Fordham Urban Law Journal

Volume 6 | Number 1 Article 6

1977

Case Note: Constitutional Law - Due Process - Municipal Towing Ordinance Authorizing the Assessment of Towing Fees and Storage Charges Without Notice and Opportunity for Hearing Violates Due Process

Laurie S. Schaffer
Fordham University School of Law

CASE NOTES

Constitutional Law—Due Process—Municipal Towing Ordinance Authorizing the Assessment of Towing Fees and Storage Charges Without Notice and Opportunity for Hearing Violates Due Process. *Remm v. Landrieu,* 418 F. Supp. 542 (E.D. La. 1976).

On December 30, 1975, plaintiff Remm parked his car on a street in the city of New Orleans.[1] Thereafter, the police ticketed the car and towed it to the police auto pound. Pursuant to the New Orleans City Towing Ordinance,[2] the pound refused to surrender Remm's automobile without first receiving payment of the towing charges and accrued storage fees.[3]

Plaintiff Remm challenged the constitutionality of the ordinance on due process grounds in the United States District Court for the Eastern District of Louisiana.[4] The court concluded that the ordinance deprived the owner of two property interests: (1) the access to and use of the vehicle;[5] and (2) an interest in the fees collected before the vehicle is released.[6] Relying primarily on *Fuentes v. Shevin,*[7] it found the New Orleans City Towing Ordinance to be violative of the Federal Constitution because it denied the owner of the impounded vehicle procedural due process.[8]

---

1. Remm v. Landrieu, 418 F. Supp. 542 (E.D. La. 1976).
2. NEW ORLEANS, LA. CODE § 38-274. *Id.* at 544.
3. *Id.* at 543. There are no provisions directing the pound to notify the owner or to provide a hearing before the money is collected. An attempt at notice is required prior to sale or disposition of the car by the pound. *Id.* at 544.

> Any unoccupied vehicle of any kind or description whatever found violating any traffic law shall be removed immediately and impounded by any police officer or duly authorized person and shall only be surrendered . . . upon payment of fifteen dollars ($15.00) hereby declared to be the towing fee covering such impounding. [The] owner shall thereafter have the responsibility of separately disposing of the violation charge . . .

NEW ORLEANS, LA. CODE § 38-274.

The owner receives the parking ticket upon the return of his car after the payment of the storage charges and towing fees. He has the option of either pleading guilty and paying the ticket or contesting it. If he decides on the latter a trial date will be set and he must post a bond to assure his appearance. The amount of the bond is equal to the minimum fine in the particular situation. If he is found not guilty, the pound will return the fee paid. *Id.*

4. *Id.* at 543.
5. *Id.* at 545.
6. *Id.*
7. 407 U.S. 67 (1972).
8. 418 F. Supp. at 548.

Due process protection of property interests as defined by *Fuentes* requires that a person receive notice of and an opportunity for a hearing before his property is seized.[9] An exception was made for extraordinary situations which involve a government interest that demands prompt action.[10] Applying this view, the district court reasoned that the seizure of a car constitutes an extraordinary situation because of the need for immediate action to insure public safety and to regulate traffic.[11] Thus, the section authorizing the seizure was upheld. However, the section authorizing the collection of the towing charge and storage fees was found unconstitutional because there was no immediate need to collect the money before the owner had an opportunity to be heard.[12] Consequently, an extraordinary situation did not exist to justify the denial of due process.

In general, the deprivation of life, liberty, and property without due process is prohibited by the fifth and fourteenth amendments to the United States Constitution.[13] Due process decisions involve two steps: (1) a determination of whether an interest (in life, liberty, or property) has been affected; and (2) a determination of the type of hearing required, if any.[14] Regardless of the type of hearing granted, the opportunity for a hearing "granted at a meaningful time and in a meaningful manner,"[15] is essential to due process.

The Supreme Court in the early 1970s began to expand the types of interests that the due process clause protected.[16] One particular area of change from the common law involved the right of a property holder in summary seizures (attachment, garnishment, replevin, or government seizures). Traditionally, a balancing test weighing the various interests at stake was used to determine which interests would be afforded due process protections.[17] Under this analysis

9. 407 U.S. at 96-97.

10. *Id.* at 90-91.

11. 418 F. Supp. at 545.

12. *Id.*

13. U.S. CONST. amend. V, and XIV, §1.

14. Morrisey v. Brewer, 408 U.S. 471, 481 (1972); Board of Regents v. Roth, 408 U.S. 564, 570-72 (1972).

15. Boddie v. Connecticut, 401 U.S. 371, 378 (1971). *See also* Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

16. *See* North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601, 610 (1975) (Powell, J., concurring); Morrisey v. Brewer, 408 U.S. 471 (1972) (parolee's right to due process in revocation of parole); Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits).

17. Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

property interests were secondary in importance to life and liberty, with the consequence that the res in question could be attached or garnished without prior notice, hearing, or judicial order.[18] For example, in *Phillips v. Commissioner,* the Court said "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."[19]

In *Sniadach v. Family Finance Corp.,*[20] the Supreme Court altered the traditional application of procedural due process to prejudgment remedies. The Court held that a creditor may not garnish a debtor's wages before the debtor has received notice and been afforded the opportunity to question the garnishment.[21] Instead of balancing various interests (whether governmental or private) against each other, Mr. Justice Douglas considered the nature of the property deprived and said that wages were a "specialized type of property"[22] whose garnishment "may as a practical matter drive a wage-earning family to the wall."[23] The Court, however, did not determine that the usual attachment proceedings were unconstitutional. Rather, it distinguished this case by concluding that the general rule does not satisfy every situation.[24]

The reasoning of the *Sniadach* Court resulted in the formation of two divergent views as to which property interests required pre-seizure hearings.[25] One followed the *Sniadach* holding strictly and viewed a pre-seizure notice and a hearing as applying only to gar-

18. The rationale was to secure the creditor's interest in the property so that judgment could be satisfied. *See* Coffin Brothers v. Bennett, 277 U.S. 29, 31 (1928).

19. 283 U.S. 589, 596-97 (1931). Application of this view of due process can be found in pre-*Fuentes* cases involving towing ordinances. In 1972, the New York City Towing Ordinance and corresponding state statutes were questioned on due process grounds in *Cohen v. City of New York,* 69 Misc. 2d 189; 329 N.Y.S. 2d 596 (Civ. Ct. 1972). The challenge in *Cohen* was similar to *Remm* in that the seizure of the vehicle was before the owner had been afforded a determination of guilt or innocence. The court simply stated that due process does not require an initial judicial determination if there is an opportunity for a subsequent hearing. 69 Misc.2d at 192, 329 N.Y.S.2d at 600.

20. 395 U.S. 337 (1969).

21. *Id.* at 342. The statute in Wisconsin gave the creditor ten days after the service of the garnishee to serve the debtor. Upon the service of the garnishee the wages could be frozen. In this particular case service of the debtor and the garnishee took place on the same day. *Id.* at 338-39.

22. *Id.* at 340.

23. *Id.* at 341-42.

24. *Id.* at 340.

25. Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1126 (3d Cir. 1976).

nishment cases.[26] The other view, which was adopted in broad terms by *Fuentes*, interpreted *Sniadach* as invalidating the traditional procedures in most cases.[27]

Writing for the majority in *Fuentes*, Mr. Justice Stewart held that a person's interest in his property is entitled to due process before the seizure of that property,[28] except in extraordinary situations.[29] At issue in *Fuentes* were the Florida and Pennsylvania prejudgment replevin statutes which permitted summary seizure of property based on an *ex parte* application to the court clerk who then issued a writ of replevin.[30] Although neither statute provided for notice nor a hearing prior to the seizure,[31] Florida required the complainant to pursue his claim to legal title in court.[32] The Pennsylvania statute had no such provision.[33]

The rationale behind the *Fuentes* decision was "to protect [the] use and 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."[34] In addition to minimizing the instances of arbitrary seizures the Court redefined the type of interest that would be protected by due process. It found that the significance of the property in terms of its "necessity" was not a factor, because the protections of due process apply whether or not necessities are involved.[35] Rather, the justices decided that a possessory interest in property was enough to invoke the due process clause, regardless of whether the possessor has full title.[36] Furthermore, the Court found that a temporary and non-final deprivation denies a person his possessory interest even if it appears

26. *Id.*
27. *Id.*
28. 407 U.S. at 96-97.
29. *Id.* at 90.
30. *Id.* at 69.
31. *Id.* at 70.
32. *Id.* at 74.
33. *Id.* at 77-78.
34. *Id.* at 81. The Court makes a distinction between summary seizure by the state for the benefit of a private person and seizure by the state for the state's own interest.
35. *Id.* at 88-90.
36. *Id.* at 84. Although considering a pure possessory interest to be a property interest, the Court did not discuss or further refine the concept. What constitutes a property interest has been defined differently in other cases. *Board of Regents v. Roth* spoke of a property interest in terms of a legitimate claim of entitlement. *See* fn. 20, *supra.*

that the result of a final hearing would deprive the person of permanent possession.[37]

The Court did not believe that a later hearing or damage award would be sufficient to remedy the wrong that had already taken place.[38] However, the opinion did not clarify what procedures would be considered appropriate to insure that due process is afforded, beyond requiring some type of notice or hearing prior to the seizure.[39]

Although it adopted a strict view regarding the deprivation of property through the usual summary seizure procedures, the *Fuentes* Court recognized the need in extraordinary situations for retaining summary power in the government.[40] Situations considered to be extraordinary are those involving a government need or policy which must be executed.[41] To meet this need, the decision provided for a limited exception which permits seizure of the res prior to a notice or hearing in an extraordinary situation if certain conditions are met. First, the situation must necessitate a seizure to secure an important governmental or public interest. Second, there must be a need for prompt action. Third, there must be strict governmental control over the seizure and only a government official can initiate it. Finally, standards must be enumerated in a narrowly drawn statute to govern the official's discretion in determining whether a seizure is necessary and justified.[42] Through these requirements the Court tried to contain abuse of the power granted to the state by requiring the state to control strictly the use of the force.[43]

The Florida and Pennsylvania statutes were viewed as having abdicated state control since an official was not involved in the

37. 407 U.S. at 84-87.

38. *Id.* at 82. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Stanley v. Illinois, 405 U.S. 645, 647 (1971).

39. *Id.* at 80-82.

40. *Id.* at 90-91.

41. Phillips, *Revolution And Counterrevolution: The Supreme Court on Creditors' Remedies*, 3 Fordham Urb. L.J. 1 (1975). An example of an extraordinary situation is found under the Internal Revenue Code which provides that the Commissioner may begin a procedure which would result in a levy on the taxpayer's assets if he finds that taxes which are due or owing from a certain taxpayer will be jeopardized by delay in collection. 26 U.S.C. § 6861 (1970); C.I.R. v. Shapiro, 424 U.S. 614, 618-19 (1976).

42. 407 U.S. at 91.

43. *Id.* at 90-93.

mechanism which brought about the seizure.[44] Not only did the officials abdicate their control, but the statutes also did not differentiate among the types of situations which would justify a seizure. Consequently, the state power was used by private parties to remedy private disputes in which neither the government nor the public had an interest.[45]

The *Fuentes* analysis was applied in *Graff v. Nicholl*,[46] a case which preceded *Remm* and involved the validity of a towing ordinance. An abandoned car had been towed after notice to the owner but prior to any opportunity for a hearing.[47] This procedure complied with the city of Chicago's towing ordinance which drew a distinction between cars that presumptively were abandoned either because they were in a state of disrepair or had not been moved in several days and cars that were parked illegally and thus created a hazard.[48] As to the latter category, the ordinance authorized an immediate tow prior to notice or a hearing. In regard to the former category, it designated a waiting period for cars which had not been moved.[49] However, no such time period was indicated for cars in disrepair. The ordinance apparently authorized an immediate tow prior to a hearing, but as a matter of practice notice was routinely given.[50] The court did not find the entire ordinance invalid but held that the section authorizing the removal of abandoned cars without notice or the opportunity for a hearing was unconstitutional because the circumstances did not demand prompt action as evidenced by the waiting period in both instances. Furthermore, the vehicles did not present an extraordinary situation, such as creating a hazard, which would demand government action.[51]

---

44. *Id.* at 93.
45. *Id.* at 92.
46. 370 F. Supp. 974 (N.D. Ill. 1974).
47. *Id.* at 978.
48. *Id.* at 980.
49. *Id.* at 982.
50. *Id.*
51. *Id.* For other cases involving different types of towing ordinances, *see* Stypmann v. Neider, 70-2312 (N.D. Cal. 1974) (towing and impoundment of vehicles by private garagekeepers); Stephens v. Tielsch, 73-73C2 (W.D. Wash.) *rev'd on other grounds*, 502 F.2d 1360 (9th Cir. 1974); Seals v. Nicholl, 378 F. Supp. 172 (N.D. Ill. 1973) (seizure of a prisoner's car); Freidus v. Leary, 66 Misc. 2d 70, 320 N.Y.S.2d 122 (N.Y. Cty. 1971), *rev'd*, 38 App. Div. 2d 919, 329 N.Y.S.2d 897 (1st Dept. 1972) (reasonableness of towing removal charge).

Remm v. Landrieu[52] followed a similar line of reasoning in its analysis of the New Orleans City Ordinance which authorized the seizure of cars allegedly violating the traffic laws. The decision rests on two factors: (1) the procedures set out by the towing ordinance result in the deprivation of property interests; and (2) *Fuentes'* due process analysis remains functional.

The court in *Remm* found that the city had enforced the ordinance in two phases and that within each there was a deprivation of property without prior notice or hearing.[53] Initially, the owner of the car was denied access to and the use of his vehicle as a result of the actual towing.[54] In applying the *Fuentes* analysis to this phase, the court determined that the municipality had the responsibility of regulating its streets and that the seizure of cars to clear a public street represented an extraordinary situation in which due process can be denied. The court found that the requirements of an extraordinary situation as defined in *Fuentes* were met: (1) the seizure was necessary to protect the interest of local municipalities in regulating the use of the streets; (2) prompt action was necessary to insure public safety and convenience; and (3) a city official made the determination that there was a violation and was guided by standards detailed in a narrowly drawn statute.[55]

Remm found the second portion of the ordinance authorizing the collection of the towing charge and storage fees unconstitutional.[56] The court distinguished between the property interests involved in the seizure of the car and the assessment and payment of fees.[57] After concluding that the actual seizure was justified under the extraordinary situation exception, the *Remm* court found that the assessment and mandatory collection of the storage charges and towing fees without a hearing denied the owner due process and that the extraordinary situation exception was not applicable.[58]

Judge Sear considered the city's interest in this phase to be the collection of the storage charges and towing fees from those who

52. 418 F. Supp. 542 (E.D. La. 1976).
53. *Id.* at 545.
54. *Id.*
55. *Id.*
56. 418 F. Supp. at 545.
57. *Id.*
58. *Id.* at 546.

were guilty of a traffic violation.[59] However, the payment of the storage charges and towing fees was not treated in the same manner as the parking fine. There was no opportunity for a hearing before the pound collected the storage and towing fees. This differed from the procedure for the collection of the parking ticket fine where a hearing could be requested and payment postponed pending the outcome.[60] The towing fees and storage charges were collected regardless of guilt or innocence. This procedure raised questions not only of due process but also of creating a presumption of guilt. Because a car would presumptively not have been towed unless it was parked in violation of the traffic laws, the mere towing of the car is in essence a charge against the owner of having violated these laws.

The court further found that this portion of the towing ordinance did not fulfill the other requirements set out in the definition of an extraordinary situation. There was no apparent need for prompt action.[61] If the city could wait to collect the fine for the parking ticket violation it could postpone the collection of the towing fees and storage charges from owners who desired to contest the ticket. Finally, the government official who collected the towing fees and storage charges was not guided by the standards of a narrowly drawn statute. The ordinance did not distinguish between actual violators and alleged violators. Rather, it called for payment of the fees and charges by all owners of impounded cars.[62]

If the city were interested in collecting the charges and fees from the guilty, the court suggested that the posting of a bond would be the proper procedure. This constitutional device would both insure the court appearance of those who wished to contest the ticket and satisfy the city's monetary interest in collecting from traffic violators.[63]

It seems evident from the procedures required by the existing ordinance that the city was interested in collecting the storage charges and towing fees regardless of guilt or innocence,[64] and that

59. *Id.* at 545.
60. *Id.* at 545-46.
61. *Id.*
62. *Id.*
63. 418 F. Supp. at 545.
64. *Id.* at 544.

the payment was really a fine. Moreover, the posting of a bond would not alter the present method of operation of the pound. The officials would collect money, be it a fee for the posting of the bond or payment of the storage charges and towing fees, at the same time. Under the present ordinance, an owner must pay the storage charges and towing fees regardless of his intention to contest the parking ticket. If he later challenges the ticket and is found innocent the storage charges and towing fees would be returned.[65] If the owner had put up a bond, the payment for the bond would be returned if he were found innocent. Consequently, the only real distinction between the two situations appears to be in name; nevertheless, the court felt that a bond requirement would comply with the Constitution.

Since the decision in *Fuentes,* the composition of the Court has changed,[66] resulting in a confused situation where *Fuentes* was implicitly overruled[67] and then, two days later, revived.[68] In *Mitchell v. W.T. Grant & Co.,*[69] a case factually similar to *Fuentes,* the majority (which dissented in *Fuentes*)[70] abandoned the strict rule of *Fuentes* and used the more traditional balancing of interests test.[71] The *Mitchell* Court found that the summary seizure procedures set out in the Louisiana statute[72] were constitutional and that a creditor

65. *Id.*

66. Jonnett v. Dollar Savings Bank, 530 F.2d 1123, 1130 (3d Cir. 1976) (Gibbons, J., concurring). The majority in *Fuentes* was composed of Justices Stewart, Douglas, Brennan and Marshall. Justices White, Burger and Blackmun filed a dissenting opinion. Justices Powell and Rehnquist did not participate as the arguments were heard before they joined the bench, 407 U.S. at 68.

67. Mitchell v. W.T. Grant and Co., 416 U.S. 600, 629 (1974) (dissenting opinion).

68. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

69. 416 U.S. 600 (1974).

70. Justices White, Burger, Blackmun, Rehnquist and Powell composed the majority in *Mitchell* with the first three dissenting in *Fuentes. See,* fn. 66 *supra.*

71. 416 U.S. at 635, fn. 8 (Stewart, J., dissenting), 416 U.S. at 603-12.

72. *Id.* at 605-06. The Louisiana statute set out the following procedure in order to obtain a writ of sequestration: (1) The grounds for obtaining a writ are the possibility that the debtor will waste or dispose of the property. Writ is available only upon the submission of a verified petition or affidavit setting out the specific nature of the claim, the amount involved and the specific grounds. (2) A judge must review the petition and only he is empowered to issue the writ. (3) The creditor must file a bond which would be sufficient to cover all the debtor's damages if the debtor prevails in court. (4) There is no provision for notice or a prior hearing. After the seizure the debtor is entitled to an immediate dissolution of the writ unless the creditor can prove his grounds. If the creditor can not meet the burden, then the court must order the property to be returned to the debtor with any damages which includes attorney's fees. The debtor can also regain possession immediately after the seizure by posting a bond.

could seize a debtor's property without prior notice or a hearing.[73] The Court considered that both the debtor and creditor held "current, real interests"[74] in the property, but found that the creditor's interest in either being paid or securing possession of the goods, undiminished in value as a result of deterioration,[75] took precedence over the debtor's interest in possession.[76] This decision represented a change from the *Fuentes* view that the interests of the debtor took precedence over the creditor.[77]

Although *Mitchell* appeared to reflect a decision by the Court to limit the application of *Fuentes,* the Court a few days later relied on the extraordinary situation exception of *Fuentes* in *Calero-Toledo v. Pearson Yacht Leasing Co.*[78] The case involved the seizure of a vessel pursuant to the Controlled Substances Act of Puerto Rico.[79] This statute specifically stated that vessels would be seized only when transporting certain illegal property which was clearly designated in the statute.[80] Additionally, the officials responsible for initiating the seizure were designated.[81]

The *Calero* Court evidently felt that the statute was narrowly drawn within the guidelines enunciated in *Fuentes.* A comparison of the statute in *Calero* with the New Orleans Towing Ordinance results in the conclusion that the provision in the New Orleans statute authorizing the seizure of vehicles was drawn in compliance with *Fuentes.* The *Remm* statute described the type of vehicle (unoccupied) which would be subject to seizure if found violating a traffic law. In addition, only a police officer or duly authorized person had the power to remove the vehicle.[82]

A recent case, *North Georgia Finishing, Inc. v. Di-Chem,*[83] seems to indicate that the decision in *Mitchell* is an exception to *Fuentes* when the procedural safeguards set out in *Mitchell* are present.[84]

---

73. *Id.* at 606.
74. *Id.* at 604.
75. *Id.* at 607-8.
76. *Id.* at 608-10.
77. 407 U.S. at 86-87.
78. 416 U.S. 663 (1973).
79. *Id.* at 665.
80. *Id.*
81. *Id.*
82. 418 F. Supp. at 544.
83. 419 U.S. 601 (1975).
84. *Id.* at 606-7; *See* also note 71 *supra.*

North Georgia involved a garnishment procedure which authorized an officer or clerk of the court to issue a writ of garnishment upon the showing of conclusory allegations.[85] Under the statute the creditor was required to file a bond for the protection of the debtor.[86] There was no provision concerning notice or a hearing.[87] The only method of dissolving the garnishment was for the debtor to file a bond for the protection of the creditor.[88] As the debtor did not have a method to challenge the garnishment unless he filed the bond,[89] the Court found that the Georgia statute violated the due process clause for the same reasons as the Florida and Pennsylvania statutes in *Fuentes*.[90] The provision in question could have been found unconstitutional under *Mitchell* as well; nevertheless, the Court analogized the situation to *Fuentes*, appearing to reaffirm it.[91]

The *North Georgia* decision cannot be considered a complete reaffirmation of *Fuentes*. The decision discussed the strict *Fuentes* standard but not in the context of the particular property interest at issue.[92] Instead of examining the factual situation to determine whether or not a possessory interest had been affected, the Court returned to a balancing test (which *Fuentes* had rejected) when it considered that the "probability of irreparable injury . . . is sufficiently great so that some procedures are necessary to guard against the risk of initial error."[93] In determining whether due process protections were necessary, the Court was concerned with the degree of injury as opposed to the fact of injury regardless of its nature as *Fuentes* would have required.

The standard of procedural due process as applied by the Su-

85. The statute at issue in *North Georgia* required that the creditor state the "amount [he] claimed to be due [that he] has reason [to] apprehend loss of same or some part thereof unless . . . garnishment shall issue." 419 U.S. at 602.

86. *Id.* at 603.

87. *Id.* at 605.

88. *Id.* at 607.

89. *Id.*

90. *Id.* at 606.

91. 419 U.S. at 606-07. The Court noted that the Georgia garnishment statute (which was the issue of the case) did not have the "saving characteristics" found in the statute in *Mitchell*. *Id.* at 607. Relying on this would have been enough to find the Georgia statute unconstitutional without a further analysis under *Fuentes*. Instead it appears to limit *Mitchell* to the situation where a statute has the same provisions as found in *Mitchell* and in that select case the statute would be valid.

92. 419 U.S. at 606.

93. *Id.* at 608.

preme Court today in summary seizure cases remains unclear. It appears that the Court is moving away from the strict standard of *Fuentes* to the balancing process of *Mitchell* and *North Georgia.*[94] Where the safeguards as set out by *Mitchell* are present, it seems probable that *Mitchell* will be applied. In other situations, *Fuentes* will govern though possibly limited by the holding in *North Georgia.*

In analyzing the issue of due process, *Remm* did not give sufficient consideration to possible changes in the theory since *Fuentes.* Judge Sears referred to *Mitchell,* but only in regard to the type of hearing and notice required.[95] The court did not consider what *Mitchell* represented in the line of cases interpreting due process. In general, *Mitchell* signalled the Supreme Court's return to the application of the balancing test rather than following the strict *Fuentes* test in every instance. Specifically, *Mitchell* resulted in what could be considered an exception to *Fuentes,* when the proper procedural safeguards as found in *Mitchell* are present. Although the *Remm* analysis considered whether the extraordinary situations exception to *Fuentes* would render the towing ordinance constitutional, the *Remm* court did not examine the constitutional situation in terms of *Mitchell.*

In order to obtain a seizure prior to notice or hearing, the statute at issue in *Mitchell* set out the following requirements. The creditor must submit a verified petition or affidavit to the court detailing the nature of the claim, the factual situation, as well as the amounts claimed due.[96] In addition, it must appear that the debtor has the power to alter or conceal the property to the creditor's detriment.[97] Only a judge has the authority to issue the writ upon the clear presentation of a verified petition, and then only if the creditor files a bond for the protection of the debtor.[98] Upon seizure, the debtor is entitled to an immediate dissolution of the writ which must be ordered unless the creditor can prove his allegations. The debtor can also regain possession of[99] the property regardless of whether he moves to dissolve the sequestration by filing a bond for the protec-

94. Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1128-30 (3d Cir. 1976).
95. 418 F. Supp. at 548, fn. 12.
96. 416 U.S. at 605.
97. *Id.*
98. *Id.* at 605-6.
99. *Id.* at 606.

tion of the creditor.[100]

An application of the *Mitchell* test to the New Orleans City Towing Ordinance reveals that under *Mitchell* it is unlikely that the second portion of the ordinance would be found constitutional. One of the more serious deficiencies is that a judge is not the final authority on whether or not the fees are collected. As the *Remm* court noted, the collection is mandatory from all owners whose cars have been subject to seizure. Other factors supporting such a conclusion are the absence of a statutory requirement of a verified petition asserting the facts, the filing of a bond for the protection of the owner, and finally the immediacy of a hearing. Perhaps some of these provisions would not be required, as there is a government interest involved which already justifies the seizure of the car. Nevertheless, the *Mitchell* Court's requirement that the authority to issue such a writ be vested only in a judge[101] makes it unlikely that a statute lacking this provision would be found constitutional.

The Supreme Court still appears to be following a balancing test, particularly in light of *North Georgia.* However, where the statute at hand does not justify a seizure prior to hearing or notice under one of the two exceptions to *Fuentes,* the Court is continuing to give greater weight to preserving a person's property interests until he has had an opportunity to be heard. As a result, the state's interest in collection of the towing charges and other fees would not outweigh a person's right to a hearing before the fees are collected. The possibility of irreparable injury is present because a person is deprived not only of money to pay the fees but also of his means of transportation in a society where a car is almost an essential item.

As due process is interpreted today, the *Remm* analysis is a valid application. Although the decision does not consider the changing dimensions of due process, its basic reasoning is sound, viable, and should endure.[102]

Laurie S. Schaffer

100. *Id.* at 607.

101. *Id.* at 616.

102. As noted, the direction in which due process will evolve is unclear. In 1976, the Supreme Court remanded a case for construction to the New York courts concerning a New York attachment statute that was procedurally similar to *Mitchell.* Carey v. Sugar, 425 U.S. 73 (1976).