

Symposium on Commercial Law

Self-Help Repossession of Consumer Goods: A Constitutional Look at Section 9-503 of the Uniform Commercial Code

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Self-Help Repossession of Consumer Goods: A Constitutional Look at Section 9-503 of the Uniform Commercial Code, 7 Val. U. L. Rev. 439 (1973).

Available at: <https://scholar.valpo.edu/vulr/vol7/iss3/7>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



SELF-HELP REPOSSESSION OF CONSUMER GOODS: A CONSTITUTIONAL LOOK AT SECTION 9-503 OF THE UNIFORM COMMERCIAL CODE

INTRODUCTION

In recent years consumer credit, or "buying on the installment plan," has become a widely accepted method for financing the purchase of consumer goods.¹ With the widespread acceptance of the Uniform Commercial Code,² most installment sellers now secure their transactions with Article 9 security interests.³ Typically, the buyer is permitted to retain possession of the collateral provided that he does not violate any of the stipulations in the security agreement⁴ that would give rise to a default.⁵ Should default occur, one option available to the secured party⁶ is the right to repossess the collateral without recourse to judicial process.⁷ Section 9-503 of the Code provides:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.⁸

Non-judicial repossession was recognized long before the drafters of the Code incorporated the remedy into 9-503. Under the English common law, a creditor was permitted to use self-help to recover possession of a chattel that was wrongfully detained, pro-

1. By the end of November 1972, outstanding consumer installment credit exceeded \$124 billion. Financial and Business Section, 59 FED. RES. BULL. A 56 (Jan. 1973).

2. All states except Louisiana have adopted the Uniform Commercial Code by statute. All references to the Uniform Commercial Code [hereinafter cited as UCC] are to the 1972 Official Text and Comments.

3. Section 1-201 defines a "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation."

4. Section 9-105(1)(l) defines a "security agreement" as "an agreement which creates or provides for a security interest."

5. The Code does not define default or state when it occurs. Rather, the contracting parties are free to specify in the security agreement their own conditions that would constitute a default. *Borochoff Properties, Inc. v. Howard Lumber Co.*, 115 Ga. App. 691, 696, 155 S.E.2d 651, 654 (1967).

6. Section 9-105(1)(m) defines a "secured party" as "a lender, seller or other person in whose favor there is a security interest"

7. The secured party may also sue the buyer on the debt or initiate other pre-UCC foreclosure proceedings against the debtor. See UCC § 9-501(1).

8. UCC § 9-503.

vided this could be accomplished without breaching the peace.⁹ Prior to the adoption of the Uniform Conditional Sales Act (UCSA) in 1919, most American jurisdictions afforded creditors a similar right to peaceably repossess collateral upon occasion of the debtor's default under a conditional sales contract.¹⁰ Following codification of self-help in the UCSA¹¹ the modern Code endorsed analogous provisions in 9-503.¹²

Proponents of self-help repossession contend that its use is necessary to effectuate a swift and efficient disposition of the collateral once default occurs. The primary concern of the creditor at such time is to realize the largest possible return from liquidation of the security. This can best be accomplished by eliminating expensive court costs and reducing the likelihood of collateral depreciation that would result from protracted judicial proceedings.¹³ Similarly, it is argued that by maximizing the proceeds from liquidation the debtor's equity in the collateral is preserved and the necessity for deficiency judgments is reduced.¹⁴

Despite arguments to the contrary, some courts have begun to question the validity of repossession without judicial process.¹⁵ Consumer advocates maintain that depriving a debtor of his possessory

9. As noted by Blackstone:

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, . . . in which case the owner of the goods . . . 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.

3 W. BLACKSTONE, COMMENTARIES * 4.

10. Two pre-UCSA cases decided in Indiana that demonstrate the general acceptance of recaption are *Swain v. Schild*, 66 Ind. App. 156, 117 N.E. 933 (1917); *Sherman v. Jackson*, 14 Ind. 459 (1860). See also 146 A.L.R. 1331 (1943).

11. U.C.S.A. § 16 provided:

When the buyer shall be in default in the payment of any sum due under the contract, or in the performance of any other condition which the contract requires him to perform in order to obtain the property in the goods, or in the performance of any promise, the breach of which is by the contract expressly made a ground for the retaking of the goods, the seller may retake possession thereof. Unless the goods can be retaken without breach of the peace, they shall be retaken by legal process; but nothing herein shall be construed to authorize a violation of the criminal law.

12. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.1 (1965).

13. Comment, *Non-Judicial Repossession—Reprisal in Need of Reform*, 11 B.C. IND. & COM. L. REV. 435 (1970).

14. Hogan, *The Secured Party and Default Proceedings under the UCC*, 47 MINN. L. REV. 205, 253 (1962).

15. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970).

interest in the secured collateral without notice and the opportunity for a prior hearing violates his due process rights guaranteed by the fourteenth amendment and Section 1983 of the Civil Rights Act.¹⁶ The District Court for the Southern District of California recently reviewed these considerations in *Adams v. Egley*¹⁷ and concluded that Section 9503 of the California Commercial Code¹⁸ failed to maintain constitutional due process standards. Since *Adams*, other jurisdictions have attempted to review 9-503 repossession procedures, and although such courts have failed to reach the merits, it is apparent that future litigation on this issue is forthcoming.¹⁹

This note will present a constitutional analysis of the summary repossession remedy contained in 9-503, and will seek to determine whether this procedure infringes upon a debtor's due process rights. An examination will then be made concerning the effect that prior notice and due process hearing requirements are likely to have, both on the creditor's interest in efficient repossession and the debtor's desire to obtain readily available consumer credit. Since state action is required to bring the fourteenth amendment and Civil Rights Act protections into effect, attention will also be focused on whether a legislative enactment of 9-503 constitutes sufficient state activity to allow judicial review of private self-help repossession.

DUE PROCESS AND NON-JUDICIAL REPOSSESSION

The Sniadach Case and Its Progeny

Before considering self-help repossession in the light of 9-503, it would be beneficial to examine briefly some of the recent case law dealing with summary adjudications. In *Sniadach v. Family Finance Corp.*²⁰ the Supreme Court struck down a Wisconsin wage

16. 42 U.S.C. § 1983 (1964).

17. 338 F. Supp. 614 (S.D. Cal. 1972), *appeal docketed sub nom.* *Adams v. Southern Cal. First Nat'l Bank*, No. 72-1484, 9th Cir., Mar. 15, 1972.

18. CAL. COMM. CODE § 9503 (West 1963). The California Commercial Code adopts 9-503 verbatim.

19. In the following cases the due process issue was not reached for want of state action: *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972); *Messenger v. Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (1972); *Kirksey v. Theilig*, 41 U.S.L.W. 2325 (D. Colo. Nov. 30, 1972).

The court in *McCormick v. First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971), preceded the *Adams* decision and also dismissed the complaint for failure to meet the "under color of state law" requirement.

20. 395 U.S. 337 (1969).

garnishment statute²¹ that allowed a creditor to secure a court attachment of a debtor's wages prior to a hearing on the underlying claim. Speaking for the majority, Mr. Justice Douglas declared that, absent some compelling state interest, summary procedures would not satisfy the requirements of due process.²² Not only did the Wisconsin statute fall short of satisfying the compelling state interest test, but its broadly drawn provisions failed to restrict the use of garnishment procedures to extraordinary situations.²³ The significance of this decision was that for the first time the Court established a requirement for a due process hearing before property could be seized by prejudgment attachment.²⁴

Initially the scope of the *Sniadach* decision was unclear, since the opinion had placed heavy emphasis on the grievous loss suffered by low income wage earners when deprived of income.²⁵ Further, no affirmative criteria had been established to gauge the degree of compelling state interest needed to override a person's right to a hearing when his property interests were affected.²⁶ Consequently, several courts confined *Sniadach* to its facts and, absent a situation of grave necessity, readily found significant state interests to justify summary proceedings.²⁷

21. WIS. STAT. § 267.18(2)(a), c. 507, § 1 (1965), as amended WIS. STAT. § 267.18(2) (Supp. 1972).

22. 395 U.S. 337, 339 (1969).

23. *Id.*

24. *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 114 (1969).

25. 395 U.S. 337, 340-42 (1969).

26. Although definite standards were not specified, Mr. Justice Douglas cited four cases that indicate by implication the required degree of compelling state interest. Two of the cases involved summary seizure of banks on the verge of failure by government officials. *Fahey v. Mallonee*, 332 U.S. 245 (1947), and *Coffin Brothers v. Bennett*, 277 U.S. 29 (1928). In *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950), the Federal Food and Drug Administrator was permitted to seize a quantity of misbranded vitamin products summarily. The last case allowed a resident creditor's prejudgment attachment of a nonresident's property in order to obtain quasi-in-rem jurisdiction. *Ownbey v. Morgan*, 256 U.S. 94 (1921).

It is apparent from the first three cases that overwhelming public interests were at stake. Even though the rationale of the fourth case is not as compelling, it should be recalled that prejudgment attachment of a nonresident's property is sometimes the only method by which state citizens can achieve redress for injuries inflicted by nonresidents. For further commentary on these cases, see *Randone v. Appellate Dep't of Super. Ct.*, 5 Cal. 3d 536, 548, 488 P.2d 13, 25, 96 Cal. Rptr. 709, 721 (1971), *cert. denied sub nom.* Northern Cal. Collection Serv., Inc. v. *Randone*, 407 U.S. 924 (1972); Comment, 13 B.C. IND. & COM. L. REV. 1503, 1506 (1972).

27. See, e.g., *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971) (garnishment of property other than wages); *Young v. Ridley*, 309 F. Supp. 1308 (D.D.C. 1970) (extra-judicial foreclosure by the mortgagee of real property).

Most courts, however, viewed *Sniadach* less restrictively and began to examine other areas where due process rights allegedly had been jeopardized by summary adjudications. Thus, in the cases that followed, many new property interests other than wages were brought within the purview of fourteenth amendment protections.²⁸ Of paramount importance in these decisions was the general proposition that

due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property²⁹

Fuentes v. Shevin

Not long after the *Sniadach* decision, courts in several jurisdictions began to scrutinize the effect of their replevin statutes on a debtor's due process protections.³⁰ The leading case of *Fuentes v. Shevin*³¹ merits particular attention, since an action in replevin³² to repossess collateral under a conditional sales agreement is very closely related to the self-help remedies permitted by 9-503.

In *Fuentes* the Supreme Court reviewed the decisions of two

28. See, e.g., *Bell v. Burson*, 402 U.S. 535 (1971) (pre-hearing suspension of a driver's license); *Goldberg v. Kelley*, 397 U.S. 254 (1970) (termination of welfare benefits); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeeper's lien on boarder's property to secure unpaid rent); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970) (landlord's lien on tenant's property); *Randone v. Appellate Dep't of Super. Ct.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), cert. denied sub nom. Northern Cal. Collection Serv., Inc. v. Randone, 407 U.S. 924 (1972) (prejudgment attachment of property upon the filing of an action on an expressed or implied contract for the payment of money); *Jones Press, Inc. v. Motor Travel Servs., Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970) (garnishment of debtor's accounts receivable pending judgment on the debt).

29. 395 U.S. 337, 343 (1969) (Harlan, J., concurring). *Accord*, *Bell v. Burson*, 402 U.S. 535, 540 (1971); *Goldberg v. Kelley*, 397 U.S. 254, 267 (1970).

30. See, e.g., *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970) (creditor restrained from utilizing New York's replevin statutes to repossess consumer goods from indigent debtors); *Kosches v. Nichols*, 68 Misc. 2d 795, 327 N.Y.S.2d 968 (New York City Ct. 1971). *But cf.* *Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100 (10th Cir. 1970) (creditor permitted to replevy bowling equipment from defaulting purchaser).

31. 407 U.S. 67 (1972).

32. "Replevin" is defined as follows:

A personal action *ex delicto* brought to recover possession of goods unlawfully taken, . . . the validity of which taking it is the mode of contesting, if the party from whom the goods were taken wishes to have them back *in specie*

BLACK'S LAW DICTIONARY 1463-64 (4th ed. 1968).

three-judge courts³³ which had upheld the constitutionality of the Florida and Pennsylvania replevin statutes.³⁴ The statutory scheme of the Florida law enabled a creditor to seek a writ of replevin without any showing that his goods were being wrongfully detained by the defaulting debtor. After the creditor filed a complaint initiating a formal suit for repossession and posted a security bond for double the value of the collateral, a writ was issued directing an officer to recover the goods and serve the debtor with the complaint. Following this *ex parte* repossession procedure the collateral was impounded for three days, during which time the debtor could post his own double bond and reclaim possession. If, however, the debtor refused or was unable to file the required security, the property was transferred to the creditor, pending final disposition of the underlying suit for repossession.³⁵ The Pennsylvania replevin statute was markedly similar to the Florida law, with one glaring exception—the creditor was never required to initiate a formal court action to establish his right to possession.³⁶

Writing for a 4-3 majority,³⁷ Mr. Justice Stewart concluded that the two replevin statutes violated a debtor's constitutional rights.³⁸ In reaching this decision, the Court clarified the two previously noted ambiguities from the *Sniadach* case.³⁹ First, application of the due process clause was not to be confined to interests in specialized

33. *Epps v. Cortese*, 326 F. Supp. 127 (E.D. Pa. 1971), *prob. juris. noted*, 402 U.S. 994 (1971); *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971).

In the *Fuentes* case the plaintiff-debtor challenged the replevy of a gas stove and stereophonic phonograph that she had purchased pursuant to conditional sales contracts. The creditor-defendant, Firestone Tire and Rubber Co., had repossessed the collateral after the debtor terminated her payments subsequent to a dispute over the servicing of the stove. Following the Florida procedure, the creditor had only to fill out a standard form document and have it stamped and signed by the small-claims court clerk before the writ was issued. For a highly informative narrative of this case compiled by the attorneys who represented Mrs. Fuentes, see Abbott & Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955 (1972).

Three of the plaintiffs in the *Epps* case protested the repossession of personal property that had been purchased under conditional sales agreements. A fourth plaintiff was the ex-wife of a local deputy sheriff who disagreed with her custody of their son. Being familiar with Pennsylvania's routine replevin procedures, the irate ex-husband replevied his son's clothes, furniture and toys.

34. FLA. STAT. ANN. § 78.01 (Supp. 1973); PA. STAT. ANN. tit. 12, § 1821 (1967).

35. 407 U.S. 67, 73-75 (1972).

36. *Id.* at 75-78.

37. Justices Powell and Rehnquist did not participate.

38. 407 U.S. at 96.

39. See notes 25 & 26 *supra* and accompanying text.

properties or "necessities."⁴⁰ Like the wages in *Sniadach*, consumer goods were thus construed to fall within the fourteenth amendment's definition of "property." Although a debtor under a conditional sales agreement lacks full title to the collateral,⁴¹ it was recognized that he had acquired cognizable interests in both the use and possession of the goods. Generally these rights are not secured through a gratuitous gesture by the creditor; rather, the debtor typically pays substantial finance charges for the privilege of immediate enjoyment of the merchandise. Therefore, the Court concluded that, should a dispute arise over continued possession of the collateral, a sufficient property interest would be jeopardized and the due process protections should be invoked.⁴²

The second ambiguity resolved in *Fuentes* was the degree of "compelling state interest" needed to justify a summary adjudication. It was noted that only in truly unusual circumstances will the outright seizure of property be tolerated without prior notice and the opportunity for a hearing.⁴³ In such cases there must be important governmental or public interests involved, a need for prompt action and strict statutory control over the extra-judicial procedures.⁴⁴ The Court then proceeded to find the broadly drawn Florida and Pennsylvania replevin laws deficient in all three respects. Since the interest of the creditor was purely private and there was no showing of urgency, the statutes could not be used to repossess a debtor's property before he had been afforded the chance to be heard.⁴⁵

Finally, Mr. Justice Stewart considered the situation in which a debtor signs an adhesion contract which purportedly waives his due process rights. All of the debtors in *Fuentes* had signed finely printed conditional sales agreements giving the seller permission to repossess the merchandise in the event of default. The Court concluded that when parties to a sales contract are in positions of vastly unequal bargaining power there must be a clear showing that any waiver of constitutional rights by the debtor was made "voluntarily, intelligently, and knowingly."⁴⁶

40. 407 U.S. at 88-90.

41. The Court need not have concerned itself with determining which party had title to the collateral, since under the Code this distinction is immaterial. See UCC § 9-202.

42. 407 U.S. at 86-87.

43. *Id.* at 90.

44. *Id.* at 91.

45. *Id.* at 90-93.

46. *Id.* at 94-96. Presumably the *Fuentes* decision would allow the continued use of contractual waivers when it could be shown that the consumer voluntarily and knowingly

Adams v. Egley

In *Adams v. Egley*⁴⁷ the United States District Court for the Southern District of California reviewed the self-help provisions contained in Section 9503 of the California Commercial Code and held them unconstitutional.⁴⁸ Plaintiff Adams had taken a bank loan for \$1,000, in exchange for which he executed a promissory note and security interest in favor of the bank. The agreement stipulated that should default occur the secured party retained the right to repossess plaintiff's three motor vehicles which had been pledged as collateral. After the note had been assigned to a second bank, Adams reneged on his payments. Subsequently, defendant Egley, acting as an agent for the assignee, repossessed two of the vehicles which were later sold at a private sale.⁴⁹

Although *Adams* was decided four months prior to *Fuentes*, the reasoning of the two cases was remarkably parallel. Like *Fuentes*, the California district court chose to interpret the *Sniadach* decision broadly, echoing the constitutional premise that absent extraordinary circumstances a debtor could not be deprived of his property without procedural due process.⁵⁰

The *Adams* court took issue with prior cases that had upheld contractual waivers of due process rights in security agreements.⁵¹ Specifically, the court did not feel that "a statute providing for

relinquished his due process rights. The Court distinguished the instant case from *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174 (1972), in which the constitutionality of a cognovit note executed between two large corporations of similar bargaining power was upheld. In that context it was felt that the party which had agreed to a confession of judgment was fully aware of the significance of waiving its constitutional rights. *Cf. Swarb v. Lennox*, 405 U.S. 191 (1972). It is difficult, however, to determine whether a valid waiver has actually taken place in any given situation. It could well be that an initial hearing would be necessary simply to establish the legitimacy of the waiver. The net effect of such a requirement undoubtedly would be the discouragement of all waiver clauses in consumer's sales contracts. See *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 94-95 (1972).

47. 338 F. Supp. 614 (S.D. Cal. 1972).

48. The court also found the dispositive provisions in Section 9504 of the California Commercial Code to be unconstitutional.

49. 338 F. Supp. at 616.

50. *Id.* at 618. Although *Adams* and *Fuentes* were decided on due process grounds, some commentators have seen overtones of equal protection considerations in these decisions. Advocates of this concept maintain that, inasmuch as the inequities of consumer credit transactions are often felt most acutely by the poor, there is ample basis for raising the equal protection arguments of the fourteenth amendment. Comment, 13 B.C. IND. & COM. L. REV. 1503, 1505 (1972); Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942, 954 (1970).

51. *Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100 (10th Cir. 1970); *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971).

repossession without notice or hearing [was] exempt from constitutional scrutiny merely because its operation [was] confined to situations involving the presence of a contract.”⁵² While in some situations contracting parties of relatively equal bargaining power may forego due process safeguards, there is a strong presumption against the waiver of any constitutional rights. Demonstrating the same skepticism voiced by Mr. Justice Stewart in *Fuentes*, Judge Nielsen questioned the efficacy of waivers found in the usual consumer’s security agreement.⁵³

Consistent with recent judicial decisions exemplifying pro-consumer concerns,⁵⁴ the *Adams* court sympathized with the plight of low income buyers who are often victimized by abusive sales practices. Sensing the divergence of opinion over whether the *Sniadach* doctrine applied only to “necessary” property interests, the court observed that ordinarily the subjects of Article 9 security interests are common household goods and automobiles, which are essential to maintain a decent standard of living. The general provisions of 9-503 which permit self-help repossession of *any* secured collateral, regardless of its nature, were thus found to be overly broad.⁵⁵ This distinction of “necessaries” vis-a-vis nonessential consumer products need not have been made, for under the expanded notions of due process dictated by *Fuentes* all significant property interests merit the protections of the fourteenth amendment.

Contrasting the repossession procedures struck down in *Fuentes*⁵⁶ with the 9-503 provisions reviewed in *Adams*, it is clear that the Code’s self-help remedy is even more deficient in respecting the debtor’s rights than the replevin statutes. While judicial control over the replevin procedures may have been only perfunctory, there was at least some point between default and repossession where the judiciary was interposed between the conflicting claims of the parties. Nowhere does a similar judicial intervention exist in the 9-503 self-help provisions. Further, a creditor seeking to replevy goods sold pursuant to a conditional sales agreement was required to post bond equal to double the value of the collateral. While this did not necessarily guarantee good faith on the creditor’s part, his latitude to

52. 338 F. Supp. 614, 620 (S.D. Cal. 1972).

53. *Id.*

54. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

55. 338 F. Supp. 614, 621 (S.D. Cal. 1972).

56. See note 34 *supra* and accompanying text.

repossess merchandise arbitrarily was restricted to a significantly greater degree than under 9-503, where no bond is required. It might be argued that the debtor's right to redemption outlined in the Code⁵⁷ more easily facilitates his recovery of the repossessed collateral than under the replevin statutes where he, like the creditor, must post a double bond. In reality, however, a defaulting debtor who is unwilling or unable to maintain his payment schedule will doubtless find it just as cumbersome to secure bond as to fulfill all of his obligations under the security agreement necessary for redemption.

It can be concluded that although *Adams* pre-dated *Fuentes*, its reasoning relative to the constitutionality of 9-503 was consistent with the due process requisites specified in the context of replevin procedures. For the first time, the powerful self-help remedies authorized in 9-503 had been declared unconstitutional. The far reaching ramifications of this decision will be analyzed in the following sections.

COMPETING INTERESTS UNDER 9-503: SECURED PARTY VS. DEBTOR

Advocates of the self-help repossession procedures outlined in the Code maintain that a defaulting debtor's interests are adequately protected by an elaborate set of restraints imposed on the secured party after repossession of the collateral.⁵⁸ Initially the consumer may seek to have the entire security agreement voided if it is manifestly unconscionable⁵⁹ or adhesive.⁶⁰ The self-help remedy

57. Section 9-506 allows a debtor to redeem the collateral by tendering fulfillment of all obligations contained in the security agreement and reimbursing the creditor for all expenses incurred in repossessing the goods. If the security agreement contains a clause accelerating payment of the debt upon occasion of default, the debtor can only fulfill his obligation by repaying the entire outstanding debt. See UCC § 9-506, Comment.

58. See Brief for the Permanent Editorial Board for the Uniform Commercial Code as Amicus Curiae, *Adams v. Egley, appeal docketed sub nom. Adams v. Southern Cal. First Nat'l Bank*, No. 72-1484, 9th Cir., Mar. 15, 1972. [This brief was prepared by Professor Soia Mentschikoff, and will hereinafter be cited as MENTSCHIKOFF.]

59. UCC § 2-302(1) provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

See also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967); Comment, *The Uniform Commercial Code's Solution for Unconscionable Contracts*, 48 ORE. L. REV. 209 (1969).

60. Contracts of adhesion can generally be characterized as one-sided agreements where

is itself limited by the fact that only peaceable repossessions are permitted.⁶¹ Once the creditor acquires custody of the security he is under a duty of reasonable care to preserve the consumer's equitable interest in the goods.⁶² Should the secured party elect to sell the collateral at a public sale, reasonable notification of the time and place must be given to the debtor.⁶³ Similarly, a debtor is entitled to notice of the time after which a private sale might be held to liquidate the collateral.⁶⁴ At no time before disposal of the goods may the secured party interfere with the debtor's right to redemption, provided that the debtor has not waived this right after default.⁶⁵ When the buyer has completed payment on 60 percent of a debt arising from a purchase money security interest in consumer goods, the creditor is estopped from keeping the collateral in satisfaction of the loan unless the debtor has signed a statement after default renouncing this right.⁶⁶ Any sale of the goods must be conducted in a commercially reasonable manner to insure the greatest possible realization from liquidation.⁶⁷ Finally, if the creditor demonstrates a lack of good faith⁶⁸ or fails to adhere to any of the afore-

the seller attempts to limit his performance or liability through the use of finely printed exculpatory clauses. Commonly these contracts are standard form sales agreements which force the consumer into a take-it-or-leave-it position with respect to purchasing and financing the merchandise. Recently courts have come to realize that contracts which force the buyer to adhere to unconscionable terms are unenforceable. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction*, 5 AKRON L. REV. 1 (1972); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

61. UCC § 9-503. The Code does not elaborate on the characteristics of a "breach of the peace." If the debtor resists the repossession physically there is a good chance that the courts will find that the peace has been broken. Similarly, creditors are well-advised not to break into unoccupied homes. See *Morris v. First Nat'l Bank & Trust Co.*, 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970); 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 44.1 (1965).

62. UCC § 9-207(1). The secured party also has a duty to act reasonably in the care of any personal articles accidentally taken when the collateral was repossessed, and failure to exercise such care may allow the debtor to sue for conversion. This problem usually arises when automobiles are retaken and the creditor either loses or damages personal property that was contained in the vehicle. See, e.g., *Southern Indus. Savings Bank v. Greene*, 224 So. 2d 416 (Fla. Dist. Ct. App. 1969); *General Motors Acceptance Corp. v. Petrillo*, 253 Md. 669, 253 A.2d 736 (1969). Without actual damage, however, the simple accidental taking of any items with the security will not amount to a conversion. See *Thompson v. Ford Motor Credit Co.*, 324 F. Supp. 108 (D.S.C. 1971).

63. UCC § 9-504(3).

64. *Id.*

65. UCC § 9-506.

66. UCC § 9-505(1).

67. UCC § 9-507(2).

68. UCC § 1-203. UCC § 1-201(19) defines "good faith" as "honesty in fact in the conduct or transaction concerned."

mentioned provisions, the debtor is entitled to either injunctive relief or money damages.⁶⁹

In addition to the Code remedies, the debtor may utilize traditional tort theories to recover remuneration for injuries sustained from a wrongful repossession. Should the secured party retake the collateral without any claim of right he may be sued for conversion.⁷⁰ If the self-help methods used to repossess the merchandise are patently offensive to the debtor, the creditor may be liable for damages resulting from defamation, abuse of process or the intentional infliction of mental distress.⁷¹ Texas has even recognized the distinct tort of unreasonable collection.⁷² As a result, a debtor in Texas who becomes the victim of an unreasonable collection effort that causes him either physical or mental injuries may sue the secured party for actual or compensatory damages.

The obvious common denominator of both the Code and tort remedies is that *repossession must first have occurred* for any of them to be effective. This observation is crucial because it goes to the heart of the due process theories espoused in *Fuentes* and *Adams*. The paramount theme of those decisions was that a debtor is entitled to a hearing before he can be deprived of his property. In *Fuentes* the Supreme Court explicitly stated that it would not "[embrace] the general proposition that a wrong may be done if it can be undone."⁷³ Thus, the mere existence of post-repossession remedies neither justifies self-help repossession per se nor obviates the requirement for a due process hearing prior to recovery of the collateral by the secured party.

An additional observation is that before any of these remedies are actionable, the dispossessed debtor is obliged to initiate a lawsuit and formally assert his rights in court. To assume that the average middle class debtor, let alone the low income consumer, has ready access to an attorney and the courts is naive.⁷⁴ It would be far

69. UCC § 9-507(1). See also note 103 *infra*.

70. W. PROSSER, LAW OF TORTS 79-97 (4th ed. 1971).

71. *Id.* at 57.

72. Note, *Effectively Regulating Extrajudicial Collection of Debts*, 20 MAINE L. REV. 261, 271-73 (1968). This source indicates that the following three factors are relevant in determining whether the creditor's collection methods were unreasonable: the actual conduct of the secured party, the foreseeability of either physical or mental injury to the debtor, and the legality of the underlying debt.

73. 407 U.S. 67, 82 (1972), quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

74. Comment, *Non-Judicial Repossession—Reprisal in Need of Reform*, 11 B.C. IND. & COM. L. REV. 435, 458 (1970).

better to force the secured party, prior to reclaiming the collateral, to take the initiative in asserting his rights at a non-judicial hearing. By informally settling disputes before repossession, the likelihood that a debtor would be required to utilize these remedies could be reduced.

Necessity for a Due Process Hearing

Proponents of summary repossession adamantly maintain that the benefits to be achieved from a due process hearing are illusory.⁷⁵ On the other hand, denying a seller of consumer goods the right to recover the collateral by self-help deprives him of his most important remedy.⁷⁶ To facilitate discussion of the competing arguments, the problems encountered in the repossession of two general types of collateral will be analyzed. First, consideration will be given to the recovery of common household products; and second, the specialized problems of automobile repossession will be scrutinized.⁷⁷

Ordinary household goods such as appliances, furniture and television sets constitute the garden variety type of consumer products purchased under a security agreement.⁷⁸ Typically these items

Even if the low income buyer is successful in gaining access to the courts, his chances of successful litigation are often minimal. Ghetto merchants are notorious for "going out of business" when in fact they have simply changed the name of their enterprise. The poor are generally ignorant of the significance attached to receipts and warranties, and as a result they frequently lose these papers prior to trial. In addition, retention of expensive professional counsel is apt to neutralize any realization of damages. See D. CAPLOVITZ, *THE POOR PAY MORE* 171-75 (Free Press ed. 1967); Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 764-65 (1967).

75. Mr. Justice White's dissenting comments in *Fuentes* are typical:

The Court's rhetoric is seductive, but in end analysis, the result it reaches will have little impact and represents no more than ideological tinkering with state law.

None of this seems worth the candle to me. The procedure that the Court strikes down is not some barbaric hangover from bygone days. The respective rights of the parties in secured transactions have undergone the most intensive analysis in recent years. . . . Recent studies have suggested no changes in Art. 9 in this respect. . . . I am content to rest on the judgment of those who have wrestled with these problems 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.

407 U.S. 67, 102-03 (1972) (White, J., dissenting) (citations omitted).

76. *Murdock v. Blake*, 26 Utah 2d 22, 27, 484 P.2d 164, 169 (1971).

77. UCC § 9-109(1) states that goods are " 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes." Thus, ordinary household products would be classified as consumer goods by the Code. An automobile would also be a consumer good if its intended use was for personal or family purposes.

78. As of November 1972, installment credit for ordinary household products exceeded \$38 billion, or approximately 30.7 percent of the total unpaid consumer debt. Financial and Business Section, 59 FED. RES. BULL. A 56 (Jan. 1973). Roughly two-thirds of all buyers

are moderately priced at the time of purchase, and, once repossessed, offer little prospect for profitable resale.⁷⁹ Since the likelihood of significant recoupment from liquidation of the collateral is remote, most secured parties would much prefer the buyer to complete the payments, even if this necessitates an alteration of the installment schedule.⁸⁰ This situation also explains why an unscrupulous creditor in some cases will see greater advantage in using the repossession statutes for their *in terrorem* effect, rather than as a means to recover the goods.⁸¹ Furthermore, a defaulting debtor is not as likely to abscond with the ordinary consumer product since, unlike an automobile, such collateral is usually not readily movable. This factor would tend to dilute the argument that self-help is required to effect speedy repossession.⁸²

Conversely, a consumer may have legitimate interests that need protection after default occurs. Although inability to pay is probably the major cause of default on a security agreement,⁸³ the buyer may nevertheless have a valid reason for refusing to continue his installments. Failure by the seller to complete performance, breach of warranty and lack of merchantability have long been recognized as adequate grounds for the debtor to suspend payment.⁸⁴ Yet under the present system of self-help repossession these defen-

purchasing major durables finance at least a portion of the cost with consumer credit. Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 761 (1967). Since the close of World War II the percentage of installment contracts delinquent for 30 days or more has remained at a relatively constant three percent of the total number of outstanding loans. P. McCracken, J. Mao & C. Fricke, *CONSUMER INSTALLMENT CREDIT AND PUBLIC POLICY* 119 (1965).

79. Mindful that the secondhand market for ordinary consumer products is generally limited, the Uniform Consumer Credit Code [hereinafter cited as U3C] has drastically limited the creditor's right to seek deficiency judgments. When the value of the collateral is less than \$1,000, the secured party is precluded from suing for the unpaid balance after he has repossessed the merchandise. U3C § 5.103(2). Alternatively, the creditor may bring an action against the buyer for the entire unpaid debt, in which case he may not repossess the collateral. *Id.* § 5.103(6)(a). See also Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 440-41 (1968).

80. Gifford, *The Debtor's Default under Article 9 of the Uniform Commercial Code: With Suggestions for Draftsmen*, 19 ALA. L. REV. 41 (1967); Hogan, *The Secured Party and Default Proceedings under the UCC*, 47 MINN. L. REV. 205 (1962).

81. D. CAPLOVITZ, *THE POOR PAY MORE* 21 (Free Press ed. 1967); Note, *Installment Sales: Plight of the Low Income Buyer*, 2 COLUM. J. LAW & SOC. PROB. 1, 9 (1966).

82. Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions*, 8 B.C. IND. & COM. L. REV. 535, 557 (1967).

83. Note, *Installment Sales: Plight of the Low Income Buyer*, 2 COLUM. J. LAW & SOC. PROB. 1, 5-6 (1966).

84. See generally UCC § 2-313 (express warranties); UCC § 2-314 (implied warranty of merchantability).

ses can only be asserted *after* the debtor has lost control of the collateral. Since in many cases the rights of the parties are indeterminate after default, it would seem inequitable to demand that the consumer first relinquish his possessory interest and then shoulder the entire burden of initiating a lawsuit to recover his loss. In addition, repossession of household commodities almost always necessitates an invasion of private homes.⁸⁵ Had the consumer stolen the collateral, it could only be retrieved by an officer after a magistrate had issued a warrant. It is certainly incongruous for the law to respect a felon's search and seizure rights while at the same time authorizing a private creditor to summarily seize goods that the consumer acquired lawfully.⁸⁶

On balance, it can be concluded that, in the case of ordinary household products, the secured party's interest in self-help repossession does not outweigh the debtor's constitutional rights to prior notice and a hearing. It should be recalled that both *Adams* and *Fuentes* confined the use of summary procedures to extraordinary circumstances. From the foregoing presentation of the competing debtor-creditor interests at the time of default, it is evident that a 9-503 repossession presents no such unusual circumstances. Certainly the seller's concern in recovering modest property losses cannot condone jeopardizing a consumer's due process rights guaranteed by the fourteenth amendment.

The problems of automobile financing, however, are in many respects unlike those encountered in the sale of household goods.⁸⁷

85. This intrusion of the home gives rise to a substantial possibility that the debtor's right of privacy will be infringed. Considering the recently developed first amendment right of privacy, it might be questionable whether self-help could pass constitutional muster on this score. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

86. Some courts have now come to realize that the fourth amendment prohibitions against unlawful searches and seizures are applicable when a civil repossession is contemplated, as well as when a crime has been committed. See, e.g., *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D. N.Y. 1970); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

Speaking in relation to New York's replevin statutes, the court in *Laprease* stated:

The argument that the Fourth Amendment does not apply, is supported by neither good sense nor law. If the Sheriff cannot invade the privacy of a home without a warrant when the state interest is to prevent a crime, he should not be able to do so to retrieve a stove or refrigerator about which the right to possession is disputed. . . . "It is surely anomalous to say that the individual and his property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

315 F. Supp. 716, 722 (N.D.N.Y. 1970) (citations omitted).

87. As of November 1972, the total consumer debt arising out of automobile sales

In most localities there is a relatively high demand for used cars, which condition makes resale economically feasible. This factor usually enables a secured party to recover most of his losses if he can keep his depreciation costs down by minimizing the time between default and resale.⁸⁸ Creditors therefore argue that the requirement of a due process hearing merely creates costly delays and increases the size of a deficiency judgment rendered against the debtor.⁸⁹ A secured party also has a bona fide concern in rapidly recovering an automobile, since it is a highly mobile form of collateral and thus can easily be removed from the creditor's reach. Notifying a defaulting debtor that his car is about to be repossessed will doubtless increase the possibility of a "skip."⁹⁰ Finally, it has been argued that, in the vast majority of defaults, the debtor has no real assertable defenses against the secured party.⁹¹

Arguably the reasons advanced in favor of self-help are more persuasive in the field of motor vehicle sales than those seen previously in the case of ordinary household products. Again the question that must be answered is whether the circumstances surrounding automobile repossessions are truly extraordinary in view of the *Fuentes* and *Adams* decisions. The *Adams* court specifically dealt with a default on a motor vehicle security agreement and concluded that no such compelling circumstances existed.⁹² Future courts and legislatures may be inclined to weigh the practical considerations of these repossessions more heavily and thus seek to authorize the

exceeded \$43 billion, or approximately 35.1 percent of the total value of outstanding installment loans. Financial and Business Section, 59 FED. RES. BULL. A 56 (Jan. 1973). In 1971, 50 percent of all persons purchasing new or used automobiles financed at least a portion of the sales transaction with consumer credit. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 547 (Table 894) (93d ed. 1972). The 30-day delinquency rate for direct bank loans was .77 percent as of February 1972. During the same time period the corresponding delinquency rate for indirect loans (where the automobile dealer assigns chattel paper to a bank or finance company) was 1.13 percent. MENTSCHIKOFF 17.

88. MENTSCHIKOFF at 21-22.

89. *Id.*

90. *Id.* at 27. Some commentators have questioned whether placing a consumer on notice will increase his propensity to abscond with the automobile. Customarily a defaulting debtor receives several delinquency notices and telephone calls from the creditor prior to repossession. It is argued that if the debtor is intent upon stealing the collateral, he will have had ample opportunity to do so before receiving notice of a repossession hearing. Note, *Replevin: A Due Process Prescription for an Ancient Writ*, 45 TEMP. L.Q. 259, 265 (1972).

91. Even if the consumer has no valid defenses to assert, the Supreme Court has observed that "[t]he right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972).

92. 338 F. Supp. 614, 618 (S.D. Cal. 1972).

continued use of self-help for automobile repossessions. Such a move on the part of lawmakers would be regrettable, for it would make a debtor's constitutional rights contingent on the dollar value of the creditor's property interest in the collateral. Conceding that the peculiar problems of motor vehicle repossession and resale warrant special treatment, a superior solution would be to establish a highly efficient administrative body capable of dealing with automobile hearings on a priority basis. This procedure would serve to mitigate losses suffered from collateral depreciation resulting from time-consuming due process hearings.

Cost of a Due Process Hearing and Future Availability of Credit

Perhaps the major objection to abrogation of the self-help remedy is the increase in costs that must necessarily be incurred to finance due process hearings. One authority has estimated that requiring judicial repossession of automobiles would cost \$16 million annually in the State of California.⁹³ Who will be called upon to bear this cost is the pertinent question which the courts must ultimately face. Unfortunately, all existing cases that have established a need for a hearing have remained oblivious to this issue.⁹⁴

The Code would allow these increased repossession costs to be added to the debt owed by the buyer to the secured party.⁹⁵ However, if it is necessary for the individual consumer to assume the entire expense, it is doubtful that he would want an opportunity to be heard unless he had an almost certain chance to prevail. Another solution would be to spread the costs among the public at large. But surely state legislatures will not be overly receptive to the idea of raising tax rates in order to cure a predominately lower class problem. Perhaps the optimum solution would require the public to assume the bulk of the expense, while at the same time charging a nominal fee to the losing party at the hearing in order to insure good faith litigation.

Another probable consequence of denying self-help to the secured party will be the rise of interest rates on installment loans.

93. MENTSCHIKOFF App. A, 35-36. This estimate was computed by Robert W. Johnson, Professor of Industrial Administration, Purdue University. The total figure represents the aggregate losses that would have been sustained had an estimated 66,000 automobiles been judicially repossessed in California during 1971.

94. See, e.g., *Bell v. Burson*, 402 U.S. 535, 540-41 (1971); *Goldberg v. Kelley*, 397 U.S. 254, 266 (1970).

95. UCC § 9-504(1)(a).

An inordinate increase of credit costs would be particularly unfortunate for the vast majority of buyers who complete payment on their security agreements without default.⁹⁶ Furthermore, credit could be thrown out of reach to some low income consumers who formerly had access to it. Although some commentators believe that higher interest rates would serve a beneficial purpose in curtailing over-extension to high-risk debtors,⁹⁷ there may be a need for some governmental control to keep credit costs from spiraling.⁹⁸

No doubt the ultimate effect that prior notice and hearings are likely to have on the consumer credit industry will not be as dour as the critics predict. In *Fuentes* the Supreme Court simply established that the debtor must have the opportunity to be heard; it did not prescribe mandatory due process hearings in the instance of every default. Only a small fraction of security agreements end in default,⁹⁹ and, of these situations, fewer present meritorious questions of fact that must be decided. Certainly it is logical to assume that, when a consumer voluntarily discontinues his installment payments with full knowledge of the ensuing consequences, he will not want to subject himself to the additional time and trouble of an evidentiary hearing. Finally, the pessimistic projections of the cost skeptics lose flavor when one queries: If the function of the judicial system is not to settle disputes, what other purpose does it serve?¹⁰⁰

CHARACTERISTICS OF A DUE PROCESS HEARING

Both *Fuentes* and *Adams* established the need for a hearing

96. Commenting on this possibility in *Adams*, Judge Nielsen stated:

For those who make an earnest effort to maintain their payment schedules and default due to circumstances beyond their control, creditors have traditionally exercised considerable flexibility and have exhausted every reasonable alternative before resorting to the drastic and expensive remedy of repossession. These persons, the ostensible beneficiaries of *Sniadach* and its progeny, stand to suffer substantially in the long run, if sellers and creditors raise their prices and interest rates commensurate with the cost of the judicial process which these decisions make necessary.

338 F. Supp. 614, 622 (S.D. Cal. 1972).

97. *Randone v. Appellate Dep't of Super. Ct.*, 5 Cal. 3d 536, 549, 488 P.2d 13, 26, 96 Cal. Rptr. 709, 722 (1971), cert. denied sub nom. Northern Cal. Collection Serv., Inc. v. *Randone*, 407 U.S. 924 (1972); Note, *Effectively Regulating Extrajudicial Collection of Debts*, 20 MAINE L. REV. 261, 262 (1968).

98. For a listing of existing credit rate ceilings in the various states, see *Hearings on S. 26 Before the Subcomm. on the Study of Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 4-13 (1967).

99. See notes 78 & 87 *supra*.

100. *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971); Note, *Replevin: A Due Process Prescription for an Ancient Writ*, 45 TEMP. L.Q. 259, 265 (1972).

prior to the time a creditor could summarily seize control of the collateral after the debtor allegedly defaults.¹⁰¹ However, neither of these decisions chose to articulate any of the characteristics that a due process hearing should assume in order to protect the debtor's rights.¹⁰² At this juncture it would be profitable to enumerate some of the essential elements that would be required to make the proceeding a meaningful opportunity in which the consumer could assert his rights when faced with a 9-503 repossession.

Initially, it is important to realize that the only purpose of a prior hearing is to ascertain the creditor's right to repossession. Should the secured party, after he has retaken possession, damage the buyer's equity in the collateral, the debtor would be entitled to sue for damages either in tort or under 9-507(1) of the Code.¹⁰³ Consequently, an informal administrative proceeding would be preferable to a more formal and protracted judicial trial.

Ideally each state should appoint an administrator whose function would be to supervise the establishment and maintenance of an extra-judicial administrative agency designed to provide repossession hearings.¹⁰⁴ When a debtor allegedly defaults on his security agreement, the creditor would contact the agency, which in turn would notify the consumer of the claim against him. If the debtor elects to forego the hearing, either the agency or a law enforcement officer could then proceed to recover the merchandise and deliver it to the secured party. Should the buyer choose to contest the impending repossession, a hearing would be scheduled so that he could present his defense.

As a guide in formulating the procedural requisites necessary

101. 407 U.S. 67, 84 (1972); 338 F. Supp. 614, 618 (S.D. Cal. 1972).

102. The *Fuentes* court concluded that "[t]he nature and form of such prior hearings . . . are legitimately open to many potential variations and are a subject . . . for legislation—not adjudication." 407 U.S. 67, 96-97 (1972).

103. When a secured party fails to comply with Part V of Article 9, the debtor is permitted to recover damages to the extent of his injury. In the special case of consumer goods, 9-507(1) gives the debtor the right "to recover in any event an amount not less than one credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus 10 percent of the cash price."

104. In the six states that have enacted the Uniform Consumer Credit Code there is a provision that establishes an extra-judicial administrative agency. The primary function of the administrator under U3C § 6.104 is to insure compliance to the U3C from the consumer credit industry. The authority of this administrator could be expanded to include the management of procedural machinery necessary to effectuate repossession hearings.

As of 1972, the following states had adopted the U3C: Colorado, Idaho, Indiana, Oklahoma, Utah and Wyoming. 7 UNIFORM LAWS ANNOTATED 12 (West Supp. 1972).

for an effective hearing, it would be appropriate to review some of the guidelines outlined by the Supreme Court in *Goldberg v. Kelley*.¹⁰⁵ There the Court elaborated the procedures required in a hearing to terminate welfare benefits; although the problems encountered in commercial law are not always as acute as those found in poverty law, certain inferences can definitely be drawn. Minimal due process considerations espoused in *Goldberg* dictate that the administrative proceeding be held "at a meaningful time and in a meaningful manner."¹⁰⁶ Timely and adequate notice accompanied with a brief statement of the secured party's grounds for relief should be sent to the debtor in advance of the hearing.¹⁰⁷ A buyer who has allegedly defaulted should also have the opportunity to present his own evidence orally and to cross-examine any adverse witnesses.¹⁰⁸ Lastly, it is axiomatic that the decisionmaker render an impartial decision based solely on the evidence presented at the hearing.¹⁰⁹

Even though the *Goldberg* decision did not require an attorney to be appointed for the welfare recipient, it did concede that he should be allowed to retain one if he so desired.¹¹⁰ Unlike the welfare recipient who probably will have to confront his caseworker at a termination proceeding, a defaulting debtor will in many instances have to oppose a highly trained corporate attorney. This disparity in legal proficiency between the conflicting parties could make a mockery out of a hearing theoretically designed to protect a consumer's due process rights. Keeping in mind the added expense of professional representation, the administrative officer should be vested with limited discretion to appoint counsel for indigent debtors in those cases where the possibility of grave injustice exists.

An additional factor that has yet to be resolved is the burden of proof that must be assumed by a secured party at a repossession

105. 397 U.S. 254 (1970).

106. *Id.* at 267, quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

107. *Id.* at 267-68.

108. *Id.* at 268.

109. *Id.* at 271. Whether or not the decision reached at the hearing should be subject to full judicial review is a question yet to be resolved. The *Goldberg* court did not endorse review of the decisionmaker's determination in a welfare case, since there was already a statutory procedure for a post-termination hearing. Should a state choose to expand the function of the administrator under the U3C, as suggested in note 104 *supra*, there is a provision for judicial review of contested cases in U3C § 6.414. However, in view of the debtor's extensive UCC rights and remedies after default, it might be overly zealous to demand review of repossession hearings. See notes 59-69 *supra* and accompanying text.

110. 397 U.S. 254, 270 (1970).

hearing. In *Fuentes*, the majority talked in terms of the creditor establishing a "probable validity" that he had the right to replevy the goods.¹¹¹ If, as Mr. Justice White maintained in dissent, a creditor need only make out a prima facie showing of default, the heralded virtues of a due process hearing would not be realized.¹¹² One commentator has suggested that a more realistic burden would be the "preponderance of the evidence" standard commonly encountered in civil actions. Using this approach the creditor would have to prove that it was more likely than not that he was entitled to replevin.¹¹³ Similarly, the secured party in a 9-503 repossession should be required to assume the "preponderance of the evidence" burden. The replevin suit presented in *Fuentes* was a possessory action preceding a full-dress hearing to determine whether a creditor could retain title to the collateral. Since the Code considers the collateral's title immaterial,¹¹⁴ there is no provision for a subsequent judicial proceeding after repossession has occurred pursuant to 9-503. Hence the circumstances surrounding an Article 9 repossession warrant the imposition of the more stringent "preponderance of the evidence" burden.

The Supreme Court has observed that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."¹¹⁵ In that light, the preceding recommendations are intended only as a skeletal model of procedures that could be adopted to accommodate an evidentiary hearing prior to a 9-503 repossession. In the future, state legislatures should be encouraged to experiment with alternative methods designed to safeguard a defaulting debtor's rights consistent with the due process prescriptions of the fourteenth amendment.

STATE ACTION AS A CONDITION PRECEDENT TO CONSTITUTIONAL REVIEW OF 9-503

To date, five courts have attempted to determine whether a repossession under 9-503 constitutes a deprivation of property without due process of law. With the exception of the *Adams* case, no

111. 407 U.S. 67, 97 (1972), quoting *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring).

112. 407 U.S. 67, 102 (1972) (White, J., dissenting).

113. *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 90 (1972).

114. UCC § 9-202.

115. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

court has been able to find the state action required to bring the fourteenth amendment protections into effect.¹¹⁶ It is therefore relevant to consider briefly whether the enactment of 9-503 as a state statute satisfies the state action requirement,¹¹⁷ even though the section merely authorizes a *private* creditor to repossess collateral summarily pursuant to a *private* security agreement.

Resolution of the issue seems to hinge in part on the construction given to the Supreme Court's decision in *Reitman v. Mulkey*.¹¹⁸ In 1964 the people of California voted to amend their state constitution with a provision that made it unlawful for the state to interfere with the sale of private homes.¹¹⁹ Under a guise of state neutrality, the effect of the amendment was to encourage private racial discrimination which would have been constitutionally prohibited had the legislature expressly authorized it.¹²⁰ Speaking for the majority, Mr. Justice White affirmed the lower court's conclusion that "a prohibited state involvement could be found 'even where the state can be charged with only encouraging' rather than commanding discrimination."¹²¹

Applying a parallel analysis, the court in *Adams* reasoned that the existence of 9-503 as a state statute encouraged creditors to incorporate self-help repossession into their security agreements.

116. See note 19 *supra*.

117. Some courts have distinguished the state action requirement of the fourteenth amendment from action "under color of state law" necessary to satisfy 42 U.S.C. § 1983. Since these distinctions are not relevant to the instant analysis, attention will be confined to a discussion of the fourteenth amendment jurisdictional requirements. See *Klim v. Jones*, 315 F. Supp. 109, 113-17 (N.D. Cal. 1970).

118. 387 U.S. 369 (1967).

119. CAL. CONST. art. I, § 26 (1964) read in part as follows:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion chooses.

120. The amendment, presented on the ballot as Proposition 14, also had the effect of repealing pro tanto two existing California statutes which had made it illegal for private realtors to discriminate racially. Unruh Civil Rights Act, CAL. CIV. CODE §§ 51-52 (West Supp. 1972); Rumford Fair Housing Act, CAL. HEALTH & SAF. CODE §§ 35700-44 (West 1967). It might be argued that the nullification of these laws was in itself the basis of state action in *Reitman*. However, the California Supreme Court correctly noted that the legislature was under no initial obligation to enact these statutes, and thus their mere repeal would not necessarily have constituted state action. But beyond countermanding the Unruh and Rumford Acts, the state had placed its imprimatur on private discriminations by "constitutionalizing" the right to sell real estate without state interference. 387 U.S. 369, 376 (1967).

121. 387 U.S. 369, 375 (1967), quoting *Mulkey v. Reitman*, 64 Cal. 2d 529, 536, 413 P.2d 825, 832, 50 Cal. Rptr. 881, 888 (1966), cert. granted, 385 U.S. 967 (1966).

Thus, even though the contracting parties were private individuals, there was sufficient influence exerted on the agreement by the statute to satisfy the state action requirement.¹²²

Just two weeks after *Adams* was decided by the Southern District Court of California, the Northern District Court of the same state was presented with an almost identical fact situation in *Oller v. Bank of America*.¹²³ Despite the similarities, the constitutional due process issue failed for want of state action. The judge in *Oller* believed that *Reitman* could be distinguished, since the problems seen in the context of racial discrimination were of greater magnitude than those found in commercial transactions.¹²⁴ In essence, the court stated that although there was some state action, such action was not sufficient to satisfy jurisdictional requirements. Unless the scope of the fourteenth amendment is to be confined to situations involving racial discrimination, the *Oller* decision may be criticized on the ground that the presence of state action should not depend on the type of injury being suffered, but rather on the degree of state involvement with the cause of the harm. Certainly the degree of state entanglement in the field of commercial law cannot be deemed de minimis. When the legislatures adopted Article 9 of the Code, of which 9-503 is a part, they demonstrated a clear intent to control the entire domain of secured transactions.¹²⁵ Even though 9-503 endorsed the use of private self-help, the fact remains that the right was a state-created policy embodied in a state statute.

A more persuasive argument to defeat state action was developed in *Messenger v. Sandy Motors, Inc.*,¹²⁶ in which the constitutionality of 9-503 was again questioned. In that case the court recognized that self-help is an ancient remedy which was in existence long before the Uniform Commercial Code adopted it in Article 9. Since the creditor's original right to summary repossession was not dependent on a statute, it was concluded that the presence of a statute which authorized a concurrent right did not amount to state action.¹²⁷ An opposite result could have been reached had the

122. 338 F. Supp. 614, 617 (S.D. Cal. 1972).

123. 342 F. Supp. 21 (N.D. Cal. 1972).

124. *Id.* at 23.

125. For a development of the "state entanglement" theory, see *Evans v. Newton*, 382 U.S. 296 (1966); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

126. 121 N.J. Super. 1, 295 A.2d 402 (1972).

127. *Id.* at 5, 295 A.2d at 405-06.

Messenger court followed the holding in *Klim v. Jones*,¹²⁸ in which the constitutionality of an innkeeper statute was under consideration. The common law right of an innkeeper to seize a tenant's property as security for unpaid rent was recognized, like self-help, long before the statute was drafted. Finding appropriate jurisdiction to reach the merits, the court held that "when private action conforms with state policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action."¹²⁹

Perhaps the state action question can best be answered by returning to the *Civil Rights Cases*,¹³⁰ where the "under color of state law" doctrine was originally formulated. There the Supreme Court declared:

[U]ntil some *State law* has been passed . . . adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against *State laws*¹³¹

One authority has suggested that the above quotation implies that any state statute is ipso facto state action.¹³² If the courts could accept the mere existence of 9-503 as state action without looking to the section's substance, many of the jurisdictional problems associated with judicial review of self-help would be eliminated.

CONCLUSION

Recently refined concepts of procedural due process are apt to have a far reaching impact on the powerful creditor remedy of self-help found in 9-503. It is doubtful whether a secured party's right to repossess collateral summarily will be able to withstand the constitutional directive that entitles a debtor to notice and a hearing before he can be deprived of any significant property interest. But the attendant problems with providing prior notice and due process hearings are likely to be severe. Higher interest rates and reduced

128. 315 F. Supp. 109 (N.D. Cal. 1970).

129. *Id.* at 115, quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 203 (1970) (Brennan, J., concurring in part and dissenting in part).

130. 109 U.S. 3 (1883).

131. *Id.* at 13 (emphasis added).

132. Black, "State Action," *Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 84 (1967).

availability of credit could well be the unpleasant consequences of otherwise well-intentioned judicial opinions designed to benefit the consumer. With creative legislation it may be possible to devise efficient administrative procedures capable of handling the required evidentiary hearings at a minimum cost. It is hoped that future courts will overcome the jurisdictional complexities surrounding state action and meet the challenge of solving the vital issues that concern creditor and consumer alike.

