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## CREDITORS' SELF-HELP REMEDIES UNDER UCC SECTION 9-503: VIOLATIVE OF DUE PROCESS IN TEXAS?

DAVID HUGHES\*

The United States Supreme Court in *Sniadach v. Family Finance Corp.*<sup>1</sup> and *Fuentes v. Shevin*<sup>2</sup> has enunciated the doctrine that the due process clause of the 14th amendment requires notice and an opportunity to be heard before seizure of property in pursuit of remedies involving state or governmental action. *Sniadach* held unconstitutional a Wisconsin statute<sup>3</sup> which permitted a creditor to obtain a prejudgment garnishment of a debtor's wages without provisions for notice and prior hearing before the garnishment order was issued and executed. Due to some unfortunate language in the opinion of the Court,<sup>4</sup> the scope of the decision was rendered somewhat uncertain. While some decisions did not limit the holding to specified types of property,<sup>5</sup> the dispute as to the scope of *Sniadach* was subsequently resolved, to a large extent, by *Fuentes*. The Court held that the replevin statutes of the States of Florida and Pennsylvania, authorizing seizure of goods by a sheriff upon application of a creditor without opportunity for a hearing, violated the due process clause.<sup>6</sup>

While many prejudgment remedies in Texas requiring action by state officers such as garnishments and sequestration are now constitutionally suspect under *Sniadach* and *Fuentes*,<sup>7</sup> the repossession of goods by a secured creditor, not directly calling upon state officials to act in the taking of such property, raises the question of whether there has

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1. 395 U.S. 337 (1969).

2. 407 U.S. 67 (1972).

3. Wis. L. 1965, c. 507, § 1, *as amended*, WIS. STAT. ANN. § 267.02(2) (Supp. 1973).

4. Justice Douglas' majority opinion in *Sniadach* stated: "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969). There was some speculation that the holding would be restricted to wage garnishment.

5. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare payments); *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of driver's license).

6. *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972).

7. TEX. R. CIV. P. 657-679; TEX. REV. CIV. STAT. ANN. art. 4076 (1966); *see Southwestern Warehouse Corp. v. Wee Tote, Inc.*, — S.W.2d — (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

been sufficient state involvement to support a claim of denial of due process. While this article will deal primarily with constitutional attacks in the federal courts on self-help repossession under Section 9-503 of the Uniform Commercial Code,<sup>8</sup> it will also attempt to define the acts essential to constitute state action that may arise under state court decisions as well. The ensuing discussion will further analyze the validity of waivers of notice and pre-hearing seizures in the light of *Fuentes*.

#### JURISDICTION AND THE "STATE ACTION" PROBLEM

In federal courts there must be satisfaction of jurisdictional as well as substantive requirements.<sup>9</sup> Only when a federal court has decided that there has been "state action" may it then determine whether such state action was a denial of due process.<sup>10</sup> While a state court faces no jurisdictional limitations, there can be no recognized claim of deprivation of a federally protected right unless the substantive "state action" is present.

Numerous federal courts have concluded that no such state action is present when a secured creditor repossesses goods pursuant to section 9-503 and have dismissed due process challenges to such self-help repossessions.<sup>11</sup> *Adams v. Egley*<sup>12</sup> was one of the first federal cases to hold that self-help repossession does constitute state action and is violative of due process.<sup>13</sup> The Court of Appeals for the Ninth Circuit recently reversed this decision, however, holding that repossession of

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8. When in the context of Texas law, the Uniform Commercial Code citations will be to the Texas version: TEX. BUS. & COMM. CODE ANN. § 9.503 (1968). The section provides in part:

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 the peace or may proceed by action.

9. When "federal question" jurisdiction is alleged, there must be more than \$10,000 in controversy and sufficient "state action" so that the case "arises under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331(a) (1970). Jurisdiction may also be invoked by "Civil Rights" under 28 U.S.C. § 1343(3) (1970). The substantive claim, the alleged deprivation of rights, must occur "under color of" state law. See 42 U.S.C. § 1983 (1970).

10. *Shelley v. Kraemer*, 334 U.S. 1, 18-19 (1948).

11. *Colvin v. Avco Fin. Servs. Inc.*, CCH SECURED TRANS. GUIDE ¶ 52,046, at 67,141 (N.D. Utah Jan. 4, 1973); *Kirksey v. Theilig*, 351 F. Supp. 727, 732 (D. Colo. 1972); *Oller v. Bank of America*, 342 F. Supp. 21, 23 (N.D. Cal. 1972).

12. 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom.*, *Adams v. Southern Cal. First Nat'l Bank*, CCH SECURED TRANS. GUIDE ¶ 52,216, at 67,306 (9th Cir. Oct. 4, 1973).

13. *Id.* at 617.

motor vehicles by self-help on default of payment where there is a contract providing for such is not an act under color of state law and is not, therefore, state action within the meaning of the due process clause.<sup>14</sup> In *Adams*, the debtors had signed security agreements and each subsequently defaulted with the vehicles being repossessed by the secured parties without judicial process. The California statute which was at issue in *Adams* is identical to that of Texas, both being duplicate enactments of section 9-503.<sup>15</sup> Since this section authorizes repossession without resort to judicial process, the principal barrier in determining that self-help repossession is accomplished under color of state law is the complete lack of participation by any state official. Conversely, private citizens who act in concert with state officers are considered to be clothed with state action.<sup>16</sup>

In seeking to determine the outer limits of state action, the case of *Burton v. Wilmington Parking Authority*<sup>17</sup> is instructive. In *Burton*, a restaurant which had leased space in a parking facility owned by a state agency had discriminated against Blacks. State action was found even though the state had done nothing to encourage the wrongful action other than enter into the lease with its tenant. In announcing a balancing test, the Court stated: "[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."<sup>18</sup> The Supreme Court, in *Adickes v. S. H. Kress & Co.*,<sup>19</sup> has further defined the relationship of state action, at least where racial discrimination is involved, by announcing that a private individual, who discriminates on the basis of race with knowledge of and pursuant to a state enforced custom requiring such action, is a participant in joint activity with the

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14. *Adams v. Southern Cal. First Nat'l Bank*, CCH SECURED TRANS. GUIDE ¶ 52,216, at 67,306 (9th Cir. Oct. 4, 1973).

15. Compare CAL. COMM. CODE § 9503 (Deering 1963), with TEX. BUS. & COMM. CODE ANN. § 9.503 (1968).

16. *United States v. Price*, 383 U.S. 787 (1966); *Williams v. United States*, 341 U.S. 97 (1951). *Price*, however, involved private conduct of a criminal nature taken in concert with state law enforcement officers in an indirect attempt to avoid discrimination prohibitions. *Williams* was concerned with a private detective who held a special police officer's card issued by the city of Miami and who used brutal methods of obtaining confessions from suspects accused of stealing from the detective's corporate employer.

17. 365 U.S. 715 (1961).

18. *Id.* at 722.

19. 398 U.S. 144 (1970); accord, *Reitman v. Mulkey*, 387 U.S. 369 (1967) (state action found where no state official had participated in a homeowner's refusal to rent an available apartment to plaintiffs solely because of their race).

state under color of state custom or law.<sup>20</sup> This expansion of the definition of state action was limited somewhat by the Supreme Court in *Moose Lodge v. Irvis*.<sup>21</sup> The case dealt with a private club member whose Black guest was refused service because of his race. State action was asserted on the grounds that the Pennsylvania Liquor Authority had issued a liquor license to the club; however, the Court held that the liquor regulations, with one exception,<sup>22</sup> did not in any way foster or encourage the wrongful private conduct as to constitute state involvement in the actions of the club.<sup>23</sup> The relevance and soundness of using racial discrimination cases to determine whether there has been "state action" in the enactment of section 9-503 is questionable and has been rejected in several decisions.<sup>24</sup> Concluding that self-help repossession by a private party is made under color of state law and analagous to racial discrimination is inconsistent with both the purpose and development of the law under the Civil Rights Acts. Problems of racial discrimination cases, which evidence a pattern of intentional indirect efforts to circumvent constitutional rights, are unlike the self-help creditor's remedy which is based on economic grounds of long standing<sup>25</sup> and are best left for state courts and legislatures.

#### *Public Function Test*

One theoretical method used in attempting to find state action in self-help repossessions is the so-called "public function"<sup>26</sup> test as fol-

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20. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 (1970).

21. 407 U.S. 163 (1972). *See also* *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

22. *Moose Lodge v. Irvis*, 407 U.S. 163, 177-79 (1972). The exception arises when a state regulation requires a local private club to adhere to all provisions of that organization's national constitution and by-laws which result in constitutional deprivations. The Court found that state sanction in this instance would constitute state action.

23. *Id.* at 173.

24. *Oller v. Bank of America*, 342 F. Supp. 21, 23 (N.D. Cal. 1972); *accord*, *Kirksey v. Theilig*, 351 F. Supp. 727 (D. Colo. 1972); *Messenger v. Sandy Motors, Inc.*, 295 A.2d 402 (N.J. Super. Ct. 1972).

25. *Adams v. Southern Cal. First Nat'l Bank*, CCH SECURED TRANS. GUIDE ¶ 52,216, at 67,164 (9th Cir. Oct. 4, 1973), *citing* *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973).

26. *See, e.g.*, *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); *United States v. Classic*, 313 U.S. 299 (1941) (criminal prosecution under counterpart statute to 42 U.S.C. § 1983 for irregularities in the conduct of a state Democratic party primary); *Smith v. Allwright*, 321 U.S. 649 (1944) (state law controlled Texas primaries and Democratic Party held to be agent of state when private political party excluded Negroes from voting which constituted a 14th amendment violation); *Terry v. Adams*, 345 U.S. 461 (1953) (Texas County political group excluded Negroes from preprimary elections constituting state action, either because the state permitted the only effective election or because the private group performed a state function). These cases are

lowed in *Hall v. Garson*.<sup>27</sup> The facts arising out of *Hall* reveal the seizure of a portable television set by a landlady from the tenant's apartment under the authority of the Baggage Lien for Rent statute<sup>28</sup> which gives the landlord a lien on the personal property of a tenant in rented premises. The statute additionally authorized the enforcement of that lien through peremptory seizure of the property by the landlord.<sup>29</sup> Chief Judge Brown, in holding state action was present which deprived the tenant of due process rights, wrote:

In this case the alleged wrongful conduct was admittedly perpetrated by a person who was not an officer of the state or an official of any state agency. But the action taken, the entry into another's home and the seizure of another's property, was an act that possesses many, if not all, of the characteristics of an act of the State.<sup>30</sup>

*Hall* turns on the issue of intrusion into another's home and the seizure of property<sup>31</sup> owned by a tenant not subject to a prior contractual security interest. Since the factual situation in *Hall* constitutes a breach of the peace, it is distinguishable from a peaceable repossession under section 9-503.<sup>32</sup> It is within this narrow area which private parties may contractually reserve a security interest and peaceably repossess without the necessity of judicial process.

#### *Statutory Changes in the Common Law*

Closely related to the preceding discussion, regarding determination of state action by the public function test, is the occurrence of a statutory alteration of a common law rule or practice, as opposed to a mere codification of it. In proceedings where state action is sought to be identified, the assertion is made that when a statutory change so alters a common law rule or practice, the new legislation can be regarded as en-

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distinguishable from self-help repossession as they are restricted to racial discrimination in voting, which is specifically prohibited by the 15th amendment.

27. 430 F.2d 430 (5th Cir. 1970).

28. TEX. REV. CIV. STAT. ANN. art. 5238a (1962), *as amended* TEX. REV. CIV. STAT. ANN. art. 5236d (Supp. 1974).

29. *Id.*

30. *Hall v. Garson*, 430 F.2d 430, 439 (5th Cir. 1970).

31. This is not to suggest that because we have a property right involved, there is no federal constitutional issue. In *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 549 (1972), the Supreme Court rejected any limitation on 28 U.S.C. § 1343 (1970) and 42 U.S.C. § 1983 (1970) to actions based on personal rights as opposed to property rights.

32. Texas permits self-help repossession only when it can be accomplished without a breach of the peace. *Gulf Oil Corp. v. Smithey*, 426 S.W.2d 262, 265 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

couragement of a state policy.<sup>33</sup> The rationale is that a change in policy can be more readily identified as a source of encouragement for private conduct than a traditional policy of long standing.

Texas law prior to the enactment of the Texas version of section 9-503 did not provide a secured creditor the right to possession of the collateral upon default unless such a right was expressly provided for in the agreement creating the security interest.<sup>34</sup> While it would appear that there is some encouragement by the State of Texas of a new policy in the enactment of section 9.503, since now the secured creditor has the right of repossession unless expressly excluded, section 9.503 as presently applied works no real change upon the prior common law right to take possession, since there must be acquiescence or assent by the debtor for the repossession to be effected without force or other breach of the peace.<sup>35</sup> Also without parallel provision in prior Texas law is the express recognition in section 9.503 of the secured party's right, if provided for in the agreement, to compel the debtor upon default to assemble the collateral and make it available at a convenient place designated by the secured party. Prior Texas law did provide, however, that the parties might make any agreement with respect to the collateral which did not violate the law, and it is submitted that such recitation in section 9.503 does not result in state action as such would have been enforceable under the prior Texas law.

In a broader sphere, statutorily authorized self-help does not represent a radical change from common law. As reported by Pollack and Maitland,<sup>36</sup> for a long time the law as to repossession by creditors was very weak and, as a practical matter, could not prevent self-help of the most violent kind. Fairly early in legal history, however, the law began to prohibit in uncompromising terms any and every attempt to substitute force for judgment. This was especially true of the English law in the 13th century. Subsequently, however, the legal at-

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33. *E.g.*, *Boland v. Essex County Bank & Trust*, 361 F. Supp. 917, 920 (D. Mass. 1973); *Collins v. Viceroy Hotel Corp.*, 338 F. Supp. 390, 394 (N.D. Ill. 1972); *Klim v. Jones*, 315 F. Supp. 109, 114 (N.D. Cal. 1970).

34. *E.g.*, *Montgomery v. Collins*, 32 S.W. 1067, 1068 (Tex. Civ. App. 1895, no writ).

35. *Singer Sewing Mach. Co. v. Rios*, 96 Tex. 174, 71 S.W. 275 (1903); *Harling v. Creech*, 88 Tex. 300, 31 S.W. 357 (1895) provided for mortgagee under a chattel mortgage to take possession of the mortgaged property in the event of default if accomplished without force. This was construed to be a contractual right derived from the mortgage instrument itself and not from the statutory authority of TEX. REV. CIV. STAT. ANN. art. 5490 (Chattel Mortgages).

36. 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 574 (2d ed. 1899).

titude toward the use of force in repossessions grew less strict, again allowing a controlled self-help remedy to the creditor.<sup>37</sup> In view of the common law's later tradition of peaceful self-help as well as the controlled conditions existing today under section 9.503, there is no necessity to return to 13th century rationale and the desire to abolish self-help.

### *Contractual Exclusion*

Following prior Texas law closely is the premise that state action may be excluded on the basis of a written security agreement or contract between debtor and creditor which incorporates the statutory language into the terms of the agreement.<sup>38</sup> The creditor can be said to hold the right to repossess based solely on the agreement, the enforcement of which is not contingent upon any statutory enactment. Therefore, even if the rationale prevails that section 9.503 changes prior law, and further, that this change constitutes state action, the presence of a written agreement embodying the provisions of section 9.503 should preclude any action under color of state law, assuming adequate notice and waiver procedures satisfy due process requirements.

In *McCormick v. First National Bank*,<sup>39</sup> a federal district court upheld the Florida version of section 9-503 in connection with an automobile repossession.<sup>40</sup> The action was based on a contractual agreement that gave the creditor an independent right to repossession which rendered the existence of state involvement irrelevant. The court, by way of dicta, went on to state: "If the portion of the Code involved did not exist as law in this state, such provision could have been set forth word for word in the contract signed by plaintiffs."<sup>41</sup>

### FUENTES: WAIVERS OF NOTICE AND PRE-SEIZURE HEARINGS

#### *Exceptions*

The Supreme Court in *Fuentes* recognized "extraordinary situations" that would justify postponing notice and opportunity for hearing.<sup>42</sup> The Court laid down three situations, which all being present, would

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37. *Id.* at 574. In *Fuentes v. Shevin*, 407 U.S. 67, 79 n.12 (1972), the Court similarly reviewed the English common law and recognized the use of self-help remedies as long as no state action is involved.

38. *Singer Sewing Mach. Co. v. Rios*, 96 Tex. 174, 71 S.W. 275 (1903).

39. 322 F. Supp. 604 (S.D. Fla. 1971).

40. *Id.* at 606.

41. *Id.* at 606.

42. *Fuentes v. Shevin*, 407 U.S. 64, 90-91 (1972).



result in a recognized exception; (1) seizure is necessary to secure an important governmental or general public interest; (2) there is a special need for prompt action; and (3) the state keeps strict control over the use of legitimate force.<sup>43</sup> While the mere interest of the creditor in collecting his debt was not sufficient in *Fuentes* to constitute an important general public interest,<sup>44</sup> the Court did say that there may be cases where the creditor could show immediate danger and the necessity for prompt action when a debtor threatened to destroy or conceal property subject to seizure.<sup>45</sup>

Prompt repossession of security is imperative in certain instances, especially in the case of automobiles which are easily concealed or sold by the debtor. Even if it be shown, however, that situations exist in which prompt repossession is vital, section 9.503 is not so "narrowly drawn to meet . . . such unusual conditions,"<sup>46</sup> as required by the second criterion of *Fuentes*. Section 9.503 further places the control of the use of self-help repossession entirely in the hands of private persons,<sup>47</sup> with the state exercising no restraint so long as the repossession is peaceable. This abdication of state control contravenes the third criterion as set out in *Fuentes*—that the state exercise strict control over the use of legitimate force. It is submitted again, however, that courts could continue to uphold summary repossession on the basis of common law tradition, as an independent contractual right, or merely on lack of state action, rather than attempting to pigeon-hole the self-help remedy within the ambit of enumerated exceptions.

### *Is a Pre-Seizure Hearing Required?*

The Court in *Fuentes* did not specify the type of proceeding that

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43. In announcing these exceptions the Court cited prior cases as examples: *Ownby v. Morgan*, 256 U.S. 94 (1920) (attachment necessary for securing jurisdiction in a state court) (public interest); *Phillips v. Commissioner*, 283 U.S. 589 (1931) (summary seizure of property to collect the internal revenue of the United States); *Fahey v. Maloney*, 332 U.S. 245 (1947) (protection against bank failure); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (contaminated food).

44. *Fuentes v. Shevin*, 407 U.S. 64, 92 (1972).

45. *Id.* at 93.

46. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969).

47. This analysis prevailed in *Green v. First Nat'l Exch. Bank*, 348 F. Supp. 672 (W.D. Va. 1972), wherein the Virginia statutory version of UCC § 9-503 was challenged. The court held passive state action resulted when a private citizen repossessed an automobile for a bank and was therefore not violative of due process. There must be active and direct state action by an official or by a branch of government. *Id.* at 674; *see*, *Pease v. Havelock Nat'l Bank*, 351 F. Supp. 118 (D. Neb. 1972) (automobile repossession effected by breach of the peace but case dismissed for lack of federal jurisdiction).

would be required prior to seizure under the due process clause, leaving this matter for the state legislatures to decide.<sup>48</sup> The Court did not question the power of a state to seize goods before a final judgment in order to protect the security interest of creditors so long as such creditors were required to test their claim to the goods through the process of a fair hearing.<sup>49</sup> Noting that "the nature and form of such prior hearings, moreover, are legitimately open to many potential variations,"<sup>50</sup> the Court pointed to the basic principle that it considered fundamental in any notice and hearing procedure:

Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however it is axiomatic that the *hearing must provide a real test*. "[D]ue process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at establishing the validity, or at least the probable validity, or the underlying claim against the alleged debtor *before* he can be deprived of his property . . . ." <sup>51</sup>

The dissenting opinion in *Fuentes* summarized elements of the majority opinion's analysis of due process requirements thusly: (1) notice of default from creditor to debtor; (2) a short period in which the debtor may file objection to repossession; and (3) repossession if no objection is filed; or (4) a pre-seizure hearing to establish a probable cause that default has occurred.<sup>52</sup> Assuming provisions will be enacted for pre-seizure hearings by the state legislatures, the procedures will apply no doubt to all types of pre-seizure remedies, both judicial and self-help.<sup>53</sup>

Caution and protection of one's client, however, demand that some form of prior notice and preliminary hearing be held prior to seizure un-

48. *Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972).

49. *Id.* at 96.

50. *Id.* at 96.

51. *Id.* at 97 (emphasis added), quoting *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

52. *Fuentes v. Shevin*, 407 U.S. 67, 102 (1972) (dissenting opinion). Mr. Justice White, joined by the Chief Justice and Mr. Justice Blackmun in the dissenting opinion, suggested that the debtor gains nothing significant under such procedures. Some abbreviated procedure will be necessary, however, to cope with the increased volume of pre-seizure hearings that will likely result if self-help procedures are eliminated. *Id.* at 103.

53. The Permanent Editorial Board for the Uniform Commercial Code, through its Review Committee for Article 9, had completed its final report on section 9-503 (April 25, 1971) before the constitutionality of self-help appeared on the scene. This suggests that there were no new demands or developments in commercial transactions that prompted the Review Committee to make any recommended changes. See Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 563-66 (1973).

til the question of self-help repossession has been settled in Texas.<sup>54</sup> Obviously there will be instances where this procedure will assist the unscrupulous debtor in attempts to evade payment. The procedure, however, will protect the debtor who believes he has a valid defense to the creditor's claim and who has in the past suffered the loss of possession of his property even though he subsequently prevails at trial. The stakes can be high for the creditor who wishes to assume the risk of self-help without the precaution of pre-seizure notice and hearing, as the Civil Rights Statutes allow claims for damages as well as injunctive relief for violation of due process rights.<sup>55</sup> Until the question of the application of *Fuentes* to section 9.503 has been settled, a careful lawyer will no doubt advise a creditor-client that some form of notice and opportunity to be heard will be essential prior to seizure to guard against a potential constitutional claim by the debtor.

### *Contractual Waivers*

The Court in *Fuentes* left open the possibility that a debtor could waive his right to notice and hearing.<sup>56</sup> As Justice White makes clear in his dissent, this possibility may easily avoid the effect of the majority decision by spelling out clearly in the credit instruments that the creditor may regain possession of the property without a hearing and without the necessity of judicial process.<sup>57</sup>

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54. The author has observed a growing tendency among practicing attorneys to seek pre-seizure hearings in connection with writs of sequestration. To safeguard the creditor's interest in property, where the facts indicate risks involved by leaving the property in the debtor's possession, application is made for a temporary restraining order to prevent secretion or disposal of such property by the debtor prior to the pre-seizure hearing.

55. 28 U.S.C. §§ 1343(3), (4) (1970) provides:

The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

56. *Fuentes v. Shevin*, 407 U.S. 67, 95-96 (1972).

57. *Id.* at 102 (dissenting opinion).

In *D. H. Overmyer Co. v. Frick Co.*,<sup>58</sup> the Supreme Court held that confession of judgment procedures<sup>59</sup> are not per se violative of procedural due process.<sup>60</sup> There are unique facets of this decision which are particularly relevant in evaluating the effect of *Fuentes*. First, the rationale in *Overmyer* may be shown to be analogous to any self-help, prejudgment procedure based upon contractual waiver of a debtor's due process rights to pretrial notice and hearing.<sup>61</sup> Second, the consumer-creditors will have a much greater burden in proving a waiver of constitutional rights than commercial creditors, as *Overmyer* was a negotiated contract between two corporations, not a debtor-creditor contract of adhesion.<sup>62</sup> In *Fuentes*, the contracts at issue were standard form conditional sales contract agreements which contained waiver clauses in fine print and were prepared for use by one party with a strong bargaining position against another with a weak bargaining position; therefore, a discussion of the fine points of a contractual waiver defense by a repossessing creditor was not faced.

The possibility that a debtor may be permitted to waive any potential right to notice and hearing is significant for section 9-503 transactions. However, a note of caution is in order since there appear to be substantial limits on what may be done to constitute effective waiver.

58. 405 U.S. 174 (1972).

59. Such procedure is of doubtful validity in Texas when used in connection with prejudgment writs or self-help remedies due to the prohibitions of TEX. REV. CIV. STAT. ANN. art. 2224 (1971) which provides:

No acceptance of service and waiver of process, nor entry of appearance in open court, nor a confession of judgment shall be authorized in any case by the contract or writing sued on, or any other instrument executed prior to the institution of such suit, nor shall such acceptance or waiver be made until after suit is brought.

The procedural counterpart is contained in TEX. R. CIV. P. 314 (judgment may subsequently be impeached for fraud or other equitable cause).

60. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972).

61. *E.g.*, a debtor signs a cognovit note which grants the holder the right to enter a personal judgment against him and sacrifices his rights to prejudgment notice and hearing. This was done in *Overmyer* under an Ohio confession of judgment procedure. OHIO. REV. CODE ANN. § 2323.13 (Baldwin 1971).

62. The Court in *Overmyer*, in passing stated: "[W]here the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972). In *Steven v. Fidelity & Cas. Co.*, 27 Cal. Rptr. 172 (1962), the court in discussing "contracts of adhesion," provided a workable definition:

The term refers to a standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a 'take it or leave it' basis, without opportunity for bargaining and under such conditions that the 'adherer' cannot obtain the desired product or service save by acquiescing in the form agreement.

*Id.* at 185.

To be sure, the due process right of notice prior to a civil judgment is subject to waiver as shown by *Overmyer*. The Supreme Court alluded to the qualifications for effective waiver in *Fuentes* as amounting to one that is voluntary, knowing, and intelligently made.<sup>63</sup> This is primarily applicable to the commercial creditor-debtor sector, as there is rarely equal bargaining position, either by experience or education, in the consumer-debtor situation. In *Fuentes*, the contract language was decidedly unclear to the uneducated debtor, so much so that the Court did not even reach the questions of voluntariness of unintelligence in executing the contract.<sup>64</sup> The Court pointed out:

The conditional sales contracts here simply provided that upon a default the seller "may take back," "may retake," or "may repossess" merchandise. The contracts included nothing about the waiver of a prior hearing. They did not indicate *how or through what process*—a final judgment, self-help, prejudgment replevin with a prior hearing, . . . the seller could take back the goods. Rather, the purported waiver provisions here are no more than a statement of the seller's right to repossession upon occurrence of certain events.<sup>65</sup>

The due process clause has been held applicable to self-help under section 9-503 due to ineffective waiver in several lower federal court decisions. In *Michel v. Rex-Noreco, Inc.*,<sup>66</sup> a decision involving repossession of a mobile home, a conditional sales contract governed by Vermont law contained the provisions of section 9-503 of the Uniform Commercial Code in fine print. Upon default in payments, the defendant, acting as the creditor bank's agent, verbally notified the debtor of intended repossession and the following day, gave notice formally of such intent. The federal district court, in granting a preliminary injunction against the repossession, stated:

Other than the provisions of the sales agreement, the defendant (Rex-Noreco) offered nothing to establish an effective waiver on the part of the plaintiff (debtor) of her right to be heard. The fine print in the conditional sales contract, without more, does not constitute a voluntary and knowing surrender of her fundamental right to be heard before being ousted and dispossessed of the home she acquired under the purchase agreement.<sup>67</sup>

The court further stated that there was no compelling need for prompt

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63. *Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972).

64. *Id.* at 95.

65. *Id.* at 95-96 (Court's emphasis).

66. CCH SECURED TRANS. GUIDE ¶ 52,070, at 67,164 (D. Vt. Nov. 1, 1972).

67. *Id.*

action through immediate seizure since no "extraordinary situation has been demonstrated . . . within the permissible exceptions indicated in *Fuentes* . . . ."68

In yet another decision, *James v. Pinnix*,<sup>69</sup> a federal district court in Mississippi has declared section 9-503 unconstitutional insofar as it authorized the seizure of property without affording adequate prior notice and an opportunity for pre-seizure hearing, absent a knowing and intelligent waiver of rights to same.<sup>70</sup> *James* involved a class action pursuant to a conditional sales contract on an automobile, the contract providing for repossession and waiver of notice, but was silent on the waiver of a prior hearing. In deciding the case, the court cited *Fuentes* as authority for enjoining the creditor from taking the automobile from the debtor until a hearing providing for adequate safeguards for due process was held.<sup>71</sup>

Using waiver clauses in security agreements or other contractual instruments is fraught with peril. Normally, the consumer will not avail himself of the assistance of counsel or understand or appreciate the terms of such clause and furthermore, the consumer-debtor will rarely, if ever, be in an equal bargaining position with the creditor. In drafting contractual waiver clauses, such clauses should achieve at least two objectives: (1) The clause should clearly and concisely state the scope of the debtor's rights and that such are being waived; and (2) the printed waiver material must be large and in conspicuous "bold-face" print so as to attempt to show that the debtor had notice of such waiver.<sup>72</sup> After pursuing these minimal requirements of reasonable notice and clarity, the draftsman should then pursue the more important goal of avoiding or minimizing the possibility of adhesion. To avoid the "take it or leave it" basis of such contract, it has been sug-

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68. *Id.*

69. CCH SECURED TRANS. GUIDE ¶ 52,172, at 67,263 (S.D. Miss. Feb. 14, 1973).

70. *Id.*

71. *Id.* Both *Michel* and *James* are silent on any mention of state action or jurisdictional discussion, but it can be assumed this question was affirmatively decided, since such is essential prior to a consideration of due process. *But see* *Magro v. Lentini Bros. Moving & Storage*, 338 F. Supp. 464 (E.D.N.Y. 1971), *aff'd on opinion below*, 460 F.2d 1064 (2d Cir.), *cert. denied*, 406 U.S. 961 (1972). This case involved delivery of furniture to a warehouse for storage and subsequently sold at public auction following notice. The court did not decide the question of state action involvement because it determined that even if there was the presence of state action, there was no deprivation of due process.

72. *Fuentes v. Shevin*, 407 U.S. 67, 95-96 (1972); *accord*, *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716, 724 (N.D.N.Y. 1970) (fine print on back of conditional sales contract ineffective waiver).

gested that consideration be given the debtor for signing the waiver in the hope of establishing equality of bargaining position between the parties.<sup>73</sup> The consideration could be an offer by the lender to adjust interest rates if the borrower signed a waiver or by a merchant offering to reduce the carrying charges on the purchase price for a signed waiver. The aim is to establish a meaningful choice for one of the parties coupled with contract terms that are not unreasonably favorable to the other party.

Attempting to draft meaningful waiver clauses is worthwhile and not to be ignored; however, the creditor should also protect himself further by obtaining a waiver after default but before seizure of a debtor's property. While this will not always be effective due to hostile or uncooperative debtors, it is a safer method to pursue when seeking to avoid the problem of an unequal bargaining position in an adhesion situation.

#### CONCLUSION

What may be the answer to the *Fuentes* self-help remedy puzzle seems to be limited only by one's imagination, judging by the myriad solutions currently being offered. Perhaps special procedures will have to be designed by the legislature to provide a forum for pre-seizure hearings in connection with waiver of rights, and notice and opportunity for objection to repossession by debtors. Or perhaps the Uniform Commercial Code, which is intended to facilitate commercial transactions by implementing their practice into its provisions, will provide an independent basis for an answer. For example, the UCC's general obligation of good faith could be imposed on the secured party in the enforcement of the security agreement.<sup>74</sup>

Until the courts have reviewed the question or the legislature responds, prudent creditors in Texas should observe prior notice and hearing procedures before exercising their self-help repossession rights under section 9.503.

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73. For an excellent discussion and several examples of form waivers, see John Krahmer, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 TEX. TECH. L. REV. 23, 43-44 (1972).

74. UNIFORM COMMERCIAL CODE § 1-203.