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Kentucky Law Survey: The Constitutionality of Kentucky's Prejudgment Seizure Law

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THE CONSTITUTIONALITY OF KENTUCKY'S PREJUDGMENT SEIZURE LAW

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Introduction

Chapter 425 of the Kentucky Revised Statutes (KRS) delineates provisional remedies, including Kentucky's 1978 amendments to its replevin and attachment laws. These new prejudgment seizure provisions represent the General Assembly's effort to minimize unnecessary costs and delays, while also protecting defendants' rights. The results of this attempted reconciliation between a creditor's rights and his debtor's rights are innovative, serving as a real boon to creditors in an age where there is little else on the legal scene giving creditors cause to rejoice.[1] It is possible that the recent changes in Kentucky's procedure may prove so successful that they will be adopted in other states—provided that they are constitutional.

The statutory changes with which this article is concerned represent a two-pronged approach to provisional remedies: (1) authorization for ex parte writs, and (2) authorization

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[1] In August of 1974, Roy L. Steinheimer, Jr., in an address before the West Virginia Bar Association made the following remark: "Certainty is ideally the morality of the market place. Summary prejudgment creditors' remedies have had precious little of this lately." Steinheimer, *Address—Summary Prejudgment Creditors' Remedies and Due Process of Law: Continuing Uncertainty after* Mitchell v. W. T. Grant Company, 32 WASH. & LEE L. REV. 79, 95 (1975). William H. Newton is in accord with Steinheimer's sentiment: "Recent decisions of the United States Supreme Court with respect to prejudgment creditors' remedies have interjected substantial confusion into commercial affairs, effectively undermining the entire commercial world." Newton, *Procedural Due Process and Pre-judgment Creditor Remedies: A Proposal for Reform of the Balancing Test*, 34 WASH. & LEE L. REV. 65, 66 (1977). Most creditors and their counsel would agree that the more recent statutes and case decisions have subtracted little from the truth of these comments.

for relaxing the hearing requirement when the prejudgment seizure is not ex parte. As part of the first prong, KRS section 425.308 authorizes an ex parte order of prejudgment attachment on the strength of an affidavit showing "great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice."[2] Section 425.076 similarly authorizes ex parte writs of possession.[3] The second part of Kentucky's two-pronged approach to provisional remedies requires the creditor to provide the debtor with notice that he has seven days in which to petition the court for a hearing or to pay the claims in full.[4] If the defendant fails to request a hearing after this notice, and the plaintiff has otherwise satisfied the requirements of chapter 425, either type of writ may be issued without further delay.[5]

Following the United States Supreme Court's landmark decision in *Fuentes v. Shevin*,[6] any statute authorizing prejudgment seizure of a debtor's property must be drafted carefully to survive inevitable challenges to its constitutionality. *Fuentes* held that, except for certain extraordinary situations, due process requires that a debtor be provided with notice and a hearing before any prejudgment seizure of property in his possession.[7] Such an approach is not appealing to creditors because it enables the debtor to hide or dispose of the property to be seized; but its use increased after *Fuentes*, as secured creditors searched for means to reach quickly collateral that appeared threatened by damage, disposal or depreciation.[8] Due to the continued strength of *Fuentes*' influence on

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[2] KY. REV. STAT. § 425.308(1) (Supp. 1978)[hereinafter cited as KRS].

[3] KRS § 425.076(1)(Supp. 1978).

[4] KRS § 425.301(3)(Supp. 1978) authorizes this procedure for attachment of both wages and other types of property. KRS § 425.312(1)(Supp. 1978) prescribes the same procedure for issuance of a writ of possession. [*Editor's note*: after this issue went to press KRS § 425.312 was repealed and reenacted as KRS § 425.012 by 1980 Ky. Acts, ch. 188, § 296 (effective July 15, 1980)].

[5] KRS § 425.307(3)(Supp. 1978)(writs of attachment); KRS § 425.312(2)(Supp. 1978)(writs of possession).

[6] 407 U.S. 67 (1972).

[7] *Id.* at 90-91.

[8] This search took another direction as secured creditors increased their resort to non-judicial repossession because *Fuentes* did not appear to interfere with a creditor's right to self-help repossession without notice to the debtor. The interpretation

the imagination of defense counsel in such actions, it is likely that someone will challenge the constitutionality of one facet or the other of Kentucky's prejudgment seizure law. The two issues in such challenges probably will be: (1) whether the availability of a hearing contingent on a debtor's requesting it, rather than requiring a mandatory hearing in all cases, is sufficient to satisfy procedural due process; and (2) whether the current ex parte procedures provide sufficient protection for the defendant's constitutional rights.

This article will scrutinize Kentucky's new prejudgment seizure law in light of the constitutional requirements of *Fuentes* and its progeny.

I. THE SUPREME COURT, DUE PROCESS, AND PROVISIONAL REMEDIES

The "modern history"[9] of the United States Supreme Court's scrutiny of provisional remedies began in 1969 with *Sniadach v. Family Finance Corp.*[10] and extends through the

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of *Fuentes* on this point proved to be correct as at least seven circuit courts of appeal have ruled that non-judicial repossession does not involve state action and therefore does not come within the purview of the fourteenth amendment. *See* Gibson v. Dixon, 579 F.2d 1071 (7th Cir. 1978) (per curiam); Bosse v. Crowell, Collier & MacMillan, 565 F.2d 602 (9th Cir. 1977); Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974) (per curiam); Gary v. Darnell, 505 F.2d 741 (6th Cir. 1974); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Gibbs v. Garver, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Brantley v. Union Bank & Trust Co., 498 F.2d 365 (5th Cir. 1974) (per curiam); Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir. 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Shirley v. State Bank of Conn., 493 F.2d 739 (2d Cir. 1974); Adams v. South Carolina First Nat'l Bank, 492 F.2d 324 (9th Cir.), *cert. denied*, 419 U.S. 1006 (1973); Bilhe Optical Labs, Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973).

The ironic result is that the Supreme Court's decisions have caused a reduction in the number of ex parte replevin actions but probably have increased the number of self-help repossessions. While both procedures are without notice to the debtor, an ex parte replevin with use of an elected or court-appointed process server seems more protective of a debtor than the activities of a creditor-selected employee or "outside adjuster."

[9] In an earlier series of cases, the Court approved the use of prejudgment attachment liens which failed to provide for notice or a hearing. *See* McKay v. McInnes, 279 U.S. 840 (1929); Coffin Bros. v. Bennett, 277 U.S. 29 (1928); Ownby v. Morgan, 256 U.S. 94 (1921).

[10] 395 U.S. 337 (1969).

1976 decision of *Carey v. Sugar.*[11] Unfortunately the path from *Sniadach* to *Carey* has been anything but straight. While there have been numerous attempts to reconcile *Sniadach* and its progeny,[12] such an effort is beyond the scope of this article. Instead, this article attempts to distill from these cases the pivotal factors upon which a decision concerning the constitutionality of Kentucky's prejudgment seizure law can be made.

A. Sniadach v. Family Finance Corp.

Before *Sniadach v. Family Finance Corp.*,[13] it had long been assumed by the legal community that the prejudgment seizure of a debtor's property by a creditor without notice or a hearing was constitutional.[14] Justice Douglas, writing for the majority in *Sniadach,* however, quickly disabused legislators and creditors of such a notion. In *Sniadach,* the Court expanded traditional notions of due process to invalidate Wisconsin's prejudgment garnishment law, holding that "absent notice and prior hearing the prejudgment garnishment procedure violates fundamental principles of due process."[15] The Court was careful, however, to limit its holding, noting that wages constitute "a specialized type of property presenting distinct problems in our economic system."[16] In addition, the Court indicated that there might be extraordinary situations in which governmental and creditor interests were deserving of special protection and in which prejudgment seizure of a

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[11] 425 U.S. 73 (1976) (per curiam).

[12] *See* Brabham, Sniadach *Through* Di-Chem *and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes,* 12 U. RICH. L. REV. 157 (1977-78) [hereinafter cited as Brabham]; Catz & Robinson, *Due Process and Creditor's Remedies: From* Sniadach *and* Fuentes *To* Mitchell, North Georgia *and Beyond,* 28 RUTGERS L. REV. 541 (1974-75) [hereinafter cited as Catz & Robinson]; Kay & Lubin, *Making Sense of the Prejudgment Seizure Cases,* 64 KY. L.J. 705 (1975-76); Rendleman, *Analyzing the Debtor's Due Process Interest,* 17 WM. & MARY L. REV. 35 (1975-76); Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process,* 61 VA. L. REV. 807 (1975) [hereinafter cited as Scott].

[13] 395 U.S. 337 (1969).

[14] Brabham, *supra* note 12, at 157-58.

[15] 395 U.S. at 342.

[16] *Id.* at 340.

defendant's property would be constitutional.[17] Such was not the case, however, with the Wisconsin statute.

While *Sniadach* left a number of questions unanswered,[18] three important points emerged from the decision: (1) a deprivation of the use of property, although only temporary, could constitute a "taking" within the fourteenth amendment;[19] (2) at least in the case of wages, due process requires that the defendant be afforded notice and a hearing before being deprived of their use;[20] and (3) there may be cases in which the state's or creditor's interest is deserving of special protection.[21]

B. Fuentes v. Shevin

Any hope in the creditor community that the *Sniadach* requirement might be limited to "specialized types of property" such as wages was put to rest three years later in *Fuentes v. Shevin*.[22] The Court struck down Florida and Pennsylvania's ex parte replevin statutes as invalid under the fourteenth amendment.[23] Both states' statutory schemes authorized the issuance of a writ of replevin upon the ex parte application of the person seeking the writ.[24] Neither statute provided for notice to the defendant or for a preseizure hearing.[25] In striking down these statutes, the Court stated that the requirement that the defendant be given notice and a hearing prior to deprivation was not limited to "specialized types of property," as the fourteenth amendment protects all

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[17] *Id.* at 339.

[18] *See* Brabham, *supra* note 12, at 161-62; Catz & Robinson, *supra* note 12, at 544-45.

[19] Catz & Robinson, *supra* note 12, at 545-46; Rendleman, *Analyzing the Debtor's Due Process Interest*, 17 WM. & MARY L. REV. 35, 37 (1975).

[20] 395 U.S. at 337.

[21] *Id.* at 339. *See also* Scott, *supra* note 12, at 818.

[22] 407 U.S. 67 (1972).

[23] Both statutes had been upheld by the lower federal courts. *See* Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), *rev'd sub nom.* Parham v. Cortese, 407 U.S. 67 (1972); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970), *rev'd sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972).

[24] 407 U.S. at 75-76.

[25] *Id.* at 76-77.

property.[26]

The Court also attempted to detail those "extraordinary circumstances" in which the *Sniadach-Fuentes* preseizure notice and hearing requirements were inapplicable:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[27]

Justice Stewart continued by exploring the nature of these categories. Of particular interest to the present inquiry is his discussion of a situation in which prejudgment seizure might be constitutional: "[t]here may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."[28]

Finally, the Court reaffirmed the *Sniadach* position on the type of hearing mandated by due process:

> [S]ince the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test. . . . "[D]ue process is afforded by the kind of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of this property."[29]

Fuentes' impact on prejudgment seizure laws throughout the country was enough to make both creditors and legislators wring their hands and scratch their heads. As similar laws toppled under *Fuentes'* authority,[30] creditors became pain-

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[26] *Id.* at 89-90.

[27] *Id.* at 91.

[28] *Id.* at 93.

[29] *Id.* at 97 (quoting Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969)).

[30] *See, e.g.*, Thompson v. McKeesee, 375 F. Supp. 195 (E.D. Ky. 1974) (*per curiam*); Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (E.D. Me. 1973); Schneider v. Margossian, 349 F. Supp. 741 (D. Mass. 1972).

fully aware of their need for a constitutionally permissible alternative to the convenient, but now illegal, provisional remedies of the past. Whatever problems it presented for creditors and legislators, *Fuentes* brought some measure of stability in the area of provisional remedies,[31] since it seemed clear that except in some extraordinary situations, prejudgment seizure of a defendant's property without notice and a hearing was unconstitutional. In addition, *Fuentes* extended these due process requirements to all types of property. Two years later, however, the Supreme Court, with a slightly altered membership, strayed from the clearly marked path of *Sniadach* and *Fuentes*.

C. Mitchell v. W.T. Grant Co.

In 1974, the Supreme Court handed down *Mitchell v. W.T. Grant Co.*,[32] a decision which two commentators unfacetiously styled a "repossession" of *Fuentes*.[33] In *Mitchell*, the Court upheld a Louisiana statute permitting a mortgagee or a lien holder to obtain a writ of sequestration on ex parte application without prior notice to the debtor. The Court characterized the Louisiana procedure as effecting a "constitutional accommodation of the conflicting interests of the parties."[34] Mr. Justice White, writing for the Court, refused to overrule *Fuentes*, claiming that it "was decided against a factual and legal background significantly different from that now before us . . . ."[35] The Court singled out the following factors as distinguishing the Louisiana statute from those statutes invalidated in *Fuentes*: (1) the mortgagee or lien holder had to supply an affidavit stating the nature and the amount of the claim and the specific facts constituting the grounds relied upon for issuance of the writ; (2) the requisite showing had to

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[31] Brabham, *supra* note 12, at 167.

[32] 416 U.S. 600 (1974).

[33] Newton and Timmons made their response to *Mitchell* clear both in their text and in their title: "It [*Fuentes*] garnered the notoriety which establishes landmark decisions in law without transcending into the realm of politics or general history. But its reign, its position, its characterization—its rule?—was shortlived." Newton & Timmons, Fuentes *"Repossessed,"* 26 BAYLOR L. REV. 469 (1974).

[34] 416 U.S. at 607.

[35] *Id.* at 615.

be made to a judge rather than a mere court clerk; and (3) the statute expressly provided for an immediate hearing and dissolution of the writ upon the defendant's motion unless the plaintiff could establish his grounds for issuance of the writ. The Louisiana statute was drawn narrowly so that the grounds for issuance of the writ were susceptible to documentary proof.[36]

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[36] *Id.* at 615-18. Thus the *Mitchell* Court did not expressly overrule *Fuentes,* but distinguished the two cases on their facts. A scholarly argument has been made that *Mitchell* represents an example of one of the "extraordinary circumstances" listed in *Fuentes* in which ex parte prejudgment seizure is permissible. Of course, for such an argument to prevail, it is first necessary to establish that all three of the conditions which the *Fuentes* Court listed as being present in an "extraordinary circumstance" need not be present in the same case to justify prejudgment seizure without a hearing. For a thorough discussion of this point, and the argument that *Mitchell* is an example of one of the "extraordinary circumstances" given in *Fuentes* and that the cases can therefore be reconciled, *see* Kay & Lubin, *Making Sense of the Prejudgment Seizure Cases,* 64 KY. L.J. 705, 708-16, (1975-76).

Newton and Timmons contend that *Mitchell* arguably can be viewed as passing the entire *Fuentes* "extraordinary circumstances" test if the protection of property rights is seen as the important governmental or general public interest, if the probability of waste or alienation likewise satisfies the requirement of a special need for very prompt action, and if the participation of a judge fulfills the requirement that the state exercise strict control over its monopoly of legitimate force. But Newton and Timmons do not present this analysis as their own, and state that it is "probably inaccurate" despite *Mitchell's* failure to overrule *Fuentes.* Newton & Timmons, Fuentes *"Repossessed,"* 26 BAYLOR L. REV. 469 (1974).

Another commentator, in addressing the question of whether all three conditions must be present to comprise an "extraordinary circumstance" under *Fuentes,* has stated: "If all three things must be present before there is an extraordinary situation under which the court would approve summary seizure, then the right to this process would be rare indeed. The better view, however, is that any one of the three will constitute an extraordinary situation." Brabham, *supra* note 12, at 166.

Before concluding this discussion of *Fuentes'* tripartite definition of an "extraordinary situation," it is worth quoting additional commentary:

> [T]his suggestion [in *Fuentes*] that imminent flight, conversion, or sequestration of goods might qualify as an 'extraordinary situation' upsets the three-fold test quoted above. The test seemed to require satisfaction of all three conditions, but this dictum implies that satisfaction of any one would be sufficient. That is, if there were a need for prompt action, it would be irrelevant whether a public interest was at stake.

Catz and Robinson, *supra* note 12, at 556. This analysis comports with that of Kay and Lubin.

The "extraordinary circumstance" most recognizable from the *Mitchell* facts is the *Fuentes* Court's third and last example: "[T]he State has kept strict control over its monopoly of legitimate force: The person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn

Mr. Justice White also emphasized that in *Mitchell* both the plaintiff and the defendant had a present interest in the disputed property and therefore both parties' interests had to be weighed:

> Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. 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. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.[37]

Obviously the broad command of *Fuentes* had been eroded. While the *Fuentes* Court had required notice and a hearing before seizure, and made no attempt to distinguish between secured and unsecured creditors,[38] the *Mitchell* Court would permit prejudgment seizure in cases in which

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statute, that it was necessary and justified in the particular instance." Fuentes v. Shevin, 407 U.S. 67, 91 (1972).

The problem which immediately confronts anyone attempting to explain the *Mitchell* result as requiring only one "circumstance" of the three, however, is that the *Mitchell* Court never said it was employing the "extraordinary circumstances" rationale. Another theory which attempts to explain *Mitchell* as something less than a complete "repossession" of *Fuentes* stresses *Mitchell's* recognition of a current, real interest of the creditor in the *res* by way of a vendor's lien. "*[M]itchell* recognized a possible distinction between the provisional remedy of pre-judgment garnishment (or attachment) and that of statutory repossession based on the repossessing creditor's significant present interest in the property subject to seizure." Scott, *supra* note 12, at 827.

"*Fuentes* does seem to ignore certain situations where there are two equally valid interests involved. Yet unless there are current, real interests, *Fuentes* clearly should apply. Where there are such current, real interests then a balancing [between the rights of the creditor and the rights of the debtor] is proper." Newton, *Fuentes "Repossessed" Reconsidered*, 28 BAYLOR L. REV. 497, 531 (1976).

This conclusion has had more than one adherent: "If . . . the plaintiff is only a general or contract creditor or a potential judgment creditor, the interests are not dual. In such a case, the defendant has the sole interest, and *Fuentes* controls." Rendleman, *Analyzing the Debtor's Due Process Interest*, 17 WM. & MARY L. REV. 35, 40 (1975-76).

[37] 416 U.S. 600, 604 (1974).

[38] *See* Brabham, *supra* note 12, at 164.

both parties had an interest in the property and where minimal safeguards were provided. Therefore the status of prejudgment seizure procedures was plunged into confusion and the continuing validity of *Fuentes* was placed in doubt.[39]

D. North Georgia Finishing, Inc. v. Di-Chem, Inc.

Those legal scholars who viewed *Mitchell* as less than a total repossession of *Fuentes* had their conclusion, if not their varying analyses, confirmed by yet another surprising decision, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[40] In *Di-Chem*, the Supreme Court struck down a Georgia garnishment statute which allowed writs of garnishment to be issued in pending suits by a court clerk on the basis of a plaintiff's affidavit containing only conclusory allegations.[41] The Georgia law prescribed the filing of a bond by the debtor as the only method of dissolving a garnishment once it had issued.[42] There was no provision for a hearing either before the seizure or promptly thereafter.[43]

The Court explained that the Georgia statute could not be upheld by virtue of the recent decision in *Mitchell* because it lacked the "saving characteristics" of the Louisiana law upheld there.[44] These saving characteristics, as described by the *Di-Chem* Court, were:

> [t]he writ . . . was issuable only by a judge upon the filing of an affidavit going beyond mere conclusory allegations and clearly setting out the facts entitling the creditor to sequestration. The Louisiana law also expressly entitled the debtor to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued.[45]

This application of *Mitchell* to a situation involving an unsecured creditor further undercut the vitality of *Fuentes*,

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[39] *Id.* at 167.
[40] 419 U.S. 601 (1975).
[41] *Id.* at 607.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 606.
[45] *Id.* at 607.

which even after *Mitchell* was thought to be applicable in cases involving general creditors.[46] After *Di-Chem,* however, assuming that the *Mitchell* safeguards are present, it is clear that the prejudgment seizure of a defendant's property by a general creditor is constitutional. In addition, it should be noted that Mr. Justice White only mentions three of the four *Mitchell* safeguards;[47] he does not discuss the need for the statute to be narrowly drawn so that the decision to issue the writ can be made on the basis of documentary proof. Mr. Justice White's omission raised the question of whether the requirement of a narrowly drawn statute was the only *Mitchell* safeguard which can be absent or whether the presence of any three of the four *Mitchell* requirements is sufficient to uphold a statute.[48]

E. Carey v. Sugar

The final case to date in the *Sniadach-Fuentes* line is *Carey v. Sugar,*[49] a *per curiam* decision handed down a year after *Di-Chem.* In *Carey,* the Supreme Court reviewed a three judge district court's decision[50] that the New York attachment statute was unconstitutional. Although the New York statute had several provisions in common with the Louisiana statute upheld in *Mitchell,*[51] the district court had concluded that the statute was invalid on several counts. First, although the statute provided for a post-seizure hearing, the court felt such a hearing was inadequate since, unlike the statute in *Mitchell* which required the writ of sequestration be vacated "unless

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[46] Brabham, *supra* note 12, at 169-70.

[47] *See* text accompanying note 45 *supra* for Mr. Justice White's listing of the *Mitchell* safeguards.

[48] *See* Catz & Robinson, *supra* note 12, at 63; Schwertz, *Constitutional Law—Due Process—Prejudgment Seizure of Property,* 52 DEN. L.J. 619-632 (1975); Note, *Debtors' and Creditors' Due Process: Applying the Balancing Standard,* U. FLA. L. REV. 554, 561 (1977).

[49] 425 U.S. 73 (1976) (*per curiam*).

[50] Sugar v. Curtis Circulation Co., 383 F. Supp. 643 (S.D.N.Y. 1974).

[51] The district court noted four parallels between the Louisiana statute upheld in *Mitchell* and the New York statute in question: (1) the order is subject to judicial approval; (2) it is issued upon the basis of an affidavit; (3) the creditor must post an indemnifying bond; and (4) the debtor can regain his property by posting a bond. 383 F. Supp. at 648.

the plaintiff prove[d] the grounds upon which the writ was issued,"[52] the New York statute provided that the writ of attachment could be vacated only if the defendant proved that the attachment was " 'unnecessary to the security of the plaintiff.' "[53] Therefore, the district court determined that the New York statute impermissibly shifted the burden of proof to the defendant and failed to require inquiry into the validity of the plaintiff's underlying claim.[54] The court also observed that the New York statute was unconstitutional under *Mitchell* because the grounds upon which the writ of attachment could be issued were not " 'uncomplicated matters that lend themselves to documentary proof.' "[55] Finally, the New York statute was held constitutionally infirm because it permitted a creditor without a possessory interest in the property in question to obtain a writ of attachment.[56]

The Supreme Court vacated the district court's decision and ordered the court to abstain from deciding the constitutionality of the statute until the state courts had interpreted it.[57] In discussing the district court's decision, the Court stated:

> In its [the district court's] view, the hearing available on a motion to vacate the attachment was inadequate principally 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.[58]

In remanding the case, the Court noted that two New York trial courts had interpreted the statute to require a post-seizure hearing on the merits of the plaintiff's case and that a similar decision by the New York appellate courts would make it unnecessary for the federal district court to decide the

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[52] LA. CODE CIV. PRO. ANN. art. 3506 (West 1964).
[53] 383 F. Supp. at 648. *See* N.Y. CIV. PRAC. § 6223 (McKinney 1963).
[54] 383 F. Supp. at 648-49.
[55] *Id.* at 649.
[56] *Id.*
[57] Carey v. Sugar, 425 U.S. 73, 79 (1976) (*per curiam*).
[58] *Id.* at 77.

constitutionality of the New York statute.[59] The Court failed to discuss, however, the effect of the two other deficiencies in the statute.[60] Presumably they are unnecessary to the constitutionality of the statute. Again the Court has raised the question of what "bare bones" necessities a statute must possess before it can pass constitutional muster.

F. *Summary*

Although apparent inconsistencies in this important line of cases are difficult, if not impossible to reconcile,[61] the decisions are not without some guidelines. As a result of these major decisions, state legislators and courts should be aware of the following propositions: (1) the fourteenth amendment's guarantee of due process applies to "any significant taking of property;"[62] (2) ordinarily, the debtor must have notice and an opportunity to be heard prior to any prejudgment seizure of such property; and (3) ex parte prejudgment seizure writs are constitutional, but only if certain safeguards are provided.

While it would be the height of folly to suggest that *Sniadach* and its progeny can be reduced to a simple list of safeguards, such a list can provide a useful tool for determining the constitutionality of Kentucky's ex parte prejudgment seizure provisions. Moreover, it should be remembered that it is unclear as yet how many and what combination of these factors are necessary to "save" a statute. Nor has the Court indicated what weight each of these factors is to be given. With these caveats the following list is proposed:

(1) the decision to issue the writ is made by a judge;[63]

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[59] *Id.* at 78-79.

[60] *See* notes 55 & 56 *supra* and accompanying text for a discussion of the other two deficiencies.

[61] *See, e.g.*, Newton, *Procedural Due Process and Prejudgment Creditor Remedies: A Proposal for Reform of the Balancing Test*, 34 WASH. & LEE L. REV. 65, 68-79 (1977); Weisman, Mitchell v. W. T. Grant—*Pre-Seizure Hearing—To Be or Not to Be*, 30 Mo. B.J. 474 (1974).

[62] Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

[63] *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606-07 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600, 616 (1974); Guzman v. Western State Bank, 516 F.2d 125, 130-31 (8th Cir. 1975); Aaron Ferer & Sons Co. v. Berman, 431 F. Supp. 847, 852 (D. Neb. 1977); Sugar v. Curtis Circulation Co., 383 F. Supp.

(2) the plaintiff must post an indemnity bond prior to issuance of the writ;[64]
(3) the plaintiff must be required to disclose the facts supporting his request for a writ with specificity;[65]
(4) an early post-seizure hearing is required by the statute;[66]
(5) the writ can be issued only upon narrowly defined grounds;[67]
(6) the defendant can reclaim the property by posting a bond.[68]

II. A RECENT HISTORY OF PREJUDGMENT SEIZURE LAW IN KENTUCKY

In 1974, in *Thompson v. Keesee*[69] a three-judge panel of

643, 648 (S.D.N.Y. 1974); Bernhardt v. Commodity Option Co., 528 P.2d 919, 921 (Colo. 1974); Unique Caterers, Inc. v. Rudy's Farm Co., 338 So.2d 1067, 1070-71 (Fla. 1976); Stoller Fisheries, Inc. v. American Title Ins. Co., 258 N.W.2d 336, 346 (Iowa 1977); International State Bank v. Gamer, 281 N.W.2d 855, 858-59 (Minn. 1979); Bank of Ephraim v. Davis, 581 P.2d 1001, 1005 (Utah 1978).

[64] *See* North Georgia Finishing, Inc. v. Di-Chem, Inc. 419 U.S. 601, 612 (1975) (Powell, J., concurring); Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 648 (S.D.N.Y. 1974); Bernhardt v. Commodity Option Co., 528 P.2d 919, 921-22 (Colo. 1974); Stoller Fisheries, Inc. v. American Title Ins. Co., 258 N.W.2d 336, 344-45 (Iowa 1977); International State Bank v. Gamer, 281 N.W.2d 855, 859 (Minn. 1979).

[65] *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600, 615 (1974); Aaron Ferrer & Sons Co. v. Berman, 431 F. Supp. 847, 852 (D. Neb. 1977); Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 648 (S.D.N.Y. 1974); Unique Caterers, Inc. v. Rudy's Farm Co., 338 So.2d 1067, 1070 (Fla. 1976); International State Bank v. Gamer, 281 N.W.2d 855, 858-59 (Minn. 1979); Bank of Ephraim v. Davis, 581 P.2d 1001, 1005 (Utah 1978).

[66] *See* Carey v. Sugar, 425 U.S. 73, 77-78 (1976) (per curiam); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600, 618 (1974); Guzman v. Western State Bank, 516 F.2d 125, 131 (8th Cir. 1975); Aaron Ferrer & Sons Co. v. German, 431 F. Supp. 847, 852 (D. Neb. 1977); Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 648-49 (S.D.N.Y. 1974); Unique Caterers, Inc. v. Rudy's Farm Co., 338 So.2d 1067, 1070 (Fla. 1976); Stoller Fisheries, Inc. v. American Title Ins. Co., 258 N.W.2d 336, 346 (Iowa 1977); International State Bank v. Gamer, 281 N.W.2d 855, 859 (Minn. 1979).

[67] *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 617 (1974); Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 649 (S.D.N.Y. 1974).

[68] *See* Aaron Ferrer & Sons Co. v. Berman, 431 F. Supp. 847, 852 (D. Neb. 1977); Sugar v. Curtis Circulation Co., 431 F. Supp. 643, 648 (S.D.N.Y. 1974); Bernhardt v. Commodity Option Co., 528 P.2d 919, 922 (Colo. 1974); International State Bank v. Gamer, 281 N.W.2d 855, 859 (Minn. 1979).

[69] 375 F. Supp. 195 (E.D. Ky. 1974). The weakness in the Kentucky statute was so similar to the weakness of the Florida and Pennsylvania statutes struck down in

the United States District Court for the Eastern District of Kentucky issued a *per curiam* opinion declaring Kentucky's old replevin statute unconstitutional under *Fuentes.* Kentucky became only one of a number of states whose provisional remedy statutes collapsed under the judicial sledgehammer of *Fuentes.*[70] After the decision in *Thompson,* the 1976 Kentucky General Assembly amended Kentucky's prejudgment seizure laws to conform to the requirements of *Fuentes.*[71] The old law was almost totally repealed and replaced by new provisions. Unfortunately, in the effort to draft a statute which would overcome the problems cited in *Thompson,* new problems in the amended law escaped the drafters' notice.

The 1976 changes affected both writs of possession and writs of attachment.[72] The law governing both writs was changed to require that prior to issuance of the writ the defendant be served with a copy of the complaint, the motion and the affidavit in support thereof, and notice of his right to contest the attachment or replevin at a mandatory hearing.[73] If the defendant could not be found for personal service after diligent search, an affidavit verifying that a diligent search was made could be filed, and the defendant could then be served by certified mail, return receipt requested, to his last known place of residence.[74]

After a mandatory hearing, the "judicial officer" in charge

Fuentes, that this author and others prevailed upon the thirteen circuit judges in Jefferson County to adopt a local rule prohibiting a clerk from issuing a writ of possession or attachment, and requiring a hearing by the court upon notice to the defendant. This effort to constitutionalize Kentucky's unconstitutional statute was never subjected to serious challenge.

[70] *See, e.g.,* cases cited in note 30 *supra.*

[71] 1976 Ky. Acts, ch. 91, § 45.

[72] For a more thorough examination of Kentucky's prejudgment seizure law after the 1976 amendments, see Mapother, *Kentucky's New Prejudgment Seizure Law,* 40 KY. BENCH & B. 20 (July, 1976).

[73] 1976 Ky. Acts, ch. 91, § 4.

[74] These requirements are still embodied in KRS § 425.021 (Supp. 1978), which should have been repealed in 1978. The Senate Judiciary Committee decided not to repeal it because of the reference to these requirements in KRS § 425.086(2) (Supp. 1978). For further explanation, *see* Mapother, *Prejudgment Seizure—Practice and Procedure in Kentucky,* 42 KY. BENCH & B. 12, 42 n.5 (Oct. 1978).

could issue a "writ of possession"[75] if the plaintiff established therein the probable validity of his claim to possession of the goods, provided he also had supplied the required bond.[76] The sheriff taking possession of the property under the writ was required to store it for ten days, during which time the defendant could file a bond for redelivery.[77] Under KRS section 425.066, the plaintiff also was given the remedy of a temporary restraining order if it appeared probable that the property is in immediate danger of being transferred, concealed or removed, or its value substantially impaired.

The 1976 amendments also provide for ex parte prejudgment writs if the plaintiff can establish to the satisfaction of a judicial officer that great or irreparable injury will result "if issuance were delayed until the matter could be heard on notice."[78] The judicial officer is to make this determination on the basis of "facts shown by affidavit."[79] In addition, to obtain an ex parte writ of possession the plaintiff must satisfy the requirements of KRS section 425.011,[80] which requires the plaintiff to file a written motion, executed under oath in the court in which the action is instituted. The plaintiff's motion must include: (1) evidence "of the basis of the plaintiff's claim and that he is entitled to possession of the property

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[75] The 1976 amendments borrowed the term "writ of possession" from statutes in other states. Until that time, the correct term for a writ of replevin was "order of delivery," and an attachment writ was simply an "order of attachment." The 1976 amendments unfortunately applied to the new term "writ of possession" to both of these writs.

[76] 1976 Ky. Acts, ch. 91, § 3.

[77] *Id.* § 20.

[78] KRS § 425.076(1) (Supp. 1978) (writ of possession); KRS § 425.308(1) (Supp. 1978) (order of attachment).

Subsection (2) of KRS § 425.308 (Supp. 1978) seems to incorporate all the requirements of KRS § 425.307 (Supp. 1978), when in fact subsection (3) of the latter statute was not intended to apply to ex parte proceedings because it incorporates the demand notice procedure of KRS § 425.301(3) (Supp. 1978), a requirement clearly inconsistent with ex parte proceedings. The legislative history of the statute should yield a judicial interpretation harmonizing the inconsistencies that developed during the amending process in the 1978 General Assembly.

[79] KRS § 425.076(1) (Supp. 1978) (writ of possession); KRS § 425.308(1) (Supp. 1978) (order of attachment).

[80] KRS § 425.076(3) (Supp. 1978). KRS § 425.307(2) (Supp. 1978) imposes somewhat similar requirements for an order of attachment.

claimed;"[81] (2) "a showing that the property is wrongfully detained by the defendant . . . ;"[82] (3) a description of the property in question and a statement of its value;[83] (4) a statement of the location of the property;[84] and (5) "[a] statement that the property has not been taken for a tax assessment, or fine . . . or seized under execution against the property of the defendant . . . ."[85] Finally, the plaintiff must establish the probable validity of his claim to possession of the property[86] and provide the required indemnity bond before the writ will issue.[87]

The 1976 legislative revisions left numerous practical problems which have been considered elsewhere at length,[88] but two major weaknesses in the 1976 revisions deserve some attention here. First, mandatory hearings held only after personal service of notice at least ten days prior to the hearing caused unnecessary delays and expenses, especially in view of the fact that most defendants never bothered to appear at these hearings. Second, the general requirement that notice be served personally, rather than by mail, also was unduly expensive and burdensome.

Under the mandatory hearing provision, the plaintiff's attorney was required to obtain a hearing date, list the date in the notice, and see that the notice and other papers were personally served on the defendant at least ten days prior to the scheduled hearing. Sheriffs were often less than dependable, and if the complaint, motion and notice were served less than ten days prior to the hearing, the plaintiff's attorney would have to arrange with the court to cancel the hearing and schedule a new one. This meant that the complaint, motion

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[81] KRS § 425.071(2)(a) (Supp. 1978). In addition, if the plaintiff's claim is based upon a written instrument he must attach a copy of it to the motion. *Id.*

[82] KRS § 425.011(2)(b) (Supp. 1978).

[83] KRS § 425.011(2)(c) (Supp. 1978).

[84] KRS § 425.011(2)(d) (Supp. 1978).

[85] KRS § 425.011(2)(e) (Supp. 1978).

[86] KRS § 425.036(1)(a) (Supp. 1978).

[87] KRS § 425.111 (Supp. 1978) (writ of possession); KRS § 425.309 (Supp. 1978) (order of attachment).

[88] Mapother, *Kentucky's New Prejudgment Seizure Law*, 40 KY. BENCH & B. 20 (July, 1976).

and notice, or at least some notice of a new date and time of the new hearing, would have to be personally served on the defendant again at least ten days prior to the new hearing. In the meantime, the defendant mistakenly might come to court for a hearing that had been cancelled.

In addition, there was increasing evidence that many debtors failed to take advantage of opportunities for hearings. In a survey in four cities, Professor Caplovitz discovered that over ninety percent of the claims in these cities resulted in default judgments against the debtor.[89] Furthermore, " 'nearly 65% of all judgments obtained by banks and more than 47% obtained by finance companies were entered by default when the defendant debtor failed to appear.' "[90] As to Kentucky, the author's own informal survey, which was conducted by his Louisville office, revealed that over ninety percent of the debtor-defendants failed to appear at these mandatory hearings.[91]

The requirement that notice be served personally on the defendant, rather than by mail, was also ill advised and unwarranted. Service by mail has long been found to afford adequate notice to the defendant of pending litigation.[92] Ironically, Kentucky by this time already had an established procedure for notice by mail in actions for prejudgment attachment of wages.[93] The anomalous result was that a wage earner defendant received a mailed notice at least seven days before his wages could be attached, but in every other prejudgment proceeding, the defendant, whether corporate or individual, had to be served personally at least ten days prior to the hearing.

In response to these problems, the 1978 Kentucky General Assembly enacted House Bill 713,[94] the principal provisions of which were drafted by this author. House Bill 713

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[89] 2 D. CAPLOVITZ, DEBTORS IN DEFAULT 11-35, 11-66 (1971), *discussed in* Scott, *supra* note 13, at 817 n.37.

[90] *Id., discussed in* Scott, *supra* note 12, at 843 n.148.

[91] Mapother, *Prejudgment Seizure—Practice and Procedure in Kentucky*, 42 KY. BENCH & B. 12, 42 n.6 (October 1978).

[92] *See, e.g.*, Ind. Trial Rule 4.1.

[93] 1970 Ky. Acts, ch. 217, § 5.

[94] 1978 Ky. Acts, ch. 399.

eliminated the mandatory hearing procedure, substituting procedures for a hearing at the debtor's option.[95] To obtain a writ of possession or an order of attachment under the debtor's option procedure the plaintiff must deliver to the defendant a written demand and a copy of the complaint, motion and summons, or send these documents by registered or certified mail, return receipt requested, to the defendant's last known place of residence, at least seven days before the order is sought.[96] The demand must inform the defendant that he has seven days in which to petition the court for a hearing or pay the amount claimed in full, and unless he requests the hearing or pays the claim within seven days an order will be sought to attach or replevy his property.[97] In addition, the demand must "identify the court in which the suit has been filed, the grounds therefore, the date of the demand, the amount of the claim, and the name and address of the plaintiff and his attorney."[98] If a debtor does not request a hearing or pay the amount claimed within the seven day period the writ will issue upon the plaintiff or his attorney filing an affidavit evidencing compliance with the demand notice require-

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[95] House Bill 713 amended KRS § 425.301. 1978 Ky. Acts, ch. 399, § 4. It also created KRS §§ 425.307, 425.308, 425.309, and 425.312. [See *editor's note supra* note 4 regarding renumbering of KRS § 425.312]. 1978 Ky. Acts, ch. 399, §§ 1-3, 5.

[96] KRS § 425.312(1) (Supp. 1978) (writs of possession); KRS § 425.301(3) (Supp. 1978) (order of attachment).

The statute purposely was drafted not to require that the mail actually be received by the defendant; it was specifically designed to provide a method of service by mail that is reasonably certain to inform. It is certainly a means that one might reasonably adopt to furnish notice to a defendant. This method has been upheld as consititutional in other circumstances. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

Since CR 4 requires service by certified mail to be restricted (deliver to addressee only), one could argue that unrestricted mail service under KRS § 425.301 and KRS § 425.312 is not sufficient to support an *in personam* judgment. The potential use of this argument prompted this author to seek an amendment to CR 69 to authorize unrestricted certified mail service to be sufficient for personal judgment in replevin and attachment proceedings. CR 69.01 became effective June 1, 1978 and so provides. *See* Mapother, *Prejudgment Seizure—Practice and Procedure in Kentucky*, 42 KY. BENCH & B. 12 (October 1978).

[97] KRS § 425.312(1) (Supp. 1978) (writ of possession); KRS § 425.301(3) (Supp. 1978) (order of attachment).

[98] KRS § 425.312(1) (Supp. 1978) (writ of possession); KRS § 425.301(3) (Supp. 1978) (order of attachment).

ments.[99] When the debtor does request a hearing, it will be held before a judicial officer pursuant to KRS section 425.031.[100] No hearing need be held unless requested by the defendant. The 1978 amendments did not affect the procedure for obtaining an ex parte writ except to make clear that ex parte orders of attachment are permitted in addition to ex parte writs of possession.

III. CONSTITUTIONAL SCRUTINY OF KENTUCKY'S PREJUDGMENT SEIZURE LAW

A. *Ex Parte Provisions: KRS Sections 425.076 and 425.308*

Despite the lamentation of many commentators over an apparent lack of consistency in the *Fuentes* line of cases,[101] close examination of the cases provides much of the information necessary to determine the constitutionality of Kentucky's ex parte prejudgment procedure provisions.[102] Unfortunately, without a crystal ball, it is not possible to predict with certainty whether Kentucky's present ex parte provisions can withstand all constitutional attacks. There is, however,

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[99] KRS § 425.312(1) (Supp. 1978) (writ of possession); KRS § 425.301(3) (Supp. 1978) (order of attachment).

[100] KRS § 425.312(2) (Supp. 1978) (writ of possession); KRS § 425.307(3) (Supp. 1978) (order of attachment).

[101] The most authoritative among those commentators criticizing these cases for inconsistencies have been various members of the Supreme Court itself. Justice Stewart, in his dissent to *Mitchell,* stated: "this case is constitutionally indistinguishable from *Fuentes v. Shevin,* and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent." 416 U.S. 600, 634 (1974) (Stewart, J., dissenting). He went on to remark that, "[t]he only perceivable change that has occurred since the *Fuentes* case is in the make-up of this Court." 416 U.S. at 635. Thereafter, in a short concurrence to North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), Justice Stewart described the impact of that decision by paraphrasing Mark Twain: "It is gratifying to note that my report of the demise of *Fuentes v. Shevin* . . . seems to have been greatly exaggerated." 419 U.S. at 603 (Stewart, J., concurring).

Justice Blackmun, in his dissent to *Di-Chem,* complained: "I accept the views of . . . dissenting and concurring Justices in *Mitchell* that *Fuentes* at least was severely limited by *Mitchell,* and I cannot regard *Fuentes* as of much influence or precedence for the present case." *Id.* at 616 (Blackmun, J., dissenting).

[102] *See* notes 61-68 *supra* and accompanying text for a discussion of some of the common factors in the *Fuentes* line of cases. Also *see* articles cited in note 12 *supra* for attempts to reconcile the decisions.

good reason to believe that the provisions are sound.

The Court in *Fuentes* recognized three circumstances in which ex parte seizure before judgment is permissible.[103] Although the language employed by the Court indicates that these conditions are to be read conjunctively so that all three must be present to constitute an "extraordinary situation," the better view, as urged by commentators, is that any one of these is sufficient.[104] The second condition listed by Mr. Justice Stewart, that is, "a special need for very prompt action,"[105] is of particular interest. Apparently expanding on this situation, Mr. Justice Stewart also stated that there may be a "special need for very prompt action" in those cases in which "a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."[106]

Under Kentucky's statutory scheme the plaintiff must make such a showing before an ex parte writ can be issued. KRS section 425.076(1) requires the plaintiff to demonstrate that "great or irreparable injury" will result if the writ of possession is not issued until the matter can be heard after notice.[107] Indeed, KRS section 425.076(2)(a), which provides that KRS section 425.076(1) is satisfied by a showing of a danger that the disputed property will be concealed or substantially impaired in value if the issuance of the writ is delayed until after a hearing,[108] appears to be drafted with Mr. Justice Stewart's words in mind.

The present status of the "extraordinary situation" exception nevertheless is unclear, especially in light of the Court's failure to apply it in *Mitchell*.[109] It is therefore necessary to evaluate Kentucky's prejudgment seizure statute in terms of the factors developed by the courts after *Mitchell*.

One such factor is that the ex parte writ is issuable only

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[103] *See* text accompanying note 27 *supra* for the Court's explication of these situations.

[104] Brabham, *supra* note 12, at 166 & n.39.

[105] 407 U.S. 67, 91 (1972).

[106] *Id.* at 93.

[107] KRS § 425.076(1) (Supp. 1978).

[108] KRS § 425.076(2)(a) (Supp. 1978).

[109] Catz & Robinson, *supra* note 12, at 558.

by a judge.[110] Under Chapter 425, ex parte writs of possession[111] and attachment,[112] as well as those which follow a debtor-requested hearing,[113] can be issued only by a judicial officer. The term "judicial officer" as defined in KRS section 425.006(1) means "any judge or any commissioner or other officer appointed by the trial court to perform the duties required by this Chapter."[114] It is clear from section 425.076 (writs of possession) and section 425.308 (writs of attachment) that in issuing these writs the judicial officer is performing a judicial function which is not at all akin to a nondiscretionary, automatic issuance by a court clerk.

Chapter 425 likewise requires the plaintiff to post a bond of at least twice the amount of the property before the writ of possession[115] will issue and a bond of at least twice the amount of the claim before a writ of attachment[116] will issue. In addition, the defendant may reclaim possession of the property or prevent the plaintiff from taking possession pursuant to a writ of possession by posting a similar bond.[117] Such provisions seem in line with those singled out by Mr. Justice Powell in *Di-Chem*[118] and by later courts[119] as providing necessary safeguards. Moreover, under the ex parte provisions the judicial officer's decision to issue an ex parte writ must be made on the basis of *"facts* shown by affidavit."[120] Thus the statute apparently requires more than the conclusory allegations permitted under the statutes invalidated in *Fuentes* and *Di-Chem.*

Kentucky's ex parte statutory scheme lacks an express provision for a prompt post-seizure hearing at which the cred-

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[110] *See, e.g.,* cases cited in note 63 *supra.*

[111] KRS § 425.076(1) (Supp. 1978).

[112] KRS § 425.308(1) (Supp. 1978).

[113] KRS § 425.031 (Supp. 1978).

[114] KRS § 425.006(1) (Supp. 1978).

[115] KRS § 425.111 (Supp. 1978).

[116] KRS § 425.309 (Supp. 1978).

[117] KRS § 425.116 (Supp. 1978).

[118] 419 U.S. 601, 612 (1978) (Powell, J., concurring).

[119] *See, e.g.,* cases cited in notes 64 & 68 *supra* for discussion of various safeguard provisions.

[120] KRS § 425.076(1) (Supp. 1978) (writ of possession); KRS § 425.308(1) (Supp. 1978) (order of attachment) (emphasis added).

itor-plaintiff must establish the grounds upon which the writ was issued. The presence or absence of such a provision was relied on in part by the *Mitchell*[121] and *Di-Chem*[122] Courts in assessing the constitutionality of the statutes in question. Indeed, Mr. Justice Powell's concurring opinion in *Di-Chem* went so far as to elevate the requirement of a prompt post-seizure hearing to a constitutional necessity.[123] Such a conclusion is not indicated by the majority opinions in *Mitchell* and *Di-Chem,* however.[124] In each case the Court did not reach its decision on the statute in question solely on the basis of whether it provided for a prompt post-seizure hearing. Rather, the Court scrutinized the statutes in light of a number of factors. In *Mitchell,* for example, Mr. Justice White also pointed to the requirements that the plaintiff's affidavit set forth detailed facts demonstrating that the creditor was entitled to the writ[125] and that the whole process be overseen by a judicial officer[126] as "saving characteristics" of the statute. The present Kentucky statute contains both of these elements.[127]

Furthermore, Mr. Justice White, writing for the majority in *Mitchell* and *Di-Chem,* never attempted to rate any of the safeguards as to their relative importance. In fact, it is far from settled that all of the *Mitchell* safeguards must be present before a statute will be upheld.[128] The Court's failure in *Di-Chem* and *Carey* to examine the Georgia and New York

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[121] 416 U.S. at 618.

[122] 419 U.S. at 607. *See also* case cited in note 66 *supra* for assessment of safeguard provisions by other courts.

[123] *Id.* at 611-12 (Powell, J., concurring).

[124] *See* Newton, *Procedural Due Process and Prejudgment Creditor Remedies: A Proposal for Reform of the Balancing Test,* 34 WASH. & LEE L. REV. 65, 73 (1977); Note, *Debtors' and Creditors' Due Process: Applying the Balancing Standard,* 29 U. FLA. L. REV. 554, 561 (1977); Comment, *Prejudgment Seizure of Property,* 52 DEN. L.J. 619, 632 (1975).

[125] 416 U.S. 600, 615 (1974).

[126] *Id.* at 616.

[127] KRS § 425.076(1) (Supp. 1978) (writ of possession) and KRS § 425.308(1) (Supp. 1978) (order of attachment) require the writs to be issued on the basis of factual affidavits. Judicial supervision also is required by KRS § 425.076(1) (Supp. 1978) (writ of possession) and KRS § 425.308(1) (Supp. 1978) (order of attachment).

[128] Catz & Robinson, *supra* note 13, at 563; Note, *Debtors' and Creditors' Due Process: Applying the Balancing Standard,* 29 U. FLA. L. REV. 554, 561 (1977).

statutes in light of all four of the *Mitchell* requirements supports the theory that a statute may be upheld even though lacking a particular *Mitchell* safeguard. Indeed, such a theory is implicit in *Carey* where the Court seemed willing to uphold a statute which lacked several of the *Mitchell* safeguards.[129] As noted before,[130] the Court in *Carey* suggested that the New York statute, which lacked a number of the *Mitchell* safeguards, might be constitutional if the New York courts interpreted it to require a post-seizure hearing on the merits of the plaintiff's claims.[131] Such a reading of *Carey* is compatible with the one suggested here: a statute which lacks an express provision for a prompt post-seizure hearing but which contains other safeguards not found in the New York statute may provide sufficient due process protection to pass constitutional requirements.[132] Thus, in view of the safeguards which the Kentucky statute does provide, the omission of an express post-seizure hearing should not render the statute predictably unconstitutional.

B. *Hearing-at-Debtor's Option*

Before examining Kentucky's hearing-at-debtor's option procedure it should be noted that the Court in *Fuentes* was not imposing upon the states a single, inflexible procedure. Rather, as the Court observed, "[l]eeway remains to develop a form of hearing that will minimize unnecessary costs 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."[133] The hearing-at-debtor's option procedure accomplishes just that.

Moreover, the Court in *Fuentes* was not mandating that a

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[129] *See* notes 49-60 *supra* and accompanying text for a discussion of *Carey*.

[130] *See* text accompanying note 59 *supra* for further discussion of this point.

[131] 425 U.S. 73, 78 (1976) (per curiam).

[132] Professor Scott has argued convincingly that requiring an immediate post-seizure hearing is not the most effective or efficient method for protecting the debtor's rights. Scott, *supra* note 12, at 855-58. In its stead he would substitute requirements for a prompt final adjudication and creditor-debtor bonds. *Id.* at 858-60.

[133] 407 U.S. 67, 97 n.33 (1972).

hearing be held automatically in each case. The Court could have construed *Sniadach* to require such a hearing,[134] but clearly it rejected such an interpretation:

> [W]e deal here only with the right to an *opportunity* to be heard. Since the issues and facts decisive of rights in repossession suits may very often be quite simple, there is a likelihood that many defendants would forego their opportunity, sensing the futility of the exercise in the particular case. And, of course, no hearing need be held unless the defendant, having received notice of his opportunity, takes advantage of it.[135]

The Court's concern was that the debtor be provided with notice and an opportunity for a hearing prior to the seizure of the disputed property. The optional hearing procedure provides both notice and an opportunity for a hearing, while avoiding unnecessary expense and delay.[136]

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[134] Scott, *supra* note 12, at 818.

[135] 407 U.S. at n.29 (emphasis in original). Similar language in another Supreme Court case is worth comparing to the above quote from *Fuentes*:

> Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, . . . or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication. . . . What the constitution does require is "an *opportunity* . . . granted at a meaningful time and in a meaningful manner. . . ."

Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (citations omitted).

[136] It is interesting to note that the new Bankruptcy Code, in section 102(1), construes "notice and hearing" in a manner parallel to the construction placed on this constitutional requirement by Kentucky's new prejudgment seizure law:

> In this title-
>
> (1) "after notice and a hearing" or a similar phrase-
>
> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but
>
> (B) authorizes an act without an actual hearing if such notice is given properly and if-
>
> (i) such a hearing is not requested timely by a party in interest; or
>
> (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act
>
> . . . .

11 U.S.C.A. § 102(1) (Special Pamphlet 1979).

In a similar situation, the Court has indicated its willingness to accept an optional hearing procedure under appropriate circumstances. *Memphis Light, Gas & Water Division v. Craft*[137] was a suit challenging the constitutionality of a municipal utility's procedure for terminating electric, gas, and water services. When the utility's records showed that a bill was overdue for a sufficient length of time, it sent a final notice "simply [stating] that payment was overdue and service would be discontinued if payment was not made by a certain date."[138] The notice did not inform the customer of any procedure for challenging a disputed bill.[139] The Court held that the utility's failure to provide their customers notice of the available procedures for challenging disputed bills and "an opportunity to present their complaint to a designated employee empowered to review disputed bills and rectify errors" was a deprivation of property without due process of law.[140] In a footnote, Mr. Justice Powell clarified that the Court was not requiring mandatory hearings in every case:

> [L]ay customers of electric service, the uninterrupted continuity of which is essential to health and safety, should be informed clearly of the availability of an opportunity to present their complaint. In essence, the recipients of a cut-off notice should be told where, during which hours of the day, and before whom the disputed bills may appropriately be considered.[141]

In his dissent, Mr. Justice Stevens agreed with this reading of the case: "I do not understand the Court to require municipal utilities to schedule a hearing before each termination notice is mailed. The Court seems to assume, as I do, that no hearing of any kind is necessary unless the customer has reason to believe he has been overcharged."[142]

It seems clear, therefore, that there are no constitutional objections to a procedure under which a hearing is held only

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[137] 436 U.S. 1 (1978).
[138] *Id.* at 13.
[139] *Id.* at 13-14.
[140] *Id.* at 22.
[141] *Id.* at 14 n.15.
[142] *Id.* at 26 (Stevens, J., dissenting).

at the debtor's option. What remains to be examined is whether the specific provisions of Kentucky's optional hearing procedure truly provide the debtor with notice and an opportunity to be heard. In this regard, it should be noted that *Mitchell* and the cases following it are not directly applicable here since the *Fuentes* requirement of notice and an opportunity for a hearing *prior* to the seizure is satisfied. There is therefore no need to inquire into what safeguards are necessary in lieu of such notice and opportunity for a hearing.[143]

One provision which may raise some concern is that under KRS section 425.312 (writ of possession) and KRS section 425.301(3) (orders of attachment) the debtor may be given only seven days in which to pay the claim in full or petition the court for a hearing. Such a short length of time, it might be argued, fails to provide the debtor with real notice or opportunity for a hearing. This seems especially true in light of the provisions in the Kentucky[144] and Federal Rules of Civil Procedure[145] allowing a party twenty days to respond to a prior pleading. Such an argument misconstrues what is required of the debtor during this period. The debtor must only decide between paying the claim in full and petitioning the court for a hearing. There is no need to draft a responsive pleading. Moreover, such an argument fails to take into account the very nature of prejudgment seizure, which is a *provisional* remedy. If the creditor had to wait twenty days from the service of his complaint in the demand letter before he could repossess his collateral, he would be in no better position than if there were no prejudgment seizure statute. That is, he would be entitled to a default judgment and could have postjudgment execution against the debtor. The very purpose of prejudgment seizure is to allow the creditor to repossess and protect his collateral in the interim between filing suit and obtaining judgment.

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[143] For example, if the debtor does not exercise his option and request a hearing after the creditor has given him an opportunity to be heard, then it would no longer be necessary for a "judicial officer" to issue the writ. At that point, the issuance of the writ becomes merely a clerical function and may be issued by a clerk.

[144] KY. R. CIV. P. 12.01.

[145] FED. R. CIV. P. 12(a).

CONCLUSION

Fuentes and its progeny did not prevent practical prejudgment seizure remedies which protect the due process rights of debtors. Kentucky's new prejudgment seizure law may well provide a guide for other state legislatures. A short inspection of statutes in some other states reveal that recent amendments have not resulted in workable procedures yet. The California legislature's response to *Fuentes* and its progeny, for example, is similar to Kentucky's original undesirable procedure—that of requiring a notice hearing before issuance of a writ of possession.[146] Florida's post-*Fuentes* replevin statute[147] at least provides that a hearing need not be held if it is waived by the defendant—an unlikely occurrence in view of the high percentage of defaulting defendants in such cases.[148] Nebraska goes so far as to require that any voluntary waiver by the defendant of his right to a hearing must be under oath.[149] The legislators of North Carolina appear particularly naive in their solution to the requirements of *Fuentes*: upon the plaintiff's request, the clerk sends the defendant a form for written waiver of the hearing. If this form is not returned signed by the defendant, a hearing must be held.[150]

Clearly, these sample attempts to overcome the practical difficulties imposed by *Fuentes*' requirements of prior notice and hearing fall far short of Kentucky's new procedure. The simple innovation of providing the defendant in a prejudgment attachment or replevin proceeding with adequate notice and an optional hearing upon the debtor's request provides due process, with less delay and less expense. Kentucky's provisions for ex parte prejudgment seizures also reflect an awareness of constitutional guidelines for such procedures. Its omission of an express provision for a prompt post-seizure hearing does not seem enough to render the provisions unconstitutional in view of the other due process safeguards they

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[146] CAL. CIV. PROC. CODE § 512.020 (West 1979).

[147] FLA. STAT. § 78.065 (Supp. 1979).

[148] 2 D. CAPLOVITZ, DEBTORS IN DEFAULT 11-35, 11-66 (1971), *discussed in* Scott, *supra* note 12, at 843 n.148.

[149] NEB. REV. STAT. § 25-1093.02 (1975).

[150] N.C. GEN. STAT. § 1-474.1(b) (Supp. 1979).

contain. Of course, the General Assembly could remove any doubt as to the constitutionality of these ex parte procedures by simply adding the requirement of such a post-seizure, prejudgment hearing to the existing safeguards. Local courts also could adopt rules requiring that hearings always promptly follow any ex parte seizure within their jurisdiction. The effect of that type of additional safeguard is probably only cumulative, and should not be viewed as strictly necessary to the present statute's preservation, at least not according to the guidance thus far granted by the Supreme Court in the matter.