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Julian B. McDonnell

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SNIADACH, THE REPLEVIN CASES AND SELF-HELP REPOSSESSION—DUE PROCESS TOKENISM?

JULIAN B. McDONNELL*

Last term, a divided United States Supreme Court invalidated the replevin statutes of Pennsylvania and Florida. In *Fuentes v. Shevin*¹ and *Parham v. Cortese*² (the *Replevin Cases*), the Court held these statutes unconstitutional insofar as they authorized repossession of collateral through state officials before the debtor was notified of the attempted repossession and accorded an opportunity to be heard on the merits of the creditor's claim. The *Replevin Cases* involved typical consumer purchases of household goods,³ and accordingly raised new questions about the basic relationship between secured creditors and consumer debtors—a relationship upon which our consumer credit economy is based. Creditors have traditionally regarded the right to immediate repossession of collateral after determining the debtor to be in default as the essence of personal property security arrangements,⁴ and their standard-form security agreements typically spell out this right. One of the main reasons this pre-judgment procedure is so highly valued is that the threat of repossession is a principal means of obtaining payment on an installment sales contract.⁵

The *Replevin Cases* are also significant in that they constitute another chapter in the current reappraisal, precipitated by *Sniadach*

* Assistant Professor of Law, The University of Georgia School of Law; B.S., Spring Hill College, 1963; LL.B., University of Virginia, 1966.

¹ 407 U.S. 67 (1972).

² 407 U.S. 67 (1972). The appellants also contended that the statutes violated Fourth Amendment protections against unreasonable searches and seizures under cases such as *Camara v. Municipal Court*, 387 U.S. 523 (1967), but the Court did not reach this question, and it will not be discussed here. 407 U.S. at 71 n.2. The standing of repossession under the Fourth Amendment is likewise not considered in this article.

³ In *Fuentes*, the creditor, through a local deputy sheriff, repossessed a gasoline stove and a stereophonic phonograph that had been purchased under a conditional sales contract. The debtor had refused to continue making the installment payments because of a dispute arising over the servicing of the stove. 407 U.S. at 70-71. *Parham* involved the seizure of a bed, a table and other household goods seized under writs of replevin. As in *Fuentes*, the property repossessed in *Parham* had been purchased under conditional sales contracts, and the debtors had fallen behind in their installment payments. *Id.* at 71-72.

⁴ The courts sometimes agree. See *Murdock v. Blake*, 26 Utah 2d 22, 29, 484 P.2d 164, 169 (1971), where the court noted that "the most important remedy available to a secured party is the right to take possession of the collateral following a debtor's default." See also *Goodman v. Schulman*, 144 Misc. 512, 514-15, 258 N.Y.S. 681, 683-84 (N.Y. City Ct. 1932); *Hogan*, *The Secured Party and Default Proceedings Under the U.C.C.*, 47 *Minn. L. Rev.* 205, 211 (1962); and *Comment*, *Nonjudicial Repossession—Reprisal in Need of Reform*, 11 *B.C. Ind. & Com. L. Rev.* 435 (1970).

⁵ For judicial recognition of the frequent use of the self-help procedure see *Southern Indus. Sav. Bank v. Greene*, 224 So. 2d 416, 418 (Fla. Ct. App. 1969).

v. Family Finance Corp.,⁶ of pre-judgment procedures utilized to deny individuals of property and other interests. Following the Supreme Court's holding in *Sniadach* that pre-judgment garnishment of wages without notice or opportunity for hearing violated "the fundamental principles of due process,"⁷ a variety of governmental processes have been successfully attacked as constituting a violation of due process. Summary termination or suspension of entitlements as diverse as welfare benefits⁸ and driving licenses⁹ have been barred. Further, reputation,¹⁰ parenthood,¹¹ and access to the judicial process¹² have all been found by the Court to be interests which—at least in some circumstances—require procedural protection from governmental impairment. Other courts have grappled with a proliferation of suits challenging traditional creditor's remedies ranging from the landlord's distress for rent¹³ to a utility's termination of service on nonpayment.¹⁴

The *Replevin Cases* have clearly extended the scope of *Sniadach*. The question still remains as to what form the *Sniadach* doctrine, as interpreted by the Court in the *Replevin Cases*, will take in the future, and whether the doctrine will be still further extended. The *Replevin Cases* by implication left the door open for the Court to apply *Sniadach* to the "self-help" repossession provisions of the Uniform Commercial Code,¹⁵ and by such application to find this form of pre-judgment seizure violative of the Fourteenth Amendment as the Pennsylvania and Florida replevin statutes had been found to be.

The Pennsylvania and Florida replevin statutes struck down in the *Replevin Cases* authorized repossession of collateral by state officials, usually local sheriffs. This judicial repossession¹⁶ must be dis-

⁶ 395 U.S. 337 (1969).

⁷ *Id.* at 342.

⁸ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁹ *Bell v. Burson*, 402 U.S. 535 (1971).

¹⁰ *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

¹¹ *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹² *Boddie v. Connecticut*, 401 U.S. 371 (1971).

¹³ *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970).

¹⁴ *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972).

¹⁵ Uniform Commercial Code §§ 9-503, -504 (1962 Official Text). Reference is to the 1962 Official Text since the edition served as a model for many state enactments. Only minor differences in repossession procedures are introduced by the 1972 Edition. These differences are noted in connection with the modified provisions. The provisions of § 9-503 are set out in the text at note 70 *infra*.

¹⁶ A typical example is the Florida statute which was struck down by the *Replevin Cases*. Fla. Stat. Ann. § 78.01 (Supp. 1972-1973) provides:

Right to replevin—Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided. Or such person may seek like relief, but with summons to defendant instead of replevy writ in which event no bond is required and the property

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tinguished from the "self-help" repossession provided for in sections 9-503 and 9-504 of the Uniform Commercial Code. Self-help repossession is *private* in the sense that a state statute merely authorizes the creditor, on default of the debtor, to seize the secured collateral.¹⁷ At no time are any judicial or law enforcement officials involved in the repossession, as was the case with the statutes involved in the *Replevin Cases*. Notwithstanding this dissimilarity, the two forms of repossession are similar in one crucially important regard—neither procedure affords the debtor notice of the proposed taking or any opportunity to dispute the merits of the creditor's claim until *after* the property has been repossessed. It is the submission of this article that the similarities between judicial repossession and self-help repossession are by far greater than the differences. It will be argued that this similarity requires similar treatment for self-help repossession under *Sniadach* and the *Replevin Cases*, and a concomitant finding that self-help repossession violates the due process clause of the Fourteenth Amendment.

The contention that self-help repossession is violative of the due process clause of the Fourteenth Amendment is not without its judicial adherents. In *Adams v. Egley*,¹⁸ the United States District Court for the Southern District of California held that self-help repossession, provided for in sections 9503 and 9504 of the California Commercial Code,¹⁹ was unconstitutional, reasoning that *Sniadach* was "a return of the 'entire domain of prejudgment remedies to the long standing

shall be seized only after judgment, such judgment to be in like form as that provided when defendant has retaken the property on a forthcoming bond. . . .

Fla. Stat. Ann. § 78.07 (Supp. 1972-1973) provides:

Bond; Requisites—Before a replevy writ issues, plaintiff shall file a bond with surety payable to defendant to be approved by the clerk in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action.

Fla. Stat. Ann. § 78.08 (Supp. 1972-1973) provides:

Writ; form; return—The writ shall command the officer to whom it may be directed to replevy the goods and chattels in possession of defendant, describing them, and to summon the defendant to answer the complaint.

Fla. Stat. Ann. § 78.13 (Supp. 1972-1973) provides:

Writ; disposition of property levied on—The officer executing the writ shall deliver the property to plaintiff after the lapse of three (3) days from the time the property was taken unless within the three (3) days defendant gives bond with surety to be approved by the officer in double the value of the property . . . , conditioned to have the property forthcoming to abide the result of the action, in which event the property shall be redelivered to defendant.

¹⁷ See Coogan, The New UCC Article 9, 86 Harv. L. Rev. 477, 564 (1973).

¹⁸ 338 F. Supp. 614 (S.D. Cal. 1972), appeal docketed, No. 72-1484, 9th Cir. Feb. 29, 1972.

¹⁹ Cal. Commercial Code §§ 9503-04 (West 1964). These provisions are almost verbatim adaptations of U.C.C. §§ 9-503 and 9-504.

procedural due process principle which dictates that except in extraordinary circumstances, an individual may not be deprived of his life, liberty, or property without notice and hearing.²⁰

Inasmuch as *Adams* has invalidated sections 9-503 and 9-504 of the Uniform Commercial Code, the decision has invited extensive discussion commenting upon the merits of the decision in light of *Sniadach* and the *Replevin Cases*.²¹ A crucial question, as of yet unanswered, concerns the effect of *Adams* on the creditor-debtor relationship: will *Adams* afford the debtor significant due process protections? *Adams* must be carefully re-evaluated in light of this query, since the extension of the *Replevin Cases* to self-help repossession could, from the standpoint of the consumer, provide only token due process protections. It will be submitted that a reduction of due process protection to mere due process tokenism could be effected by a liberal construction of waiver clauses, allowance of only a short time period between notice to the debtor and the actual hearing, or limiting the hearing solely to a determination of the debtor's default.

This article will begin with a discussion of *Sniadach* and the *Replevin Cases*. Then the article will focus on two aspects of *Adams v. Egley*. First, the propriety of extending the scope of the *Replevin Cases* to the self-help repossession sections of the Code will be examined. Second, the extent of due process protection provided by an extension of the *Replevin Cases* to *Adams* will be analyzed, with careful attention given to the potential for limiting this protection through judicial laxity regarding waiver and notice requirements.

I. OPPORTUNITY TO BE HEARD

A. *The Scope of Sniadach*

Prior to *Sniadach* the courts did not appear to be troubled by the constitutional standing of traditional pre-judgment remedies. Justice Holmes wrote in *Coffin Bros. v. Bennett*: "Nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit."²² In *Coffin Bros.*, the Court upheld a Georgia statute empowering the State Superintendent of Banks to issue execution against the property of stockholders of a closed bank when the stockholders failed to pay assessments due on their securities. Similarly, the Court in *Ownbey v. Morgan*²³ sustained a Delaware foreign attach-

²⁰ 338 F. Supp. at 618.

²¹ See, e.g., Uniform Commercial Code Commentary, 13 B.C. Ind. & Com. L. Rev 1503 (1972), and Note, 3 Loyola L.J. 451 (1972).

²² 277 U.S. 29, 31 (1928).

²³ 256 U.S. 94 (1921).

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ment statute requiring the non-resident defendant resisting a \$200,000 claim to post security before he could plead or obtain the release of his stock which had been summarily seized. The Court's assumption regarding the economic position of the party whose property is attached—an assumption that appeared to be an essential part of the Court's reasoning—surfaced in a pregnant aside:

The condition imposed has a reasonable relation to the conversion of a proceeding *quasi in rem* into an action *in personam*; ordinarily it is not difficult to comply with—a man who has property usually has friends and credit—and hence in its normal operation it must be regarded as a permissible condition . . .²⁴

Against this background the Court, in *McKay v. McInnes*,²⁵ needed only a *per curiam* citation of *Coffin Bros. and Ownbey* to support its affirmance of a decision by the Supreme Judicial Court of Maine²⁶ upholding that state's general attachment statute. The statute allowed pre-judgment seizure of property in all types of civil actions without requiring even the posting of security by the plaintiff. Admitting that the procedure deprived the defendant of the use of his property, the Maine Supreme Judicial Court concluded, however, that no deprivation of constitutional rights occurred because the seizure was conditional, temporary, and part of an established legal proceeding.²⁷ *McKay*, then, signified an acceptance by the Supreme Court of the notion that temporary takings of property effected by summary procedures did not constitute unconstitutional deprivations.²⁸

That acceptance, however, did not survive *Sniadach*, which presented a nearly perfect case to deemphasize the distinction protecting temporary deprivations from attachment on constitutional grounds. That case presented not a stockholder resisting a claim of a creditor or

²⁴ *Id.* at 111 (emphasis added).

²⁵ 279 U.S. 820 (1928).

²⁶ 127 Me. 110, 141 A. 699 (1928).

²⁷ *Id.* at 116, 141 A. at 702-03. The Maine Court concluded:

[D]eprivation does not require actual physical taking of the property or thing itself. It takes place when the free use and enjoyment of the thing or the power to dispose of it at will are affected.

But, although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of the property contemplated by the Constitution.

Id. (emphasis added).

²⁸ For a further discussion of the "temporary deprivation" concept see *Shell Oil Co. v. Milne*, 246 A.2d 837 (Vt. 1968), and *Byrd v. Rector*, 112 W. Va. 192, 163 S.E. 845 (1932). See also Note, Attachment and Garnishment. Constitutional Law, Due Process of Law, 68 Mich. L. Rev. 986, 992 (1970).

regulatory agency, but a worker resisting the pre-hearing garnishment of her wages by a finance company. Justice Douglas' opinion for the Court illustrated that the freezing of the defendant's wages by summary judicial process constituted a "taking" of property under the Due Process Clause even though it was temporary in nature. Drawing on both congressional investigations and law review commentary, he stressed the hardship imposed by the wage garnishment procedure which gives the creditor leverage over the only income of the average debtor.²⁹ Since the garnishment is capable of driving "a wage-earning family to the wall," he concluded that it was an "obvious" taking of property under the Fourteenth Amendment.³⁰

Justice Harlan was also convinced as to the constitutional inadequacy of prejudgment garnishment procedures, but for different reasons. Casting aside *McKay* as an "unexplicated per curiam,"³¹ he argued that prior cases involving adequacy of service³² and administrative procedures³³ established, except where special governmental interests were present, that opportunity for hearing was required before any taking of property not de minimis in nature. Such a procedure was "part of the Anglo-American legal heritage"³⁴ and was aimed at establishing "the validity, or at least the probable validity, of the underlying claim" before depriving the debtor of his property.³⁵

Justice Harlan's concurrence, explicating his view of the doctrine of due process as established by precedent, appears to have been prompted in large measure by the only dissent in *Sniadach*, that of Justice Black. Any attempt to give content to the Due Process Clause apart from the specifics of the Constitution, concluded Justice Black, amounted to invocation of "Natural Law."³⁶ Stressing that Mrs. Sniadach had not shown that the garnishment had imposed hardship on her personally, he was content with the distinction between temporary and constitutional takings of property propounded by the Maine court in *McKay*.³⁷

The language of the *Sniadach* opinion produced predictable and

²⁹ Justice Douglas reasoned: "The leverage of the creditor on the wage earner is enormous." 395 U.S. at 341. He concluded that there were many "grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking." *Id.* at 340.

³⁰ *Id.* at 341-42.

³¹ *Id.* at 344 (concurring opinion).

³² *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

³³ *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126 (1941); *United States v. Illinois Cent. R. Co.*, 291 U.S. 457 (1934); *Londoner v. City & County of Denver*, 210 U.S. 373 (1908).

³⁴ 395 U.S. at 343.

³⁵ *Id.*

³⁶ *Id.* at 351 (dissenting opinion).

³⁷ *Id.* at 348-49.

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a sharp disagreement as to its meaning and implications. Some lower courts read the case as applying only to wage garnishments and similar situations involving "special irreversible economic hardships."³⁸ This view enabled them to sustain replevin statutes³⁹ and garnishments unrelated to wages.⁴⁰ On the other hand, several courts, stressing Justice Harlan's concurrence, viewed *Sniadach* as a general mandate for notice and hearing before any taking of property, absent special governmental interests. These courts applied notice and hearing requirements in cases dealing with garnishments of bank accounts⁴¹ and receivables⁴² as well as with replevin and similar statutes.⁴³ Still other tribunals attempted to follow a middle course, finding the decision applicable only when necessities of life are threatened, but broadly defining necessities to embrace most consumer possessions.⁴⁴

The *Replevin Cases* provided the Supreme Court with an excellent opportunity to delineate those circumstances to which *Sniadach* should

³⁸ 300 West 154th St. Realty Co. v. Department of Buildings, 26 N.Y.2d 538, 260 N.E.2d 534, 311 N.Y.S.2d 899 (1970). In this case, the Board of Health of the City of New York ordered, by statutory authority, a tenant to pay over a certain amount of his rent to the Board to abate a nuisance in the tenant's apartment, i.e., to repair a broken toilet. The landlord was not given an opportunity to assert his non-liability as to the nuisance until after the rents had been turned over to the Board. The New York Court of Appeals rejected the landlord's claim that the extrajudicial collection of rent violated his right to due process of law, holding that "[t]he instant procedure involves none of the special irreversible economic hardships requiring prior judicial proceedings, as does wage garnishment . . ." Id. at 544, 260 N.E.2d at 537, 311 N.Y.S.2d at 903.

³⁹ Brunswick Corp. v. J&P Inc., 424 F.2d 100 (10th Cir. 1970). Also in this category are two three-judge court rulings: Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970), and Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), both of which were reversed in the *Replevin Cases*.

⁴⁰ E.g., TermPlan Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969); Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971).

⁴¹ Larson v. Fetherston, 44 Wisc. 2d 712, 172 N.W.2d 20 (1969).

⁴² Jones Press, Inc. v. Motor Travel Serv., Inc., 286 Minn. 205, 176 N.W.2d 87 (1970).

⁴³ Randone v. Superior Court, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (attachment); Blair v. Pitchess, 5 Cal. 3d. 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (claim and delivery).

⁴⁴ E.g., Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970). In *Laprease*, the plaintiff had purchased a bed and mattress, a chest, a dinette set, and other household furnishings from the defendant under a conditional sales contract. The plaintiff defaulted on her payments, and the defendant sought to repossess the property, agreeing, however, to hold seizure in abeyance if the plaintiff would make certain payments on the contract. The plaintiff sought a temporary restraining order and an injunction, alleging that she was unable to make the stipulated payment and consequently was in danger of having the property in question repossessed by the defendant.

The United States District Court for the Northern District of New York held that the prehearing seizure of the property involved, authorized by statute, violated the due process clause. The court reasoned that "[b]eds, stoves, mattresses, dishes, tables and other necessities for ordinary day-to-day living are, like wages in *Sniadach*, a 'specialized type of property presenting distinct problems in our economic system,' the taking of which on the unilateral command of an adverse party 'may impose tremendous hardships' on purchasers of these essentials." Id. at 722.

apply. Justice Stewart, writing for the majority, reasoned that "[a]ny significant taking of property by the State is within the purview of the Due Process Clause."⁴⁵ Further, *Sniadach* was not a "radical departure from established principles of procedural due process."⁴⁶ Although implicitly acknowledging that many prior cases had limited *Sniadach* according to the importance of the articles of property replevied, the Court concluded:

No doubt, there may be many gradations in the "importance" or "necessity" of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of "property" generally.⁴⁷

Hence, according to the *Replevin Cases*, the Court felt that it was not the character of the property but the importance of "[a] fair process of decision-making" which brought the constitutional principle of due process into operation.⁴⁸ Only by testing the validity of the creditor's claim through notice and opportunity for hearing could the debtor receive protection from unfair or mistaken deprivations. Bonding requirements at most tested only the strength of the creditor's belief in his possession. Prior hearings should and would be required before any deprivation occurred—even one temporary in nature—except in extraordinary situations where prompt action is needed to "secure an important governmental or general public interest"⁴⁹ and strict control over the summary seizure power is maintained by public officials.⁵⁰ Typical replevin statutes serve no such interest, the Court concluded, inasmuch as they are concerned with "private gain" and the minimization of creditor costs.⁵¹

Justice White, dissenting, saw an entirely different constitutional and economic landscape.⁵² Past cases, he wrote, "provide no automatic

⁴⁵ 407 U.S. at 86.

⁴⁶ *Id.* at 88.

⁴⁷ *Id.* at 89-90.

⁴⁸ *Id.* at 81.

⁴⁹ *Id.* at 91.

⁵⁰ *Id.*

⁵¹ *Id.* at 92 & n.29.

⁵² Justice White was joined by Chief Justice Burger and Justice Blackmun. Justices Powell and Rehnquist took no part in the case. The dissent also argued that since the plaintiffs had adequate remedies at law in proceedings that were still pending in the state courts, under *Younger v. Harris*, 401 U.S. 37 (1971), the district courts' judgments should have been vacated. 407 U.S. at 99. The majority rejected this view, arguing that *Younger* was not applicable insofar as the appellants had sought only declaratory relief, not injunctions against pending or future state court proceedings. *Id.* at 71 n.3.

test for determining whether and when due process of law requires adversary proceedings."⁵³ The seller as well as the buyer has property interests to be protected "until the purchase price is fully paid, *the seller early in the transaction often having more at stake than the buyer.*"⁵⁴ To Justice White, the question should be only whether or not the buyer has failed to make his payments; if not, "it would seem not only 'fair,' but essential that the creditor be allowed to repossess."⁵⁵ It is unlikely that the creditor will be mistaken or unfair because it is proper to rely on the accuracy and fairness of the creditor's answer to this one factual question—i.e., whether the debtor has defaulted—since "dollar and cents considerations weigh heavily against false claims of default."⁵⁶ Accordingly, Justice White would sustain those replevin statutes under which the collateral is merely "placed in custody and immobilized" pending final determination of the creditor's claim.⁵⁷ In short, the minority is willing to permit temporary deprivations in circumstances where the probability of unfair claims is low and both creditor and debtor have economic interests in the property.

In sum, the *Replevin Cases* did not fully resolve the diverse interpretations *Sniadach* engendered. However, with the decision in *Adams v. Egley*,⁵⁸ the crucial area of dispute appears to have shifted from judicial repossession embodied in replevin statutes to the self-help provisions of the Uniform Commercial Code. At this point, then, the mechanics of self-help repossession must be explained to facilitate a complete understanding of *Adams* and the questions and problems that that case may raise.

B. *The Process of Self-help Repossession and Adams v. Egley*

The legal framework governing most self-help repossessions is established in Part 5 of Article 9 of the Uniform Commercial Code. Section 9-503 provides:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of peace or may proceed by action.⁵⁹

⁵³ *Id.* at 101.

⁵⁴ *Id.* at 99 (emphasis added).

⁵⁵ *Id.* at 100.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 338 F. Supp. 614 (S.D. Cal. 1972).

⁵⁹ U.C.C. § 9-503.

The Code itself does not require any notice to the debtor prior to the repossession.⁶⁰ The right to recapture arises automatically upon "default," a term which the Code does not attempt to define. In practice, however, the creditor will normally send a series of notices demanding payment before declaring the entire debt due and proceeding to seize the collateral. Following repossession, the secured party may dispose of the collateral at public or private sale. All aspects of this sale must be "commercially reasonable,"⁶¹ but the Code does not impose a definition of commercial reasonableness any more demanding than "conformity with reasonable commercial practices among dealers in the type of property sold."⁶² Except where the collateral is perishable or threatens to decline rapidly in value, the secured party must send the debtor "reasonable notification" of the time and place of the proposed public sale or of the time after which a private sale is to be made.⁶³ The debtor may then redeem the collateral before such sale by tendering fulfillment of all obligations,⁶⁴ or may seek to have the disposition "ordered or restrained on appropriate terms and conditions" if the secured party fails to comply with the statutory rules.⁶⁵ In addition, the debtor may seek damages for loss caused by non-compliance with these rules.⁶⁶ If a debtor is able to establish a violation of the statutory repossession procedures he is automatically entitled to "the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price."⁶⁷

The Code's repossession framework is designed to give flexibility to the creditor. The crucial term "default" is normally defined in the security agreement prepared by or on behalf of the creditor.⁶⁸ Along with failure to make scheduled payments, other grounds such as general insecurity are typically stated. Unlike the replevin statutes struck down in the *Replevin Cases*, the Code does not require a posting of security prior to seizure, nor does it provide the debtor alleging wrongful repossession a method of obtaining return of the property pending a trial of his claim. Following the seizure, the financier chooses the method of disposition subject, under section 9-504, only to the general standard of commercial reasonableness.⁶⁹

⁶⁰ *Weaver v. O'Meara Motor Co.*, 452 P.2d 87 (Alas. 1969); *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 7 U.C.C. Rptr. 952 (Tex. Civ. App. 1970).

⁶¹ U.C.C. § 9-504.

⁶² U.C.C. § 9-507(2).

⁶³ U.C.C. § 9-504(3).

⁶⁴ U.C.C. § 9-506.

⁶⁵ U.C.C. § 9-507.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See 2 W. Willier & F. Hart, *Forms and Procedures Under the Uniform Commercial Code* ¶ 92.40 (1971).

⁶⁹ U.C.C. § 9-504(1).

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From the above outline, it would appear that self-help repossession is in every sense "private" and that the state, at most, is no more than a neutral observer. The court in *Adams v. Egley*, however, was not persuaded by this proposition. In *Adams*, the plaintiff borrowed a sum of money from a bank and executed a promissory note and security agreement on several automobiles in favor of the bank. The terms of the security agreement provided that

the secured party shall also have all of the rights and remedies of a Secured Party under the California Uniform Commercial Code Without limiting the generality of the foregoing, upon the occurrence of any such event of default the Secured Party is entitled to take possession of the vehicle and to take such other measures as Secured Party may deem necessary for the protection of the vehicle.⁷⁰

Subsequently, the plaintiff failed to make the installment payments required by the promissory note and the bank then took possession of two of the vehicles that had served as security under the security agreement. The automobiles were ultimately sold by the bank at a private sale.⁷¹

The plaintiff in *Adams* argued that sections 9503 and 9504 of the California Commercial Code,⁷² providing for summary repossession of secured property, authorized an unconstitutional taking of property without due process of law.⁷³ The defendant, on the other hand, contended that the alleged wrongful acts did not come within the purview of the Fourteenth Amendment inasmuch as "state action" was not involved. This was true, the defendant creditor argued, because the self-help repossession utilized was based on a private contract whose terms were wholly self-executing, unlike the wage garnishment procedure in *Sniadach* which required a court order.⁷⁴

The *Adams* court was not persuaded by the defendant's arguments. Conceding that the repossessions complained of were ostensibly

⁷⁰ 338 F. Supp. at 616.

⁷¹ *Id.* The other plaintiff in the consolidated action had borrowed two separate sums of money from a credit union to purchase a truck and an automobile. With both loans, the plaintiff executed promissory notes and security agreements, pledging the truck and automobile as security. The terms of both agreements provided that "in the event of default of any term or condition of this security agreement, or the promissory note aforesaid, Secured Party shall be entitled to immediate possession of said . . . property according to law." *Id.* The credit union repossessed the automobile and truck after the plaintiff failed to meet his required payments.

⁷² Sections 9503 and 9504 of the California Commercial Code (West 1964) are, with a few exceptions, verbatim adoptions of §§ 9-503 and 9-504 of the Uniform Commercial Code.

⁷³ 338 F. Supp. at 617.

⁷⁴ *Id.*

private acts authorized by contract, the court nevertheless concluded that the self-help repossession statute had a significant influence on the provisions of that contract and argued that the defendant creditors were " 'persuaded or induced to include' repossession by the fact that such repossession was permitted by statute."⁷⁶ Based on these observations, the *Adams* court reasoned that the

Commercial Code sections set forth a state policy, and the security arguments upon which the instant actions rest, whose terms are authorized by the statute and which incorporate its provisions are merely an embodiment of that policy. It is therefore apparent that the acts of repossession . . . are sufficient state action to raise a federal question.⁷⁶

Overcoming this preliminary hurdle, the *Adams* court then concluded that *Sniadach* necessitated a finding that the self-help repossessions in question violated the due process clause of the Fourteenth Amendment.⁷⁷

Since the application of *Sniadach* to self-help repossession appears to turn solely on the question of state action,⁷⁸ this portion of the *Adams* holding must be examined in more detail. The court's state action analysis was based on *Reitman v. Mulkey*.⁷⁹ In *Reitman*, a provision of the California Constitution prohibited any restriction on the right of a person to sell property to any other person he might choose.⁸⁰ The United States Supreme Court affirmed an opinion of the California Supreme Court that found the constitutional provision to be a violation of the due process clause of the Fourteenth Amendment.⁸¹ Examining the potential impact of the constitutional provision, the Court argued that the intent of the section was to authorize racially discriminatory behavior in the housing market and that a basic policy of the state now sanctioned this right to discriminate. Based on this observation, the Court concluded that the constitutional provision would "significantly encourage and involve the state in private dis-

⁷⁶ *Id.*

⁷⁶ *Id.* at 618.

⁷⁷ See text at note 18 *supra*.

⁷⁸ See Coogan, *The New UCC Article 9*, 86 *Harv. L. Rev.* 477, 564 (1973).

⁷⁹ 387 U.S. 369 (1967).

⁸⁰ Art. I, § 26, of the California Constitution provides that

[n]either the state nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

⁸¹ 387 U.S. at 381.

criminations" so as to constitute state action under the Fourteenth Amendment.⁸²

Any analysis of state action, as the Court in *Reitman* noted, would be incomplete without a discussion of *Burton v. Wilmington Parking Authority*.⁸³ In *Burton*, a municipal parking authority constructed a public parking facility with cash grants from the municipality and the proceeds from the issuance of revenue bonds. To help meet debt service requirements, the authority leased a portion of the premises to a corporation to be used as a restaurant. The authority agreed, among other things, to complete construction of the facility including decorative finishings such as ceramic tile floors and wrought iron railings. Further, the authority agreed to furnish heat, gas service and all necessary structural repairs at its expense.⁸⁴

After the parking facility was constructed and the restaurant was open for business, the plaintiff in *Burton* was denied service in the restaurant on the basis of his race. The United States Supreme Court, holding that the alleged acts of discrimination fell within the purview of the Fourteenth Amendment, reached significant conclusions regarding state action. The Court reasoned that a determining test for the recognition of state action would be a difficult, if not impossible, task,⁸⁵ and that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."⁸⁶ Analyzing the relationship between the restaurant and the parking authority, the Court found significant state action from the fact that the authority had "elected to place its power, property and prestige"⁸⁷ behind the acts of discrimination. State action, then, in terms of *Burton*, is the aggregate of the different factors of state involvement.⁸⁸

In the context of *Adams* and self-help repossession, *Reitman* and *Burton* are not without significance. These two latter cases stand for the proposition that state action will not turn on the presence or absence of active state participation; on the contrary, state action will be found where a state, through statutory law, encourages an activity or places its governmental power and prestige behind an activity or practice.⁸⁹

⁸² *Id.*

⁸³ 365 U.S. 715 (1961).

⁸⁴ *Id.* at 719-20.

⁸⁵ *Id.* at 722.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *Developments in the Law, Equal Protection*, 82 Harv. L. Rev. 1067, 1069 (1969).

⁸⁹ See also *Peterson v. City of Greenville*, 373 U.S. 244 (1963), and *Lombard v.*

In light of the above considerations, it is submitted that reliance by the *Adams* court on the state action principles enunciated in *Reitman* was not misplaced. In both cases active state participation was lacking, but the vice in *Adams* was the same as that in *Reitman*—the authorization and encouragement of an activity or practice by state policy embodied in statutory law. To conclude that the state action principles enunciated in the civil rights context of *Reitman* are inapplicable to the debtor-creditor relationship would require accepting two separate state action tests under the Fourteenth Amendment and an anomalous hierarchy of constitutional rights in which equal protection claims would enjoy precedence over due process claims.⁹⁰

II. MINIMUM DUE PROCESS PROTECTIONS—DUE PROCESS TOKENISM

As the above analysis suggests, it would not be unreasonable for the Supreme Court to conclude that self-help repossession, as embodied in section 9-503 of the Uniform Commercial Code, constitutes sufficient state action so as to bring the practice within the purview of the due process clause of the Fourteenth Amendment. Such an extension of *Sniadach* and the *Replevin Cases*, however, would not necessarily afford a consumer debtor protections thought to be the essential requisites of procedural due process. Token due process protections in the *Adams* context could be effected by judicial and legislative acceptance

Louisiana, 373 U.S. 267 (1963). See also *Bullock v. Carter* 405 U.S. 134 (1972), and *Gray v. Sanders*, 372 U.S. 368 (1963).

Last term, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the Supreme Court held that the granting of a liquor license to a private club and the attendant regulation by state alcohol control authorities did not constitute state action such as would subject the club to the equal protection restrictions of the Fourteenth Amendment. For a discussion of *Moose Lodge* see *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 70 (1972).

⁹⁰ *Contra*: *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972), where the court, in a fact situation identical to that in *Adams*, concluded that §§ 9503 and 9504 of the California Commercial Code did not embody the requisite state action required for a violation of the due process clause of the Fourteenth Amendment. The court in *Oller* concluded that *Reitman* was inapplicable because "[t]he historical, legal and moral considerations fundamental to extending federal jurisdiction to meet racial injustices are simply not present in the instant case." *Id.* at 23. See also *McCormick v. First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971). Other lower federal courts have refused to apply *Reitman* to the Code's self-help repossession provisions on the ground that these provisions represent a codification of long-standing common law doctrine rather than a sudden intervention as in *Reitman*. E.g., *Kirksey v. Theilig*, 351 F. Supp. 727 (D. Colo. 1972); *Greene v. First Nat'l Exch. Bank*, 11 U.C.C. Rptr. 367 (W.D. Va. 1972). This reasoning appears defective because: (1) it confuses consideration of discriminatory intent under the Equal Protection Clause with the threshold question of whether state action is present; (2) a right of self-help repossession was not recognized in our system until the nineteenth century. 2 G. Gilmore, *Security Interests in Personal Property* § 44.1 (1965).

of liberal waiver provisions, insufficient time spans between notice and hearing, and hearings limited solely to the issue of debtor default.

A. Waiver

In the *Replevin Cases*, the contract signed by one of the debtors provided that "in the event of default of any payment or payments, Seller at its option may take back the merchandise"⁹¹ Since, the creditor argued, the debtor had signed the agreement containing this clause, she had waived her procedural due process rights and could not protest the pre-judgment repossession.

The Court, however, was of a contrary opinion and concluded that the debtor's due process rights had not been waived. In reaching this position, the Court made several significant observations:

There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of sale. The [creditor] made no showing whatever that the [debtors] were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.⁹²

Concluding that the alleged waiver had not been "voluntarily, intelligently, and knowingly" made, the Court found that the debtor had not waived her procedural due process rights.⁹³

Notwithstanding the fact that the debtors in the *Replevin Cases* had been found not to have waived their due process rights, the Court did not conclude that waiver was impossible in the debtor-creditor context.⁹⁴ Further, Justice White pointed out that it would be relatively

⁹¹ 407 U.S. at 94. This clause, part of a printed form contract, appeared in small type and was unaccompanied by any explanation of the meaning of the clause. Id.

⁹² Id. at 95.

⁹³ Id. The Court pointed out that the language of waiver provisions must at least be "clear," and that the conditional sales contracts did not include any reference to a waiver of notice and hearing, nor did the contracts "indicate how or through what process—final judgment, self-help, prejudgment replevin with a prior hearing, or pre-judgment replevin without a prior hearing—the seller could take back the goods." Id. at 95-96. Therefore the Court concluded that the above language did not waive the debtors' constitutional rights. Id.

⁹⁴ See also *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), where the Court upheld a confession of judgment procedure that did not include notice to the debtor. The Court in the *Replevin Cases*, however, argued that *Overmyer* was inapplicable since the confession of judgment provision in that case had been specifically bargained for by two corporations during the course of business negotiations and was therefore not a "contract of adhesion." 407 U.S. at 95.

simple for creditors to utilize repossession by clearly stating in the credit instrument that the goods could be seized without a hearing or without employing the judicial process at all.⁹⁵

It would appear, then, that while the self-help repossession provisions of section 9-503 of the Code, absent provisions for notice and hearing, could be declared a violation of the due process clause of the Fourteenth Amendment, the possibility of waiving these due process rights could effectively limit the beneficial features of an application of *Sniadach* and the *Replevin Cases* to *Adams*.⁹⁶ However, the waiver argument, as the *Adams* court recognized, can be severely limited by the relationship between the debtor and his creditor.⁹⁷ The *Adams* court found it necessary to distinguish a waiver reached through bargaining by parties of equal strength from a situation involving a creditor economically stronger than his debtor so as to be able to dictate contractual terms through a standard form contract on a take-it-or-leave-it basis; in the latter case the *Adams* court found an ineffective waiver.⁹⁸

As *Adams* indicates, the scope of waiver of procedural due process rights in the self-help repossession context is unclear at best. How the Supreme Court would resolve the question is also unclear, but the Court has considered the waiver conundrum. In *D.H. Overmyer Co. v. Frick Co.*,⁹⁹ the Court held a confession of judgment provision in a contractual agreement between a corporate debtor and a corporate creditor valid inasmuch as the waiver had been "voluntarily, intelligently, and knowingly made."¹⁰⁰ In *Overmyer*, the Court stressed that the waiver was the product of negotiated bargaining between corporate parties of relatively equal economic strengths. However, the Court in dictum noted that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the . . . [confession of judgment] provision, other legal consequences may ensue."¹⁰¹ Significantly, the *Replevin Cases* also noted that unequal bargaining power between the parties could destroy the effectiveness of a purported waiver of procedural due process rights.¹⁰²

⁹⁵ *Id.* at 102.

⁹⁶ Cf. Coogan, *The New UCC Article 9*, 86 *Harv. L. Rev.* 477 (1973). The author also concludes that "the debtor in an Article 9 transaction may well be put on notice by the terms of his security agreement that, in the event of defaults the creditor can repossess under 9-503 without any notice or hearing." *Id.* at 565.

⁹⁷ 328 F. Supp. 614 (1972).

⁹⁸ *Id.* at 620.

⁹⁹ 405 U.S. 174 (1972).

¹⁰⁰ *Id.* at 187.

¹⁰¹ *Id.* at 188.

¹⁰² 407 U.S. at 95. For other cases finding a purported contractual waiver ineffective see *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970), and *Laprease v.*

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Notwithstanding the trend in judicial thinking that increasingly appears to support the proposition that waivers of procedural due process rights should be disallowed where there "is a great disparity in bargaining power,"¹⁰³ the Supreme Court has not ruled out the possibility of effective waiver provisions. Should such provisions be ruled permissible, the application of the *Replevin Cases* to *Adams* would afford a consumer debtor only token protections in the adhesion contract situation, characterized by parties of relatively unequal economic strengths and a lack of meaningful negotiation and bargaining. If the debtor could be forced to waive his procedural due process rights through the utilization of an ordinary standard form contract, the application of *Sniadach* and the *Replevin Cases* to *Adams* would be of limited value.

B. Notice and Hearing

As to the form and substance of the notice and hearing requirement, the Court in *Sniadach* made this observation:

[D]ue process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use.¹⁰⁴

The Court in the *Replevin Case* did not expand on what the *Sniadach* test would require beyond a statement that a hearing must provide a "real test."¹⁰⁵ The Court did conclude, however, that the substantive hearing requirements could be satisfied by numerous variations determined through the legislative process.¹⁰⁶

Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970). See also Coogan, *The New UCC Article 9*, 86 Harv. L. Rev. 477, 565-66 (1973), and Uniform Commercial Code Commentary, 13 B.C. Ind. & Com. L. Rev. 1503 (1972).

¹⁰³ 405 U.S. at 188.

¹⁰⁴ 395 U.S. at 343. See *Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306 (1950). In *Mullane*, the bank established a common trust fund, with 113 trusts participating. Upon termination of an accounting period, the bank petitioned the Surrogates' Court for settlement of its account as a common trustee. Many of the beneficiaries of the trusts involved were not residents of the state of New York, but the only notice of the bank's application given beneficiaries was by publication in a local newspaper in accordance with state banking law.

The United States Supreme Court held that notice by publication was sufficient as to those beneficiaries whose whereabouts were unknown. However, as to beneficiaries whose addresses were known to the trustee, notice by publication was insufficient and a violation of due process of law because "under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319. See also *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 152-53 (1941), and *United States v. Illinois Cent. R. Co.*, 291 U.S. 457, 463 (1934).

¹⁰⁵ 407 U.S. at 97.

¹⁰⁶ *Id.* at 96-97.

While the Court has not clearly delineated notice and hearing requirements in the debtor-creditor contract, it has made significant pronouncements, in other areas, as to the required length of time between notice and hearing and the structural form that a required hearing could take. In *Lindsey v. Normet*,¹⁰⁷ the Court upheld an Oregon statute that provided that a hearing on a landlord's right to retake leased premises from a defaulting tenant occur not later than six days after service of a complaint on the defaulting tenant. The statute also provided in effect that the triable issues of fact at the hearing would be limited to a determination as to the defaulting tenant's non-payment of rent. These two features of the statute, the plaintiff tenants argued, violated their procedural due process rights, since a six-day notice requirement would not afford a defaulting tenant an adequate opportunity to secure legal counsel, and a hearing limited to the issue of tenant default would not permit the tenant to allege breaches of the lease by the landlord.¹⁰⁸

The Court was not persuaded by the plaintiff's reasoning, and concluded that neither the six-day notice provision nor the lack of a full evidentiary hearing violated the due process clause of the Fourteenth Amendment. On the first issue, the Court was not convinced that the tenant's interests would be adversely affected by a six-day notice requirement since the tenant would always know whether or not he was in possession of the premises and in default on rental payments.¹⁰⁹ As to the scope of issues that could be litigated at the required hearing, the tenant would not be denied due process of law inasmuch as the tenant was not foreclosed under Oregon law from bringing his own action for breach of lease covenants by the landlord.¹¹⁰

Even though limited to a landlord-tenant situation, *Lindsey*, in the context of *Adams* and the debtor-creditor relationship, could have significant repercussion. As suggested earlier, the Supreme Court could extend the rationale of *Sniadach* and the *Replevin Cases* to *Adams* and require notice and a hearing before self-help repossession could be utilized. However, the beneficial results of this extension could be severely limited if the Court sanctioned state statutory law that provided for short notice and default-only hearing requirements.¹¹¹ A

¹⁰⁷ 405 U.S. 56 (1972).

¹⁰⁸ *Id.* at 64.

¹⁰⁹ *Id.* at 65. The Court did conclude, however, that "it is possible for this provision to be applied so as to deprive a tenant of a proper hearing in specific situations, but there is no showing made here, and possible infirmity in other situations does not render it invalid on its face." *Id.*

¹¹⁰ *Id.* at 65-66.

¹¹¹ Some courts have already sanctioned a short notice requirement. See, e.g., *Kosches v. Nichols*, 68 Misc. 2d 795, 327 N.Y.S.2d 968 (Civ. Ct. N.Y. City 1971), where the

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limited period between notice and hearing could mean, for many individuals, the lack of an effective opportunity to be heard inasmuch as their ability to acquire counsel and to prepare their case adequately would be impaired. Indeed, as Justice Douglas pointed out in *Lindsey*, the difficulty of serving adequate legal representation on a few days notice could make *Sniadach*-type notice and hearing requirements illusory due process protections.¹¹² Further, the opportunity to litigate allegations of creditor default only at a future hearing suggests, especially in the situation where a creditor has breached his warranties of sale, that the debtor would lose possession of the secured property without an opportunity adequately to present his side of the story.¹¹³ In this situation, then, the application of the principles enunciated in *Sniadach* to self-help repossession would certainly be no more than a token gesture and an illusory procedural due process protection.

III. CONCLUSION

This article has attempted to illustrate and analyze two propositions. The first, that the self-help repossession provisions of Article 9 constitute sufficient state action such as to be within the purview of the Fourteenth Amendment, has been wholly endorsed by this article. The second proposition, however, that the extension of *Sniadach* and the *Replevin Cases* to *Adams* could provide the consumer debtor with illusory due process protections, has been suggested so that the problems raised by the extension can be remedied, as the Court in the *Replevin Cases* suggested, by the legislative process.¹¹⁴

A legislative prescription purporting to remedy any problems resulting from an extension of *Sniadach* to self-help repossession would have to insure that a consumer debtor be afforded full procedural due process protections. This would mean, first of all, that notice and hearing procedural rights could not be easily waived where an adhesion contract was utilized by a creditor. Further, the defaulting debtor should be given sufficient opportunity to secure adequate legal representation. Finally, the debtor should be able to raise all available defenses at the repossession hearing.

court construed *Sniadach* as permitting only seven days' notice of hearing before a statutory seizure of property.

¹¹² 405 U.S. at 85 (dissenting). See also *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970), aff'd, 405 U.S. 191 (1972), where the district court expressed doubts as to whether a "20-day notice provision prior to execution of a confessed judgment . . . grants sufficient time to permit a debtor with limited resources to . . . [open or strike off] a confessed judgment." 314 F. Supp. at 1101.

¹¹³ 405 U.S. at 85-91.

¹¹⁴ See 407 U.S. at 97 & n.33, where the Court concluded that through the legislative process "leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing"

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