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Constitutional Law - Fourteenth Amendment - Summary Prejudgment Seizure of Goods Pursuant to a Writ of Replevin Held to Be a Deprivation of Property without Due Process of Law

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CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — SUMMARY PREJUDGMENT SEIZURE OF GOODS PURSUANT TO A WRIT OF REPLEVIN HELD TO BE A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW—In *Fuentes v. Shevin*[1] and its companion case *Parham v. Cortese*,[2] actions were filed challenging the constitutionality of the Florida and Pennsylvania prejudgment replevin statutes. In a 4-3 decision[3] the Supreme Court held that the failure to provide a possessor of property with notice and an opportunity for a hearing prior to seizure of the property, under a writ of replevin, was a deprivation of property without due process of law in violation of the fourteenth amendment.[4]

I. The Factual Setting

In *Fuentes,* appellant purchased, in two separate transactions, a stove and stereo from the Firestone Tire and Rubber Company under conditional sales contracts requiring monthly payments on the total bill of $600. Firestone retained title to the goods while Fuentes was entitled to possession conditioned on payment of the monthly installments. With only $200 remaining to be paid, Fuentes stopped making payments after a dispute arose as to repair service on the stove. Firestone, thereupon, filed an action to repossess in a Florida small claims court. Concurrently, the company obtained a writ of replevin ordering the sheriff to seize the goods. The property was taken from Fuentes the same day.

To obtain the writ of replevin, Firestone had to file the repossession action and apply for the writ before a court clerk, claiming that Fuentes wrongfully detained the goods.[5] The Florida statute additionally required the posting of a bond in double the value of the property be replevied.[6]

1. 407 U.S. 67 (1972).
2. *Id.*
3. Justices Powell and Rehnquist not participating.
4. U.S. Const. amend. XIV, § 1. "[N]or shall any State deprive any person of . . . property without due process of law. . . ."
5. Fla. Stat. § 78.01, F.S.A. (1969):
Right to Replevin—Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided. Or such person may seek like relief, but with summons to defendant instead of replevy writ in which event no bond is required and the property shall be seized only after judgment, such judgment to be in like form as that provided when defendant has retaken the property on a forthcoming bond. Notice of lis pendens to charge third persons with knowledge of plaintiff's claim on the property may be recorded.
6. Fla. Stat. § 78.01, F.S.A. (1969):
Bond, requisites—Before a replevy writ issues, the plaintiff shall file a bond

Thus, upon the *ex parte* application of Firestone, appellant Fuentes was summarily relieved of the stove and stereo. She was given neither notice of, nor opportunity to contest, the issuance of the writ before seizure. Afterwards, she would have her day in court as the defendant in the repossession action. Her only course of interim action was to post within three days of the seizure a counterbond with the sheriff for double the value of the property. The sheriff was bound by the statute to hold the property three days before delivering it to the applicant Firestone.[7] Firestone was to have possession (unless a counterbond was posted by Fuentes) until a final disposition as to title or right to possession was had in the underlying action.

Fuentes subsequently filed suit in federal district court challenging the constitutionality of the Florida replevin statute on due process grounds. A three judge court upheld the constitutionality of the procedure.[8]

Parham involved a similar challenge to the Pennsylvania replevin statute. As in *Fuentes,* none of the three appellants involved received any advance notice of the seizure or an opportunity to contest it. Unlike *Fuentes,* there were no civil actions to repossess filed by the creditors.[9]

The Pennsylvania replevin procedure followed by the creditors was similar in most respects to the Florida process. An *ex parte* application before an official[10] together with a bond in double the value of the property to be replevied was the extent of the procedure. In Pennsylvania, however, the applicant did not have to claim an interest in the property nor that the possessor had wrongfully detained it.[11] Additionally, Pennsyl-

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with surety payable to defendant to be approved by the clerk in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by the defendant in the action.

7. Fla. Stat. § 78.13, F.S.A. (1969):

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

8. Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).

9. The creditor/applicants in the Pennsylvania cases were Sears, Roebuck and Company and the Government Employees Exchange Corporation.

10. A prothonotary rather than a clerk.

11. The procedural requirements for the issuance of a writ of replevin in Pennsylvania are set forth in the Pennsylvania Rules of Civil Procedure, 12 P.S. App. R.C.P. § 1073 (1947):

Commencement of Action

(a) An action of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond, together with

(1) the plaintiff's affidavit of the value of the property to be replevied, and

vania, unlike Florida, did not require the filing of a repossession action as a condition precedent to obtaining a writ of replevin. Therefore, besides denying a pre-seizure hearing, Pennsylvania did not even guarantee that there would be a post-seizure hearing on the merits.[12] As in Florida, a Pennsylvania party could recover possession by posting a counterbond in double the value of the property within three days of seizure.[13]

The Pennsylvania appellants filed suit in federal district court challenging the constitutionality of the replevin procedure on due process grounds. A three judge court denied this challenge and upheld the process.[14]

II. THE MAJORITY OPINION

A. Replevin Analyzed

Writing the opinion for the majority of the Court,[15] Justice Stewart

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(2) the plaintiff's bond in double the value of the property, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the plaintiff fails to maintain his right of possession of the property, he shall pay to the party entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ.

(b) An action of replevin without bond shall be commenced by filing with the prothonotary
(1) a praecipe for a writ of replevin without bond or
(2) a complaint.

If the action is commenced without bond, the sheriff shall not replevy the property but at any time before the entry of judgment the plaintiff, upon filing the affidavit and bond prescribed by subdivision (a) of this rule may obtain a writ of replevin with bond, issued in the original action, and have the sheriff replevy the property.

12. Unless the applicant follows the procedure under 12 P.S. App. R.C.P. § 1073 (b)(2) (1947), the defendant will not get a post-seizure hearing at all unless he initiates the action himself under 12 P.S. App. R.C.P. § 1073(a) (1947): If an action is not commenced by a complaint, the prothonotary, upon praecipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty (20) days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros. None of the applicants in the Pennsylvania case filed a complaint for repossession.

13. 12 P.S. App. R.C.P. § 1076 (1947):

Counterbond

(a) A counterbond may be filed with the prothonotary by a defendant or intervenor claiming the right to the possession of the property, except a party claiming on a lien thereon, within seventy-two (72) hours after the property has been replevied, or within seventy-two (72) hours after service upon the defendant when the taking of possession of the property by the sheriff has been waived by the plaintiff as provided by Rule 1077(a), or within such extension of time as may be granted by the court upon cause shown.

(b) The counterbond shall be in the same amount as the original bond, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the party filing it fails to maintain his right to possession of the property he shall pay to the party entitled thereto the value of the property, and all legal costs, fees and damages sustained by reason of the delivery of the replevied property to the party filing the counterbond.

14. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1970).

15. Justices Douglas, Brennan, Stewart and Marshall.

examined the historical application and use of the writ of replevin. "Replevin at common law was an action for the return of specific goods wrongfully taken or 'distrained'."[16] Contrary to what has become popular belief, the writ did not always issue out of a purely *ex parte* proceeding.[17] The possessor could always stop the proceedings and challenge the seizure by claiming ownership. Upon this challenge, the sheriff was empowered to summarily determine ownership, and thus possession, pending final judgment in the underlying action.[18]

Stressing the differences between the writ at common law and as used today, Justice Stewart noted that previously the writ was used to recover goods wrongfully taken or "distrained". In recent years its main usage has been by creditors to recover goods rightfully taken but wrongfully detained.[19] At common law the creditors' correct remedy would have been in either debt or detinue, neither of which provided for seizure by color of law before a final judgment.[20] Thus, on the only occasion in which the common law sanctioned prejudgment seizure under color of law, notice and some kind of summary hearing were given to the possessor.

Ascertaining that the common law offered no sanctuary to the defenders of summary replevin, the Court discussed the constitutionality of prejudgment seizure of goods without prior notice and hearing.

B. Constitutional Right to Notice and Hearing Established

Examining procedural due process, the Court noted that for at least the past century, "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified."[21] Granted this right in every case,

16. Fuentes v. Shevin, 407 U.S. at 78.

17. *Id.* at 79, where the Court quoted from 3 Holdsworth, History of English Law 284 (1927):

> [T]he distrainor could always stop the action of replevin by claiming to be the owner of the goods; and as this claim was often made merely to delay the proceedings, the writ *de proprietate probanda* was devised early in the fourteenth century which enabled the sheriff to determine summarily the question of ownership. If the question of ownership was determined against the distrainor the goods were delivered back to the distrainee pending final judgment.

18. This also conflicts with Pennsylvania law which does not even require the plaintiff to initiate a court action to determine title or right of possession, see *supra* nn.11 and 12.

19. Fuentes v. Shevin, 407 U.S. at 79.

20. *Id.*, citing Plucknett, A Concise History of the Common Law 362-65 (1956) 2 Pollock & Maitland, History of English Law, 173-75, 203-11 (1909). Whereas debt would have been proper to recover the value of the goods, detinue would have been the proper action in the present cases where recovery of the goods was sought: "DETINUE . . . a form of action which lies for the recovery, *in specie*, of personal chattels from one who acquired possession of them lawfully, but retains it without right, together with damages for the detention." Black's Law Dictionary (Rev. 4th Ed. 1968).

21. Fuentes v. Shevin, 407 U.S. at 80, quoting from Baldwin v. Hale, 68 U.S. 223 (1863).

> [I]t is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[22]

The issue was framed:

> [W]hether procedural due process in the context of these cases [dealing with state replevin statutes] 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.[23]

The answer was, for the majority at least, in the affirmative.

The Court found that the purposes behind the constitutional right to be heard were first, to ensure fair play to the individual and second, to protect his use and possession from arbitrary encroachment.[24] The second was seen as the primary reason for the hearing requirement. The Court said that an *ex parte* system acted to encourage unfounded applications—through either mistake or outright fraud—while a system in which timely notice and preliminary hearings were given would act, per se, to reduce such applications:

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . [and] no better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.[25]

Justice Stewart then noted that since the prevention of unwarranted, false deprivations of property was the aim of a hearing, it must be given at a time when the deprivation can still be prevented—before the seizure. While a later hearing may properly adjudge the respective rights of the parties and, in a proper case, vindicate the possessor, the damage of the wrongful seizure has already been done. This damage cannot be avoided in all cases by a return of the property plus damages.[26]

C. State Statutes Examined

After holding that prior notice and an opportunity for a hearing before capture of property were constitutionally required, the Court examined the

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

23. *Id.* The state action needed for a violation of the Due Process clause was obviously found in both the application to a state official and seizure by the sheriff and was never discussed as a separate issue in the case.

24. *Id.* at 80-81.

25. *Id.* at 81, quoting from Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-72 (1950) (Frankfurter, J., concurring).

26. *Id.* at 81-82. Both Florida and Pennsylvania provide for return of the property if warranted by the underlying court action plus damages for the deprivation, if any, to be taken out of the plaintiff's bond. Fla. Stat. § 78.07, F.S.A. (1969), *supra* n.6 and 12 P.S. App. R.C.P. § 1073(a)(2) (1947), *supra* n.11.

Florida and Pennsylvania statutes in question and found them unable to pass constitutional muster. The fact that the applicants had to allege a right to possession of the property,[27] post a bond in double the value of the property, and expose themselves to possible damages did not save the statutes. Although these "safeguards" may have prevented some false claims, they were no substitute for the constitutional right to prior notice and a hearing.

D. Property Interests Protected

"The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the fourteenth amendment's protection."[28] The Court proceeded to discuss the relationship between the constitutional right given and the length of seizure, the type of goods involved and the property interest of the possessor.

1. Length of seizure

That the seizure of the goods may only be temporary—given the right to file a counterbond, or considering that an underlying court action may be pending—does not remove the capture from the protection of the fourteenth amendment.[29] A temporary seizure would be just as violative of the fourteenth amendment as a permanent one.[30] The fact that the defendant can reacquire the property by posting a large counterbond does not affect his right to a prior hearing.

2. Type of property interest

The appellees contended that the defendants did not have full legal title to the property but only a contractual right to possession and therefore were beyond the ambit of the fourteenth amendment. Justice Stewart held that these possessory interests were within the scope of the amendment:

> The Fourteenth Amendment's protection of "property," however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest." . . . The appellants were deprived of such an interest in the replevied goods —the interest in continued possession and use of the goods.[31]

The fact that the creditors may have had an undisputed right to possession of the goods due to the default of the defendants was held to be immaterial:

27. Except Pennsylvania, *see* p. 230 *infra*.
28. Fuentes v. Shevin, 407 U.S. at 84.
29. *Id.* at 84-86.
30. *Id.* A hearing would still be required although the type needed may be affected by the length of the deprivation, see text accompanying n.61 *infra*.
31. *Id.* at 86, quoting from Boddie v. Connecticut, 401 U.S. 371, 379 (1971) and citing Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

> But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defense, that is immaterial here. The right to be heard does not depend on an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."[32]

3. Type of goods

Justice Stewart found that a main reason for the decision of the courts below was that, since the goods involved here—a stove, stereo, bed, table—were not strictly "necessities" of life, they were not deserving of constitutional protection. The Court found that the lower courts had based their reasoning on too narrow a reading of *Sniadach v. Family Finance Corp.*[33] and *Goldberg v. Kelly.*[34] The thrust of those cases was not that a hearing must be held only before deprivation of "necessities" such as wages or welfare payments, but rather, that procedural due process requires a hearing before deprivation of any property. Although wages and welfare benefits were singled out in those decisions, the operation of the due process clause does not turn on the type of goods involved:

> The Fourteenth Amendment speaks of "property" generally. And, under our free enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of the 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".[35]

E. Extraordinary Situations

The majority of the Court recognized extraordinary situations in which advance notice and right to a hearing may be dispensed with and summary seizure allowed. Before this could occur, however, three factors must be present:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a very special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure had been a governmental official responsible for determining, un-

32. *Id.* at 87, quoting from Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915).

33. 395 U.S. 337 (1969) which held that a hearing is required before a prejudgment *wage* garnishment.

34. 397 U.S. 254 (1970) which required a hearing before the State could cut off *welfare benefits.*

35. Fuentes v. Shevin, 407 U.S. at 90.

> der the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[36]

Examples given of cases allowing such seizure without a prior hearing included those in which the government had an interest,[37] those where the summary procedure was necessary to prevent an economic catastrophe damaging to a large segment of the public,[38] and those in which summary capture was necessary for a court to preserve jurisdiction.[39] The majority did not find any elements of these extraordinary situations present in the cases on appeal. An examination of the state statutes in question revealed that they were not narrowly drawn to limit summary seizure to extraordinary cases but in fact allowed it in routine instances.

The Court noted further[40] that, while time and money were indeed saved by not providing for prior notice and hearings, these considerations were not enough to eliminate the constitutional right:

> Procedural due process is not intended to promote efficiency or accomodate all possible interest: it is intended to protect the particular interests of the person whose possessions are about to be taken.[41]

F. Waiver

The last argument considered by the Court was the contention that the appellants had waived their rights to prior notice and a hearing through clauses in the conditional sales contracts.[42] Although dictum, since the statutes were held unconstitutional as written, the Court's reasoning will be persuasive in judging the validity of waiver clauses in the future. The Court emphasized that there was no bargaining regarding the contract clauses and that the parties were of unequal bargaining power—essentially that these were contracts of adhesion. The appellants were not made specifically aware of the "waiver" clause nor was its full meaning adequately explained. Drawing an analogy from *D.H. Over-*

36. *Id.* at 91.

37. *Id.* at 92; *supra* n.24 where the Court cited and quoted from Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 597 (1931) (summary seizure of property to collect federal taxes allowed): "Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied." (emphasis omitted).

38. Summary seizure incident to a bank failure allowed. *Id.* at 92 n.26, citing Fahey v. Mallonee, 332 U.S. 245 (1947); *see* Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928).

39. *Id.* at 91; n.23, citing Ownbey v. Morgan, 256 U.S. 94 (1921).

40. *Id.* at 90; *supra* n.22.

41. *Id.*

42. *Id.* at 94. Mrs. Fuentes' contract provided that "in the event of default of any payment or payments, seller at his option may take back the merchandise. . . ." Similarly, the Pennsylvania contracts provided that the seller "may retake" or "repossess" the merchandise if the buyer defaulted. All were standard clauses in printed, form contracts with no explanatory material.

meyer v. Frick,[43] a recent case involving a waiver of due process rights in a contract between two corporations relatively equal in bargaining power, the Court said that in the instant cases the situation of the parties and the naked terms of the contract militated against a valid waiver.[44]

III. The Dissenting Opinion

A. State Court Argument

Justice White, joined by the Chief Justice and Justice Blackmun, dissented from the majority opinion. The first part of his short dissent propounded the view that the appellants did not belong in federal court. He felt that under *Younger v. Harris*,[45] appellants should have raised their constitutional objections in the underlying state actions.[46]

B. Creditor Protection Needed

The second half of the dissent was aimed at the merits of the case. Justice White was of the opinion that the replevin statutes in question adequately protected the competing interests of the possessor/buyer and the applicant/seller. The seller was interested in protecting the goods from possible harm and deterioration through continued use, while the buyer was interested in continued use and possession. The procedure in question, Justice White reasoned, furthered the seller's interest by preventing use by the buyer pending court determination of their respective rights, while the buyer, although losing interim use, would be made whole through damages taken out of seller's bond if he prevailed in the underlying action.[47]

The dissent said that the practical considerations of the normal replevin case opposed imposition of a constitutional requirement of

43. 405 U.S. 174 (1972).

44. Fuentes v. Shevin, 407 U.S. at 95, 96.

45. 401 U.S. 37 (1971). The case involved the California Criminal Syndicalism Act. Harris was indicted under the Act and while the state proceeding was pending brought suit in federal court to enjoin Younger, the district attorney, from prosecuting him alleging the unconstitutionality of the Act. The Court held that the possible unconstitutionality of the state statute on its face did not in itself justify federal intervention. In a concurring opinion, Justice Brennan, joined by Justice White, indicated that the state proceeding was the proper forum for the defendant's objections. It is worthy of note that Justice Brennan, the author of the above opinion, did not share Justice White's view in the applicability of Younger to the present cases and was in the majority here.

46. Fuentes v. Shevin, 407 U.S. at 97-99 (White, J., dissenting). Under this view Mrs. Fuentes should have objected to the seizure on due process grounds in the repossession action instituted by Firestone in the Florida court and pending at the time of her action in federal court. Apparently the dissent would require the appellants in *Parham* to take the steps necessary to institute an action in the Pennsylvania court, since no actions had been filed by the creditors, *supra* n.12.

47. *Id.* at 99-100.

notice and preliminary hearing. Reasoning that the purpose of the hearing was "to prevent unfair and mistaken deprivations of the property,"[48] Justice White stated that in the usual case the buyer has either defaulted or not—and if he has "it would seem not only 'fair', but essential, that the creditor be allowed to repossess. . . ."[49] The dissent indicated that the likelihood of a false claim of default was not sufficiently serious to warrant more protection than the replevin laws in question already required—allegations of ownership and posting of a bond.[50]

In the final analysis, Justice White felt that the statutes allowing prejudgment seizure upon allegation of a right to possession and posting of a bond met the minimum standards of procedural due process required in these types of cases. He agreed with the majority that no specific type of hearing was required by due process.[51] He differed, however, with the majority opinion that some type of hearing was always required.[52] Instead, he felt that in certain cases protection could be given without a formal type of adversary hearing, especially where, as here, a bond was posted and access to a post-seizure hearing on the merits was provided. The object of Justice White's solicitude was the creditor: "Surely under the Court's own definition, the creditor has a 'property' interest as deserving of protection as that of the debtor."[53]

C. *Disadvantages in Majority Holding*

The dissent saw two distinct disadvantages to the majority holding. First, the holding offered little, if any, new protection to buyer/possessors. Under the majority's reasoning, creditors could avoid prior notice and hearing by merely spelling out in the contract the procedure that will be followed for seizure upon default.[54] Second, the added responsibilities put on the creditor may well result in either a reduction in the availability of credit or higher credit charges.[55]

D. *Impact on the Uniform Commercial Code*

Justice White felt that the majority was wrong in rejecting what they said was an outmoded concept. In recent years the Uniform Com-

48. *Id.* at 100.
49. *Id.*
50. *Id.* at 100-01.
51. *Id.* at 101-02.
52. *See* text accompanying nn.60-64, *infra.*
53. Fuentes v. Shevin, 407 U.S. at 102 (White, J., dissenting).
54. *Id.* at 95-96, referring to the statement of Justice Stewart:
> 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, or prejudgment replevin without a prior hearing—the seller could take back the goods.

55. *Id.* at 103.

mercial Code has completely revamped the area of secured transactions. It contains a provision for seizure of goods by a creditor without judicial proceedings:

> 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. . . .[56]

Justice White felt that summary seizure was a viable concept and if accepted by the Uniform Commercial Code should be accepted here.

Rather than acquiesce in what he felt was a revolutionary departure in debtor-creditor cases,[57] Justice White was:

> [C]ontent to rest on the judgment of those who have wrestled with these problms so long and often and upon the judgment of the legislatures, that have considered and so recently adopted provisions that contemplate precisely what has happened in these cases.[58]

IV. COMMENT

In reading *Fuentes* it is easy to give a somewhat overly broad interpretation to the majority opinion. At first blush a reader can get either of the following impressions: first, that all replevin writs are now outlawed or, second, that no seizure of property is valid unless preceded by notice and a preliminary hearing. Neither of these is necessarily true.

In simple terms, this decision declares that in the case of a replevin of *consumer goods* from an *unsophisticated buyer/possessor,* procedural due process demands that he be given notice and an opportunity to be heard before the goods are seized by the sheriff. Replevin of goods other than consumer goods and replevin of consumer goods from knowledgeable buyer/possessors are presumably valid without prior notice and hearing.[59]

56. Uniform Commercial Code § 9-503 (1962). The recent 1972 amendments have made no changes in this section.

57. The majority opinion said that today's decision was "in the mainstream of the past cases" dealing with procedural due process. Fuentes v. Shevin, 407 U.S. at 88.

58. *Id.* at 103.

59. In support of this construction of the holding of Fuentes, the reader is referred to the discussion of "consumer goods" *id.* at 88-90; and to the approving discussion of the Overmyer case, *id.* at 94-96, involving a waiver by "knowledgeable" corporations. "Sophisticated" is used here to denote someone who is knowledgeable in business practices and the related law, *i.e.*, when these people waive their right to notice and a hearing they know they are waiving a constitutional right and subjecting themselves to prejudgment seizure through a summary replevin writ. "Unsophisticated" is used to refer to the "ordinary" consumer who is not so knowledgeable. It is submitted that it would be hard to envision any business or businessman as "unsophisticated" while of course, many non-business individuals are certainly "knowledgeable".

Another conclusion which might be drawn from the holding is that a full, trial-type hearing on the merits is required before every seizure. Again, this is not necessarily true.

The majority indicated a number of factors which would bear on the type and form of hearing required. First, the existence of "[o]ther, less effective safeguards . . ."[60] such as a bond requirement or an allegation under oath of a right to possession would demand a less formal hearing. Second, the length and character of the deprivation has a bearing on the form of hearing required—an opportunity to file a counterbond to recover the goods may call for a less comprehensive hearing.[61] Third, the simplicity of the issues is relevant in determining the character of the hearing. For example, where default is the only issue, a summary type of hearing would only be necessary.[62] Fourth, the type and value of the property involved may have a bearing on the form of the required hearing—perhaps the type of hearing given could be based on a cost scale with more formal hearings being held for more expensive property.[63] Fifth, the aggregate cost and delay incident to the hearing requirement will naturally have an impact on the type used.[64] There are, of course, other factors not mentioned by the Court which would weigh on the form of hearing required. For example, the character of the property—such as perishable goods—might require only a summary type of hearing. Another point to remember is that the Court itself acknowledged that there are "extraordinary situations" in which summary proceedings with no hearing are appropriate.[65] Added to these situations may be instances where the creditor can get summary seizure without a hearing by alleging and offering proof that the debtor will destroy or conceal the goods.

Theoretically, the holding of the majority, that prior notice and a hearing before seizure are required, is appealing, but, as the dissent indicates,[66] its practical effect may be to offer no new protection for consumers. Creditors are sure to take advantage of the main "loophole" in the Court's opinion which allows summary seizure when a

60. *Id.* at 83-84. These "safeguards" of course, are not enough to obviate the hearing requirement entirely, *see* p. 233 *infra.*

61. *Id.* at 86. Of course, even temporary seizures demand some type of hearing, *see* p. 234 *infra.*

62. *Id.* at 86-87; *supra* n.18. The existence or nonexistence of defenses will not, however, entirely remove the hearing requirement, *supra* n.32.

63. *Id.* at 89-90, *supra* n.21. This is not to say that the type or value of property will determine if there is to be a hearing—all property will get the protection; but only that the value may dictate, to some extent, the form of the hearing.

64. *Id.* at 96-97, n.33. Of course, cost and delay have no effect on the constitutional right to a prior hearing, *see* p. 236 *infra.*

65. *See* p. 235 *infra.*

66. Fuentes v. Shevin, 407 U.S. at 102-03 (White, J., dissenting).

proper waiver clause is used. This means that if the clause explicitly states that prejudgment replevin without a hearing will be used and the buyer is apprised of the fact that he is waiving his constitutional right to a prejudgment hearing with notice, seizure can be accomplished without such procedural requirements.[67] While it is not argued and probably not arguable that constitutional rights may not be waived by contract,[68] it is submitted that unless the Court acts to plug this "loophole" the decision will lose much of its intended effect.

To put the needed teeth into this holding the Court should not merely look into the facts of each case or examine the text of the waiver clause to determine if a hearing is required. Rather, they should base the requirements of notice and hearing in each case on whether the buyer is sophisticated or unsophisticated.[69] This could be done by the outlawing or disregarding of such waiver clauses in ordinary consumer contracts. Thus, a hearing would always be required when an unsophisticated buyer is involved, but not when a sophisticated buyer is involved. This method, it is submitted, is the only way to fully protect the ordinary consumer and, when considered together with the limiting factors on the type of hearing suggested by the Court, would not strip the creditor of a quick and valuable remedy.[70]

In the dissent, Justice White correctly points out the main weakness of the majority opinion—the waiver "loophole". In trying to protect creditors, however, he fails to take into account that there are unscrupulous dealers who do use *ex parte* replevin procedures to harass innocent buyers who have legitimate complaints.[71] Although it must be aware of the abuses in the present system, the dissent, in its solicitude for creditors, would require no pre-seizure hearings at all. The majority, on the other hand, while protective of debtors, still gives creditors consideration by limiting the hearing requirement to replevin of consumer goods from unsophisticated debtors, exempting certain "extraordinary situations" and listing a number of limiting factors upon the form of the hearing required. Certainly, no one would argue that the creditor does not have a "[p]roperty interest as deserving of protection as that of the debtor,"[72] but while the majority makes an effort to accommodate the competing interests

67. *Supra* n.54.

68. *See, e.g.*, Overmyer v. Frick, 405 U.S. 174 (1972) and Fuentes v. Shevin, 407 U.S. at 96 n.31.

69. *Supra* n.59 and accompanying text.

70. *But see* Due Process in Consumer Cases: Fuentes v. Shevin, VI Clearinghouse Review 7, 418, 420-21 (1972) where a prior hearing on the validity of the waiver is suggested. It is felt that basing the requirements on the type of person involved rather than on the type of waiver used is a better way to implement the decision, although the result will be the same in most cases.

71. Fuentes v. Shevin, 407 U.S. at 99-102 (White, J., dissenting).

72. *Id.* at 102.

(through use of the suggested procedure together with the limiting factors already discussed), the dissent makes no such effort.

V. ILLINOIS LAW

The Illinois statute on replevin is essentially similar to both the Florida and Pennsylvania statutes held unconstitutional in *Fuentes*. It provides for an action of replevin whenever goods have been wrongfully distrained, or otherwise wrongfully taken or shall be wrongfully detained. . . ."[73] In order to obtain a writ, the applicant must file a petition alleging ownership of the property or a right to immediate possession and that the property is being wrongfully held by the defendant.[74] Additionally, the applicant must post a bond in double the value of the property to be replevied.[75]

Unlike the other statutes, the Illinois law does not require the sheriff to hold the property for three days, but requires him to turn it over promptly to the applicant[76] unless a counterbond is filed by the defendant.[77] The Illinois creditor is required to institute an underlying action to determine his title or right to the goods[78] and failure to do so will cause a return of the property to the defendant and subject the applicant to damages.[79]

The "safeguards" built into the Illinois statute—allegation of ownership and a large bond—are clearly insufficient to save it in the face of *Fuentes*.[80] The other provision—allowing the defendant to reclaim the goods through a counterbond—is of even less effect since the sheriff is required to deliver the goods "forthwith" to the applicant without any holding period.[81] While the other statutes allowed the defendant three days in which to raise the counterbond[82] an Illinois defendant must surrender the goods unless he has the money readily available. The only redeeming aspect of the Illinois statute is that the applicant must pursue an action to determine his right to the goods. This, however, is also inadequate to spare the statute. Further, the statute provides that "the clerk shall issue the writ of replevin upon request of the plaintiff."[83] The crux of the Courts opinion is that the unchallenged word of a self-serving appli-

73. Ill. Rev. Stat. ch. 119, § 1 (1971).
74. *Id.* § 4.
75. *Id.* § 10.
76. *Id.* § 14.
77. *Id.*
78. *Id.* § 10.
79. *Id.* § 22.
80. *See* p. 232 *infra.*
81. Ill. Rev. Stat. ch. 119, § 14 (1971).
82. *See supra* nn.7, 13 and accompanying text.
83. Ill. Rev. Stat. ch. 119, § 5 (1971).

cant, no matter how well-intentioned, is insufficient to obviate the constitutional requirements of notice and preliminary hearing.

It is beyond the scope of this note to suggest a new statute for Illinois, however, a few general statements may be made.

First, it is urged that the Illinois courts follow the path suggested—outlawing waiver clauses in consumer contracts and providing for preliminary hearings before prejudgment replevin whenever an unsophisticated buyer is involved.[84] The type and form of the hearing will vary.[85]

Second, to bring the statute within *Fuentes,* considerable narrowing is needed. A hearing should be provided in every case except for certain enumerated exceptions: 1) the extraordinary situations mentioned by the Court;[86] 2) instances where the applicant alleges, with some proof, that defendant will destroy or conceal the goods; 3) cases where perishable goods are involved.

Third, whenever a waiver is involved, the hearing should concern the validity of the waiver. The opinion leaves open the possibility that an allegation of a valid waiver might be enough to preclude a hearing[87] but this is not clear and a hearing should be required.

The precise impact of *Fuentes* upon the Illinois law is, of course, not yet clear. It is clear however, that unless the statute is narrowed considerably, the ancient writ of replevin will die in Illinois.

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84. *See* p. 239 *infra.*
85. *Supra* nn. 60-65 and accompanying text.
86. *See* p. 235 *infra.*
87. *See* p. 236 *infra.*