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FUENTES v. SHEVIN: NEW PROCEDURAL SAFEGUARDS FOR THE BUYER UNDER CONDITIONAL SALES CONTRACTS

The fourteenth amendment to the United States Constitution provides that no state "shall deprive any person of life, liberty, or property without due process of law." In recent years, the problem of applying this right to everyday commercial transactions involving conditional sales contracts has constantly been before the courts.[1] Particularly, the problem has concerned the rights of both the seller and buyer under a conditional sales contract in the event of a default by the buyer. Typically, when a vendee of a conditional sales contract defaults, the vendor will attempt to repossess the goods by replevin, necessarily raising certain questions. Can he do so summarily, without a hearing and without giving the vendee adequate notice? Will this procedure violate due process and wrongfully deprive the vendee of his "property" between the time of the vendor's repossession and the final judgment of the court? What effect will the replevin statutes of the state,[2]

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[1] Some of the more important cases on this topic will be discussed later in this article.

[2] ILL. REV. STAT. ch. 119, §§1-27 (1971) is the replevin statute in Illinois.

The following jurisdictions permit prejudgment recovery of chattels: ALA. CODE tit. 9, §§93-97 (1959); ALAS. R. CIV. P. §88 (1968); ARIZ. REV. STAT. ANN. §§12-1301 to -1302 (1956); ARK. STAT. ANN. §§34-2101 to -2104 (1962); CAL CODE CIV. P. §§509-12 (West 1967); CONN. GEN. STAT. ANN. §§52-515 to -531 (1960); D.C. CODE ENCYCL. ANN. §16-3701 (1966); IDAHO CODE §§8-301 to -312 (1948); IND. ANN. STAT. §§3-2701 to -2713 (1968); IOWA CODE ANN. §643.10 (1950); KAN. STAT. ANN. §60-1005 (1964); KY. REV. STAT. §425.120 (1972); ME. REV. STAT. ANN. tit. 14, §7301 (1965); MASS. GEN. LAWS ANN. ch. 247, §7 (1959); MICH. STAT. ANN. §27A7309 (1962); MINN. STAT. ANN. §565.01 (1947); MISS. CODE ANN. §2841 (1957); MO. ANN. STAT. §§533.010 to -.230 (1965); MONT. REV. CODE ANN. §93-4101 (1964); NEB. REV. STAT. §§25-1093 to 10.110 (1965); NEV. REV. STAT. tit. 3, §31840 (1971); N.H. REV. STAT. §§536.1 to 536.8 (1955); N.J. REV. STAT. §2A:59-1 (1952); N.M. STAT. ANN. §§22-17-1 to -21 (1954); N.C. GEN. STAT. §1-472 (1969); N.D. CENT. CODE §32-07-01 (1960); OHIO REV. CODE ANN. §2737.01 (Anderson 1954); OKLA. STAT. ANN. tit. 12, §1571 (1961); ORE. REV. STAT. §29.810 (1969); R.I. GEN. LAWS ANN. §34-21-1 (1970); S.C. CODE ANN. §10-2501 (1962); S.D. COMPILED LAWS ANN. §§21-15-1 to -15-8 (1967); TENN. CODE ANN. §§23-2301 *et seq.*; UTAH R. CIV. P. 64B (1953); VT. STAT. ANN. tit. 12, §12-5371 (1958); WASH. REV. CODE ANN. §§7.64.010 to -.010 (1961); WIS. STAT. ANN. §265.01 (1957); WYO. STAT. ANN. CODE CIV. P. §§1-693 to -707 1957); V.I. CODE ANN. tit. 5, §211 (1967). Shortly after the decision in *Fuentes* the Tennessee replevin statutes, TENN. CODE ANN. §§23-2301 to 2328 were declared unconstitutional insofar as they authorized deprivation of property without the right to a prior opportunity to be heard.

applicable sections of the Uniform Commercial Code,[3] and provisions of the contract[4] have on the vendor if he attempts to replevy the property? These are some of the questions which the Supreme Court attempted to answer in the decision of *Fuentes v. Shevin.*[5]

In *Fuentes,* the Supreme Court reviewed the decisions of two federal district courts upholding the constitutionality of the Florida and Pennsylvania replevin laws,[6] which authorized summary seizure by an *ex parte* application for a writ of replevin. One appellant, Margarita Fuentes, purchased a gas stove and a stereophonic phonograph under a conditional sales contract in which title was retained in the vendor until all installments were paid. After a product servicing dispute developed, and with approximately $200 remaining in unpaid installments, the vendor obtained a writ of replevin ordering the sheriff to seize the disputed goods.[7] Shortly thereafter, Mrs. Fuentes instituted an action in the district court challenging the constitutionality of the Florida replevin statute.[8] The appellants in the second case bought a bed and other household items under a conditional sales installment contract.[9] The vendors obtained and executed summary writs in Pennsylvania claiming that the defendants had not continued their installment payments, whereupon the goods were seized by the sheriff.

Mr. Justice Stewart, writing for the majority, held that the Pennsylvania and Florida replevin provisions were invalid under the fourteenth amendment, since the appellants were deprived of property without precedural due process of law.[10] Due process, the Court held, was violated because no oppor-

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See Mitchell v. State, Civil No. 72-241 (W.D. Tenn., Sept. 28, 1972).

[3] The UNIFORM COMMERCIAL CODE section most important in this regard is §9-503 which provides:

> 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 . . . .

[4] Provisions such as an express reservation, by the vendor, to summarily repossess the chattel on default by the vendee.

[5] 407 U.S. 67 (1972).

[6] The first case that the Court reviewed was Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970). The other case consolidated for review by the Court was Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971).

[7] The factual background reported here is drawn from the Supreme Court opinion, 407 U.S. 67, 70-73 (1972), the district court opinion, Fuentes v. Faircloth, 317 F. Supp. 954, 956 (S.D. Fla. 1970), and a recent law review article written by two of the attorneys who handled the case for Mrs. Fuentes, Abbott & Peters, *Fuentes v. Shevin: A Narrative of Federal Tax Litigation in the Legal Services Program,* 57 IOWA L. REV. 955, 959-63 (1972).

[8] 407 U.S. 67, at 71 (1972).

[9] *Id.* at 71.

[10] *Id.* at 96.

tunity for a hearing was provided for the appellants before their property was repossessed.[11] Under the Constitution, a person whose rights are to be affected is entitled to a hearing at a meaningful time and manner even if the effect is to be temporary.[12] The Court commented that the Florida and Pennsylvania replevin statutes violated the principles of due process,[13] and that the requirement that a party first post a bond conclusively alleging that he is entitled to specific goods was no substitute for a prior hearing.[14] Further, the Supreme Court stated that the possessory interests of these conditional vendees who made "significant installment payments" were sufficient for them to invoke due process safeguards despite the fact that title remained in the vendors,[15] and notwithstanding that the deprivation of property might be only temporary.[16] Finally, it was held that the contract provisions for repossession in the event of the buyer's default did not amount to a waiver of appellant's right to due process, since those provisions neither dispensed with a prior hearing nor indicated the procedure by which repossession was to be achieved.[17]

REPLEVIN AND CONDITIONAL SALES CONTRACTS

In *Fuentes,* the sale of the chattels was made under a conditional sales contract. A conditional sale has been defined as a transaction in which the vendee receives both possession and the right to use of the goods; however, the transfer of title is dependent upon the full payment of the purchase price.[18] The vendee pays the vendor in installments which include a finance charge; thus, until full payment is made, title remains in the vendor as security[19] for payment from the vendee. In Illinois,

[11] *Id.* at 80.
[12] *Id.* at 85.
[13] *Id.* at 83.
[14] *Id.*
[15] *Id.* at 84.
[16] *Id.* at 85.
[17] *Id.* at 96.
[18] *Sales,* 47 AM. JUR. §828 (1960). The creditors in *Fuentes* expressly reserved title to the goods. The contract read as follows:

> Until such payment has been made Buyer agrees that Seller shall retain title and right of possession of said merchandise; Buyer will not sell, remove or encumber and shall be responsible for all losses or any damage to said merchandise and in the event of default of any payment or payments, Seller at its option may take back the merchandise or affirm the sale and hold Buyer liable for the unpaid balance, including any delinquency or collection charge where permitted by law.

[19] *See* Frazier v. Allison, 315 Ill. App. 253, 42 N.E.2d 967 (1942); Edward Thompson Co. v. Collins, 151 Ill. App. 545 (1909); Branstetter Motor Co. v. Silverberg, 140 Ill. App. 451 (1908); O'Neil v. Rogers, 110 Ill. App. 622 (1903); Gould v. Howell, 32 Ill. App. 349 (1890); Fairbanks v. Malloy, 16 Ill. App. 277 (1885).

For a general discussion of conditional sales and rights of bona fide purchasers under conditional sales contracts, *see* R. BROWN, THE LAW OF PERSONAL PROPERTY §72 (2d ed. 1955).

this type of installment sales contract is strictly regulated by statute.[20]

Replevin has been the most commonly used method to enforce the seller's rights,[21] although other remedies, such as self help, have been available.[22] The right of a conditional seller to summarily repossess property has been held to have arisen at the inception of the sales contract by reason of the retention of title,[23] even if there were no stipulations in the contract disclosing such a remedy.[24] Many conditional sales contracts provided that upon default, the vendor could retake the property without legal process and sell it, without notice, at a public sale.[25] More recently, section 9-503 of the Uniform Commercial Code has expressly granted the power of self help to the secured vendor without need for judicial process.[26] However, the issuance of replevin writs[27] has been the preferable procedure for the conditional vendor to repossess, since a resort to "self help" could expose a creditor to possible liability in an action for trespass, conversion, or invasion of privacy.[28]

Replevin is a statutory action in Illinois.[29] The statute,

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[20] ILL. REV. STAT. ch. 121½, §§501-33 (1971).

[21] Note 19 *supra*.

[22] *See* cases in 32 I.L.P. S(_5: ch. 10, §208 for a brief survey of the remedies of the seller on default.

[23] 45 A.L.R. 3d 1233 at 1242.

[24] *Id.*

[25] A majority of courts have sustained the validity of these provisions. *Id.* at 1244.

[26] *See* the comments of U.C.C. §9-503. See also note 3 *supra*.

[27] Replevin actions existed as long ago as the late 12th and early 13th centuries and it has been said to be among the most ancient and well defined writs known to the common law. H. WELLS, A TREATISE OF THE LAW OF REPLEVIN (2d ed. 1907).

Replevin comes from the word *replegiare*, meaning to take back the pledge. It was used as a means for redelivering the pledge taken in distress by the landlord. 3 W. BLACKSTONE, COMMENTARIES 147. Replevin originated as a means of protecting the poor from the arbitrary exercise of power by the rich, *i.e.*, the lords. J. COBBEY, LAW OF REPLEVIN §1 (2d ed. 1900). Often, a landlord or other creditor would seek to collect on the rental or debt owed to him by appropriating without legal process, property of the debtor. If the debtor objected to this seizure, he was forced to become a plaintiff in an action to recover the property. Since it was recognized that even this temporary taking could work an injustice, the debtor was allowed, through leave of court, to seek a writ of replevin by which, upon receipt of sufficient security, the court would order the local sheriff to seize the chattels and return them to the plaintiff-debtor until a final determination of the claim against him. 71 COLUM. L. REV. 887 (1971).

The gist of replevin became that of a wrongful taking while the gravamen of detinue was the wrongful detention of property. 3 W. BLACKSTONE, COMMENTARIES 147. Contemporary actions of replevin wherein a creditor seeks to recover goods pursuant to a conditional sales contract resemble the common law action of debt or detinue rather than replevin. Thus, actions to regain property lost by a voluntary parting of possession (as in conditional sales contracts) were directed through actions of detinue and not replevin. 3 W. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 577.

[28] Note 23 *supra* at 1243.

[29] ILL. REV. STAT. ch. 119, §§1-27 (1971).

similar to that in *Fuentes,* merely requires the plaintiff to file a verified complaint in which he states that he is the owner of the described property and that such property is wrongfully retained by the defendant.[30] A writ is then issued to the sheriff,[31] who is directed to deliver the property to the plaintiff.[32] The plaintiff is required to post a bond;[33] however, the defendant may retain possession of the chattel by posting a similar bond.[34] There is no provision in the statute for a preliminary hearing to determine probable cause for the repossession. Consequently, an *ex parte* application for replevin results in the dispossession of the chattel from the vendee without a prior hearing to determine probable cause for the issuance of the replevin writ. In the event that the vendor wrongfully sues out a writ of replevin, costs and damages are paid from the posted bond.[35] The issue before the *Fuentes* Court was whether such

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[30] *Id.* at §4.

An action in replevin shall be commenced by the filing of a verified complaint which describes the property to be replevied and states that the plaintiff in such action is the owner of the property so described, or that he is then lawfully entitled to the possession thereof, and that the property is wrongfully detained by the defendant, and that the same has not been taken for any tax, assessment, or fine levied by virtue of any law of this State, against the property of such plaintiff, or against him individually, nor seized under any execution or attachment against the goods and chattels of such plaintiff liable to execution or attachment, nor held by virtue of any writ of replevin against such plaintiff. The clerk shall issue the writ of replevin upon request of the plaintiff.

[31] *Id.* at §6.

[32] *Id.* at §7.

The writ of replevin shall require the sheriff, or other officer to whom it is directed to take the property, describing it as in the complaint, from the possession of the defendant, and deliver the same to the plaintiff unless such defendant executes a bond and security as hereinafter provided, and to summon the defendant to answer the plaintiff in the action, or in case the property or any part thereof is not found and delivered to the sheriff or other officer, to answer the plaintiff for the value of the same. The writ of replevin may be served as a summons by any person authorized to serve writs of summons.

[33] *Id.* at §10.

Before the execution of any writ of replevin the plaintiff or some one else on his behalf shall give to the sheriff or other officer a bond with sufficient security in double the value of the property about to be replevied, conditioned that he will prosecute such suit to effect and without delay and make return of the property to the defendant if return of the property shall be awarded or will deliver the same to the intervening petitioner should it be found that the property belongs to him, and save and keep harmless such sheriff or other officer as the case may be, in made, unless the plaintiff shall, in the meantime, have become entitled to the possession of the property, when judgment may be given against him for costs and such damage as the defendant shall have sustained; or if the property was held for the payment of any money, the judgment may be in the alternative that the plaintiff pay the amount for which the same was rightfully held, with proper damages, within a given time, or make return of the property in case such property has been delivered to the plaintiff.

[34] *Id.* at §14.

[35] *Id.* at §10.

statutes as the Illinois replevin statute violated due process.

DUE PROCESS AND SUMMARY REPOSSESSION

Numerous courts have held that common justice and the fourteenth amendment require that no person shall be deprived of his property without notice and an opportunity to defend.[36] To meet the procedural requirements of due process, sufficient notice of the pendency of the proceeding must be given to the defendant along with a reasonable opportunity for him to appear. The hearing, which must precede the taking of the property, cannot be mere form, but must provide an opportunity to defend.[37]

A new direction against summary proceedings was forged by the Supreme Court in *Sniadach v. Family Finance Corporation*.[38] In that case, the plaintiff finance corporation, in accordance with the procedure provided by the Wisconsin statute,[39] instituted a garnishment action. The defendant was served with summons and notice of the litigation on the same day that his wages were frozen, thus depriving him of their use until adjudication of the suit. The Court held that the freezing of these wages deprived the defendant of due process, since no notice or hearing was provided. Noting that wages were a "specialized type of property presenting distinct problems in our economic system," the Court reasoned that the deprivation of wages without opportunity to be heard could present a grave hardship on the wage earner, since an adequate defense to the garnishment may exist and never be heard. However, the

[36] *See* Twining v. New Jersey, 211 U.S. 78 (1908); Blackmer v. United States, 284 U.S. 421 (1932); Postal Teleg-Cable Co. v. Newport, 247 U.S. 464 (1918); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950). *See also* Newberry Library v. Board of Education of City of Chicago, 387 Ill. 85, 55 N.E.2d 147 (1944); Gunnell v. Palmer, 370 Ill. 206, 18 N.E.2d 202 (1938); People v. Lavendowski, 329 Ill. 223, 160 N.E. 582 (1928); Rabbitt v. Frank C. Weber & Co., 297 Ill. 491, 130 N.E. 787 (1921); Boettcher v. Howard Engraving Co., 389 Ill. 75, 58 N.E.2d 866 (1945); Walter Cabinet Co. v. Russell, 250 Ill. 416, 95 N.E. 462 (1911).

[37] *Constitutional Law*, 16 AM. JUR. 2d §562; Roller v. Holly, 176 U.S. 398 (1900); Washington *ex rel.* Oregon R.R. & Navigation Co. v. Fairchild, 224 U.S. 510 (1912); Walker v. Hutchinson, 352 U.S. 112 (1956); Schroeder v. New York City, 371 U.S. 208 (1962); People v. Gale, 339 Ill. 162, 171 N.E. 186 (1939); *In re* Rackliffe's Estate, 366 Ill. 22, 7 N.E.2d 754 (1937); Smith v. Dept. of Registration and Education *et al*, 412 Ill. 332, 106 N.E.2d 722 (1952).

[38] 395 U.S. 337 (1969).

[39] WIS. STAT. §267.18(2) (a) provides:

When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action.

Court did note several extraordinary situations where due process would be satisfied by the Wisconsin statute.[40] In his concurring opinion, Mr. Justice Harlan stated that the deprived "property" at issue was the use of the garnished wages during the garnishment and suit. He reasoned that "due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the . . . probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use."[41]

The Supreme Court continued its attack on summary repossession methods in *Goldberg v. Kelly*,[42] holding that the fourteenth amendment requires that welfare recipients be given an evidentiary hearing before the termination of public assistance benefits. Moreover, the Court stated that due process required timely and adequate notice detailing the reasons for a proposed termination of benefits and an effective opportunity to defend. The opportunity to be heard, it was said, must be tailored to "the capacities and circumstances of those who are to be heard."[43] The Court reasoned that the predetermination hearing need not take the form of a trial or include a record; however, minimal procedural safeguards required an opportunity to retain an attorney at the hearing, confront and cross-examine witnesses, and present oral evidence to an impartial decision maker whose conclusion must rest solely on the legal rules and evidence adduced at the hearing.[44]

In March of 1971, the Supreme Court extended the reasoning of *Sniadach* and *Goldberg* in the case of *Boddie v. Connecticut*.[45] Here a class action was brought on behalf of all female welfare recipients residing in Connecticut and seeking a divorce. The Connecticut statute required the payment of court fees and costs for service of process before a party was permitted access to the courts.[46] The Supreme Court held that due process prohibited a state from denying any individual access to state courts solely because of the inability to pay court fees,[47] reasoning that due process requires an opportunity to be heard before one may be deprived of a significant property interest.[48] The procedures that satisfy due process vary with the importance of the interests involved and the nature of the sub-

[40] 395 U.S. 337,339-40 (1969). See note 102 *infra*.
[41] *Id.* at 343.
[42] 397 U.S. 254 (1970).
[43] 397 U.S. 254 at 269 (1970).
[44] *Id.* at 270.
[45] 401 U.S. 371 (1970).
[46] CONN. GEN. STAT. §52-259.
[47] 401 U.S. at 380-81.
[48] *Id.* at 379.

sequent proceedings.[49] Thus, the state may not, consistent with the fourteenth amendment, pre-empt the right to dissolve a marriage by failing to afford all citizens the means the courts have prescribed for such action.[50]

Most recently, the Court in *Bell v. Burson*[51] extended *Sniadach* and fortified the judicial attack on statutes violating procedural due process by holding that the petitioner was deprived of due process by the Georgia Motor Vehicle Statute,[52] which allowed the suspension of a driver's license without a hearing.[53] Affirming the principles espoused in *Sniadach* and *Goldberg,* the Court reasoned that due process will only be satisfied if the statutory inquiry is limited to a determination of whether there may be a reasonable possibility of judgment in the amount claimed against the licensee.[54] Thus, a hearing was required, since the taking of the license without such was a deprivation of property within the purview and protection of the fourteenth amendment.[55]

ANALYSIS OF FUENTES V. SHEVIN

Post Sniadach Decisions and Due Process

In the wake of *Sniadach,* summary procedural methods came under judicial attack throughout the country. Applying the reasoning of *Sniadach,* many courts construed the decision as setting forth general principles of procedural due process. For example, the replevin statutes of two states were declared unconstitutional, since they did not provide vendees with notice and a hearing before repossession.[56] Prejudgment

[49] *Id.* at 378.
[50] *Id.* at 383.
[51] 402 U.S. 535 (1971).
[52] Motor Vehicle Safety Responsibility Act, GA. CODE ANN. 92A-601 *et seq.* (1958).
[53] 402 U.S. at 542.
[54] 402 U.S. at 540.
[55] *Id.* at 543.
[56] Just four months after the decision in Goldberg, the New York Court of Appeals in Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (D.C.N.Y. 1970) held that the statute permitting the prejudgment seizure of chattels without an order of a judge or court was constitutionally defective. It was determined that, "beds, stoves, mattresses, dishes, tables and other necessities such as the wages in *Sniadach,* were a 'specialized type of property presenting distinct problems in our economic system,' the taking of which on the unilateral command of an adverse party may impose tremendous hardships on purchasers of these essentials." *Id. at* 722. Bypassing the question of equal protection and recognizing that the defendant can obtain possession pending trial by posting bond, the court found that he would be deprived of the use and enjoyment of his property for a minimum of four days, and more likely for a longer period. *Id.* at 723. The court further found that "lack of refrigeration, cooking facilities and beds create hardships, it would seem, equally as severe as the temporary withholding of one-half of Sniadach's pay; and measured by *Sniadach,* the hardships imposed cannot be considered as minimus."

The *Laprease* decision stands for the principle that while the defendant

procedures for the garnishment of accounts receivable were

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might have been able to reclaim the property by posting a bond, the amount of which had been fixed by his adversary, the fact remains that the debtor was already deprived of his property possibly without notice and an opportunity to be heard. No facts indicating special circumstances were presented to a judicial officer to justify a concept of due process that would allow the elimination of the right to be heard.

In Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242 (1971), the California claim and delivery statute (similar to replevin) was attacked on the ground that it violated constitutional due process. Relying heavily on the rationale in *Sniadach*, the court held:

> Like wage garnishments, the execution of claim and delivery process involves a taking of property. Indeed, in claim and delivery cases, the taking is the obvious physical removal of personal property. This deprivation of property is a taking even though the defendant may later recover his property if he prevails at the ultimate trial on the merits and even though the plaintiff must post a bond. In his concurring opinion in *Sniadach*, Justice Harlan clearly pointed out that the 'property' of which petitioner has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit . . . Similarly, the 'property' of which a defendant is deprived by execution of claim and delivery process is the use of the disputed goods between their seizure and the final judgment. Neither the eventual recovery of the property nor the posting of a bond remedies this loss of the use of the property pending final judgment.

482 P.2d at 1257. The court was faced with the problem of whether the debtor waived his constitutional rights by a clause signed by him in the conditional sales agreement. In answering this problem in the negative, the court held that the mere fact that such clauses are exacted in many cases cannot render constitutional the claim and delivery law which deprives alleged debtors of their right to due process whether or not such purported waiver has been signed. *Id.* at 1259.

A second California decision made an even stronger attack upon summary repossession of property. In Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), the terms of the security agreement provided that should the debtor fail to make payment of any part of the principal or interest as provided in the promissory note, the secured party would have all the rights and remedies of a secured party under the California UNIFORM COMMERCIAL CODE, or other applicable law, and all rights and remedies should, to the extent permitted by law, be cumulative. The issue then presented in this case was whether section 9-503 of the UNIFORM COMMERCIAL CODE was constitutionally defective on the grounds of due process.

The court held that the logic of *Sniadach* should be controlling:

> [T]he great weight of authority, both state and federal, has taken a broader approach, seeing in *Sniadach* not a special constitutional rule for wages, but a return of the 'entire domain of prejudgment remedies to the long standing procedural due process principal which dictates that except in extraordinary circumstances, an individual may not be deprived of his life, liberty, or property without notice and hearing.'

Id. at 618.

Provisions such as section 9-503 of the UNIFORM COMMERCIAL CODE might lead to the repossession of property not specified in the conditional sales agreement. This is particularly true where the subjects of the seizure are vehicles which may have other items stored inside. Therefore, the *Adams* court recognized even if the security agreement did work a valid waiver of the rights to pre-seizure notice and hearing with regard to the named collateral, no such assumption could be made as to the extraneous items and, therefore, the denial of due process is self-evident. *Id.* at 621. In *Sniadach*, the court limited itself to wages by stating it was a "specialized type of property presenting distinct problems in our economic system." Other courts have interpreted "specialized type of property as referring to those goods which, in some vaguely defined way are essential to the maintenance of day-to-day existence." The security interests covered by the UNIFORM COMMERCIAL CODE §9-503 may be the essential items necessary for day-to-day existence, household appliances, furniture, and automobiles, all of which may be considered necessities. Therefore, for this reason alone, section 9-503 of the UNIFORM COMMERCIAL CODE fails to meet the test established by

declared unconstitutional,[57] as well as statutes in two states which did not provide for a hearing before subjecting a boarder's personal property to an innkeeper's lien.[58] A Pennsylvania confession of judgment procedure,[59] a regulation authorizing the seizure and retention of money found on the person of a hospital patient for hospital expenses,[60] and an act giving a landlord a unilateral right to levy on his tenant's property for rent due,[61] were all found to be violative of the principles prescribed in *Sniadach.* The denouncement of the Wisconsin garnishment law provoked similar demands for notice and hearing requirements in other states,[62] as well as in such previously unquestioned areas as warehousemen's liens,[63] repossessions of real property,[64] extrajudicial mortgage foreclosures,[65] attachments of real estate,[66] summary imprisonment for non-appearance at disclosure proceedings,[67] dismissal of civil service employees,[68] landlord liens,[69] and distraints for rent.[70]

However, some courts limited the *Sniadach* decision by holding that it did not prescribe general principles of due process; consequently, *Sniadach* was strictly construed and its reasoning was not extended to summary replevin actions.[71] For

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the *Sniadach* court and is therefore constitutionally defective; thus, it must be held illegal. *Id.* at 621.

[57] Arnold v. Knettle, 10 Ariz. App. 509, 460 P.2d 45 (1969); Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N.W.2d 87 (1970).

[58] Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972). The *Collins* case will be analyzed in more detail later in this article.

[59] Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *aff'd,* 405 U.S. 191 (1972).

[60] McConaghley v. New York, 60 Misc. 2d 825, 304 N.Y.S.2d 136 (1969).

[61] Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970).

[62] *See, e.g.,* McMeans v. Schwartz, 330 F. Supp. 1397 (S.D. Ala. 1971); Lynch v. Household Finance Corp., 318 F. Supp. 1111 (D. Conn. 1970), *rev'd,* 405 U.S. 538 (1972); Arnold v. Knettle, 10 Ariz. App. 509, 460 P.2d 45 (1969); Randone v. Appellate Dept., 96 Cal. Rptr. 709, 488 P.2d 13 (1971); McCallop v. Carberry, 1 C.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); Lucas v. Stapp, 497 P.2d 250 (Wash. Ct. App. 1972); Larson v. Featherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969). *See generally* Michelman, *The Supreme Court, 1968 Term,* 83 HARV. L. REV. 7, 113-18 (1969); Note, *Constitutional Law — Prejudgment Attachment and Garnishment — The Progeny of the Sniadach-Kelly Marriage,* 49 N. CAR. L. REV. 763 (1971).

[63] Magro v. Lentini, 338 F. Supp. 464 (E.D.N.Y. 1971).

[64] Hutcherson v. Lehtin, 313 F. Supp. 1324 (N.D. Cal. 1970); Velazquez v. Thompson, 321 F. Supp. 34 (S.D.N.Y. 1970).

[65] Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970).

[66] Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); Robinson v. Loyola Foundation, Inc., 236 So. 2d 154 (Fla. App. 1970).

[67] Desmond v. Hachey, 315 F. Supp. 328 (S.D. Me. 1970).

[68] Ricucci v. United States, 425 F.2d 1252 (Ct. Cl. 1970).

[69] Hall v. Garson, 430 F.2d 430 (5th Cir. 1970).

[70] Sellers v. Contino, 327 F. Supp. 230 (E.D. Pa. 1971); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970).

[71] *See* Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970); Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970); Termplan, Inc. v. Su-

example, in *Brunswick v. J. and P., Inc.,*[72] the prejudgment repossession of certain bowling equipment was upheld on the ground that the conditional sales contracts involved authorized such procedure. *Sniadach* was distinguished because:

> . . . [it] expressly was a unique case involving a 'specialized type of property presenting distinct problems in our economic system.' That case [Sniadach] involved wage garnishment without notice or hearing . . . It is not in the least comparable to the case here on appeal involving enforcement of a security interest.[73]

The court reasoned that since the appellants had agreed that the creditor could enter upon default to recover the collateral, with or without process, they could not complain after they did in fact default.[74] In *McCormick v. First National Bank,*[75] it was recognized that since the conditional sales contract in issue provided the seller with all of his Uniform Commercial Code rights on default, including section 9-503, there was no violation of due process when the seller summarily repossessed his security.[76]

The argument that New Jersey's summary repossession statutes violated due process was rejected in *Almor Furniture v. MacMillan.*[77] The court determined that although the defendant's arguments were persuasive, the security provisions of section 9-503 of the Uniform Commercial Code should not be jeopardized by a sudden unconstitutional declaration of one of the remedies relied upon by sellers in security transactions.[78]

The rules and practices of a Baltimore city court in replevin actions were held not to be violative of due process in *Wheeler v. Adams Company.*[79] The defendants had bought certain household items pursuant to a conditional sales con-

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perior Court of Maricopa County, 105 Ariz. 270, 463 P.2d 68 (1969); Michael's Jewelers v. Handy, 6 Conn. Cir. 103, 266 A.2d 904 (1969); Mills v. Bartlett, 265 A.2d 39 (Del. Super. 1970).

[72] 424 F.2d 100 (10th Cir. 1970).

[73] *Id.* at 105.

[74] It should be pointed out that in *Brunswick* both the debtor and creditor were commercial parties familiar with conditional sales contracts and the clauses therein, while in *Fuentes* the debtors were private individuals unfamiliar with such contracts. This difference will be important in a later discussion on effective waiver of constitutional rights on the part of the buyer. It should also be pointed out that the goods involved in *Brunswick* were industrial (bowling equipment), while those involved in *Fuentes* were of a household nature.

[75] 322 F. Supp. 604 (D.C. Fla. 1971).

[76] *Id.* at 605.

[77] 116 N.J. Super. 65, 280 A.2d 862 (1971).

[78] 116 N.J. Super. 69, 280 A.2d 864. The court also reasoned that although replevin was originally designed to test title of property associated with different goods (*e.g.*, wagons, logs, timber), it has today become part of our system of financing on the basis of secured interest and installment payment plans. Thus, the court declined to declare unconstitutional the New Jersey replevin statute.

[79] 322 F. Supp. 645 (D.C. Md. 1971), *prob. jur.* noted, 401 U.S. 906 (1970).

tract; the vendors repossessed, as they did in *Fuentes*, by writ of replevin. The court held that the seizure of chattels before a hearing was necessary to protect the rights of the vendor and prevent an undue burden, rendering the replevin remedy ineffective and curtailing credit selling. The court placed great emphasis on the fact that the rights of the purchaser were adequately safeguarded by the city's court proceedings,[80] such protections including: 1) the burden of the vendor to make a prima facie showing to the judge that he was entitled to the writ; 2) the requirement that the vendor post a bond; and 3) the possibility that the vendee could retain the goods by posting bond.[81]

The Florida replevin statute was upheld in the district court decision of *Fuentes v. Faircloth*,[82] which extended the reasoning of *Brunswick* to cases involving consumer goods. The court recognized that hardships facing welfare recipients and those persons whose wages are garnished were not present in the case of the sale of a gas stove and stereo. The court concluded that despite *Sniadach* and *Goldberg*, there remained certain situations where, if the seller repossessed in order to protect his security interest, the prejudgment seizure of goods without a hearing would be valid.[83]

In *Epps v. Cortese*,[84] the arguments in favor of replevin

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[80] The creditor in *Wheeler* contended that the Maryland replevin process commences with an *ex parte* judicial order which is not issued until the seller establishes a prima facie case of its right to possession; that the effectiveness of the replevin remedy would often be paralyzed by notice to a purchaser in advance of seizure since such notice would enable him to move or secrete the chattels sought; and that an indigent may, if he or she cannot obtain a *retorno habendo* bond, obtain an accelerated People's Court trial. Therefore, the replevin procedure was not violative of due process. In agreeing with the above arguments the court held:

> [T]he contention that surprise and therefore seizure before a hearing is necessary to protect the interests of the seller, replevin plaintiff, cannot be dismissed as frivolous. The People's Court requirement of *ex parte* judicial consideration only, prior to the issuance of a writ of replevin, must be considered against that background. Plaintiffs contend that, at least in the absence of a showing by a seller who is a replevin plaintiff that there is a specific reason to believe that a purchaser (replevin defendant) will conceal or dispose of the goods sought to be replevied if the replevin seizure is not carried out without prior notice, any practice which provides only for an *ex parte* hearing prior to seizure falls short of both constitutional due process and search and seizure standards. But seemingly there will be few instances in which a seller who is a would-be replevin plaintiff will be able to allege sufficient specific information about a given purchaser to support the probability that that purchaser will hide or dispose of goods which the seller desires to replevy. Thus, applying in a civil replevin setting, standards approximating the probable cause requirements of the criminal law . . . seem unrealistic.

322 F. Supp. 657 (citations omitted).

[81] 322 F. Supp. at 658, *prob. jur.* noted, 401 U.S. 906 (1970).

[82] 317 F. Supp. 954 (D.C. Fla. 1970), *prob. jur.* noted 401 U.S. 906 (1970).

[83] *Id.* at 957.

[84] 326 F. Supp. 127 (D.C. Pa. 1971), *prob. jur.* noted 402 U.S. 954 (1970).

statutes were espoused with special clarity. The court distinguished *Sniadach* on the ground that wages were more than mere property of the garnishee; rather, they were needed to buy the necessities of life, unlike the rings, stereo sets, and diamond watches involved in the case at bar.[85] Further, in *Sniadach* the creditor sought property in which he had no title, while here the vendor retained title to the property.[86] *Sniadach* and *Goldberg* were read in light of their particular facts, and were held not to have declared the general remedy of replevin unconstitutional. Consequently, the court reasoned that since there was no irreparable harm suffered similar to that in *Sniadach* and *Goldberg*, and since there was no finality of taking by the sheriff in the replevin repossession action, the vendee's right to procedural due process was not violated.[87] A preliminary hearing, the court continued, might adversely affect both future commercial transactions and the continuation of retail credit, since the creditor would be denied an adequate and practical remedy for repossession.[88] Further, it was recognized that the summary repossession procedure substantially conserved state financial resources by reducing the number of hearings in a lawsuit. Finally, if the replevin action was subsequently found to be in bad faith, the vendee could be "made whole" by the forfeiture of the plaintiff's bond.[89] For these reasons, the court concluded that preliminary hearings in replevin were not required.

Due Process, Replevin, and Fuentes v. Shevin

The Court in *Fuentes* stated: "the central meaning of due

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[85] *Id.* at 133. The *Epps* court held:

[B]ecause wages have no substitute and because they are each day used to obtain and meet the needs of that day, they are quite unlike the property here involved — stereo sets, rings, diamond watches, tables, stools and bed. The debtor can temporarily live without such property while its owner seeks its return in kind. In *Sniadach*, the creditor sought property to which he had no title and which, because of its unique character, was an irreplaceable necessity to the debtor. In contrast, the creditor here (plaintiff in the replevin suit) seeks specifically identifiable property to which he has reserved title and which he now seeks in order to prevent its loss, concealment or destruction. To eliminate a summary remedy which permits immediate repossession of secured property, may well limit an aggrieved creditor to a worthless judgment with the attendant legal expense of obtaining it. *Sniadach* involved a seizure grounded in a collateral claim on a promissory note where the creditor utilizing the garnishment procedure had no colorable interest whatsoever in the debtor's wages, nor any interest in protecting or preserving his own property. The situation in *Sniadach*, therefore, is readily distinguishable . . .

[86] *Id.* It is submitted that this case is by far the best reasoned case of the post *Sniadach* opinions which refused to extend due process protections to summary repossession replevin actions. The court noted that several post *Sniadach* opinions had extended the due process protections to replevin but the court plainly stated its disagreement with these cases.

[87] *Id.* at 134.

[88] *Id.* at 136.

[89] *Id.* at 135-6.

process has been clear. Parties whose rights are to be affected are to be heard; and so to protect that right they must be notified."[90] Applying this broad statement to due process, the Court held that the prejudgment replevin statutes of Pennsylvania and Florida violated this principle because no notice or hearing was given to vendees when their "property" was repossessed.[91] A hearing is required after the goods are repossessed, but neither a later hearing nor damage award can alter the fact that there could have been an "arbitrary taking" by the vendor.[92] Although a plaintiff-vendor is required to post bond and thus subject himself to liability if the goods are not his own, the Court, while impliedly rejecting the reasoning of *Wheeler* and *Epps,* reasoned that nothing more than the applicant's personal belief in his rights were tested by the bond requirements.[93] Since a vendor's private gain was at stake, the mere deterrent of posting bond was not a substitute for constitutional due process.[94]

Noting the holding in *Epps,* that the vendees were not deprived of due process because the taking was not final, the *Fuentes* Court reasoned that the possessory interests of the vendees in those chattels were within the protection of the fourteenth amendment. Relying heavily on *Sniadach* and *Bell,* the Court held that, "it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a deprivation in terms of the fourteenth amendment."[95] *Wheeler* was impliedly rejected as the Court concluded that the mere posting of security by the defendant to regain the repossessed property was not a substitute for due process.[96] Reviewing the *Epps* arguments that the vendees did not have a property interest because they lacked title, the Court concluded that *Boddie, Bell,* and *Goldberg* should be extended to any significant property interest. As in

[90] 407 U.S. 67 at 80. To support this position on due process, the Supreme Court cited 18 cases including:
Lynch v. Household Fin. Corp., 405 U.S. 538 (1972); Goldberg v. Kelly, 379 U.S. 254 (1970); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 309 (1950); Opp Cotton Mills v. Adm'r 312 U.S. 126 (1941); Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864).
It appears that the extent to which procedural due process must be afforded depends on whether the recipient's interest in avoiding that loss outweighs the government's interest in summary adjudication. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Noble State Bank v. Haskel, 219 U.S. 104, 110 (1911).
[91] 407 U.S. at 83.
[92] *Id.* at 81-2.
[93] *Id.* at 83.
[94] *Id.* at 83-4.
[95] *Id.* at 84-5.
[96] *Id.* at 85.

Sniadach, the appellants were deprived of an interest in the continued use and possession of the goods until trial; consequently, that interest was entitled to protection under the fourteenth amendment. Even if it were proven at the preliminary hearing that the appellants had in fact defaulted, such would not be a valid excuse to prevent a hearing.[97]

As previously mentioned, *Epps, Brunswick,* and the district court decision of *Fuentes* all held that the due process safeguards of *Sniadach* did not apply unless the chattels were "absolute necessities of life."[98] The court in *Fuentes* reasoned, however, "that while *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine."[99] This fact was made clear in *Bell,* since the driver's license was obviously considered not to be a necessity "in the same light that wages were in *Sniadach.*"[100] Thus, the household goods in this case were held to be included within the protections outlined in *Boddie, Sniadach,* and *Bell.* Since the fourteenth amendment applies to "property" generally,[101] the distinction between necessities and luxuries is without foundation in applying the safeguards of due process.

Finally, the *Fuentes* Court noted the argument of *Sniadach* that under certain extraordinary conditions, both a notice and hearing would not be required before dispossession. However, the Court reasoned that the facts at bar did not constitute any of the extraordinary circumstances outlined.[102]

The dissent of Mr. Justice White considered the seller's

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[97] *Id.* at 87.
[98] *Id.* at 88.
[99] *Id.* at 88-89.
[100] *Id.* at 89.
[101] *Id.* at 90.
[102] The following cases upheld the validity of summary seizure methods: The seizure of a mislabeled food supplement was upheld because public health outweighed private interest. Ewing v. Mytinger & Casselberry Inc., 339 U.S. 594 (1950). Similarly in dealing with contaminated food. North American Storage Co. v. Chicago, 211 U.S. 306 (1908). Such governmental or public interest were also held to outweigh private interests in the collection of government revenue. Phillips v. Commissioner, 283 U.S. 589, 596 (1931); aiding the national war effort, Central Union Trust Co. v. Garavan, 254 U.S. 554, 566 (1921); Stoer v. Wallace, 255 U.S. 239, 245 (1921); United States v. Pfitsch, 256 U.S. 547, 553 (1921); and in the prevention of a bank failure through summary seizure of the bank's assets under the Fed. Home Loan Bank Administration Act of 1936. Fahey v. Mallonee, 332 U.S. 245 (1947). Other instances of the approval of summary procedures by the Supreme Court have been; administrative price and rent controls in time of war, Bowles v. Willingham, 321 U.S. 503, 521 (1944); suspension of an exemption from stock registration. R. A. Holman & Co. Inc. v. Sec. Exch. Comm'r, 299 F.2d 127, 132 (D.C. Cir. 1962) *cert. denied,* 370 U.S. 911 (1962); and dismissal of a defense employee, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

interest in any default-replevin proceeding,[103] arguing:

> If there is a default, it would seem not only fair, but essential, that the creditor be allowed to repossess; and . . . the likelihood of a mistaken claim of default is sufficiently real or recurring to justify a creditor do more than typical state law requires and permits him to do.[104]

The dollars and cents considerations of the vendor, stated the dissent, weigh heavily against false claims of default. Thus, the dissent reasoned that the prejudgment hearing is unnecessary.[105]

Justice White stated that *Goldberg, Sniadach,* and *Bell* did not initiate inflexible procedures which must be adopted to every type of repossession.[106] Further, the dissent argued that the creditor's interest in preventing further use of his chattel after default was completely ignored by the majority.[107] At the very least, the vendee's right to possession should be dependent upon the making of a payment into court.[108] The dissent reasoned that the requirement of a prejudgment hearing would do little to protect the rights of a debtor since this right could be waived, and further, if a hearing is required, the vendor would merely establish probable cause by showing that a default had occurred.[109] Moreover, as originally argued in *Epps,* the dissent recognized that the availability of credit to poor buyers may also be diminished.

Finally, the Uniform Commercial Code, which so persuasively governs the subject matter, was not revised when the new edition was published in 1971. The editorial board refused to change the wording of section 9-503 which provided for summary repossession methods. Therefore, the dissent reasoned that section 9-503 of the UCC should not be held unconstitutional,[110] and adopted the reasoning of *Epps, McCor-*

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[103] In the vigorous dissent, Justices White, Burger, and Blackmun rejected the majority opinion in the following manner:

> 1. It goes without saying that in the typical installment sale of personal property both seller and buyer have interests in the property until the purchase price is fully paid, the seller early in the transaction often having more at stake than the buyer.
>
> 2. Neither is it disputed that the buyer's right to possession is conditioned upon his making the stipulated payments and that upon default the seller is entitled to possession.
>
> 3. There is no question in these cases that if default is disputed by the buyer he has the opportunity for a full hearing and that if he prevails he may have the property or its full value as damages.

407 U.S. at 99.

[104] 407 U.S. at 100

[105] *Id.* at 100.

[106] *Id.* at 101.

[107] *Id.* at 102.

[108] *Id.*

[109] *Id.* at 102-03. See p. 155 *infra.*

[110] *Id* at 103.

mick, and *Almor Furniture* in an attempt to sustain the validity of the section.

Waiver of Due Process

The Supreme Court held in *Fuentes* that the contract signed by Mrs. Fuentes did not waive her right to a probable cause hearing prior to repossession.[111] The situation in *Fuentes* was distinguished from a prior decision of the Court in *D. H. Overmyer Co. v. Freck Co.*[112] *Fuentes* recognized that *Overmyer* had held that the contractual waiver of due process had been made knowingly, voluntarily, and intelligently.[113] Further, the *Overmyer* case was not a situation involving unequal bargaining power or overreaching because both parties were aware of the significance of the waiver provision. In *Fuentes,* however:

> [t]here was no bargaining over contractual terms between the parties who, in any event, were far from equal bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.[114]

Thus, the contract clause in Mrs. Fuentes' agreement was no more than a statement of the rights of the seller to repossess under certain circumstances. Unlike the situation in *Overmyer,* the contract provision was simply not a "voluntary and knowing waiver" of her constitutional right to a pre-seizure hearing.[115]

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[111] 407 U.S. 67 at 96.

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

[113] 407 U.S. at 95.

[114] *Id.* In the Overmyer case, 405 U.S. 174 (1972), the petitioner, D. H. Overmyer Co., Inc. and respondent Frick Co., entered into a construction contract. After Overmyer failed to meet the progress payments due, Frick discontinued its work and filed mechanic's liens against the property. Subsequently, Overmyer executed a promissory note in consideration of Frick's agreement to complete the work and to forego enforcement of the liens. After the work was completed and accepted, Overmyer again requested and was granted additional time to pay. After negotiation, Overmyer executed a new note to replace the first, and Frick agreed to release the mechanic's liens. The new note, however, contained a confession of judgment clause. Claiming a breach of the contract by Frick, Overmyer ceased making payments on the second note and Frick caused judgment to be confessed for the balance then due. Overmyer moved to vacate the judgment, averring deprivation of his procedural due process right to notice and a hearing before judgment. After an appellate court and the Supreme Court of Ohio had rejected Overmyer's constitutional claim, the United States Supreme Court granted certiorari.

The Supreme Court affirmed but made it clear that it did so only because the facts proved that Overmyer, a corporation, was fully aware of the significance of the cognovit note which was part of the consideration for Frick's agreement to extend the pay period. The Court held that Overmyer had "voluntarily, intelligently and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing. . . ." 405 U.S. 174 (1972).

[115] 407 U.S. 67 at 96 (1972). There was no waiver because the contract provision itself said nothing about waiver but only that the seller "may take back" his merchandise in the event of default.

Although *Fuentes* prescribed broad standards of procedural due process for the protection of vendees, it appears that such can be waived by appropriate contract clauses.[116] The Supreme Court, in several pre-*Fuentes* decisions, set forth the requirements necessary to waive procedural due process protections. Waiver has been defined as an intentional relinquishment or abandonment of a known right or privilege.[117] A valid waiver must be voluntarily, knowingly, and intelligently made.[118] In determining whether rights have been waived, much depends on the facts and circumstances surrounding each case including the background, experience, and conduct of the individual.[119] Although the parties may agree to waive certain rights in advance,[120] courts indulge in every presumption against the waiver of due process rights.[121]

Several Illinois courts have also used similar requirements to determine whether due process rights have been waived.[122] For example, in *Scott v. Danaher,*[123] the district court held that an alleged waiver must be examined in light of the well-settled presumption against the waiver of a constitutional right. The court further held that whether the execution by a debtor of a cognovit clause in a promissory note amounts to an understanding and voluntary waiver of the debtor's constitutional right to notice and hearing upon subsequent confession of judgment and garnishment of his assets is a fact issue which must be resolved in each individual case; turning upon such circumstances as the debtor's intelligence, state of mind, education, and bargaining power at the time of the execution of

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[116] *See* note 139 *infra.*

[117] Johnson v. Zerbst, 304 U.S. 458, 464 (1937).

[118] *Id.*; Swarb v. Lennox, 92 S. Ct. 767 (1972).

[119] D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); Brady v. United States, 397 U.S. 742, 748 (1969); Brookhard v. Janis, 384 U.S. 1 (1966).

[120] National Equipment Rental v. Szukhent, 375 U.S. 311 at 316 (1964).

[121] Ohio Bell Tel. Co. v. Pub. Util. Comm'n, 301 U.S. 292, 307 (1937); Hodges v. Easton, 106 U.S. 408 (1882). The presumption against waiver holds true in criminal cases as well. *See* Illinois v. Allen, 397 U.S. 337 (1970); Miranda v. Arizona, 384 U.S. 436 (1966). *See also* Glasser v. United States, 315 U.S. 60 (1942).

[122] To waive a right one must have knowledge of that right and a clear intention to waive it must be proved by precise and unequivocal evidence. Klim v. Johnson, 16 Ill. App. 2d 484, 148 N.E.2d 333 (1958); Muller v. Equitable Life Assur. Soc., 293 Ill. App. 555, 13 N.E.2d 96 (1938); Acme Feeds, Inc. v. Daniel, 312 Ill. App. 330, 38 N.E.2d 530 (1941); Perin v. Parker, 126 Ill. 201, 18 N.E. 747 (1888). The criterion to determine waiver is not solely the language employed, but is a combination of that articulation and the surrounding circumstances. People v. Landgham, 122 Ill. App. 2d 9, 257 N.E.2d 484 (1970); Kaplan's Inc. v. Aetna Ins. Co., 16 Ill. App. 2d 541, 149 N.E.2d 113 (1958). The burden of proof is upon the party claiming the waiver; to prove that he was aware of the right's existence and his entitlement to it. Home Indem. Co. of N.Y. v. Allen, 190 F.2d 490 (1951); Ferrero v. Knights of Security, 309 Ill. 476, 141 N.E. 130 (1923); Garvy v. Blatchford Calif. Meal Co., 119 F.2d 973 (1941).

[123] 343 F. Supp. 1272 at 1277-78 (N.D. Ill. 1972). Note 143 *infra.*

the note. It is obvious that a layman may have difficulty in comprehending both the meaning of terms and the legal ramifications which flow from the execution of a document containing a cognovit clause.

THE IMPLICATIONS OF FUENTES

The most direct consequence of *Fuentes v. Shevin* in Illinois has been that parts of the replevin statute now have questionable validity as to summary repossession. Sections 4 to 7, which describe summary application and repossession pursuant to the replevin statute, are now most likely unconstitutional,[124] although the remaining sections appear sound.[125] As previously noted, *Fuentes* was not a constitutional bar against the repossession by replevin of the seller's collateral; rather, only statutes which provided for summary

[124] See notes 30-32 *supra.*

[125] The Illinois legislature may do well to follow the lead of New York. After the New York Replevin statute was declared unconstitutional as violative of due process in Laprease v. Raymours Furniture Co. 315 F. Supp. 716 (1970), the New York legislature enacted the following statutes:

> CPLR 7102 (d) 1 (1971);
>
> Order of seizure. 1. Upon presentation of the affidavit and undertaking and upon such terms as may be required to conform to the due process of law requirements of the fourteenth amendment to the constitution of the United States, the court shall grant an order directing the sheriff of any county where the chattel is found to seize the chattel described in the affidavit and including, if the court so directs, a provision that, if the chattel is not delivered to the sheriff, he may break open, enter and search for the chattel in the place where the chattel may be.
>
> CPLR 7102 (d) 2 (1971);
>
> If the order of seizure does not include the provision permitted by paragraph one of this subdivision, the court shall grant a restraining order that the chattel shall not be removed from the state if it is a vehicle, aircraft or vessel or, otherwise, from its location, transferred, sold, pledged, assigned or otherwise disposed of or permitted to become subject to a security interest or lien until further order of the court. Unless the court otherwise directs, the restraining order does not prohibit a disposition of the chattel to the plaintiff. Disobedience of the order may be punished as contempt of court.

CPLR 7102 (d) 1 leaves the determination of whether to afford the debtor notice and an opportunity to be heard prior to seizure in the discretion of the trial judge. This statute has been held to be constitutional on its face. CPLR 7102 (d) 2 operates to permit the trial judge to restrain the sale, removal, or encumbrance of the goods if not seized per paragraph one above. Nonetheless, it appears that the considerations of the type of property and the balancing of interests must weigh heavily in favor of the creditor for seizure to be ordered without prior notice or hearing being allowed the debtor. Perhaps only where it appears uncontroverted that the creditor is about to suffer an irreversible harm should seizure be allowed before notice or an opportunity to be heard is afforded the debtor. Despite the finding that CPLR 7102 (d) 1 is constitutional on its face, the question is by no means settled. Certainly, under such a broadly drawn statute, each case presents a new opportunity for a constitutional challenge under its particular facts. Until further legislation and/or judicial interpretation, it appears that the issuance of an injunction prohibiting removal, sale or encumbrance of the goods, as per CPLR 7102 (d) 2, with a subsequent action in detinue, is the best balance of the creditor's and debtor's rights available in most jurisdictions.

repossession by vendors without a prior hearing were forbidden.[126]

On the basis of the *Fuentes* decision, the Circuit Court of Cook County on August 24, 1972, added the following paragraph to the general orders which deal with replevin actions:

> REPLEVIN AND GARNISHMENT ACTIONS
>
> (a) The Clerk of the Circuit Court of Cook County shall not accept actions in replevin for filing and shall not issue writs of replevin.
>
> (b) The Clerk of the Circuit Court of Cook County shall not accept an affidavit for a non-wage garnishment and shall refuse to issue summons in such proceeding based upon a judgment by confession unless such judgment is confirmed after service of process.[127]

In connection with the order, the office of the state's attorney has issued an opinion addressed to the Clerk of the Circuit Court of Cook County, which includes the following:

> . . . the strong language of both the *Scott* and *Fuentes* cases leads to the inescapable conclusion that non-wage garnishments without prior notice and an opportunity for a hearing are no longer legally permissible. These recent cases are illustrative of judicial interest in affording notice and an opportunity for hearing prior to depriving an individual of his property. It is my opinion that your office refuse to accept affidavits for non-wage garnishments and you should further refuse to issue summons in such proceedings based upon judgments by mere confession.[128]

As a result of *Fuentes*, section 9-503 of the Uniform Commercial Code, which provides a secured party on default the right to take possession of his collateral without judicial process, appears to have been impliedly held unconstitutional.[129] As previously discussed, the courts in *Almor Furniture*, *Wheeler*, and *Epps* were hesitant to declare section 9-503 unconstitutional because of the adverse implications on conditional vendor security. Although the majority in *Fuentes* never reached this argument, the dissent reasoned that the failure of the Uniform Commercial Code's Editorial Board to revise section 9-503 was substantial impetus for sustaining the validity of prejudgment replevin statutes.[130] The effect of *Fuentes* will necessarily be to limit the conditional vendor's right of "self help" in repossessing his chattel, pursuant to section 9-503, in the event of default. Judicial process is now probably necessary for a conditional vendor to repossess, and the due process safe-

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[126] See p. 144 *supra*.

[127] General order of the Circuit Court of Cook County, section 6.4 (Aug. 24, 1972).

[128] State's Attorney Legal Opinion No. 1425.

[129] Note 3 *supra*.

[130] 407 U.S. 67 at 103.

guards of *Sniadach* will certainly be effective to require a prejudgment hearing.

One apparent weakness of the *Fuentes* opinion is the lack of direction concerning the person or persons to conduct the probable cause hearing. There is some indication in the opinion, however, that the sheriff may be the officer who should preside, since he is the one who would eventually repossess the goods for the seller. Another weakness concerns the rights of the vendor and vendee at the probable cause hearing. Is there a right to counsel and a right to cross-examination? What kind of evidence may be introduced at the hearing; and will any determination by the sheriff at the hearing be subsequently binding?

The decision does, however, afford a few "clues" as to the form of hearing required. Due process tolerates appropriate variances in the form of the hearing, dependent upon the nature of the case.[131] The hearing must consider "the importance of the interests involved,"[132] matters such as the length and severity of the deprivation,[133] and the simplicity of the decisive issues.[134] Thus, it is apparent that the required hearing may vary greatly according to each case. However, legislative action is certainly needed to structure and clarify the form of the hearing in order to effectively protect a vendee's procedural due process rights.

A more subtle effect of *Fuentes* will be its impact on interest rates and vendee credit when chattels are bought "on time." In the typical consumer credit transaction, a vendor sells his chattel to the vendee, who contracts to pay in installments; interest is charged on each installment, and title to the chattel is retained by the vendor as security. Most importantly, both the terms of the agreement, controlled in Illinois by the Retail Installment Sales Act,[135] and the amount of interest or finance charge that the vendee must pay, depend on the type of article sold, the vendee's credit, the amount of the sale, and the credit and collection practices of the vendor.

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[131] *Id.* at 82.
[132] *Id.*
[133] *Id.* at 86.
[134] *Id* at 87, n.18.
[135] The Retail Installment Sales Act affords vast protection for the buyer under conditional sales contracts. For excellent discussions on retail credit transactions, see: Alexander, *Fraudulent Installment Sales*, 1960, 41 Chi. Bar Rec. 285 (1960); Mikva, *Future Trends in Consumer Credit*, 52 Chi. Bar Rec. 355, (1971); Nichols, *Illinois Retail Installment Sales Act*, 46 ILL. BAR. J. 658 (1958); White, *Representing the Low Income Consumer in Repossessions, Resales, and Deficiency Judgment Cases*, 64 NW. U.L. REV. 808 (1970); Berger, *The Bill Collector and the Law — a Special Tort, at Least for a While*, 17 DEPAUL L. REV. 327 (1968).

As a result of *Fuentes,* summary replevin collection practices of conditional vendors were declared unconstitutional. Consequently, the availability of credit for conditional vendees may rapidly decline, since the conditional vendor's security has also diminished. This was essentially the argument presented in *Epps* and it would appear that it has some validity,[136] although there is authority to the contrary.[137] It might be expected that most vendees who were previously "high risks" because of their indigent status might now be denied credit or, if granted credit, might be charged the maximum finance rates permissible under the Illinois Retail Installment Sales Act.[138] Thus, potential purchasers who have a questionable financial status might now find greater difficulty in purchasing both luxury items and necessities.

The retail vendor also might be affected adversely by the decision. These sellers might have fewer customers since they may be forced to charge higher interest rates. Vendors now have no summary method to repossess chattels in the event of default and they certainly may be hesitant to sell to a "high risk" customer, since their property could deteriorate or be destroyed by the vendee after default and before trial.

The impact of *Fuentes* may, nevertheless, be obscured through the use of waiver provisions in future conditional sales contracts.[139] If the contract provisions satisfy the strict require-

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[136] *See* McGraw and Walsh, *Chattel Mortgages and Conditional Sales,* 42 ILL. BAR J. 738, 749-50 (1954). A prior hearing always imposes some costs in time, money and effort and it is often more efficient to dispense with the hearing; but the *Fuentes* Court reasoned that these costs cannot outweigh the constitutional right to a hearing, 407 U.S. at 90, n.22 and at 92, n.29. A prior hearing may, however, increase disruptions of the debtor's privacy and increase deficiency judgments against debtors. *See* White and Summers, HANDBOOK OF THE UCC 126-6 (1st ed. 1972).

For an excellent discussion on credit and finance charges, *see* W. MORS, CONSUMER CREDIT FINANCE CHARGES 75-78 (1965); Johnson, *Regulation of Finance Charges on Consumer Installment Credit,* 66 MICH. L. REV. 81, 109 (1967); Shay, *The Uniform Consumer Credit Code: An Economist's View,* 54 CORNELL L. REV. 491, 496-97 (1969). Note, *An Empirical Study of the Arkansas Usury Law: "With Friends Like that. . . .",* 1968 U. ILL. L.F. 544, 618-19.

[137] 4 TEXAS TECH. L. REV. 23, 52-62 (1972) presents an excellent analysis of the implications of *Fuentes.* The authors conclude that the *Fuentes* requirement for a pre-seizure hearing should have little effect on the credit policies of finance companies and merchants because of the small number of repossessions attempted by them each year. It appears that the high interest rates charged by finance companies and retail merchants absorb these losses as a business cost.

Further, default occurs only in a small number of the loans made. It appears that repossession is many times impractical, and where repossession is practical debtors will probably give up the collateral voluntarily. For all these reasons, *Fuentes* will probably have no effect on credit transactions involving finance companies and merchants.

[138] ILL. REV. STAT. ch. 121½, §527 (1971).

[139] Such provisions may read "In the event I/we default in any of the obligations, I/we hereby waive notice and hearing and agree that the collateral may be repossessed." 4 TEXAS TECH. L. REV. 23 (1972).

ments for waiver of due process, the conditional vendee might waive his right to a pre-seizure hearing.[140] Hence, the conditional vendee may find himself in the same relative position as before *Fuentes.* Since the courts have always been rather skeptical toward waiver provisions, it is possible that many attempted waivers will not be sustained in future debtor-creditor situations.[141]

Counterbalancing the adverse effects of *Fuentes* is the broad standard of fairness and due process which the case proclaims. No longer must a buyer of goods be subjected to unfounded claims of a vendor if he attempts to repossess. A probable cause hearing is required before a writ of replevin will issue. Consequently, unfounded harassment of vendees will probably decrease, provided they continue to pay their vendors when the installments are due. Further, the state will no longer act in the dark when it issues a replevin writ. Rather, it now has the opportunity to hear both the vendor and vendee before ordering the sheriff to replevy the goods. Private parties, serving their own advantage, can no longer unilaterally invoke state power to replevy goods from another. Following *Fuentes,* if the probable cause hearing determines that there was a default, the vendor will recover the chattel. However, if there is no showing of default, the vendee now has the right to keep the chattel until a final determination of the case at trial.

Clearly the *Fuentes* decision has left other summary remedies of relief constitutionally questionable in Illinois. In *Collins v. Viceroy Hotel Corporation,*[142] decided after *Sniadach,* but before *Fuentes,* the court held that the Illinois Innkeeper Laws, authorizing a hotel proprietor to seize property without any prior notice or hearing, were constitutionally defective. Relying on *Sniadach,* the court reasoned that since the hotel guests were not granted a hearing at which to contest the underlying claim, due process was not afforded. As a result, other statutory lien remedies in Illinois, which do not provide for a hearing and notice before the lien attaches, may be consti-

[140] See note 139 *supra. See also* the text discussion of the dissent.

[141] The fact is that no party, except one without equal bargaining power, would ever "voluntarily" sign a provision waiving procedural due process. In many cases, the creditor will impose unconscionable demands on the debtor unless a waiver is signed. Courts may view such a waiver provision as coercive and may not sustain it as a waiver of due process. The "surrounding circumstances" of an attempted waiver by the vendee will be thoroughly analyzed before a court will sustain any attempted waiver provision of procedural due process rights. Thus, the courts may continue to indulge in every presumption against waiver notwithstanding clear provisions in the contract.

[142] 338 F. Supp. 390 (N.D. Ill. 1972).

tutionally defective;[143] and the most noticeable of these being mechanic's hospital liens.[144]

CONCLUSION

In light of the Supreme Court's firm stand against summary repossession methods in *Sniadach* and *Goldberg,* the *Fuentes* decision is hardly surprising. If the basic presumptions of *Sniadach* and *Goldberg* supporting notice and hearing before dispossession of property are agreed upon, then *Fuentes* becomes merely a logical extension of these due process principles to replevin statutes. The argument of several courts in distinguishing *Sniadach* on the basis of "necessity" versus "luxury" interests logically "held no water."[145] *Sniadach* used the "specialized type of property" argument merely as minor support for the position that due process was violated. There was never any attempt to forge a new type of property interest which was alone entitled to due process protection. Thus, several courts attempted to infer from *Sniadach* and *Goldberg* a distinction which was never intended by the Supreme Court.

In conclusion, there will certainly be some adverse ramifications as a result of *Fuentes.* However, one thing is now certain: *Fuentes* has forged new safeguards for buyers under con-

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[143] Twelve days prior to the decision in *Fuentes,* the district court held in Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972), that the Illinois Garnishment Act, in conjunction with judgments obtained by confession, violated the due process clause of the fourteenth amendment. In the facts of this case, the plaintiff, William L. Scott, executed an installment sales contract and judgment note for the purchase of a vacuum cleaner from Custom King System. The contract and note contained a cognovit clause which purported to authorize the holder of the note to confess and enter judgment against the obligor without service of process. After the plaintiff ceased payment on the note, the creditor confessed judgment against the plaintiff in the Circuit Court of Cook County. The judgment was obtained without notice to the plaintiff, in accordance with the applicable state statute. The creditor, on the basis of the cognovit judgment, directed defendant Danaher, Clerk of the Circuit Court of Cook County, to issue a non-wage garnishment summons against the plaintiff's bank. The first notice plaintiff received of the garnishment action against him occurred when his bank advised him that a garnishment summons had been served upon the bank and that the funds of his account would be frozen pending disposition by court order.

The gravamen of plaintiff's contention was that the procedure encompassed by the Illinois garnishment statute permitted expropriation of property from a debtor without prior notice or an opportunity to be heard on the merits of the claim either at the time judgment is confessed or at the time that the garnishment summons is issued.

Again, relying on the logic in *Sniadach,* the court held that, "it needs no extended discussion to establish that in the instant case the debtor is deprived of the use of his property. The fact that the judgment may be re-opened and the property returned to the plaintiffs does not mitigate the fact that the plaintiffs are precluded from the use of their property for some length of time." *Id.* at 1275.

[144] ILL. REV. STAT. ch. 82, §1 *et seq.* (1971).

[145] *See* the discussion of Epps v. Fuentes (lower court decision) and *Brunswick* in the text.

ditional sales contracts by requiring notice and a hearing before replevin writs may issue. Consequently, the decision has imposed a greater responsibility on the vendor and will certainly prevent unfounded repossession claims in the future.

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