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Commercial Transactions: The Future of Self-Help Repossession, 8 J. Marshall J. Prac. & Proc. 96 (1974)

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COMMERCIAL TRANSACTIONS: THE FUTURE OF SELF-HELP REPOSSESSION

The entire credit structure in the United States today depends upon giving effect to the agreements which have been entered into by the debtor and his creditor. The cost of borrowing money is dependent, in part, upon an expedient remedy being available to the secured creditor.[1] Self-help repossession, as codified by the *Uniform Commercial Code*,[2] is one such expedient remedy.

As a result of *Sniadach v. Family Finance Corp.*,[3] *Fuentes v. Shevin*[4] and, most recently, *Mitchell v. W.T. Grant Co.*,[5] there has been an upheaval in the law concerning summary repossession as a creditor's remedy.[6] Although Justice White, in *Mitchell*, refused to squarely address the question of whether self-help repossession is unconstitutional,[7] he did admit that "[t]he commentators are in the throes of debate."[8] On one side the commentators believe that due process requires, at the minimum, notice to the debtor and an opportunity for the debtor to be heard prior to any repossession.[9] The other side insists that the cost of credit will be maximized by a mandate of procedural safeguards and that such safeguards would not be in the interest of the general public.[10]

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1. Johnson v. Associates Finance, Inc., 365 F. Supp. 1380 (S.D. Ill. 1973). A "'[s]ecured party' means a lender, seller or other person in whose favor there is a security interest . . . ." UNIFORM COMMERCIAL CODE § 9-105(1)(m). A security interest is the interest in the collateral conveyed by the debtor to the secured party. *Id.* § 1-201(37).

2. UNIFORM COMMERCIAL CODE § 9-503 provides in part:

> 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.

Id. § 9-504 provides for the disposition of the collateral that has been repossessed. The text will refer to these sections as "the self-help provisions" and the UNIFORM COMMERCIAL CODE as the "*UCC*".

3. 395 U.S. 337 (1969). Without notice and an opportunity to be heard before seizure, Mrs. Sniadach's wages were garnished. The Wisconsin procedure was that upon application to the clerk of the court by the creditor, a summons issued to the garnishee, and thereafter the wages were frozen. Only upon subsequent trial on the merits with the garnishee emerging victorious were the wages unfrozen. The United States Supreme Court held that the prejudgment garnishment was unconstitutional as it violated the due process clause of the fourteenth amendment.

4. 407 U.S. 67 (1972).

5. 42 U.S.L.W. 4671 (U.S. May 14, 1974).

6. *See* Hawkland, *The Seed of Sniadach: Flower or Weed*, 79 CASE & COM. 3 (1974).

7. 42 U.S.L.W. at 4677 n.13.

8. *Id.*

9. As will be discussed note 59 *infra* and accompanying text, *Mitchell* admits of a less rigid due process standard.

10. *See, e.g.*, Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (1972).

SELF-HELP REPOSSESSION UNDER THE *UCC*

Federal Due Process

The proscription of the due process clause of the fourteenth amendment is limited to *state* action which results in a deprivation of property rights and does not encompass action taken by an *individual*.[11] Self-help had traditionally been action taken by the creditor without the aid of court process.[12] By virtue of the states having enacted the self-help provisions of the *UCC*,[13] the debtor has raised the argument that any self-help repossession by the secured creditor amounts to "state action" thus bringing such action within the protection of the due process clause of the fourteenth amendment.[14]

Whether this argument is accepted by the courts and the self-help provisions of the *UCC* are found violative of the federal constitution is dependent in part upon whether the courts find that there is significant state action[15] when a state enacts a statute which merely reiterates the common law right to repossess but which does not compel its use.

In order for significant state action to arise there must be active assistance on the part of the state. State action is not involved in the private conduct of an individual.[16] The state must be directly or actively involved rather than merely lending its passive support.[17] Once the test is met, the federal courts will hold that a cause of action cognizable in federal court is stated.[18]

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11. "[N]or shall any *State* deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1 (emphasis added). *See* Civil Rights Cases, 109 U.S. 3, 11 (1883).

12. The remedy of distress at common law was "[t]he taking a personal chattel out of the possession of a wrong-doer into the custody of the party injured, to procure a satisfaction for a wrong committed . . . ." BLACK'S LAW DICTIONARY 561 (4th ed. 1968).

For an excellent discussion of the history of self-help repossession *see*, 2 W. BLACKSTONE, COMMENTARIES 856-58; 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 574 (2d ed. 1899); 3 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 278 (1906).

13. The UNIFORM COMMERCIAL CODE has been adopted by all states except Louisiana.

14. See text accompanying notes 29-34 *infra*.

15. There must be *significant* state action in order to give rise to a potential fourteenth amendment violation. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

16. Shelley v. Kraemer, 334 U.S. 1 (1948).

17. Lucas v. Wisconsin Electric Power Co., 466 F.2d 638, 654-56 (7th Cir. 1972).

18. U.S. CONST. art. III, § 2 provides that "[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution . . . ."

Congress in its enabling legislation 28 U.S.C. § 1343 (1970) (emphasis added) states:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .

Thus, the debtor whose goods have been repossessed by a secured creditor using self-help repossession permitted by the *UCC*, and who wishes to challenge the constitutionality of the secured creditor's actions, must allege and prove that the secured creditor acted under color of state law.[19] By failing to meet the above criteria, the debtor will be dismissed for failure to state a federal cause of action.[20]

Federal Decisions

Courts of Appeals

The four circuits which have considered the issue of whether state enactment of the self-help provisions of the *UCC* constitutes significant state action within the meaning of the fourteenth amendment have unanimously held that no such action was involved.[21]

The courts found that the states were merely regulating the contractual right to repossess and as such were lending only their passive support and were not *requiring* the use of self-help repossession. Since no significant state action was involved, the claims were dismissed for failure to state a federal cause of action, and the courts did not decide what would be required by the fourteenth amendment.[22]

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(3) To redress the deprivation, *under color of any State law, statute, ordinance, custom or usage*, of any right, privilege or immunity secured by the Constitution of the United States . . . .

One such "civil action authorized by law" is found in 42 U.S.C. § 1983 (1970) which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Thus, 42 U.S.C. § 1983 provides a civil remedy for deprivation of any constitutional right by a person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . ." 28 U.S.C. § 1343 is the provision which gives the district court jurisdiction to hear the federal cause of action.

If there is no state action, the case does not arise under the federal constitution, and the federal court will not hear the case because there is no federal cause of action.

19. The "under color of" is treated as the equivalent to the state action requirement of the fourteenth amendment. United States v. Classic, 313 U.S. 299, 326 (1941).

20. 42 U.S.C. § 1983 (1970) and its jurisdictional counterpart 28 U.S.C. § 1343(3) (1970).

21. James v. Pinnix, 4 CCH SECURED TRANSACTIONS GUIDE ¶ 52,385 (5th Cir. June 10, 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3703 (U.S. June 19, 1974) (No. 73-1897); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3693 (U.S. June 7, 1974) (No. 73-1842).

22. James v. Pinnix, 4 CCH SECURED TRANSACTIONS GUIDE ¶ 52,385, at

District Courts

The federal district courts disagree as to whether a state's enactment of the *UCC* constitutes significant state action. The root of the problem is found in the determination of whether the *UCC* merely reiterates the common law contractual right to repossess or whether it confers upon the secured creditor a new right to summarily repossess the property. If the former is found to be true, there is no significant state action, and the case is dismissed for failure to state a federal cause of action.[23] If the latter is found true, the court decides the case and finds the self-help provisions unconstitutional because of lack of due process safeguards.[24]

The federal district courts which have found that there is no significant state action rely on the fact that the secured creditor is acting independently under his contract, whether self-help is expressly provided for in the contract or not,[25] and is not acting under color of state law.[26] It is not an arm of the state that is acting directly against an individual's property and depriving him of it without notice and hearing, but rather it is an individual so acting. Action taken by an individual is clearly not within the penumbra of the fourteenth amendment.[27]

> To say . . . that all human behavior which conforms to statutory requirements is 'State action' or is 'under color of State law' would far exceed not only what the framers of [42 U.S.C. § 1983] . . . ever intended but common sense as well.[28]

The *UCC* only authorizes private repossession that would exist absent the statute.[29]

67,495 (5th Cir. June 10, 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16, 17 (8th Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3703 (U.S. June 19, 1974) (No. 73-1897); Shirley v. State Nat'l Bank, 493 F.2d 739, 745 (2d Cir. 1974); Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank, 487 F.2d 906, 907 (8th Cir. 1973); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 338 (9th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3693 (U.S. June 7, 1974) (No. 73-1842).

23. *See, e.g.*, Johnson v. Associates Finance, Inc., 365 F. Supp. 1380 (S.D. Ill. 1973); Nichols v. Tower Grove Bank, 362 F. Supp. 374 (E.D. Mo. 1973); Colvin v. Avco Financial Servs. of Ogden, Inc., 12 UCC Rep. Serv. 25 (D.C. Utah 1973); Kirksey v. Theilig, 351 F. Supp. 727 (D.C. Colo. 1972); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D.C. Neb. 1972); Greene v. First Nat'l Exchange Bank, 348 F. Supp. 672 (W.D. Va. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971).

24. *See, e.g.*, Gibbs v. Titelman, 13 UCC Rep. Serv. 401 (E.D. Pa. 1973); Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917 (D.C. Mass. 1973).

25. *See* Colvin v. Avco Financial Servs. of Ogden, Inc., 12 UCC Rep. Serv. 25, 27 (D.C. Utah 1973).

26. McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971).

27. Greene v. First Nat'l Exchange Bank, 348 F. Supp. 672 (N.D. Va. 1972).

28. Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972).

29. Shirley v. State Nat'l Bank, 13 UCC Rep. Serv. 43 (D.C. Conn. 1973), *aff'd*, 493 F.2d 739 (2d Cir. 1974).

The federal district courts which have found the self-help provisions unconstitutional analogize self-help repossession to the civil rights cases of *Adickes v. S.H. Kress & Co.*[30] and *Reitman v. Mulkey.*[31] The courts have determined that even though *Adickes* and *Reitman* concerned redress for racial discrimination, "the amount of state involvement necessary to constitute 'color of state law' for a deprivation of one constitutional right would equal the amount of state involvement necessary for another constitutional right."[32] As established by the Supreme Court in *Adickes* and *Reitman*, "when private action conforms with state policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action."[33] Applying this test, the courts have found that enactment of the self-help repossession provisions by the states encouraged and involved the states in private repossessions, which constituted sufficient state action to raise a federal question.

Once the courts had determined that there was significant state action it was but a short step to application of the basic procedural safeguards enunciated in *Fuentes v. Shevin.*[34] However, a hurdle has been placed in the path of the courts that had so readily held the self-help repossession provisions unconstitutional—*Mitchell v. W.T. Grant Co.*[35]

Analysis of Mitchell v. W.T. Grant Co.

Mitchell v. W.T. Grant Co.

In *Mitchell* the constitutionality of a Louisiana sequestration

30. 398 U.S. 144 (1970). The Supreme Court of the United States found a state-enforced custom of segregating the races in public restaurants and held that plaintiff's fourteenth amendment right was violated if she could show discriminatory acts by defendant done under compulsion of the state-enforced custom.

31. 387 U.S. 369 (1967). The United States Supreme Court held that a California constitutional amendment was violative of the fourteenth amendment because the amendment authorized discrimination on racial grounds in the sale and rental of real estate thus significantly involving the state in private discrimination.

32. Gibbs v. Titelman, 13 UCC Rep. Serv. 401, 409 (E.D. Pa. 1973).

33. Adickes v. S.H. Kress & Co., Inc., 398 U.S. 144, 203 (1970) (Brennan, J., concurring).

34. 407 U.S. 67 (1972). *Fuentes* concerned the constitutionality of the pre-judgment replevin statutes of Pennsylvania and Florida. The Court there stated that there must be notice and hearing before state officers could repossess the debtor's property. However, two items must here be noted. First, the Supreme Court stated that "[t]he creditor could, of course, proceed without the use of state power, through self-help by 'distraining' the property before a judgment." *Id.* at 79 n.12. In addition, in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972), which was decided the same day as *Fuentes*, the Court stated that *mere state regulation* was not enough significant state action to warrant application of the fourteenth amendment.

35. 42 U.S.L.W. 4671 (U.S. May 14, 1974). All cases previously discussed were decided prior to *Mitchell.*

procedure[36] was questioned. The debtor had purchased goods under an installment sales contract from the creditor. Louisiana law also provided the creditor with a vendor's lien to secure the unpaid balance of the purchase price. After the debtor defaulted, the creditor filed suit seeking the issuance of a writ of sequestration. Upon the creditor's furnishing a bond, the state trial judge ordered the writ to issue; whereupon the sheriff seized the goods. In addition, a citation went out to the debtor advising him of the writ of sequestration and bond and ordering him to appear or to file a pleading within five days. The debtor, claiming that the seizure violated his right to due process, filed a motion to dissolve the writ. The Louisiana Supreme Court upheld the constitutionality of the sequestration procedure affirming the judgments of the lower courts. The Supreme Court granted certiorari to decide the constitutional question.[37]

The Supreme Court found that the Louisiana procedure was constitutional because it protected the interests of both the debtor and the creditor.[38] Under the Louisiana procedure,[39] a writ of sequestration issues on the authority of a judge after a clear showing of ownership or possessory rights by the petitioner and a clear showing that it is within the power of the defendant to remove or otherwise dispose of the property. It is also necessary that the petitioner file sufficient bond to protect the defendant before the writ will issue.

Even though the debtor received neither notice of the creditor's application for the writ nor an opportunity to be heard prior to its issuance, the Court determined that the subsequent immediate full hearing on the matter of possession satisfied due process.[40] The Court relied on the facts that under the Louisiana procedure the debtor could immediately apply for dissolution of the writ, that such dissolution was mandatory unless the creditor proved the allegations upon which the writ issued,[41] and, in addition, that the debtor could regain possession by filing his own bond.[42] Thus, the debtor was sufficiently protected.

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36. A mandate of the court, ordering the sheriff, in certain cases, to take in his possession, and to keep, a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing.
BLACK'S LAW DICTIONARY 1531 (4th ed. 1968).
37. 42 U.S.L.W. at 4672.
38. *Id.* at 4673.
39. *Id.*
40. *Id.* at 4675.
41. *Id.* at 4673.
42. *Id.*

Mitchell v. W.T. Grant Co. and Fuentes v. Shevin

It must first be noted that the Supreme Court made every effort in *Mitchell* to limit the implications to be drawn from its holding.[43] However, as the dissent pointed out, *Mitchell* can be read to effectively overrule *Fuentes v. Shevin*,[44] and the majority appears to be making a distinction without a difference.[45]

The Court in *Fuentes v. Shevin* stated: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified."[46] The notification and hearing requirement in *Fuentes* had to be met prior to the repossession.[47] In comparison, the *Mitchell* Court stated that "a hearing must be had before one is *finally* deprived of his property" and that a prior-to-seizure hearing might not be necessary where a full and immediate post-seizure hearing is provided.[48] The *Mitchell* Court retreats from the absolute rule stated in *Fuentes*, but what distinguishes the cases?

In *Fuentes* the creditor obtained a writ of replevin by application to the *clerk* of the court on the creditor's bare assertion that he was entitled to it.[49] To obtain a writ of sequestration the creditor must have alleged specific facts, and a *judge* would then issue the writ.[50]

The *Mitchell* Court further distinguished *Fuentes* because of the presence of judicial supervision and management throughout the Louisiana sequestration procedure.[51] The Court stated that the control minimized the risk that there would be a wrongful taking of the debtor's property.[52] Although the question of judicial supervision was not at issue, the *Fuentes* Court had implicitly determined that if a risk of an arbitrary taking was present, due process prohibited a solely *ex parte* hearing prior to the deprivation.

> [W]hen 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. It has long been recognized that

43. *Id.* at 4677 n.13.
44. *Id.* at 4682.
45. *Id.*
46. 407 U.S. at 80.
47. *Id.* at 83.
48. 42 U.S.L.W. at 4675 (emphasis added).
49. 407 U.S. at 74.
50. 42 U.S.L.W. at 4673. Only in the parish in which the *Mitchell* case arose was the writ issued by a judge. In all other parishes the writ issued from the clerk of the court. Further, the allegations of specific facts necessary in the *Mitchell* parish might not have been as rigidly adhered to in a parish in which the writ issued from a clerk of the court.
51. *Id.* at 4676. The Court in *Fuentes* had determined that a subsequent hearing could not alter the fact that there could have been an arbitrary taking by the creditor. 407 U.S. at 82.
52. 42 U.S.L.W. at 4676.

'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . [And n]o better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'[53]

The *Mitchell* Court found that the bond posted by the creditor would sufficiently protect the debtor's interests in the property, and, moreover, the debtor himself could post bond and retain possession of the property while still affording protection for the creditor's interests.[54] The *Fuentes* Court had flatly rejected the argument and had stated that the posting of a bond by the debtor was not a substitute for constitutional due process.[55]

Finally, the *Mitchell* Court pointed to the promptness of the hearing available to the debtor,[56] as compared to the eventuality of any hearing available to the debtor in *Fuentes*.[57] In the *Mitchell* Court's view, a mere postponement of the hearing and judicial determination was not a denial of due process.[58] But as was stated in *Fuentes*:

The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. . . . 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.[59]

Mitchell, Fuentes, and the UCC

Under *Mitchell* a state statute which permits repossession by a secured creditor is not violative of the fourteenth amendment and adequately protects the interests of both the debtor and the creditor if it contains the following provisions: a sworn affidavit containing specific allegations of facts showing a right to repossess, judicial supervision prior to the seizure, a prompt post-seizure hearing, and posting of bonds by the parties.[60] How does the above compare to the safeguards afforded to the debtor and the creditor under the *UCC*? The Court emphasized that in no way was *Mitchell* indicative of how the Court might decide a case arising under the self-help repossession provisions of the *UCC*.[61] Justice White, writing for the majority, suggested "caution in the

53. 407 U.S. at 81.
54. 42 U.S.L.W. at 4674.
55. 407 U.S. at 83-84.
56. 42 U.S.L.W. at 4677.
57. 407 U.S. at 75, 77.
58. 42 U.S.L.W. at 4675.
59. 407 U.S. at 86.
60. 42 U.S.L.W. at 4674. It is notable that the distinctions between these requirements and the Florida replevin statute found unconstitutional in *Fuentes* are minimal. 407 U.S. at 73 n.6.
61. 42 U.S.L.W. at 4677 n.13.

adoption of an inflexible constitutional rule" and reiterated that the Court's holding "is limited to the constitutionality of the Louisiana sequestration procedures."[62] With the Court's limitation in mind, a discussion of the effects of the decision is warranted.

It is apparent that *Fuentes* has been effectively limited if not overruled.[63] *Fuentes* stated that unless exceptional circumstances[64] existed, procedural due process required an adversary hearing *prior* to temporarily depriving a person of any possessory interest in tangible personal property.[65] *Mitchell* retreats from this principle in allowing a hearing *subsequent* to the deprivation of possessory interests in property to satisfy due process.[66]

This decision may very well have far-reaching effects on self-help repossession. Since due process no longer requires notice and a hearing prior to deprivation of possessory interests in tangible personal property, admittedly under limited circumstances, it appears that the courts will no longer summarily hold self-help repossession invalid. Now when a federal court determines that mere enactment of the self-help provisions constitutes state action,[67] *Mitchell* may afford the creditor additional arguments in support of the constitutionality of these provisions.

The Court in *Mitchell* recognized that the interests of the creditor as well as the debtor must be protected and held that the Louisiana sequestration statute provided a constitutional accommodation of their interests.[68] The *Mitchell* Court sought to protect the debtor's interest in not having the goods subjected to an arbitrary taking by the secured creditor. The *UCC* itself contains protections for the debtor,[69] but the provisions do not protect the interest that both the *Mitchell* Court and the fourteenth amendment mandate.

The *UCC* only condones a peaceful repossession of property.[70] If a breach of the peace occurs,[71] the creditor is subject

62. *Id.*
63. *Id.* at 4678 (Powell, J., concurring). *Id.* at 4682 (Stewart, Douglas & Marshall, JJ., dissenting).
64. 407 U.S. at 90-91. These circumstances do not exist in a typical § 9-503 situation.
65. 407 U.S. at 80.
66. 42 U.S.L.W. at 4675.
67. See note 18 *supra* and accompanying text.
68. 42 U.S.L.W. at 4673.
69. UNIFORM COMMERCIAL CODE §§ 9-501 - 9-507.
70. "In taking possession a secured party may proceed without judicial process *if this can be done without breach of the peace . . . .*" *Id.* § 9-503 (emphasis added).
71. A breach of the peace occurs once there is entry by the creditor into the debtor's house or garage without the debtor's consent. *See* Annot., 99 A.L.R.2d 358 (1965). The creditor cannot exert wrongful pressure on the debtor. He can use no force, and he acts at his own risk. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 995 (1972).

to both tort liability[72] and liability under section 9-507.[73] Under section 9-507 if the self-help provisions have not been complied with the debtor may obtain a court order restraining disposition of the goods and may obtain damages caused by the secured creditor's failure to comply with these provisions. In addition, if the proceeds of a sale are insufficient to satisfy the debt, the creditor is not entitled to a deficiency judgment.[74]

The debtor has the right to redeem goods which have been repossessed,[75] even if the self-help provisions have been complied with, and the creditor cannot impair this right by a repledge of the collateral although this right may be contracted away by the debtor.[76] The creditor who disposes of the collateral by sale must give the debtor notice and dispose of the collateral in a commercially reasonable manner,[77] and the debtor has the right to repurchase the goods at the sale.[78] If the creditor violates the *UCC* standards, he is again subject to liability under section 9-507. Thus it can be seen that the above provisions do not protect the debtor from an arbitrary taking but only protect his interest after there has been a seizure, whether proper or improper.

The *Mitchell* Court sought to protect the secured creditor's interest in receiving payment for any goods purchased, and the *UCC* adequately protects this interest. Upon default[79] the credi-

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72. J. WHITE & R. SUMMERS, *supra* note 71, at 995.

73. UNIFORM COMMERCIAL CODE § 9-507 provides for the secured party's liability for failure to comply with Part 5 of the *UCC*:

> (1) 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 on appropriate terms and conditions. . . . If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus 10 per cent of the cash price.

74. J. WHITE & R. SUMMERS, *supra* note 71, at 995.

75. UNIFORM COMMERCIAL CODE § 9-506. The debtor's right to redeem is terminated: (1) upon disposition of the collateral by the creditor, (2) upon the creditor's making a contract of disposition, (3) upon satisfaction of the secured obligation by the creditor's retention of the collateral under *id.* § 9-595 (2), or (4) upon written agreement with the debtor after default.

The debtor should be required to pay all of the obligation as a condition precedent to redemption. *Id.* § 9-506, Comment.

76. UNIFORM COMMERCIAL CODE § 9-207(2)(e).

77. *Id.* § 9-504. A sale is commercially reasonable if the creditor in selling the collateral acts in good faith, avoids loss, and makes effective realization. Old Colony Trust Co. v. Penrose Indus., Corp., 280 F. Supp. 698, 715 (E.D. Pa. 1968). A disposition of collateral which has been approved in a judicial proceeding is commercially reasonable. Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (1972). *See also* UNIFORM COMMERCIAL CODE § 9-507(2).

78. UNIFORM COMMERCIAL CODE § 9-504, Comment 5.

79. Default is determined according to the contract provisions agreed to by the debtor and the secured creditor. *Id.* § 1-208 provides that the creditor

> may accelerate payment or performance or require collateral or ad-

tor may repossess the collateral.[80] He may then either retain the collateral in satisfaction of the debtor's obligation or sell the collateral in a commercially reasonable manner.[81]

Even though the *UCC* sufficiently protects the interest of the creditor, it does not even attempt to protect the interest of the debtor in being free from a wrongful taking by the secured creditor. Therefore, the *UCC* does not even approach the constitutional accommodation of the interests of the parties strived for by the *Mitchell* Court.

The Court in *Mitchell* also emphasized the availability of a prompt post-seizure judicial hearing.[82] In this regard, the creditor wishing to sustain the constitutionality of the *UCC* provisions can argue that these provisions emphasize promptness in the creditor's actions after repossession, thus affording the debtor an opportunity to have any dispute as to the validity of the seizure quickly resolved by a court. A sale of collateral necessarily results in notice to the debtor prior to the sale.[83] A sale of collateral after repossession will not be commercially reasonable if it is not prompt.[84] In addition, where the repossession is of consumer goods,[85] the sale must take place within ninety days.[86] Any decision to retain the collateral in satisfaction of the obligation will necessarily be prompt, as written notice must be sent to the debtor.[87] Although the *UCC* does not require the prompt post-seizure judicial hearing dictated by *Mitchell*, the prompt action to be taken and notice required to be given by the secured creditor insure the *availability* of a prompt post-seizure hearing albeit initiated by the debtor.

Finally, in his effort to sustain the constitutionality of the self-help provisions, the creditor must urge that the costs of credit require a self-help remedy. Because of the legal costs of using the courts, the creditor will usually seek to realize his claim without the aid of the courts by means of self-help repossession.

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ditional collateral 'at will' or 'when he deems himself insecure' or in words of similar import . . . only if he in good faith believes that the prospect of payment or performance is impaired.

80. *Id.* § 9-503.

81. *See* note 77 *supra* and accompanying text.

82. 42 U.S.L.W. at 4677.

83. UNIFORM COMMERCIAL CODE § 9-504.

84. Every aspect of the sale of repossessed collateral "including the . . . time . . . must be commercially reasonable." *Id.*

85. "Goods are (1) 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes . . . ." *Id.* § 9-109.

86. *Id.* § 9-505(1). If the debtor has not paid sixty per cent, the creditor may retain the collateral in satisfaction or sell the collateral in a commercially reasonable manner. *Id.* § 9-505(2).

In the case of consumer goods, if the creditor fails to sell within ninety days, he may be liable for conversion, *id.* § 9-505(1), or for the minimum recovery prescribed in *id.* § 9-507(1).

87. *Id.* § 9-505(2).

By eliminating this alternative, the creditor must either sue on the debt or foreclose on the collateral—both in a judicial proceeding.[88] The costs of litigation will be passed on to the debtors thus increasing the costs of borrowing money.[89] The Supreme Court in *Mitchell* recognized this problem and stated that

> the principle question yet to be satisfactorily answered is the impact of prior notice and hearing on the price of credit, and more particularly, of the mix of procedural requirements necessary to minimize the cost.[90]

The cost considerations include the costs incurred by the creditor due to a delay in repossession caused by the necessity for a prior hearing and notice being sent to the debtor.[91] The *Mitchell* Court also addressed this problem:

> Wholly aside from whether the buyer, with possession and power over the property, will destroy or make away with the goods, the buyer in possession of consumer goods will undeniably put the property to its intended use, and the resale value of the merchandise will steadily decline as it is used over a period of time. . . . Clearly, if payments cease and possession and use by the buyer continue, the seller's interest in the property as security is steadily and irretrievably eroded until the time at which the full hearing is held.[92]

In addition to the above-mentioned deterioration costs, the seller also incurs opportunity costs which are the return the seller would have received from investing the proceeds of sale.[93]

There will also be costs incurred by the state itself. By elimination of self-help repossession, any judicially authorized repossession will be done by a sheriff or marshall. The state will incur these costs which eventually will be passed on to the consumer. Also, there will be an increased burden on the state courts as repossession must necessarily proceed only after judicial action.

Thus, there is a fine balancing test which the courts will use. In deciding the constitutionality of the self-help provisions, the courts must determine whether the increased costs which would result from holding the provisions unconstitutional outweigh the

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88. *Id.* § 9-501(1).

89. Any discussion of costs is necessarily theoretical rather than empirical, as surveys taken by the NATIONAL COMMISSION ON CONSUMER FINANCE remain unpublished.

90. 42 U.S.L.W. at 4677 n.13.

91. *See* Adams v. Egley, 338 F. Supp. 614, 622 (S.D. Cal. 1972), *rev'd sub nom.* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3693 (U.S. June 7, 1974) (No. 73-1842).

92. 42 U.S.L.W. at 4674.

93. *See* Note, *Self-Help Repossession: the Constitutional Attack, the Legislative Response, and the Economic Implications*, 62 GEO. L.J. 273 (1973).

constitutional protections to be afforded the debtor.[94] The creditor must argue that on cost considerations alone, the *UCC* repossession provisions must be upheld constitutionally.[95]

This argument has been accepted by one state court in upholding the constitutionality of the self-help provisions under the fourteenth amendment. In *Messenger v. Sandy Motors, Inc.*[96] the debtor charged that section 9-503 of the *UCC* violated the federal due process clause.[97] The debtor had purchased an automobile from the creditor and had defaulted in making the payments. The creditor repossessed the car by driving it away from its parking space. There was no judicial process or breach of the peace.[98] The New Jersey Superior Court concluded that self-help repossession did not deny the debtor due process.[99] In reaching that conclusion, the court determined that the increased cost of credit to all consumers manifestly outweighed any constitutional guarantees to be afforded to the debtor.[100]

> [T]hose facts amply demonstrate that a . . . provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack.[101]

The Illinois Due Process Clause

Even if self-help repossession is found not to be significant state action and therefore not to present a federal cause of action,[102] its constitutionality could still be attacked under the Illinois Constitution. Article 1, section 2 of the 1970 Illinois Con-

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94. "Whether or not the benefits of the present decision [holding §§ 9-503 and 9-504 of the *UCC* unconstitutional] will prove sufficient to outweigh the possible costs remains to be seen." Adams v. Egley, 338 F. Supp. 614, 622 (S.D. Cal. 1972), *rev'd sub nom.* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *petition for cert. filed,* 42 U.S.L.W. 3693 (U.S. June 7, 1974) (No. 73-1842). *See also* Fuentes v. Shevin, 407 U.S. 67, 90 n.22, 92 n.29 (1972), where the Court states that the constitutional right to a hearing cannot be outweighed by the increased costs.

Balancing constitutional safeguards to be afforded the individual against the interests of the general public has been adhered to in the first amendment context. *See, e.g.,* City of Chicago v. Gregory, 39 Ill. 2d 48, 233 N.E.2d 422 (1968).

95. For an excellent discussion of the legislative reforms in this area *see* Note, *Self-Help Repossession: the Constitutional Attack, the Legislative Response, and the Economic Implications,* 62 Geo. L.J. 273 (1973).

96. 121 N.J. Super. 1, 295 A.2d 402 (1972). For state courts which have found no significant state action *see, e.g.,* Giglio v. Bank of Delaware, 307 A.2d 816 (Del. Ch. 1973); Northside Motors of Florida, Inc. v. Brinkley, 282 So. 2d 617 (Fla. 1973); Brown v. State Nat'l Bank, 509 P.2d 442 (Or. 1973).

97. 121 N.J. Super. at 2, 295 A.2d at 403.

98. *Id.* at 3, 295 A.2d at 404.

99. *Id.* at 9, 295 A.2d at 410.

100. *Id.* at 5-7, 295 A.2d at 406-08. This determination by the court is implicit in the cost discussion.

101. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188 (1972).

102. Note 18 *supra* and accompanying text.

stitution provides: "No person shall be deprived of life, liberty or property without due process of law . . . ."

This section is substantially unchanged from the 1870 Constitution[103] and has been considered not to require any action on the part of the state.[104] Thus a debtor who has been subjected to self-help repossession by his creditor can establish a cause of action cognizable in an Illinois court without having to either allege or prove any state action.

Regarding notice and hearing, the Illinois Constitution's due process clause embodies the same requirements as are necessary under the federal due process clause.[105] Therefore, the Illinois courts must reach the same constitutional accommodation of the interests of both the debtor and the secured creditor as did the *Mitchell* Court. If the Illinois courts deem the right of the debtor to be free from an arbitrary taking to be of paramount importance, the self-help provisions will be held unconstitutional since the *UCC* does not protect this interest of the debtor.[106] However, if the Illinois courts consider the costs to the public to be of paramount importance, as did the New Jersey court in *Messenger* and which was expressly left open in *Mitchell*, the constitutionality of the self-help provisions will be sustained.[107] It is submitted that the latter course is the wiser.

Contractual Waiver of Due Process

Although the self-help repossession provisions of the *UCC* may not withstand a constitutional attack, the debtor may waive by contract his right to hearing and notice prior to any repossession by the creditor.[108] The contract must contain language of waiver as to any right to be heard on the validity of the underlying claim prior to the repossession.[109] A waiver of fundamental constitutional rights must be voluntarily, intelligently and knowingly made.[110] The factors which are to be applied in a determination of the validity of such a contractual waiver are:

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103. Ill. Const. art. 2, § 2 (1870).
104. S.H.A. Const. art. 1, § 2. (Constitutional Commentary).
105. *See, e.g.*, Lincoln-Lansing Drainage Dist. v. Stone, 364 Ill. 41, 2 N.E.2d 885 (1936); Reif v. Barrett, 355 Ill. 104, 188 N.E. 889 (1933); Public Utilities Comm'n *ex rel.* Mitchell v. Chicago & West Towns Ry. Co., 275 Ill. 555, 114 N.E. 325 (1916).
106. See text accompanying notes 68-81 *supra.*
107. See text accompanying notes 88-101 *supra.*
108. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). For good discussions of the requirements of waiver *see*, Anderson, *A Proposed Solution for the Commercial World to the Sniadach-Fuentes Problem: Contractual Waiver*, 79 Case & Com. 24 (1974); Krahmer, Clifford & Lasley, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 Tex. Tech. L. Rev. 23 (1972).
109. Fuentes v. Shevin, 407 U.S. 67, 95-96 (1972).
110. Johnson v. Zerbst, 304 U.S. 458, 464 (1937).

equality or inequality of bargaining power, the debtor's knowledge of the waiver, and the debtor's understanding of the waiver clause.[111]

Equality or inequality of bargaining power may be illustrated by the Supreme Court's decision in *D.H. Overmyer Co. v. Frick Co.*[112] In *Overmyer* two corporations bargained for a cognovit note. A judgment was obtained on the note without first giving notice and an opportunity to be heard. The majority looked to the equality of the bargaining power of the contracting parties in upholding the constitutional validity of the clause. However, the Court went on to state that "where there is a great disparity in bargaining power . . . other legal consequences may ensue."[113]

It is next necessary to determine if the contract is one of adhesion. It is noteworthy that standardized contracts are frequently contracts of adhesion.

> Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.[114]

Not only do contracts of adhesion represent inequality of bargaining power but also may represent the creditor's failure to call the provisions to the attention of the debtor. Thus, the creditor must call the waiver clause to the attention of the debtor.[115]

Finally, the debtor must understand what he is waiving. In determining if the debtor understood the waiver, the court will evaluate, among other things, the debtor's training, experience, understanding of the English language, and any help in understanding the waiver clause given him by the creditor.[116] It is submitted that if it is expressly in the contract that in waiving notice and hearing the debtor is waiving a right otherwise secured to him by the United States Constitution, the debtor will understand the significance of the waiver.

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111. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); Brady v. United States, 397 U.S. 742 (1969); Brookhard v. Janis, 384 U.S. 1 (1966).

112. 405 U.S. 174 (1972).

113. *Id.* at 188.

114. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

115. There is a presumption against the waiver of due process rights. Johnson v. Zerbst, 304 U.S. 458 (1937); Hodges v. Easton, 106 U.S. 408 (1882).

116. *See* Johnson v. Zerbst, 304 U.S. 458 (1937).

Once the above criteria are met, the court will find the debtor to have made a valid waiver, and the contractual clause will withstand constitutional attack. As the dissent of Justice White in *Fuentes* points out:

> It would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all.[117]

Conclusion

The main objection to the remedy of self-help repossession is that the debtor neither receives notice nor has an opportunity for a hearing prior to the seizure. It must be remembered, however, that the due process clause of the fourteenth amendment prohibits only state action, not private action.[118] Since self-help repossession does not involve state action,[119] there is no requirement that the debtor be heard as to the validity of the creditor's underlying claim or that the debtor receive notice of the repossession prior to the taking.[120]

Even if state action is found so that there is a federal cause of action, it seems likely that the courts will find that the costs to the public without self-help repossession far outweigh any constitutional safeguards to which the debtor might be entitled, and the self-help repossession provisions will be held constitutional. It also appears that the same result would obtain in a state cause of action brought under the Illinois Constitution. Moreover, implicit in the Court's decision in *Mitchell* is the fact that a pre-repossession hearing may suffice if certain safeguards are met.[121] Thus, a self-help repossession statute could be easily amended by the legislature to meet the new criteria set out in *Mitchell*.[122] It will be constitutionally sufficient for the amendment to merely require that the secured creditor proceeds in an *ex parte* court hearing by sworn affidavit specifically setting out the default. As long as this *ex parte* hearing is not conclusive of the rights of the parties, a post-seizure hearing is *available* to the debtor. This "mix of procedural requirements"[123] will not have a significant impact on the cost of credit and will result in a constitutional accommodation of the interests of the parties not currently contained in the *UCC*. It is submitted that the Supreme Court will retreat from *Mitchell* and hold that a statutory

117. 407 U.S. at 102.
118. Note 18 *supra* and accompanying text.
119. Cases cited note 21 *supra*.
120. Cases cited note 22 *supra*.
121. 42 U.S.L.W. 4671 (U.S. May 14, 1974).
122. Note 60 *supra* and accompanying text.
123. 42 U.S.L.W. at 4677 n.13.

provision for a prompt post-seizure hearing is not constitutionally mandated.

Finally, absent the above proposed amendment, if the *UCC* provisions are held to be violative of either the Illinois Constitution or the Constitution of the United States, the parties still retain the contractual freedom to waive notice and hearing so long as the waiver is intelligently, voluntarily and knowingly made.

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