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CONSTITUTIONAL ATTACKS ON CREDITORS' SELF-HELP REPOSSESSION RIGHTS UNDER U.C.C. SECTION 9-503—DEVELOPMENTS IN ILLINOIS SECURED TRANSACTIONS

Michael I. Spak* and Donald F. Spak**

The nationwide attacks on creditors' right of self-help in repossession cases has culminated this year in significant judicial developments affecting rights and obligations of debtors in secured transactions. The authors examine the recent Illinois decisions interpreting Article Nine of the Uniform Commercial Code. In an analysis of Sniadach, Fuentes, and other decisions radically altering the "freedom of contract" doctrine, Messrs. Spak consider the constitutionality of prejudgment repossession under the UCC; they reluctantly conclude that repossession statutes are not illegal, notwithstanding the deprivation of due process by individual secured creditors.

INTRODUCTION

Since the previous survey of secured transactions appeared two years ago,1 the Illinois courts have decided a number of interesting cases involving the interpretation and application of Article Nine of the Uniform Commercial Code. These cases have involved deficiency balances and judgments, dealers in the ordinary course of business, and fixtures. Furthermore, the last two years have witnessed continued constitutional challenges to the self-help repossession provisions of Article Nine. A discussion of these developments follows.

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I. RECENT ILLINOIS DECISIONS
Deficiency Balance and Judgments

The focal case regarding judgments upon deficiency balances after the sale of the collateral by the creditor is Tauber v. Johnson. In this case the First District Appellate Court considered the appropriate remedy to be applied (1) where the debtor is not properly notified of the intended sale of the collateral, and (2) where the interest rate was usurious under Illinois law. The trial court ruled that the contract was legal and enforceable, but only to the legal rate of interest. The debtor appealed the ruling, contending that the entire contract should be unenforceable because the interest rate was illegal. The appellate court, through Justice English, affirmed the trial court by holding that the statute, which applies criminal liability to a person who knowingly violates the statute, merely makes the excessive interest provision unenforceable. The court "cannot read into the statute an additional general penalty declaring the entire contract void if any of its provisions are violated."

The second issue before the Tauber court, whether the deficiency balance is collectable even though the creditor had not fully complied with the notice provisions of section 9-507, is of somewhat wider interest. One year before, in Morris Plan Co. v. Johnson, the Third District Appellate Court had followed the liberal trend by holding that the creditor's non-compliance with the notice provisions had the legal effect of extinguishing the obligation of the debtor for a subsequent deficiency balance. The liberal approach of Morris makes compliance with the UCC notice provisions a condition precedent to the collection of the deficiency balance. Although following the conservative approach which a literal reading of the Code dictates, the Tauber court reached the same result. The Code states that:

If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained

4. 8 Ill. App. 3d at 792, 291 N.E.2d at 182.
6. For a complete discussion of Morris and its context, see Spak, supra note 1.
on appropriate terms and conditions. If the disposition has occurred the
debtor or any person entitled to notification or whose security interest
has been made known to the secured party prior to the disposition has a
right to recover from the secured party any loss caused by a failure to
comply with the provisions of this Part. . . .7

By combining this section of the Code and two interesting pre-
sumptions, Tauber was able to arrive at the same conclusion as
the court in Morris. The first presumption was that the collateral
would have sold for its proper value had the debtor been properly
notified of the sale. The second presumption was that the proper
value is at least the amount still owing on the debt. The court then
concluded that unless the creditor can rebut the presumptions and
prove that the sale was commercially reasonable, the sale will not be
so considered. Under this Code provision then, the debtor would have
the right to recover any loss caused by the commercially unreason-
able sale, i.e., the amount still owing on the debt following the sale
of the collateral. The creditor would still have the right to recover
the deficiency balance from the debtor. The practical effect of
this ruling is that the two debts will offset each other so that the de-
ficiency balance will be uncollectable from the debtor.

Several recent cases have involved issues related to notification
by the creditor. In Tauber the case concerned proof of notifica-
tion. The first district held that a letter stating the creditor's in-
tent to sell the collateral need not be received
by the debtor, so long
as the letter is properly mailed.

In Prairie Vista, Inc. v. Casella,8 the Fourth District Appellate
Court also discussed notification, but here it was in terms of the
time requirements for a reasonable notice under section 9-504(3).
The debtor returned the keys to his mobile home to his creditor.
On April 7, 1971, the creditor mailed a notice of sale of the collat-
eral to take place on April 10. The letter was received on April 8,
but April 9 was a holiday. Since there was no effective opportu-
nity for the debtor to prepare for the sale, the trial court found the
notice to be unreasonable under the Code, and the appellate court
affirmed the decision.

In Application of Bickel,9 the appellate court held that a misde-
scription of the collateral to be sold is not enough to violate the
the standard of commercial reasonableness regarding notice:
The debtors do not claim that they were in ignorance as to what was trans-
piring. They did nothing prior to, or at the sale, with reference to the
method, manner, time, place or terms of sale. They were represented by
counsel at the sale who made no objections.\textsuperscript{10}
Another point raised on appeal was that there was a discrepancy
between the actual value of the property and the price received
at sale. The debtors contended that the discrepancy was relevant
to a determination of whether the sale was commercially reason-
able. The court disagreed, holding that “mere inadequacy of price
in the absence of fraud, mistaken or illegal practices does not vitiate
such a sale.”\textsuperscript{11}

\textit{Dealers in the Ordinary Course of Business}

The Illinois Supreme Court affirmed the appellate court’s deci-
sion in \textit{American National Bank & Trust Co. v. Mar-K-Z Motors
& Leasing Co.}\textsuperscript{12} Mar-K-Z was in the business of leasing cars;
the company purchased each car new, leased it for a period of two
years, and then sold the used car. To finance the purchase of the
cars, Mar-K-Z entered into a secured transaction with a lender.
The automobile involved in this case was a 1969 Buick which was
purchased with a loan from the plaintiff, the Idea Bank, and
leased to a lessee. When the lease was terminated, the car was
returned to Mar-K-Z and then sold as a used car to the defen-
dant, Henry Buttel. Mar-K-Z defaulted on the loan to the bank,
and the bank proceeded in replevin against Mr. Buttel to recover
the automobile. The key point in the case, and the major issue
on appeal, was whether the leasing company was “a person in the
business of selling goods of that kind.” Section 9-307 provides that
“A buyer in the ordinary course of business,” who is one who pur-
chases the item from “a person in the business of selling goods of that
kind,” takes free from a security interest in the collateral. At issue
was whether the subsequent purchaser of the used car must return
his purchase to the bank. In a concise opinion, the court held

\textsuperscript{10} \textit{ld.} at 816, 303 N.E.2d at 543-44.
\textsuperscript{11} \textit{ld.}
\textsuperscript{12} 11 Ill. App. 3d 1046, 298 N.E.2d 209 (1st Dist. 1973), \textit{aff’d}, 57 Ill.2d 29,
that Mar-K-Z was in the business of selling used cars and that the defendant was a buyer in the ordinary course of business. Accordingly, Mr. Buttel was able to keep his used car.

Fixtures

The treatment of fixtures under the UCC was discussed in *Landfield Finance Co. v. Feinerman*, in which the question was whether the 12,000 items of personal property in a hotel were fixtures or personalty. The Appellate Court of the First District, Third Division, through Justice Dempsey, held that the determination of whether property is a fixture or personalty is dependent upon the intent of the parties. In this case, the court determined the articles to be personalty because a chattel mortgage had formerly been entered into. "The acceptance of a chattel mortgage has been found to express very strong evidence of intent that such items were to remain personalty and not be considered a part of the Real Estate."  

II. CONSTITUTIONAL ISSUES

Until recently a debtor had no specific legal right to protect him from the eager grasp of the creditor. Under the "freedom of contract" theory, parties could provide that a creditor could attach the debtor's wages, have the sheriff seize his personal property, or even repossess his automobile, all without any notice or hearing. According to the prevailing philosophy, if the debtor had a defense, he could recover his property after the trial or by judicial process. Recently, however, this "total freedom of contract" doctrine was severely limited by the United States Supreme Court in *Sniadach v. Family Finance Corp.* and *Fuentes v. Shevin*. *Sniadach* struck down prejudgment wage garnishments as violative of due process, while *Fuentes* declared indiscriminate prejudgment replevin statutes unconstitutional.  

14. *Id.* at 491, 279 N.E.2d at 34.  
15. This is an interesting "Presumption of guilt" found nowhere else in the law.  
18. 395 U.S. at 342.  
19. 407 U.S. at 84.
This Article will now analyze the Supreme Court's holdings in *Sniadach* and *Fuentes* and will attempt to ascertain whether, as a logical extension of these holdings, the Supreme Court must decide against the constitutionality of repossession by self-help under section 9-503 of the UCC. 20

The Sniadach Decision

Mrs. Christine Sniadach allegedly owed $420 on a promissory note to Family Finance, and to collect the debt Family Finance instituted a garnishment action. Under Wisconsin law, Sniadach's employer was required to withhold one-half of her wages pending a court determination of the case. 21 Mrs. Sniadach attacked this prejudgment garnishment provision as violative of the due process requirement of the fourteenth amendment. The Wisconsin Supreme Court rejected Mrs. Sniadach's contention, 22 but the United States Supreme Court reversed. 23

The fourteenth amendment's prohibition of state deprivation of "life, liberty, or property, without due process of law," encompasses three factors: (1) state action, (2) deprivation of property, and (3) satisfaction of due process. 24 The requirement of state

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20. The Uniform Commercial Code § 9-503 states:
   Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement provides, the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may remedy equipment unusable, and may dispose of collateral on the debtor's premises under section 9-504.


22. Family Fin. Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1967).


action is met when the action has as its source a person or an agency formally identifiable as a state instrumentality, regardless of the position of the particular officer or agency in the governmental hierarchy. In Sniadach, the prejudgment garnishment statute could be enforced only through the action of the state court, and so state action was present.

Prior to Sniadach, it was commonly accepted that "deprivation of property" referred to the title of property. If a property owner had been permanently deprived of the use of his property because title was seized, there was a deprivation. In the prejudgment garnishment proceedings, the wages were only temporarily frozen, and if the garnishee prevailed at trial, all of the wages would be returned. It was reasoned that such a deprivation of property was only temporary and that a true deprivation had not occurred.

Sniadach upset the traditional deprivation arguments by holding that even a temporary freezing of wages was a deprivation of property under the fourteenth amendment. Rather than declaring that any temporary deprivation of property by a state is forbidden, the decision adhered to the traditional meaning of deprivation, but carved an exception for wages. The Court characterized wages as "a specialized type of property presenting distinct problems in our economic system;" therefore even the temporary deprivation of wages under the prejudgment wage garnishment statute was deemed to constitute a deprivation of property violating the fourteenth amendment.

The general rule of "due process" is that before a person may be deprived of life, liberty, or property, he must be given notice that will afford an opportunity for a hearing. The concept of procedural due process is rooted in the spirit of fundamental fairness to the individual, subject to the needs of society only in extraordinary situations. Justice Douglas, writing for the Sniadach Court, ack-

27. Id. at 340.
28. Id. at 341-42.
30. In some extraordinary situations the United States Supreme Court found the due process requirements of notice and a hearing before seizure less important than the isolation or seizure of property in the face of an overwhelming public interest,
nowledged the need for summary procedures in some unusual instances, but noted that the facts in *Sniadach* did not present a situation requiring special protection to either the state or the creditor; further, the Wisconsin statute was not narrow enough to meet any unusual condition. Finally, *in personam* jurisdiction was possible in *Sniadach* because the debtor was a resident of the state and was amenable to personal service. Thus, since none of the exceptions to the due process rule applied, the Court held that the debtor must be afforded notice and an opportunity for a hearing before her wages could be denied.

Having invalidated a traditional creditor remedy, *Sniadach* fostered a wide range of opinion and speculation in the legal community as to whether its ruling extended to all prejudgment remedies or was limited to analogous situations. At the time many commentators predicted that *Sniadach* would be narrowly construed, to be applied only in those situations involving special property interests. This position could be justified if *Sniadach’s* breadth were governed by the actual language employed by Justice Douglas in the majority opinion. Based upon the express language used by the Court, one could reasonably conclude that the *Sniadach* court had no intention of making a full-scale attack on all provisional remedies, but rather attempted to define due process requirements in the taking of property as a function of the hardship attached to the taking—the more serious the hardship, the more demanding the requirements. Since the garnishment of wages


32. *Id.* at 342.


34. *See* Hawkland, *Prejudgment Garnishment of Wages After Sniadach*, 75 COM. L.J. 5 (1970). Professor Hawkland anticipated that *Sniadach* would be limited only to those situations involving special property interests, the taking of which produced substantial hardships upon the debtor.
resulted in a greater hardship than attachment of other forms of property, it appeared that summary procedures not involving the taking of "special" property fell outside the purview of Sniadach. Many courts have accepted this limited interpretation of Sniadach and have upheld other summary prejudgment remedies involving property other than wages. For example, the court in First National Bank & Trust Co. v. Pomona Machinery Co., 35 allowed a writ of attachment directed to an Arizona bank in an action by a California bank to collect moneys due on a promissory note. The court reasoned that there existed proper grounds for distinguishing between depriving a wage earner of present cash flow by prejudgment garnishment and impounding reserve assets of a business enterprise, since the latter's rights were adequately protected by the right to replevy. Similarly, in American Oil Co. v. McMullin, 36 the court held that attachments or garnishments that were neither attachments of business property nor garnishments of wages were valid, even though the property was seized without notice and without an opportunity to be heard. Referring to the Sniadach decision, the court stated: "We do not think that Sniadach was intended to preclude all attachments and garnishments merely because some hardship may result." 37

On the other hand, a number of courts have reasoned that the Sniadach decision, rather than being limited to specialized property interests, rests upon fundamental principles of due process without regard to the nature of the property seized. The contention that prejudgment attachment procedures violate due process only in cases involving extraordinary circumstances such as wage garnishment was rejected in Randone v. Appellate Department of Superior Court of Sacramento County. 38 That part of the California prejudgment attachment procedure which permitted, prior to notice or hearing, attachment of property upon the mere filing of an action on a contract for the payment of money was held violative of due process. In that case, the court did not construe Sniadach as carving out an exception only for wages or other like property,

36. 433 F.2d 1091 (10th Cir. 1970).
37. 433 F.2d at 1096.
38. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).
but held that it simply applied the traditional due process analysis to summary prejudgment remedies. Declaring the statutory scheme unconstitutional, the court held that the procedure sanctioned a deprivation of a debtor's use of his property prior to a judicial determination; the court did not consider the nature of the property and the hardships attached to its deprivation.

Likewise, in Jones Press, Inc. v. Motor Travel Services, Inc., the Minnesota court declared unconstitutional statutes which permitted the garnishment and impounding of accounts receivable without according the parties the procedural safeguards guaranteed under the fourteenth amendment.

Faced with the conflicting opinions of the lower courts that attempted to interpret the effect of Sniadach upon other traditional summary procedures, the Supreme Court was afforded the opportunity to choose between the narrow and broad interpretations in its consideration of Fuentes v. Shevin.

The Fuentes Decision

Just as Mrs. Sniadach first learned of an action pending against her when she discovered that her wages were frozen, Margarita Fuentes, a Florida resident, was unaware of an action against her until a deputy sheriff arrived at her home to seize her stove and stereo. The stereo and stove were purchased under a conditional sales contract from a local retailer. According to the contract, Mrs. Fuentes was entitled to possession unless she defaulted on monthly payments. Mrs. Fuentes claimed that the stove did not work, but the

39. 286 Minn. 205, 176 N.W.2d 87 (1970).
retailer disregarded her complaint. She then stopped making further payments on the stove, but paid the balance due on the stereo. This payment however, was treated by the retailer as if it were a prepayment on the entire contract. The retailer, claiming that Mrs. Fuentes defaulted, initiated a suit, posted a bond equal to twice the value of the goods, and submitted a form to the court clerk requesting a writ of replevin. The writ was summarily issued, and the goods were seized later that day. Had Mrs. Fuentes been afforded a hearing before the seizure, she could have prevented the taking of the stereo by explaining to the court that she had the lawful right to its possession.

The facts of Fuentes demonstrate the state action required for the application of the fourteenth amendment. The sheriff's seizure of the property was clearly the act of an agent of the state, under color of state law. As to "deprivation of property," the Court in Sniadach had not considered whether the deprivation there was permanent or temporary, nor the effect, if any, of the distinction. The Fuentes court approached the problem methodically, discussing types of ownership, types of property, and duration of deprivation. First, it expanded the Sniadach concept of property ownership to include properties in which the debtor has less than full title. Under traditional property notions, Mrs. Fuentes' interest in the property seized might not have been protected as "property" under the fourteenth amendment, since she was the purchaser of goods under a conditional sales contract in which title rests with the vendor until full payment of the purchase price. The court in Fuentes, however, expressly held that the deprivation of even a possessory interest was sufficient to invoke the protection of the fourteenth amendment because it constituted "a significant property interest." 42

Sniadach apparently carved out an exception to the traditional rule to allow the application of fourteenth amendment to "a specialized type of property" 43 under the theory that wages are essentials of life. 44 Some courts held to the "necessity of life" test and refused

44. Id. at 341-42. In Fuentes, prior Supreme Court decisions are cited to point out that Sniadach did not carve out an exception. Fuentes v. Shevin, 407 U.S. 67 (1972). Perhaps the answer to the confusion is that the Court is reinterpreting and extending Sniadach to fit the facts of Fuentes.
to require due process for non-essential items.\textsuperscript{45} According to the lower court, \textit{Fuentes} was such a case because the stereo was not a necessity of life.\textsuperscript{46} The Supreme Court, however, rejected this "necessity of life" test.

This reading of \textit{Sniadach} \ldots reflects the premise that [this case] marked a radical departure from established principles of procedural due process. \ldots [It] did not. \ldots [It was] in the mainstream of past cases, having little or nothing to do with the absolute "necessities" of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect. \ldots

\ldots

The Fourteenth Amendment speaks of "property" generally \ldots. It is not the business of a court adjudicating due process rights to make its own critical evaluation \ldots and protect only the ones that, by its own rights, are "necessary."\textsuperscript{47}

Finally, \textit{Fuentes} considered the length of time necessary for a deprivation. Coincident to the holding that the deprivation of any significant property interest falls within the scope of the fourteenth amendment, the Court held that the length of a deprivation was inconsequential:

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. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.\textsuperscript{48}

In \textit{Sniadach}, the concept of due process was confined to balancing the right of an individual to due process prior to a seizure against the needs of society in certain extraordinary instances to provide due process after the seizure. \textit{Fuentes} refined the due process issue further by breaking it down into the balancing analysis and the hearing analysis.

Balancing the rights of individuals against the needs of society did not give the \textit{Sniadach} Court much difficulty because no compelling state interest was presented and the seizure was not necessary to secure jurisdiction over the debtor. \textit{Fuentes} repeated this


\textsuperscript{47} 407 U.S. at 88, 90.

\textsuperscript{48} \textit{Id}. at 86.
analysis and concluded that some extraordinary situations may require the summary seizure of goods, but since the replevin statutes under consideration were indiscriminate and overly broad, they were unconstitutional. The Court noted that "there may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods." While this statement appears favorable to creditors, it should be noted that the use of the words "disputed goods" raises questions as to the full meaning of the statement. If these words impose no limitation, the statement implies that in special situations demanding immediate action, such as concealment or potential destruction of the goods, the goods in dispute can be summarily taken. This language, however, can also be read to infer that summary seizure is permissible only where there is a dispute as to the right to possession of the goods between the debtor and creditor. So construed, the Fuentes decision would permit summary seizure only in those cases in which the property interests in the goods were divided between the creditor and debtor, cases in which a secured creditor seeks to repossess the collateral to which his security interest has attached. If the latter interpretation is the true meaning of the language, all garnishment and attachment remedies would be impermissible unless the creditor gave the debtor prior notice and an opportunity to be heard. It would seem more likely, however, that the Court merely erred in its choice of words since affording notice and an opportunity to be heard in critical situations where the debtor is likely to destroy or conceal the goods would be requiring the creditor to cause the result he is attempting to avoid—destruction or disappearance of the goods.

Procedural due process requires that parties whose rights are affected are entitled to a hearing. To enjoy that right, they must be notified "at a meaningful time and in a meaningful manner." The replevin statutes at issue in Fuentes authorized a hearing after the seizure, prompting the question of whether a hearing after seizure was at a meaningful time, i.e., a time at which an arbitrary

49. Id., at 93.
deprivation of property could be avoided. Justice Stewart, writing for the majority in *Fuentes*, rejected the validity of post-seizure hearings. Noting that the purpose of due process was to prevent arbitrary takings, and not to provide a remedy after the fact, the court stated:

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual’s possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.\(^\text{52}\)

The question of whether Mrs. Fuentes had waived her right to due process was also considered. The seller contended that Mrs. Fuentes waived her due process rights by signing an agreement that provided: “[I]n the event of default of any payment or payments, Seller at its option may take back the merchandise . . . .” The Court noted that the terms were part of a standard form contract, in small type, and with little explanation of their meanings. In addition, there was a wide disparity in bargaining power between the two parties. Weighing the above factors, the Court concluded that there was no waiver of the right to due process. Since the *Fuentes* Court found no waiver, the due process clause of the fourteenth amendment applied. Relying on *Sniadach*, the Court found that due process had to be afforded Mrs. Fuentes before there could be a valid prejudgment replevin of her property.\(^\text{53}\)

The *Fuentes* dissent\(^\text{54}\) can be analyzed in terms of the balancing approach to due process. Due process is a flexible concept, protecting individual rights against the state whenever it is necessary or desirable to do so. In the dissent, Justice White proposed that the debtor was being afforded sufficient protection to satisfy due process because, as a practical matter, most prejudgment seizures are justified. The dissent concluded that it was not worth the trouble against arbitrary takings when there was no permanent damage suffered. After all, Justice White noted, “[d]ollar-and-cents con-

\(^{52}\) *Id.* at 81-82.

\(^{53}\) *Id.* at 96.

\(^{54}\) The dissenters were Chief Justice Burger, Justice White, and Justice Blackmun. *Id.* at 97.
siderations weigh heavily against false claims of default as well as against precipitate action that would allow no opportunity for mistakes to surface and be corrected."\(^5\) In addition, the dissent argued that since the Permanent Editorial Board for the UCC had not recommended a change in regard to remedies upon default, the court should defer to those who have struggled with the default problems throughout the years.\(^6\)

It should be noted that Justices Powell and Rehnquist did not participate in *Fuentes*. Had they participated, there is no doubt in the mind of this author that they would have dissented, making the result a five-four decision in favor of replevin rather than a four-three decision against it.

*The Constitutionality of UCC Section 9-503*

The *Fuentes* decision, by its specific holding, ended all conjecture occasioned by *Sniadach*. *Fuentes* allowed little latitude whenever a court faced a case that involved a creditor's prejudgment seizure of property. Nevertheless, cases have challenged the validity of UCC section 9-503. This section allows summary repossession upon default by a secured creditor, so long as no breach of the peace results.\(^7\) The main issue in such cases has been whether repossession of goods by self-help involves sufficient state action in the deprivation of a person's property as to invoke the fourteenth amendment. The following is a brief summary of the arguments utilized in the cases.

In its most patent form, state action involves the direct action by the state. To illustrate, a uniformed law officer who enters someone's house and seizes property constitutes state action. In such a case the state is acting directly—the agent's actions do not have to be authorized. The fact that the agent was clothed with apparent authority suffices to invoke protection under the fourteenth amendment. Repossession, however, is quite a different matter; the secured party ordinarily acts by himself, without the assistance of a state officer. For this reason, some courts have failed to find the

\(^5\) Id. at 100.

\(^6\) Id. at 103.

\(^7\) See Spak, supra note 1.
direct state action necessary to subject repossession under section 9-503 to due process requirements.

For example, in Greene v. First National Exchange Bank, the court held that repossession was not a direct state action, so that the fourteenth amendment guarantees did not apply.

The Fourteenth Amendment can control only the actions of states, not private individuals. Therefore, because the operation of the statute involved does not require the aid, assistance, or interaction of any state agent, body, organization, or function, the state has not deprived the plaintiff of his property.

Similarly, in Nichols v. Tower Grove Bank, a case arising out of the repossession of an automobile, the court held that the parties were simply acting pursuant to a private contract; the repossession of the automobile, therefore, involved no state action.

While direct state action can be readily discerned in most instances, finding indirect state action poses a more difficult problem. Over the years, the Supreme Court has found state action in a number of individual acts of racial discrimination. Under the old concept, it was thought that state action was only present where the state was directly involved. Today, however, state action is held to exist if a private individual conspires with an agent of the state, if the actions of an individual may be summarily enforced by the state as if part of an overt conspiracy, or if the state clothes the individual with the authority of state law by issuing a special police officer's badge to a private investigator.

According to Reitman v. Mulkey, the mere enactment of a statute has been regarded as state action if it encourages, authorizes, or permits an individual to perform an act that would be contrary to due process or equal protection but for that state action. In Reitman, California voters amended their state constitution to overturn state laws that prohibited discrimination in the sale of resi-

59. Id. at 675.
61. Id. at 378.
dential real estate. The Supreme Court of California ruled that the amendment was unconstitutional, since rather than merely repealing anti-discrimination laws, the amendment encouraged racial discrimination and as such constituted state action. The United States Supreme Court affirmed, finding that the amendment made the right to discriminate a basic state policy. Furthermore, stated the Court, since the Supreme Court of California believed that the amendment would significantly encourage and involve the state in private acts of discrimination, the amendment constituted state action.

In Adams v. Egley, District Court Judge Leland Nielson of the southern district of California relied almost exclusively on the Reitman decision in declaring repossession by self-help unconstitutional. The court reasoned that in Reitman a state constitutional amendment was found to be state action because its effect caused outright involvement of the state in the encouragement of discrimination. Similarly, in a repossession case, the secured creditor repossesses property without due process under the authority of section 9-503 of the UCC. The California court reasoned that in both cases, the state's enactment of a statute had encouraged individuals to commit acts that they may have refrained from doing in the absence of the statute. The enactment of section 9-503 of the UCC, therefore, was held to constitute a state action sufficient to involve the fourteenth amendment. Since the taking involved a state action depriving an individual of his property without due process of law, the California counterpart of section 9-503 was held unconstitutional.

Recently, however, the Ninth Circuit Court of Appeals reversed the district court's ruling, finding no "significant state action" and therefore the due process clause of the fourteenth amendment would not apply to self-help repossessions. The court relied on the standard set forth in Moose Lodge No. 107 v. Irvis, which declared that state action could not be found unless the state had

"significantly involved itself"\textsuperscript{70} with the challenged conduct. In that case the court held that the issuance of a license by the state to sell liquor was not significant enough so as to implicate the state in the racially discriminatory practices of a private club.

In addition, the \textit{Adams} court found that \textit{Reitman} could be distinguished on at least two grounds. First, in \textit{Reitman}, the state was involved to a far greater degree in the challenged conduct: the legislation had authorized what had been previously proscribed, and if allowed, it would frustrate a constitutional goal. However, in self-help cases, the enactment of the provisions of the Uniform Commercial Code did not reverse any law but merely codified existing law.

Second, the court was not convinced that the racial discrimination cases were analogous to cases involving self-help repossession of secured property. The court reasoned that while racial discrimination cases evidence "intentional . . . circumvention of constitutional rights, . . . creditor remedies [are] based on economically reasoned grounds of . . . long standing."\textsuperscript{71}

The court also found that \textit{Fuentes} was not controlling: "We do not read \textit{Fuentes} so broadly that it encompasses all private actions between individuals pursuant to their consensual undertakings."\textsuperscript{72}

The court then declared that state involvement, for purposes of constitutional rights to due process, is not reflected by the enactment of UCC section 9-503, which put into statutory form the common law right of creditors to repossess without judicial assistance.

Similarly, in \textit{Oller v. Bank of America}, \textsuperscript{73} a case in the Northern District of California, the court declined to find state action by distinguishing \textit{Reitman} as a racial discrimination case to which the fourteenth amendment was designed to apply. Reasoning that repossession was not the type of evil at which the fourteenth amendment had been directed, the court found that the "historical, legal, and moral considerations" that were paramount in extending federal jurisdiction to meet racial injustices simply did not exist in \textit{Oller}.\textsuperscript{74}

\begin{itemize}
  \item \textsuperscript{70} \textit{Id.} at 173.
  \item \textsuperscript{71} 492 F.2d at 333.
  \item \textsuperscript{72} \textit{Id.} at 338.
  \item \textsuperscript{73} 342 F. Supp. 21 (N.D. Cal. 1972).
  \item \textsuperscript{74} \textit{Id.} at 23.
\end{itemize}
Chief Judge Morgan, in *Johnson v. Associates Finance, Inc.*,\(^75\) relied almost exclusively on the decision rendered by the court of appeals in *Adams*. The court held that the state, by its adoption of the UCC, could not be held responsible for creating the conditions which resulted in the standardized contract that are typically used in the credit industry, and which provide for self-help repossession without notice or prior hearings. Such repossession by private parties, therefore, was not "state action." The court found in *Fuentes*, state officials played an active role in the summary-taking, whereas in the present case, repossession was accomplished wholly by the actions of private persons. The court concluded that a decision declaring Illinois' self-help repossession provision unconstitutional would be an unwarranted extension of *Fuentes*. The same conclusion was reached by courts in Florida,\(^76\) Georgia,\(^77\) and Delaware.\(^78\)

Yet, other courts deciding similar problems have held otherwise. In *Hall v. Garson*,\(^79\) the court was faced with the question of the validity of the Texas distraint statute.\(^80\) This statute grants to the operator of any apartment a lien upon certain personal property found within the tenant's dwelling for all rents due and unpaid by the tenant. The operator is also granted the right to enforce such liens by preemptory seizure and retention of the tenant's property until rent due has been paid. There is no provision in the statute requiring any kind of hearing prior to seizure, although the tenant may replevy distrained goods and bring an action in trespass for an improper seizure. The court held that since the distraint procedure authorized the landlord to use the traditional power of the state to execute a lien, such a delegation of power amounted to state action.

Similarly, in *Gibbs v. Titelman*,\(^81\) a Pennsylvania statutory scheme involving the repossession of motor vehicles was declared unconstitutional as violative of the due process clause of the four-

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\(^{76}\) Northside Motors, Inc. v. Brinkley, 282 So. 2d 617 (Fla. 1973).
\(^{79}\) 468 F.2d 845 (5th Cir. 1972).
\(^{80}\) TEX. REV. CIV. STAT. ANN. art. 5238a (Supp. 1972).
The court first addressed itself to the argument that self-help repossession is merely a codification of the common law principle of distress or distraint and is therefore constitutionally acceptable. After providing a most accurate description of the history of the principle of self-redress,82 the court expressed its view as to the present application of this extra-judicial remedy:

Certainly, our judicial system is sophisticated enough to redress the injuries which once gave rise to the need for self-help, notwithstanding the constitutional proscription against a deprivation of property without due process.83

The court next considered the contention that the state involvement in the repossession scheme is only passive and not significant enough to warrant invocation of the due process clause of the fourteenth amendment. The court rejected this “passive” versus “active” state action distinction as a basis for determining “color of state law” where the deprivation of one’s property is at stake. The court went on to explain:

When a statute or even a common law custom allows an individual to unilaterally transcend the fundamental and inalienable level of equality, . . . that statute is clothing the individual with a power which can only truly be consistent with the state. It is this power . . . that constitutes “state action.”84

To the extent that section 9-503 permitted self-help repossession, such permission was construed by the court as being a license to perform a state function; accordingly, it is subject to due process requirements.

Other lower courts have also overcome the state action problem in repossession under UCC section 9-503. In Michel v. Rex-Noreco, Inc.,85 Chief Judge Holden of the Vermont federal district court granted a preliminary injunction to halt the threatened repossession of a mobile home. Following the Hall v. Garson rationale,86 Chief Judge Holden found state action to be present and the repossession statute unconstitutional as violative of the due process clause of the fourteenth amendment.87 Of particular note in the

82. Id. at 44-47.
83. Id. at 47.
84. Id. at 48.
86. See text accompanying notes 79-80 supra.
87. In regard to due process, Fuentes is fairly particular in its holding that before
decision is the court's utilization of Fuentes' arguments rather than merely echoing the holding. The court intimated that repossession would be allowed upon a showing of extraordinary circumstances or immediate danger to the collateral, but, in the absence of such a showing, an injunction would issue to prevent the lawful taking. Also, it was held that the creditor had not waived her right to due process by signing the security agreement which permitted repossession by self-help. As in Fuentes, the court found that the signing of this agreement in fine print did not constitute a valid and knowing surrender of the constitutional right to due process.

Here in the seventh circuit, our northern district held the Illinois Innkeepers Lien Law to be unconstitutional in Collins v. Viceroy Hotel Corp. Parallel to the Texas distraint law, under Illinois law a hotel proprietor was granted the right to place a lien upon the property brought into his hotel by a guest, as well as the power to summarily enforce the lien by seizing the property and selling it upon non-payment of charges by the guests. In either case the

an individual can be deprived of his property by an action of the state, he must be given reasonable notice of the action and afforded an opportunity to be heard prior to the seizure. Some cases which have upheld the constitutionality of repossession, however, have distinguished Fuentes to avoid following its dictates.

Messenger v. Sandy Motor, Inc., 295 A.2d 402, 121 N.J. Super. 1 (1972), for example, held that due process was satisfied on a theory of waiver. Fuentes refused to allow a waiver but the Messenger court distinguished car and stereo repossessions inasmuch as everyone who buys a car knows that it will be repossessed if the payments are not made.


88. See Fuentes v. Shevin, 407 U.S. at 90-94. The spirit of Sniadach and Fuentes compels a conclusion that such a holding is valid. If a creditor had reasonable grounds to believe that the debtor will destroy or conceal the collateral, he could obtain a court order authorizing seizure, thus eliminating the need for summary repossession.


91. ILL. REV. STAT. ch. 71, § 2 (1969); ILL. REV. STAT. ch. 82, § 57 (1969).

proprietor could act without an opportunity for the guest to contest
the proprietor's claim. The late Judge Alexander Napoli held that
the state's passage of the statute constituted the state action neces-
sary to find that a person has acted "under color of state law" un-
der the Civil Rights Act of 1871.

These procedures are almost identical with the repossession pro-
cedures under UCC section 9-503. Distraint, innkeeper's lien laws,
and repossession by self-help existed at common law to provide for
a summary disposition of outstanding debts. All three authorize the
taking of property in the possession of another without a prior hear-
ing, and all three allow the taker to be the judge of whether a seiz-
ure should take place. In the event of improper seizure, distraint,
or repossession, state statutes allow for damages to the aggrieved
party. The differences between these procedures are that they deal
with separate and distinct legal relationships. Repossession may
be seen to arise from a contractual relationship, although the other
two procedures could be made contractual by including them in for-
mal agreements, such as leases or waivers to be signed by guests
registering in hotels. Since the three procedures are of the same
nature, it is incongruous for courts to decide the cases differently,
summarily finding state action in two but not the third.

One final argument that could be raised in support of denying the
constitutionality of self-help repossession is that any other result
would be anomalous and encourage breaches of the peace. While
replevin statutes have been held violative of due process even
though they provide for minimal procedural safeguards (i.e., bond-
ing procedures, obtaining a writ from a clerk), self-help, if held
constitutional, would permit a taking of property where procedural
safeguards are completely absent. A debtor, by resisting the seiz-
ure to the point that the taking would be a breach of the peace,
would force the creditor to resort to replevin or other remedies that
fall within the purview of *Fuentes* and *Snidadach*, and thus require
procedural safeguards that the debtor would otherwise be denied.93

In the wake of *Fuentes*, the Illinois General Assembly enacted a
new replevin statute.94 It provides that a defendant in a replevin

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93. Hawkland, supra note 34.
94. ILL. REV. STAT. ch. 119, §§ 1-28 (1973). The relevant sections are § 4a and
§ 4b. § 4a:
action be given five days notice of a hearing to contest the issuance of a writ of replevin. Also in conformance with *Fuentes*, it provides that a plaintiff may appear before a court in an *ex parte* hearing, and a writ of replevin may summarily issue upon a showing by the plaintiff that he will suffer "immediately impending harm" such as by destruction, concealment, removal from the state, perishability, or sale of the disputed property. Thus, in a procedure similar to that required for the granting of a search warrant, a writ of replevin may be summarily granted and still not violate due process.

The defendant shall be given 5 days written notice in the manner required by Rule of the Supreme Court, of a hearing before the Court to contest the issuance of a writ of replevin. No writ of replevin may issue nor may property be seized pursuant to a writ of replevin prior to such notice and hearing except as provided in Section 4b.

As to any particular property, the right to notice and hearing established in this Section may not be waived by any consumer. As used in this Section, a consumer is an individual who obtained possession of the property for personal, family, household, or agricultural purposes.

Any waiver of the right to notice and hearing established in this Section must be in writing and must be given voluntarily, intelligently, and knowingly.

Notice to the defendant is not required if the plaintiff establishes and the court finds as a matter of record and supported by evidence that summary seizure of the property is justified by reason of necessity to:

(a) protect the plaintiff from an immediately impending harm which will result from the imminent destruction or concealment of the disputed property in derogation of the plaintiff's rights in the property;
(b) protect the plaintiff from an immediately impending harm which will result from the imminent removal of the disputed property from the state, taking into consideration the availability of judicial remedies in the event of the removal;
(c) protect the plaintiff from an immediately impending harm which will result from the perishable nature of the disputed property under the particular circumstances at the time of the action;
(d) protect the plaintiff from an immediately impending harm which will result from the imminent sale, transfer or assignment of the disputed property to the extent such sale, transfer or assignment is fraudulent or in derogation of the plaintiff's rights in the property;
(e) recover the property from a defendant who has obtained possession by theft.

At an *ex parte* hearing to determine if notice is not required, the court shall examine the evidence on each element required by this Section or any written waiver of rights presented by the plaintiff. If the court finds that notice is not required, or that the waiver is in accordance with law, it shall order a hearing as soon as practicable on the issuance of the writ of replevin.

In addition to Illinois, many other states have changed their replevin laws to conform to the standards enunciated in *Fuentes*. Some states, however, did not modify their replevin statutes. One such state was Louisiana, whose law was challenged in the recent case of *Mitchell v. W. T. Grant Co.*. The Louisiana statute provides that a creditor seeking a writ of sequestration to sequester certain goods pending the outcome of a lawsuit may petition the court in an *ex parte* action with a claim that the debtor may dispose of the property during the pendency of the legal proceedings. Although there is no practical difference between this procedure and the scheme denounced in *Fuentes*, the court, for reasons to be explained, upheld the constitutionality of the statute because "Louisiana law provides for judicial control of the process from beginning to end," and is not indiscriminate inasmuch as it allows for seizure upon a showing of danger.

The *Mitchell* dissent (Mr. Justice Stewart, with Justices Douglas and Marshall concurring) soundly blasted the majority by pointing out the practical effect of the statute. "Whether the issuing functionary be a judge or a court clerk, he can in any event do no more than ascertain the formal sufficiency of the plaintiff's allegations, after which the issuance of the summary writ becomes a simple ministerial act." Since there is no practical difference between the two schemes, the dissent concluded that the court disregarded *stare decisis* and "[t]he only perceivable change that has occurred since the *Fuentes* case is in the makeup of this Court."

**Conclusion**

It is against the backdrop of *Sniadach, Fuentes,* and *Mitchell* that the problem of repossession under section 9-503 of the UCC must be considered. Many agree that these three cases stand for the proposition that repossession by self-help is an indiscriminate

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95. 94 S. Ct. 1895 (1974).
96. Id. at 1904-05.
97. Id. at 1912.
98. Id. at 1914. The possibility that the law would change in some respect as a result of the court's membership was foreseen by the academic community. See Spak, *The Constitutionality of Repossession By Secured Creditors Under Article 9-503 of the Uniform Commercial Code*, 10 Hous. L. Rev. 855, 867 (1973); Comment, *Creditor's Rights*, 3 Loyola U. of Chicago L.J. 451, 461 (1972).
taking of property without due process of law.99 There is no hearing whatsoever prior to the finance company's taking of the debtor's car from the driveway in the dead of night, and there need not be any showing of an emergency or danger situation to a court prior to the seizure. The law's sole concern is that the debtor be in default under UCC prior to the seizure of the collateral. This approach totally disregards the Mitchell court's concern that a debtor not be "at the unsupervised mercy of the creditor and court functionaries."100

Yet, repossession by self-help has been upheld by most courts that have considered the problem. The constitutional safeguard of the fourteenth amendment prohibits action by the state which deprives an individual of his property without due process of law. The courts reason that the state is not a party to repossession.101

The Supreme Court will certainly hear a case on repossession within the next few terms. At least two possible alternatives logically present themselves. First, the Supreme Court could determine that there is no, or at most an insignificant amount of, state action involved, as did the court in Adams, and dismiss the case for failure to state a claim upon which relief can be granted. The second alternative would be to find state action and then analyze repossession in light of Fuentes. The Supreme Court could certainly apply the Fuentes decision to repossession by self-help and still not terminate the right of repossession. The Supreme Court could decide that UCC section 9-503 violates due process because of its overbreadth, inasmuch as it allows indiscriminate prejudgment repossessions. Then states would be afforded the opportunity to design legislation permitting repossession only in cases where "immediately impending harm" would ensue. In those situations, the secured creditor could appear before a judge ex parte, and prove that the collateral is in danger and must be seized by self-help immediately—or provisions could be made for the posting of a bond by the repossession to protect the debtor in the event of mistaken repossession. In any


100. 94 S. Ct. at 1904. The Mitchell majority expressly states that its decision "will not affect recent cases dealing with garnishment or summary self-help remedies of secured creditors or landlords." Id. at 1906 n.14.

101. See Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973):
event, a post-seizure hearing would be held to determine title, exactly the same as in the old replevin action. In all other situations, the secured creditor could proceed under the new replevin action, providing notice of a pre-seizure hearing.

The advantages of the modified repossession scheme are compelling, especially in the light of what the *Fuentes* dissent labelled "the practical considerations involved." In the usual default situation, the secured creditor seeks satisfaction before he decides to repossess the collateral. In many cases, the debtor realizes his inability to pay and tells the creditor to take the goods away. In *Messenger v. Sandy Motors, Inc.*, the court related the testimony of a witness who testified that out of 235 repossessions by his bank, 120 were voluntary. It is safe to assume that these "volunteers" would not contest a replevin action; in fact, there would be no need for a hearing if they surrendered the collateral.

Out of the remaining 115 debtors who did not voluntarily surrender the collateral upon default, it can be assumed that at least two different types of debtors can be discerned. First, there will be those who will be prone to conceal, sell, or otherwise dispose of the collateral. The secured creditor would already know the identity of these problem accounts, so he could summarily repossess upon default, pursuant to the modified repossession scheme. The second type debtor may not voluntarily return the collateral, but he will not, in most instances, actively prevent its repossession. In these cases, there is no danger in the debtor retaining possession of the goods for the week or so until the hearing can be held.

There will, however, be situations where a debtor will forcibly prevent repossession since, as noted earlier, if the taking gives rise to a breach of the peace, the creditor is forced to pursue alternative remedies such as replevin, which, according to *Sniadach*, requires notice prior to the seizure. Thus, by actively restraining the seizure, a debtor is assured of receiving procedural safeguards not otherwise available under repossession. According to the modified statutory scheme, these complications will be remedied since the secured creditor will be able to appear before a judge *ex parte* and receive judicial approval to proceed with the summary seizure.

102. 407 U.S. at 100.
While the popular belief is that additional consumer protection (notice) is directly proportional to the cost of commercial credit—*i.e.*, the more procedural safeguards afforded debtors, the greater their cost in securing financial assistance—a recent article reports an empirical survey of banks and retail establishments that suggest otherwise.

An analysis of these overall results indicates that there is no need for the credit market to be unduly concerned with the possible effects of *Fuentes* and *Adams*. Default occurs in only a small percentage of total loans made. Creditors stated that in many of these defaults repossession as a collection remedy is not feasible and in those few defaults where repossession is feasible, the vast majority of debtors will voluntarily give up the collateral. This greatly diminishes the number of defaults where involuntary repossession is an important collection remedy. Thus, *Fuentes* and *Adams* will affect only a minute portion of the credit markets' transactions.\(^{104}\)

Obviously such a conclusion upsets the conservative reasoning in favor of repossession. In sum however, when “pinned to the wall” for a prognostication, the authors are reluctantly led to the conclusion that repossession statutes are not illegal, notwithstanding the deprivation of due process of law by individual secured creditors.

The crucial feature of prejudgment repossession by self-help is that the state is not actively involved in the seizure of property as it was in the *Sniadach* and *Fuentes* instances.

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