Creditors' Prehearing Remedies and Due Process

Andrew R. Sherwood

Since 1945 outstanding consumer credit in America has increased from five and one-half billion dollars[1] to one hundred and forty billion dollars.[2] Although creditors have traditionally had an arsenal of remedies available in the event their debtors defaulted, this burgeoning credit system has emphasized the inherent inequities of many of those procedures. In recent years, therefore, a number of these remedies which had remained generally unchallenged in the past have been assailed.[3] Of particular interest are the decisions by the Supreme Court of the United States circumscribing creditors' rights at the prejudgment stages of the dispute. Within a 3-year period, the Court has twice invalidated state statutory schemes by formulating expansive constitutional guidelines mandating the observance of due process.[4] The broad penumbras of these decisions have sent debtors' attorneys in search of new avenues to protect their clients. One important controversy to emerge from the quest has been the siege against prejudgment self-help by creditors.[5]

This analysis adopts a threefold approach in attempting to determine both the substantive and procedural directions toward which the law of creditors' rights may move in the future. First, the two recent decisions of the Supreme Court which have had a major impact on creditors' prehearing remedies will be reviewed. In light of the underlying policy considerations of these decisions, the discussion will then focus on methods of challenging the continued validity of self-help

1. 31 FED. RES. BULL. 1154 (Nov. 1945).
2. 58 FED. RES. BULL. A56 (Aug. 1972). The rapid expansion in the amount of credit outstanding appears to have two causes: an increase in population and a general change in attitude regarding the desirability of incurring debt. See Peterson, *Some Observations on Provisional Relief in American Law*, 14 AM. J. COMP. L. 266 (1965).
3. The constitutional basis for most attacks on creditors' remedies has been an alleged violation of the due process clause of the fourteenth amendment. U.S. CONST. amend XIV, § 1. See text & note 10 *infra*.
4. Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).
5. *See* text accompanying notes 59-76 *infra*.

repossession allowed by various state enactments of the *Uniform Commercial Code*. Finally, some innovative alternatives will be presented for solving the problems which appear likely in view of the demise of prehearing creditor remedies.[6]

SNIADACH AND ITS PROGENY

If recent decisions do evidence a change in judicial predilection toward limiting creditors' rights, certainly *Sniadach v. Family Finance Corp.*[7] is the cornerstone of the movement. In *Sniadach* the Supreme Court of the United States declared the Wisconsin wage garnishment statutes[8] unconstitutional. The Wisconsin procedure provided that once a creditor had filed suit alleging default of a debt, the clerk of the court could issue a writ of garnishment which allowed the debtor to receive only a subsistence allowance from his employer prior to a judgment on the underlying action.[9] The debtor in *Sniadach* brought suit alleging that the statute violated fourteenth amendment due process safeguards by authorizing the withholding of wages without first providing for notice of the impending garnishment and an opportunity to oppose the action.[10] The Court held that the mandates of the fourteenth amendment would not allow withholding an individual's wages solely on the basis of a creditor's allegation of default unless due process requirements had been met.

For forty years prior to *Sniadach*, the constitutionality of prejudgment creditors' remedies had remained basically unchallenged. Such passive acceptance by debtors was probably the result of the Supreme Court's decision in *McKay v. McInnes*,[11] where a state court opinion[12] was affirmed without comment. In *McKay* the state court

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6. For a discussion of the history of prejudgment remedies, see Comment, *Non-Judicial Repossession—Reprisal in Need of Reform*, 11 B.C. IND. & COM. L. REV. 435 (1970).

7. 395 U.S. 337 (1969).

8. WIS. STAT. §§ 267.01 *et seq.* (1967). The provisions of the Wisconsin statutes, prior to their amendment following *Sniadach*, were substantially the same as those in many other states. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-1571 *et seq.* (1956); ARK. STAT. ANN. §§ 31-501 *et seq.* (1962); N.D. CENT. CODE §§ 32-09-01 *et seq.* (1960). *See also* Western Coach Corp. v. Shreve, 344 F. Supp. 1136 (D. Ariz. 1972), relying on *Sniadach* and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), to declare the Arizona wage garnishment statutes unconstitutional.

9. WIS. STAT. § 267.18(2)(a) (1967).

10. The fourteenth amendment prohibits "any state [from] depriv[ing] any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1; *cf.* Baldwin v. Hale, 68 U.S. 223, 233 (1864) ("Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense"). *See also* Grannis v. Ordean, 234 U.S. 385 (1914); Hovey v. Elliott, 167 U.S. 409 (1897); Windsor v. McVeigh, 93 U.S. 274 (1876).

11. 279 U.S. 820 (1929) (per curiam).

12. McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928).

had determined that the prejudgment remedy of attachment did not constitute a "taking" of property because it was only a temporary measure. It was therefore concluded that general due process standards were inapplicable. The primary importance of *Sniadach*, then, was to bring creditors' remedies which constituted even a temporary deprivation of property within the purview of the fourteenth amendment. While this decision evidenced a substantial change in judicial attitude from the time of *McKay*, the holding resulted not from a revolutionary "alteration of principles of due process but instead from a reevaluation of the potential and actual effect of prejudgment seizure upon debtors."[13]

Although some lower federal and state courts have limited *Sniadach* to wage garnishment situations[14] or cases involving necessities of life,[15] the majority of courts have read the decision to encompass other prehearing remedies.[16] The latter interpretation was confirmed when the Supreme Court again addressed the subject of creditors' rights[17] in *Fuentes v. Shevin*.[18]

In *Fuentes*, two lower court decisions[19] concerning the constitutionality of replevin statutes in Florida[20] and Pennsylvania[21] were consolidated. Both states permitted a state official other than a judge[22] to issue a prejudgment writ of replevin for the secured property of an al-

13. Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 551, 488 P.2d 13, 23, 96 Cal. Rptr. 709, 719 (1971), *cert. denied*, 407 U.S. 924 (1972).

14. *See, e.g.*, Brunswick Corp. v. J&P, Inc., 424 F.2d 100 (10th Cir. 1970); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969), *noted in* 12 ARIZ. L. REV. 202 (1970); Michael's Jewelers v. Handy, 6 Conn. Cir. 103, 266 A.2d 904 (1969).

15. Epps v. Cortese, 326 F. Supp. 127, 133-34 (E.D. Penn. 1971); Fuentes v. Faircloth, 317 F. Supp. 954, 958 (S.D. Fla. 1970).

16. *See, e.g.*, Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D. N.Y. 1970) (seizure of furniture under state replevin statute); Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972) (attachment of checking account); Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N.W.2d 87 (1970) (garnishment of accounts receivable); Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969) (prejudgment garnishment of bank account). *See also* Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (landlord "locking out" delinquent tenant).

17. In Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), the Supreme Court was presented with a dispute arising out of a prehearing garnishment of an alleged defaulting debtor's bank account. The subject matter of the appeal was a procedural question, however, and the validity of the prehearing remedy was never addressed.

18. 407 U.S. 67 (1972).

19. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).

20. FLA. STAT. ANN. §§ 78.01 *et seq.* (Supp. 1972-73).

21. PA. STAT. ANN. tit. 12, §§ 1821 *et seq.* (1967). The Pennsylvania case did not involve a creditor-debtor relationship. Rather, the dispute was between the defendant and her estranged husband over the possession of their son's clothes, furniture and toys. Fuentes v. Shevin, 407 U.S. 67, 86-87 n.16 (1972).

22. In both Pennsylvania and Florida the writ could be issued by a court clerk. PA. R. CIV. P. 1073; FLA. STAT. ANN. § 78.04 (Supp. 1972-73). The Pennsylvania statutes refer to a clerk of a court as a prothonotary. PA. R. CIV. P. 76.

leged defaulting debtor upon the application of a creditor and the posting of a bond for twice the value of the property.[23] The Florida law also required the creditor to allege legal entitlement and initiate an action to permanently regain possession.[24] In both states, once a writ was issued the local sheriff or his deputy was required to take control of the property.[25] Under the Florida statute, the seizing authority detained the items for 3 days during which time the debtor could reclaim possession by posting his own security bond for double the value of the property. If the seized property was not reclaimed, it was released to the control of the creditor pending a final judgment on the underlying court action.[26] In Pennsylvania, however, the applicant was not required either to allege legal entitlement to the property or to initiate an action to gain permanent possession.[27] Following the creditor's posting of the bond and subsequent seizure of the property, the only way for the debtor to receive even a post-seizure hearing was to initiate a lawsuit.

Three-judge district courts upheld the constitutionality of these statutes by reading recent Supreme Court decisions[28] to require notice and a hearing only if the deprivation involved necessities of life.[29] On appeal, however, Mr. Justice Stewart writing for the majority dispelled this contention:

> The Fourteenth Amendment speaks of 'property' generally. And, under our free enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are 'necessary.'[30]

It was therefore held that the deprivation of any property right by an agent of the state without the debtor having a prior opportunity to be heard constituted a deprivation of property without due process of law.[31] Moreover, the debtor's rights are not measured in regard to the

23. These procedures are common to the replevin statutes of most states. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-1301 *et seq.* (1956); CONN. GEN. STAT. ANN. § 52-518 (1960); MINN. STAT. ANN. § 565.03 (1947).

24. *Compare* FLA. STAT. ANN. § 78.07 (Supp. 1972-73) *with* FLA. FORM 1.937 (Supp. 1972-73).

25. FLA. STAT. ANN. § 78.08 (Supp. 1972-73); PA. R. CIV. P. 1074.

26. FLA. STAT. ANN. § 78.13 (Supp. 1972-73).

27. PA. R. CIV. P. 1073. The Pennsylvania law did allow the debtor to regain possession of the chattel by posting a counterbond within 3 days. *Id.* at 1076.

28. Goldberg v. Kelly, 397 U.S. 54 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

29. Epps v. Cortese, 326 F. Supp. 127, 133-34 (E.D. Penn. 1971); Fuentes v. Faircloth, 317 F. Supp. 954, 958 (S.D. Fla. 1970).

30. 407 U.S. 67, 90 (1972) (footnote omitted).

31. *Id.* at 96. The *Fuentes* court stated that the purpose of the requirement for a hearing prior to the seizure of secured property was "to protect [the debtor's] use and

creditor's rights in the property; it is sufficient that the debtor have an "interest in continued possession and use of the goods."[32] The Court recognized that the bond requirement might deter wholly unfounded applications for writs, but felt this minimal effect was no substitute for meeting due process requirements.[33]

It was recognized, however, that the state would be privileged to seize private property without first providing the owner with notice of the impending action and an opportunity to contest the seizure if appropriate circumstances existed.[34] These limited circumstances exist when the governmental or public interest in the seizure is superior to the interest held by the possessor of the property, when the need for prompt action is such that no time is available for notice and hearing and when the person initiating the seizure is a governmental official and not a private party.[35] The Court commented that states have no such compelling interest in the monitoring of private creditor-debtor relationships.[36]

Fuentes therefore stands for the proposition that a state is generally prohibited from seizing the property of an alleged defaulting debtor without first providing him with notice and the opportunity for a hearing. Consequently, statutes which authorize state agents to effect a seizure and are not limited to the special circumstances set forth above violate the fourteenth amendment.[37] What is not as evident is the

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possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." *Id.* at 81.

32. *Id.* at 86.

33. *Id.* at 83. The Court believed that the bond posting requirement represented only a test of the applicant's own belief in his rights. The Court considered it "well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Id.* at 85.

34. *Id.* at 90-92.

35. *Id.* at 91. For cases where the Supreme Court has determined that these requirements have been met, see Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (prehearing seizure of misbranded drugs to prevent public health danger); Ownbey v. Morgan, 256 U.S. 94 (1921) (prehearing seizure of property in order to acquire in rem jurisdiction over a non-resident defendant). Although *Ownbey* appears to have been reaffirmed in Fuentes v. Shevin, 407 U.S. 67, 91, n.23 (1972), it seems difficult to justify the contention that there is an overriding public interest in those situations where jurisdiction could be obtained through the use of modern long arm statutes. See Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962); "Garnishment and the Validity of Quasi in Rem Jurisdiction," 13 ARIZ. L. REV. 409 (1972).

In Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 554, 488 P.2d 13, 24-25, 96 Cal. Rptr. 709, 720-21 (1971), *cert. denied*, 407 U.S. 924 (1972), the Supreme Court of California indicated that in addition to the requirements set forth in *Fuentes*, it would further limit the occasions where summary procedures would be allowed. These additional limitations were that the property appropriated was not vital to an individual's life or livelihood and that the "taking" was conducted under narrowly drawn statutes sanctioning the seizure only when a superior public necessity actually arose.

36. 407 U.S. at 92.

37. *But see* Roofing Wholesale Co. v. Palmer, — Ariz. —, 502 P.2d 1327 (1972),

constitutionality of statutes authorizing prehearing seizures executed by private individuals since the fourteenth amendment operates to limit only action by a state, one of its agents or a private party acting under color of law.[38]

SELF-HELP REPOSSESSION: AN UNCONSTITUTIONAL CREDITORS' REMEDY?

State enactments of section 9-503 of the *Uniform Commercial Code* (UCC) authorize a creditor to take possession of secured property upon default by a debtor either through judicial process or by "self-help" repossession.[39] These statutes differ from those condemned in *Fuentes*, where due process was a factor because the seizure was effected by an officer of the state.[40] Under section 9-503, the seizure may occur between private parties, and fourteenth amendment due process requirements would be significant only if the action of the repossessing creditor could be imputed to the state.

State Action

The parameters of the "state action" concept were set forth by Mr. Justice Bradley writing for the majority in the *Civil Rights Cases*:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [fourteenth] amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.[41]

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where the Supreme Court of Arizona refused to follow *Fuentes* because that decision was handed down by a seven-man court with a majority of only four justices. It was the opinion of the Arizona court that with all members of the present United States Supreme Court participating on a similar question, a different decision would be reached.

38. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("[The fourteenth] Amendment erects no shield against merely private conduct"); Civil Rights Cases, 109 U.S. 3, 11 (1883) ("Individual invasion of individual rights is not the subject-matter of the [fourteenth] Amendment").

39. 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. [emphasis added].

Hereinafter, all citations to Code sections are to the particular section of the UCC (1962 Official text). For individual state variations, see *Uniform Laws Annotated,* UNIFORM COMMERCIAL CODE § 9-503 (Supp. 1972).

The UCC has been adopted by every state except Louisiana. Arizona's enactment of section 9-503 is codified at ARIZ. REV. STAT. ANN. § 44-3149 (1967).

40. *See* text accompanying note 25 *supra.*

41. 109 U.S. 3, 11 (1883).

These concepts have provided the guidelines for courts to determine what constitutes state action. Most of the cases discussing the degree of involvement by the state required to bring the fourteenth amendment into play have been in the area of racial discrimination.[42] Consequently, the precedents for this determination have been couched in equal protection language.[43] The basic tests of the degree of involvement necessary to impose fourteenth amendment requirements on private parties, however, would appear to be equally applicable to cases arising under the due process clause.[44]

Based on the Court's decision in *Fuentes,* the privately-executed prehearing seizure authorized by section 9-503 appears susceptible to constitutional challenge if the requisite state action can be established. There are two theories under which it may be found. First, state enactment of the UCC encourages the use of creditor remedies which are contrary to due process principles. Second, the creditor, in acting as a seizing authority, is performing a function which is necessary for the continued stability of our present economic system. Hence, it can be argued that this function is ultimately the responsibility of the government and not the creditor.

The most significant state action decision by the Supreme Court in the area of legislative enactments authorizing private conduct in which the state itself is prohibited from engaging is *Reitman v. Mulkey.*[45] In that case, the Court considered the constitutionality of section 26 of the California Constitution,[46] which prohibited the state or

42. *See, e.g.,* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

43. *See* cases cited note 42 *supra.*

44. *See* United States v. Williams, 341 U.S. 97 (1950); *cf.* United States v. Price, 383 U.S. 787 (1965). For an analysis of state action and how it can bring the fourteenth amendment requirements to bear on private parties, see Comment, *The Growth of Procedural Due Process Into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . in our Economic System,"* 66 NW. U.L. REV. 502 (1971).

45. 387 U.S. 369 (1967). The Supreme Court consolidated two state court decisions. Prendergast v. Snyder, 64 Cal. 2d 877, 413 P.2d 847, 50 Cal. Rptr. 903 (1966); Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).

In Hunter v. Erickson, 393 U.S. 385 (1969), the Supreme Court held unconstitutional on its face a section of a city charter which invalidated existing local fair housing laws and required future laws to be approved by a majoriy of the voters. The section of the charter was distinguished by the city from the constitutional provision held unconstitutional in *Reitman* on the grounds that the charter section "declares no right to discriminate in housing, authorizes and encourages no housing discrimination, and places no ban on the enactment of fair housing ordinances." *Id.* at 389. Since the Court had other grounds for holding the section unconstitutional, it declined to discuss the validity of the distinction between these two enactments.

46. CAL. CONST. art. 1, § 26 provided in part:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell,

its subdivisions from enacting legislation restricting the right of an individual to refuse to sell, lease or rent private realty to any person. In reaching its decision, the Supreme Court relied heavily on the findings of fact and opinion of the Supreme Court of California.[47]

The California court, in considering the constitutionality of section 26, examined the historical context in which it was adopted, its apparent immediate objective and its potential ultimate effect. This examination revealed that prior to the adoption of the provision, two pieces of legislation had been enacted which prohibited private discrimination by business establishments[48] or by sellers or lessors of any private dwelling containing more than four units.[49] In the state court's opinion, the immediate objective of section 26 was to repeal this legislation. The court concluded that the ultimate effect of the affirmative authorization of the section would be to encourage racial discrimination by the creation of a constitutional right of private discrimination.

These findings were generally accepted by the United States Supreme Court.[50] As evidence that section 26 encouraged discrimination, the Court noted that in the companion case on appeal with *Reitman* the landlord had in fact relied on the constitutional provision to establish his right to discriminate in renting his property. The Supreme Court concluded that the presence of the provision in the California law established the private right to discriminate as a "basic" policy of the state.[51]

Applying the *Reitman* rationale to a state enactment of the self-help provision of section 9-503 would seem to compel the same result. An examination of the historical context in which the UCC was adopted indicates that a number of states[52] had enacted legislation in accordance with the *Uniform Conditional Sales Act* (UCSA),[53] which required a creditor to provide an alleged defaulting debtor with at least 20 days notice of an intention to repossess.[54] One immediate effect of the adoption of the UCC was the repeal of the UCSA[55] and

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lease or rent such property to such person or persons as he, in his absolute discretion, chooses . . . .

47. Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).

48. Unruh Civil Rights Act, CAL. CIV. CODE §§ 51-52 (Supp. 1972).

49. Rumford Fair Housing Act, CAL. HEALTH & SAFETY CODE §§ 2700 *et seq.* (Supp. 1972).

50. 387 U.S. 369, 381 (1967).

51. *Id.*

52. S. EAGER, THE LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES AND TRUST RECEIPTS WITH FORMS (1961), lists at § 303 some of the states which adopted the *Uniform Conditional Sales Act.*

53. The *Uniform Conditional Sales Act* (hereinafter cited as UCSA) is set forth at *id.* §§ 441 *et seq.*

54. *Id.* § 465.

55. *See* UCC § 9-101, Comment; *id.* § 9-102, Note.

the creation of a statutory right to repossess without providing notice to an alleged defaulting debtor.

There can be little doubt that the ultimate effect of this statutory right has been to encourage private parties to utilize methods of repossession which do not comply with due process principles. This encouragement is evident from the references to section 9-503 which have been incorporated in standard form contracts as authority for the creditor's use of self-help repossession.[56] Additional encouragement is apparent from the overall scheme which Article 9 of the UCC is designed to provide for all sales involving secured transactions.[57] By its enactment, a state designates the Code's scheme as the basic guide for all applicable business transactions within its borders. It is difficult to believe that under such circumstances a state's enactment of the UCC and consequent repeal of all inconsistent legislation does not encourage utilization of the Code's provisions.[58]

The application of the principles expounded in *Reitman* to the constitutionality of section 9-503 as enacted in California[59] was considered by a federal district court in *Adams v. Egley.*[60] This decision, rendered about 4 months prior to the Supreme Court's disposition of *Fuentes*, involved a debtor who guaranteed a $1,000 loan by signing a promissory note and security agreement pledging three motor vehicles as security.[61] The security agreement provided that in the event the debtor was delinquent in the payment of any principal or interest, the creditor was authorized to take possession of the secured property in accordance with the provisions of the *California Uniform Commercial Code.*[62] After the debtor lagged in his payments, the creditor's agent seized two of the vehicles without the use of judicial process and sold them to satisfy the outstanding balance on the note.[63] Subsequently, Adams initiated an action against the creditor and his agent

56. Adams v. Egley, 338 F. Supp. 614, 617 (S.D. Cal. 1972).
57. UCC § 9-101, Comment.
58. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 203 (1970) (Brennan, J., concurring in part and dissenting in part) ("when private action conforms with state policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action"); McCain v. Davis, 217 F. Supp. 661, 666 (E.D. La. 1963) ("There is no action more state action than legislative enactment of a statute").
59. California codified this section of the UCC at CAL. COMM. CODE § 9503 (West 1964). The district court also considered the unconstitutionality of CAL. COMM. CODE § 9504 (West 1964).
60. 338 F. Supp. 614 (S.D. Cal. 1972), *appeal docketed*, No. 72-1484 (9th Cir. Oct. 1972).
61. *Adams* was the consolidation of two separate actions. The other case presented a slightly different fact situation, but since the underlying principles were the same only the facts of *Adams* have been set forth in the text.
62. CAL. COMM. CODE § 9503 (West 1964).
63. *Id.* § 9504 (West 1964) authorizes a private sale of the secured property.

for damages and challenged the constitutionality of the repossession statutes that had authorized the creditor's conduct.

As a necessary prerequisite to a discussion of federal question jurisdiction,[64] the *Adams* court addressed the issue of whether state action was present. Relying on *Reitman v. Mulkey*,[65] the court determined that the enactment of the statute established repossession as a policy of the state and hence constituted sufficient state involvement to require the creditor to comply with due process principles. Although the *Adams* court recognized that in the cases before it there was evidence that the presence of the statute had tended to encourage, if not to induce, the use of self-help repossession,[66] it apparently did not consider this to be a requirement of *Reitman*. Instead, the federal district court interpreted *Reitman* to mean that the "mere enactment of the statute [constituted] state involvement sufficient to bring the alleged discriminatory acts within the purview of the Fourteenth Amendment."[67] Such a broad reading of *Reitman* may not be justified in light of more recent opinions of the Supreme Court which appear to indicate that some degree of actual encouragement by the state must be present.[68]

The *Adams* decision was not followed in at least three other recorded opinions in which the constitutionality of state enactments of section 9-503 had been challenged.[69] In *Oller v. Bank of America*[70]

64. In addition to federal question jurisdiction based on alleged violations of the fourteenth amendment, the California district court also recognized jurisdiction under 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.

Since a property interest is a constitutionally protected right and since section 1983 purports to authorize federal jurisdiction for "deprivation of any rights . . . secured by the Constitution," the court's reliance on this section for jurisdiction in *Adams* would seem to be justified. While courts in the past had held section 1983 applicable only when the right or immunity of which the plaintiff had allegedly been deprived was one of personal liberty, not dependent for its existence upon infringement of property rights, National Land & Inv. Co. v. Specter, 428 F.2d 91 (3d Cir. 1970), Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970), in Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), the Supreme Court expressly rejected the personal-proprietory rights distinction as applied to 28 U.S.C. § 1343(3) (1970), the jurisdictional counterpart of section 1983. In light of *Lynch*, section 1983 would appear to provide an excellent vehicle for a debtor affected by a state's enactment of section 9-503 to bring the issue of constitutionality of that statute before a federal court.

65. 387 U.S. 369 (1967); *see* text and notes 45-51 *supra.*

66. 338 F. Supp. at 617.

67. *Id.*

68. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 161-62 n.23 (1970). *See generally* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

69. A fourth case, recently handed down by a district court in Colorado, was also decided contrary to *Adams*. In Kirksey v. Theiling, 41 U.S.L.W. 2325 (D.C. Colo.

and *McCormick v. First National Bank*[71] federal district courts were unable to find the requisite state action. Jurisdiction which had been pleaded under section 1343(3) of title 42 of the *United States Code*,[72] based on the deprivation of a constitutional right "under color of state law,"[73] was therefore denied. Both courts reasoned that the creditors' right of prehearing seizure arose as a result of contractual provisions independent of the state's enactment of section 9-503. The courts thus believed that the exercise of that right was not under color of state law as required by the jurisdictional statute.[74] The *Oller* court recognized *Adams* but thought its reliance on *Reitman* was misplaced. *Oller* apparently viewed *Reitman* as an expansion of state action concepts justified only by the racial injustices involved in that case and hence inapplicable to the due process rights at issue in state adoptions of section 9-503.[75]

The constitutionality of a state repossession statute was also challenged in *Messenger v. Sandy Motors, Inc.*[76] This state court opinion generally followed the reasoning of the federal decisions in *Oller* and *McCormick*. *Reitman* was distinguished as involving discrimination in housing and not procedural due process.[77] The court rested its holding, however, on the theory that the enactment of section 9-503 had not created a new right, but had only codified an existing one.[78] Additionally, the court believed that those who drafted the contract would have included this right to a prehearing seizure even in the absence of a state repossession statute.[79] Thus, the court was able to ef-

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Nov. 30, 1972), the court distinguished *Reitman* on the ground that a state's enactment of section 9-503 did not constitute sufficient encouragement and that *Reitman*'s state action rationale was limited to cases involving racial discrimination.

70. 342 F. Supp. 21 (N.D. Cal. 1972).

71. 322 F. Supp. 604 (S.D. Fla. 1971).

72. 42 U.S.C. § 1343 reads in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States.

73. *Id.*

74. 342 F. Supp. 21, 23 (N.D. Cal. 1972); 322 F. Supp. 604, 606 (S.D. Fla. 1971). The *McCormick* court's additional holding that jurisdiction under 42 U.S.C. § 1343(c) did not extend to deprivations of property rights appears to have been overruled by Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).

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

76. 295 A.2d 402 (N.J. Super. 1972).

77. *Id.* at 405.

78. *Id.* at 407. The *Messenger* court noted that self-help had been present at common law, *citing* 2 POLLACK & MAITLAND, THE HISTORY OF ENGLISH LAW 574 (2d ed. 1968). The court, therefore, believed that merely codifying the already existing common law right could not make the exercise of that right subject to the requirements of the fourteenth amendment. The permanent editorial board for the Uniform Commercial Code would appear to be in accord, UCC § 9-503, Comment.

79. One writer discussing *Adams* considered it an incongruity that "[w]hen no statute has been enacted the parties can agree to self-help; but with the presence of a

fectively evade the central issue of whether the statute does, in fact, generally encourage private violations of due process.

Even if these decisions are correct in their interpretation of *Reitman*, section 9-503 may still be susceptible to constitutional challenge if the conduct of the creditor can be imputed to the state. The theory is that the creditor is performing a function which, in the absence of the statute, would be substantially the responsibility of the state. In this regard, Mr. Justice Douglas, writing for the majority in *Evans v. Newton*, noted that "[w]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[80]

Inherent in a state's duty to promote the general welfare is a responsibility to prevent situations which would be extremely damaging to its economy.[81] The intricate role that a functioning credit system plays in the economy of our society is apparent from the amount of credit currently outstanding.[82] Since a credit system would be inoperative without a method of recovering the property in the event of default and a debtor's complete inability to pay, it is reasonable to conclude that it should be initially the responsibility of the state to function as a seizing authority. Indeed, the states have tacitly admitted to this responsibility by establishing replevin procedures.[83] As section 9-503 evidences, however, the states have gone beyond this point. By making judicial process and self-help alternative remedies under that section, the states have offered to share their responsibility with private citizens. While states might be commended for this generally laudable effort to avoid burdening public resources with tasks which can be more efficiently performed by delegating the responsibility to individuals, it must also be remembered that states cannot delegate powers beyond their own limitations.[84]

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statute expressly authorizing such an agreement, the parties must overcome the rigid standards required for a constitutional waiver before the contract clause can be effective." 1972 U. ILL. L. FORUM 635, 638.

80. 382 U.S. 296, 299 (1966).

81. *Cf.* Fahey v. Mallonee, 332 U.S. 245 (1947); Coffin Bros. v. Bennett, 277 U.S. 29 (1928). In both cases, the government's responsibility to prevent public economic disaster provided sufficient grounds for due process requirements to be disregarded in the seizure of bank assets.

82. *See* text & notes 1-2 *supra*.

83. All 50 states have enacted replevin statutes. 40 TENN. L. REV. 125, 127 n.8 (1972).

84. *See* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319 (1968) (where a "shopping center serves as [a] community business block 'and is freely accessible and open to the people in the area . . .' the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises"); Evans v. Newton, 382 U.S. 296 (1966) (municipality prohibited from either

Due Process Requirements

If state action can be established under either of the above theories, it must then be decided whether there has been a violation of any constitutional principles. The due process requirements set forth in *Fuentes v. Shevin* were that an alleged defaulting debtor must be afforded notice and the opportunity for a hearing prior to the seizure of any secured property. Since section 9-503 of the UCC authorizes the seizure of secured property in the absence of either prior notice or the opportunity for a hearing, it is suggested that this section is contrary to the above principles.[85] Consequently, if the requisite state action is established, state statutes which embody these principles should be held unconstitutional, at least in the consumer context.[86]

It was recognized by the Court in *Fuentes*, however, that these requirements could be waived.[87] The Court considered the legal effect of a contract provision by which a debtor waived his due process rights in the event of default. The majority indicated that in the typical situation where the provision is part of a standard form contract and is a necessary condition of sale it would be unenforceable as a contract of adhesion.[88] A different result might be reached when the contractual waiver of due process rights was determined to be "voluntary, intelligent and knowing."[89] Considerations relevant to this determination would be whether it could be shown that the parties were of equal bargaining position, that the debtor had full knowledge of the rights he was abandoning and that the inclusion of the provision was actually part of the bargained-for exchange.[90]

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maintaining a racially segregated park or relinquishing control of the park to private parties to be operated on a segregated basis); Terry v. Adams, 345 U.S. 461 (1953) (state prohibited from delegating its responsibilities to provide for elections to private political organizations which carry out these responsibilities in a discriminatory manner).

85. *See* Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972). *But see* Messenger v. Sandy Motors, Inc., 295 A.2d 402, 406-10 (N.J. Super. 1972) (even if state action, there was no due process violation).

86. It should be noted that under UCC § 9-503 a creditor may proceed without judicial process only "if this can be done without breach of the peace." Recognizing that "breach of the peace" is an evolving concept now including non-violent conduct, Comment, *Non-Judicial Repossession—Reprisal in Need of Reform*, 11 B.C. IND. & COM. L. REV. 435, 445-49 (1970), it might be possible to argue that the concept should prohibit a creditor from interfering with his debtor's possessory interest in the property without meeting requirements of due process; *cf.* Fuentes v. Shevin, 407 U.S. 67, 84-85 (1972). This argument is difficult to support by the letter or spirit of the UCC, however, since the creditor's remedies in 9-503 are clearly intended to be in the alternative.

87. 407 U.S. 67, 94 (1972).

88. *Id.* at 94-95. Mr. Justice White, in his dissenting opinion, however, considered it possible that creditors could circumvent the notice and hearing requirement by clearly expressing the waiver provision in the credit instrument. *Id.* at 102.

89. *Id.* at 95, *citing* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972) (applying standards governing waiver of constitutional rights in a criminal proceeding).

90. 405 U.S. at 188. In *Overmyer* the contract was negotiated between two cor-

Although not discussed in *Fuentes*, it appears that a valid waiver could also be given after a default has occurred. Presumably, such a waiver would still have to be voluntary, intelligent and knowing. If, under these circumstances, a defaulting debtor agreed that he was delinquent and authorized the seizure, there would appear to be no reason to require a hearing. The seizing authority, however, may be under a duty to insure that the debtor is informed of his right to a hearing, as the waiver otherwise would be subject to challenge as not being knowledgeable or intelligent.

The Supreme Court set forth the minimal procedural safeguards for compliance with the notice and hearing requirement in *Goldberg v. Kelly*.[91] The Court's discussion in *Fuentes v. Shevin* leaves little doubt that these are the standards to be met in creditor-debtor controversies where debtors have not waived their rights.[92] In *Goldberg* the Court stated that notice of a contemplated deprivation must be both "timely and adequate . . . detailing the reasons" which justify such action.[93] A hearing would be meaningless without an adequate opportunity to prepare a defense. After proper notice has been provided, the Court considers three elements necessary to satisfy the hearing requirement: the individual must have an "effective opportunity to defend by confronting any adverse witness,"[94] he "must be allowed to retain an attorney if he so desires"[95] and the hearing must be such that it affords the opportunity to present evidence to an impartial decisionmaker whose decision must rest solely on the applicable legal rules and evidence presented at the hearing.[96] As long as these requirements are met, the form which a hearing takes may vary according to the nature of the case.[97] This could become significant if other jur-

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porations and the waiver provision was specifically bargained for. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943), states:

> 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.

See also Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953).

91. 397 U.S. 254 (1970) (New York procedure which permitted termination of welfare benefits after the recipient had been provided 7 days notice and an opportunity to submit a written statement setting forth why the payments should not be discontinued held unconstitutional).

92. Fuentes v. Shevin, 407 U.S. 67, 86-88, 89 n.20, 97 (1972).

93. 397 U.S. at 267-68.

94. *Id.* at 268.

95. *Id.* at 270.

96. *Id.* at 268, 271.

97. Fuentes v. Shevin, 407 U.S. 67, 82 (1972); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

isdictions follow *Adams v. Egley* and creditors are unable to obtain valid waivers from defaulting debtors. The resulting increased demand for hearings may then compel the development of some innovative variation from the traditional methods of complying with due process safeguards.

MEETING DUE PROCESS REQUIREMENTS

A conventional hearing within the existing judicial system would be one method of meeting the due process requirements, and that method would be wholly appropriate since in many cases the hearing will dispose of the entire controversy.[98] In some jurisdictions, however, the civil case load is already so heavy that it would be weeks, months or even years before a hearing could be secured.[99] This would be an unreasonable period of time to expect a creditor to passively stand by while a debtor continued in possession of the secured property. For this reason, some judges have expressed concern as to the ultimate effect of imposing due process requirements in the area of creditors' remedies.[100] They reason that since existing methods of complying with the hearing requirement are so costly and time consuming, one of two consequences is probable: either creditors will simply refuse to do business with a large segment of society or will charge prohibitively high interest rates to compensate for the additional cost in the event of default.[101] In either case, the result could deprive lower income individuals access to certain consumer goods. Because of these problems, alternatives to the present system must be devised which will not only meet the *Goldberg* safeguards, but also

98. The use of the word "hearing" refers to a proceeding which complies with the procedural due process safeguards set forth in *Goldberg*. Since civil rules of procedure generally do not provide for any pretrial proceeding which would satisfy these requirements, such a "hearing" in a civil case would be the trial.

99. *See* Tydings, *Improving Archaic Judicial Machinery*, 57 A.B.A.J. 154, 154-55 (1971):

> In our state civil courts, instances of delays of two, three, or even five years between the time when a case is filed and when it is finally tried are common . . . . Suffice it to say that the problem is not confined to the courts of any one state or to one area or section of the country.

See also The Push to Streamline the Courts, BUSINESS WEEK, Dec. 4, 1971, at 46 ("[I]n federal courts alone, more than 9,000 civil cases have remained on the docket for more than three years").

100. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 102-03 (1972) (White, J., dissenting); Adams v. Egley, 338 F. Supp. 614, 622 (S.D. Cal. 1972); Wheeler v. Adams Co., 322 F. Supp. 645, 657 (D. Md. 1971).

101. *See* authority cited note 100 *supra;* Greenfield, *Coercive Collection Tactics—An Analysis of the Interests and the Remedies*, 1972 WASH. U.L.Q. 1, 8-10; testimony of Ralph Nader before the National Commission On Consumer Finance [hereinafter cited as Commission] during hearing on debt collection practices, June 22-23, 1970. A summary of these hearings appears at 88 BANKING L.J. 291, 303 (1971). *But see* Zeigel, *Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint*, 68 COLUM. L. REV. 488, 504-06 (1968) (the Canadian experience with severe creditor restrictions has produced no evidence of credit depletion).

facilitate a rapid disposition of claims.[102] Toward this end, two innovative concepts have been suggested. While the details must remain responsive to the patterns and needs of individual jurisdictions, the basis of the suggestions are sufficiently defined to demonstrate their feasibility.

One alternative would be the establishment of a court with limited jurisdiction to hear only consumer-related matters.[103] These courts would follow a model code of procedure specifically designed to meet the realities of the typical debtor-creditor confrontation. One of the realities which should be a matter of specific concern is that most debtors will not be represented by counsel.[104] Therefore, the system should be designed so that claims and defenses could be asserted without unnecessarily restrictive rules. The pleading process could be accomplished through the use of standard forms[105] and the hearing could be conducted in an informal atmosphere with relaxed rules of evidence. Precedents for this system already exist for dissolution of marriages,[106] where the value of the property involved is at least as great as that involved in most debtor-creditor disputes.[107]

Another alternative to existing methods of satisfying due process standards involves hearings before persons other than professional

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102. *See* Fuentes v. Shevin, 407 U.S. 67, 97 n.33 (1971) ("Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has little probability of succeeding on the merits of the dispute"); Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) ("[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard"); Frank v. Maryland, 359 U.S. 360, 371, *rehearing denied*, 360 U.S. 914 (1959) (due process is a changing concept which must advance as society advances).

103. A suggestion by Blair C. Shich, an attorney with the National Consumer Law Center, Boston College Law School, testifying before the Commission. 88 BANKING L.J. 291, 329 (1971).

104. *See* D. CAPLOVETZ, THE POOR PAY MORE 161 (1967). *See generally* Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. OF URBAN LAW 217 (1968).

105. The Small Claims Courts of California use a standard form of eight questions which is filled out by the plaintiff and becomes the basis for the complaint. Plaintiff's Statement to Clerk, Small Claims Court of Los Angeles Judicial District, 76P442M-SC204-CDB 8-64.

106. *See* ARIZ. REV. STAT. ANN. §§ 25-381.14 to -.16 (Supp. 1972-73).

107. An informal hearing has also been authorized to satisfy due process requirements prior to the termination of welfare benefits. Goldberg v. Kelly, 347 U.S. 254, 269 (1970) ("Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence"); *cf.* ARIZ. REV. STAT. ANN. § 8-231 (Supp. 1972-73) which provides for informal hearings to dispose of disputes involving juveniles.

The existing network of Justice of the Peace, Small Claims or Common Plea Courts throughout the country could provide the structural framework for a consumer court. The present shortcomings of these courts, however, would first have to be corrected. *See generally* UNITED STATES PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967); ARIZONA LEGISLATIVE COUNCIL, REPORT ON JUSTICE OF PEACE COURTS IN ARIZONA (1958).

judges.[108] This system would function at the local level with the formation of grievance committees composed of consumers and merchants.[109] The function of these committees would be to hear complaints and attempt to settle consumer problems through personal contact with the parties before a full scale hearing became necessary. If the dispute could not be settled through informal discussions with members of the grievance committee, the parties could then submit their case to an arbitration panel, also composed of local consumers and merchants.[110] At the arbitration hearing, both the debtor and creditor would have the opportunity to be represented by counsel and, if unrepresented, to personally examine witnesses and present evidence. The rules of procedure would be of the same relaxed nature as those suggested for the consumer court.[111]

If either party believed the decision of the arbitration panel was unjust, he could initiate an action in state or federal court. The decision of the panel would stand unless vacated after a subsequent judicial hearing, however.[112] Hence, neither party would be abandoning his right to resort to the courts, but both parties would be afforded an early determination of the right to immediate possession of the secured property. Under this system, the debtor could be represented by counsel, confront adverse witnesses and present evidence to an impartial decisionmaker. As a result, the detrimental effect of long judicial delay envisioned by some judges would be avoided.

Both suggested solutions offer the creditor the same basic advantage over existing judicial procedures. The forum provided under each is limited to consumer-related disputes which should allow for a rapid initial determination of the creditor's rights. Although either alternative would be an improvement for the debtor, the local committee/arbitration system would provide some distinct advantages. First, the grievance committee's activities within the community could

108. Both President Nixon and Chief Justice Burger in their addresses to the National Conference on the Judiciary at Williamsburg, Virginia, in March 1971, suggested that some matters presently handled by the judiciary could be dealt with equally well through private arbitration or "parajudges." *Speeding Up Justice—President's Plan*, U.S. NEWS & WORLD REPORT, Mar. 22, 1971, at 37. *See also As I See It*, FORBES, July 1, 1971, at 21 (interview with Chief Justice Burger).

109. Mrs. Edna DeCoursey Johnson, Director of the Family Service Program of the Baltimore Urban League, suggested to the National Commission on Consumer Finance that the establishment of grievance committees could promote mutual understanding between merchants and the community in low income areas. 88 BANKING L.J. at 327.

110. Suggestion of the Honorable Mary Gardiner Jones, Commissioner, Federal Trade Commission. *Id.* at 325. *See generally Malpractice—Prescriptions to Find the Unholy War Between Doctors and Lawyers*, STUDENT LAW., Oct. 1972, at 20, for an examination of the use of a similar method to decrease the number of malpractice claims.

111. *See* text & notes 103-07 *supra*.

112. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 266-67 (1970).

assist in preventing credit practices which may cause default. Moreover, if a dispute arose and the debtor had a legitimate claim, the grievance committee might be able to assist in negotiating with the creditor. If the dispute resulted in a hearing before the arbitration panel, the debtor would face a less intimidating atmosphere.

CONCLUSION

Prejudgment creditor remedies were brought within the purview of the fourteenth amendment by the Supreme Court's decision in *Sniadach v. Family Finance Corp.*[113] To date, the Court has expressly condemned only wage garnishment[114] and replevin,[115] where these remedies are utilized without the debtor being afforded prior notice and the opportunity for a hearing. It would be a mistake, however, to narrowly interpret these decisions. *Sniadach* has already been extended to encompass other activities unrelated to creditors' remedies,[116] as well as providing the basis for the Court's holding in *Fuentes v. Shevin.*[117] It is now possible that *Fuentes,* in turn, will provide the basis for the demise of self-help repossession as provided for by state enactments of section 9-503 of the UCC. Under these statutes, the state is delegating its responsibility to act as a seizing authority and affirmatively encouraging creditors to follow a procedure which arguably violates the due process principles of the fourteenth amendment enunciated in *Fuentes.* Circumventing constitutional limitations in this manner violates both the letter and spirit of past Supreme Court decisions.[118] If a state wishes to allow self-help repossession, creditors must be required to conduct themselves in accordance with the mandates of the fourteenth amendment.

Two alternatives to the existing methods of complying with hearing requirements of the fourteenth amendment have been presented. Although both the new consumer court and the arbitration system would meet the *Goldberg* safeguards of confrontation, representation and presentation,[119] they present some initial problems of implementation. Since an arbitration system generally derives its authority from

113. 395 U.S. 337 (1969).
114. *Id.*
115. Fuentes v. Shevin, 407 U.S. 67 (1972).
116. Bell v. Burson, 402 U.S. 535 (1971) (suspension of a driver's license prohibited in the absence of prior notice and hearing); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (public posting of name of individual as an excessive drinker prohibited in the absence of prior notice and hearing); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits prohibited in the absence of prior notice and hearing).
117. 407 U.S. 67 (1972).
118. *See* text and cases cited note 84 *supra.*
119. *See* text accompanying notes 91-96 *supra.*

contract provisions, the success of this alternative would depend on the cooperation of local merchants and concerned members of the community. As a practical matter, however, as long as creditors believe that self-help repossession under section 9-503 has survived *Fuentes* and is still a viable option, most of them would probably be hesitant to assist in the establishment and administration of grievance committees and arbitration panels.

Similar problems would probably exist for the establishment of a new consumer court. The court would have to receive its judicial authority through legislation, and state and federal lawmakers might be hesitant to act until the existing system has proven inadequate. If the decision in *Adams v. Egley*[120] is followed in other jurisdictions, however, and preseizure hearings become a universal requirement in the creditors' rights area, a considerable increase in the volume of civil cases seems inevitable. While some courts may be able to cope with this increase, others will face unmanageable congestion. The legislature-promoted public interest should mitigate against this situation. Nor would it be in the interest of creditors who would sustain long delays prior to a determination of their rights to secured property. In view of these realities inherent in the existing judicial structure, a new consumer court or an arbitration system may become attractive alternatives.

120. 338 F. Supp. 614 (S.D. Cal. 1972).