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Debtors' and Creditors' Due Process: Applying the Balancing Standard

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DEBTORS' AND CREDITORS' DUE PROCESS: APPLYING THE BALANCING STANDARD

INTRODUCTION

Prejudgment writs of attachment and garnishment have long been important tools for the protection of the creditor. By removing certain assets from the debtor's control prior to a final determination of liability, the creditor secures immediate protection from intentional or negligent damage to property that may provide the only means for satisfying his claim once it is reduced to judgment.[1] Both writs are classified as extraordinary remedies,[2] yet they differ in that attachment authorizes seizure of the debtor's property in his possession,[3] while garnishment permits removal from third persons of property belonging to or money owed to the debtor, to whom the creditor is subrogated.[4]

In this country both attachment and garnishment have developed primarily as statutory remedies,[5] though their origin can be traced to the custom of London merchants.[6] Under the London custom, garnishment was used to compel the debtor's appearance and, in default of appearance, to satisfy the debt.[7] This practice was expanded in the New England colonies to include prejudgment seizure of tangible assets in the debtor's possession.[8] Thus, prejudgment seizure emerged as a method to secure the judgment that the creditor might ultimately obtain.[9] Most jurisdictions subsequently limited the use of prejudgment remedies to special situations such as nonresidency, concealment or absence of the debtor, and actual or threatened secretion or disposition of the property to make it unavailable to creditors.[10]

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1. *See, e.g.*, Wilder v. Inter-Island Steam Navigation Co., 211 U.S. 239 (1908); Barber v. Morgan, 84 Conn. 618, 80 A. 791 (1911); *Ex parte* Fuller, 99 Fla. 1165, 128 So. 483 (1930); Grimestad v. Lofgren, 105 Minn. 286, 117 N.W. 515 (1908).

2. *See, e.g.*, F.A. Haber & Co. v. Nassitts, 12 Fla. 589, 609 (1868); C. DRAKE, LAW OF SUITS BY ATTACHMENT §4a (7th ed. 1891); 1 R. SHINN, ATTACHMENT AND GARNISHMENT §2 (1896).

3. *See, e.g.*, Steen v. Ross, Keen & Co., 22 Fla. 480 (1886); Union Bank & Trust Co. v. Edwards, 281 Ky. 693, 137 S.W. 2d 344 (Ct. App. 1940).

4. *See, e.g.*, Consolidated Nat'l Bank v. Reiniger Mining & Smelting Co., 111 Cal. App. 64, 295 P. 79 (Dist. Ct. App. 1931); Pleasant Valley Farms & Morey Condensery Co. v. Carl, 90 Fla. 420, 106 So. 427 (1925).

5. *See, e.g.*, Loewe v. Savings Bank, 236 F. 444 (2d Cir. 1916); Williams v. T.R. Sweat & Co., 103 Fla. 461, 137 So. 698 (1931); Freeport Motor Cas. Co. v. Madden, 354 Ill. 486, 188 N.E. 415 (1933). *Contra*, Barber v. Morgan, 84 Conn. 618, 80 A. 791 (1911).

6. C. DRAKE, *supra* note 2, §1. *See, e.g.*, L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co., 109 F. 393 (5th Cir. 1901), *aff'd*, 189 U.S. 135 (1903); International Bedding Co. v. Terminal Warehouse Co., 146 Md. 479, 126 A. 902 (Ct. App. 1924). The remedies have also been traced to Roman law. R. SHINN, *supra* note 2, §1. *See* Fulwider v. Benda, 62 S.D. 400, 253 N.W. 154 (1934).

7. C. DRAKE, *supra* note 2, §5; 1 R. SHINN, *supra* note 2, §2.

8. Williams, *Creditors' Prejudgment Remedies: Expanding Strictures On Traditional Rights*, 25 U. FLA. L. REV. 60, 63 (1972).

9. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 489 (1952).

10. *See, e.g.*, FLA. STAT. §76.04 (1975).

Despite the obvious lack of notice and hearing inherent in the prejudgment seizure process, attachment and garnishment were rarely challenged on procedural due process grounds before 1969. Under the then prevailing view, due process was satisfied if an opportunity for a hearing was provided before the property was ultimately subjected to the claims of creditors.[11] In its 1969 decision in *Sniadach v. Family Finance Corp.*,[12] however, the United States Supreme Court dramatically increased the constitutional scrutiny accorded creditors' prejudgment remedies. The landmark decision in *Sniadach* was the first in a series of Court decisions analyzing the constitutional requirements for prejudgment seizure.

This note focuses on lower court applications of Supreme Court decisions after *Sniadach* as they affect attachment and garnishment.[13] The first section reviews and analyzes the major Supreme Court decisions from *Sniadach* through *Carey v. Sugar*,[14] and suggests that these decisions, appearing to be

11. *See, e.g.*, McKay v. McInnes, 279 U.S. 820 (1929) (per curiam); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928).

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

13. Many states have statutes according liens to landlords, hotelkeepers, warehousemen, mechanics, and materialmen for goods or services rendered. Some states also provide a statutory procedure to be followed in foreclosure sales resulting from deeds of trust. When ex parte seizure is allowed, the first constitutional consideration is whether any state action is involved. Unless state action is involved in a procedure, the guarantees of due process do not apply. U.S. CONST. amend. XIV, §1 provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

State action is most readily found if the property is seized by a state officer. *See, e.g.*, Ragin v. Schwartz, 393 F. Supp. 152 (W.D. Pa. 1975) (landlord lien); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) (distress for rent); Stevenson v. Cullen Center, Inc., 525 S.W.2d 731 (Tex. Civ. App. 1975) (landlord lien). If a state officer is not involved, a court may still find state action if a statute authorizes action by the creditor of a type normally performed by a state officer. *See, e.g.*, Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975) (innkeepers' lien); Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S.D. Fla. 1975) (innkeepers' lien); Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917 (D. Mass. 1973) (U.C.C. self-help repossession). *But see* Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975) (boardinghouse lien); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974) (U.C.C. self-help repossession); Brooks v. Flagg Bros., Inc., 404 F. Supp. 1059 (1975) (U.C.C. warehousemen's lien sale); USA 1 Lehndorff Vermoegensverwaltung v. Cousins Club, Inc., 64 Ill. 2d 11, 348 N.E. 2d 831 (1976) (landlord distress for rent). State action generally has not been found in cases involving foreclosure sales under deeds of trust, even though statutes provided specific steps to follow for the foreclosure to be valid. *See, e.g.*, Northrip v. Federal Nat'l Mortgage Ass'n, 527 F.2d 23 (6th Cir. 1975); Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975). *But see* Roberts v. Cameron-Brown Co., 410 F. Supp. 988 (S.D. Ga. 1975) (finding state action where HUD had required inclusion of power of sale clause); Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975) (finding of state action in extensive statutory duties and powers of clerk).

14. 425 U.S. 73 (1976). The other major cases in the *Sniadach* series are North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); and Fuentes v. Shevin, 407 U.S. 67 (1972). Commentators have expressed divergent opinions on the effect of this series. *See* Catz & Robinson, *Due Process and Creditor's Remedies: From* Sniadach *and* Fuentes *to* Mitchell, North Georgia *and Beyond*, 28 RUTGERS L. REV. 541 (1975); Pearson, *Due Process and the Debtor: The Impact of* Mitchell (pts. 1-2), 28-29 OKLA. L. REV. 743, 277 (1975-1976); Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975). The

ambiguous and conflicting, may rest on an underlying consistency.[15] The second section examines lower court decisions following recent Court pronouncements and assesses the varying interpretations of Court mandates, identifying particular safeguards that have been consistently emphasized.[16] The last section offers some concluding observations on the present state of the law and the directions taken in recent court decisions.[17]

DUE PROCESS GUARANTEES APPLIED TO PREJUDGMENT SEIZURES

The Supreme Court placed constitutional limitations on the provisional writs for the first time in the 1969 *Sniadach*[18] decision. In *Sniadach*, the creditor instituted a garnishment proceeding against the debtor's employer alleging a claim due on a promissory note. A summons of garnishment was issued by the court clerk without prior notice to the debtor and without a prior hearing. Emphasizing the hardship produced by deprivation of wages and the resulting power of the creditor to force the debtor to satisfy the debt,[19] the Court held the Wisconsin procedure to be a violation of due process because it effected a deprivation of property without prior notice and a hearing. Significantly, the Court did not rule ex parte prejudgment procedures unconstitutional per se, but instead maintained that such procedures meet due process requirements in certain extraordinary situations in which the interest of a state or creditor commanded special protection and the applicable statute was narrowly drawn to meet those unusual conditions.[20] The decision did not resolve whether garnishment of wages must be preceded by notice and a hearing, and whether notice and the mere opportunity for a prior hearing would suffice.[21] Furthermore, the extent to which the Court's reasoning applied beyond garnishment of wages was also left undecided.[22]

Court decisions have also caused lower courts considerable confusion. *See, e.g.*, Ragin v. Schwartz, 393 F. Supp. 152 (W.D. Pa. 1975) (applied a combination of *Fuentes* and *Di-Chem*); Terranova v. Avco Fin. Serv., Inc., 396 F. Supp. 1402, 1407 (D. Vt. 1975) (commented on the uncertain course of the Supreme Court); Thornton v. Carson, 111 Ariz. 490, 491, 533 P.2d 657, 658 (1975) (*Mitchell* either overruled *Fuentes*, or represented a considerable retreat from *Fuentes*); Thompson v. DeHart, 84 Wash. 2d 931, 530 P.2d 272 (1975) (applied a mixture of *Mitchell* and *Fuentes*).

15. See text accompanying notes 18-61 *infra*.

16. See text accompanying notes 62-170 *infra*.

17. See text accompanying notes 171-195 *infra*.

18. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

19. *Id.* at 340-42. The Court noted recent congressional hearings on wage garnishment and two law review articles that had exposed the enormous power of the creditor to force a low income wage earner to pay a small alleged debt in order to gain release of his wages. *See* Note, *Wage Garnishment in Washington — An Empirical Study*, 43 WASH. L. REV. 743 (1968); Note, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759.

20. 395 U.S. at 339.

21. Not only did the Court's ambiguity pose problems for lower courts ruling on the constitutionality of prejudgment seizure procedures, but legislatures could assure that such statutes would be upheld only by including a preseizure hearing requirement. Such a requirement could greatly increase the costs of prejudgment procedures. *See* Scott, *supra* note 14, at 817-18.

22. *Id.* at 817. Some lower courts interpreted *Sniadach* as applying only to garnishment of wages. *See, e.g.*, Brunswick Corp. v. J. & P. Inc., 424 F.2d 100 (10th Cir. 1970); Aaron v.

The unanswered questions of *Sniadach* were addressed three years later in *Fuentes v. Shevin*.[23] In that case, the Court struck down Pennsylvania and Florida replevin statutes that permitted the seizure of household items[24] other than necessities without prior notice under writs of replevin after the debtors had defaulted on installment sales contracts. The creditors in *Fuentes*, unlike the creditor in *Sniadach*, had prior interests in the property seized. The Court in *Fuentes* deemed this distinction to be immaterial and refused to limit *Sniadach* to wages, stating that *Sniadach* was "in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life, but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect."[25]

The Florida statute[26] invalidated in *Fuentes* allowed a writ of replevin to be issued by a clerk of the court upon the creditor's conclusory allegation that his goods were wrongfully detained. Prior to the issuance of the writ, the plaintiff was also required to file a complaint stating that he was lawfully entitled to possession of the property, thereby initiating a court action for repossession, and post a double bond. The Florida law allowed the defendant to recover possession of the property at the required trial on the merits in the repossession action. The Pennsylvania statute contained similar provisions, except that no hearing on the merits was required unless the defendant initiated such an action.[27]

In *Fuentes*, as in *Sniadach*, the Court stressed the deprivation of property suffered by the debtor and overlooked the prior possessory interest of the *Fuentes* creditor in the seized property.[28] The invalidation of the prejudgment seizure statutes was qualified, though, by the Court's suggestion of one exception to the requirement for prior notice and an opportunity for a hearing. Building on the *Sniadach* reference to extraordinary situations,[29] the Court reasoned that seizure still would be permitted without notice or prior hearing if the seizure was necessary to secure an important governmental or general public interest, there was a special need for prompt action, and the state

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Clark, 342 F. Supp. 898 (N.D. Ga. 1972); Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971); Almor Furniture & Appliances, Inc. v. MacMillan, 116 N.J. Super. 65, 280 A.2d 862 (Dist. Ct. 1971). Other courts extended *Sniadach* to any prejudgment seizure. *See, e.g.*, Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); and other cases collected in Fuentes v. Shevin, 407 U.S. 67, 72 n.5 (1972).

23. 407 U.S. 67 (1972). *Fuentes* was a four to three decision. Justices Powell and Rehnquist, though members of the Court when the decision was announced, were not members of the Court at the time the case was argued.

24. Among the items replevied were a stereo record player, a stove, a bed, and a table. 407 U.S. at 71.

25. *Id.* at 88.

26. FLA. STAT. §§78.01-.21 (1971) (repealed by 1973 Fla. Laws ch. 73-20, §2).

27. 407 U.S. at 75-78.

28. In a conditional sales contract, the seller retains title to the goods delivered to the buyer. In theory, either the title does not pass until the payments are completed, or the buyer has only a voidable title pending complete payment. *See generally* 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 62-85 (1965).

29. See text accompanying note 20 *supra*.

strictly controlled the actions of officers implementing such procedures.[30] Listing several examples of measures upheld by the Court in the past,[31] the *Fuentes* Court noted that attachment without notice or prior hearing had been permitted when "necessary to secure jurisdiction in state court – clearly a most basic and important public interest."[32]

Even though *Fuentes* appeared to require, except in extraordinary situations, notice and an opportunity for a hearing prior to prejudgment seizures, the decision nonetheless can be interpreted as allowing seizure even if no extraordinary factors are present. According to *Fuentes,* the purpose of the due process right to be heard was to protect the "use and possession of property from arbitrary encroachment [in order] to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party."[33] From this definition of purpose, the Court formulated the requirement of prior notice and opportunity for a prior hearing, but only after determining that the Florida and Pennyslvania procedures for issuing a writ were not functional substitutes for a prior hearing. Accordingly, even under the *Fuentes* rationale, some combination of requirements for issuing the writ might adequately replace a prior hearing. *Fuentes* apparently required as a minimum that valid procedures provide for discretionary review by the officer issuing the writ[34] and that its issuance be predicated upon facts rather than conclusory allegations by the creditor.[35]

Although the majority in *Fuentes* focused narrowly on the interests of debtor,[36] the dissent[37] evaluated the overall fairness of the prejudgment process, taking into account the interests of both parties to a typical installment sales contract.[38] The balancing test advocated by the *Fuentes* dissent was

30. 407 U.S. at 90-93.

31. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (bank failure); Phillips v. Commissioner, 283 U.S. 589 (1931) (tax collection); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) (war); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (contaminated food).

32. 407 U.S. at 91 n.23. This statement referred to Ownbey v. Morgan, 256 U.S. 94 (1921), a Supreme Court decision often cited as approving of foreign attachment without prior notice or hearing. The parties in *Ownbey*, however, never questioned the validity of foreign attachment. The *Fuentes* reference to *Ownbey* has been the source of much confusion to lower courts. See text accompanying notes 143-170 *infra*.

33. 407 U.S. at 81.

34. The Court in *Fuentes* said that, although courts will generally refrain from taking tentative action until it has examined the facts supporting the plaintiff's position, no such discretionary review was required by the statutes under consideration. *Id.* at 83.

35. While no court subsequently interpreted *Fuentes* in this manner, such a reading is consistent with the later Supreme Court decisions. See text accompanying notes 39-47 *infra*.

36. See text accompanying note 28 *supra*. *See* Scott, *supra* note 14, at 822-23.

37. Justices White and Blackmun and Chief Justice Burger dissented.

38. Although the point was not extensively developed, the dissent questioned the usefulness of a prior hearing, stating that "[i]t is very doubtful . . . that such a hearing would in fact result in protections for the debtor substantially different from those the present laws provide." 407 U.S. at 102 (White, J., dissenting). One commentator agrees. *See generally* Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CAL. L. REV. 82, 107-13 (1973). *But see* Dauer & Gilhool, *The Economics of Constitutionalized Repossession:*

adopted by the majority of the Court in the 1974 decision of *Mitchell v. W.T. Grant Co.*[39] Although *Mitchell*, like *Fuentes*,[40] involved a creditor's seizure of property under an installment sales contract,[41] the Louisiana provisions for issuing the writ differed substantially from the invalidated Florida and Pennsylvania procedures. As required by statute, the plaintiff in *Mitchell* posted bond and filed an affidavit alleging specific facts. Only then was the sequestration writ[42] issued by a judge having discretionary powers. The Louisiana sequestration procedure reviewed in *Mitchell* further safeguarded the interests of the debtor by providing that the debtor could obtain an immediate post-seizure hearing requiring the creditor to prove the grounds on which the writ had been issued, and that the debtor could regain possession of the seized property by posting a bond.[43]

In holding that the Louisiana procedure did not violate due process, the *Mitchell* Court weighed the concurrent interests of the creditor and the debtor in the seized property. Although implicitly overruling the *Fuentes* requirement of a prior hearing,[44] the Court employed a balancing analysis similar to the

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A Critique for Professor Johnson and a Partial Reply, 47 S. CAL. L. REV. 116, 131-37 (1973). Even if a prior hearing were held, a substantial number of debtors might not appear in court. Twelve percent of the debtors surveyed in a New York study claimed never to have been served with process. D. CAPLOVITZ, CONSUMERS IN TROUBLE 195 (1974). Of those known to have been served with process, 15% failed to answer the summons because they did not know that they were supposed to appear in court. *Id.* at 205. The *Fuentes* dissent expressed the fear that the availability of credit would be diminished and its cost increased by the Court's decision. In the view of the dissenters, the decision provided the debtor with little or no additional protection against arbitrary deprivations. 407 U.S. at 102-03 (White, J., dissenting).

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

40. The dissenters in *Fuentes* had become the Court majority by the addition of Justices Powell and Rehnquist, who had taken no part in the *Fuentes* decision. The *Fuentes* dissent's argument for weighing the interests of the creditor and the debtor in the seized property was used in *Mitchell* as the test for determining the constitutionality of the process. 416 U.S. at 604-07.

41. See note 28 *supra* and accompanying text.

42. Sequestration differs from attachment in that sequestered property is taken into custody of the court rather than possession of the creditor. After a determination of the merits of the conflicting claims of the parties, the property is delivered to the party entitled to possession. The remedy is derived from French, Spanish, and Roman law. Millar, *Judicial Sequestration in Louisiana: Some Account of Its Sources*, 30 TUL. L. REV. 201, 216 (1956).

43. 416 U.S. at 605-07, 616-18.

44. *See, e.g., id.* at 623 (Powell, J., concurring); *id.* at 634 (Stewart, J., dissenting); Thornton v. Carson, 111 Ariz. 490, 491, 533 P.2d 657, 658 (1975). Most if not all lower courts after *Fuentes* construed it as requiring a prior hearing. *See, e.g.*, Bay State Harness Horse Racing & Breeding Ass'n v. PPG Indus., Inc., 365 F. Supp. 1299 (D. Mass. 1973); Clement v. Four N. State St. Corp., 360 F. Supp. 933 (D.N.H. 1973). Perhaps because of the lower court response to *Fuentes*, the majority in *Mitchell* attempted to distinguish *Fuentes* to limit its holding. 407 U.S. at 611-18. The Court could have distinguished *Fuentes* in several ways. First the writ in *Mitchell* was issued upon the order of a judge who acted after being presented with specific facts supporting the creditor's allegations, while the writ in *Fuentes* had been issued following mere conclusory allegations by the creditor. Fuentes v. Shevin, 407 U.S. at 81, 93. Additionally, the Court in *Fuentes* had implied that issuance by an officer with discretionary powers might help to bring the procedure within constitutional parameters, especially if the Court were presented with the underlying facts. *Id.* at 83. Further, in contrast to *Fuentes*, in which neither invalidated statute provided for an immediate post-

reasoning used in *Fuentes*, in which the requirements for the issuance of the writ were analyzed as possible substitutes for a prior hearing but found lacking because they did not acceptably minimize the danger of an unfair deprivation of property.[45] Expanding the *Fuentes* rationale, the *Mitchell* Court found that notice and an opportunity for a hearing prior to seizure were not required in all cases, thus adopting the view of the *Fuentes* dissent by adding concern for the creditor's interest to the balancing formula. Accordingly, the Court found that Louisiana sequestration procedures struck the proper constitutional balance by reducing both the danger of unfair deprivation of property and the possibility of damage to the creditor's interest through the sale, concealment, or transfer of the property by the debtor.[46]

Apparently, the Court viewed the postseizure hearing as the most crucial safeguard mentioned in *Mitchell*,[47] because such a hearing ensured that any

seizure hearing, the Court in *Mitchell* upheld a statute that provided such an opportunity. The *Mitchell* Court noted these differences in the statutes but failed to develop such reasoning in order to distinguish *Fuentes*. The Court instead relied on the unconvincing ground that the broad fault standard of wrongful detention involved in *Fuentes* was ill-suited for ex parte determination. Mitchell v. W.T. Grant Co., 416 U.S. at 617-18. According to the *Mitchell* dissent, however, the issues in *Fuentes* were the same as those in *Mitchell*: "the creditor-vendor needed only to establish his security interest and the debtor-vendee's default." *Id.* at 633 (Stewart, J., dissenting). Clearly, the significant difference between *Fuentes* and *Mitchell* lies in the statutory requirements for issuing the writ and an opportunity for an immediate postseizure hearing. One commentator, however, attributes the *Mitchell* decision to the Court's implicit recognition that widespread application of the *Fuentes* prior hearing rule would significantly increase the costs of prejudgment seizure without substantially reducing the possibility of a wrongful taking. Scott, *supra* note 14, at 828.

The *Mitchell* dissent, composed of the four justices who had formed the *Fuentes* majority, construed *Fuentes* as holding that bond requirements and the simplicity of the issues involved went to the type of notice and hearing necessary prior to seizure, but could not be substituted for the required prior hearing. 416 U.S. at 631 (Stewart, J., dissenting). For the dissent, only an extraordinary situation would justify prejudgment seizure without prior notice. This view, however, misinterprets *Fuentes*, which left substantial openings for the possibility that statutory provisions could provide an adequate substitute for the prior notice and hearing. See text accompanying notes 26-34 *supra*. *Fuentes* had stated that the reason for the prior hearing was to minimize substantively unfair or mistaken deprivations of property. Use of other methods to accomplish that end, if available, probably would be permissible.

Justice Powell's concurrence in *Mitchell* fell between the majority's balancing approach and the dissent's absolutist approach. Powell would require that the "creditor furnish adequate security and make a specific factual showing before a neutral officer or magistrate of probable cause to believe that he is entitled to the relief requested. An opportunity for an adversary hearing must then be accorded promptly after sequestration to determine the merits of the controversy, with the burden of proof on the creditor." *Id.* at 625 (Powell, J., concurring).

45. See text accompanying notes 33-34 *supra*.

46. 416 U.S. at 608-09. Although the vendor in *Mitchell* had a lien on the property involved which could be destroyed by the debtor conveying the property to a third person, the danger to creditors posed by fraudulent transfer is present in all cases. In the 49 states in which the U.C.C. has been adopted, it provides protection of the vendor's security interest against interests of third party purchasers only if the creditor files a financing statement. U.C.C. §9-201. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §25-2, at 901 (1972).

47. Those requirements were the following: (1) bond posting by the creditor; (2) an

wrongful seizure undertaken without notice or hearing would be rectified promptly. Although certain safeguards in the Louisiana statute were clearly more important than others to the Court, *Mitchell* did not hold that any particular safeguard was constitutionally required.[48]

Less than one year after *Mitchell* was decided, however, the Court appeared to indicate that some or all of the safeguards were constitutionally mandated. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[49] the Court invalidated the Georgia garnishment statute on facts in which, unlike the earlier cases, both parties were businesses. The creditor corporation had filed for process of garnishment against the debtor's bank account simultaneously with instituting suit. To obtain the writ, the creditor posted a double bond and filed an affidavit containing conclusory allegations. The writ was then issued by the clerk of the court. The only method of dissolution available to the debtor was the filing of a bond.[50]

In holding the Georgia statute unconstitutional, the Court in *Di-Chem* appeared to apply *Mitchell* in a mechanical fashion. The Court did not profess to balance the interests of the creditor and the debtor, but instead apparently found the process invalid because it lacked several of the five safeguards contained in the statute upheld in *Mitchell*.[51] Further analysis reveals that the *Di-Chem* Court apparently was simply listing the deficiencies of a procedure clearly unconstitutional because of its uneven balancing of the interests of debtor and creditor. Especially important was the absence of an opportunity for an early postseizure hearing. Only substantial alternative safeguards would have overcome this deficiency, and no such safeguards were incorporated into the Georgia procedure. In one significant respect *Di-Chem* expanded the reach of *Mitchell*, for the *Di-Chem* decision implicitly refused to limit *Mitchell* to situations in which the creditor had a prior interest in the property seized. Had the Court chosen to so limit *Mitchell*, *Di-Chem* could have declared the Georgia garnishment statute unconstitutional without applying the balancing test of *Mitchell*.[52]

Although *Di-Chem* relied primarily on *Mitchell*, the Court also cited *Fuentes* as requiring notice, an opportunity for an early hearing, and participa-

affidavit supported by an allegation of specific facts; (3) issuance of the writ by a judge having discretionary powers; (4) the debtor could move for an immediate postseizure hearing; and (5) the debtor could regain possession of the seized property by posting a bond. LA. CODE CIV. PRO. ANN. art. 3501, 3506-3508, 3571, 3574, 3576 (West 1961).

48. Two commentators, however, believe that some if not all of the safeguards are constitutionally required. Pearson (pt. 2), *supra* note 14, at 326; Scott, *supra* note 14, at 832-33.

49. 419 U.S. 601 (1975). The majority opinion was written by Justice White, who had been in the *Fuentes* minority, for the *Di-Chem* majority consisting of White and the Justices of the *Mitchell* dissent.

50. GA. CODE ANN. §§46-101 to -201 (1971) (repealed by 1976 Ga. Laws tit. 46).

51. 419 U.S. at 607. Specifically, the procedure was found to be lacking for the following reasons: (1) the writ was issuable by a clerk; (2) the affidavit contained only conclusory allegations; and (3) the only method available to dissolve the writ was for the debtor to file bond. *Id.*

52. The creditor in *Di-Chem* had no prior interest in the debtor's bank account. *See*, Hutchison v. Bank of N.C., 392 F. Supp. 888, 898 (M.D.N.C. 1975); Pearson, (pt. 2), *supra* note 14, at 298-300.

tion by a judicial officer in the issuance of the writ.[53] The characterization of *Fuentes* as requiring an early hearing seems anomalous, because *Fuentes* originally appeared to have required that a hearing be held prior to the seizure.[54] Moreover, the lack of clarity in *Di-Chem* left substantial questions as to how far the decision may have revived *Fuentes*,[55] and thus sowed the seed of more confusion for lower courts.

The latest Court decision in the *Sniadach* series is the per curiam opinion vacating and remanding *Carey v. Sugar*[56] to a three-judge district court. The creditor corporation in *Sugar* filed suit against the debtor and two other corporations charging them with a complicated scheme of fraud. Concomitantly, the creditor sought to attach the debts owed by one co-defendant to another co-defendant. The writs of attachment were issued by a judge after the creditor had posted bond and had filed an affidavit alleging specific facts. The debtor corporation did not avail itself of New York procedures providing for dissolution of the attachment either by giving bond in an amount equal to the value of the seized property or by prevailing at a court hearing.[57] Applying *Mitchell*, the district court held that New York's attachment law violated due process rights.

In vacating the lower court's decision, the Supreme Court ordered that court to abstain from deciding the case until New York courts resolved whether the prescribed hearing immediately following the seizure was designed to determine the likelihood that the plaintiff would prevail on the merits. The Court, however, refused to consider several issues that the lower court had considered important.[58] While the district court had struck down

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53. Justice Powell objected to the majority's apparent resuscitation of *Fuentes*. Powell's concurring opinion reiterated the requirements he had first enumerated in *Mitchell* as necessary to satisfy due process. 419 U.S. at 609, 611 (Powell, J., concurring). See note 44 *supra*.

The dissent in *Di-Chem* expressed the view that *Fuentes* had little or no precedential value after having been severely limited by *Mitchell*. The dissenters, Chief Justice Burger and Justices Blackmun and Rehnquist, adhered to the balancing process enunciated in *Mitchell*, but disagreed with the *Di-Chem* majority on the outcome of that balancing based on the facts in *Di-Chem*. The dissenters would have upheld the Georgia garnishment statute as establishing an adequate balance. The dissent emphasized that both parties in *Di-Chem* were businesses, as had been the situation in the earlier decisions, rather than a business suing individual persons. This, coupled with the safeguards of the Georgia statute — that the debtor was assured a full hearing at some time, that the plaintiff post a double bond, and that there be a conclusory allegation of apprehension of loss — satisfied the dictates of due process to the satisfaction of the dissent. The dissent found little need for judicial approval of the writ as long as the issuing officer was a court officer. *Id.* at 619 (Blackmun, J., dissenting).

54. See text accompanying notes 28-34 *supra*.

55. According to Professor Scott, *Di-Chem* appeared to view *Mitchell* as an exception to *Fuentes*. Scott, *supra* note 14, at 831. This view has also been taken by at least one lower court decision. Hernandez v. Danaher, 405 F. Supp. 757 (N.D. Ill. 1975), *prob. juris. noted sub nom.* Trainor v. Hernandez, 96 S.Ct. 2622 (1976). See text accompanying notes 75-76 *infra*.

56. 425 U.S. 73 (1976). Suit was brought under 42 U.S.C. §1983 (1970).

57. N.Y. CIV. PRAC. LAW §§6201-6226 (McKinney 1976).

58. Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 648-50 (S.D.N.Y. 1974).

the New York attachment statute primarily because of the supposed lack of an opportunity for an immediate hearing on the merits of the underlying claim, the court also contrasted the statute with that in *Mitchell* and found two significant distinctions. First, unlike *Mitchell* the creditor in *Sugar* had no concurrent possessory interest in the property attached. Second, while in *Mitchell* the only issues to be adjudicated at the *ex parte* hearing were whether the debt existed and whether it was delinquent, the more complicated issue of fraud was involved in *Sugar*. Fraud, according to the lower court, was not a matter for documentary proof. The Supreme Court's failure to mention these issues seems doubly significant in view of the Court order that the lower court abstain solely on the basis that the New York statute might be constitutional if it required an opportunity for an immediate hearing on the underlying merits of the claim. The combined effect of these actions suggests that the *Mitchell* balancing process will be used notwithstanding the creditor's lack of a prior possessory interest in seized property.[59]

Mitchell and its balancing test[60] best express the current position of the Supreme Court in the application of due process guarantees to prejudgment remedies. As illustrated in *Sugar*, that balancing process is to be applied whether or not the creditor had a prior interest in the property seized, and thus the existence of or nonexistence of a prior interest is just one of many factors to be weighed. Unfortunately, lower courts have not consistently applied the balancing process to challenged prejudgment remedies.[61] Most of the lower court confusion can be traced to the *Di-Chem* decision, with its ambiguous revival of *Fuentes* and apparently mechanical application of the *Mitchell* criteria.

Lower Court Treatment of Prejudgment Seizure and Due Process

Supreme Court enunciations of due process requirements for prejudgment seizures to date have involved only seizure of personal property for nonjurisdictional purposes. Lower courts have been forced to interpret the extent to which these decisions can be extended beyond the seizure of personal property and applied both to attachment of real property for nonjurisdictional purposes and to attachment of real or personal property for purposes of obtaining jurisdiction over nonresidents.[62] Indeed, even when seizure of personal property is at issue, lower court decisions illustrate ample confusion in deter-

59. See text accompanying note 52 *supra*.

60. See text accompanying notes 39-46 *supra*. *See* Note, *The Supreme Court—1973 Term*, 88 HARV. L. REV. 43, 71 (1974).

61. See text accompanying notes 62-170 *infra*.

62. *See, e.g.*, Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976) (real property attachment; applied *Mitchell*); Terranova v. Avco Fin. Serv., Inc., 396 F. Supp. 1402, 1407 (D. Vt. 1975); Allen Trucking Co. v. Adams, 56 Ala. App. 478, 323 So. 2d 367 (Civ. App. 1975) (personal property attachment; applied the *Fuentes* extraordinary situations exception); First Recreation Corp. v. Amoroso, 26 Ariz. App. 477, 549 P.2d 257 (Ct. App. 1976) (real property attachment; no taking of property so Supreme Court decisions on due process do not apply); Earnest v. L.H. Shor & Assocs., Inc., 45 U.S.L.W. 2197 (D.C. Super. Ct. 1976) (personal property attachment; applied a combination of *Fuentes* and *Mitchell*).

mining the proper due process analysis to be applied.[63] Many lower courts either have relied on the Court's analysis in *Fuentes* and *Di-Chem* or have misapplied the balancing approach first enunciated in *Mitchell.* Assessing such inconsistencies, this section evaluates several recent lower court decisions in three areas: (1) personal property attachment for nonjurisdictional purposes; (2) real property attachment for nonjurisdictional purposes; and (3) attachment of real or personal property for jurisdictional purposes.[64]

Seizure of Personal Property for Nonjurisdictional Purposes

Although most decisions acknowledge *Mitchell* as the controlling Supreme Court decision in this area,[65] many lower courts have failed to utilize the *Mitchell* balancing formula properly.[66] Instead, they apply that decision in a mechanical manner as if it required that a prejudgment seizure statute, to be validated, must contain all five of the protective features of the Louisiana statute upheld in *Mitchell.* These lower courts have failed to analyze competing interests to determine whether statutory safeguards sufficiently protect the creditor's interest in the property while minimizing the possibility of unfair or mistaken deprivations of a debtor's property.

Mechanical Application of Mitchell. This mechanical application is well illustrated in *Unique Caterers, Inc. v. Rudy's Farm Co.*,[67] in which the Supreme Court of Florida ruled that portions of Florida's attachment statute were unconstitutional in light of *Mitchell.*[68] Admitting its uncertainty as to the full import of *Sniadach* and its progeny, the Florida court opined that the challenged statute violated the dictates of both *Fuentes* and *Mitchell.*[69] In *Unique Caterers,* the creditor, concurrent with filing suit, filed a motion unaccompanied by affidavit for a writ of attachment. After the creditor posted bond, the writ was issued by a court clerk and property sufficient to satisfy the claim was seized. Subsequently, the debtor's motion to dissolve the attachment was denied by the county court.[70] Although Florida law provided that the

63. *See, e.g.*, Hernandez v. Danaher, 405 F. Supp. 757 (N.D. Ill. 1975) (*Mitchell* as an exception to *Fuentes*), *prob, juris. noted sub nom.* Trainor v. Hernandez, 96 S. Ct. 2622 (1976); Douglas Research & Chem. Inc. v. Soloman, 388 F. Supp. 433 (E.D. Mich. 1975) (applied both *Fuentes* and *Mitchell*).

64. This method of categorization was also used by Professor Pearson in his article analyzing earlier lower court decisions. Pearson (pt. 2), *supra* note 14, at 278-79.

65. *See, e.g.*, Garcia v. Krause, 380 F. Supp. 1254 (S.D. Tex. 1974); Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (Ct. App.) *cert. denied*, 289 N.C. 615, 223 S.E.2d 392 (1976). *Contra*, Doran v. Home Mart Bldg. Centers, Inc., 233 Ga. 705, 213 S.E.2d 825 (1975).

66. See text accompanying notes 45-48 *supra.*

67. 338 So. 2d 1067 (Fla. 1976).

68. The Florida prejudgment garnishment statute had been declared unconstitutional in 1975. Bunton v. First Nat'l Bank, 394 F. Supp. 793 (M.D. Fla. 1975).

69. 338 So. 2d at 1069, 1071. The court thought that the statute, which did not require prior notice and hearing, would not fit within the *Fuentes* extraordinary situations exception. *Id.* at 1069.

70. *Id.* at 1068.

attachment could be dissolved by the debtor's posting bond,[71] the debtor did not avail himself of this provision. The Florida supreme court stated that the statutory grounds in Florida probably did not fit within the extraordinary situations exception developed by *Fuentes* but refused to rest its decision on this point, noting that subsequent Supreme Court decisions had substantially modified *Fuentes*.[72] The Florida court construed *Mitchell* as constitutionally requiring all five safeguards present in the Louisiana statute and found the Florida statute was constitutionally defective for the following reasons: (1) the writ need not be issued by a judge; (2) when the alleged debt was due, the writ would issue on the conclusory allegations of the creditor; and (3) the statute provided an opportunity for, but did not require, an immediate postseizure hearing.[73]

The third shortcoming found in the Florida statute, the absence of an automatic and immediate postseizure hearing, indicates a significant distortion of *Mitchell*. The United States Supreme Court in *Mitchell* had upheld a law that, like the statute struck down in *Unique Caterers*, did not require a postseizure hearing unless requested by the debtor.[74] The Florida supreme court interpreted *Mitchell* as compelling a postseizure hearing even in the absence of such a request. An even more fundamental flaw in the Florida court's analysis was the determination that *Mitchell* imposed per se constitutional requirements for all prejudgment writs. The court's holding ignored *Mitchell*'s mandate for a balancing of the interests of the debtor and the creditor[75] to determine whether a particular procedure sufficiently minimized the likelihood of mistaken deprivations of property while protecting the creditor's interest in the property.

A mechanical application of *Mitchell* was used to hold the Illinois attachment statute[76] unconstitutional in *Hernandez v. Danaher*.[77] In that case, the Illinois Department of Public Aid (IDPA) filed a complaint charging the debtors with fraudulent concealment of the existence of certain funds for the purpose of continuing to receive public aid assistance. IDPA also filed for attachment of the debtors' credit union funds. Under Illinois law, the court clerk was required to issue the writ after the creditor posted bond and filed an affidavit setting forth one of the conclusory allegations prescribed by statute. The debtor could obtain release of the attached property by filing a double bond or by prevailing at a postseizure hearing. That hearing might be delayed, however, for as long as sixty days after the seizure of the property,[78] and the

71. FLA. STAT. §§76.01-.32 (1975).

72. 338 So. 2d at 1069-70. The court said that the effect of *Mitchell* and *Di-Chem* on the *Fuentes* prior hearing requirement was ambiguous. *Id.* at 1069.

73. *Id.* at 1071.

74. Mitchell v. W.T. Grant Co., 416 U.S. at 610.

75. See text accompanying notes 40-48 *supra*.

76. ILL. REV. STAT. ch. 11, §§1-3, 6, 8, 10, 14 (1973).

77. 405 F. Supp. 757 (N.D. Ill. 1975), *prob. juris. noted sub nom.* Trainor v. Hernandez, 96 S. Ct. 2622 (1976).

78. The hearing, if requested, would be held as the return date of the writ, set by the creditor and required to be not less than 10 nor more than 60 days from the date of the writ. ILL. REV. STAT. ch. 11, §§6, 27 (1973).

hearing in tort cases was limited to determining the potential damages and thus the maximum value of property to be attached. The court found that the statutory procedure violated *Mitchell* for the following reasons: (1) the attachment was not issued by a judge; (2) the writ was issued upon the creditor's conclusory allegations, unsupported by an affidavit of facts; and (3) the debtor had no opportunity for an immediate postseizure hearing at which to challenge the creditor's entitlement to the writ.[79]

The *Hernandez* court, while mentioning the first two defects in invalidating the statute, emphasized the inability of the debtor to effectively challenge the grounds for issuance of the writ of attachment after the property had been seized.[80] Because the *Hernandez* court construed *Mitchell* to represent a limited exception to the *Fuentes* preseizure hearing requirement, the court failed to determine whether the statute fairly balanced competing interests. Instead, the court applied *Mitchell* as if each of the safeguards in the Louisiana statute were constitutionally required.

Balancing the Interests. Other decisions have employed a balancing process to determine the constitutionality of prejudgment seizure procedures. The Louisiana executory process procedure[81] was upheld by the state supreme court in *Hood Motor Co. v. Lawrence.*[82] The challenged procedure allowed a creditor to seize and sell property ex parte to enforce a mortgage or "privilege"[83] on seized property. Prior to seizure the creditor had to submit a petition containing factual allegations, whereupon a judge or clerk could authorize the sale. The writ in *Hood* was signed by a clerk.[84] After seizure of the property, written notice was served upon the debtor, who was then entitled, without posting bond, to an injunction against the sale if any of several statutory grounds was established.[85] Interpreting Court decisions as prohibiting the automatic issuance of an ex parte writ upon the creditor's conclusory allegations, the court concluded that due process did not require that a judge issue the writ but was satisfied if an officer with discretionary powers issued the writ.[86] Although the only issue presented to the court was the constitutionality of a writ issued by a clerk, the court recognized that the validity of the overall procedure depended on its effectiveness in accommodating competing interests.[87] Accordingly, the *Hood* debtors were found to be better protected than the debtors in *Fuentes* and *Di-Chem* by requirements that the petition be supported by facts and that an opportunity be provided for an early postseizure hearing.

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79. 405 F. Supp. at 762.
80. *Id.*
81. LA. CODE CIV. PRO. ANN. art. 2631-2644 (West 1960).
82. 320 So. 2d 111 (La. 1975).
83. LA. CODE CIV. PRO. ANN. art. 2631 (West 1960).
84. 320 So. 2d at 112.
85. LA. CODE CIV. PRO. ANN. art. 2753 (West 1960).
86. 320 So. 2d at 114-16. While not certain that its deicsion would be upheld if appealed, the court noted that the Louisiana executory process provided substantial other safeguards to the debtor's interest and that *Mitchell* required only that a neutral officer issue the writ.
87. *Id.* at 114-15.

The Eighth Federal Circuit in *Guzman v. Western State Bank*[88] more closely applied the *Mitchell* balancing approach and held the prejudgment attachment statute of North Dakota[89] unconstitutional. The *Guzman* debtors had financed the purchase of a mobile home by executing promissory notes, which had been sold to a bank. Increased heating costs resulting from problems in the mobile home's heating system and windows rendered the debtors unable to continue payments on their notes. The creditors sued on the default and applied to attach the mobile home, filing an affidavit supported by other documents that showed the existence of the debt and the default. After the bank posted bond, the writ was issued by the court clerk and the debtors' home was repossessed.[90]

In an extensive opinion, the *Guzman* court examined the North Dakota statute and the circumstances of the case to determine whether the attachment procedure sufficiently minimized the possibility of a wrongful taking while protecting the interests of the creditor.[91] The court found that, even though the affidavit was supported by allegations of facts, the statute was unconstitutional because it failed to require that the supporting affidavit assert that the attachment was necessary to preserve the property interest of the creditor.[92] Since *Mitchell* included in its balancing process the likelihood that the buyer would conceal or transfer the property to the creditor's detriment,[93] the *Guzman* requirement that this specifically be alleged seems to exceed *Mitchell* requirements. This additional requirement is broadly consistent with the balancing process of *Mitchell,* however, inasmuch as the *Guzman* court required that a creditor allege or show some substantial reason before being allowed to deprive a family of its home without prior notice or hearing.

The *Guzman* court did not find issuance of the writ by a court clerk per se violative of due process, but instead found that *Mitchell* required the exercise of judicial discretion to minimize the likelihood of error. According to *Guzman,* the exercise of such discretion could determine whether "the impact on the debtor of even a temporary deprivation of the property outweighs the interest of the creditor or the state in affording the creditor ex parte attachment."[94] Because the North Dakota statute compelled the clerk to issue the writ upon filing of certain papers, the court found the protection afforded the debtor to be insufficient.[95]

88. 516 F.2d 125 (8th Cir. 1975).

89. N.D. CENT. CODE §§32-08-01 to -30 (1976).

90. 516 F.2d at 126-27. The mobile home was seized in early March, when temperatures were still below freezing. *Id.*

91. *Id.* at 128-29.

92. *Id.* at 130. The *Guzman* court was influenced by the *Fuentes* and *Mitchell* statements that an attachment must be based upon more than the conclusory allegations of the creditor. See text accompanying notes 26, 34, 44-46 *supra.*

93. Mitchell v. W.T. Grant Co., 416 U.S. at 608-09.

94. 516 F.2d at 131.

95. *Id.* at 131 & n.7. The *Guzman* court said in dictum that until clarified by the Supreme Court the holdings of *Mitchell* and *Di-Chem* required that a judge issue the writ. The court questioned, however, whether the reasoning behind *Mitchell* required that a judge issue the writ. *Id.* This seems to be a more mechanical interpretation of *Mitchell* than the *Guzman* court applied elsewhere in its analysis.

The most serious deficiency in the procedure assessed in *Guzman* was the requirement that a debtor post bond to obtain a hearing to challenge an attachment. The court reasoned that, since the requirement of a bond could prevent a debtor from contesting attachment of valuable property, this provision undermined the goal of minimizing the impact of a wrongful attachment.[96] Furthermore, the court, citing *Sniadach*, stressed the hardship caused by seizure of a family's home and found that this detriment clearly outweighed any interest that the creditor had in effecting prejudgment seizure without notice or hearing.[97]

The *Guzman* decision represents a faithful application of the *Mitchell* balancing approach to the evaluation of prejudgment seizures of personal property. Unfortunately, many lower court decisions, such as *Unique Caterers* and *Hernandez*, have held that *Mitchell* required five specific safeguards and thus have failed to grasp that *Mitchell* actually required only that procedures adequately balance the interests of the creditor and the debtor.

Real Property Attachment for Nonjurisdictional Purposes

With no Supreme Court decision addressing due process requirements for prejudgment attachment of real property, lower courts faced with this particular problem have divided along two major lines. One line of decisions[98] adheres to the reasoning of the district court decision, summarily affirmed by the Supreme Court in *Spielman-Fond, Inc. v. Hanson's, Inc.*[99] holding that a lien attaching to real property did not constitute a significant taking of property and thus did not invoke due process considerations.[100] The other line

96. 516 F.2d at 131. *Cf.* Boddie v. Connecticut, 401 U.S. 371 (1971) (indigents must be afforded free access to court to obtain divorce).

97. 516 F.2d at 132.

98. *See, e.g., In re* Northwest Homes, Inc., 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975); First Recreation Corp. v. Amorosa, 26 Ariz. App. 477, 549 P.2d 257 (Ct. App. 1976).

99. 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.*, 417 U.S. 901 (1974).

100. *Id.* The Supreme Court decision was handed down shortly after *Mitchell*. For a Supreme Court discussion of the effects of a summary affirmance, see Hicks v. Miranda, 422 U.S. 332 (1975), in which the Court held a lower court in error for disregarding a Supreme Court decision summarily dismissing for want of a substantial federal question an appeal from a state court decision upholding the same statute in light of the same constitutional challenge. There is considerable disagreement over the precedential weight to be given to a summary decision without opinion. Rios v. Dillman, 499 F.2d 329, 334 n.8 (5th Cir. 1974). In Edelman v. Jordan, 415 U.S. 651, 671 (1974), the Supreme Court stated that summary affirmances have less precedential value than an opinion of the Court fully addressing the merits. One circuit has interpreted this as allowing lower courts to reexamine the issue. Jordon v. Gilligan, 500 F.2d 701, 707-08 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). Several other circuits, however, have indicated that *Edelman* means only that the Supreme Court is less bound by its summary decisions. U.S. *ex rel.* Wojtycha v. Hopkins, 517 F.2d 420, 424-25 (3d Cir. 1975); Thonen v. Jenkins, 517 F.2d 3, 7 (4th Cir. 1975); Doe v. Hodgson, 500 F.2d 1206, 1207-08 (2d Cir. 1974). One other circuit had indicated prior to *Edelman* and *Hicks* that a Supreme Court summary affirmance of a lower court is binding on the lower courts. Ahern v. Murphy, 457 F.2d 363 (7th Cir. 1972). The Fifth Circuit has noted that, where the facts of the case summarily affirmed are distinguishable from those in the case under review, the court has only its own "reasoned speculation regarding the legal im-

of lower court decisions finds a significant taking of property when a lien attaches to real property,[101] but these decisions nonetheless demonstrate confusion as to the proper standard required by Supreme Court decisions.

No Taking. In *Spielman-Fond,* a three-judge district court upheld the constitutionality of the Arizona mechanics' and materialmen's lien statute,[102] finding no significant property taking. Liens of creditors who had provided labor and furnished materials had attached to the debtor's mobile home park.[103] Despite the clouds on title and the difficulty of alienation resulting from the liens, a three-judge district court found that the owner was deprived of neither possession nor the ability to sell the property should a willing buyer be found.[104]

Particular features of the case may limit the reach of *Spielman-Fond.* First, the creditors had a prior interest in the attached property because of the labor and materials furnished, which probably increased the value of the land in an amount comparable to the decrease in value due to attachment of the lien. Second, the debtor may have suffered little immediate harm. The owner of the attached land was in the business of leasing mobile home spaces and he continued to lease spaces despite the attachment. Further, since *Spielman-Fond* was decided prior to *Mitchell,* the district court could have found either no significant taking, thus escaping the rigid *Fuentes* prior notice rule, or a significant taking in a situation that probably would not fall within the extraordinary situations exception of *Fuentes.* Given these circumstances, the court was justified in finding no significant taking of property because the debtor was deprived of neither use nor possession and the value of the land was not significantly diminished by the lien.

Notwithstanding these limitations, a Ninth Federal Circuit decision used the *Spielman-Fond* rationale to uphold a prejudgment attachment statute, which subjected real property to a creditor's lien without prior notice or a judicial hearing. In *In re Northwest Homes, Inc.,*[105] the creditor sued the debtor for goods sold and delivered and following the debtor's answer denying the debt, filed the required affidavit, which under the Washington statute[106] compelled

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portance of the differences." Rios v. Dillman, 499 F.2d 329, 334 n.8 (5th Cir. 1974). The Fifth Circuit concluded that the factual similarities between the case under consideration and the related Supreme Court action made the Supreme Court's summary opinion "highly persuasive — if not controlling — authority" which the court was not free simply to disregard. *Id.*

101. *See, e.g.,* United States Gen., Inc. v. Arndt, 417 F. Supp. 1300, 1311-13 (E.D. Wis. 1976) (applied *Mitchell,* but indicated that it was applying *Fuentes* as interpreted by *Di-Chem*); Terranova v. Avco Fin. Serv., Inc., 396 F. Supp. 1402, 1407 (D. Vt. 1975) (commented on the uncertain course of the Supreme Court and the uncertainty that the decision would be upheld); Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975) (applied *Mitchell*); Thompson v. DeHart, 84 Wash. 2d 931, 530 P.2d 272 (1975) (distinguished *Fuentes* and applied *Mitchell*).

102. ARIZ. REV. STAT. ANN. §§33-981 to -1006 (1973).

103. Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. at 997.

104. *Id.* at 999.

105. 526 F.2d 505 (9th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976).

106. WASH. REV. CODE ANN. §§7.12.010-.330 (1973), *as amended by* 1973 Wash. Laws ch. 154, §16.

the court clerk to issue the writ of attachment. The statute required that, after the property had been attached, the creditor demonstrate at an early hearing that the writ was properly issued.[107] Applying *Spielman-Fond*, the court found no significant taking of a property interest and therefore found no need to address due process questions.[108] The court observed in dicta, however, that the Washington statute provided for a hearing much like the Louisiana statute upheld in *Mitchell*.[109] Thus, had this court applied due process to real property attachment, it nonetheless might have validated the Washington procedure. Instead, by finding that a lien on real property was not a significant taking of property, the *Northwest Homes* court foreclosed analysis as to the applicable due process standard.

The *Spielman-Fond* rationale was also applied by the Arizona Court of Appeals in *First Recreation Corp. v. Amoroso*.[110] In a suit on a promissory note, the plaintiff in *Amoroso* sought to attach real property of the debtor. The writ was issued without notice, and no hearing was held either before or immediately after the issuance of the writ.[111] The only method of dissolution available to the debtor was to post bond.[112] The court held that *Spielman-Fond* was controlling and thus found no property interest at stake sufficient to invoke the notice and hearing requirements enunciated by the Supreme Court.

The unfortunate conclusion of these courts that the attachment of a lien to real property does not fall within the ambit of due process probably emanated from pre-*Mitchell* Court decisions, interpreted as allowing little procedural variation to accommodate various property interests affected.[113] Under the balancing test advanced by *Mitchell*,[114] the debtor's clear interest in maintaining a free and unencumbered title to real property obviates any reason for the no taking approach.[115] Thus, applying *Mitchell* in *Northwest Homes* would not necessarily have invalidated the Washington statute, but would have required at least minimal due process protection for owners of real estate. Under the balancing approach, the interest of the real property owner in maintaining

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107. 526 F.2d at 505.

108. *Id.* at 506. Almost one year earlier, the same statute was upheld in the face of a due process attack by the Washington supreme court. The Washington court, however, found that there was a significant taking of property, but that the statute fit within the extraordinary situations exception of *Fuentes*. Thompson v. DeHart, 84 Wash. 2d 931, 935, 530 P.2d 272, 274 (1975).

109. 526 F.2d at 506-07.

110. 26 Ariz. App. 477, 549 P.2d 257 (Ct. App. 1976).

111. *Id.* at 479, 549 P.2d at 258-59.

112. ARIZ. REV. STAT. ANN. §§12-1521 to -1539 (1973), *as amended by* 1976 Ariz. Legis. Serv., ch. 170, §§9-13.

113. As one commentator has explained, *Fuentes* asked only whether there was a significant taking of property that would invoke due process. Under *Mitchell* a second question would be asked: What kind of safeguards does due process require? Pearson (pt. 2), *supra* note 14, at 285.

114. See text accompanying notes 39-40, 44-46 *supra*.

115. *See, e.g.*, Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (D. Me. 1973) (restriction of power to alienate clear title to real property is a taking of property); Clement v. Four N. State St. Corp., 360 F. Supp. 933 (D.N.H. 1973) (impairment of title to real estate triggers due process protection).

clear title, although less important than one's need for continued use and possession of personal goods, would be measured against the creditor's interest in obtaining a lien, an interest equally valuable whether personal or real property is involved. Indeed, even under *Fuentes*, the lesser interest in real property cases would permit less stringent requirements of prior notice and hearing.[116] Under the more flexible *Mitchell* analysis, fewer safeguards would be necessary for the procedure to be held constitutional even in the absence of a prior hearing requirement.[117] Although the Supreme Court has placed considerable emphasis on judicial discretion in issuing the writ[118] and on the ability of the debtor to quickly and effectively challenge any seizure,[119] the debtor's lesser interest in maintaining unencumbered title greatly abates the functional desirability of requiring judicial supervision prior to the attachment. However, the interest of the debtor in clearing title should retain sufficient weight to require an opportunity for an immediate postseizure hearing.

Taking. Illustrating the second approach taken by lower courts in real property attachments is the decision by a three-judge district court in *United States General, Inc. v. Arndt.*[120] The creditor in *Arndt* filed an action to recover from the debtor corporation money owed for services performed. The creditor contemporaneously filed for a writ of attachment by presenting an affidavit consisting of conclusory allegations.[121] After bond was posted, the court clerk, as required by statute, automatically issued the writ.[122] Although allowed to challenge the grounds for issuance of the writ at any time before trial, the debtor instead initiated a separate action in federal court to challenge the constitutionality of the procedure.

The court in invalidating the statute stated that it applied "*Fuentes*, as interpreted in *North Georgia Finishing*."[123] Actually, the court considered only the debtor's property interest and neglected the interest of the creditor. According to the *Arndt* court, the statute failed for the following reasons: (1) the writ could be issued upon conclusory allegations; (2) the security bond required of the creditor was inadequate; (3) there was no opportunity for an immediate hearing; and, most important to the court; (4) the debtor was specifically precluded at the dissolution hearing from challenging the creditor's likelihood of success on the merits.[124] The court's mechanical application of *Mitchell* is amply demonstrated by the conclusion that the procedure was un-

116. Fuentes v. Shevin, 407 U.S. at 86. See text accompanying notes 33-35 *supra*.

117. See text accompanying notes 44-46 *supra*.

118. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 607; Mitchell v. W.T. Grant Co., 416 U.S. at 605-06, 609-10; Fuentes v. Shevin, 407 U.S. at 83-84. See text accompanying note 53 *supra*.

119. Carey v. Sugar, 425 U.S. at 75; North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 606-07; Mitchell v. W.T. Grant Co., 416 U.S. at 606, 610. See text accompanying note 46 *supra*.

120. 417 F. Supp. 1300 (E.D. Wis. 1976).

121. *Id.* at 1306. The creditor had "executed an affidavit stating that the underlying action was one for damages in excess of $500 which grew out of a contractual agreement." *Id.*

122. WIS. STAT. ANN. §§811.01-.26 (West 1977).

123. 417 F. Supp. at 1312.

124. *Id.* at 1312-13.

constitutional simply because no immediate postseizure hearing was required[125] despite the statutory provision for a hearing to vacate or modify the writ within five days of the filing of a motion by the debtor.[126] The *Arndt* court expressed concern that the statute failed to set a time within which the motion must be decided, yet under the Louisiana statute upheld in *Mitchell*, the hearing was not required to be held within a certain time period.[127] Indeed, several Louisiana court decisions prior to *Mitchell* upheld attachments in situations in which four weeks to three months had passed between the motion and the hearing.[128] In this respect, the Wisconsin statute's five-day requirement better protects the debtor's interests.

Notwithstanding this protection of the debtor's interests, the statute failed to allow the debtor to challenge the underlying merits of the creditor's claim that formed the basis for issuing the writ. Thus, the statute largely negated the benefit provided by the opportunity for an immediate hearing. Unlike the statute examined in *Sugar*,[129] the Wisconsin statute could not be interpreted to permit inquiry into the underlying merits of the claim.[130] The *Arndt* court, however, by its mechanical application of *Mitchell* avoided any meaningful evaluation of the statutory accommodation of competing interests.

Another decision following the second approach in real property attachment is *Hutchison v. Bank of North Carolina*,[131] in which a three-judge district court upheld North Carolina's attachment law. The creditor in *Hutchison* brought suit against the debtor for money due on four promissory notes, filed an affidavit alleging fraud by the debtor,[132] and secured a lien on a condominium unit owned by the debtor. The *Hutchison* court held that a lien on real property effected a significant taking of property. It further observed the *Mitchell* focus on the effectiveness of the challenged statute in minimizing the risk of a wrongful taking resulting from an ex parte procedure and simultaneously accommodating the interest of the creditor in gaining possession of the property.[133] The statute under review in *Hutchison* required that the

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125. *Id.*

126. WIS. STAT. ANN. §811.18 (West 1977).

127. LA. CODE CIV. PRO. ANN. art. 3506 (West 1961).

128. *See, e.g.*, Hancock Bank v. Alexander, 256 La. 643, 237 So. 2d 669 (1970) (four weeks from motion to hearing on dissolution); Louisiana Power & Light Co. v. Crescent Properties, Co., 273 So. 2d 48 (La. Ct. App. 1973) (five weeks from motion to hearing on the motion); Victory Elec. Works, Inc. v. Maryland Cas. Co., 140 So. 2d 183 (La. Ct. App. 1962) (hearing held almost three months after motion).

129. N.Y. CIV. PRAC. LAW §§6201-6226 (McKinney 1976). See text accompanying notes 57-58 *supra*.

130. Under WIS. STAT. ANN. §811.19 (West 1977), "the defendant may, by special answer, deny the existence, at the time of the making of the attachment affidavit of the material facts stated therein *except the alleged liability and the amount thereof*." (emphasis added).

131. 392 F. Supp. 888 (M.D.N.C. 1975).

132. The debtor then brought suit in federal court under 42 U.S.C. §1983 (1970), claiming that she had been deprived of property without due process of law. 392 F. Supp. at 891.

133. 392 F. Supp. at 893. The court concluded that despite *Fuentes* and its apparent revival in *Di-Chem*, states may provide for prejudgment seizure without notice and prior hearing because of the state interest in protecting creditors' remedies. *Id.* at 898. The court observed that *Mitchell* and *Di-Chem* repudiated the *Fuentes* extraordinary situations excep-

creditor post bond and allege specific facts to procure the writ. The debtor could gain release of the property by posting bond or by prevailing at a dissolution proceeding to be heard before either a clerk or a judge.[134] The court reasoned that the requirement that the creditor allege supporting facts was an "important, initial step in ensuring against wrongful or abusive use of the process by a creditor."[135] Although the writ was issued by a clerk, the court found that North Carolina law and practice made the clerk more than a functionary, thus providing for the discretion that the Supreme Court emphasized in cases after *Fuentes*.[136] While the creditor in *Hutchison* had no prior interest in the property seized,[137] the court found that, in light of *Di-Chem, Mitchell* did not require that the creditor have a prior interest in the property for the balancing process to apply.[138]

The *Hutchison* decision thus illustrates that application of due process standards does not compel the invalidation of a statutory scheme for attaching liens to real property. Moreover, courts can balance the interests of creditors and debtors by applying due process standards instead of foreclosing inquiry into the accommodation effected by the statute with a finding that a prejudgment lien does not constitute a significant taking of property.

Attachment for Jurisdictional Purposes

When attachment is used to gain jurisdiction over a nonresident defendant or a resident defendant who cannot be found, the seizure serves two functions.[139] First, it allows the acquisition of jurisdiction by an appropriate court, and second, once jurisdiction is obtained, the attached property serves as security for the plaintiff's ultimate recovery. Although few courts distinguish between the two functions,[140] each of the two addresses distinctive interests warranting separate scrutiny under the *Mitchell* balancing test. For example, in the first instance great weight must be accorded to the state's interest in gaining jurisdiction over property within its boundaries. Thus, acquisition of jurisdiction may justify different, less demanding safeguards against wrongful attachment because of the important state interest to be served. On the other

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tion, even though the court mentioned that the statute would fit within the exception. *Id.* at 895. If the extraordinary situations exception allowed seizure without notice or prior hearing under the strict *Fuentes* rule, seizure is certainly allowed under the more relaxed *Mitchell* approach.

134. N.C. GEN. STAT. §§1-440.1-.9 (1974).

135. 392 F. Supp. at 895.

136. *Id.* at 896. See text accompanying notes 34, 53 *supra.*

137. This was not true in *Mitchell,* in which the creditor had a prior interest in the seized property. See text accompanying note 41 *supra.*

138. 392 F. Supp. at 898. See text accompanying note 52 *supra.*

139. *Id.* at 896; Note, *Quasi in Rem Jurisdiction and Due Process Requirements,* 82 YALE L.J. 1023, 1032 (1973).

140. *Compare* Maxwell v. Hixson, 383 F. Supp. 320, 325 (S.D. Tenn. 1974) (foreign attachment serves only to gain jurisdiction), *aff'd,* 96 S. Ct. 1656 (1976) *with* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1129 (3d Cir. 1976) (plaintiff has two interests served: establishing jurisdiction and restraining property for eventual payment of claim) *and* Hutchison v. Bank of N.C., 392 F. Supp. 888, 896 (M.D.N.C. 1973) (distinguishing between the functions).

hand, if jurisdiction can be obtained by other means, such as the use of a long-arm statute or a general appearance of the defendant,[141] the state interest in gaining jurisdiction disappears.[142] In this case, the attachment would serve only as security for the plaintiff's claim and the balancing process thus would dictate greater safeguards for the debtor's interest.

Many lower courts in this area have relied on citations by the Supreme Court in *Fuentes*[143] and *Mitchell*[144] that seemingly refer to the Court's decision in *Ownbey v. Morgan*[145] as approving foreign attachment without prior notice or hearing. The defendant in *Ownbey*, however, challenged, not the constitutionality of the jurisdictional attachment, but rather the requirement that he post bond before he could file a general appearance.[146] Also, since 1921 when *Ownbey* was decided, subsequent changes in the law have cast doubt on its continued validity. Under *Boddie v. Connecticut*[147] whether access to a court can be conditioned upon the payment of a substantial bail is questionable. Further, the decision in *International Shoe Co. v. Washington*[148] gave states a new method of obtaining jurisdiction over many nonresidents that was unavailable at the time of *Ownbey*. Thus, since *Ownbey* was decided, foreign attachment has lost much of its importance as a means of obtaining jurisdiction.[149]

One example of questionable court reliance on *Ownbey* as immunizing foreign attachment from notice and hearing requirements is the decision of a three-judge district court in *Maxwell v. Nixon*.[150] The creditor in *Maxwell* sued for money due on a note and attempted to obtain service of process on the debtor. Following the return of the sheriff stating that the debtor was "not to be found in my county," the writ of garnishment was issued without further allegations by the creditor and without notice to the debtor.[151] Under Tennessee law, the defendant could appear specially and contest the allegation of absence from the jurisdiction that was the basis of the issuing of the writ. The debtor could also obtain release of the garnished wages by posting a bond.[152] Despite possible due process deficiencies, the statute was upheld as constitu-

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141. See text accompanying notes 169-170 *infra*.

142. *See generally* Note, *supra* note 139.

143. Fuentes v. Shevin, 407 U.S. at 83 n.23.

144. Mitchell v. W.T. Grant Co., 416 U.S. at 613.

145. 256 U.S. 94 (1921).

146. *Id.* at 110-12. The bond requirement was eliminated by the legislature prior to the decision of the Supreme Court. Ownbey v. Morgan, 30 Del. (7 Boyce) 297, 323, 105 A. 838, 849 (1917).

147. 401 U.S. 371 (1971) (indigents must be afforded free access to court to obtain divorce).

148. 326 U.S. 310 (1945) (allowing a court to obtain personal jurisdiction over a nonresident who maintained minimum contacts with the state).

149. Jurisdiction over nonresidents is now commonly obtained through the use of so called long arm statutes. Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 763-68 (1973); Note, *supra* note 139.

150. 383 F. Supp. 320 (E.D. Tenn. 1974).

151. *Id.* at 321-22.

152. TENN. CODE ANN. §§23-601 to -665 (1976).

tional. The *Maxwell* court discounted the applicability of *Mitchell*[153] because of the Supreme Court's *Ownbey* citation which, according to the *Maxwell* court, showed the continued vitality of the "rule laid down in Ownbey v. Morgan according due process approval to the use of an attachment without prior notice where the use of the attachment was necessary to the acquisition of jurisdiction."[154]

Although the statute at issue in *Maxwell* might have been upheld under *Mitchell,* substantial doubt exists as to whether the statute could withstand an exacting balancing scrutiny since the creditor in *Maxwell* had garnished the debtor's wages, subjecting the debtor to substantial financial difficulty. As in *Sniadach,* in which wage garnishment necessitated prior notice and hearing because of the potential harm to the debtor,[155] stringent safeguarding of wage garnishment would seem appropriate here even though the state interest in obtaining jurisdiction is also entitled to great weight.

While several other courts similarly have relied on *Ownbey,* the continued effect of these decisions should be very limited. Because most of these decisions arose in[156] or relied on[157] cases in the Third Circuit, the continued vitality of such cases is doubtful in light of the recent Third Circuit decision of *Jonnet v. Dollar Savings Bank*[158] in which the Pennsylvania attachment procedure was held to be unconstitutional. The *Jonnet* decision overruled one prior case[159] and severely limited the future significance of *Ownbey.* In *Jonnet,* the plaintiff filed a complaint alleging that the defendant had failed to honor a mortgage commitment. Several days later, the plaintiff obtained from the court clerk writs of garnishment, which were served on two corporations obliged to make contractual payments to the debtor. Issued without prior notice or hearing, the writs were based on a praecipe that gave no indication of the merits of the plaintiff's claim.[160] Furthermore, neither was a bond required nor was discretion allowed in issuing the writ.[161] The writs could be dissolved only when the defendant posted security.

As the *Jonnet* court observed, the plaintiff in *Ownbey* had questioned only the conditioning of the hearing on the payment of a bond. The court thus concluded that *Ownbey* stood for the proposition that due process did not require

153. 383 F. Supp. at 322-23. The statute's failure to require posting of bond or any allegations for the writ to issue raised questions concerning the applicability of *Mitchell.* The statute upheld in *Mitchell* had required that the creditor post bond and support his allegations with an affidavit of specific facts, but the Court did not hold that these safeguards were constitutionally required. See text accompanying notes 47-48 *supra.*

154. 383 F. Supp. at 325.

155. See text accompanying note 19 *supra.*

156. Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979 (3d Cir. 1972) (upholding Pennsylvania foreign attachment statute after the *Sniadach* decision but before *Fuentes*); Balter v. Bato Co., 385 F. Supp. 420 (W.D. Pa. 1974) (upholding Pennsylvania foreign attachment statute after the *Mitchell* decision but without even mentioning *Mitchell*).

157. Allen Trucking Co. v. Adams, 56 Ala. App. 478, 323 So. 2d 367 (Civ. App. 1975).

158. 530 F.2d 1123 (3d Cir. 1976).

159. Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979 (3d Cir. 1972), *overruled by* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1124 (3d Cir. 1976).

160. 530 F.2d at 1125.

161. PA. R. CIV. P. 1251-1279 (1976).

that notice and a hearing precede foreign attachments. Applying the reasoning of *Mitchell*, the court tested the adequacy of the statute's accommodation of the interests of the parties.[162] The Pennsylvania statute under review in *Jonnet* was found overly protective of the creditor's interests because of the lack of a requirement that specific facts to support the writ be alleged and because the writ was not issued by an officer possessing discretionary powers.[163] Most importantly, the statute failed to provide the defendant any means for promptly contesting the attachment. While the court noted the balancing approach of *Mitchell*,[164] it appeared to apply *Mitchell* as if each of the safeguards were always mandated. Although the court thus ignored the substance of *Mitchell*, *Jonnet* nonetheless represents a major forward step in correctly applying due process protection to foreign attachments.

The *Mitchell* balancing test was more faithfully applied in *Greyhound Corp. v. Heitner*,[165] in which the Delaware supreme court upheld that state's sequestration statute in a stockholders' derivation action. The suit was brought on behalf of the Greyhound Corporation against nonresident defendants who were served under the sequestration statute. Shares of stock and certain contract rights that the defendants held under agreements with Greyhound were seized. The Delaware court, rather than simply applying the safeguards approved in *Mitchell* as a "litmus test,"[166] penetratingly analyzed the statute and found an appropriate balance of the interests of both parties. Referring to *Jonnet*, the *Greyhound* court noted that the creditor had two interests in foreign attachment: to establish jurisdiction and to restrain property for the eventual payment of the judgment.[167] The debtor's interests were safeguarded by the following requirements: (1) a judge controlled the process at all times; (2) the property seized had a value reasonably related to the amount of the asserted claim; (3) notice be given to the debtor immediately following the seizure; (4) before making a general appearance, the defendant could challenge compliance with the rules for issuing the writs; (5) after a general appearance, the defendant's property would be returned unless the plaintiff could show that such a release would render satisfaction of any judgment obtained less likely; and (6) the defendant retained some control over the property seized.[168]

162. 530 F.2d at 1129. Plaintiff's interests were defined as establishing jurisdiction and restraining property for eventual payment of a successfully established claim. Defendant's interests were stated as maintaining control over the use and possession of his property and his ability to conveniently defend his lawsuit. For more on the ability of a state to force a nonresident into an inconvenient court, see Note, *Developments in the Law — State Court Jurisdiction*, 73 HARV. L. REV. 909, 953-55 (1954).

163. 530 F.2d at 1129-30.

164. *Id.* at 1129.

165. 361 A.2d 225 (Del. 1976).

166. *Id.* at 232.

167. *Id.* See text accompanying notes 139-140 *supra*.

168. 361 A.2d at 232-34. The court specifically rejected the defendant's claim that requiring a general appearance before allowing a hearing on the merits of the claim violated due process, stating that a valid public purpose was served by concentrating settlement of claims in one action. *Id.* at 235. The court's rejection of this argument is unfortunate. Although Delaware has an interest in gaining jurisdiction over the person and the property, the Supreme Court has ruled that jurisdiction over the person may be obtained only if that

The court thus concluded that the statute represented a balancing of the interests of the parties and fully comported with due process.

Until recently, lower court decisions in the area of due process requirements of attachment for jurisdictional purposes have generally failed to apply the *Mitchell* balancing test because of their misplaced reliance on ambiguous Court citations to *Ownbey*.[169] The more recent momentum of *Jonnet* and *Greyhound*, however, is toward limiting *Ownbey* and applying the *Mitchell* test to foreign attachment statutes, thus extending protection against deprivation of property without due process of law to nonresidents of forum states. Because of the strength of the state interest in obtaining jurisdiction over nonresidents owning property within the state,[170] the level of due process protection due the nonresident debtor may be less than that afforded residents already subject to the jurisdiction of the state. Thus, in assessing the validity of prejudgment seizures for jurisdictional purposes, the *Mitchell* balancing formula includes not only creditor and debtor interests but also the interest of the state in obtaining jurisdiction.

CONCLUSION

The Mitchell *Safeguards: A Balancing Test, Not a Check List*

The lack of clarity in Supreme Court decisions applying due process concepts to prejudgment seizures has confused the lower courts as to the appropriate standards for determining the constitutionality of statutes authorizing prejudgment seizures.[171] Clearly, any prejudgment seizure statute incorporating all the safeguards of the Louisiana statute upheld in *Mitchell*[172] would be constitutionally secure. Accordingly, as a practical matter many states will adopt statutes incorporating all these provisions to foreclose serious constitutional challenges to the processes authorizing seizures.[173] Whether all five safeguards need be present in every situation, however, has not been answered directly by

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person has certain minimum contacts with the state. International Shoe Co. v. Washington, 326 U.S. 310 (1945). The only contact with Delaware by the defendants in *Greyhound* was stock held in a Delaware corporation. Further, as was noted recently in a decision of the Third Circuit, none of the acts forming the basis of the *Greyhound* suit was performed in Delaware. U.S. Indus. Inc. v. Gregg, 540 F.2d 142 (3d Cir. 1976).

169. See text accompanying notes 140-149 *supra*.

170. At least one commentator has observed that the state interest in obtaining jurisdiction aids individual plaintiffs rather than the general public and is therefore a "public interest of a lower order." Clark & Landers, Sniadach, Fuentes *and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 366 (1973). Also, where other means of obtaining jurisdiction are available, the state interest in seizing property to gain jurisdiction is reduced. Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979, 981-82 (3d Cir. 1972). See text accompanying notes 148-149 *supra*.

171 See text accompanying notes 62-170 *supra*.

172. Those requirements were: (1) bond posting by the creditor; (2) an affidavit supported by an allegation of specific facts; (3) issuance of the writ by a judge having discretionary powers; (4) an immediate postseizure hearing if the debtor moves for it; and (5) possession of the seized property to be regained by the debtor upon posting a bond. LA. CODE CIV. PRO. ANN. art. 3501, 3506-3508, 3571, 3574, 3576 (West 1961).

173. *See, e.g.*, 1976 Fla. Laws ch. 76-19, §1 (to be codified as FLA. STAT. §78.068).

the Supreme Court.[174] A careful reading of *Mitchell* indicates that it does not mandate a mechanical application of certain criteria so that the Louisiana provisions need not be present in every statute. Instead, the Supreme Court has adopted a balancing approach in effectuating the commands of due process.

In developing the balancing test the Court assigned varying weights to the five *Mitchell* safeguards. Most important is the opportunity for an immediate postseizure hearing,[175] because it is the one *Mitchell* provision most inextricably tied to the due process right to be heard.[176] Courts are unlikely to find circumstances balanced in the creditors' favor sufficiently to justify upholding a statute that provides for no postseizure hearing.[177] Indeed, lower court decisions have consistently invalidated statutes that do not provide an opportunity for a postseizure hearing immediately after seizure.[178] Given the critical role of the postseizure hearing, a statute having no other *Mitchell* safeguard could be upheld if the statute under review either contained other safeguards adequately protecting the interests of both parties or applied only to real estate attachment or foreign attachment, which traditionally have been subjected to less demanding procedural requirements.[179]

In the usual attachment and garnishment situation, however, lower courts have required more than a postseizure hearing.[180] At a minimum, these decisions have insisted that the writ be issued by an officer with discretionary power,[181] who may, in some cases, not be a judge.[182] Closely related to issuance by a discretionary officer is the *Mitchell* ingredient of an affidavit alleging

174. Authorities are divided on the question whether any particular safeguards are constitutionally required. See text accompanying note 48 *supra*.

175. See text accompanying notes 118-119 *supra*. Discretionary issuance of the writ also supports the *Mitchell* provision of an affidavit of specific factual allegations. Unless the officer is presented with facts, the discretion may not be fully utilized. Pearson (pt. 2), *supra* note 14, at 298. *Contra*, Scott, *supra* note 14, at 854.

176. *Cf.* Brown v. Liberty Loan Corp., 539 F.2d 1355, 1368-69 (5th Cir. 1976) (upheld Florida postjudgment garnishment procedures primarily because of the prompt availability of a postseizure hearing).

177. *But see* Stanton v. Manufacturers Hanover Trust Co., 388 F. Supp. 1171 (S.D.N.Y. 1975).

178. Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976); Guzman v. Western State Bank, 516 F.2d 125 (8th Cir. 1975); Hernandez v. Danaher, 405 F. Supp. 757 (N.D. Ill. 1975), *prob. juris. noted sub nom.* Trainor v. Hernandez, 96 S. Ct. 2622 (1976); Unique Caterers, Inc. v. Rudy's Farm Co., 338 So. 2d 1067 (Fla. 1976).

179. See text accompanying notes 98-162 *supra*.

180. Although the Court has not yet examined a law providing for an immediate postseizure hearing after a writ was issued by a clerk with discretionary powers, the clear indication from both concurrences and dissents is that the Court would uphold such a law. *See, e.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 611 n.3 (Powell, J., concurring) (issuance by a clerk is allowed since the basic protection for the debtor is supplied by the immediate postseizure hearing before a judge); *id.* at 619 (Blackmun, J., dissenting) (clerk-judge distinction of little value so long as the writ is issued by a court officer not by an agent of the creditor).

181. *See, e.g.*, Guzman v. Western State Bank, 516 F.2d 125 (8th Cir. 1975); Hernandez v. Danaher, 405 F. Supp. 757 (N.D. Ill. 1975), *prob. juris. noted sub nom.* Trainor v. Hernandez, 96 S. Ct. 2622 (1976); Unique Caterers, Inc. v. Rudy's Farm Co., 338 So. 2d 1067 (Fla. 1976).

182. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975); Hood Motor Co. v. Lawrence, 320 So. 2d 111 (La. 1975).

specific facts justifying the issuance of the writ. Few courts have extensively treated this provision, and the specific facts safeguard appears to be less important than discretionary issuance.[183]

Clearly less important in minimizing the danger of a wrongful taking is the requirement that the creditor post bond prior to obtaining the writ. Only if the amount at issue is substantial would most plaintiffs have any difficulty raising the necessary bond. Indeed, three recent cases have upheld attachment laws that contained no provisions for the creditors to post bonds.[184] A bond posting requirement nonetheless provides a fund from which to compensate a debtor for any damage caused by wrongful seizure.

Factors Influencing the Balancing

Even if a statute contains some *Mitchell* safeguards, the facts of a particular case may influence a court to invalidate a prejudgment seizure process inasmuch as concern for the debtor pervades the balancing process. *Sniadach* indicated that procedures permitting the seizure of a person's wages will be intensely scrutinized.[185] Similarly, *Guzman* ruled in favor of a family whose home had been seized without notice, even though the challenged scheme utilized several *Mitchell* safeguards.[186] When necessities such as wages or living quarters are seized by creditors, prejudgment attachment and garnishment may never be allowed absent notice and an opportunity for a prior hearing, because of the debtor's manifest interest in maintaining possession and use.

Another factor that may affect the balancing analysis is the debtor's status as either a person or a business entity. If the debtor is a business, courts as a minimum require that seizure be followed by an opportunity for a hearing.[187] Beyond this threshold requirement, however, the overall effect of the debtor's business identity on the balancing process is uncertain and the question of which of the procedural safeguards will be required remains unanswered. To date, few lower court decisions and only the Supreme Court decisions in *Di-Chem* and *Sugar* have involved corporate debtors. The Court's holding in *Di-Chem* invalidated a clearly inadequate statutory scheme.[188] The decision in *Sugar* indicated that corporations might be entitled to the same due process

183. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975); Unique Caterers, Inc. v. Rudy's Farm Co., 338 So. 2d 1067 (Fla. 1976). *But see* Maxwell v. Hixson, 383 F. Supp. 320 (E.D. Tenn. 1974). Indeed, one commentator has found the protection afforded by this provision to be minimal. Scott, *supra* note 14, at 854-55. Professor Scott indicates that the specific facts requirement will only increase the cost of prejudgment seizure procedures without providing any benefits to the debtor or creditor. *Id.*

184. Maxwell v. Hixson, 383 F. Supp. 320 (E.D. Tenn. 1974) (foreign attachment); Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976) (foreign attachment); Hood Motor Co. v. Lawrence, 320 So. 2d 111 (La. 1975) (seizure and sale of personal property to enforce a mortgage).

185. See text accompanying note 19 *supra.*

186. See text accompanying notes 88-97 *supra.*

187. Carey v. Sugar, 425 U.S. 73 (1976); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). *But see* Stanton v. Manufacturers Hanover Trust Co., 388 F. Supp. 1171 (S.D.N.Y. 1975).

188. See text accompanying notes 51-52 *supra.*

rights accorded individuals.[189] The recent lower court decision in *Stanton v. Manufacturers Hanover Trust Co.*,[190] however, suggests that business defendants might be afforded less protection by procedural safeguards. The court in *Stanton* upheld an attachment for jurisdictional purposes even though the defendant had no opportunity to challenge the attachment prior to a trial on the merits.

Although some decisions in each area of due process application to prejudgment seizures properly embrace the *Mitchell* balancing test, a substantial number of courts have failed to apply the appropriate standard of due process. Recent judicial momentum assessing prejudgment seizure of personal property for jurisdictional and nonjurisdictional purposes indicates that creditors and debtors in the future can expect to find more widespread application of the *Mitchell* balancing test. Yet, while most decisions reviewing statutes allowing prejudgment seizure of personal property have utilized a balancing process, other decisions have misconstrued *Mitchell* and applied it in a mechanical fashion by determining whether the five safeguards are present in the reviewed statute.[191] Another area of judicial bewilderment is attachment for jurisdictional purposes, an area needlessly complicated by Supreme Court citations to *Ownbey* leading many lower courts to summarily reject the applicability of due process to foreign attachment statutes.[192] Recently, however, several courts properly limited *Ownbey* and applied a balancing test to the statute under review.[193] The future of real property attachment is much less certain, federal courts having split on the threshhold issue of whether such a significant property taking is involved as to invoke due process considerations.[194] Among those courts finding a deprivation of property, disagreement has arisen over the appropriate due process analysis, with some courts following *Fuentes* while other courts follow *Mitchell*.[195] This confusion of lower courts in all areas of due process application to prejudgment creditors' remedies will probably continue until the Supreme Court further emphasizes that courts are to employ

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189. Carey v. Sugar, 425 U.S. 73 (1976). See text accompanying notes 56-59 *supra*.

190. 388 F. Supp. 1171 (S.D.N.Y. 1975). There is support, however, for the proposition that businesses must be accorded the same due process rights as nonbusiness debtors. *See* First Recreation Corp. v. Amoroso, 26 Ariz. App. 477, 480, 549 P.2d 257, 260 (Ct. App. 1976); Pearson (pt. 2), *supra* note 14, at 301-02.

191. See text accompanying notes 68-80 *supra*.

192. See text accompanying notes 143-155 *supra*. One decision that applied due process considerations used the *Fuentes* extraordinary situations exception, which really is just another method of exempting the procedure from due process analysis. *See* Usdan v. Dunn Paper Co., 392 F. Supp. 953 (E.D.N.Y. 1975).

193. See text accompanying notes 156-170 *supra*.

194. *Compare In re* Northwest Homes, Inc., 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) (no taking of property to invoke due process considerations) *with* United States Gen., Inc. v. Arndt, 417 F. Supp. 1300 (E.D. Wis. 1976) (three-judge district court applied due process considerations) *and* Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975) (three-judge district court finding a taking and applying due process considerations).

195. *Compare* Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975) (applied *Mitchell*) *with* Thompson v. DeHart, 84 Wash. 2d 931, 530 P.2d 272 (1975) (applied *Fuentes*).

the *Mitchell* balancing test in judging prejudgment remedies. The Court must stress that the *Mitchell* test is not a checklist but a balancing process.

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