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NEW BALANCE IN THE RIGHTS OF CREDITORS AND DEBTORS: THE EFFECT ON MARYLAND LAW

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The author analyzes the basis of recent decisions which have held state procedures for prejudgment attachment and replevin unconstitutional. He considers the effect of these decisions, which establish a new balance in the rights of debtors and creditors, on Maryland provisional creditors' remedies. His conclusion is that, although the Maryland procedure for attachments on original process will probably survive attack, the procedures for replevin and distress will not.

During the past few years, court decisions based on the fourteenth amendment have greatly enhanced the constitutional rights of debtors. In June 1969, in *Sniadach v. Family Finance Corp.*,[1] the United States Supreme Court held a Wisconsin prejudgment wage garnishment statute unconstitutional because the statute failed to provide for notice and an opportunity for a hearing to the debtor before freezing his wages. Three years later, in *Fuentes v. Shevin*,[2] the Supreme Court held unconstitutional the Florida replevin statute because it also failed to provide for notice and a hearing prior to seizure of disputed goods. Other courts have found other pretrial creditors' remedies unconstitutional, including other prejudgment attachments and garnishments,[3] distress,[4] and innkeepers' liens.[5]

This article reviews the basis for these decisions and considers how they are likely to affect some Maryland creditors' remedies. Part I consists of a brief examination of due process considerations. Recent developments in the case law are discussed in Part II, and in Part III the Maryland procedures for attachment on original process, replevin and distress are considered.

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1. 395 U.S. 337 (1969).
2. 407 U.S. 67 (1972).
3. *See, e.g.*, Randone v. Appellate Dep't of the Super. Ct. of Sacramento County, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972).
4. *See, e.g.*, Hall v. Garson, 430 F.2d 430 (5th Cir. 1970).
5. *See, e.g.*, Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

PART I: PROCEDURAL DUE PROCESS

The fourteenth amendment requires that property be taken by state action only in accordance with "due process of law."[6] This vague phrase has been interpreted to mean that a taking of property must be preceded by notice and an opportunity to be heard.[7] Generally, the hearing must precede the taking, but in some situations the hearing may be postponed.[8] Courts which have considered the validity of procedural rules authorizing a taking prior to an opportunity to be heard have generally employed a balancing test.[9] In weighing the competing governmental and private interests served or affected by these rules, it is necessary to consider the nature of the interests affected, the manner in which this is accomplished, the justifications for proceeding in that manner, and the available alternative procedures.[10]

The countervailing interests to be weighed in considering the constitutionality of creditors' pretrial remedies include those of the

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6. "[N]or shall any State deprive any person of life, liberty, or property without due process of law...." U.S. CONST. amend. XIV, § 1.
7. "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." Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863). In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), the Court stated:

   > Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case.

8. Due process requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, 401 U.S. 371, 379 (1971).
9. *See* Note, *Attachment and Garnishment—Constitutional Law—Due Process of Law—Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The Sniadach Case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986, 995 (1970) [hereinafter cited as Note, 68 MICH. L. REV.]. Some examples of applications of the balancing test are: "Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." Cafeteria Worker's Local 473 v. McElroy, 367 U.S. 886, 895 (1961). "The extent to which procedural due process must be afforded ... depends upon whether the recipient's interest in avoiding that loss [of welfare benefits] outweighs the government interest in summary adjudication." Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).
10. Justice Frankfurter in his concurring opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951), stated:

   > Due Process is not a mechanical instrument .... It is a delicate process of adjustment inescapably involving the exercise of judgment ....
   >
   > ... The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed ... the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

state, creditors and debtors.[11] State procedures for the prompt and efficient collection of debts encourage creditors to extend credit, and thus enhance economic growth.[12] The public has a corresponding interest in the protection of debtors and consumers against unjustified seizure of their property.[13]

The pretrial remedies considered in this article aid creditors in three ways. First, the remedies generally insure that if the creditor is successful in establishing his claim in the main action against the debtor, there will be a fund out of which the judgment can be satisfied. Second, pretrial remedies give creditors leverage in negotiating settlements that avoid costly trials. Third, the procedures aid the creditor in bringing the debtor into court.

The debtor's interest lies in the continued use of his property, free from unwarranted interference. To protect that interest, a debtor has a right to notice and a hearing prior to the taking. But if the state or creditor's interests outweigh the debtor's interest in a particular situation, then his property may be seized prior to judgment.

The remainder of this article will show how courts have balanced these countervailing interests in considering the validity of some procedures that allow seizure without prior notice and a hearing.

PART II: SNIADACH AND FUENTES

A. *Sniadach*

Prior to the *Sniadach* decision, pretrial remedies such as attachment and garnishment had gone unchallenged for over forty years. These remedies were generally justified on the basis that the taking was only temporary, and that an opportunity for a hearing was provided in the trial of the main action. The leading case was *McKay v. McInnes*,[14] which rejected a challenge on due process grounds to a Maine statute permitting prejudgment attachment. Pursuant to the statute, a lien was imposed on the defendant's real property. The state court found that the statutory lien was indeed a taking of property,[15] but concluded

11. *See* Note, 68 MICH. L. REV. at 996; Note, *Attachment in California, A New Look at an Old Writ*, 22 STAN. L. REV. 1254, 1258-64 (1970).
12. This basic assumption has not gone unchallenged. *See* Note, 68 MICH. L. REV. at 997; Comment, *The Constitutional Validity of Attachment In Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A.L. REV. 837, 846 (1970).
13. Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 723 (N.D.N.Y. 1970). *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1969).
14. 127 Me. 110, 141 A. 699 (1928), *aff'd per curiam*, 297 U.S. 820 (1928).
15. The court stated:

> Property in legal conception is the total of the rights and powers incident to a thing rather than the thing itself. The legal right to use and derive a profit from land or other things is property. And the power of disposition at the will of the owner is property. Deprivation does not require actual physical taking of property or the thing itself. It takes place when the free use and enjoyment of the thing or the power to dispose of it at will is affected.

Id. at 116, 141 A. at 702 (citation omitted).

that the taking did not violate due processs in that it was temporary and conditional upon the outcome of the main action and the debtor was afforded an opportunity to be heard at the trial. The Supreme Court affirmed in a one-sentence per curiam opinion.[16]

The Court undertook an active review of this subject in *Sniadach*, where the statute in question[17] allowed the creditor to request the court clerk to issue a garnishee summons to freeze the debtor's wages subject to a weekly subsistence allowance.[18] No provision was made for notice or hearing prior to garnishment, although the creditor was required to serve the summons and complaint on the debtor within ten days after service on the garnishee.[19] Mrs. Sniadach's employer was served pursuant to the statute by her creditor, who claimed she owed $420 on a promissory note. Mrs. Sniadach moved to dismiss the garnishment proceedings for failure to satisfy due process. The Wisconsin Supreme Court,[20] basing its decision on *McKay v. McInnes*, sustained the statute, but the United States Supreme Court reversed. The Court held that because Mrs. Sniadach had been deprived of a significant property interest (the use of her wages during the period between the garnishment and the trial of the main action) she must be given notice and an opportunity for a hearing prior to the taking.[21] The statute did not provide an opportunity for a prior hearing, and was therefore unconstitutional.

The result in *Sniadach* cast considerable doubt on the validity of the basic assumption of the earlier attachment cases[22]—that the taking is justified, as it was merely temporary and conditional. Although notice and an opportunity to be heard were not provided prior to the attachment, they were required prior to sale of the property. While the

16. The Court affirmed on the authority of Ownbey v. Morgan, 256 U.S. 94 (1921), and Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928). In *Ownbey* the Court upheld a Delaware statute requiring a nonresident defendant to post security equal to the value of the property attached as a condition to making an appearance for the purpose of presenting a defense. The purpose of the statute was said to be to provide a means of collecting debts with the incidental purpose of compelling the nonresident debtor's appearance. It was upheld on this basis and because it had been sanctioned by long use. In *Coffin Bros.* the question was whether a Georgia statute providing a means for prompt collection of assessments from shareholders of insolvent banks met the requirements of due process. The statute authorized the Superintendent of Banks to issue executions against shareholders' property without a prior hearing if they failed to pay their assessments after notice. However, if the stockholder protested by filing an affidavit of illegality, a hearing was held. But until a decision was rendered in the main action, a lien was imposed on the property attached. The Court upheld the statute because it provided for a full hearing after creation of the lien, but before the property was sold, and because prejudgment liens were commonly accepted remedies in Georgia.
17. Act of Dec. 21, 1965, ch. 507, § 1, [1965] Wis. Laws 795, *as amended* WIS. STAT. ANN. §§ 267.01-.24 (Supp. 1972).
18. Act of Dec. 21, 1965, ch. 507, § 1, [1965] Wis. Laws 795, 801, *as amended* WIS. STAT. ANN. § 267.18(2)(a) (Supp. 1972).
19. WIS. STAT. ANN. § 267.07 (Supp. 1972).
20. Family Finance Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1969), *rev'd*, 395 U.S. 337 (1969).
21. 395 U.S. at 342 (Harlan, J., concurring).
22. *See* pp. 238-39 & note 16 *supra*.

statutory scheme considered in *Sniadach* was essentially similar in that respect, the fact that the taking was temporary did not save the Wisconsin statute. Justice Douglas, writing for the majority, distinguished the earlier cases by asserting that pretrial remedies which failed to provide for notice and a hearing prior to the seizure met the requirements of due process only in extraordinary situations requiring special protection for a state or creditor interest.[23] While the earlier cases involved unusual circumstances which tipped the balance of interests in favor of the state procedural rule in questions,[24] the facts in *Sniadach* presented a situation requiring no special protection for a state or creditor interest.

The *Sniadach* Court's application of the balancing test was not explicit. The hardships caused by pretrial garnishment of wages were repeatedly emphasized,[25] but at no point were the interests of the state or of the creditors discussed, except for the assertion that the facts of *Sniadach* did not present the special state or creditor interest needed to justify the procedure.[26] It is clear, however, that a more thorough consideration of state and creditor interests would have made no difference in the outcome. The well-documented hardships imposed by

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23. Justice Douglas commented:

> Such summary procedure may well meet the requirements of due process in extraordinary situations [citing *Ownbey* and *Coffin Bros.*]. But in the present case no situation requiring special proection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition.

395 U.S. at 339.

24. In *Ownbey* the special interest was the state interest in providing a forum for creditors in actions against non-residents. Prompt action was required in *Coffin Bros.* to preserve public faith in the banking system. Justice Douglas' treatment of *McKay* is less clear. He stated:

> A procedural rule that may satisfy due process for attachments in general, see *McKay v. McInnes*, 279 U.S. 820, does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms.

395 U.S. at 340. The statement appears to affirm *McKay* but to find it inapplicable to wage garnishments. *See* Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971). Justice Harlan, in his concurring opinion, questioned *McKay*: "And I am quite unwilling to take the unexplicated *per curiam* in *McKay v. McInnes* . . . as vitiating or diluting these essential elements of due process." 395 U.S. at 343-44. In contrast, Justice Black would have affirmed the decision of the Wisconsin Supreme Court on the authority of *McKay*. *Id.* at 348.

25. Justice Douglas asserted: "A prejudgment garnishment of the Wisconsin type may impose tremendous hardship on wage earners with families to support." 395 U.S. at 340. He identified these hardships as loss of income (particularly where the statutory exemption was inadequate as in Wisconsin), discharge from employment, and additional financing charges when the debtor agrees to refinance the loan to obtain release of his wages. "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." *Id.* at 342.

26. The author of Note, 68 MICH. L. REV. at 996–97, criticizes the *Sniadach* Court for not discussing the relative weight of the public and creditor interests but concludes that such a discussion would have made no difference in the result. In the absence of special circumstances the interests of creditors and the public in a prejudgment garnishment statute are those described generally at pp. 237–38 *supra*.

prejudgment garnishment of wages should outweigh any interest that the state or a creditor might assert under the facts presented in *Sniadach*. Furthermore, an effective alternative procedure was available to collect the debt in that Mrs. Sniadach was a resident of Wisconsin (thus, in personam jurisdiction was readily available[27]), and her wages could have been garnished after a judgment was obtained.

While the holding in *Sniadach* was limited to prejudgment garnishment of wages, the Court's broad language[28] suggested that the same principle might apply to other pretrial remedies.

B. Interpreting *Sniadach*

For several years after the *Sniadach* decision, there was considerable uncertainty as to its interpretation and application. Some courts construed it narrowly to apply only to pretrial garnishment of wages,[29] while other courts held that it applied to any property that was a "necessity of life."[30] Still other courts have construed it broadly and applied it to prejudgment attachments generally,[31] to replevin[32] and

27. 395 U.S. at 339. The Court's discussion suggests that the nonresidence of a defendant is an "extraordinary situation" justifying pretrial seizure.

28. *See* note 23 *supra*.

29. *See, e.g.*, American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970) (holding Hawaii's prejudgment garnishment statute constitutional with respect to corporate checking accounts, payroll accounts and accounts receivable); First Nat'l Bank & Trust Co. v. Pomona Mach. Co., 107 Ariz. 286, 486 P.2d 184 (1971); Western Bd. of Adjustors, Inc. v. Covina Publishing, Inc., 9 Cal. App. 3d 662, 88 Cal. Rptr. 293 (1970). Courts finding that *Sniadach* was limited to prejudgment garnishment of wages have generally quoted the following statement from Justice Douglas' opinion: "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340. *E.g.*, "*Sniadach*, in this Court's opinion, only carved out the garnishment of wages . . . as an exception to the Supreme Court's ruling in McKay v. McInnes. . . ." Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100, 102 (D. Conn. 1971) (citation omitted).

30. *See, e.g.*, Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (various items of household furniture were necessities); Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), *rev'd sub nom.* Parham v. Cortese, 407 U.S. 67 (1972) (stereo, watch, and diamond rings were not necessities); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970), *rev'd*, 407 U.S. 67 (1972) (stereo and gas stove were not necessities); Aaron v. Clark, 342 F. Supp 898 (N.D. Ga. 1972) (savings account for college tuition was a specialized form of property similar to wages). The application of *Sniadach* only to "necessities" is consistent with the balancing approach. The effect of the deprivation is more serious when such property is involved and a more important state or creditor interest should be required to justify pretrial seizure. But the doctrine requires the difficult task of determining in each case whether the property seized is a "necessity." Further, the distinction is illogical. The fourteenth amendment does not distinguish between various kinds of property. The argument was repudiated in *Fuentes v. Shevin*: "The relative weight of property interests is relevant, of course, to the *form* of notice and hearing required. . . . But *some* form of notice and hearing—formal or informal—is required before deprivation of a property interest that 'cannot be described as *de minimus*.' " 407 U.S. at 90 n.21 (citations omitted) (first emphasis added, second in original).

31. *See, e.g.*, Randone v. Appellate Dep't of the Super. Ct. of Sacramento County, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972); Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N.W.2d 87 (1970); Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

32. Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970).

distress[33] statutes, and to other creditors' remedies.[34] While later Supreme Court decisions contained harbingers of a broad construction of *Sniadach*,[35] its proper application to creditors' provisional remedies was not lucidly defined until recently in *Fuentes v. Shevin*.[36] Obviously, this case marks an important turning point in the rights of creditors and debtors.

C. *Fuentes*

The Florida[37] and Pennsylvania[38] replevin statutes considered in *Fuentes* were similar in operation. The Florida statute authorized any person whose goods were wrongfully detained to obtain a writ of replevin[39] by alleging in his complaint that he was entitled to possession of the chattels, and posting a bond in at least double the value of the property to be replevied.[40] The writ commanded the officer to whom it was directed to seize the goods and to summons the defendant.[41] After seizure, he was required to hold the property for three days before delivering it to the plaintiff pending final judgment.[42] The defendant could obtain return of the property by posting his own bond within the three-day period during which the officer held the property.[43] This procedure obviously did not provide either notice or an opportunity for a hearing prior to seizure of the disputed goods.

The factual structure of *Fuentes* was simple: Mrs. Fuentes purchased a gas stove and a stereo under conditional sales contracts. When a dispute arose over the servicing of the stove and she withheld payments, the conditional seller obtained a writ of replevin and repossessed the goods. At this point, Mrs. Fuentes brought an action in a federal district court challenging the constitutionality of the Florida procedure;

33. Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970).
34. Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeepers' lien).
35. Goldberg v. Kelly, 397 U.S. 254 (1970) (notice and opportunity for a hearing required before termination of welfare benefits); Bell v. Burson, 402 U.S. 535 (1971) (Georgia statute providing for suspension of motor vehicle registration and operator's license of uninsured motorist involved in accident, unless he posted security for the amount of damages claimed, held unconstitutional without a prior hearing as to the reasonable possibility of obtaining judgment against him).
36. 407 U.S. 67.
37. FLA. STAT. ANN. §§ 78.01-.21 (Supp. 1973).
38. 12 PA. STAT. § 1821 (1967), authorizes writs of replevin. The procedures for replevin actions are found in PA. APP. R. CIV. P. 1071-87.
39. FLA. STAT. ANN. § 78.01 (Supp. 1973).
40. *Id.* § 78.01. The purpose of the bond requirement is to ensure that if the defendant is successful in defending the main action he will be able to recover from the plaintiff at least the value of the goods replevied and any expenses incurred in the action.
41. *Id.* § 78.08.
42. *Id.* § 78.13.
43. *Id.*

however, the district court upheld the procedure.[44] The Supreme Court reversed in a four-to-three decision, holding that the Florida statute "worked a deprivation of property without due process of law insofar as it denied the right to a prior opportunity to be heard before chattels are taken from their possessor."[45] The Court did not hold that a debtor could not be deprived of his property prior to final judgment, but only that his property could not be taken until his creditor had established the probable validity of his claim at a prior hearing.[46]

Three arguments justifying the prejudgment writ of replevin were presented. The first of these asserted that the taking was only temporary because the state procedure allowed the defendant an opportunity to recover the goods immediately by posting his own bond in double their value. In rejecting this contention, the Court remarked that *Sniadach* had established that even a temporary, nonfinal, deprivation of property was nonetheless a taking within the meaning of the fourteenth amendment.[47] Further, the requirement that the defendant post a bond to obtain return of the property was itself said to be a taking.[48]

Second, it was argued that the debtor had no interest protected by the fourteenth amendment because the seller had retained legal title by the conditional sales contracts. The Court pointed out that the possessory right of the vendees was a significant property interest and was protected by the fourteenth amendment.[49]

Fuentes finally rejected the argument that a prior hearing was required only when the property taken was an absolute necessity of life. This argument was apparently based on those cases narrowly interpreting *Sniadach* to apply only when the necessities of life were taken.[50] The Court found that the fourteenth amendment applied to deprivation of any significant property interest. The transaction considered in *Fuentes* involved consumer goods, and courts *could* limit its future application to replevin of such goods; however, the Court's broad language in rejecting the third argument would appear to preclude such a narrow construction.[51]

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44. Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970), *rev'd sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972). The Pennsylvania procedure was upheld in Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), *rev'd sub nom.* Parham v. Cortese, 407 U.S. 67 (1972).
45. 407 U.S. at 96.
46. *Id.*
47. *Id.* at 84-85.
48. *Id.* at 85.
49. *Id.* at 86.
50. *See* note 30 *supra.*
51. The Court stated: "[I]f the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of 'property' generally." 407 U.S. at 90. In a non-consumer transaction, a creditor may be able to proceed through a replevin action without prior hearing if he obtains a waiver of the debtor's right to that hearing. See pp. 254-56 *infra.*

The Court's discussion of the state and creditor interests furthered by a state prejudgment replevin procedure was not extensive. The private interest in an inexpensive procedure for obtaining possession of disputed goods,[52] and the state interest in limiting the burden which a prior hearing would impose on its judicial machinery[53] were found to be insufficient to outweigh the debtor's right to a prior hearing. The Court did not mention the creditor's interest in preventing further use and deterioration of the disputed property,[54] nor did it discuss the public interest in enhancement of retail credit furthered through efficient debt collection procedures such as prejudgment replevin.[55] Nonetheless, it appears that these interests were not sufficient to shift the scales.

Thus, the *Fuentes* Court adhered to the *Sniadach* view that in ordinary circumstances neither the state interest in protecting creditors nor the creditor interests themselves could outweigh the right of the

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52. The Court stated:

> By allowing repossession without an opportunity for a prior hearing, the Florida and Pennsylvania statutes may be intended specifically to reduce the costs for the private party seeking to seize goods in another party's possession .... The appellees argue that the cost of holding hearings may be especially onerous in the context of the creditor-debtor relationship. But the Court's holding in Sniadach v. Family Finance Corp. ... undisputably demonstrates that ordinary hearing costs are no more able to override due process rights in the creditor-debtor context than in other contexts.

Id. at 92 n.29. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

53. In a note the Court commented:

> A prior hearing imposes some cost in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right.... Procedural due process is not intended to promote efficiency or accomodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

407 U.S. at 90 n.22.

54. The district court's discussion in *Epps v. Cortese* describes the state and creditor interests more fully:

> Clearly, the State has a countervailing interest in summary seizure by replevin which is to be weighed against the plaintiffs' right not to be temporarily deprived of their property prior to a hearing on the merits. Initially, summary seizure conserves State financial resources and administrative time in reducing the number of evidentiary hearings in a given lawsuit. Additionally, the State and creditor interests coincide in providing a protective remedy for those who have retained title to or security interest in specific and unspecialized property by authorizing procedures designed to prevent destruction, misuse or concealment of property by the debtor pending final disposition. Adequate remedies made available to creditor interests are necessary to the preservation and continuation of retail credit. ... To deny the creditor an adequate and practical remedy may deny the debtor of his only means of obtaining many widely accepted, but costly items. ... The preservation of adequate remedies is also necessary to the maintenance of many large and small retail businesses without which our economy might well substantially decline to the detriment of the very individuals whom plaintiff's here seek to protect.

326 F. Supp. 127, 135-36 (E.D. Pa. 1971). *See* 407 U.S. at 103 for similar comment by Justice White, dissenting.

55. *See* p. 238 *supra*.

debtor to notice and a hearing before his property is taken. Only in unusual circumstances, requiring special protection to a state or creditor interest, may a debtor's property be seized prior to notice and hearing.

The *Fuentes* Court asserted that past Supreme Court decisions had allowed summary seizure only in a few limited circumstances. The Court found three factors common in such cases:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary in the particular instance.[56]

As examples of such situations, the Court suggested an attachment might be necessary to secure jurisdiction over a nonresident defendant,[57] and a seizure might be needed to prevent a debtor from destroying or concealing disputed goods.[58] In order to survive constitutional attack, a statute authorizing pretrial seizure without notice and hearing must be narrowly drawn to limit its use to such special situations,[59] and it must allow for the maintenance of effective control over the use of state power.

The new balance of creditors' and debtors' rights established in *Sniadach* and *Fuentes* is likely to have substantial impact on other pretrial remedies. The probable effect of these decisions on some Maryland procedures will be considered in Part III.

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56. 407 U.S. at 91.
57. In a note the Court stated:
> In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against . . . a bank failure [citing *Coffin Bros.*]. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest [citing *Ownbey*]. It is much less clear what interests were involved in the third case, decided with an unexplicated *per curiam* opinion simply citing *Coffin Brothers* and *Ownbey* [citing *McKay*]. As far as essential procedural due process doctrine goes, *McKay* cannot stand for any more than was established in the *Coffin Brothers* and *Ownbey* cases on which it relied completely.

407 U.S. at 91 n.23. In addition to suggesting that the nonresidence of a debtor is a sufficient circumstance to justify summary seizure, the Court's note is in agreement with the manner in which Justice Douglas distinguished the earlier attachment cases in Sniadach. *See* p. 240 *supra*.

58. In its discussion of the deficiencies of the Pennsylvania and Florida replevin statutes, the Court commented: "There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not 'narrowly drawn to meet any such unusual condition.'" 407 U.S. at 93.
59. *Id.*

PART III: THE MARYLAND STATUTES

A. Attachment

The Supreme Court's decision in *Sniadach* triggered attacks on state prejudgment attachment statutes throughout the country.[60] At least five state statutes were declared unconstitutional on the basis that the principles underlying that decision extended beyond mere garnishment of wages.[61] Courts in Arizona, Connecticut and Hawaii ruled that *Sniadach* had merely made an exception to the general validity of prejudgment attachments;[62] but after *Fuentes* was decided, at least three more state statutes were held unconstitutional,[63] and it appears that only Arizona has insisted that its statute remains valid.[64]

The Maryland procedure for attachments on original process,[65] unlike the statutes found unconstitutional in *Sniadach* and *Fuentes*, is narrowly drawn.[66] Although any property of the debtor may be attached,[67] the use of attachments on original process is limited to five situations:[68] (a) when the debtor is a non-resident; (b) when a resident defendant has been twice returned *non-est*; (c) when the debtor has absconded or is about to abscond; (d) when the debtor has or is about to conceal his assets to defraud creditors, or has fraudulently contracted the debt, and (e) when the debtor is a nonresident heir or devisee. To obtain the writ, the creditor must file a

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60. For a more detailed discussion of attachment and garnishment *see* Note, 68 MICH L. REV. 986; Note, *Attachment in California, A New Look at an Old Writ*, 22 STAN. L. REV. 1254 (1970); Comment, *The Constitutional Validity of Attachment In Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A.L. REV. 837 (1970).
61. McMeans v. Schwartz, 330 F. Supp. 1397 (S.D. Ala. 1971); Randone v. Appellate Dep't of the Super. Ct. of Sacramento County, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972); Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N.W.2d 87 (1970); Lucas v. Stapp, 6 Wash. App. 971, 497 P.2d 500 (1972); Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).
62. Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970); Termplan, Inc. v. Superior Ct. of Maricopa County, 105 Ariz. 270, 463 P.2d 68 (1969).
63. McClellan v. Commercial Credit Corp., 350 F. Supp. 1013 (D.R.I. 1972), *aff'd mem.*, 93 S. Ct. 935 (1973); Schneider v. Margossian, 349 F. Supp. 741 (D. Mass. 1972); Etheredge v. Bradley, 502 P.2d 146 (Alas. 1972).
64. Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 502 P.2d 1327 (1972). *But see* Western Coach Corp. v. Shreve, 344 F. Supp. 1136 (D. Ariz. 1972).
65. MD. ANN. CODE art. 9, §§ 1-49 (1968). The procedural rules implementing the statutory provisions are found in MD. R. CIV. P. G40-61. The comparable provisions for the Maryland District Courts are found in MD. DIST. R. CIV. P. G40-61.
66. For a useful discussion of the competing interests involved in a broadly drawn prejudgment attachment statute see Randone v. Appellate Dep't of the Super. Ct. of Sacramento County, 5 Cal. App. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972).
67. MD. R. CIV. P. G45. Limitations on attachment of wages are set forth in MD. ANN. CODE art. 9, §§ 31-32 (1968).
68. MD. R. CIV. P. G40. An attachment is available under sections (a) and (c) of Rule G40 in actions either *ex contractu* or *ex delicto*. An attachment is available under sections (b), (d) and (e) of Rule G40 only in an action *ex contractu* for liquidated damages. *Id.* G41.

declaration, an affidavit stating that he believes he is entitled to the writ, documentary evidence of his claim and a bond in the amount of the claim for attachments under sections (a), (c) and (d) of Rule G40.[69] The writ is served by posting a copy of it on real property or by seizure and sequestration of tangible personal property.[70] In an attachment by way of garnishment, the writ is served upon the person holding property belonging to the defendant.[71] The debtor may file a motion to quash the attachment and obtain an immediate hearing on his motion,[72] or he may dissolve the attachment by giving a bond in an amount equal to the value of the property attached.[73]

There should be no serious question as to the validity of subsections (a) and (e) of Rule G40. The use of prejudgment attachments for the purpose of enabling residents to adjudicate claims against nonresidents has long been recognized.[74] In both *Sniadach* and *Fuentes* the Court affirmed the use of attachments without prior notice and hearing when necessary to obtain jurisdiction,[75] and the California,[76] Pennsylvania[77] and District of Columbia[78] foreign attachment statutes have been upheld in cases decided after *Sniadach*.[79] Foreign attachment

69. *Id.* G42.
70. *Id.* G46. In Maryland attachment of the property of the debtor creates an inchoate lien in favor of the plaintiff. Union Trust Co. v. Biggs, 153 Md. 50, 137 A. 509 (1927). It is arguable that the mere imposition of a lien on real property, which, unlike personal property, is not seized and sequestered, is not a significant taking and therefore not restricted by the fourteenth amendment. The defendant remains in possession of the property, but the attachment restricts his ability to sell or encumber it. At least one court has found that the taking is significant. Idaho First Nat'l Bank v. Rogers, 41 U.S.L.W. 2492 (Idaho Dist. Ct. Feb. 21, 1973). *But cf.* Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971). *See also* note 15 *supra*; Buchanan v. Warley, 245 U.S. 60, 74 (1917).
71. MD. R. CIV. P. G47.
72. *Id.* G51.
73. *Id.* G57.
74. Pennoyer v. Neff, 95 U.S. 714 (1877).
75. *See* notes 23 & 57 *supra*.
76. Property Research Financial Corp. v. Superior Ct. for County of Los Angeles, 23 Cal. App. 3d 413, 100 Cal. Rptr. 233 (1972); Banks v. Superior Ct., City & County of San Francisco, 26 Cal. App. 3d 143, 103 Cal. Rptr. 590 (1972); Ortleb v. Superior Ct. for County of Los Angeles, 23 Cal. App. 3d 424, 100 Cal. Rptr. 471 (1972).
77. Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979 (3d Cir. 1972), *cert. denied*, 409 U.S. 843 (1972).
78. In Tucker v. Burton, 319 F. Supp. 567 (D.D.C. 1970), where the wages of a Maryland debtor employed in the District of Columbia were garnished by a Maryland corporation, the court found that the debtor's nonresidence was a special circumstance justifying garnishment without prior notice and hearing under the District of Columbia statute. Judge Wright, dissenting, would have held that the use of the statute under these circumstances was unconstitutional because in personam jurisdiction was readily available—either in Maryland where the debtor lived and the creditor did business or in the District of Columbia where the debtor worked. *But cf.* Mills v. Bartlett, __Del.__, 265 A.2d 39 (Del. Super. Ct. 1970), *rev'd on other grounds*, __Del.__, 272 A.2d 702 (Del. Sup. Ct. 1970) (application of the Delaware wage garnishment statute held unconstitutional despite the wage-earner's nonresidence).
79. *Cf.* U.S. Industries, Inc. v. Gregg, 348 F. Supp. 1004 (D. Del. 1972). Gordon v. Michel, __Del. Ch.__, 297 A.2d 420 (1972) (both cases upheld Delaware sequestration statute, which is analogous to a statute providing for foreign attachment).

serves the important state interest of providing a forum for residents of a state in actions against nonresidents. Notice prior to the attachment would defeat its purpose, because the defendant would then have an opportunitv to dispose of the property or to remove it from the state.

When an alternative procedure for obtaining jurisdiction is available, the justification for summary seizure no longer exists, and the creditor should not be permitted to attach the debtor's property within the state without prior notice and an opportunity for a hearing. For example, to the extent that the creditor may invoke jurisdiction under the Maryland statute governing in personam jurisdiction,[80] it is arguable that he should be denied the use of summary prejudgment attachment. The statute provides that Maryland courts may exercise jurisdiction over any person[81] as to a cause of action arising from any of a number of activities conducted in the state, including ownership or use of real property. Unless the nonresident is conducting some other activity within the state, the statute applies to ownership of real property but not personal property. Further, the cause of action must arise as a result of the activity or ownership.

It is clear that the Maryland long-arm statute does not authorize in personam jurisdiction in all cases where quasi-in-rem jurisdiction may be obtained by foreign attachment. Nor should the plaintiff be required to engage in litigation (which he may eventually lose) merely to determine whether the long-arm statute confers jurisdiction in a particular case.[82] Although the need for foreign attachments to obtain jurisdiction is probably no longer as great as before the long-arm statute, they are justified and should be retained, despite the possibility of invoking jurisdiction under the long-arm statute.[83]

A more difficult question is presented when the defendant enters a general appearance, thereby submitting to the jurisdiction of the court. Once the defendant has entered a general appearance and in personam jurisdiction is obtained, any judgment validly obtained by the creditor may be enforced in any other state.[84] In the absence of other unusual circumstances, the governmental interest justifying summary prejudgment attachment (that of compelling the nonresident's appearance) no longer exists, and the attachment should accordingly be dissolved.

The Maryland procedure allows a defendant who has appeared to dissolve an attachment by giving a bond in an amount equal to the value of the property attached.[85] The requirement of posting a bond as

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80. MD. ANN. CODE art. 75, §§ 94-100 (1969).
81. Person is defined to include any individual, corporation, partnership or other commercial entity. MD. ANN. CODE art. 75, § 94 (1969).
82. Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979 (3d Cir. 1972), *cert. denied*, 409 U.S. 843 (1972).
83. *See* Note, *Attachment in California, A New Look at an Old Writ*, 22 STAN. L. REV. 1254, 1261-62 (1970).
84. *See, e.g.*, Milliken v. Meyer, 311 U.S. 457 (1940); Harris v. Balk, 198 U.S. 215 (1905).
85. MD. R. CIV. P. G57.

a condition to dissolving the attachment is itself a taking of property.[86] If the defendant has submitted to the court's jurisdiction, the justification for either the original seizure or the bond requirement no longer exists. Thus, to the extent that the Maryland procedure allows dissolution of the attachment after a general appearance only upon condition that the defendant file a bond, it should be found unconstitutional.[87]

The remaining circumstances in which the Maryland statute authorizes summary prejudgment attachment appear to be within the language of *Sniadach* and *Fuentes*, authorizing such seizures in extraordinary circumstances—when the debtor is absconding or is about to abscond with intent to defraud his creditors;[88] when the debtor has concealed or disposed of his assets or is attempting to do so;[89] when a debtor cannot be located for personal service;[90] and when the debtor has fraudulently contracted the debt.[91] The state interest in making its process locally effective and in providing a remedy for creditors should justify the use of the attachment procedure in these situations.

A possible weakness in the Maryland procedure is the abdication of state control over use of the attachment procedure.[92] Currently, a creditor may obtain the writ of attachment simply by filing an affidavit which sets forth his belief that he is entitled to have it issued,[93] and by filing a bond to ensure that the debtor may recover damages if the attachment is wrongful.[94] The weakness of this procedure is that it

86. Fuentes v. Shevin, 407 U.S. 67, 85 (1972).

87. Although agreeing with this view, one court has refused to dissolve a foreign attachment after entry of a general appearance on the ground that the reasoning of *Ownbey* and *McKay* precluded such action and those cases had not been overruled. Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979, 982 (3d Cir. 1972), *cert. denied*, 409 U.S. 843 (1972). *Lebowitz* was decided prior to *Fuentes*; however, *Fuentes* did not overrule *McKay* and it affirmed *Ownbey*. *See* note 57 *supra*. For a case suggesting that *Sniadach* had overruled *McKay* see Randone v. Appellate Dep't of the Super. Ct. of Sacramento County, 5 Cal. 3d 536, 551–52 n.13, 488 P.2d 13, 23 n.13, 96 Cal. Rptr. 709, 721 n.13 (1971), *cert. denied*, 407 U.S. 924 (1972).

88. Md. R. Civ. P. G40(c).

89. *Id.* G40(d).

90. *Id.* G40(b). In Jernigan v. Economy Exterminating Co., 327 F. Supp. 24 (N.D. Ga. 1971), *appeal dismissed*, 407 U.S. 943 (1972), the inability of the plaintiff to locate the defendant for a period of several weeks was found to justify the use of the Georgia bail trover statute to obtain repossession of a car without prior notice and hearing.

91. Md. R. Civ. P. G40(d).

92. In *Fuentes* the abdication of state control over the use of the Pennsylvania and Florida replevin procedures was one factor in the Court's holding that the statutes were unconstitutional. The Court said:

> The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure.

407 U.S. at 93.

93. Md. R. Civ. P. G42(b).

94. *Id.* G42(e).

allows the creditor unilaterally to invoke state power merely on his belief that he is entitled to do so. Since the affidavit is not required to state the facts justifying the creditor's belief, nor is it reviewed by a state official to determine the need for summary seizure, it is possible that a successful challenge may be made to the Maryland procedure on this basis. However, since Maryland's attachment on original process procedure is narrowly drawn, it should survive constitutional challenge with the addition of the above safeguards.

B. Replevin

The Maryland replevin procedure[95] is essentially similar to the Florida procedure found to be unconstitutional in *Fuentes*—a creditor obtains the writ of replevin by filing a replevin bond of double the value of the property claimed,[96] and a declaration in the replevin action is filed either simultaneously or within fifteen days after the execution of the writ by seizing the property and transferring it to the creditor.[97] Unless he was in possession by force or fraud, the defendant may obtain its return[98] provided he files his own bond in the amount of the replevin bond.[99] The verdict in the replevin action awards possession of the property and damages, if any, for its wrongful detention.[100] The Maryland procedure does not provide for the requisite notice and hearing prior to seizure of the goods, nor is its use limited to extraordinary situations.[101] Although no challenge has been

95. Md. R. Civ. P. BQ40-52. The procedure followed by the Maryland District Courts is similar. Md. Dist. R. Civ. P. BQ40-52.
96. Md. R. Civ. P. BQ42-43.
97. *Id.* BQ44.
98. *Id.* BQ46.
99. *Id.* BQ47.
100. *Id.* BQ49.
101. *Fuentes* was based on the fourteenth amendment. The fourth amendment has also been urged as a basis for invalidating replevin statutes. The protection of the fourth amendment from unreasonable searches and seizures is not limited to criminal cases but extends to the civil area as well. Camara v. Municipal Ct. of the City & County of San Francisco, 387 U.S. 523 (1967). The argument is that the entry and seizure of chattels by the sheriff or other state officer without a warrant constitutes an unreasonable search and seizure. The issue was raised but not reached in *Fuentes*, 407 U.S. at 96 n.32. As the Court pointed out the issue is probably immaterial as a result of its decision—usually, at least, the officer no longer enters without court approval because a prior hearing on the probable validity of the creditor's claim is required. Other courts have found replevin statutes unconstitutional based at least in part on the fourth amendment argument. *See, e.g.*, Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 722 (N.D.N.Y. 1970):

> If the sheriff cannot invade the privacy of a home without a warrant when the state interest is to prevent crime, he should not be able to do so to retrieve a stove or refrigerator about which the right to possession is disputed. Nor should he have any greater right to make a seizure . . . by virtue of a requisition '*deemed* to be the mandate of the court' . . . but which in fact is the mandate of the plaintiff's attorney issued without the examination or approval of an intervening magistrate. . . .

See Dorsey v. Community Stores Corp., 346 F. Supp. 103 (E.D. Wis. 1972); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

made to it,[102] the procedure is clearly unconstitutional.[103]

A procedure complying with the requirements of *Fuentes* is currently being used in the Circuit Court of Baltimore City, an equity court.[104] A creditor seeking to obtain possession of chattels files a petition setting forth the facts which constitute his right to possession, and requests that a trustee be appointed to take charge of the property and sell it.[105] The court orders the defendant to appear in person to show cause why the trustee should not be appointed and the property seized and sold. The date for appearing to answer this order is shortened to seven days after its issuance.[106] If the creditor is successful in establishing his claim at the hearing, or if the defendant does not appear, the court orders the trustee to take possession of the property and sell it to satisfy the obligation and costs of repossession and sale.[107] If necessary, the debtor should be permitted a postponement, but normally the issues and the proofs required will be quite simple and can be adjudicated at an early hearing.

This procedure not only ensures that the debtor's right to notice and an opportunity for a hearing prior to seizure of his property is protected, but also it offers some protection to creditor interests. First, to the extent that a creditor may obtain rapid adjudication of his claim, he is not so needful of the protection afforded by pretrial seizure of the disputed goods: the circuit court's procedure allows a creditor to obtain judgment in only seven days, absent good reason for delay. Second, the costs and delays resulting from holding two hearings (one to attempt to

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102. Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971), decided prior to *Fuentes*, found that the procedure followed by the People's Court of Baltimore City did not violate due process even though it did not provide for notice and hearing prior to issuance of the writ of replevin. For a description of the procedure, which varied from that proscribed in the Maryland Rules, *see id.* at 648–50. The People's Court is now a district court.

103. For cases holding other replevin statutes unconstitutional see Turner v. Colonial Fin. Corp., 467 F.2d 202 (5th Cir. 1972) (Mississippi); Mitchell v. Tennessee, 351 F. Supp. 846 (W.D. Tenn. 1972); Dorsey v. Community Stores Corp. 346 F. Supp. 103 (E.D. Wis. 1972) (decided prior to *Fuentes*); 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); Thorp Credit, Inc. v. Barr, 200 N.W.2d 535 (Iowa 1972); Inter City Motor Sales, Inc. v. Szymanski, 42 Mich. App. 112, 201 N.W.2d 378 (1972); Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 176 (1972).

104. *See* Tatelbaum, *Flower or Thorn? The Unconstitutionality of Replevins*, 5 MD. B.J. no. 1, at 20 (Oct. 1972), which describes the procedure more fully.

105. MD. R. CIV. P. BR1-6.

106. The court may order rapid service. *Id.* 102 provides: "The return day for all summonses and other process requiring action by a defendant or by the sheriff or an officer of the court shall be the first Monday in each month except as otherwise stated in such process." The summons may require special handling to insure its timely service. To further ensure that the defendant receives adequate notice, the plaintiff is required in the circuit court's procedure to notify the defendant and to inform him of his right to appear and to offer a defense.

107. If the property is collateral for a secured transaction the sale is made pursuant to UNIFORM COMMERCIAL CODE § 9-504. The comparable Maryland provision is MD. ANN. CODE art. 95B, § 9-504 (1964). If § 9-504 does not apply, the sale is made pursuant to MD. R. CIV. P. BR3-4, 6.

obtain possession of the disputed goods and the other to obtain judgment) are avoided.

If the creditor believes the procedure described above does not provide sufficient protection to his interests in a given case, he may seek an ex parte injunction restraining the debtor from selling or otherwise disposing of the disputed property prior to the hearing. The request for an ex parte injunction may be presented to the judge at the same time as the request for a show cause order. To obtain the injunction, the creditor must demonstrate by specific facts in an affidavit (or a verified pleading) that unless the injunction is issued he will suffer "immediate, substantial and irreparable injury" before the hearing can be held.[108] If the creditor is successful in obtaining the injunction, his interest in the property is protected by the threat of contempt proceedings against any defendant who violates the court's order.[109] The injunction restraining the debtor from disposing of his property is itself a taking of property—the right to dispose of an interest in property freely.[110] However, this taking should meet the *Fuentes* requirements. Because an ex parte injunction will only issue in extraordinary circumstances, if the creditor can establish facts showing that he is entitled to an ex parte injunction, he has thereby demonstrated a situation justifying prejudgment seizure.

Further, unlike the Florida replevin procedure found unconstitutional in *Fuentes*, the circuit court's procedure does not abdicate state control over the use of state power. A judicial officer reviews the request for an injunction as well as the facts supporting the creditor's belief in his need therefor, and the judge has discretion to communicate informally with the defendant prior to acting on the creditor's request.[111] This judicial scrutiny gives further protection to the debtor's interests.

The circuit court's procedure appears to be a compromise between the interests of creditors and debtors that meets the *Fuentes* requirements. To facilitate use of this procedure, it is likely that the Maryland District Courts will be given equity power and sole jurisdiction of replevin actions. Although other procedures for complying with *Fuentes* may be developed, the circuit court's procedure appears to be adequate, at least for the moment.

C. Self-help Repossession

Perhaps a more important question in terms of economic effect on retail installment sellers is whether a creditor may resort to self-help

108. Md. R. Civ. P. BB72.
109. *Id.* BB80.
110. *See* note 70 *supra.*
111. Md. R. Civ. P. BB72.

repossession and proceed without judicial process. Proceeding pursuant to a contractual provision and without a prior opportunity for a hearing, the creditor or his agent enters the debtor's premises, seizes the disputed goods and disposes of them. No state official participates and no judicial sanction is necessary. Self-help recapture is a common practice today in the event of default on installment sales contracts, and is authorized by the Uniform Commercial Code.[112]

While there can be no doubt after *Fuentes* that the fourteenth amendment, if applicable, would invalidate such summary procedure, the fourteenth amendment operates only when state action is involved. It generally does not apply to private conduct,[113] although private acts may be reached if there is sufficient involvement with the state.[114] The most tenuous application of the fourteenth amendment to the private sphere was made in *Reitman v. Mulkey*,[115] where the Supreme Court considered an amendment to the California constitution which had the effect of repealing that state's legislation prohibiting racial discrimination in the sale or lease of real estate. The Court held the amendment unconstitutional because it established a state policy which encouraged private racial discrimination. The encouragement given was held to be sufficient state involvement to bring the private conduct within the fourteenth amendment.

The applicability of the fourteenth amendment to self-help repossession depends on the scope to be given to *Reitman*. In a recent decision,[116] a federal district court found that creditors were induced to include clauses providing for self-help recapture in their installment sales contracts because the Uniform Commercial Code authorized such action. Relying on *Reitman*, the court held that because the state policy so established encouraged repossession in violation of the due process right to prior notice and hearing, the state was sufficiently involved in the private acts of repossession to bring those actions within the fourteenth amendment. It should be noted, however, that at least seven other courts have been unwilling to give *Reitman* so broad a

112. UNIFORM COMMERCIAL CODE § 9-503. Maryland has a similar statutory provision. MD. ANN. CODE art. 95B, § 9-503 (1964), 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. . . ." MD. ANN. CODE art. 95B, § 9-504 (1964) authorizes the secured party to dispose of the collateral and to apply the proceeds to satisfaction of the indebtedness and the expenses of retaking and disposal. The Retail Installment Sales Act, MD. ANN. CODE art. 83, § 141(a) (1969), also authorizes self-help repossession. Section 141(b) provides that the seller or his assignee may give notice of his intention to repossess at least ten days before he does so. Section 142(a)(3) provides that unless he gives notice, he cannot recover the costs of retaking and storing.

113. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); Shelley v. Kraemer, 334 U.S. 1 (1948).

114. United States v. Price, 383 U.S. 787 (1966); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

115. 387 U.S. 369 (1967).

116. Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972).

sweep,[117] and even a district court in the same state has disagreed.[118] There, *Reitman* was found to be inapplicable because it dealt with racial discrimination, the area where the fourteenth amendment has had its greatest impact, and thus should have been limited to similar situations.[119] Still another district court[120] reached a similar result by reasoning that the purpose of the constitutional amendment considered in *Reitman* had been to authorize what had formerly been illegal under California statutes. In contrast, the Uniform Commercial Code merely codified what had formerly been a common and accepted practice.[121] While the weight of authority is certainly with the courts holding that the fourteenth amendment is not applicable to self-help repossession pursuant to contractual right,[122] no safe prediction can be made as to whether that procedure will survive the current attack on creditors' remedies.

Conditional sellers may be able to avoid the impact of *Fuentes* by including waiver provisions in their conditional sales contracts. As is true with respect to other constitutional rights, the right to prior notice

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117. Calvin v. Avco Fin. Serv., Inc., 4 CCH SECURED TRANS. GUIDE ¶ 52,046 (D. Utah Jan. 4, 1973); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); Kirksey v. Theilig, 4 CCH SECURED TRANS. GUIDE ¶ 52,003 (D. Col. Nov. 30, 1972); Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672 (W.D. Va. 1972); McCormick v. First Nat'l Exch. Bank, 322 F. Supp. 604 (S.D. Fla. 1971); Kipp v. Cozens, 4 CCH SECURED TRANS. GUIDE ¶ 51,980 (Cal. Super. Ct. June 26, 1972); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (1972).

118. Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972).

119. The court stated:

> *Reitman*, which dealt with racial discrimination in violation of the due process clause, clearly presented a compelling factual situation to which the Civil Rights Acts and their jurisdictional counterparts were designed to apply. The historical, legal and moral considerations fundamental to extending federal jurisdiction to meet racial injustices are simply not present in the instant case.

Id. at 23.

120. Kirksey v. Theilig, 4 CCH SECURED TRANS. GUIDE ¶ 52,003 (D. Col. Nov. 30, 1972).

121. *Id. Accord*, Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (1972) (codification of the ancient practice of self-help and surrounding it with procedural safeguards did not bring it within the fourteenth amendment).

122. The result might be otherwise if the creditor neglected to include a provision in the installment sales contract authorizing him to repossess and then proceeded pursuant to the authority conferred by UNIFORM COMMERCIAL CODE § 9-503. The situation would then be analogous to that of a landlord entering the leased premises and seizing the property of his tenant to satisfy the tenant's rent obligation pursuant to a distress statute authorizing action without resort to judicial process. As in self-help repossession, the question is raised as to whether the landlord's seizure is state action so as to make the fourteenth amendment applicable. The courts considering this question have found that it is and have held such statutes unconstitutional for failing to provide for notice and hearing prior to the seizure. *See* Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972); Macqueen v. Lambert, 348 F. Supp. 1334 (M.D. Fla. 1972); Dielen v. Levine, 344 F. Supp. 823 (D. Neb. 1972); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972) (innkeepers' lien unconstitutional); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeepers' lien unconstitutional). These cases involve considerable stretching of the fourteenth amendment by broad application of past Supreme Court decisions dealing with racial discrimination to debtors' rights.

and hearing may be waived.[123] However, there is a strong presumption against such a waiver,[124] and a court must find that the waiver has been knowing and intelligent before it will be upheld.[125]

In *Fuentes* it was argued that the debtors had waived the right to prior notice and hearing because the conditional sales contracts they had signed provided that the seller could repossess the goods in the event of default. The Court found that these provisions merely gave the seller the right to repossess without specifying through what process he might do so, and consequently the contractual provisions did not amount to a waiver.[126] The Court pointed out that the contracts were of adhesion, that the parties were far from equal in bargaining power and that the seller had not shown that the debtors were actually aware of the significance of the provisions relied upon as a waiver.[127] Although the Court did not rely on these facts in concluding that there was no waiver, its language indicates that future attempts by vendors to enforce waiver provisions in installment sales contracts for consumer goods will probably be unsuccessful.[128]

In another recent case,[129] however, the Supreme Court held that a cognovit clause in a promissory note had waived the maker's right to notice and a hearing prior to entry of judgment upon a default in payment. The facts were significantly different from those in *Fuentes*, as the provision authorizing the confession of judgment resulted from negotiations between corporate parties and the creditor had given consideration therefor. The Court commented that the result might be different in other cases where it was not so clear that the waiver had been knowing and intelligent.

These cases suggest the following requirements for a valid waiver provision: (1) it must specifically state that by it the debtor waives his right to notice and hearing prior to seizure of the collateral, and not merely that the seller has the right to repossess on default; (2) it should state the consequences resulting from waiver in language that a layman could easily understand; (3) it must be made conspicuous, for instance, by including it in capital letters in red print immediately above the signature blank, or in a separately executed portion of the form; and (4) the creditor should state the consideration, if any, given for the waiver provision.

While it is unlikely that even a waiver provision meeting the above

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123. D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972).
124. Fuentes v. Shevin, 407 U.S. 67, 94 n.31 (1972), and cases cited therein.
125. As the Court stated in Brady v. United States, 397 U.S. 742, 748 (1970): "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."
126. 407 U.S. at 95–96.
127. *Id.*
128. *Id.*
129. D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972).

requirements would withstand attack in a consumer contract,[130] it would meet most of the objections raised in the recent decisions and should be upheld where the contract is not one of adhesion.[131] If the provision is upheld, the creditor may proceed either pursuant to the present replevin procedure or through self-help.

D. Distress

Distress is an ancient common law remedy[132] entitling the landlord to seize all personal property on the premises and retain it as a pledge until the tenant redeems it by paying the past due rent. Originally, the landlord did not have the right to sell the property distrained, but a statute later authorized the distrainor to sell the property and to apply the proceeds to satisfaction of the rent and the expenses incurred in the distraint.[133] In Maryland, the common law remedy has been superseded by statute.[134]

Under the Maryland procedure, the landlord may bring an action of distress for unpaid rent in the district court having jurisdiction of the area in which the leased premises lie.[135] He initiates the action by filing a petition alleging the amount of rent in arrears,[136] whereupon the court issues an order directing levy on all goods on the leased premises not exempted by law.[137] The officer making the levy is required to serve a copy of the petition and order of levy upon each

130. Kosches v. Nichols, 68 Misc. 2d 795, 797, 327 N.Y.S.2d 968, 970 (N.Y. Civ. Ct. 1971): "Needless to say, the clauses giving the seller the right to enter a debtor's residence and seize the goods without a court order are unconscionable. One clause . . . even gives the seller the right to enter and seize any OTHER property without court order." In Grossman Furniture Co. v. Pierre, 119 N.J. Super. 411, 291 A.2d 858 (Dist. Ct. 1972), the court reformed the contract to exclude the clause of an installment sales contract allowing recapture partly because it was not conspicuous. *See* Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969).

131. A contractual waiver provision was found to waive a corporate defendant's right to prior notice and hearing in a replevin action in Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970). The clause provided that upon default the creditor "may take immediate possession of said property and for this purpose the Seller may enter the premises where said property may be and remove the same without notice or demand, and with or without legal process. . . ." *Id.* at 105.

132. For a history of the common law action see 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW, 574–78 (2d ed. 1968); 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW, 281–87 (5th ed. 1942).

133. 2 W. & M., c. 5, § 2, 2 ALEXANDER'S BRITISH STATUTES 774–75 (Coe ed. 1912).

134. MD. ANN. CODE art. 21, §§ 8-301 to -331 (Supp. 1972). Section 8-302(a) provides: "Distress for rent is hereby declared to be an action at law which shall be brought as provided herein." Unlike the statutes considered in the cases cited in note 122 *supra*, the Maryland statute does not authorize the landlord to resort to self-help.

135. MD. ANN. CODE art. 21, § 8-302 (Supp. 1972).

136. *Id.* § 8-303.

137. *Id.* § 8-304. The property exempted from levy is described in § 8-308. Goods may be levied upon regardless of whether they are owned by the tenant or by a third party. *Id.* § 8-305. As to the rights of a third party whose goods are levied upon see *id.* §§ 8-310, -322. The statute authorizes forcible entry to make levy at any hour of the day or night; but, if the property is used as a dwelling, forcible entry may be made only if the levying officer cannot otherwise make entry and the court so orders. *Id.* § 8-307.

tenant on the leased premises.[138] If personal service cannot be made, the officer posts the petition and order on the interior of the premises.[139] Thus, the tenant first learns of the distress action at the time of, or after, seizure of his property. The effect of levy is to give the landlord a lien upon the goods until they are sold to satisfy the rent obligation;[140] in the interim they are held in *custodia legis.*[141] The court may order removal of the goods levied upon if the landlord shows a need for such protection.[142] The tenant may petition the court to order that the goods levied upon or seized be released from the claim for distress;[143] but as a condition of release, the court may require the filing of a bond to indemnify the landlord if he suffers loss as a result of the release.[144] Alternatively, the tenant may file an answer to the distress action setting forth any defense he may have.[145] If the tenant fails to answer, or if the court finds in favor of the landlord, the court may order a sale of the goods.[146]

The Maryland statute appears to be deficient in light of *Sniadach* and *Fuentes.* Although the tenant is not deprived of possession of the goods unless the landlord can show a need for removal, once the levy has been made, the landlord acquires a lien on the goods. The imposition of this lien is itself a taking of a significant property right—the right to dispose of one's property,[147] and the statute makes no provision for notice and hearing prior to this taking. It is true that the statute provides for recovery of the property free of the lien, and therefore, the taking is, to that extent, only temporary. But *Sniadach* and *Fuentes* established that even a temporary and conditional taking is within the protection of the fourteenth amendment.[148] Moreover, the provision that the defendant may be required to post a bond to obtain release of his property is itself a taking of property.[149] Further, the statute is not narrowly drawn so as to allow prejudgment taking only in extraordinary situations. Such

138. *Id.* § 8-304.
139. *Id.*
140. *Id.* § 8-311.
141. *Id.* § 8-306.
142. *Id.* § 8-309. The court may order the landlord to post a bond as a condition of removal. *Id.*
143. *Id.* § 8-315.
144. *Id.*
145. *Id.* § 8-313. The tenant may also bring an action in replevin. MD. R. CIV. P. BQ48(b).
146. MD. ANN CODE art. 21, § 8-313 (Supp. 1972).
147. The Pennsylvania distress statute found unconstitutional in Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972), also contained a provision allowing a distraint without actual removal of the tenant's goods from the premises. Unlawful removal of the goods levied upon would enable the landlord to initiate a trespass action and recover treble damages from the offender. The court found that the tenant was deprived of the opportunity to dispose of his goods—a taking of a significant property interest. The Maryland procedure does not contain a provision authorizing treble damages but does provide for issuance of an order to follow the goods if removed. MD. ANN. CODE art. 21, § 8-314 (Supp. 1972). And because the goods levied upon are in *custodia legis*, removal of them would subject the tenant to contempt proceedings. MD. ANN. CODE art. 26, § 4 (1966), and MD. DIST. R. CIV. P. P1-5 (1972). *See* notes 15 & 70 *supra.*
148. *See* p. 243 *supra.*
149. *See* p. 243 *supra.*

situations might include those when the tenant is a nonresident, has twice been returned *non-est* or is absconding with or attempting to conceal his assets; but the Maryland statute is not limited to such situations.

A procedure similar to that devised by the Baltimore City Circuit Court for replevin actions could be used to comply with due process requirements in distress actions, while at the same time protecting the interests of landlords.[150] By including provisions in their lease forms that operate as a waiver of the tenant's right to prior notice and hearing, landlords may be able to continue to use the present distress procedure.[151] As in the replevin situation, such provisions would be subject to a defense of unconscionability.

CONCLUSION

The Court in *Sniadach* and *Fuentes* has struck a new balance in the interests of creditors and debtors. Except in unusual circumstances the right of a debtor to notice and a hearing prior to any significant taking of his property will outweigh both the interests of his creditors and any state interest in their protection. The results are that the creditor is not assured at the initiation of his action that a fund will exist out of which he may satisfy his claim.

It is not yet clear how far the principles established by *Sniadach* and *Fuentes* will be extended. Although it appears that the Maryland prejudgment attachment procedure will survive *Sniadach* and *Fuentes*, the Maryland replevin and distress procedures will not, and no firm prediction can be made as to the continued validity of self-help repossession. Nor are these the only creditors' remedies subject to constitutional attack: confessed judgments[152] and mortgage foreclosures[153] have also been challenged, although thus far, unsuccessfully.

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150. *See* pp. 251-52 *supra*.

151. *See* pp. 254-56 *supra*.

152. In D. H. Overmyer Co. v Frick Co., 405 U.S. 174 (1972), the Court held that a confessed judgment note was not per se unconstitutional, but suggested that entry of a confessed judgment might be violative of due process in some circumstances. For other recent cases concerning the validity of confessed judgments see Swarb v. Lennox, 405 U.S. 191 (1972), *aff'g* 314 F. Supp. 1091 (E.D. Pa. 1970); Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971), *vacated mem.*, 405 U.S. 971 (1972); International Equity Corp. v. Pepper & Tanner, Inc., 222 Pa. Super. 118, 293 A.2d 108 (1972), *appeal dismissed mem.*, 93 S. Ct. 556 (1972). *See also* Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972). For helpful commentary see Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111 (1961); Note, *Cognovit Judgments: Some Constitutional Considerations*, 70 COL. L. REV. 1118 (1970); Note, *Due Process—Confession of Judgment Procedures Are Not Unconstitutional Per Se*, 25 VAND. L. REV. 613 (1972). The Maryland procedure for entry of judgments by confession is MD. R. CIV. P. 645.

153. *See* Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970). The Maryland procedure on foreclosure of mortgages may be found in MD. R. CIV. P. W70-80. In particular *see* MD. R. CIV. P. W71(c), (d)(1), W72(d). *Cf.* Buckner v. Carmack, ___La.___, 272 So. 2d 326 (1973).

It is clear, however, that the recent changes in the balance of creditors' and debtors' rights will have a significant effect on the commercial world.[154] The requirement of a prior hearing will obviously increase collection costs, which will doubtless be passed along to all debtors. Because the only effective way to limit these costs will be to select credit risks with greater care, the result may be to dry up credit in areas where it would have been available prior to *Sniadach* and *Fuentes.*[155] The full impact of *Sniadach* and *Fuentes* cannot be determined until the limits of the application of the principles underlying those decisions are ascertained; nevertheless, it is apparent that the impact will be substantial.

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154. For a discussion of the economics of self-help repossession see Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 10–12, 295 A.2d 402, 406–08 (1972).
155. *See* Fuentes v. Shevin, 407 U.S. 67, 103 (1972) (White, J., dissenting).

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