*.[85] However, in view of the presumption against waiver of constitutional rights,[86] the strong tendency of courts to refuse enforcement of terms highly disadvantageous to the weaker party in contracts of adhesion,[87] and the fact that such a purported waiver will have been executed prior to the time when most consumer defenses arise (making it likely that the waiver was not made with full awareness of its consequences),[88] it seems unlikely that such a waiver could be enforced in the typical consumer context. At the very least, a contractual waiver would have to be clear and unequivocal, leaving no doubt that the purchaser or borrower is agreeing not only to return or collection per se, but also to return or collection without notice or an opportunity to present any defenses.[89]

Another creditor's remedy is self-help. However, where these acts expressly rely upon Uniform Commercial Code sections 9-503 and 9-504, their constitutionality is in dispute, as evidenced by recent conflicting U.S. District Court decisions in California.[90]

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[85]*Cf.* note 75 *supra*, describing the Mecklenburg County procedure.

[86]Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 307 (1937). These two cases were cited in *Fuentes*. 92 S. Ct. at 2001 n.31.

[87]*See* Shuchman, *Consumer Credit by Adhesion Contracts*, 35 TEMPLE L.Q. 125, especially cases cited at 132-34 (1962). See also UNIFORM COMMERCIAL CODE § 2-302; N.C. GEN. STAT. § 25-2-302 (1971). In the context of secured sales agreements, *see, e.g.*, Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970).

[88]Brief for Appellant at 28, Parham v. Cortese, 92 S. Ct. 1983 (1972).

[89]*See* 92 S. Ct. at 2002.

[90]Since Fuentes is a fourteenth amendment decision, 92 S. Ct. at 1996, "state action" must be present in any deprivation of property to which it is sought to be applied. Adickes v. S.H. Kress & Co., 398 U.S. 144, 169 (1970). Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), found the necessary state action component in the implementation through private contractual agreements of state policy embodied in §§ 9503-04 of the California Commercial Code. *Id.* at 617. The court cited Reitman v. Mulkey, 387 U.S. 369 (1967), as authority for its determination that mere encouragement by state law of private acts inconsistent with constitutional mandate was sufficient to bring those acts within the control of the fourteenth amendment. 338 F. Supp. at 617. The Code provisions were therefore held unconstitutional, and the acts of repossession in reliance on the Code provisions were held illegal. *Id.* at 622. Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972), reached the opposite conclusion, however, by refusing to find state action in private contracts providing for self-help along the lines of the Uniform Commercial Code provisions. The *Oller* court felt that *Reitman*, dealing as it did with racial discrimination, was not controlling in a debtor-creditor context: "The historical, legal and moral considerations fundamental to extending federal jurisdiction to meet racial injustices are simply not present in the instant case." *Id.* at 23. It should be noted that California Commercial Code § 9503 adopts the Official Text of the Uniform Commercial Code without change. California Commercial Code § 9504 substantially adopts the Official

The economic impact of *Fuentes* has yet to be demonstrated. The dissent expressed concern that "the availability of credit may well be diminished or, in any event, the expense of securing it increased."[91] It seems probable, though, that the requirements of *Fuentes* will have minimal effect on consumer credit. Only where the debtor is willing to destroy or conceal the goods would the creditor's risk be appreciably increased by the requirement of notice before seizure. And if this is indeed an "extraordinary circumstance," then *Fuentes* does not preclude seizure without notice. Moreover, even where required, the expense of procedural due process need not be substantial, since informal hearings may suffice in many cases[92] and may probably be waived[93] in others. It seems probable that the prophecy of the dissent in *Fuentes* will not materialize.

KENT WASHBURN

**Constitutional Law—First Amendment—Shopping Centers and the "Quasi-Public" Forum**

That "freedom of speech" involves something more than a federal and state[1] laissez-faire attitude toward expression is hardly a novel concept.[2] The Supreme Court has typically asserted that an affirmative "maintenance of the opportunity for free political discussion . . . is a

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Text, but makes the notice provisions more specific. CAL. COMM. CODE ANN. § 9503-04 (1964).

[91]92 S. Ct. at 2005. This same fear was expressed by the court in *Adams*. 338 F. Supp. at 622. The same argument was made in support of the California summary attachment procedure to the court in *Randone*—and was rejected. Randone v. Appellate Dept., 5 Cal. 3d 536, 555-56, 488 P.2d 13, 24-26, 96 Cal. Rptr. 709, 721-22 (1971); *see* Comment, 17 U.C.L.A.L. REV., *supra* note 72, at 846. Collection agencies also had argued that wage garnishment was essential to the economy, but an empirical study has indicated that "the extension of consumer credit is unrelated to garnishment laws." Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1240 (1965).

[92]*See* text accompanying notes 76-79 *supra*.

[93]*See* text accompanying notes 83-84 *supra*.

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[1]The first amendment reaches the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652 (1925).

[2]*See, e.g.*, Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 559 (1941). Professor Barron maintains that "[a]s a Constitutional theory for the communication of ideas, laissez-faire is manifestly irrelevant." Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1656 (1967).