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Creditor's Rights - The Fourteenth Amendment Held to Require Notice and Hearing Prior to Any Repossession of Consumer Property by Means Involving State Action

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CREDITOR'S RIGHTS—The Fourteenth Amendment Held to Require Notice and Hearing Prior to Any Repossession of Consumer Property by Means Involving State Action.

Mrs. Margarita Fuentes, a Florida resident, purchased a stove and service policy from the Firestone Tire and Rubber Company under a conditional sales contract. The contract called for monthly payments over a period of time.

Several months later, Mrs. Fuentes purchased a stereo from Firestone under the same type of installment contract. The total cost of the stove and stereo was approximately $500.00, plus an additional finance charge of over $100.00. Under the two contracts, Firestone retained title to the merchandise, but Mrs. Fuentes was entitled to possession unless, and until, she should default on her installment payments.

For over a year, Mrs. Fuentes faithfully met her payments, but with only about $200.00 remaining to be paid, a disagreement developed between her and Firestone over the servicing of the stove.

Firestone then instituted a repossession action in a Florida small claims court and, simultaneous with the filing of the action, obtained a writ of replevin for the disputed goods by merely submitting the appropriate form documents to the small claims court and having the documents stamped by the court clerk. Later the same day, a deputy sheriff and an agent of Firestone went to Mrs. Fuentes' home and, persuant to the writ, seized both the stove and stereo.

Shortly thereafter, Mrs. Fuentes instituted an action in the Federal District Court for the Southern District of Florida, challenging the constitutionality of the Florida prejudgment replevin procedures under the due process clause of the fourteenth amendment. She sought declaratory and injunctive relief against continued enforcement of the provisions of the Florida statutes which authorize prejudgement replevin.

A three judge district court rejected Mrs. Fuentes' constitutional claim on the ground that due process did not require notice and hear-

ing prior to seizure of goods which were not necessities of life.[1] The district court based its holding on its interpretation of *Sniadach v. Family Finance Corp.*[2]

On appeal, the Supreme Court considered whether the prejudgement replevin provisions of Florida law were valid under the fourteenth amendment.

In a 4 to 3 decision,[3] the Supreme Court reversed the Florida district court.[4] The majority, per Justice Stewart, held the Florida law violative of the fourteenth amendment since it works a deprivation of property without due process of law by denying the possessor of chattels the opportunity to be heard before the chattels are seized.[5]

The Supreme Court rejected the lower court's reading of *Sniadach v. Family Finance Corp.* The district court had reasoned that *Sniadach* established no more than that a prior hearing is required with respect to the deprivation of "necessities" of life.[6] The Supreme Court found that this reasoning evidenced too narrow a reading of *Sniadach,* and maintained 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."[7]

Before commenting fully on the *Fuentes* decision it is appropriate at this point to consider carefully the *Sniadach* decision and two cases, *Goldberg v. Kelly*[8] and *Bell v. Burson*[9] decided subsequent to *Sniadach* which had applied the *Sniadach* holding.

A study of *Sniadach, Goldberg* and *Bell* may assist in explaining the difference of opinion which arose between the district court and the Supreme Court in *Fuentes* regarding the proper reading of *Sniadach.* More importantly, it will clarify the significance of the *Fuentes* holding by determining whether *Fuentes* is merely a routine application of *Sniadach,* a logical expansion of the *Sniadach* holding, or a dramatic leap forward by the Supreme Court in the area of debtor's constitutional rights.

1. Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).
2. 395 U.S. 337 (1969).
3. Mr. Justice Stewart, who announced the majority opinion, was joined by Justices Brennan, Douglas, and Marshall. Mr. Justice White filed a dissenting opinion in which Mr. Chief Justice Burger and Mr. Justice Blackmun joined. Mr. Justice Powell and Mr. Justice Rehnquist took no part in the consideration or decision of the case.
4. Fuentes v. Shevin, 92 S. Ct. 1983 (1972).
5. *Id.* at 2002.
6. *Id.* at 1998.
7. *Id.*
8. 397 U.S. 254 (1970).
9. 402 U.S. 535 (1971).

In *Sniadach v. Family Finance Corp.*, the plaintiff had instituted a garnishment action against the defendant Sniadach and her employer as garnishee. Under the Wisconsin Garnishment Act,[10] earned but unpaid wages of a debtor could be frozen by a creditor's suit. The employer-debtor was given neither notice of the action nor an opportunity to contest the creditor's actions. The Wisconsin Supreme Court had rejected the defendant's contention that the act violated due process. The court reasoned that if a reasonable opportunity to be heard were given at *some stage* of the proceeding, due process had not been violated.[11]

The Supreme Court reversed the decision of the Wisconsin Supreme Court and concluded that the prejudgement procedure had deprived the debtor of property without due process of law.[12] The Court, in an opinion written by Justice Douglas, emphasized that the property that had been seized were the debtors' wages-" . . . a specialized type of property presenting distinct problems in our economic system."[13] Focusing on the importance of wages, the Court cited a report prepared by Congressman Sullivan, Chairman of the House Subcommittee on Consumer Affairs, as illustrating the grave injustices made possible by prejudgement garnishment. Mr. Justice Douglas felt that this "type of procedure could drive a wage earning family to the wall."[14] In view of the devastating effect any deprivation of wages, no matter how temporary, has upon an individual, the Court held that due process required notice and hearing prior to the garnishment.

The Court's characterization of wages as a "specialized" type of property appeared to be significant in an analysis of *Sniadach*. It seemed to imply a distinction between "special" property and "other" property—a distinction which provided "special" property with a greater standard of protection under the due process clause.

Subsequent to the decision in *Sniadach*, the Court's ruling in *Goldberg, v. Kelly*[15] appeared to support this limited interpretation of *Sniadach*. In *Goldberg*, welfare recipients brought suit, alleging that officials administering the relevant welfare programs had terminated, or were about to terminate, their aid without prior notice and hearing,

10. Wis. Stat. Ann. § 267.01-.24 (Supp. 1970).
11. 37 Wis.2d 163, 154 N.W.2d 259 (1968). The Wisconsin Supreme Court essentially relied upon McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), for its decision.
12. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).
13. *Id.* at 340.
14. *Id.* at 342.
15. 397 U.S. 254 (1970).

thereby denying them due process. The Supreme Court concluded that due process did, in fact, require "an adequate hearing prior to the termination of welfare benefits."[16]

The Court recognized that a denial of welfare payments could deprive a recipient of the funds needed for subsistence. In this respect, the Court's view of welfare benefits was analogous to its characterization of wages as "specialized" property, and, therefore, their termination required more than summary procedures. Thus, although the *Goldberg* opinion seemed to expand the ruling of *Sniadach* to include property other than wages, the Court had again emphasized the unique hardships incurred by an individual upon deprivation of this type of property.

Similarly, in *Bell v. Burson*,[17] the Supreme Court ruled that the revocation of a driver's license may require prior notice and hearing when the license is vital to the driver's profession.[18] In this decision the Court again emphasized, as it had in *Sniadach* and *Goldberg*, the importance of the property interest in question to the individual concerned. The driver's license was absolutely necessary for the driver, here a minister, to perform the duties of his profession.

The cummulative impact of these decisions by the Court seemed to indicate conclusively the distinguishing element of the property protected by the holding in *Sniadach* was that the property interest involved was essential to one's existence,[19] and its deprivation resulted in grevious loss.

It was this interpretation of *Sniadach* which led the three judge federal district court to conclude that the property involved in *Fuentes*, a stove and a stereo, were not within the scope of protection provided by *Sniadach*. Because the items of property were not absolute necessities of life, they were not "special" property.[20]

The Supreme Court's opinion in *Fuentes* made it clear that the principle of *Sniadach* was not to be expressed in terms of "special" property. The Court maintained that the district court's reading of *Sniadach* and *Goldberg* was much too narrow, and that both decisions were ". . . in the mainstream of past cases, having little or nothing to do with 'necessities' of life but establishing that due process requires

16. *Id.* at 264.
17. 402 U.S. 535 (1971).
18. *Id.* at 539.
19. *Id.*
20. *See* Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).

an opportunity for a hearing before a deprivation of property takes effect."[21]

Conceivably, the Court could have found that the property involved in *Fuentes* was "special" property within the meaning of *Sniadach.* It chose, however, to extend the prior notice and hearing provisions of *Sniadach* to any consumer property subject to the Florida replevin law. In this respect, the Court noted that:

> While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not . . . carve out a rule of necessity for the sort of non-final deprivations of property that they involved. . . . If the root principle of procedural due process is to be applied with objectivity, it can not rest on such distinctions. The fourteenth amendment speaks of "property" generally. . . . It is not the business of a court adjudicating due process to make its own critical evaluation of those choices and only protect ones that . . . are "necessary."[22]

Consistent with this principle, the Court concluded that the issue presented by *Fuentes* was not the nature of the property seized, but rather, whether the replevin statute was constitutionally defective by failing "to provide for hearings 'at a meaningful time.' "[23] In the Court's opinion, Justice Stewart quickly noted that the right to be heard is absolutely basic to due process. Its purpose is to insure that the individual's possession of property is free from "arbitrary encroachment" by the government.[24] From this basic premise, the Court's conclusion logically followed—in order to fulfill its purpose, the right to be heard ". . . must be granted at a time when the deprivation can still be prevented."[25] Quoting a recent case, Justice Stewart firmly asserted that the Court had never " . . . embraced the general proposition that a wrong may be done if it can be undone."[26]

The Court also specifically refuted the arguments offered in support of the Florida replevin statute. The requirement that the creditor post a bond prior to the issuance of the writ was viewed as a minimal deterent—if a deterent at all—and in any event, is "no substitute for an informed evaluation by a neutral official."[27] Similarly, the possibility

21. Fuentes v. Shevin, 92 S. Ct. 1983 (1972).
22. *Id.* at 1998, 1999.
23. *Id.* at 1994.
24. *Id.*
25. *Id.*
26. Stanley v. Illinois, 405 U.S. 645 (1972).
27. Fuentes v. Shevin, 92 S. Ct. at 1995, 1996. The Court did, however, admit that property may be seized without notice or a hearing in certain extraordinary circumstances. Those seizures must be: (1) in order to secure an important governmental or public interest; (2) where very prompt action was necessary; (3) and

that the deprivation may be only temporary was of no significance in determining the debtor's rights. The fact that the debtor may post a bond and recover his goods, or may be successful on the underlying contract dispute will be factors in determining the form of the hearing, but is not "decisive of the basic right to a prior hearing of some kind."[28] Finally, even though Mrs. Fuentes lacked full legal title to the goods, the Court found that her right to "continued possession" was a "significant property interest" sufficient for due process protection.[29]

Justice White, joined by the Chief Justice and Justice Blackman, dissented.[30] In Justice White's view, the majority had ignored the interests of the creditor in the property.

> But in these typical situations, the buyer-debtor has either defaulted or he has not. If there is a default, it would seem not only "fair" but essential, that the creditor be allowed to repossess; and I cannot say that the likelihood of a mistaken claim of default is sufficiently real or recurring to justify a broad constitutional requirement that a creditor do more than the typical state law requires and permits him to do.[31]

As a practical matter, Justice White's view may be an accurate assessment of the typical repossession situation. However, the majority's ruling in *Fuentes* did not neglect the creditor's interest in the property, not unduly burden his protection of that interest. The *Fuentes* holding does not prevent the repossession of the goods, nor does it provide the debtor with a defense to the creditor's claim of right to repossession. It merely affords the debtor the opportunity to contest the creditor's claim prior to the seizure of the goods.

Thus, despite the Court's insistence that it had never existed, it appears that the "*Sniadachian*" "special" property concept for determining what constitutes a deprivation of property without due process has been abandoned. An important, although academic, question is what influenced the Court to abandon a doctrine adopted only three years

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where the state "has kept strict control over its monopoly of legitimate force." As examples, the Court noted collection of taxes, the needs of a war effort, misbranded drugs and contaminated food. *Id.* at 2000.

28. 92 S. Ct. at 1997.

29. *Id.* at 1997.

30. As well as disagreeing with the majority on the merits of the case, Justice White also felt that the judgment should be vacated in light of Younger v. Harris, 401 U.S. 37 (1971). The *Younger* decision requires that federal court interference in state court proceedings is allowed only when bad faith or harrassment is present and irreparable injury is likely to result. Because proceedings were pending in the state court, it appears that Justice White was of the opinion that the district court, in the exercise of sound discretion, should not have acted. Fuentes v. Shevin, 92 S. Ct. at 2003.

31. *Id.* at 2004.

earlier. A possible answer lies in the *Blair v. Pitchess*[32] decision.

In *Blair*, the plaintiffs brought an action to declare the California claim and delivery law unconstitutional. The provisions of the California law were substantially identical to the Florida replevin law challenged in *Fuentes*. The California Supreme Court concluded that the seizure of property persuant to the claim and delivery law constituted a deprivation of property without due process of law.

The California Court found that many of the items of property seized under the claims and delivery law were "special" property within the scope of the *Sniadach* decision. Numerous other items subject to seizure could not be considered necessary to one's existence, and, therefore, their seizure did not require prior notice and hearing. Realizing the difficulties encountered in any attempt to fairly and effectively enforce this distinction under the statute in question, the court concluded that:

> It is not possible for us to narrow the law's scope solely to constitutional applications without completely redrafting its provisions; nor can we eliminate its unconstitutional features by merely excising certain clauses. Instead, in order to create a constitutional prejudgment remedy there must be provision for a determination of probable cause by a magistrate and for a hearing prior to any seizure. . . .[33]

The very same situation would be presented under all prejudgment seizure statutes as applied to consumer goods. Furthermore, even once it were established that notice and hearing would be granted to all debtors whose "special" property was about to be seized, the task of determining which property was "special" still remained. As a practical matter the dichotomy between "special" property and other property in the consumer area was simply impracticable.

An interesting and very important issue alluded to in the *Fuentes* case, but not decided by the Supreme court is the validity of a waiver of rights clause. The resolution of this issue will determine the ultimate effect of the Court's ruling in *Fuentes*. If a purchaser, by signing a typical installment sales contract containing a waiver of rights clause, is held to have validly waived his right to notice and hearing prior to the repossession of the goods upon default, the *Fuentes* decision will indeed be of small import in the consumer area.

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32. 5 Cal. 3d 258, 486 P.2d 1242 (1972).
33. *Id.* at 283, 486 P.2d at 1259, 1260. *See also* Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972).

The appellees in *Fuentes* had argued that Mrs. Fuentes had waived her constitutional right to notice and hearing. The Supreme Court rejected that argument on the grounds that the language in the contract relied upon by the appellees was not a waiver of rights. Rather, the Court found that the contract provisions allowing the seller to "retake" or "repossess" the property on default were merely a "restatement of the seller's right to possession upon occurrence of certain events."[34] In order to even be considered a waiver, the language must specifically refer to the buyer's right to a hearing prior to repossession.

The Court did indicate, however, that it may impose very rigid standards upon any attempt by the seller to secure a waiver of the purchasers rights. Justice Stewart pointedly contrasted the facts of the *Fuentes* case with those of *D.H. Overmyer Co. v. Frick Co.*,[35] in which a contractual waiver of rights was sustained. The contract involved in *Overmyer* was between two corporations. Overmyer, had, through its attorney's negotiations, offered to waive its rights in return for a more favorable contract terms. The Supreme Court ruled that Overmyer had knowingly and intelligently waived its rights to notice and hearing prior to judgment. In summarizing its decision in *Overmyer*, the Supreme Court stressed that the facts of the case were important, and indicated that, under a different set of facts, its ruling may be quite different.[36]

Consistent with the warning contained in *Overmyer*, the Court's discussion of waiver in *Fuentes* placed so much emphasis on the factual differences between *Overmyer* and *Fuentes* (facts typical to most installment sales contracts), that there is little doubt in which direction the Court is leaning.

> The facts of the present cases are a far cry from those of *Overmyer*. 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 the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.[37]

The Court then cited from its decision in *Overmyer* that "where the contract is one of adhesion, where there is great disparity of bargain-

34. Fuentes v. Shevin, 92 S. Ct. at 2002.
35. 405 U.S. 174 (1972).
36. *Id.* at 188.
37. 92 S. Ct. at 2002.

ing power, and where the debtor receives nothing for the waiver provision, other legal consequences may ensue."[38] This strong dicta by the Supreme Court indicates what the ultimate resolution of the issue will be.

CONCLUSION

Justice White, in his dissent, protested the effect he foresees of *Fuentes* in the Uniform Commercial Code.[39] It is impossible to ignore the probable impact *Fuentes* will have on the default and repossession sections of the Code.[40] Indeed, even prior to the Supreme Court's decision in *Fuentes,* a federal district court had held this section of the Code unconstitutional.[41]

In *Adams v. Egley*[42] the United States District Court for Southern California struck down the default and repossession possession procedure of the California Commercial Code as a deprivation of property without due process of law.

There, plaintiff George Adams borrowed one thousand dollars from the Bank of La Jolla, executing a promisory note and a security agreement in favor of the bank. The terms of the security agreement provided that, should the debtor fail to make payment of any part of the principal or interest as provided in the promissory note: "[T]he Secured Party shall . . . have all the rights and remedies of a Secured Party under the California Uniform Commercial Code, or other applicable law."[43]

Some time after the execution of the note, defendant Southern California First National Bank became the successor in interest to the Bank of La Jolla.

Alleging the plaintiff had fallen behind on his payments, the defendant Egley, acting for the bank, took possession of two of the three vehicles which served as security under the agreement. They were both subsequently sold by the bank at a private sale.

Employing reasoning similar to that used by the Supreme Court in *Fuentes,* the Adam's court found, that at a minimum, the due process clause required notice and a hearing prior to any repossession of prop-

38. 405 U.S. at 188.
39. Fuentes v. Shevin, 92 S. Ct. at 2005, 2006 (1972).
40. Uniform Commercial Code § 9-503, 504.
41. Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972).
42. *Id.*
43. *Id.* at 616.

erty where state action was involved. In *Adams* the creditor had argued that no state action was involved because the contract terms provided for repossession on default, and were merely self executing.

The court, however, rejected this argument on the grounds that sales contract, which gave the creditor "all the rights and remedies of a Secured Party under the California Uniform Commercial Code",[44] set forth a state policy encouraging creditors to deprive debtors of their property under color of State law. The court based this conclusion on the rationale set forth in the Supreme Court's decision in *Reitman v. Mulkey*.[45]

In that case, pursuant to initiative and referendum the California constitution was amended to prohibit restrictions on an individual's right to sell property. The Court found that the provision enacted as a repealer of California's antidiscriminatory housing legislation, actually served as state encouragement of private discrimination. Thus, even though the parties to the controversy were private individuals the court found: . . . the mere enactment of the statute constituted sufficient state involvement to bring the alleged discrimination within the purview of the fourteenth admendment.[46]

The *Adams* case presented an analogous situation. Although the respossessions complained of were ostensibly private acts pursuant to a contract, the significant impact of Sections 9-503 and 9-504 on the transaction can hardly be doubted.[47] Thus the *Adams* court stated:

> It is therefore apparent that the acts of repossession were made "under color of state law", as required by the Civil Rights statutes, and the passage of Sections 9-503 and 9-504 are sufficient state action to raise a federal question.[48]

Under the reasoning of the *Adams* court, it would appear that any sales contract which incorporates the repossession sections of the Code would involve sufficient state action to require the notice and hearing rights established by *Fuentes*. Furthermore, although Justice White indicates that a contract that provides for repossession without resort to judicial process will avoid the application of the *Fuentes* ruling,[49] the reasoning of the *Adams* court is compelling.

However, these trends and prospective developments initiated by the

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44. *Id.*
45. 387 U.S. 369 (1967).
46. Adams v. Egley, 338 F. Supp. at 617 (S.D. Cal. 1972).
47. *Id.*
48. *Id.* at 618.
49. 92 S. Ct. at 2005.

Fuentes decision may never materialize. Neither Justice Powell nor Justice Rehnquist took part in the *Fuentes* case, and conceivably they may provide the dissenters, the Chief Justice and Justices White and Blackman, with the votes necessary to become a majority on the issues yet unresolved by *Fuentes*.

Nevertheless, the ruling in *Fuentes v. Shevin* is a significant step forward in defining the rights of debtors, and provides the courts with a powerful tool for the protection of consumers.

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