COMMERCIAL LAW—UNIFORM COMMERCIAL CODE—SELF-HELP REPOSSESSION UNDER SECTION 9-503 DOES NOT VIOLATE THE FOURTEENTH AMENDMENT—*Messenger v. Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (Ch. 1972).

In the early evening of November 17, 1971, John Messenger discovered that his 1966 Chevrolet Impala was missing from the parking area behind the apartment building in which he was a tenant. A telephone call to the Linden police disclosed that his car had not been stolen, but instead had been repossessed by an agent who had acted for the Peoples Trust Company after the bank had unsuccessfully attempted to contact Messenger by telephone and by ordinary mail to demand possession of the car. Messenger's monthly installment payment due October 13th had been delinquent for over a month, and although earlier that same day the bank had received the October payment in the mail, the bank's collection department had not yet become aware that the payment had arrived. Messenger had been more than 10 days late in making 12 out of a total of 14 payments, and the November payment, due on the 13th, was in arrears four days when the bank instructed an agency to repossess the car.[1]

Messenger had purchased the car from Sandy Motors, a used car dealer, on July 10, 1970. Immediately following the sale of the automobile, Sandy Motors assigned all of its rights in the agreement to the Peoples Trust Company. The terms of the agreement, which were set out in a standard form contract furnished by the Peoples Trust Company, provided that the "Seller retains a purchase money Security Interest in the Vehicle and all accessions until Buyer fully performs hereunder."[2] On the front of the agreement above the signatures, reference was made in relatively large capital letters to the terms printed on back of the document, where, among a number of contract terms in legible fine print, appeared the following:

> In the event of default by Buyer hereunder, (1) the entire unpaid balance of the Total of Payments shall, at the option of Holder, become immediately due and payable, and (2) Buyer, upon

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[1] Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 3-5, 295 A.2d 402, 403-04 (Ch. 1972). Memorandum of Law in Support of Plaintiff's Request for Injunctive and Declaratory Relief at 2 [hereinafter cited as Brief for Plaintiff].

[2] 121 N.J. Super. at 3, 295 A.2d at 403. *See* Brief for Plaintiff, *supra* note 1,"Exhibit B." Messenger had purchased the car for a cash price of $1,674.75, with a cash down payment of $674.75, and had agreed to pay the balance of $1,000 plus interest and insurance charges in 24 equal monthly installments of $52.01 each. The deferred price totaled $1,922.99.

> demand, shall deliver the vehicle to Holder, or *Holder may, with or without legal process and with or without previous notice or demand for performance, enter any premises wherein the vehicle may be and take possession of the same,* together with anything in the vehicle.[3]

The day after his car was repossessed, Messenger contacted the bank and stated that he would be able to make the November installment on the next day. He was informed that the full contract price, including time payment, was now due and owing, and that failure to meet the accelerated payments would result in sale of the car within 10 days of the date of repossession. On November 22, Messenger received notice by means of a certified letter from Peoples Trust that his car was to be sold by public auction at Sandy Motors at 9:30 A.M. on November 24, 1971.[4]

On November 23, Messenger brought an action against Sandy Motors and Peoples Trust in superior court, chancery division, seeking an interlocutory injunction against the sale. The court on the same day issued an order to show cause containing a preliminary restraint. A negotiated arrangement between the parties followed, through which Messenger regained possession of the car and his account was once again reinstated at the bank.

Messenger, in support of his demand for injunctive and declaratory relief, argued that the self-help provisions of section 9-503 of the Uniform Commercial Code (N.J. STAT. ANN. § 12A:9-503) were unconstitutional.[5] Messenger's contentions presented two primary issues for the court's consideration. The first was whether there was a sufficient element of state action in self-help repossession to invoke the procedural due process safeguards of the fourteenth amendment. Secondly assuming the requisite state action, did the creditor's exercise of self-help repossession constitute such a deprivation of a debtor's property interest so as to be violative of due process because of failure to provide for prior notice and hearing?[6]

The *Messenger* court held that the existence of section 9-503 of the Code did not make a creditor's exercise of self-help repossession

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3 121 N.J. Super. at 3, 295 A.2d at 403 (emphasis added).

4 *Id.* at 5, 295 A.2d at 404; Brief for Plaintiff, *supra* note 1, at 2-3.

5 UCC § 9-503 (West 1972) provides in pertinent 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.

N.J. STAT. ANN. § 12A:9-503 (1962) adopts verbatim the official text.

6 121 N.J. Super. at 6, 295 A.2d at 404.

of debtor's automobile an action under color of state law within the meaning of the fourteenth amendment. It rejected as "misplaced" reliance upon the extension of the state action concept which has recently developed in the civil rights context.[7] Instead, the court found the right to self-help repossession to be a remedy secured under the terms of private contractual agreement, the legality of which had been recognized at common law long before its adoption by the Code.[8]

In the alternative, on the assumption that the fourteenth amendment was applicable to the case, the court held that the defendant's exercise of self-help repossession was not violative of due process.[9] The court considered significant the economic consequences of a requirement for prior notice and hearing and, as a second factor, found nothing in the self-help remedy which pointed to the use of unfair tactics.[10] In considering recent decisions, the court noted that the cases still permit a measure of flexibility in fashioning due process requirements.[11] While the agreement signed by Messenger was found to be a contract of adhesion, a buyer in the world of automobile financing "having a wealth of experience all around him to draw upon and make him aware of the possibility of repossession," could waive his right to procedural safeguards, and could not properly claim his right to due process was violated simply because no prior hearing took place.[12]

The question of whether the requirements of due process invalidate the self-help remedy of section 9-503 of the Code has been termed by one commentator as "the most important of all the constitutional attacks on prejudgment seizures for banks and finance companies with large portfolios of consumer paper."[13] The ground work for attack was laid in 1969 with the Supreme Court's decision in *Sniadach v. Family Finance Corp.*,[14] where the Court held that the Wisconsin procedure which authorized prejudgment garnishment of an individual's wages in the absence of notice and prior hearing constituted a deprivation of the debtor's property in violation of procedural due process.[15] The Court reached this conclusion notwithstanding the fact that the taking acted only to temporarily freeze the debtor's wages pending a hearing

7 *Id.* at 7, 295 A.2d at 405.

8 *Id.* at 8-9, 295 A.2d at 405-06.

9 *Id.* at 17, 295 A.2d at 410.

10 *Id.* at 9-12, 295 A.2d at 406-08.

11 *Id.* at 13, 295 A.2d at 408.

12 *Id.* at 16, 295 A.2d at 410.

13 Felsenfeld & Finkelson, *Consumer Protection Influences on Article 9*, 5 UCC L.J. 5, 40 (1972).

14 395 U.S. 337 (1969).

15 *Id.* at 342.

on the merits. The Court, however, indicated that such a summary procedure may "well meet the requirements of due process in extraordinary situations," but only in actions initiated to benefit the general public and involving a significant state interest.[16] In *Sniadach*, it could find before it no such special situation nor was the Wisconsin statute drawn narrowly enough to meet such an unusual condition if there were one.[17]

The Court recognized that wages were "a specialized type of property presenting distinct problems in our economic system."[18] The result of a prejudgment garnishment "as a practical matter [was to] drive a wage earning family to the wall,"[19] so that the taking of property in the absence of notice and a prior hearing violated due process.[20]

The Court rejected the contention that deference be given to the time-hallowed remedy of prejudgment attachment.

> The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms.[21]

Sniadach left open significant questions relating to the repossession process under Article 9. Were other forms of property, including consumer goods, to be covered by the rationale of this decision? What was the specific nature of a prior hearing which would comport with due process? Justice Harlan, in a concurring opinion in *Sniadach*, sought to establish the minimum standards required for procedural due process, concluding that due process requirements of notice and hearing must be

> aimed at establishing the validity, or at least the probable validity,

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16 *Id.* at 339. *See* Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942, 947-49 (1970). The *Sniadach* Court found extraordinary situations which justified summary procedures in the following cases: Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598-600 (1950) (sustaining summary seizures by the Federal Food and Drug Administration of misbranded drugs); Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947) (sustained authority of conservator appointed by Federal Home Loan Bank Commission to summarily seize the assets of a savings and loan association); Coffin Bros. & Co. v. Bennett, 277 U.S. 29, 31 (1928) (upheld state statute authorizing superintendent of banks to attach the property of stockholder of defunct bank against whom stock assessment had been levied); Ownbey v. Morgan, 256 U.S. 94, 110-12 (1921) (upheld prejudgment attachment of a nonresident's property in order to obtain quasi in rem jurisdiction for state court). The citation of these cases would appear to indicate the limitation of summary seizure procedures to circumstances involving a significant state interest initiated to benefit the general public

17 395 U.S. at 339.

18 *Id.* at 340.

19 *Id.* at 341-42.

20 *Id.* at 342.

21 *Id.* at 340.

of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use.[22]

The *Sniadach* decision opened the doors of justice to a broad head-on attack of prejudgment seizure remedies. One writer commented that *Sniadach* represented merely the "tip of the iceberg" which could ultimately strike at the creditor's entire arsenal of weapons in the Code.[23] The great weight of both state and federal authority adopted this broad approach, and read *Sniadach* as an attack on the entire domain of prejudgment remedies.[24]

In June, 1972, the Supreme Court in *Fuentes v. Shevin*[25] decisively limited the powers of creditors to affect prejudgment repossession through the process of statutory replevin. Both Florida and Pennsylvania had statutes authorizing state officers, upon the *ex parte* application of a creditor, to summarily seize a debtor's personal property.

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22 *Id.* at 343 (Harlan, J., concurring).

23 Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302, 323 (1972).

24 Since *Sniadach*, summary prejudgment seizures have come under constitutional challenges throughout the country. The following cases have struck down such seizures as violative of procedural due process because of failure to provide for prior notice and hearing: Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) (distraint of furniture without hearing in the enforcement of a landlord's lien); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) (distress sale of tenants' household goods by landlord under Pennsylvania Landlord and Tenant Act); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (prejudgment statutory replevin); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeeper's lien statute); Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (prejudgment attachment of bank account authorized by statute); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (California's Claim and Delivery Law providing for prejudgment replevin); Jones Press, Inc. v. Motor Travel Servs., Inc., 286 Minn. 205, 176 N.W.2d 87 (1970) (prejudgment garnishment of accounts receivable); Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969) (prejudgment garnishment of commercial bank account).

A number of cases adopted a strict interpretation of *Sniadach* in upholding summary prejudgment remedies. *See, e.g.*, Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970); Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969); Michael's Jewelers v. Handy, 6 Conn. Cir. 103, 266 A.2d 904 (App. Div. 1969).

25 407 U.S. 67 (1972), *rev'g* Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971) and Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970). For an overall view of *Fuentes, see, e.g.*, Budnitz, *Due Process in Consumer Cases: Fuentes v. Shevin*, 6 CLEARINGHOUSE REV. 418 (1972); Gardner, *Fuentes v. Shevin: The New York Creditor and Replevin*, 22 BUFFALO L. REV. 17 (1972); Note, *Right to Hearing Before Taking of Property*, 86 HARV. L. REV. 85 (1972); Note, *Creditor's Rights, Fuentes v. Shevin*, 3 LOYOLA U. CHI. L.J. 451 (1972); Note, *Debtor-Creditor Relations—Fuentes v. Shevin: Due Process for Debtors*, 51 N.C.L. REV. 111 (1972); Note, *Fuentes v. Shevin: An End to the Misuse of Replevin*, 34 U. PITT. L. REV. 312 (1972); Note, *Replevin—Prior Notice and Hearing—Due Process*, 40 TENN. L. REV. 125 (1972).

Neither statute provided for prior notice to the debtor nor an opportunity to challenge the seizure at any kind of prior hearing. The Court held that such summary prejudgment procedures constituted a taking of property without due process of law.[26] The Court found that prejudgment replevin statutes bore little resemblance to the ancient common law replevin action, which was a remedy to seize goods wrongfully *taken*, not a remedy for use by creditors to seize goods alleged to be wrongfully *detained*.[27]

The *Fuentes* Court recognized that the central meaning of procedural due process is the requirement that parties whose rights are to be affected must have a right to notice and an opportunity to be heard at a "meaningful time and in a meaningful manner."[28] The issue for the Court was

> whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another.[29]

The Court concluded that the right to notice and hearing must be granted at a time when the deprivation can still be prevented. While at a later hearing damages may be awarded to an individual for a wrongful deprivation and the goods returned, no "award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred."[30] Moreover, the fourteenth amendment's protection against deprivation of property acts to safeguard not only the rights of undisputed ownership but also extends protection to any significant property interest—in *Fuentes*, the debtors' interest in the continued possession and use of the property held as collateral.[31] These safeguards attach whenever a significant property interest is at stake, no matter what the ultimate outcome of a hearing on the merits.[32] "[*S*]*ome* form of notice and hearing—formal or informal" is required

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26 407 U.S. at 96.

27 *Id.* at 79. At common law a creditor who wished to invoke the state's power to recover goods wrongfully detained had to proceed through the action of debt or detinue, and could not seize the debtor's property before final judgment. When the common law did permit the prejudgment seizure of property by an official it provided some type of notice and opportunity to be heard, and the state official made a summary determination of the relative rights of the parties before seizing property. *Id.*

28 *Id.* at 80 (quoting from Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

29 407 U.S. at 80.

30 *Id.* at 82.

31 *Id.* at 86.

32 *Id.* at 87.

before the deprivation of *any* property interest that cannot be characterized as *de minimus*.[33]

It is significant that the *Fuentes* Court went on to hold that due process safeguards are not limited to the protection of only a few types of specialized property interests, since the fourteenth amendment speaks of "property" generally:

> It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are "necessary."[34]

The Court rejected the view that consideration of the costs in time, effort, and expense imposed by the requirements of a prior hearing could outweigh a constitutional right, for "the Constitution recognizes higher values than speed and efficiency."[35] It reasoned that the requirements of procedural due process are "not intended to promote efficiency or accommodate all possible interests," but rather "to protect the particular interests of a person whose possessions are about to be taken."[36]

The *Fuentes* Court also rejected the view that default by a debtor could be considered an "extraordinary situation" that could justify postponing notice and opportunity to be heard. Expanding on the *Sniadach* interpretation, the Court concluded that outright seizure was permitted in only a few limited situations of truly unusual nature, such as those serving an important governmental or general public interest.[37] The Court was unable to find such an interest in a summary seizure where no more than the creditor's private gain was directly at stake.

By way of dictum, the Court observed that there might be "special situations" demanding prompt action which would justify summary seizure of collateral. Such situations might exist where a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. However, it would require, in such a situation as it had in *Sniadach*, that the statutes be " 'narrowly drawn to meet any such unusual condition' "[38] Here no such unusual situation was presented by the facts of the case.

Finally, the Court considered the important issue of waiver. The creditors in *Fuentes* argued that the debtors had waived their basic

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33 *Id.* at 90 n.21.

34 *Id.* at 90.

35 *Id.* at 90 n.22.

36 *Id.*

37 *Id.* at 90-92. *See, e.g.*, cases cited note 16 *supra*.

38 407 U.S. at 93 (quoting from Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1970)).

procedural due process rights by signing conditional sales contracts which provided that the seller had the right to retake or repossess merchandise upon default.[39] These terms, part of standard form printed contracts, appeared in fine print without any explanation to clarify their meaning. The Court made reference to its recent decision in *D.H. Overmyer Co. v. Frick Co.*,[40] where it had outlined the considerations relevant to the determination of contractual waiver of due process rights. In *Overmyer*, the contract was negotiated between two corporations and the waiver provisions included were specifically bargained for and drafted by their attorneys during negotiations. The *Overmyer* Court noted that since the waiver provision was "not a case of unequal bargaining power or overreaching," and the agreement "from the start, was not a contract of adhesion," the contractual waiver of due process had been "voluntarily, intelligently, and knowingly" made.[41]

The *Fuentes* Court found no difficulty in distinguishing the *Overmyer* agreement from the cases before it. In *Fuentes*, there was no bargaining over terms, since the purported waiver clause was a printed part of the form contract on which the sale was conditioned. The parties were far from equal in bargaining power and there was no showing that the buyers were aware of the significance of the fine print which purported to waive their constitutional rights.[42] The Court noted that *Overmyer* had recognized that " 'where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue.' "[43] At the very least, the *Fuentes* Court concluded that a waiver of constitutional rights in any context must be clear.[44] However, the Court was able to avoid exploring the consequences of the *Overmyer* view by holding that the language of the purported waiver provisions were insufficient on their face to effectively waive appellants' constitutional right to a pre-seizure hearing.[45]

The *Fuentes* decision may be interpreted as an emphatic recognition of the constitutional right to notice and a hearing prior to the deprivation of a property interest.[46] However, the *Fuentes* Court failed

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39 407 U.S. at 94.

40 405 U.S. 174 (1972).

41 *Id.* at 186-87.

42 407 U.S. at 95.

43 *Id.* (quoting from D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188 (1972)).

44 407 U.S. at 95.

45 *Id.* at 95-96.

46 *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 89 (1972). For a general discussion of summary remedies, see Note, *The Prior Hearing Rule and the Demise of Ex Parte Remedies*, 53 B.U.L. REV. 41 (1973).

to go beyond *Sniadach* in articulating a set of minimum safeguards to be observed at such a hearing, leaving the nature and form of these hearings to variation which it considered to be properly the subject of legislative reform.[47] The Court concluded by quoting from Justice Harlan's concurring opinion in *Sniadach* that such a hearing would require " '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 . . . .' "[48]

Commentary in a leading guide for practitioners has indicated the belief that *Fuentes* "casts a serious doubt on the constitutionality of the provision of the Code authorizing repossession without judicial action."[49]

> If a creditor's use of judicial seizure is condemned as it has been because there is no notice to the debtor nor opportunity for him to be heard as to the existence of a default justifying respossession, there is an inconsistency in permitting the creditor to bypass that protective rule hands [sic] and repossessing without judicial aid.[50]

Unquestionably, the *Fuentes* opinion raises valid questions as to the constitutionality of the Code's provision for self-help repossession. However, it is argued that the opinion ignored the special nature and interests involved in secured transactions—the right to look to the collateral upon default is the very basis upon which a secured party enters into the transaction.[51] Moreover, it is still open to question whether the Code's provision for self-help repossession necessarily involves state action within the meaning of the fourteenth amendment. Is there an element of state action in self-help sufficient even to invoke fourteenth amendment protection? And if so, what are the parameters of due process in the world of secured transactions?

Article 9 of the Uniform Commercial Code unified the law of secured transactions, treating various forms of financing devices as merely different methods of creating security interests. At the heart of Article 9 is Part 5, which sets out the rights and remedies of the parties when a secured transaction breaks down. The secured party's right to repos-

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47 407 U.S. at 96-97.

48 *Id.* at 97 (quoting from 395 U.S. at 343).

49 4 R. ANDERSON, UNIFORM COMMERCIAL CODE § 9-503:5.1 (Supp. 1972-73).

50 *Id.*

51 Note, *Article 9—Notice Provisions Upon Default*, 1972 WASH. U.L.Q. 535, 538-39. It should be noted that the *Fuentes* decision was decided by a 4-3 vote in which Justices Powell and Rehnquist, both known for their philosophy of judicial restraint, did not participate.

sess collateral in which he holds a security interest is of critical importance and is central to the enforcement machinery of Article 9.[52]

Until *Fuentes*, a creditor was able to effect repossession through statutory replevin without prior hearing and notice. With the constitutionally mandated modification of that remedy, self-help repossession becomes the critical remedy.[53] Given the large number of self-help repossessions across the nation, creditors contend that any requirement for a prior hearing will result in higher costs of doing business which will be reflected in increased costs for the consumer, that credit-worthy customers will be denied credit, and that the courts will be jammed with unnecessary legal actions.[54] Spokesmen for the Code as well as academic writers foresee major economic dislocations to the credit community resulting from any further extension of due process safeguards.[55] Supporters of self-help argue that it is both an economical and necessary remedy.

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52 UCC § 9-501, Comment 1, states in part: "The rights of the secured party in the collateral after the debtor's default are of the essence of a security transaction."

53 The economic dimensions of the issue become readily apparent by way of reference to the following statistics cited in the *Messenger* decision. Banks, finance companies, credit unions, and other lending institutions had extended *$38.8 billion* in consumer credit throughout the United States to finance the purchase of automobiles up to the end of the first quarter of 1972. Ford Motor Credit Company alone had 977,000 accounts nationally including 21,400 in New Jersey, the total value of the New Jersey accounts running a little over $40 million. During the same period the total number of repossessions by Ford Credit nationally was 38,142; in New Jersey a total of 465. While the figures representing the ratio of repossession cases to all accounts is relatively low (approximately 4% nationally), the number of cars repossessed in a year is large. The New Jersey Division of Motor Vehicles reported 14,192 notices of seizure in 1970, and 13,489 in 1971. In California statistics indicate the eight major banks and finance companies reported 49,600 automobile repossessions in that state during 1971. 121 N.J. Super. at 10-11, 295 A.2d at 406-07.

The importance of self-help repossession is further appreciated by 1970 figures from the General Motors Acceptance Corporation. During that year they reported approximately 144,000 repossessions in the United States, while during the same period they replevied only about 2,000 automobiles. Felsenfeld & Finkelson, *supra* note 13, at 40 n.130.

Total consumer installment credit currently outstanding in the United States exceeds $127 billion. 59 FED. RES. BULL. A 56 (1973). Statistics indicate that the growth of consumer indebtedness is a relatively recent development: (figures in billions) 1929-$3.2, 1939-$4.5, 1950-$14.7, 1959-$39.2, 1962-$48.2. McCracken, Mao & Fricke, *Consumer Installment Credit & Public Policy*, 17 MICH. BUS. STUDS. 1, 7 (1965) (figures compiled from FED. RES. BULL.).

54 *See, e.g.*, Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 478-86 (1968). *See also* Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 12, 295 A.2d 402, 407-08 (Ch. 1972); Brief for UCC as Amicus Curiae at 27-28, Adams v. Southern Calif. First Nat'l Bank, No. 72-1484 (9th Cir., filed Mar. 15, 1972); Felsenfeld & Finkelson, *supra* note 13, at 5.

55 *See, e.g.*, J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 974-75 (1972).

It is contended that non-judicial repossession, not involving costly legal fees, is far more economical than formal legal process. Self-help is justified as being essential to the

Critics of this view, on the other hand, point to the large number of voluntary "turn-ins" made by buyers who are in default, in which case prior hearings are unnecessary.[56] Based on experience in small claims and landlord tenant courts, they contend that an administratively streamlined procedure sufficient to meet constitutionally required standards of due process may be had at a cost far less than that estimated by the credit community.[57] For, if there is rarely merit in debtors' claims, most cases will go by default and calendar congestion will not develop.[58] Moreover, consumer advocates have attacked the Code as anti-consumer legislation cloaked in a "mirage of neutrality."[59] They point out that protective provisions relating to consumer goods financing were deleted from the 1949 draft under lobby pressures which termed the effort "social legislation."[60]

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protection of creditor's collateral since personal property, and automobiles in particular, may be damaged or concealed before a creditor is able to obtain relief from the courts. Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions*, 8 B.C. IND. & COM. L. REV. 535, 537 (1967). Spokesmen for the credit community have estimated a per unit cost of $500 for repossession by judicial process. Plaintiff's Supplemental Memorandum of Law at 47, Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (Ch. 1972) [hereinafter cited as Plaintiff's Supplemental Memorandum of Law]. In measuring the accuracy of these figures the "cry of wolf" has been sounded, *id.* at 29, and such estimates have been attacked as an example of the creation of a credibility gap. Felsenfeld & Finkelson, *supra* note 13, at 41 (citing Johnson, *"Creditors' Remedies,"* INDUS. BANKER (Jan. 1971)).

56 Plaintiff's Supplemental Memorandum of Law, *supra* note 55, at 44-46.

57 *Id.* at 53-55.

58 Felsenfeld & Finkelson, *supra* note 13, at 49.

Consumer advocates argue that the abuse of the self-help remedy has often produced considerable hardship for the debtor. Investigation of low-income consumer groups have uncovered numerous cases of excesses and abuses perpetrated by repossessors while attempting to reclaim collateral. *See* Comment, *Non-Judicial Repossession—Reprisal in Need of Reform*, 11 B.C. IND. & COM. L. REV. 435 (1970). A recent study of automobile repossession in Connecticut disclosed that the same autos are often repossessed and resold several times at high profits over a relatively short period of time; that sales are made to poor credit risks in anticipation of quick default and profitable resale. Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20, 42 (1969). Counsel for consumers argue that the only sure method of guarding against such abuses is to give every debtor his day in court, and that the state is responsible for establishing an efficient system to provide it. Felsenfeld & Finkelson, *supra* note 13, at 48-49.

A recent study of consumer defaults indicates that about a third claim some reason for ceasing payments which typically implicate the seller—principally fraud or misrepresentations concerning the goods. *See* 1 D. CAPLOVITZ, DEBTORS IN DEFAULT 4-12 (1971). While not all of these complaints are legitimate, according to one writer it "seems likely that there is a significant percentage of cases where the debtor has a good defense and the creditor has no legal right to repossess." Neth, *Repossession of Consumer Goods: Due Process for the Consumer; What's Due for the Creditor*, 24 CASE W. RES. L. REV. 7, 15 (1972).

59 Clark, *supra* note 23, at 306.

60 *Id.* (citing 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 9.2 (1965)).

Given the imposing economic considerations of the repossession issue, the competing and contradictory debtor-creditor interests, and the conflicting rights and equities involved, few courts faced with the recently mounted constitutional attack on self-help repossession have evinced a desire to come to grips with the demands of due process in the context of this remedy as codified by section 9-503. In the emerging body of case law that has developed since the first decision in 1971, the validity of the remedy has more often turned on the presence or absence of state action sufficient to invoke the prohibitions of the fourteenth amendment. Decisions are in conflict and, as the *Messenger* court recognized, the questions presented "are before long going to be placed before the United States Supreme Court."[61]

McCormick v. First National Bank[62] was the first reported case challenging the constitutionality of section 9-503 of the Code. McCormick had purchased a car from an auto dealer and had financed the purchase with a security agreement which the dealer assigned to the defendant bank. The bank's agent repossessed the car without prior notice after McCormick allegedly defaulted in his payments.

McCormick sought to invoke federal jurisdiction on the grounds that the bank's repossession of his automobile without prior opportunity to be heard deprived him of his property without due process, and

According to Clark, the Code's drafters believed that the omission of the safeguards would do no harm since the "regulatory" aspects of secured consumer transactions were to be covered by specific state legislation, while Article 9 would cover only the "perfection" requirements. The states, however, failed to enact the type of consumer protection statutes envisioned by the Code, with the result that "Article 9 is *the* governing law when it comes to default, foreclosure, and deficiency in consumer credit transactions." In this manner, the Part 5 enforcement machinery of Article 9 which was drafted in contemplation of commercial transactions between businessmen "unknowingly has caught *consumer* credit transactions in its grasp as well." *Id.* at 306, 308.

Spokesmen for the Code have argued that a buyer who has been the victim of a wrongful repossession has legal remedies in the form of injunctive relief as well as other safeguards built into the Code. *See, e.g.*, Brief for UCC as Amicus Curiae at 26, Adams v. Southern Calif. First Nat'l Bank, No. 72-1484 (9th Cir., filed Mar. 15, 1972). However, it is argued that since most repossessions involve low-income buyers who generally lack the sophistication to recognize actionable abuses, few actually seek legal redress. While an evaluation of debtor remedies discloses several avenues of possible redress, it has been recognized that the "legal remedies and practical realities do not coincide." Comment, *supra* note 58, at 457. It has been suggested by Code spokesmen that the existence of legal services in poverty areas makes legal redress a real and not a theoretical right. However, as has been pointed out, this thinking

> proceed[s] upon the assumption that the typical dispossessed debtor is readily disposed to the protection of his rights through affirmative legal action. Such a presupposition is distinctly middle-class and, perhaps, inordinately naive.

Id. at 458.

61 121 N.J. Super. at 5, 295 A.2d at 404.

62 322 F. Supp. 604 (S.D. Fla. 1971).

that this action was under color of state law. The court dismissed McCormick's complaint pursuant to defendant's motion, finding no federal subject matter jurisdiction. The court rejected plaintiff's claim of jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) on two grounds, holding that these statutes applied only in cases involving infringements of personal liberty, not to deprivations of personal property rights.[63] The court relied in part on a three-judge decision in *Lynch v. Household Finance Corp.*[64] The Supreme Court has recently reversed this decision, holding that under section 1343(3) it is not permissible to distinguish between personal and property rights.[65]

The court further held that McCormick's auto was not repossessed under color of law, thus rejecting plaintiff's contention that the bank had acted under section 9-503 of the Code. While the security agreement gave the creditor all rights under the Code upon default of the buyer, the court concluded that the Code provisions were included in the contract simply by way of reference. Here the court found that the bank, in acting independently, had exercised a private contractual right and therefore its actions were not under color of state law.[66]

The court, by way of dictum, also found no merit in plaintiff's contention that section 9-503 was violative of due process under *Sniadach*.[67] In that decision, a specialized property interest in the nature of a necessity of life was involved, the deprivation of which, without a

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63 *Id.* at 605-06. 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.

28 U.S.C. § 1343(3) (1970) provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
>
> (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 . . . .

42 U.S.C. § 1983 creates a civil cause of action for a deprivation of constitutional rights, and 28 U.S.C. § 1343(3) gives the federal courts jurisdiction to hear suits based on the first statute. The "under color of" state law requirement of 42 U.S.C. § 1983 and the "state action" requirement of the fourteenth amendment have been construed to be of the same breadth and scope. *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966).

64 318 F. Supp. 1111 (D. Conn. 1970).

65 405 U.S. 538 (1972).

66 322 F. Supp. at 606.

67 *Id.* at 607.

prior hearing, had resulted in economic hardship. The judge in *McCormick* found dispositive his own opinion in the three-judge *Fuentes* decision,[68] later to be reversed by the Supreme Court, which rejected the "necessities of life" property interest that some courts had read into the *Sniadach* decision.[69]

With the exception of the *McCormick* interpretation of state action, the precedential value of the decision is of limited moment. However, as one writer has noted, "the case is unwittingly significant because of its finding that no real distinction exists between replevin and repossession under § 9-503."[70] If this is the case, then the *Fuentes* requirement for prior notice and hearing before replevin would appear to be equally applicable to the self-help remedy if the requisite element of state action can be found in the latter procedure.

The most significant decision to date has been *Adams v. Egley*,[71] decided by the United States District Court for the Southern District of California. The plaintiffs' motion for partial summary judgment involved the constitutionality of sections 9-503 and 9-504 of the Code, which provide for the creditor's right to repossess and dispose of collateral upon default by the debtor.[72] Plaintiff Adams had borrowed $1,000 from the Bank of La Jolla, executing a promissory note and a security agreement in favor of the bank. Shortly thereafter, the defendant Southern California First National Bank became the successor in interest to the Bank of La Jolla. Adams fell behind on his payments and defendant Egley, acting for the successor bank, repossessed two of the three vehicles which served as collateral under the security agreement and sold them later at a private sale.[73]

Plaintiffs asserted two bases for the founding of federal jurisdiction, both of which the court recognized as involving a showing of "some significant state involvement in the alleged wrongful acts . . . ."[74]

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68 *Id.*

69 Fuentes v. Shevin, 407 U.S. 67, 88-90 (1972).

70 Clark, *supra* note 23, at 330.

71 338 F. Supp. 614 (S.D. Cal. 1972), *appeal docketed sub nom.* Adams v. Southern California First Nat'l Bank, No. 72-1484 (9th Cir., filed Mar. 15, 1972). At the time of this writing the *Adams* case has been argued before the court of appeals and a decision is pending. For commentary on the case, see Note, *Constitutionality of Sections 9-503, 9-504—Due Process*, 13 B.C. IND. & COM. L. REV. 1503 (1972); Note, *Hearing and Notice Required Prior to Repossession of Chattels under California Commercial Code Sections 9-503 and 9-504*, 5 CREIGHTON L. REV. 360 (1972); Comment, *Automobile Repossession: Law in Flux*, 2 U. SAN FERNANDO VALLEY L. REV. 43 (1973).

72 338 F. Supp. at 615-16. The other case represented in this consolidated decision is Posadas v. Star & Crescent Fed. Credit Union, Civ. No. 70-359-N.

73 338 F. Supp. at 616.

74 *Id.* at 617. Jurisdiction predicated on 28 U.S.C. § 1343 (1970), 42 U.S.C. § 1983 (1970). For text of statutes, see note 63 *supra*.

For a finding of such jurisdiction, the court reasoned, the wrongful conduct of private individuals must be either authorized, sanctioned, or encouraged by state law.[75]

The bank contended that self-help repossession involved the self-executing terms of a private contract where there was no state involvement on which to found jurisdiction. The *Adams* court rejected this contention, finding applicable the expanded concept of state action as articulated by *Reitman v. Mulkey*.[76] In *Reitman*, an amendment to the California constitution prohibiting restrictions on an individual's right to sell to the party of his choice was held violative of the fourteenth amendment. The California amendment acted to repeal various anti-discriminatory housing legislation and, in effect, served as state encouragement of private acts of discrimination. As interpreted by the *Adams* court, *Reitman* found in the "*mere enactment of the statute* state involvement sufficient to bring the alleged discriminatory acts within the purview of the Fourteenth Amendment."[77]

While the *Adams* creditors contended that the repossessions were private contractual acts, the court concluded that it could not be seriously doubted that the statutory enactment of the Code had a significant impact on the specific provisions of the contract. The reference to the Code in Adams' contract, and "to immediate possession . . . according to law" in Posadas' contract, indicated that creditors were "persuaded or induced to include" provisions for repossession since such a remedy was permitted by the Code. The terms in the security agreements had therefore incorporated the Code's embodiment of state policy. Even if an independent right to repossess had been created by the security agreement, that right was still created under authority of state law. The court concluded that the acts of repossession had been made "under color of state law," and that the passage of those Code sections which authorized the acts constituted sufficient state action to raise a federal question.[78]

The *Adams* court then turned to the constitutional issue: whether self-help repossession represented a deprivation of property in contravention of the due process clause. The court reviewed the attack on statutory prejudgment remedies led by *Sniadach* and its progeny, and rejected the narrow interpretation some courts had given to that decision.[79] The Supreme Court's decision in *Fuentes*, coming a few

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75 338 F. Supp. at 617.

76 387 U.S. 369 (1967).

77 338 F. Supp. at 617 (emphasis added).

78 *Id.* at 617-18.

79 *Id.* at 618-19. *See* Note, *A Travesty of Justice: The Uniform and California Commercial Code § 9504(3)*, 4 SW. U.L. REV. 330, 335-36 (1972).

months after *Adams*, made it clear that even though a statute might be drawn narrowly enough to comport with due process, it must also be designed to protect a strong governmental or public interest which does not ordinarily include the protection of a creditor's interest in collateral held by a debtor.[80] Since *Adams* was decided before this clarification of the "special situation" exception to *Sniadach*, the bank contended that since sections 9-503 and 9-504 of the Code involved only secured transactions between contracting parties, they were drawn narrowly enough to constitute a special situation in which prejudgment seizure was constitutionally valid.[81]

The *Adams* court rejected this premise on two grounds. First, the mere entry into a security agreement is not sufficient to charge a party to a contract with notice of waiver of his right to prior notice and hearing, even though the contract provides for repossession. Recognizing the presumption against waiver of constitutional rights, the court held that such waiver was ineffective where a standard form contract was involved. While a purported waiver might be effective where two commercially equal parties bargained at arms' length, this is clearly not the situation in contracts of adhesion, where the terms are dictated by seller or lender. Since section 9-503 was not limited to repossession between parties of equal bargaining power, the statute failed to meet the test of narrowness established by *Sniadach*.[82]

Secondly, the court noted that sections 9-503 and 9-504 of the Code were not confined to secured transactions of a nonessential nature. Prior to the Supreme Court's decision in *Fuentes*, the *Sniadach* case had been interpreted as protecting only "specialized types of property" usually defined as necessities or essentials of life. Since the subjects of secured transactions are commonly household appliances, furniture, and automobiles, all of which may be considered necessities, the Code, in permitting repossession of this type of property, once again failed to meet the narrowness requirement of *Sniadach*. Based upon this pre-*Fuentes* interpretation of *Sniadach*, the *Adams* court found sections 9-503 and 9-504 of the Code violated due process since they permitted summary repossession and resale of debtors' property. The repossessions were therefore unlawful, and plaintiffs were granted partial summary judgment.[83]

Just two weeks after the *Adams* decision, the United States Dis-

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80 407 U.S. at 91-93.

81 338 F. Supp. at 619.

82 *Id.* at 620.

83 *Id.* at 621-22.

trict Court for the Northern District of California, in *Oller v. Bank of America*,[84] came to the opposite conclusion on the same questions. While the court agreed that direct action by a state official is not always necessary to meet the requirement of state action, it found exceptions only in situations where a state official has acted in concert with a private individual, or where the power exercised is purely of a statutory nature as distinguished from common law or contractual origin. In other words, since the authority to repossess was based on a contractual right that had received judicial approval long before the adoption of the Code,[85] the action by the bank was a private act taken to protect a security interest pursuant to contract. Citing *McCormick*, the court refused to view such a transaction as state action. Rather, the *Oller* court, rejecting *Adams*, would limit the *Reitman* extension of the state action concept to situations involving racial injustice. Finding state action lacking, the court granted the bank's motion to dismiss the action for lack of jurisdiction.[86]

To date there have been several post-*Fuentes* decisions attacking the constitutionality of self-help repossession under section 9-503.[87] Just

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84 342 F. Supp. 21 (N.D. Cal. 1972). *See* Burke, *Conflicting Views on Self Help Provisions of Uniform Commercial Code Expressed by Federal District Courts in California*, 26 PER. FIN. L.Q. REP. 33 (1972).

In *Oller* the defendant bank repossessed an automobile pursuant to a conditional sales contract. The plaintiff in *Oller*, like *Adams*, predicated jurisdiction on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), both of which require a showing that the challenged action in question was conducted under color of state law.

Oller, requesting declaratory relief, contended that the bank's repossession under authority of the Code constituted an action under color of law and that such action deprived her of property without the constitutional safeguards of prior notice and hearing as required by *Sniadach*. The court granted defendant's motion to dismiss, finding no state action in the bank's repossession. 342 F. Supp. at 22-23.

85 *Id.* at 22.

86 *Id.* at 23. The conflicting decisions in *Adams* and *Oller* are reported to have "created grave uncertainty and confusion among creditors in California as to the continued effectiveness" of self-help. Many creditors are said to have completely suspended all repossession activities pending a higher court ruling. Others are reported to have discontinued repossessions only in the southern district of California. *See* Burke, *supra* note 84, at 37. *But see* Note, *Summary Creditor Remedies: Going . . . Going . . . Gone?*, 10 SAN DIEGO L. REV. 292, 322 (1973). According to the writer, the confusion which has developed after the *Oller* decision has permitted most creditors to abandon the curbs on their repossession procedures which were instituted after *Adams*.

The *Adams* decision has been appealed to the Ninth Circuit. Arguments have been heard, and a decision is pending at the time this note is being written. *See* note 71 *supra*.

87 In Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972), a court dismissed plaintiff's constitutional attack on § 9-503 for want of jurisdiction. The court concluded that *Reitman* did not direct a holding that the "individual action" involved in self-help repossession was state action. Instead, the court took the position that the extension of state action was properly limited to the unique considerations of racial discrimination. *Id.*

two weeks prior to *Messenger*, the United States District Court for the Western District of Virginia decided such an action in *Greene v. First National Exchange Bank.*[88] Plaintiff Greene had purchased a car on an installment contract. Upon default, agents of the bank to whom the note and contract had been assigned repossessed his car. Greene contended that the authorization given by the Code to this practice deprived him of his property without due process of law. Plaintiff argued that the *Fuentes* rationale extended to prohibit all state laws which provide for prejudgment seizure without a hearing, and that since section 9-503 permits such a seizure, the *state* had in effect deprived him of his property without due process of law.[89]

The *Greene* court found the fourteenth amendment applicable only to *direct* state action where state officials themselves seize the property, as in *Fuentes*, and distinguished such action from what it termed "indirect state action" where private persons seized property under authority of a state law.[90] Reviewing Supreme Court decisions in which prejudgment seizures of property without prior notice or hearing had been held violative of due process, the *Greene* court concluded that the essential element in each case had been the direct action by the state through an official, agency or branch against an individual's property.[91] Here, the operation of the self-help remedy, while admittedly

at 121. The court recognized that its decision was "in conflict with the holding . . . of Adams v. Egley and Posadas v. Star and Crescent Federal Credit Union . . . . It is enough to say that I disagree with the result in those cases." *Id.* (citation omitted).

There are several other unreported or pending cases. *See, e.g.*, Zacharias v. Western Pennsylvania Nat'l Bank, CCH 1972 Pov. L. Rep. ¶ 16,352 (W.D. Pa., Aug. 29, 1972) (temporary restraining order prohibiting repossession and sale of auto under §§ 9-503 and 9-504, creditor ordered to return car to debtor, debtor required to post bond); Nowlin v. Professional Auto Sales, Inc., CCH 1972 Pov. L. Rep. ¶ 16,202 (D. Neb., June 29, 1972) (temporary restraining order prohibiting repossession and sale of auto under §§ 9-503 and 9-504, creditor ordered to return car to debtor, debtor to resume making payments weekly); Kipp v. Cozens, 11 UCC Rep. Serv. 1067 (Cal. Super. Ct., June 27, 1972) (upholding repossession of auto, provisions of § 9-503 are not unconstitutional, and are no more than a codification or restatement of the common law, and create no new rights, duties, obligations or remedies); Hadley v. Fisher, CCH 1972 Pov. L. Rep. ¶ 15,757 (Cal. Super. Ct., May 8, 1972) (preliminary injunction prohibiting repossession and sale of auto under §§ 9-503 and 9-504); Chrysler Credit Corp. v. Dinitz, 11 UCC Rep. Serv. 627 (N.Y. Civ. Ct., Kings County, Oct. 3, 1972) (creditor's action for deficiency judgment after repossession and sale of debtor's auto under § 9-503, and presumably § 9-504, dismissed, repossession illegal under 9-503, due process requires "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").

88 348 F. Supp. 672 (W.D. Va. 1972).

89 *Id.* at 673-74.

90 *Id.* at 674.

91 *Id.* The court cited the following cases as authority for its position: Bell v. Burson, 402 U.S. 535 (1972) (state suspended plaintiff's driver's license without a hearing); Boddie

pursuant to section 9-503, was the act of a private individual and constituted at most merely "passive state action" which was not violative of due process. The court made no reference to *Adams* nor to the *Reitman* interpretation in granting the bank's motion to dismiss, but noted that section 9-503 was merely the codification of the common law, which did not require the direct intervention of the state's power.[92]

In *Kirksey v. Theilig*,[93] plaintiffs relied primarily on *Reitman* in contending that state authorization and encouragement of self-help was sufficient state involvement for those private acts to meet federal jurisdictional requirements. In dismissing the action the court found *Reitman* distinguishable in two major respects. In *Reitman*, an amendment to a state constitution had the effect of authorizing and encouraging private acts of discrimination which had been expressly prohibited by fair housing legislation.[94] In contrast, the *Kirksey* court found in statutorily authorized self-help that "any kind of encouragement of the private acts by the state is nearly non-existent."[95] Secondly, the court concluded that the resolution of the state action question in *Reitman* was tied to its involvement with racial discrimination. In such cases, the *Kirksey* court reasoned, states had attempted to do indirectly, through intentional circumvention of the constitution, acts which they were prohibited from doing directly. Thus, courts were forced to look beyond the "form of the activity in order to find its tainted substance."[96] However, the court found that in self-help as authorized by the Code, both form and substance are the same. Such statutory approval represents a legislative determination that this remedy is historically sound and economically desirable for both debtor and creditor, and so may not be regarded as an attempt on the part of the state to skirt constitu-

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v. Connecticut, 401 U.S. 371 (1971) (state denied indigents access to its courts); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (state statute authorized police chief to prevent sales or gifts of liquor to plaintiff without a hearing); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare agency prohibited from terminating public assistance without prior hearing). *See also* Armstrong v. Manzo, 380 U.S. 545 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

92 348 F. Supp. at 675.

93 351 F. Supp. 727 (D. Colo. 1972).

94 *See* notes 76-78 *supra* and accompanying text.

95 351 F. Supp. at 731.

> We would be less than candid if we did not note that the private activity can be interpreted as being encouraged by the statutes. But encouragement exists only in the very limited sense that under the statutes the secured parties have less risk in making the repossessions than they would if there were no statutes or case law on the subject.

Id. at 731 n.8.

96 *Id.* at 732.

tional requirements.[97] The mere statutory authorization of self-help repossession did not "sufficiently involve the state in the acts of defendants herein for their acts to constitute action 'under color of' state law."[98]

Similarly, the *Messenger* court found that the codification of self-help repossession in section 9-503 was not sufficient to give that practice the color of state law. While 9-503 *limits* a creditor's use of self-help to peaceful situations, it does not *create* or *substantially contribute* to the creation of the right of self-help. The court viewed the exercise of this remedy as essentially one created by the terms of a private contractual agreement, the Code merely recognizing that "where the parties have agreed about possession after default their agreement is to control."[99]

The *Messenger* court therefore rejected plaintiff's contention that the right to repossess was created by section 9-503, or that the existence of the statute was influential in the inclusion of the repossession provisions in the sales contract. The court referred to self-help's "ancient and honorable" lineage as a common law remedy.[100] However, as *Fuentes* recognized, under modern practice such remedies as replevin bear little resemblance to their ancestors.[101] Common law recaption, the ancestor to the modern form of self-help repossession, was a remedy for goods that had been wrongfully detained. In fact, recaption as it originally developed had other applications, and was also a self-help action to recover "possession" of one's wife and children wrongfully held by the lord of the manor.[102]

The imprimatur of the Code is evidenced by the draftsman's in-

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97 *Id.*

98 *Id.* at 733. While the *Kirksey* court found state action lacking, it rejected the creditor's contention that the authority to repossess by self-help is derived solely as a matter of contract.

> Though it might be possible that the parties could agree to the same default provisions without the existence of the U.C.C., at present it is obvious to us that authority for the repossessions arises from both the agreements and the U.C.C. . . . Further, if the U.C.C. did not exist, it is not clear to us why the same "authorization" problems could not arise under the common law.

Id. at 731 n.7 (citations omitted).

99 121 N.J. Super. at 7, 295 A.2d at 405.

100 *Id.* at 8-9, 295 A.2d at 405-06.

101 407 U.S. at 78-80. *See* Note, *Replevin—Prior Notice and Hearing—Due Process,* 40 TENN. L. REV. 125, 126 nn.4-6, 127 (1972).

102 3 W. BLACKSTONE, COMMENTARIES *4:

> Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace.

clusion of repossession provisions within the standard form contract signed by Messenger:

> Holder may retain the goods as its property or may sell or otherwise dispose of same pursuant to the New Jersey Uniform Commercial Code, whereupon Buyer shall be liable for and shall pay any deficiency on demand.[103]

In addition, the contract provided for interpretation "according to the laws of the State of New Jersey" and stipulated that "all rights and remedies are governed by such law."[104] The self-help remedy must be coupled with other Article 9 provisions to permit sale of the seized collateral and entry of a deficiency judgment on the balance still owed after resale. Self-help is thus a "vital, interdependent cog" of Article 9's machinery, and as some writers have argued, must be considered "state action" within the meaning of the fourteenth amendment, or under "color of law" as required by federal jurisdictional statutes.[105]

The *Messenger* court specifically rejected the *Adams* view that the acts of a private individual pursuant to state law constitute state action, and instead agreed with *Oller* that such reliance on *Reitman* was misplaced, since *Reitman* was concerned solely with racial prejudice.[106] However, while the *Messenger* court correctly stated that due process was not the immediate concern of *Reitman*, that case has been interpreted in other contexts as a significant extension of the state action concept.[107]

The court considered in the alternative the contention that self-help repossession amounted to a denial of due process, assuming *argu-*

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103 Brief for Plaintiff, *supra* note 1, "Exhibit B."

104 *Id.*

105 Clark, *supra* note 23, at 329, 330 n. 116a.

106 121 N.J. Super. at 6-7, 295 A.2d at 405. The logic of this position has been criticized in Comment, *State Action and Waiver Implications of Self-Help Repossession*, 25 ME. L. REV. 27, 32-33 (1973) (footnotes omitted):

> The reasoning behind the *Oller* court's refusal to apply *Reitman* is superficially persuasive and, if the *Oller* court is correct, much of the guidance the Supreme Court has given on state action is of very limited applicability, since many of the leading decisions concerning state action arose in the context of equal protection and racial discrimination. However, there is a fundamental flaw in logic which bases a determination of state action upon the character of the substantive issues of the case. Whether a case involves state action is a threshold question which should be answered affirmatively before *any* testts to determine violation of fourteenth amendment rights are introduced. It is, in effect, a jurisdictional question to be considered prior to and separately from any substantive matters raised. The character of the case is a factor which affects the stringency of the substantive test applied, but it should not be injected into the preliminary examination of a foundation for jurisdiction.

107 *See, e.g.*, Note, *State Constitutional Amendment Guaranteeing Discretion to Seller of Real Estate Violates Fourteenth Amendment*, 20 VAND. L. REV. 1346, 1349 (1967).

endo that section 9-503 gave that practice the color of state law. The court regarded as significant the economic consequences of a requirement for prior notice and hearing before repossession, although the Supreme Court in *Fuentes* had refused to consider these same costs in its determination that replevin procedures were unconstitutional.[108] *Fuentes* expressly indicated that it was "clear that the *avoidance of the ordinary costs imposed by the opportunity for a hearing is not sufficient to override the constitutional right.*"[109]

The *Messenger* court referred to the bank's tolerant attitude towards the buyer's poor payment record as though this acted in mitigation of the absence of due process safeguards.[110] However, the *Fuentes* Court has indicated that even assuming debtors are in default and have no other valid defenses, such considerations are immaterial, since the right to a prior hearing is not dependent on an advance showing of a meritorious defense.[111]

The *Messenger* court indicated that the Supreme Court's opinion in *Overmyer* demonstrates flexibility in fashioning due process requirements to fit different situations.[112] In *Overmyer*, the Court held that a judgment obtained on a *cognovit* note was not *per se* violative of due process. However, there the note had been bargained for by businessmen and their attorneys, demonstrating the utility of summary provisions in a proper commercial setting. Justice Blackmun, writing for the Court, recognized that if the provisions had been included in a contract of adhesion, where the debtor received nothing for the waiver, "other legal consequences may ensue."[113] The *Messenger* court found the automobile sales contract to be one of adhesion, yet in referring to the setting of commercial equality presented in *Overmyer*, concluded in seeming contradiction that the manner in which the *cognovit* clause had been negotiated "bears forcefully upon the type of case of which this one is an example."[114]

The court sought to distinguish *Fuentes* on the basis that the con-

108 121 N.J. Super. at 9-12, 295 A.2d at 406-08; *see* note 53 *supra*. The court agreed with spokesmen for the credit community who had appeared as witnesses for the defense in *Messenger* that the modification of the self-help procedure to include prior notice and hearing "would impose substantial additional costs of doing business." 121 N.J. Super. at 12, 295 A.2d at 407. *Fuentes*, however, recognized that the only right constitutionally mandated before repossession was an *opportunity* to be heard, and that the aggregate cost of such a hearing should not be exaggerated. 407 U.S. at 92 n.29.

109 407 U.S. at 92 n.29 (emphasis added).

110 121 N.J. Super. at 4, 12, 295 A.2d at 403, 408.

111 407 U.S. at 87.

112 121 N.J. Super. at 13-14, 295 A.2d at 408-09.

113 405 U.S. at 187-88.

114 121 N.J. Super. at 14, 295 A.2d at 409. *See* Neth, *supra* note 58, at 29-30.

tractual language in that case had failed to waive notice of hearing, while in the case under consideration the language clearly indicated a waiver of that right.[115] However, after taking into account those considerations relevant to the determination of a contractual waiver of due process rights outlined in *Overmyer*, the *Fuentes* Court rejected the creditors' claims of waiver finding the purported waivers in the installment contracts too vague to be effective.[116] The *Overmyer* Court concluded that a confession of judgment clause, when negotiated by two business corporations through arms'-length bargaining with the advice of counsel, was a valid waiver of due process rights, "voluntarily, intelligently, and knowingly" made, with both parties aware of the significance of the waiver provision.[117] The *Fuentes* Court would require that a waiver "in any context must, at the very *least*, be clear."[118] The *Messenger* court chose to ignore the Supreme Court's acknowledgment of the strong presumption against waiver of the right to prior notice and hearing. Instead, *Messenger* would permit the waiver to be effective even in the absence of proof that the debtor was actually aware of the provisions. The court found it "difficult to believe" that the buying public was not aware of the likelihood of repossession following default.[119] However, while a waiver *per se* is not violative of due process, the Supreme Court has indicated that in circumstances such as those presented in *Messenger*, more than a vague, unarticulated awareness is required to validate a waiver of constitutional rights.[120]

The rapidly developing body of post-*Sniadach* cases concerning prejudgment remedies has been one of confusion and conflict. Ambiguities concerning the application and requirements of due process created by that decision were not satisfactorily resolved in *Fuentes*, which gave those safeguards even further extension. Thus, it is not surprising that the self-help cases have had difficulty in reaching a consensus over those problems in the context of automobile repossession. Thus far, the decisions have found in the state action issue a means of avoiding the weighty economic consequences that would appear to result from the imposition of safeguards mandated by *Fuentes*. Professor Charles Black, in analyzing *Reitman*, recognized that "there were and are no clear and concrete tests of state action; the concept is notoriously, scandalously lacking in these; it is itself nothing but a catch-

115 121 N.J. Super. at 15, 295 A.2d at 409.
116 407 U.S. at 95.
117 405 U.S. at 186-87.
118 407 U.S. at 95.
119 121 N.J. Super. at 15-16, 295 A.2d at 409-10.
120 *See* Comment, *supra* note 106, at 37-41.

phrase."[121] The state action arguments raised in *Messenger* and the other self-help cases merit more than the facile analysis presented in those decisions.[122] The constitutional status of self-help repossession, representing an issue of major importance to the credit community as well as to consumer groups, will, in all probability, have to be ultimately resolved by the Supreme Court.[123]

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121 Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14, The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 88 (1967). For a helpful analysis of § 9-503 as state action, see Neth, *supra* note 58, at 56-62; Comment, *supra* note 106, at 30-35.

122 The question has been raised whether the typical due process provisions found in state constitutions require state action. Felsenfeld & Finkelson, *supra* note 13, at 44. They argue that the rights protected by the N.Y. CONST. art. 1, § 6, and the CAL. CONST. art. 1, § 13 require no state action. This being so, it is contended that if the federal courts are closed to debtors over the jurisdictional issue, then the state courts will become the likely testing grounds for further constitutional attack of self-help repossession.

Messenger argued that self-help was violative of the N.J. CONST. art. 1, ¶ 1, as well as of the due process clause of the fourteenth amendment. 121 N.J. Super. at 5, 295 A.2d at 404. The New Jersey provision states:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

The *Messenger* court in concluding that self-help was not violative of the due process clause, did not separately consider or make reference to the New Jersey provision. *Id.* at 17, 295 A.2d at 410-11.

Quaere: Are the rights enumerated in article 1, ¶ 1 of the New Jersey Constitution protected only in instances in which a significant deprivation is threatened by an arm of the state?

123 Various proposals for the legislative reform of repossession practices as well as a review of various authoritative creditor-debtor viewpoints are described in S. Posel, *Limitations on Creditor's Remedies: Repossession and Deficiency Judgment*, in CURRENT PROBLEMS IN THE LAW OF CONSUMER CREDIT 1-39 (1971), an unpublished collection of working papers prepared by Professor Posel of the Rutgers Law School for the New Jersey Uniform Consumer Credit Code Study Commission.