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Prejudgment Remedies

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PREJUDGMENT REMEDIES*

WINTON E. WILLIAMS**

This article examines the decisions of the United States Supreme Court regarding the constitutional due process requirements for validation of the prejudgment remedies of replevin, attachment, and garnishment. These decisions are analyzed with regard to Florida law as it presently exists as well as ways the law could be amended to comport with both the dictates of the Supreme Court and the traditional protections afforded the debtor by Florida law.

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I. INTRODUCTION

Creditors' prejudgment remedies have historically functioned as a means of removing certain property of the debtor from his possession or control prior to any input by the debtor in a judicial hearing on the merits of the creditor's claim. Such remedies, or the writs upon which they are based, are also known as provisional ones because the temporary taking becomes final only after the creditor has prevailed at a hearing in which the debtor may present his defenses. Thus, if the debtor prevails, his property is restored to him. Therefore, it is suggested that creditors' remedies which require prior notice to the debtor and an opportunity for him to present defenses at a hearing which preceeds any temporary deprivation of his property — even if the hearing is expeditiously provided and litigable issues are limited — are something other or less than a prejudgment remedy. Within this definitional framework, the bottom line for Florida practitioners is that secured creditors once more have a general right to prejudgment replevin, and, while general creditors currently lack prejudgment remedies in attachment and probably garnishment, this deficiency is legislatively remedial.

* This article updates an earlier work of the writer appearing at 25 U. FLA. L. REV. 60 (1972).

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To the casual observer, the ebb and flow of the constitutional validity of Florida's prejudgment remedies tested against standards of procedural due process, is no doubt perplexing. In the recent case of *Unique Caterers, Inc. v. Rudy's Farm Co.*,¹ the Supreme Court of Florida found this state's attachment statute² to be constitutionally infirm. Based on the reasoning of that case, it is suggested that Florida's prejudgment garnishment procedure³ is likewise lacking in due process requirements. Prior to *Unique Caterers*, the invalidation of the state's prejudgment replevin procedure by the Supreme Court in *Fuentes v. Shevin*⁴ resulted in the enactment of a successor statute which provided only charily for prejudgment takings.⁵ More recent legislation⁶ has fully restored, however, the secured creditor's provisional replevin remedy. These judicial and legislative actions are understandable only in the context of the evolution of the current requisites of due process in the area of debtor-creditor relations.

Prior to 1969, there was great divergence in the availability of prejudgment remedies from state to state. This was a reflection of different attitudes toward the debtor-creditor relationship and was made possible by the almost unfettered discretion given state legislatures and courts to set forth the ambit of such remedies. This historic freedom from any federal standard of control is perhaps best illustrated by the Supreme Court's refusal to find a deprivation of due process in *Ownbey v. Morgan*,⁷ a Delaware proceeding that not only preconditioned prejudgment release of property to the debtor upon posting of surety bond but also required a nonresident individual to enter the same security as a condition to making appearance and defending the action.

Florida has historically treated debtors more benignly. In an earlier work⁸ the author has treated in some detail the benefits and limitations of prejudgment remedies in this jurisdiction. It should suffice to note that the statutory and case law of Florida have restricted and tempered the use of prejudgment garnishment and at-

1. 338 So. 2d 1067 (Fla. 1976).

2. FLA. STAT. ch. 76 (1975).

3. FLA. STAT. ch. 77 (1975).

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

5. Law of May 8, 1973, ch. 73-20, § 1 (repealed 1976). The repealed section is FLA. STAT. § 78.073 (1975).

6. Law of May 19, 1976, ch. 76-19, § 1, codified at FLA. STAT. § 78.068 (Supp. 1976).

7. 256 U.S. 94 (1921).

8. Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 U. FLA. L. REV. 60 (1972).

tachment by: (1) requiring that express statutory grounds for the writ be present; (2) placing limitations on the type of underlying claims that may give rise to the use of the provisional writs; (3) requiring that the creditor file bond with surety conditioned to pay all costs and damages which the debtor sustains in consequence of the creditor's improperly suing out the writ; and (4) creating provisions for liberal exemptions that insulate certain property against prejudgment as well as postjudgment levies.⁹

As it is traditionally applied in Florida, the requirement of express statutory grounds for a writ has limited the creditor's right to seek attachment to cases of nonresidency, absence or concealment which defeats personal service, or cases in which there is threatened or actual removal or disposition of the property.¹⁰ Similarly, to invoke the aid of prejudgment garnishment the creditor's motion initiating the writ must state "that movant does not believe that defendant will have in his possession after execution is issued, visible property in this state and in the county in which the action is pending on which a levy can be made sufficient to satisfy plaintiff's claim."¹¹ Within these limitations, however, the creditor invoking the provisional aid of attachment and garnishment has received a measure of immediate protection against diminution in value of the property that might provide the only means of partially or fully satisfying his claims; a basis, where needed, for quasi in rem jurisdiction; and an all important early lien acquisition in subsequent contests with third parties.¹²

Since replevin lies for any person whose personal property is wrongfully detained, it has long been useful to secured parties in this state who have the right upon the debtor's default to take possession of their collateral.¹³ As the creditor's use of replevin is limited to those instances in which he has a present and possessory property interest, in contrast to the lien acquired only by judicial attachment procedures, no further special grounds for the replevin writ have been imposed. When prejudgment replevin has been made generally available to secured creditors, Florida has imposed a mea-

9. *Id.* at 63-76.

10. *Id.* at 63-68.

11. FLA. STAT. § 77.031 (1975).

12. Williams, *supra* note 8, at 60-63.

13. *Id.* at 90-100.

sure of protection for the debtor by requiring the creditor to post bond.¹⁴

Finally, it should be noted that Florida statutes presently provide and have formerly provided that a debtor, subjected to any of the provisional writs, may immediately recover his property by posting bond.¹⁵ While not constituting a limitation on the use of the prejudgment remedies, the provision is an important one in assessing the hardship imposed on the debtor by the prejudgment taking. Not all jurisdictions have provided the safeguards to the debtor incorporated by Florida procedure, however. Moreover, do such safeguards validate the temporary taking inherent in the prejudgment remedies in all the instances in which the laws of the various states have made these remedies available? In its 1969 decision, *Sniadach v. Family Finance Corp.*,¹⁶ the Supreme Court held that they did not and thus set the stage for a new era in balancing the rights of debtor and creditor in prejudgment remedies.

II. *Sniadach* AND *Fuentes*: ESTABLISHMENT AND EXTENTION OF PRIOR NOTICE AND HEARING

Sniadach presented a particularly appealing case in which to recognize the debtor's due process rights. The resident debtor's wages were garnished prior to notice and an opportunity to be heard and "no situation requiring special protection to a state or creditor interest"¹⁷ was present. Although the Court held that "summary procedure may well meet the requirements of due process in extraordinary situations,"¹⁸ the case at bar was easily distinguished and removed from the sanctioned parameters. Although the Court in *Sniadach* attempted no compendium of causes that would require special protection to a state or creditor interest, creditors in jurisdictions like Florida, that generally limit attachment and garnishment writs to cases of special need, could take solace in the *Sniadach*

14. Law of May 19, 1976, ch. 76-19, § 1, *codified at* FLA. STAT. § 78.068 (3)(Supp. 1976) (current prejudgment replevin law); Law of June 27, 1967, ch. 67-254, § 28 (repealed 1973) (former prejudgment replevin law).

15. FLA. STAT. §§ 76.18, 76.19 (attachment), 77.24 (garnishment) (1975); Law of May 19, (current prejudgment replevin law) 1976, ch. 76-19 § 1, *codified at* FLA. STAT. § 78.068 (4) (Supp. 1976); Law of June 27, 1967, ch. 67-254, § 28 (repealed 1973) (former prejudgment replevin law).

16. 395 U.S. 337 (1969).

17. *Id.* at 339.

18. *Id.*

extraordinary situations test.

Furthermore, the Court's opinion in *Sniadach* was susceptible to an interpretation that limited its requirements to prejudgment takings of only particular types of property. Thus, in the interim between *Sniadach* and the Supreme Court's next decision applying due process standards to creditors' provisional remedies, *Fuentes v. Shevin*,¹⁹ three competing theories as to the effect of *Sniadach* were developed by the lower courts. Some courts held that constitutional attacks on attachment and garnishment failed when the subject of the writs was not wages.²⁰ A competing theory which, although still limiting *Sniadach* to a particular type of property, nevertheless greatly expanded the scope of coverage, was articulated by the Supreme Court of California.²¹ This decision relied heavily on an analogy between "ages" and "necessities of life" and extended the parameters of *Sniadach* to all significant property interests. Finally, other courts refused to recognize any restriction arising from the type of property subjected to attachment and garnishment.²² This latter theory was to prevail.

Paralleling the development of these competing doctrines as to the type of property immunized from prejudgment attachment and garnishment was the development of further conflict among lower courts on a related question: What was the applicability of *Sniadach* to the provisional remedies of the secured creditor to recover his collateral by replevin or like procedure under claim and delivery statutes?²³ This issue, as was the issue of whether *Sniadach's* due process rights were restricted to certain types of property, was resolved in favor of the applicability of the due process tests in *Fuentes*.

Fuentes did indeed mark the pinnacle of due process restraints on prejudgment writs. Not only did the holding obviate any distinctions founded on gradations in the importance of the property to the debtor²⁴ and fail to accord the secured creditor's provisional reme-

19. 407 U.S. 67 (1972).

20. See, e.g. *Lebowitz v. Forbes Leasing & Fin. Corp.* 326 F. Supp. 1335 (E.D. Pa. 1971); *American Olean Tile Co. v. Zimmerman*, 317 F. Supp. 150.

21. *Randone v. Superior Court*, 5 Cal. 3d 565, 96 Cal. Rptr. 709, 488 P.2d 13 (1971).

22. See *Jones Press, Inc. v. Motor Travel Serv., Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970); *Larson v. Featherston*, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

23. Compare *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970) with *Brunswick Corp. v. J. & P., Inc.*, 424 F.2d 100 (10th Cir. 1970).

24. 407 U.S. at 88-89.

dies any different status from that of the general creditor proceeding under attachment and garnishment laws,²⁵ but it also restricted the ambit of extraordinary situations that justify postponing notice and an opportunity for a hearing. The criteria of situations "requiring special protection to a state or creditor interest" enunciated in *Sniadach*²⁶ were stated in *Fuentes* in terms of necessity "to secure an important governmental or general public interest."²⁷ No explanation was offered for the removal of "creditor interests" from the extraordinary situations test. Perhaps of greater importance in view of the importance of chattel security to a credit economy was the *Fuentes* Court's characterization of the Florida proceedings as furthering "no more than private gain."²⁸ In this fashion, the general interest of the public in the availability of credit at low cost and the contribution of prejudgment repossession of chattel security to that end was summarily dismissed by the Court in *Fuentes*.

III. THE FLORIDA RESPONSE

The strictures placed on the provisional writs by *Fuentes* left little room for these writs to function in their traditional role. Not surprisingly then, the Florida legislature's response to the invalidation of the state's replevin statute in *Fuentes* was the removal of prejudgment replevin with but one highly restricted exception.²⁹ In lieu of the pre-*Fuentes* provisions for prejudgment replevin at the creditor's option,³⁰ the legislature made provision for the secured party to promptly obtain a hearing prior to final judgment on "an order directed to the defendant to show cause why the claimed property should not be taken from the possession of the defendant and delivered to plaintiff."³¹ Only after the debtor has had the opportunity to be heard on the order to show cause and only after the

25. *Id.* at 86.

26. 395 U.S. at 339.

27. 407 U.S. at 91.

28. *Id.* at 92.

29. The legislature provided that if the creditor swears in an affidavit that the claimed property is in danger of destruction, concealment, or removal from the jurisdiction at the hands of the defendant, and satisfies the court that the defendant will violate a temporary restraining order, the court may issue a writ of replevin upon a properly filed complaint without affording notice or a hearing. FLA. STAT. §§ 78.069, 78.073 (1973) (repealed 1976). See FLA. STAT. § 78.068 (Supp. 1976).

30. FLA. STAT. § 78.01 (1967) (repealed 1973).

31. FLA. STAT. § 78.065 (1975).

court determines the "probable validity" of the creditor's underlying claim, may the court direct the clerk to issue the writ of replevin.³² This substituted procedure does not constitute a prejudgment remedy although it does conform with the latitude granted by *Fuentes* as to the requirements of a hearing prior to even temporary deprivation. *Fuentes* made clear that the hearing does not have to result in a "final judgment," is "open to many potential variations" and is a subject "for legislation" provided that it establish "the validity or at least the probable validity of the claim."³³ In order to protect the secured creditor's precarious position following notice of his intention to repossess, provision was made for a temporary restraining order if the creditor could reasonably establish that the debtor was placing the property in danger of destruction, concealment or removal.³⁴ The only concession to what may have remained of extraordinary situations excusing prior notice and hearing in Florida's immediate pre-*Fuentes* replevin statute was provision for issuance of the writ without prior hearing when the creditor could establish the requisites for issuance of a restraining order, and further, that the debtor probably would violate the order.³⁵

Fuentes did indicate a means other than extraordinary situations by which the creditor could avoid the necessity of affording the debtor an opportunity for hearing prior to taking. The concept of advance contractual waiver of due process rights in a civil action was recognized by the Court in *Fuentes*, although in none of the contracts before the Court did the language relied upon establish the requisite intent of the parties to create such a waiver.³⁶ Provision for advance contractual waiver of due process rights was not utilized by the Florida legislature in its enactment of a new replevin statute following *Fuentes*. Although provision is made for dispensing with the order to show cause and thus prompt issuance of a writ of replevin if the debtor has waived his right to be notified and heard,³⁷ the debtor's waiver must be made in accordance with another section of the statute which addresses itself only to conduct of the debtor constituting waiver after receipt of a show cause order.³⁸ This

32. FLA. STAT. § 78.067 (1975).

33. 407 U.S. at 96-97.

34. FLA. STAT. § 78.069 (1973). See FLA. STAT. § 78.068 (Supp. 1976).

35. See note 29, *supra*.

36. 407 U.S. at 94-95.

37. FLA. STAT. § 78.065 (1) (1975).

38. FLA. STAT. § 78.075 (1975).

apparent legislative oversight and the limitations on the concept of advance contractual waiver of right to notice and hearing would be worthy of further analysis if Supreme Court cases since *Fuentes* did not suggest a more direct means of restoring prejudgment remedies.

IV. *Mitchell* AND BEYOND: LIMITING THE PRESEIZURE HEARING REQUIREMENT

Perhaps the best way to put in proper perspective the change in due process requirements produced by the next decision of the Supreme Court in this area, *Mitchell v. W.T. Grant Co.*³⁹ is to observe, as did the dissenting Justices, that "[t]he only perceivable change that has occurred since *Fuentes* is in the makeup of this court."⁴⁰

In *Mitchell* the seller of goods, like the seller-secured party in *Fuentes*, resorted to a prejudgment writ to repossess goods upon the buyer's default in payments. As was true in *Fuentes*, the seller-creditor in *Mitchell* obtained the writ on his ex parte application without notice to the debtor or an opportunity for hearing.⁴¹ But, unlike *Fuentes*, the Supreme Court held that the Louisiana procedure which made available to the seller a writ of sequestration (seizure of goods) without notice to the debtor or an opportunity for hearing was valid. For guidance, the *Mitchell* decision enumerated several safeguards in providing due process: (1) judicial control; (2) the amount and nature of information necessary to clearly establish grounds for seizure; (3) bond posted by the creditor; (4) a prompt postseizure hearing at which continued enforcement issues could be resolved; and (5) burden of probable cause for seizure on the creditor.⁴²

The validity accorded the ex parte application in *Mitchell* is surprising since the latitude given legislatures in *Fuentes* to fashion the required hearing was clearly limited by one basic requirement: The hearing must be at a "meaningful time" and that requires notice and hearing *before* the seizure "to minimize substantively unfair or mistaken deprivations."⁴³ The decision in *Mitchell* can be

39. 416 U.S. 600 (1974).

40. *Id.* at 635 (dissenting opinion) (footnote omitted). *But see* Justice Stewart's concurring opinion in *North Georgia Finishing, Inc., v. Di-Chem, Inc.*, 419 U.S. 601, 619, where he appeared to recede somewhat from this harsh statement of his dissent in *Mitchell*.

41. *Id.* at 602.

42. *Id.* at 615-18.

43. 407 U.S. at 81.

interpreted as an abrupt change in focus from requiring some type of adversary hearing prior to even temporary deprivation to requiring protection other than prior notice and an opportunity for the debtor to be heard. It is suggested that only through this interpretation can *Mitchell* be characterized, as the majority opinion does, as distinguishing *Fuentes*.⁴⁴

By establishing safeguards independent of any pre seizure adversary hearing, *Mitchell* harbingered restoration of prejudgment remedies in cases that would not otherwise meet the extraordinary situations test of *Sniadach*, as modified and restricted by *Fuentes*. Indeed, although the creditor in *Mitchell* alleged that it had reason to believe that the debtor would "encumber, alienate or otherwise dispose of the merchandise" prior to hearing,⁴⁵ no specific facts in the opinion support that allegation other than possibly the general belief of a lien creditor that any debtor following default is not an ideal custodian of the property.⁴⁶ Furthermore, the provisional writ in Louisiana was triggered not by specific allegations of threatened or actual conduct by the debtor, but merely by it being "within the power" of the debtor to diminish the value of the creditor's security.⁴⁷

The Louisiana procedure outlined above, which the Court in *Mitchell* validated as reaching "a constitutional accommodation of the respective interests of buyer and seller"⁴⁸ differed from the Florida replevin provisions found wanting in *Fuentes* in three respects: (1) the absence in the Florida proceedings of "judicial order, approval or participation" in the issuance of the writ;⁴⁹ (2) the requirement in Louisiana that the writ be issued only on a verified petition or affidavit alleging specific facts and not merely conclusory statements of ownership or possessory rights;⁵⁰ and (3) the requirement in Louisiana that the debtor be provided with the opportunity for an immediate postseizure hearing and dissolution of the writ unless the creditor proved the grounds for the remedy.⁵¹ Although as previously noted, Florida has long provided that the creditor in pre-

44. 416 U.S. at 615-20.

45. *Id.* at 602.

46. *Id.* at 608-09.

47. *Id.* at 605; LA. CODE CIV. PRO. ANN. art. 3571 (West).

48. *Id.* at 610.

49. *Id.* at 606, 608, 615-16.

50. *Id.* at 605, 615-18.

51. *Id.* at 606, 610, 618.

judgment replevin must post a bond to protect the debtor against abuse, *Mitchell* emphasizes that the Louisiana proceeding required the creditor's bond to guarantee the debtor his attorney's fees as well as other damages and expenses.⁵² Finally, *Mitchell* noted the provisions of the Louisiana procedure, also provided by Florida law, that permitted the debtor to regain possession pending final judicial determination of the case by posting his own bond to protect the creditor.⁵³

The creditor in *Mitchell* is strikingly similar to the secured party in Florida who uses replevin to recover possession of collateral following default. The Louisiana seller in *Mitchell* did not have a security interest in the property but relied instead on the rights given creditors to repossess goods sold independent of a security interest.⁵⁴ But in Florida, as with other jurisdictions which have adopted the Uniform Commercial Code, the reclamation rights of a seller without a security interest are limited to cases in which the buyer has received goods on credit while insolvent.⁵⁵ Based on this difference between an unsecured creditor in Louisiana and an unsecured creditor in a UCC jurisdiction, it is suggested that the unsecured seller in *Mitchell* is really the equivalent of a secured creditor under the Uniform Commercial Code for, without the more liberal provisions of Louisiana law granting him reclamation rights where they do not exist under the Code, the seller of consumer durables would have taken a security interest in the property.

In addition, although the Court in *Mitchell* emphasized that the Louisiana "vendor's lien expires if the buyer transfers possession,"⁵⁶ in this instance too there is a parallel in the position of the seller in *Mitchell* and the secured party in Florida. While the secured party in Florida may perfect his security interest in consumer goods such as those in *Mitchell* by filing,⁵⁷ he often relies — due to the cost of filing relative to the size of the transaction — on the perfected status accorded purchase money secured parties in consumer goods without the necessity of filing or taking possession of the collateral.⁵⁸ As the latter method of perfection is vulnerable to

52. *Id.* at 608, 617.

53. *Id.* at 607-08.

54. *See* *W. T. Grant Co. v. Mitchell*, 269 So. 2d 186, 189-90 (La. 1972).

55. *See* U.C.C. § 2-702 (2); FLA. STAT. § 672.702 (2) (1975).

56. 417 U.S. at 609.

57. *See* FLA. STAT. § 679.302 (1) (1975).

58. FLA. STAT. § 679.302 (1)(d) (1975).

the interests of subsequent innocent buyers for value for their own personal, family or household purposes,⁵⁹ however, here again the position of the secured party in Florida is similar to that of the seller in *Mitchell*.

The analogy is an important one for assessing the impact of *Mitchell* on all provisional remedies. *Mitchell* lays great stress on the creditor's property rights in the goods that were subjected to provisional writ. The Court emphatically noted: "The question is not whether a debtor's property may be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized."⁶⁰ Thus, one possible reading of *Mitchell* could well limit its modification of *Fuentes* only as to those creditors who have a property interest in the goods sought to be subjected to the writ, independent of lien acquisition by judicial process. In its application in Florida this would encompass secured creditors using replevin but not general creditors bringing prejudgment garnishment and attachment actions to acquire their initial lien status. The according of greater prejudgment rights to secured creditors than unsecured ones was, of course, one argument rejected by the Court in *Fuentes*. Once the Court restored secured creditors' prejudgment remedies in *Mitchell*, was it a necessary corollary that the same rules applied to the remedies of unsecured creditors? Although the Court's opinion in *Mitchell* is far from clear on this point, the answer to be gleaned from the Supreme Court's next case on the subject is that compliance with *Mitchell* probably insulates creditors in attachment and garnishment as well as replevin.

In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*⁶¹ the setting was once again one of prejudgment garnishment by a general creditor. In this instance, however, the writ was directed against a corporate debtor's bank account, and the underlying claim resulted from a substantial commercial transaction. Although the creditor had to allege that he had reason to apprehend the loss of the amount claimed,⁶² no specific allegation of any extraordinary situation appears in the facts of the case. Moreover, the fact that the debtor was able to and did file a bond resulting in the discharge of the bank as garnishee⁶³ would seem to belie the presence of any extraordinary

59. FLA. STAT. § 679.307 (2) (1975).

60. 416 U.S. at 604.

61. 419 U.S. 601 (1975).

62. *Id.* at 602, 604.

63. *Id.* at 604.

situations relating to disposal or removal of property. Given these facts, it would appear that if *Mitchell's* allowance of prejudgment takings was limited to secured creditors, the Court had an easy basis for decision in *North Georgia Finishing*. Absent extraordinary situations, the rule of *Sniadach* as modified by *Fuentes* would dictate the invalidity of the Georgia proceeding without resort to the due process standards of *Mitchell*. That this was not the basis for the finding of a due process deprivation in *North Georgia Finishing* militates against limiting *Mitchell's* provisions for utilization of prejudgment writs to remedies of secured creditors only.

Furthermore, the reasoning of the majority opinion in *North Georgia Finishing* would seem on balance to support the proposition that adherence to *Mitchell* will validate prejudgment garnishment and attachment. However, the opinion is not free from ambiguity. The lack of clarity arises from the Court's reliance on both *Fuentes* and *Mitchell*. After noting that the Georgia court's upholding of the procedure by limiting *Sniadach* to wages failed to take account of *Fuentes*,⁶⁴ the Court observes that *Fuentes* invalidated replevin statutes that permitted the secured seller to repossess the goods "without notice or hearing and without judicial order or supervision."⁶⁵ Then immediately prior to holding that the Georgia procedure was vulnerable for the same reasons as those advanced in *Fuentes*,⁶⁶ the Court seems to temper its reliance on *Fuentes* by application of a pure *Mitchell* rationale: "Because the official seizures [in *Fuentes*] had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession, they were held to be in violation of the Fourteenth Amendment."⁶⁷ In addition to seemingly incorporating *Mitchell's* overlay on *Fuentes* by the shift from the conjunctive "and" to the disjunctive "or," the Court in *North Georgia Finishing* directly addresses its holding in *Mitchell* and concludes that "[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana statute."⁶⁸

Nevertheless, the ambiguity of the Court's holding in *North Georgia Finishing* is undoubtedly a source of concern to legislative

64. *Id.* at 605-06.

65. *Id.* at 606 (emphasis added).

66. *Id.*

67. *Id.* (emphasis added).

68. *Id.* at 607.

draftsmen as it was to those Justices who noted it in their concurring and dissenting opinions.⁶⁹ If *North Georgia Finishing* did not superimpose *Mitchell* on *Fuentes*, it may follow that all provisional writs are limited to *Fuentes*' extraordinary situations. This reading would invalidate Florida's new replevin provisions for that statute⁷⁰ follows *Mitchell* and not *Fuentes*.

Further support for the primacy of the rule of *Mitchell* over that of *Fuentes* is contained in the recent per curiam opinion of the Supreme Court in *Carey v. Sugar*.⁷¹ In *Carey* the unsecured creditor sought in state court to attach under New York procedure the debt owed by one corporation to another. The debtors in the state proceeding sought a declaration in a federal district court that the attachment provisions were unconstitutional.⁷² Although New York procedure provided the debtor an opportunity for a hearing to vacate the attachment prior to judgment, the three-judge federal district court held that the postseizure hearing provisions were constitutionally inadequate. The reasoning of the district court (according to the Supreme Court) was "because the hearing would only be concerned with the question whether the 'attachment is unnecessary to the security of the plaintiff,' and would not require the plaintiff to litigate the question of the likelihood that it would ultimately prevail on the merits."⁷³ The Supreme Court remanded the case with directions that the district court abstain from a decision on the constitutional issues until the parties had an opportunity to obtain a construction of the state law by the New York courts.⁷⁴

The Supreme Court's at least tacit approval in *Carey* of prejudgment takings by unsecured creditors, provided *Mitchell* safeguards were present, would offer greater support to the argument that attachment and garnishment are to be treated as replevin, were it not for one fact in the case. In *Carey*, the underlying claim of the creditor was one which contained several counts alleging fraud on the part of the defendants.⁷⁵ As fraud might well be encompassed within the extraordinary situations of even *Fuentes* not modified by

69. *Id.* at 608-620.

70. FLA. STAT. §§ 78.01-.21 (1975 and Supp. 1976).

71. 425 U.S. 73 (1976).

72. *Id.* at 76.

73. *Id.* at 77. (citations and footnotes omitted).

74. *Id.* at 79.

75. *Id.* at 74.

Mitchell, the case does not necessarily lay to rest the ambiguities of *North Georgia Finishing*.

V. *Unique Caterers*: FLORIDA LAW FOUND UNCONSTITUTIONAL

The latest chapter in the saga of the constitutionality of the prejudgment writs in this state was recently written by the Supreme Court of Florida. In *Unique Caterers, Inc. v. Rudy's Farm Co.*,⁷⁶ the creditor invoked attachment on the grounds that it "had reason to believe: (a) the defendant is actually removing all his property to New Jersey in order to continue doing business there; [and] (b) all officers, directors and stockholders reside out of the state."⁷⁷ The opinion of the court reviewed the less than clear dictates of procedural due process arising from *Sniadach* and its progeny and concluded that an immediate *postseizure* hearing would suffice for attachment cases.⁷⁸ The Florida attachment statute was invalidated on grounds of failure to comply with *Mitchell* for the court concluded that "most seriously, the statute does not *require* an immediate post-seizure hearing, rather it simply keeps the court open at any time to hear dissolution motions."⁷⁹ The court also found Florida's attachment provisions deficient in not requiring a judge to issue the writ nor requiring a supporting affidavit based on other than a conclusory allegation of the creditor of the grounds for attachment.⁸⁰

The Supreme Court of Florida's decision bespeaks the change in focus from *Fuentes* to *Mitchell*. Under the rule of the former case extraordinary situations or the creditor's special need for the process was the determinative criterion, but the court's reading of *Mitchell* and *North Georgia Finishing* dictates *Mitchell's* safeguards regardless of the presence of extraordinary situations. *Unique Caterers* was a four to three decision. Did the three dissenting justices conclude that the presence of extraordinary situations negated the need for *Mitchell* safeguards? One can only speculate on this point for no dissenting opinion was filed in *Unique Caterers*. The opinion of the court does question, however, whether the grounds for Florida's at-

76. 338 So. 2d 1067 (Fla. 1976).

77. *Id.* at 1068 n.2.

78. *Id.* at 1070 (emphasis added).

79. *Id.* at 1071 (emphasis by the Court).

80. *Id.*

tachment proceedings qualify as post-*Fuentes* extraordinary situations.⁸¹

VI. CONCLUSION

If the applicability of *Mitchell* safeguards to validate prejudgment attachment and garnishment is less than clear, any forthcoming amendment of Florida's statutes on these subjects can present the remedies in their most favorable constitutional light by not only incorporating the requisites to prejudgment taking sanctioned by *Mitchell*, but also by limiting them to cases presenting a special need for the processes. Combining *Mitchell* safeguards with grounds that limit unsecured creditors' use of prejudgment takings would incorporate not only the best policy arguments in favor of the writs, but also reaffirm Florida's historical limitations on the use of prejudgment writs by unsecured creditors.

In this regard, it is suggested that some refinement as to what constitutes grounds for the writs may be in order. The general grounds for attachment in this state encompassing the nonresidency, absence, or concealment of the debtor or the threatened or actual removal of the debtor's property⁸² do seem to present instances of special creditor need. But, for example, special provisions relating to attachment of a ship or boat for negligence in its navigation, direction or management that results in injury to person or property⁸³ might be considered overbroad. This would appear to be true in instances of the attachment of a vessel of a resident defendant not removing or threatening removal of the vessel or his other property from the state. Rather, draftsmen may well wish to consider another basis for the nature of the underlying claim giving rise to the use of the provisional remedy, and that is one suggested by the facts in *Carey*. It would appear that a claim based on fraud might justify the prejudgment taking although Florida has never recognized such grounds. Finally, the provision for attachment in aid of foreclosure by a chattel mortgagee⁸⁴ has been rendered superfluous by the adoption of the Uniform Commercial Code in this state. The Code's unified concept of security interest would make

81. *Id.* at 1069.

82. FLA. STAT. §§ 76.04-.05 (1975).

83. FLA. STAT. § 76.32 (1975).

84. FLA. STAT. § 76.07 (1975).

replevin available to all secured parties including those who were formerly chattel mortgagees.⁸⁵

As prejudgment garnishment in Florida is probably constitutionally infirm for the same reasons as attachment, any amendment of the state's garnishment statute might likewise consider refinements as to grounds for the writ. While the creditor's belief that the debtor will not have in his possession property to satisfy an execution subsequently issued⁸⁶ would generally limit prejudgment garnishment to cases of special creditor need, the grounds do seem broader than the general ones for attachment. One can readily postulate a case in which the debtor in garnishment will not be possessed of sufficient property, but there is no danger that others will have disposed of his property in their possession or will have paid their debt to him prior to issuance of a writ of execution. Moreover, as there is at least some question of whether any prejudgment garnishment of wages would meet the requirements of *Sniadach*, the legislature may wish to prohibit prejudgment garnishment of all wages in this state.

The above suggestions for insuring that garnishment and attachment be limited to cases of special need are not intended to necessarily reflect constitutional requisites. Nor are they intended to reflect adversely on recent legislation in this state which restored prejudgment replevin in cases in which the debtor "has failed to make payment as agreed."⁸⁷ The substitution of a general right to prejudgment replevin when coupled with *Mitchell* procedural safeguards, for a practice embodying temporary restraining orders, and some highly restricted prejudgment remedies,⁸⁸ seems justified when considered in the framework of a security interest. The debtor did give the secured party a consensual lien in the property subjected to the writ, and therefore, both creditor and debtor have property interests at stake. Collateral does depreciate in value, and the debtor is often not an ideal custodian after default.

When the secured party or anyone else wishes to make use of prejudgment replevin based on grounds other than failure to make payment as agreed, the Florida legislature limited the action to

85. See Williams, *supra* note 8, at 67, 92-93.

86. FLA. STAT. § 77.031 (1975).

87. Law of May 19, 1976, ch. 76-19 § 1, codified at FLA. STAT. § 78.068 (Supp. 1976).

88. Law of May 8, 1973, ch. 73-20 § 1 (repealed 1976). The repealed sections are FLA. STAT. §§ 78.055 (6), 78.069, 78.073 (1975).

cases of "conduct that may place the claimed property in danger of destruction, concealment, waste, removal from the state, removal from the jurisdiction of the court, or transfer to an innocent purchaser, during the pendency of the action."⁸⁹ Where the creditor's right to possession presents a close issue or where the grounds for prejudgment replevin are questionable, the legislature has wisely retained a replevin procedure embodying a taking only after final hearing on the merits,⁹⁰ and — in the further alternative — issuance of the replevin writ after judicial determination of the probable validity of the plaintiff's claim in a hearing with adversarial input on an order to show cause.⁹¹ Utilization of one of the latter procedures may be well advised even when the debtor has failed to make payment as agreed to a seller-secured party, but premises his non-payment on the rights of a buyer upon notice to his seller to deduct damages for breach of the contract of sale from any part of the price still due.⁹² Otherwise, the creditor may be liable for damages sustained by what is subsequently determined to constitute an improper temporary deprivation.

Based on the above analysis which favors limiting attachment and prejudgment garnishment to cases of special creditor need, it would appear that the Supreme Court could have more profitably spent its efforts in imposing an extraordinary situations test and limiting the parameters thereof. That it did not do so is perhaps the tragic turn taken in those cases decided subsequent to *Sniadach*. It is tempting to conclude that the requirements of *Mitchell* will do much to curtail the improper use of prejudgment remedies as creditor leverage for the collection of justly disputed or even fraudulent claims. However, this writer does not feel the changes are so significant as to justify such a conclusion.

89. Law of May 19, 1976, ch. 76-19 § 1, codified at FLA. STAT. § 78.068 (Supp. 1976).

90. See FLA. STAT. § 78.01 (1975).

91. See FLA. STAT. § 78.067 (1975).

92. See FLA. STAT. § 672.717 (1975).