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Constitutional Law - Due Process - The Fuentes Case: Sniadach Made Clear

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CONSTITUTIONAL LAW—DUE PROCESS—THE FUENTES CASE: SNIADACH MADE CLEAR

On June 6, 1969, Margarita Fuentes walked into the offices of the Greater Miami Legal Services Program seeking legal assistance,[1] having been a recent victim of the Florida replevin statutes.[2] She had purchased a gas stove and a service policy from the Firestone Tire and Rubber Co. under a conditional sales contract calling for monthly payments over a period of time. A few months later she also purchased a stereo set under the same sort of contract, providing for "repossession" upon default. These accounts were consolidated giving her a balance due of approximately $500.00 for the two items plus an additional $100.00 financing charge. Subsequent to her purchases, Ms. Fuentes discovered that her new stove leaked gas. Under her service policy, she complained to Firestone, but they allegedly never put it in satisfactory working condition. During the first year Ms. Fuentes had diligently made her installment payments, but stopped doing so when the dispute developed over the stove. After investigating Ms. Fuentes' claim, and acting in the belief that she had a meritorious defense to any action by Firestone, the attorneys at the Legal Services Offices advised her not to resume payments. No further action was taken by either party until September 15, 1969, when Firestone filed in the Small Claims Court in Dade County, Florida for a writ of replevin.[3] Ms. Fuentes first became aware of the claim against her when a deputy sheriff came to her door and demanded delivery of the stove and stereo. Shortly thereafter, Ms. Fuentes instituted an action in

1. For a discussion of how legal aid lawyers used Ms. Fuentes' problem as a test case, *see* Abbott and Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955, 959 (1972).

2. The relevant Florida statutory provisions are as follows: *Right to Replevin*: "Any person, when goods or chattels may be wrongfully detained by any other person or officer, may have . . . a writ of replevin for the recovery thereof and [any] . . . damages sustained by reason of the wrongful caption or detention. Or such person may . . . institute an action seeking like relief, but with summons to the defendant instead of [replevy] writ, . . . in which event no bond shall be required of him, and seizure of the property involved shall be seized only after judgment, such judgment to be in like form and tenor as that provided for when defendant shall have retaken the property upon forthcoming bond . . . ." FLA. STAT. ANN. § 78.01 (1964); *Bond Requisites*: FLA. STAT. ANN. § 78.07 (1964). The plaintiff must file a bond in double the value of the property sought to be replevied.

3. *See* FLA. STAT. ANN. § 78.01 (1964), *supra* note 2.

federal district court, challenging the constitutionality of the Florida prejudgement replevin procedures under the due process clause of the fourteenth amendment. A three judge district court found for the defendant Firestone and upheld the constitutionality of the statute.[4]

On September 18, 1970, a similar action was commenced in a federal district court challenging the constitutionality of the Pennsylvania Replevin Procedure.[5] As was the case in the Florida challenge, a three judge district court panel upheld the constitutionality of the Pennsylvania prejudgment writ of replevin.[6]

On direct appeal, the United States Supreme Court vacated the judgments of both district courts and remanded the cases. In a 4-3 decision,[7] the Court struck down the replevin statutes of Florida and Pennsylvania and, in an opinion by Justice Stewart, held that these statutes violated the due process clause of the fourteenth amendment in that they failed to provide for notice and an opportunity to be heard before persons were deprived of their property. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

The immediate significance of the *Fuentes* opinion is that it has succinctly enunciated that the right to a hearing prior to deprivation of property is a requisite to due process as applied to the states under the fourteenth amendment, and has clearly shown that the Court does not limit the fourteenth amendment's "protection of property" to a particular class of property, but applies the due process clause to "any significant taking of property."[8] The opinion in effect gives focus to a blurry picture of procedural due process that has perplexed the courts since the landmark *Sniadach v. Family Finance Corp.*[9] case was handed down by

4. Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).

5. The procedural requisites for a prejudgment writ of replevin are set out in the PA. RULES OF CIV. PRO. Rule 1073.

6. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971).

7. The ruling was made by a seven member court since Justices Powell and Rehnquist were not sitting when the arguments were heard. Chief Justice Burger and Justices Blackman and White dissented from the 4-3 opinion. It is arguable whether the decision would have been the same if the full Court had decided the case.

8. 407 U.S. 67, 86 (1972).

9. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (Wisconsin prejudgment garnishment of wages procedure, providing no notice or prior hearing held violative of procedural due process). For a discussion of the case, *see* Kennedy, *Due Process Limitations on Creditors' remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 AM. UNIV. L. REV. 158 (1970); Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942 (1970); Note, *Garnishment of Wages Prior to Judgment is a Denial of Due Process: The Sniadach Case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986 (1970); *see also* cases cited *infra* notes 28 and 29.

the Supreme Court in 1969. Also of immediate impact is the fact that prejudgment replevin statutes throughout the states may be subjected to scrutiny by the courts in light of the constitutional requirements of *Fuentes*.[10] The underlying and more pervasive significance of *Fuentes* is that it poses a threat to a vast array of other prejudgment remedies[11] that may not measure up to due process requirements as set forth therein by the Supreme Court.

The purpose of this case note is to examine the growth and extension of due process as applied to the protection of property in the wake of *Sniadach v. Family Finance Corp.*,[12] and to discuss the clarification of the due process standard made in *Fuentes*. The impact of *Fuentes* on existing replevin procedures and other prejudgment remedies that do not measure up to the clarified standard of due process will also be considered.

At first glance, it may appear unseemly that the United States Supreme Court should declare such a deeply entrenched procedure as replevin to be unconstitutional in terms of due process. After all, writs of replevin originated some 700 years ago with the Statutes of Marlbridge[13] and Westminster.[14] At that time, the writ was used to seize property that was wrongfully taken in the first instance.[15] Where a claim was made for chattels unlawfully detained, though not unlawfully taken, the common law action for obtaining possession was detinue, not replevin.[16] Detinue, however, was an action that commanded the defendant to appear and give his reasons why the property should not be delivered to the claimant.[17] At common law the defendant would thus be given notice and an opportunity to be heard.

Today, most states have on their books prejudgment replevin statutes whereby a person may seek a writ if his goods are "wrongfully detained,"[18] not requiring that the goods be wrongfully taken as in common

10. The National Legal Aid and Defenders Association researched pertinent state statutes and found that in the District of Columbia and in every state, with the exception of Delaware and Kentucky, there exists some form of prejudgment replevin statute. Abbott and Peters, *supra* note 1, at 964 n.33.

11. For examples of the types of actions which may be furthered by *Fuentes, see* cases cited *infra* notes 28-29, 51-54.

12. 395 U.S. 337 (1969).

13. 52 HEN. 3, c. 21 (1267).

14. 3 EDW. 1, c. 17 (1275).

15. Maitland, THE FORMS OF ACTION AT COMMON LAW 48 (1936).

16. Shipman, HANDBOOK OF COMMON LAW PLEADINGS 120 (3d ed. 1923).

17. *Id.* at 118.

18. Fuentes v. Shevin, 407 U.S. 67, 86 (1972). For an example of a typical replevin statute *see* FLA. STAT. ANN. § 78.01 (1964), set out *supra* note 2.

law replevin. A close examination of these statutes will show that the only requirement for obtaining such a writ is the posting of a bond and filing of an affidavit.[19] "There is no judicial interposition between the plaintiff's affidavit and the ministerial act of issuing the writ; the defendant has no opportunity to prevent the taking once the machinery has been set in motion."[20] Under these modern replevin statutes there is nothing an individual can do to prevent the initial seizure of his property since he is not aware of the writ until the sheriff knocks at his door to retrieve the goods.

In 1896, the Supreme Court recognized that "[w]herever one is assailed in his person or his property, there he may defend. . . ."[21] The Court has thus long recognized that due process of law requires an opportunity to be heard.[22] The resulting doctrine—that the opportunity to be heard prior to deprivation of property is a fundamental requisite of due process—has been continuously upheld by the Court.[23]

The Court has recognized, however, that under certain *extraordinary circumstances* a hearing may be postponed until after the seizure of the individual's property in a situation requiring special protection for a state's or a creditor's interest.[24]

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19. In every jurisdiction with a prejudgment replevin procedure the plaintiff is required to file a bond in support of his claim, usually double the amount of the property. *See, e.g.*, FLA. STAT. ANN. § 78.08 (1964). Likewise in most jurisdictions a defendant may post a bond and reacquire the property pending the outcome of the litigation if he does so within a certain time period. *See, e.g.*, FLA. STAT. ANN. § 78.13 (1964) (3 days). However in Connecticut, Maine, Massachusetts, Nebraska, Rhode Island, Tennessee, and Vermont there are no statutory provisions permitting defendants to reacquire the property before judgment.

20. Abbott and Peters, *supra* note 1, at 962.

21. Windsor v. McVeigh, 93 U.S. 274, 277 (1876) (barring owner of real property from appearing in confiscation proceeding was unconstitutional).

22. Grannis v. Ordean, 234 U.S. 385, 394 (1914) (due process requires appropriate service of process).

23. *See, e.g.*, Bell v. Burson, 402 U.S. 535, 542-43 (1971) (suspension of drivers license of uninsured motorist after accident prior to hearing violates due process); Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (due process prohibits a state from denying indigents access to its courts to dissolve their marriage solely because of inability to pay court fees); Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (due process requires a hearing prior to termination of welfare benefits); Sniadach v. Family Finance Corp., 395 U.S. 337, 341-42 (1969) (due process prohibits prejudgment garnishment of wages); Armstrong v. Manzo, 380 U.S. 545 (1965) (failure to give petitioner notice of pending adoption proceeding was violative of due process); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 312-13 (1950) (notice must be reasonably calculated under all circumstances to apprise interested parties of the pending action and afford them an opportunity to be heard).

24. *See, e.g.*, Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961) (summary exclusion from government property without a hearing upheld

Although the Court had established the requisites of due process over the years, it was not until 1969, when the Court handed down its opinion in *Sniadach v. Family Finance Corp.*,[25] that the Court truly began to broaden the scope of due process protection. In this decision, the Court held that the Wisconsin prejudgment garnishment procedure violated the fundamental principles of due process. Never before had the Court held that due process requires a prior hearing even when the restrictions on the use of the property are relatively brief and an eventual hearing is guaranteed.[26] In the majority opinion, Justice Douglas carefully characterized the case as dealing with "wages—a specialized type of property presenting distinct problems in our economic system."[27] It was this particular characterization that brought about the different interpretations of *Sniadach* that were to follow. Many courts looked upon *Sniadach* as a constitutional basis for the extension of due process,[28] while other courts

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when activities were of a highly classified nature); Ewing v. Mytinger and Casselberry, Inc., 339 U.S. 594 (1950) (seizure of misbranded drugs dangerous to public health without a prior hearing sustained); Fahey v. Mallonee, 332 U.S. 245 (1947) (Federal Home Loan Bank's appointment of conservator to take charge of the affairs of a loan association without holding a hearing did not violate due process); Bowles v. Willingham, 321 U.S. 503 (1944) (rent controls established in defense rental areas without landlord, hearing upheld); Yakus v. United States, 321 U.S. 414 (1944) (maximum rate for beef sale during war without hearing for sellers sustained). *See also* Ownbey v. Morgan, 256 U.S. 94 (1921) (foreign attachment law requiring the defendant to first post a bond before contesting the action upheld).

25. 395 U.S. 337 (1969).

26. *See The Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 113 (1969).

27. 395 U.S. 337, 340 (1969).

28. *See, e.g.*, Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972) (repossession under UCC without prior hearing denies due process); Lebowitz v. Forbes Leasing and Fin. Corp., 326 F. Supp. 1335 (E.D. Pa. 1971) (*dicta* indicating that attachment not sufficiently drawn to protect valid state or creditor interest under *Sniadach*); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) (invalidating sale under distraint procedures which failed to provide hearing prior to dispossession); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (replevin statute held violative of due process); Klim v. Jones, 315 F. Supp. 109, 122-24 (N.D. Cal. 1970) (innkeeper lien law without provision for prior hearing held violative of due process); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970) *aff'd* 405 U.S. 191 (1972) (voiding entry of judgment by confession against debtors who lacked adequate understanding of their contracts); Arnold v. Knettle, 10 Ariz. App. 509, 460 P.2d 45 (1969) (garnishment of accounts receivable denies due process); Randone v. App. Dep't of Superior Ct. of Sacramento Co., 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971) (summary attachment of property denies due process); Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971) (distress warrant proceeding permitting household furniture to be remade without notice and hearing denies due process); Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N.W.2d 87 (1970) (prejudgment impounding of businessman's accounts receivable denies due process); McConaghley v. City of New York, 60 Misc. 2d 825, 304 N.Y.S.2d 136 (Civ. Ct. 1969) (unilateral determination in

read *Sniadach* as restricted to protection of a particular class of property.[29] In effect, two very important questions were left open by *Sniadach*: (1) is property other than wages covered by the rationale of the decision, and (2) what kind of "hearing" will be required to satisfy due process?

Considering the first question, it becomes clear in *Fuentes* that the Court never intended to restrict their reasoning in *Sniadach* to wages alone: "While *Sniadach* . . . emphasized the special importance of wages . . . , [it] did not convert that emphasis into a new and more limited constitutional doctrine."[30] The Court stressed that the district courts that heard *Fuentes* and *Epps* based their decisions on a very narrow reading of *Sniadach*.

Though the Court recognized that there are gradations of "importance" and "necessity" of various consumer goods[31] it went on to say:

> [I]f the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of 'property' generally. And, under our enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights are 'necessary.'[32]

The Court therefore makes it clear that the due process standard is to be applied across the board and equally to all classes of property.

The question of what type of "hearing" will satisfy due process was discussed in *Fuentes*, but not fully resolved. The Court was cautious in

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public hospital regarding patient's ability to pay held to deny due process); Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969) (garnishment of bank accounts denies due process).

29. *See, e.g.*, Brunswick Corp. v. J. and P., Inc., 424 F.2d 100 (10th Cir. 1970); Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); America Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970); Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970); Termplan, Inc. v. Superior Ct. of Maricopa County, 105 Ariz. 270, 463 P.2d 68 (1969) (attachment upheld); Michael's Jewelers v. Handy, 6 Conn. Cir. 103, 266 A.2d 904 (1965) (prejudgment garnishment of bank account by process of foreign attachment held constitutional); Robinson v. Loyola Foundation, Inc., 236 So. 2d 154 (Fla. App. 1970) (ex parte attachment of non-residents' real property); 300 West 154th St. Realty Co. v. Dep't of Bldgs., 26 N.Y.2d 538, 260 N.E.2d 534 (1970) (procedure which did not require that landlord be given judicial determination of liability for repairs before his tenants were asked to make payments due from them on rent directly to Board of Health to pay for such repairs).

30. 407 U.S. 67, 89 (1972).

31. *Id.* at 89.

32. *Id.* at 90.

this regard, and was reluctant to take on a task that it felt should be left to the legislatures:

> The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication.[33]

Though the form of the "hearing" was not specified in the decision, the importance of the timeliness of such prior hearings was emphasized. In discussing the cases which had been brought before the Court, it was said:

> The primary question in the present cases is whether these state statutes are consitutionally defective in failing to provide for hearings 'at a meaningful time.'[34]
>
> If the right to notice and a hearing is to serve its full purpose, then, it is clear that *it must be granted at a time when the deprivation can still be prevented.*[35] (Emphasis added.)

Considering the facts of the instant case, it is easy to see how the statutes in question did not measure up to the due process standard, in light of the fact that the parties did not know of the actions against them until the sheriff came to replevy the goods. A hearing prior to such deprivation of property is a requisite of due process.[36]

In other recent decisions of the Court, the importance of a hearing at a "meaningful time" has been stressed. In *Goldberg v. Kelly*,[37] the Court struck down a statutory scheme permitting suspension of welfare benefits prior to a hearing, while in *Bell v. Burson*,[38] the Court held that state provisions permitting the suspension of the driver's license of an uninsured motorist, after an accident but prior to a hearing on the motorist's liability, was a denial of due process of law. In this past term of the Court, and prior to the *Fuentes* decision's emphasis on the "prior hearing" requisite for due process, the Court handed down a decision in *Stanley v. Illinois*[39] which held that fathers of illegitimate children are entitled to prior notice of adoption proceedings. The constitutional requirement that "notice" and "an opportunity to be heard" be provided at a "meaningful time" seeks to protect persons against arbitrary deprivations. The rationale of the Court is that "when a person has an opportunity to

33. *Id.* at 96-97; The Court went on to say: "Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has little probability of succeeding on the merits of the dispute." *Id.* at 97 n.33.

34. *Id.* at 80.

35. *Id.* at 81.

36. *Id.*

37. 397 U.S. 254 (1970).

38. 402 U.S. 535 (1971).

39. 405 U.S. 645 (1972); for a discussion of the case *see* Note, 21 DEPAUL L. REV. 1036 (1972).

speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented."[40] This rationale is explicit in *Fuentes*, though it appears that it is the same reasoning that the Court used in *Sniadach* and subsequent decisions in formulating the standards for due process.

In light of the clarification of the due process standard that applies to deprivations of "significant property interests," it should be made clear that this is not an absolute standard. As noted by the Court, the requirement of a hearing prior to deprivation does not apply in certain "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."[41]

These extraordinary situations are not the only exceptions to the requirement of a prior hearing. Although not stated explicitly in the *Fuentes* decision, it would appear from certain language included in the opinion that one may waive his constitutional right to a prior hearing if it is done "voluntarily . . . and knowingly."[42] In this regard the majority mentioned the case of *D. H. Overmyer Co. v. Frick Co.*,[43] where "the Court recently outlined considerations relevant to the determination of a contractual waiver of due process rights."[44] In *Overmyer,* two corporations specifically bargained for, and included in their contract, a confession of judgment provision. The Court held that since the Overmyer Company, for consideration and with full awareness of the legal consequences, waived its rights to prejudgment notice and hearing, there was no deprivation of its fourteenth amendment rights.[45] However, the Court noted that "where [a] contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provisions, other legal consequences may ensue."[46]

It may be inferred, then, from a reading of the *Fuentes* case in light of of *Overmyer* that the right to a hearing prior to deprivation of property may indeed be waived if such waiver is made explicitly, voluntarily, and knowingly. The Court made clear in *Fuentes*, however, that although the contracts in that case may have provided for "repossession,"

40. 407 U.S. 67, 81 (1972).

41. Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971); for other cases that exemplify *extraordinary situations,* see *supra* note 22.

42. 407 U.S. 67, 95 (1972).

43. 405 U.S. 174 (1972).

44. 407 U.S. at 94.

45. 405 U.S. 174 (1972).

46. *Id.* at 188.

they involved no waiver of constitutional rights.[47] The contracts gave the creditors the right to repossess, but did not specify how the repossession would take place. In the absence of a clear waiver, the Court felt that the constitutional rights were still intact. It is of interest that the three judge panel that initially heard the *Fuentes* case[48] reasoned that since Ms. Fuentes admitted non-payment, she could not complain of a lack of hearing since she had agreed to the consequence of repossession in the event of a default on the contract. The lower court simply failed to distinguish between the rights the creditor acquired by the contract and the pre-imminent right of Ms. Fuentes to due process notice before any deprivation could take place.

Considering the broadened due process standard enunciated in *Fuentes*, the impact of the decision should be considerable despite its limitations. It would appear that very much like *Sniadach*, the *Fuentes* decision will provide a basis for constitutional challenges to existing replevin statutes and other prejudgement remedies that do not provide the modicum of fairness dictated by the due process clause of the fourteenth amendment. Where these constitutional challenges will be launched will depend greatly on how the legislatures of the various states have constructed their statutes. Those statutes that provide for a fair hearing at a "meaningful time" should meet the constitutional standard; but the due process requisites of *Fuentes* may well cause the demise of remedies that do not pass constitutional muster.

Even provisions of the Uniform Commercial Code will have to yield if they do not measure up to the constitutional requirements of due process.[49] In apparent conflict with the present case is § 9-503 of the Code providing for repossession in secured transactions. It provides that:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of peace or may proceed by action . . . .[50]

Though the right of the secured party to repossess cannot be called into question, how he goes about it must, under the present decision, comply with due process standards. In California, a United States District Court[51]

47. 407 U.S. 67, 95 (1972).

48. Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).

49. *See* Swygert, *Secured Transactions in Revised Article Nine*, 22 DEPAUL L. REV. — (1972); Clark, *Default, Repossession, Foreclosure and Deficiency—A Journey to the Underworld and a Proposed Solution*, 51 ORE. L. REV. 301, 330 (1972).

50. UNIFORM COMMERCIAL CODE § 9-503 (1972).

51. *See* Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972). *But see* Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); Messenger v. Sandy Motors,

recognized this constitutional conflict, even before *Fuentes* was handed down, basing its decision on a perceptive reading of *Sniadach.*

Cases such as *Adams v. Egley*,[52] the aforementioned California case, which deal with prejudgment remedies that do not afford prior hearings, may well be filling the dockets of our courts in the wake of *Fuentes.* Already *Fuentes* has been cited in striking down the replevin statute of New Mexico,[53] prejudgment attachment of automobiles in Washington,[54] and replevy of machinery and equipment under New York's Replevin Statute.[55] The impact of *Fuentes* has also been felt in Illinois, where the Secretary of State imposed new restrictions on repossession of automobiles.[56] Under the reform, anyone who repossesses a car must notify the person from whom it was repossessed that he has a right to present a legal defense before a new title may be obtained. This is significant since in Illinois, a car cannot be resold until the dealer has clear title. In Cook County, Illinois, the Clerk of the Circuit Court has been apprised of the constitutional standards of *Fuentes*, and has abolished the routine issuance of writs of replevin.[57] Under the reform imposed by the Clerk, an individual is now entitled to a court hearing before sheriff's police are ordered to seize his property.

Though *Fuentes* lays a broad base for the extension of due process protection, one must be careful not to stretch the opinion beyond its bounds. The Court itself points out that the holding is a narrow one and goes on to say:

> We do not question the power of a state to seize goods before a final judgment to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing.[58]

Inc., 41 U.S.L.W. 2211 (N.J. Super. Ct. Sept. 29, 1972); Kirksey v. Thelig, 41 U.S.L.W. 2325 (USDC, Colorado 1972).

52. 338 F. Supp. 614 (S.D. Cal. 1972).

53. Solomon Sena v. Montoya, United States District Court N.M., No. 9296, July 21, 1972, CCH SECURED TRANSACTIONS GUIDE ¶ 51885 (1972).

54. Seattle Credit Bureau v. Hibbitt, Wash. Ct. of Appeals, No. 1496-1, July 3, 1972, CCH SECURED TRANSACTIONS GUIDE ¶ 51891 (1972); for additional examples of summary attachment statutes that have been struck down in the wake of *Fuentes, see* Hall v. Garson, 41 U.S.L.W. 2249 (U.S. Ct. of Appeals, 5th Cir. Nov. 2, 1972); Gross v. Fox, 41 U.S.L.W. 2246 (U.S. Dist. Ct., E.D. Pa. Oct. 24, 1970); Etheridge v. Bradley, 41 U.S.L.W. 2247 (Ala. Sup. Ct. Oct. 27, 1972).

55. Cedar Rapids Engineering Co. v. William Haenelt, d/b/a G & H Engineering, New York Sup. Ct., App. Div., ed. Jud. Dept. No. 18,545, June 29, 1972, CCH SECURED TRANSACTIONS GUIDE ¶ 51859 (1972).

56. Chicago Daily News Aug. 5-6, 1972, at 29. A case is now pending in federal district court that challenges the Illinois UCC repossession provisions, Mojica v. Automatic Employees Credit Union, 72 C 686 (N.D. Ill. 1972).

57. Chicago Daily News, *supra* note 56, at 29.

58. 407 U.S. 67, 96 (1972).

The Court apparently does not seek to whittle away at the creditor's remedies, but simply to see that the debtor is not deprived unjustly.

In the context of *Fuentes,* the Court has imposed a constitutional standard of "fairness" on the debtor-creditor relationship. This standard may ultimately increase the cost of credit to the same consumer to whom the Court is extending the arm of due process. Whether or not the benefits of the present decision will prove to outweigh the possible costs remains to be seen.

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