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Constitutional Law--Due Process of Law--Creditors' Rights and Prejudgment Remedies

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CONSTITUTIONAL LAW—DUE PROCESS OF LAW—CREDITORS’ RIGHTS AND PREJUDGMENT REMEDIES

Prejudgment remedies have long provided great leverage to the creditor in satisfying his claims. Statutory distress for rent, prejudgment garnishment of wages, repossession and disposition of collateral by a secured party, and other similar “provisional legal or equitable processes” are usually enforced without the debtor receiving notice and a hearing. The absence of notice and a hearing conflicts directly with the fourteenth amendment’s due process clause. The very nature of procedural due process is that parties whose rights are affected are entitled to be heard, and, in order that they may enjoy that right, they must be notified. This conflict of prejudgment remedies with constitutional principles has been the basis for various decisions in recent years which may invalidate innumerable statutory schemes involving prejudgment remedies.

American society is becoming increasingly dependent on the use of consumer credit in its daily activities. The advent of universally accepted credit cards has enabled many Americans to elevate their living standards by the use of “buy now-pay later” plans. This is evidenced by the fact that at the end of March, 1972, more than $55.2 billion in consumer credit was outstanding in this country. Thus, the changes in creditor’s rights brought about by the conflict between prejudgment remedies and constitutional due process guarantees will substantially affect the American consumer.

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1 The term “provisional legal or equitable process” was coined by Professor William D. Hawkland of the University of Illinois School of Law in his “Model Notice and Hearing for Provisional Remedies Act.” This term, which will be discussed more fully under Section IV infra, refers to remedies prior to final judgment that enable a creditor to restrain the person or property of a debtor. The term encompasses such remedies as attachment, garnishment, replevin, creditor’s bill, trustee process, summary proceedings for repossession of property, extra-judicial mortgage foreclosure, injunctions, and body attachment.

I. RECENT CASE LAW ATTACKING PREJUDGMENT REMEDIES

Scrutiny of prejudgment remedies in the light of procedural due process is a result of the 1969 decision in *Sniadach v. Family Finance Corporation*. In *Sniadach*, a Wisconsin finance company, in accordance with the Wisconsin garnishment law, froze the wages of a debtor pending disposition of a suit in which the company claimed $420 due on a promissory note. The United States Supreme Court held that the Wisconsin wage garnishment procedure constituted a taking of property without prior notice and hearing in violation of procedural due process guarantees. *Sniadach* represented the first time procedural due process was used by the Court to strike down a state statute which permitted the deprivation of the use of one's property without a hearing, even though the deprivation was temporary and a subsequent hearing was guaranteed.

*Sniadach*, however, was not without its limitations. The Supreme Court merely proscribed summary procedures invoked against *specialized types of property*—in that case wages. In addition, the Court suggested that summary proceedings may be unconstitutional in extraordinary situations where the state has a special interest, provided the statute is narrowly drawn to meet the situation.

Following the rationale of *Sniadach*, subsequent decisions have expanded the concept of "specialized type of property" to invalidate various state summary procedures on due process grounds. One of the most significant of these decisions is *Fuentes*...
v. Shevin. The appellant purchased various household goods under a conditional sales contract calling for monthly payments. Under the contract, the seller retained title while the purchaser was entitled to possession unless and until the occurrence of default on the installments. A disagreement arose regarding servicing the goods, and the purchaser refused to remit further installments. The seller claimed default and obtained a writ of replevin under the Florida statutory procedure. Under this ex parte procedure the purchaser's goods were seized without notice and hearing. The Supreme Court declared the Florida replevin procedure unconstitutional. The Court held that Mrs. Fuentes was deprived of her property without due process of law, because she was denied an opportunity to be heard before her property was taken from her possession. In Fuentes the mere fact that the right of continued possession was disputed was held sufficient to require the seller of goods to show, at the very least, that the buyer had defaulted in his payments.

The principles of Sniadach and Fuentes provided the impetus without notice of a debtor's property pursuant to a state replevin statute was held unconstitutional even though the creditor was required to post bond and the debtor could have prevented the seizure by showing a meritorious defense.

A virtual deluge of cases has evolved from these same principles. Fuentes v. Shevin, 407 U.S. 67 (1972) (state prejudgment replevin statutes); Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license); Cal. Dep't of Human Resources Dev. v. Java, 402 U.S. 121 (1971) (withholding of unemployment compensation benefits pending appeal by employer); Wis. v. Constantineau, 400 U.S. 433 (1971) (posting of plaintiff's name in retail liquor outlets as an excessive drinker to whom intoxicating beverages should not be sold); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (involving confession of judgment); Randone v. Appellate Dep't, 96 Cal. Rptr. 109, 488 P.2d 13 (1971) (prohibiting summary attachment of debtor's property without prior hearing); Mihans v. Municipal Ct., 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970) (repossession of residence); State ex rel. Payne v. Walden, 190 S.E.2d 770 (W. Va. 1972) (invalidating the West Virginia distress for rent statute). See also Shaffer v. Holbrook, 346 F. Supp. 762 (S.D.W. Va. 1972); Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335 (E.D. Pa. 1971); Jones Press, Inc. v. Motor Travel Servs., Inc., 286 Minn. 205, 176 N.W.2d 87 (1970); Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969). But see Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970), where the court limited Sniadach to its facts and refused to apply it to the enforcement of a security interest, since both parties assented to the contract, thus constituting a waiver of constitutional rights. The parties assenting to the contract, however, were two companies with equal bargaining power. Waiver of constitutional rights in such a situation is quite different than in the case of adhesion contracts, which will be discussed more fully under Section II infra.


for the invalidation of two sections of the Uniform Commercial Code on constitutional grounds. In *Adams v. Egley,* a United States district court decided that sections 9-503 of the UCC—permitting repossession and disposition of collateral by a secured party after default by the debtor and authorizing summary repossession and sale without judicial process—are constitutionally defective. Repossession under such sections represents a taking of property without due process of law. The *Adams* decision has been appealed and is now pending before the Ninth Circuit. In all probability, the case will reach the Supreme Court. A final determination of the issue is of particular importance to West Virginia and every other state which has adopted the UCC.

The broad scope of the decisions from *Sniadach* to *Fuentes* to *Adams* reinforces the view that *Sniadach* was not a special constitutional rule for wages, but rather was an application of the basic principles of procedural due process to the entire spectrum of pre-judgment remedies. Thus, absent some compelling state interest, an individual must be afforded notice and a hearing before he can be deprived of his life, liberty, or property.

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*Hereinafter referred to as UCC.*

*338 F. Supp. 614 (S.D. Cal. 1972).*

*Section 9-503 provides in part that, "[u]nless otherwise agreed a secured party has on default the right to take possession of the collateral . . . [and] may proceed without judicial process if this can be done without breach of the peace . . . ."

*Section 9-504 permits a secured party to "sell, lease or otherwise dispose of any or all of the collateral" after giving the debtor and any other person who has a security interest, notice in writing of the time and place of such disposition. Notice must be delivered personally or by mailing to the debtor's last known address.*

*Adams v. Egley,* 338 F. Supp. 614 (S.D. Cal. 1972), rev'd sub nom. *Adams v. Southern Cal. First Nat'l Bank,* ___ F. 2d ___ (9th Cir. 1973). The Ninth Circuit decision was rendered on October 4, 1973, after this note was completed. Reference to *Adams* in the text are to the district court decision. For an abstract of the circuit court's decision, see the Addendum, *infra.*

*The UCC was enacted into law in West Virginia on July 1, 1964. The sections identical to the California provisions in question are embodied in W. VA. CODE ANN. §§ 46-9-503, 504 (1969).*

*The UCC has been enacted into law in every state except Louisiana.*

II. PRELIMINARY PROBLEMS: JURISDICTION AND WAIVER

Before further developing the application of due process principles to prejudgment remedies, it is necessary to examine the preliminary problems of whether the due process clause has jurisdiction to operate and, if so, whether the debtor has waived his right to due process. The due process clause of the fourteenth amendment proscribes all *state action* which denies one his rights without due process of law. Therefore, it does not shield an individual from *private conduct*, no matter how wrongful. The state action essential to invoke due process guarantees can occur only where the state has acted through its governmental authorities and is involved to a significant extent. The question of what constitutes significant state involvement has not been clearly defined by the courts and is left to be determined "by sifting facts and weighing circumstances."

Private agreements, standing alone, seem not to violate due process as long as they are effectuated by voluntary adherence to their terms. However, the district court, in *Adams*, rejected this argument where repossession, although ostensibly a private act pursuant to the terms of a contract, was in accordance with procedures embodied in statutory law. The *Adams* court felt that inclusion in the contract of a specific reference to a statute or a provision for repossession "according to law" indicated discrimination induced by statute and authorized under color of state law. The mere enactment of the statute constituted sufficient state action to bring the acts of the creditor within the purview of the fourteenth amendment. This theory is apparently based on the proposition that as long as state statutes provide a basis of authority for repossession by a private individual and such repossession is executed, state action is present.

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21365 U.S. at 722.
22Posadas v. Star and Crescent Federal Credit Union, 338 F. Supp. 614 (S.D. Cal. 1972), was consolidated with *Adams* because of their similarity. Posadas borrowed $1300 for the purchase of a truck and executed a promissory note and security agreement with the truck as security. The contract provided for "immediate possession of said . . . property according to law" in case of default. Posadas defaulted and the Credit Union took the truck.
If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law.\footnote{Id. at 135.}

Thus, the incorporation of statutory repossession and resale procedures, particularly from the UCC, into commercial contracts, seems to constitute the significant state involvement necessary to invoke the due process clause.

The question of whether a repossession is permissible self-help or a prohibited denial of due process is complex. If a repossession is merely a mechanism of self-help, there is no state involvement and, hence, no denial of procedural due process regardless of how capricious the repossession may be. However, if self-help is provided by a state statute, although the effect is to encourage extra-judicial repossession, the roots of such repossession are firmly implanted in the common law which the statutes have merely codified. But the common law roots of a procedure do not necessarily preclude it from being held unconstitutional.\footnote{For example, the landlord's distress procedure that was held unconstitutional in State ex rel. Payne v. Walden, 190 S.E.2d 770 (W. Va. 1972), had its origin in feudal times. Jones v. Ford, 254 F. 645 (8th Cir. 1918). Also, the improver's lien held unconstitutional in Straley v. Gassaway Motor Co., 359 F. Supp. 902 (S.D. W. Va. 1973), was classified a common law lien. Stallard v. Stepp, 91 W. Va. 60, 112 S.E. 184 (1922).} Although a creditor is not compelled by a statute to use prejudgment seizure, the statute is the ultimate source of the right of such seizure; therefore, state action is arguably present.

Once the problem of jurisdiction is overcome by the establishment of significant state action, the operation of the due process clause may yet be avoided if the debtor waives his constitutional rights of notice and hearing prior to being divested of his property. Several courts have held that a debtor waives his constitutional rights to notice and hearing by entering into an agreement, such as a conditional sales contract, which places him on notice of the consequences of default.\footnote{D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964); Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970).} This precise defense arose in both \textit{Fuentes} and \textit{Adams}.

The presumption against such waiver, however, is a well-
settled point of law.2 The party alleging waiver must show "an
intentional relinquishment or abandonment of a known right or
privilege."29 The Supreme Court, in a case involving a prior confes-
sion of judgment, recently held that a contractual waiver of con-
stitutional rights is effective where it is voluntarily, intelligently,
and knowingly made pursuant to negotiations between two compa-
nies with equal bargaining power. However, in the case of adhesion
contracts, where the terms are specified by the seller or lender on a
"take it or leave it basis," any purported waiver of fundamental
rights can hardly be said to be "voluntarily" made.

Although it is likely that individuals who sign installment
sales contracts are aware of the possibility that their default will
result in prejudgment seizure without notice and hearing, it is
unlikely that these individuals recognize that they are waiving
constitutional rights. In order for merchants, finance companies,
and various other creditors to invoke the concept of waiver it seems
necessary that they redefine "repossession" in the contract, mak-

ing it clear to the prospective debtor that his signature will surren-
der his constitutional rights. This requirement parallels those im-
posed by Miranda v. Arizona30 on an arresting officer. Even if such
requirements are fulfilled, a prior hearing to determine the validity
of the waiver probably remains essential.

III. THE EFFECTS OF DUE PROCESS APPLICATION ON WEST VIRGINIA
PREJUDGMENT REMEDIES

Judicial dissatisfaction with summary prejudgment remedies
seriously challenges the validity of numerous analogous summary
procedures. The effect of Sniadach and its progeny has already
been felt in West Virginia. In State ex rel Payne v. Walden,32 the
West Virginia Supreme Court of Appeals declared the West Vir-
ginia distress for rent statutes33— which permitted property of a
tenant to be levied upon and seized without prior notice or oppor-

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28Glasser v. U.S., 315 U.S. 60 (1942); Aetna Ins. Co. v. Kennedy, 301 U.S. 389
31384 U.S. 436 (1966). Under Miranda, a person in custody must be informed
that he has a right to remain silent, that anything he says can and will be used
against him in court, that he has a right to have counsel present at the interroga-
tion, and that if he cannot afford counsel, one will be appointed for him.
33W. VA. CODE ANN. §§ 37-6-9, 12, 14 (1966).
tunity for a hearing—unconstitutional as repugnant to the due process clause. Judge Haden stressed that:

When one is deprived of a right, it matters not that the deprivation is minimal. A restriction of a property right, temporarily or permanently, is nevertheless a prohibited curtailment of a right protected by the Constitution when such is accomplished without notice or hearing, absent a showing of a special or extraordinary state or creditor interest. 34

The Payne decision may likewise render the West Virginia garnishment statute 35 unconstitutional. Under this statute the plaintiff-creditor in an attachment action may designate any person as being indebted or liable to the defendant-debtor or having in his possession the effects of the defendant. Mere service of the order of attachment upon such person gives the plaintiff a lien on the claim or right which the defendant has against the garnishee. This procedure was deemed not violative of due process in Byrd v. Rector. 36 The court, in Byrd, reasoned that where a writ of attachment is issued prior to a judicial determination of the rights of the parties, there is no denial of due process, since there has been no final determination of these rights and, hence, no deprivation of property. The court, in Payne, specifically overruled Byrd to the extent that it held the deprivation of a tenant’s property via distress for rent a mere “temporary inconvenience” and not a denial of due process. The similar reasoning, in Byrd, that garnishment in aid of attachment does not deny due process since there is no final determination of the rights of the parties, is defective since it is, nonetheless, a temporary curtailment of the debtor’s rights without judicial process as forbidden by Payne.

The United States District Court for the Southern District of West Virginia adopted the theories of Sniadach and Fuentes in Shaffer v. Holbrook, 37 which reached the same conclusion as Payne and held the West Virginia distress for rent procedure violative of procedural due process. The court recently expanded this view in Straley v. Gassaway Motor Co. Inc., 38 when it declared the West Virginia repairman’s lien 39 unconstitutional. However, the court

34190 S.E.2d at 779.
36W. Va. 192, 163 S.E. 845 (1932).
39W. VA. CODE ANN. § 38-11-3 (1966). The improver’s, storer’s or transporter’s lien will hereinafter be referred to as the repairman’s lien.
ruled the statute void "in the context of and as applied in [that] action," therefore hinting that the case may be restricted to its facts.

The principles of Sniadach have also provided the foundation for the requirement of an evidentiary hearing based on timely and adequate notice before a welfare recipient's assistance can be terminated. Likewise, these same principles have been applied to invalidate automatic suspension of a driver's license pursuant to a state's "point system."

In all probability, West Virginia will experience further extensions of procedural due process to prejudgment remedies. The Florida replevin statutes struck down in Fuentes are very similar to the West Virginia detinue scheme, which also encompasses prejudgment seizure without notice or hearing. The Fuentes decision will probably be the basis for invalidating the West Virginia statutes or the impetus for grafting onto the statutes a mechanism for notice and hearing to satisfy due process requirements.

The West Virginia innkeeper's lien and bailee's lien have the same enforcement procedure as that of the repairman's lien which was held unconstitutional in Straley. From Straley, only a

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4359 F. Supp. at 906.

4In Straley the defendant estimated the cost of repair work to the plaintiff's auto as being between sixty and seventy dollars. After making the repairs, however, the charges totaled some $230 which was more than the vehicle, valued at $150, was worth and more than the plaintiff was able to pay. The defendant refused to surrender possession of the auto until the bill was paid. The plaintiff was unable to regain possession through a justice of the peace proceeding without employing an attorney and posting bond in an amount double the mechanic's bill. Under the West Virginia statute, the repairman, storer, or transporter already has a lien on personal property in his possession. He is not required to make an affidavit, post bond, or institute an action. He has the authority to give written notice to the debtor, to advertise, and to sell the property at an auction. W. VA. CODE ANN. § 38-11-14 (1966). The court felt, a fortiori, that the West Virginia repairman's lien enforcement procedures fail to fulfill the requirements of due process more grievously than the landlord's distress procedures invalidated by Payne and Shaffer.


4Bell v. Burson, 402 U.S. 535 (1971). Under W. VA. CODE ANN. § 17B-3-6 (1966), the only hearing afforded a driver on his license suspension comes after it has been suspended. Thus, the West Virginia system is in grave danger of being declared unconstitutional under recent case law.

4W. VA. CODE ANN. §§ 55-6-1 to 7 (1966).

4W. VA. CODE ANN. § 38-11-5 (1966). Under this statute an innkeeper may retain possession of personal property for the amount of his lawful claim for lodging.

short step is required to find these two statutory liens unconstitutional. Even if Straley is limited to its facts, the requirement that the lienholder be given possession of the property in question and comply with certain statutory requirements before the lien is created is not enough to satisfy due process. Under Fuentes a hearing is still required as long as the continued possession is disputed. The lienholder must at least show that the debtor has defaulted.

The holder in due course doctrine may also be affected by the application of due process. Under the doctrine, if a negotiable instrument is obtained in the ordinary course of business by a bona fide purchaser for value without notice of any defense to the note, the holder can enforce the obligation irrespective of such defense. A holder in due course has a distinct advantage in consumer credit transactions. If a debtor signs an installment note to pay a seller for the purchase of goods and the seller negotiates the note to a bank, the bank usually has the status of a holder in due course. As a holder in due course, the bank can enforce the buyer’s obligation to pay on the note even if the buyer has a defense which would excuse his failure to pay the seller, i.e., the merchandise is defective or was never delivered. If the buyer denies his obligation to pay, a parallel can be drawn to Fuentes which requires notice and a hearing where possession of property is disputed. Fuentes, then, may require that the buyer receive notice of the assignment or the sale of his obligation and be afforded an opportunity to be heard on any defenses to it before he is required to pay.

On the other hand, attachment liens may not fall victim to the requirements of procedural due process. Although by its very nature a prejudgment remedy, an attachment lien is an extraordinary remedy and cannot attach unless specific statutory grounds

47These statutory requirements, which are set forth in W. VA. CODE ANN. § 38-11-14 (1966), are that the lien be satisfied as agreed between the parties or if no such agreement, by giving the debtor written notice containing a statement of the lienor’s claim, the sum due and the date it became due. The notice shall also include a description of the goods aliened, a demand that the amount due be paid within a specified time, and a statement that if not paid within such time it will be advertised and sold by auction at a specified time and place.

48Miller v. Race, 97 Eng. Rep 398 (K.B. 1758), is the basis for the holder in due course doctrine. It held that a promissory bearer note exchanged as money by businessmen in the ordinary course of business is the same as “cash.”


50W. VA. CODE ANN. § 46-3-305 (1966).

51W. VA. CODE ANN §§ 38-7-1 to 46 (1966).
exist. This distinguishing feature may qualify the attachment lien as a statute narrowly drawn to meet an extraordinary situation and, accordingly, constitutional under Sniadach.

If the district court's decision in Adams is upheld, it would appear to be only a matter of time before the identical provisions respecting secured transactions in West Virginia and every other UCC jurisdiction are likewise held unconstitutional. However, affirmation of the district court's decision is not a certainty. The problem of whether there is sufficient state action to establish jurisdiction, is critical in the Adams case. Unlike Fuentes, which involved repossession of property by state officers pursuant to state statutes, Adams involves self-help repossession by a secured party pursuant to rights granted under a security agreement. Although these rights may arguably be sanctioned under state law, the secured party is not compelled to exercise them. If he chooses to exercise them, he is limited to self-help repossession that can be accomplished without a breach of the peace. The crucial issue is whether state action is present in the mere enactment of statutes clothing private individuals with the essentials of police power in exercising repossession or whether self-help repossession pursuant to a security agreement is outside the purview of the fourteenth amendment.

The appellee's brief to the Ninth Circuit argues that the sections of the UCC in question, which permit summary repossession by a secured party, operate more harshly than the replevin

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5'The statutory grounds prescribed by W. Va. Code Ann. § 38-7-2 (1966), exist where the debtor is a foreign corporation, or a non-resident of the State, or where the debtor is about to leave the State with intent to defraud his creditors, or is about to convert his property so as to defeat his creditors, or where any of several similar grounds are present.

6For a discussion of the requisite state action to establish jurisdiction, see text accompanying notes 18-20 supra.

7The security agreement in Adams provides that upon the occurrence of default the secured is entitled to take possession of the vehicle and take such other measures as may be necessary to protect the vehicle. 338 F. Supp. at 616 (S.D. Cal. 1972).

8UCC § 9-503.

The author wishes to express his gratitude to the Honorable John T. Copenhaver, Jr., Bankruptcy Judge of the United States District Court for the Southern District of West Virginia, for his aid in procuring the briefs to the Ninth Circuit Court of Appeals in the appeal of Adams v. Egley, which is styled Adams v. S. Cal. First Nat'l Bank. These briefs will hereinafter be referred to as briefs for appellant or appellee.

9UCC §§ 9-503, 9-504.
procedures of Pennsylvania and Florida which were struck down in *Fuentes*. The appellee argues that these sections deny the debtor both a pre-seizure and a post-seizure hearing before he is permanently deprived of his property. The secured creditor unilaterally determines if default has occurred and recovers the property without the assistance of regular law enforcement officers. No bond is required of the secured party prior to seizure, and the debtor cannot regain possession by posting a counter-bond. Applying the rule of *Fuentes*, that a creditor must show, at least, default by the debtor prior to seizing property, it is inevitable that *Adams* will be affirmed if sufficient state action is found to invoke the due process clause.

In the opposing brief filed by the Southern California First National Bank, the appellants argue that if state action is deemed to exist in *Adams*, the creditor has a similar cause of action against a debtor for denial of due process. This is based on the theory that the debtor's unilateral failure to make payments has deprived the creditor of a significant property interest—the possession of and right to use the money owed—without notice or hearing. Basic to this argument is the appellant creditor's concern that the application of due process to the debtor-creditor relationship would enhance the debtor's opportunity to abscond. Through the use of injunctions and temporary restraining orders, however, a creditor can enjoin a debtor's use of specific property prior to obtaining a judgment and thereby protect his interest in the property from fraudulent sale, removal or concealment by the debtor.

The appellants further argue that if sections 9-503 and 9-504 are rendered void, all states except Louisiana would be left without statutes governing the rights of parties in secured transactions after default. The need for such legislation would invariably lead individual states to enact repossession statutes with whatever procedural safeguards each feels necessary, thus losing the element of uniformity which the UCC fosters.

The effects of *Adams* and similar cases will be much greater than the mere destruction of part of the UCC's uniformity. As recited by the Permanent Editorial Board of the UCC in its amicus curiae brief in *Adams*, "[T]he aim or goal of any system which is adopted to regulate realization on security interests after default can be stated simply—disposition of the collateral at a fair price

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with the least possible delay and at the lowest possible cost.” The economic consequences of the application of procedural due process to prejudgment remedies will hinder this aim. Undoubtedly, the requirement of a prior hearing will further congest our already crowded courts. In addition, the cost of such hearings will probably find its way back to the pockets of the consumer, either through higher interest rates or increased taxes. Creditors will be more selective in extending credit, presumably resulting in less buying by the consumer.

IV. MEETING THE TEST OF CONSTITUTIONALITY

The imposition of notice and hearing requirements by Sniadach, Fuentes, and subsequent holdings leaves many unanswered questions as to what means are available to protect the interests of the creditor without infringing upon the debtor's constitutional rights. If these requirements are to fulfill their purpose, then, clearly, notice must be given and a hearing granted in time to prevent the deprivation of property. Even though a post-seizure hearing can result in the return of an individual's property and an award of damages if it was unfairly taken from him, it cannot undo the fact that an arbitrary taking contrary to procedural due process guarantees has already occurred. The Court in Fuentes repudiated “the general proposition that a wrong may be done if it can be undone.”

The Commercial Law League of America is presently considering a “Model Notice and Hearing for Provisional Remedies Act” drafted by Professor William D. Hawkland of the University of Illinois which would meet the due process requirements imposed by Sniadach and Fuentes and still protect the creditor's rights. The act uses the term “provisional legal or equitable process” to define all remedies prior to final judgment that enable a creditor to restrain the debtor's use or disposition of any property in which the debtor claims an interest, or to restrain the person of the

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59 Brief for Permanent Editorial Board for the Uniform Commercial Code as Amicus Curiae at 1, Adams v. S. Cal. First Nat'l Bank, ___ F.2d ___ (9th Cir. 1973).
60 407 U.S. at 82.
61 The Commercial Law League of America, founded in 1895, publishes the monthly Commercial Law Journal. The League's membership includes commercial and credit agency representatives, lawyers, and law list publishers.
62 W. Hawkland, Model Notice and Hearing for Provisional Remedies Act § 1e (unpublished).
debtor. The issuance of such process to any creditor not holding a court order is prohibited. This provision is based on the principles of Sniadach and Fuentes and blocks the creditor from seizing or arresting the debtor or repossessing his property without a court order. The court order will normally be granted only after a hearing to determine the probable validity of the creditor's claim.

To obtain an order authorizing the issuance of "provisional legal or equitable process," the creditor must file an affidavit with the court. The affidavit must contain, inter alia, a description of the claimed property, a statement as to the source of the creditor's interest in the property and his right to possession, a statement that it is being wrongfully detained, a statement of the means by which the debtor or third party came into possession, and the cause of the wrongful detention. Pursuant to this affidavit, the court issues an order directed to the debtor to show cause why the claimed property should not be taken from the possession of the debtor or third party and delivered to the creditor. This show cause order implements the rights announced by Sniadach and Fuentes; it notifies the debtor of his opportunity to be heard on the probable validity of the creditor's claim by fixing the date and time of the hearing. This date shall not be "sooner than 7 days nor more than 14 days after the service of the order." The debtor is thereby afforded reasonable notice of the hearing, yet his opportunity to abscond is minimized.

The order must be personally served on the debtor whenever possible. Otherwise, service must be in a manner that, in the opinion of the court, is reasonably calculated to afford the debtor notice. In addition to notice of the hearing, the order also notifies the debtor of his right to respond to the creditor's claim, sets a reasonable period for such a response, and informs the debtor of the probable consequences of his failure to respond. The debtor also is given the right to stay the order by posting bond. This

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For a further discussion of this concept, see note 1 supra.

W. Hawkland, Model Notice and Hearing for Provisional Remedies Act § 2a (unpublished).

Id. Comments to § 2, para. 1.

Id. § 3.

Id.

Id. § 4b.

Id. § 4b(1).

Id. § 4b(3).

Id. Comments to § 4, para. 2.

Id. § 4b(4).
provides relative equality with the creditor who can take the debtor's property prior to judgment by posting bond in accordance with applicable West Virginia statutes.

Under Professor Hawkland's Act, a hearing is conducted on the show cause order by the court sitting without a jury. The court determines whether it is necessary to restrain the debtor in order to protect the creditor's interest and which of the parties, with reasonable probability, is entitled to the possession of the property pending a final judgment. If the court rules that the creditor's claim is probably valid then it issues the creditor an order authorizing him to employ "provisional legal or equitable process."

Obviously, the preliminary hearing required by recent case law and proposed by Professor Hawkland is not a final determination of the parties' rights. It is used to determine if the creditor is probably entitled to relief, not whether in fact he will prevail. To avoid abuse of the notice and hearing requirement, it is necessary that a neutral judicial officer, as distinguished from an administrative officer, preside over the hearing. It is essential that the officer act in a judicial rather than an administrative capacity. The officer will have to preside over an adversary preliminary hearing between debtor and creditor and make a rational determination of who is likely to prevail. To merely bring the parties before the court and summarily issue an order authorizing "provisional legal or equitable process" would be an administrative act and would not fulfill the requirements of due process.

The Act also provides for summary procedures that the creditor can employ in extraordinary situations which are deemed constitutional under Sniadach and Fuentes. If the creditor files an affidavit which reasonably tends to show that the debtor or third party in possession of the disputed property is engaged in conduct, or is about to engage in conduct, to conceal the debtor or remove him from the court's jurisdiction or to place the disputed property in danger of destruction, concealment, etc., the court may issue a temporary restraining order prohibiting such acts.

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7Id. § 5b.
8Id.
9Id.
10In Shaffer v. Holbrook, 346 F. Supp. 762 (S.D. W. Va. 1972), a West Virginia justice of the peace issued a distress for rent warrant; the district court held that he was performing a non-judicial act.
11W. Hawkland, Model Notice and Hearing for Provisional Remedies Act, § 6
The Model Act recognizes that a debtor may waive his rights to notice and a hearing, but only if the waiver is made voluntarily, intelligently, and knowingly. These standards are deemed not to have been met if the waiver occurs at any time prior to the service of the show cause order, providing the debtor is not a merchant. The debtor, therefore, cannot waive his rights at the time the debtor-creditor relationship arises or prior to the occurrence of the debtor's alleged default. If the debtor is a merchant, however, he can waive his right to notice and a hearing prior to service of the show cause order by a statement in writing conspicuously showing the waiver to be made voluntarily, intelligently, and knowingly. These provisions of the Act recognize the distinctions made in Fuentes between waiver by a merchant and a non-merchant debtor. Waiver by a non-merchant debtor prior to default is essentially a contract of adhesion where the creditor has all of the bargaining power. The debtor either waives his rights to notice and hearing or is not extended credit. Under Professor Hawkland's scheme, the waiver of constitutional rights by adhesion contracts is rendered ineffective. This prevents the possibility of the creditor obtaining a waiver by bombarding the debtor with papers to sign at the time credit is extended. The ultimate test of the effectiveness of a waiver under the Model Act is whether the debtor has made such waiver voluntarily, intelligently, and knowingly.

Professor Hawkland's Act does leave one glaring question unanswered; it does not include self-help within its scope, but operates only in cases where there is "state action." The Act notes that the Supreme Court has not yet ruled on whether there is state action involved in the use of self-help, a question which may well be answered by Adams. If the Supreme Court determines that self-help is subject to procedural due process requirements, Hawkland's scheme could easily be adapted to such a decision by expanding the definition of "provisional legal or equitable process."

The distinction between self-help and repossession with the aid of state officers seems destined to become meaningless considering the expansion of the principles of Sniadach and legislation on both the state and federal levels. The National Commission on
Consumer Finance in a recent report entitled "Consumer Credit in the United States" (1973) abandoned the distinction in applying procedural due process guarantees to prejudgment remedies. If the distinction is abolished by Adams, legislatures will have to adopt a scheme for notice and hearing prior to repossession. Professor Hawkland's Act should be given prime consideration.

V. CONCLUSION

The application of procedural due process guarantees to prejudgment remedies has placed all such remedies in danger of being declared unconstitutional. Prejudgment seizure without notice and hearing is prohibited except in extraordinary circumstances where a statute is narrowly drawn to meet a particular situation. However, a condition precedent to application of due process is that there has been some significant state action involved in denying the rights of notice and a hearing prior to repossession, and the debtor has not waived these rights. The core of the problem, then, is twofold: (1) the determination of what constitutes a narrowly drawn statute that is constitutional without notice and hearing in extraordinary situations; and (2) the determination of what constitutes significant state action.

The question of whether a statute is narrowly drawn to meet an extraordinary situation can only be answered on a case by case basis. Several rules of thumb, however, are present. If a debtor is engaging in, or is about to engage in, conduct which will considerably lessen the creditor's chances of collection—such as concealing either himself or the property in question from the jurisdiction of the court or committing any other act fraudulent to the creditor—an extraordinary situation exists. Therefore, a creditor can temporarily restrain the debtor if a statute specifically enumerates such extraordinary situations and is narrowly drawn to meet them.

The problem of what constitutes state action is more complex. It is elementary that state action exists when prejudgment repossession is accomplished by the use of state officers (sheriff, constable, marshall, etc.). However, it is not clear if state action exists in cases where repossession is without the aid of state officers, and the creditor is merely exercising self-help. Self-help is a limited remedy since it can only be exercised if done so peacefully. Thus,

\[^{3}\text{Nat'l Comm'n on Consumer Fin., Consumer Credit in the United States} \ (1973).\]
a debtor's refusal to permit the creditor to repossess precludes its exercise. A final determination of whether self-help is permissible under the due process clause should be forthcoming if Adams v. Egley\textsuperscript{84} reaches the United States Supreme Court.

The effects of denying the creditor's prejudgment remedies will be widely felt by the general public. Significant portions of every state's statutes will be invalidated for non-compliance with the debtor's rights of procedural due process, and the cost of this compliance will probably be absorbed by the consumer.

Regardless of the consequences, summary procedures are teetering on the edge of unconstitutionality. Recent judicial dissatisfaction with these statutory prejudgment remedies is merely another example of strict adherence to basic constitutional principles of fundamental fairness. West Virginia's garnishment statute,\textsuperscript{85} detinue scheme,\textsuperscript{86} holder in due course doctrine,\textsuperscript{87} and motor vehicle point system,\textsuperscript{88} along with the possessory liens of repairmen,\textsuperscript{89} bailees,\textsuperscript{90} and innkeepers,\textsuperscript{91} and statutes regarding a secured party's right to possession\textsuperscript{92} and disposition\textsuperscript{93} of collateral after default may soon be held unconstitutional. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.\textsuperscript{94}"

\textsuperscript{85}W. VA. CODE ANN. § 38-7-15 (1966).
\textsuperscript{86}W. VA. CODE ANN. §§ 55-6-1 to 7 (1966).
\textsuperscript{87}W. VA. CODE ANN. § 46-3-305 (1966).
\textsuperscript{88}W. VA. CODE ANN. § 17B-3-6 (1966).
\textsuperscript{89}W. VA. CODE ANN. § 38-11-3 (1966).
\textsuperscript{90}W. VA. CODE ANN. § 38-11-4 (1966).
\textsuperscript{91}W. VA. CODE ANN. § 38-11-5 (1966).
\textsuperscript{92}W. VA. CODE ANN. § 46-9-503 (1966).
\textsuperscript{93}W. VA. CODE ANN. § 46-9-504 (1966).
ADDENDUM: ADAMS V. SOUTHERN CALIFORNIA FIRST NATIONAL BANK

The Constitutionality of Self-Help Repossession

Adams v. Southern California First Nat'l Bank, 303 F.2d ___ (9th Cir. 1973). The appellee, Adams, borrowed money from the appellant bank and executed a promissory note and security agreement covering his automobiles. The security agreement gave the bank the rights and remedies of a secured party under sections 9-503 and 9-504 of the UCC, which permit summary repossession and sale without judicial process upon default by the debtor. After paying nearly $900 on a $1,100 loan, Adams defaulted, and the bank took possession of the vehicles and sold them at a private sale. Adams brought suit in federal district court, alleging that the repossession by the bank was under color of state law and, hence, a denial of his constitutional right to due process of law. The district court upheld the petitioner's contention that sections 9-503 and 9-504 of the UCC set forth a state policy constituting sufficient state action to justify a conclusion that the repossession by the bank was a denial of the petitioner's constitutional right to due process and that the sections facilitating such repossession were unconstitutional.3

The Ninth Circuit Court of Appeals reversed the district court in an opinion filed on October 4, 1973. The court held that the state was not significantly involved in the self-help repossession procedures undertaken by the bank to permit the finding of state action required to establish the debtor's cause of action.4 The court viewed the bank's conduct as action taken by a private creditor without any direct action by the state. The fact that the bank acted with knowledge of, and pursuant to, state law was held not to constitute sufficient state involvement to invoke the proscriptions of the fourteenth amendment. The majority opinion rejected

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1Section 9-503 provides in part that "[u]nless otherwise agreed a secured party has on default the right to take possession of the collateral . . . [and] may proceed without judicial process if this can be done without breach of the peace. . . ."

2Section 9-504 permits a secured party to "sell, lease or otherwise dispose of any or all of the collateral after giving the debtor and any other person who has a security interest notice in writing of the time and place of such disposition." Notice must be delivered personally or by mailing to the debtor's last known address.


the appellee's reliance on *Reitman v. Mulkey* as standing for the proposition that when a state's statutes provide authority for repossession by a private individual and such repossession is asserted, state action is present. *Reitman* was distinguished because the state, by approving a proposition reversing previously existing law, was involved to a much greater degree than in *Adams*, where sections 9-503 and 9-504 merely codified existing law. Further, in *Reitman*, the state's "subjective intent" was to indirectly circumvent individual constitutional rights by encouraging racial discrimination in housing, while the creditor's remedies in question in *Adams* were based on extensively researched economic grounds of long standing. The court was not convinced that the resolution of a state action question involving prejudgment self-help repossession of secured property should be controlled by a case involving racial discrimination. The court, however, found *Reitman* quite relevant for what the Supreme Court stated it did not hold; that is, it did not forbid a state from putting into statutory form "an existing policy of neutrality with respect to private discrimination."

The dissenting opinion felt that the majority's distinguishing of *Reitman* by its facts was unsupportable and that *Reitman* was applicable to the *Adams* situation. The state deliberately chose a policy encouraging the repossession and sale of collateral without judicial process by embodying it in sections 9-503 and 9-504. The state meaningfully encouraged the bank, which admittedly acted pursuant to the statute, and, thus, the state was significantly involved within the meaning of *Reitman*.

The decision of the Ninth Circuit in this case is very important in the determination of what constitutes significant state action to invoke the purview of due process. Although the decision concluded that self-help is not within the realm of due process for want of significant state action, it may not be the last word on the issue.

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5387 U.S. 369 (1967).

6In *Reitman*, the California legislature had enacted several statutes regulating racial discrimination in housing. In 1964, a proposition was added to the State constitution to provide that the State could not place any limitation on the right of a person to deal with his own real property.

7Since the state action question was to be decided by "balancing facts and weighing circumstances," a consideration of substantive facts was required. Such consideration "should not result in a hierarchy of rights . . . but . . . should permit independent factual determination of state action on a case-by-case approach."

8387 U.S. at 376.
It is quite probable that the decision will be appealed to the Supreme Court for a final determination of the permissibility of self-help repossession.

*Thomas V. Flaherty*