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Security Interests: Self-help Still an Available Method of Repossession

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have upon the trial system? There are distinct advantages to having a six-member jury; less time is needed to impanel juries, court costs are reduced, and possibly less time will be needed in deciding cases.[41] The time spent during the trial itself is shortened since, presumably, six persons can look at exhibits and make their exits and entries quicker than twelve persons. In addition, time spent in polling the jury will be lessened. Even though the time saved with each case will be negligible, when all cases are considered together, the time saved will be significant.[42]

The way appears clear for additional improvements, which may enable speedier and less expensive trials without affecting the "fairness" of a trial by jury. Since a majority of federal district courts have already passed local rules reducing the size of their juries, this decision serves to lend support to what has already been done.

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SECURITY INTERESTS: SELF-HELP STILL AN AVAILABLE METHOD OF REPOSSESSION

Plaintiff bought an automobile from defendant under a conditional sales agreement. The contract provided that in the event of default, defendant would have all the rights and remedies of a secured party under the Uniform Commercial Code as enacted in Florida. Upon default by plaintiff, defendant, without plaintiff's knowledge or consent, took possession of the car pursuant to section 9-503 of the Uniform Commercial Code.[1] Plaintiff brought suit for unlawful conversion and damages. The trial court, relying upon *Fuentes v. Shevin*,[2] granted plaintiff's motion for summary judgment, holding that section 9-503, as applied to the facts and circumstances of the instant case, violated plaintiff's procedural due process rights under the fourteenth amendment. On direct ap-

41. Croake, *Memorandum on the Advisability and Constitutionality of Six Man Juries and 5/6 Verdicts in Civil Cases*, 44 N.Y. STATE B.J. 385 1972). For an estimate as to how much money will be saved, see Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI L. REV. 710, 711 (1971). As for less time to impanel juries, it has been argued that attorneys may be more selective in their voir dire examinations when facing the prospect of a six-member jury. However, ethical considerations require attorneys to take great care in the selection of each juror, regardless of the prospective jury size. Powell, *supra* note 24, at 87.

42. Powell, *supra* note 24, at 87.

1. FLA. STAT. § 679.503 (1971) [hereinafter referred to as section 9-503].

2. 407 U.S. 67 (1972) [hereinafter referred to as *Fuentes*]. In *Fuentes*, the Supreme Court found Florida's prejudgment repelvin statute and a similar Pennsylvania statute invalid under the fourteenth amendment. The Florida statute provided that upon posting a bond of double the value of the chattel sought to be seized, a creditor could interpose the sheriff between himself and the debtor in a repossession. FLA. STAT. §§ 78.01, .07, .08, .10, .13 (1971).

peal to the Supreme Court of Florida, *held,* reversed and remanded: There is not a sufficient element of state action in self-help repossession under section 9-503 to invoke the applicability of the fourteenth amendment. *Northside Motors, Inc. v. Brinkley,* 282 So. 2d 617 (Fla. 1973).

Northside Motors is the most recent in a series of cases throughout the country questioning the constitutional validity of the self-help provisions of section 9-503 of the Uniform Commercial Code.[3] The issue in those cases, just as that considered by the Supreme Court of Florida, was "whether there is a sufficient element of state action [in self-help repossession] to invoke the applicability of the Fourteenth Amendment of the Constitution of the United States . . . ."[4] If so, the doctrine enunciated in *Fuentes*[5] would apply and section 9-503[6] would, in its present form and practice, be unconstitutional.

It is well established that the restrictions on actions imposed by the fourteenth amendment apply only to such action as could properly be called "state action." "Individual invasion of individual rights is not the subject-matter of the [fourteenth] amendment."[7]

In *Shelly v. Kraemer*[8] and *Barrows v. Jackson,*[9] the United States Supreme Court held that although private agreements consisting of racial restrictions on the use and disposition of real property are private actions not under the purview of the fourteenth amendment, judicial enforcement of such agreements, at law or in equity, constitutes state action under the fourteenth amendment, and is therefore forbidden.

In *Burton v. Wilmington Parking Authority,*[10] the Supreme Court held that the exclusion of a black patron, solely on account of race, from a restaurant operated by a *private* corporation under a lease in a building financed and owned by an administrative agency of the state, was a discriminatory state action in violation of the fourteenth amendment.

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3. The following is a list of all reported cases directly ruling on the constitutionality of Uniform Commercial Code section 9-503. Colvin v. Avco Fin. Serv., 12 UCC REP. SERV. 25 (D. Utah 1973) (constitutional); Michel v. Rex-Norelco, Inc., 12 UCC REP. SERV. 543 (D. Vt. 1972) (unconstitutional); Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972) (constitutional); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972) (constitutional); Greene v. First Nat'l Exchange Bank, 348 F. Supp. 672 (W.D. Va. 1972) (constitutional); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972) (constitutional); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972) (unconstitutional); McCormick v. First Nat'l Bank, 322 F. Supp. 602 (S.D. Fla. 1971) (constitutional); Kipp v. Coyens, 11 UCC REP. SERV. 1067 (Cal. Super. Ct. 1972) (constitutional); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (1972) (constitutional); Chrysler Credit Corp. v. Dinitz, 11 UCC REP. SERV. 627 (N.Y. Civ. Ct., Kings Cty. 1972) (constitutional); Brown v. United States Nat'l Bank, — Ore. —, 509 P.2d 442 (1973) (constitutional); Plante v. Industrial Nat'l Bank, 12 UCC REP. SERV. 739 (R.I. Super. Ct. 1973) (constitutional).

4. 282 So. 2d at 620.

5. 407 U.S. 67 (1972).

6. FLA. STAT. § 679.503 (1971).

7. Civil Rights Cases, 109 U.S. 3, 11 (1883).

8. 334 U.S. 1 (1948).

9. 346 U.S. 249 (1953).

10. 365 U.S. 715 (1961).

The Supreme Court of Delaware[11] had held that the restaurant had been acting "in a purely private capacity"[12] under its lease and that its action was not that of the state within the meaning of the fourteenth amendment. In reversing, the United States Supreme Court held that "[o]nly by sifting facts and weighing circumstances can the *nonobvious* involvement of the State in private conduct be attributed its true significance."[13] The Court went on to hold: "By its inaction . . . the State has not only made itself a party to the refusal of service, but has *elected to place its power, property, and prestige behind the admitted discrimination.*"[14]

In *Reitman v. Mulkey*,[15] the United States Supreme Court affirmed the judgment of the Supreme Court of California holding unconstitutional a recently added section of the California Constitution which prohibited the state from denying any person the right to sell, lease or rent his real property to any such person as he in his absolute discretion desires.[16] The Court stated that in determining the constitutionality of such provisions, courts must look to the "immediate objectives" and "ultimate effect"[17] of the statutes. The Court concluded that "[t]he right to discriminate is now one of the basic policies of the State. . . . [T]he section will significantly encourage and involve the State in private discriminations"[18] and is, therefore, unconstitutional.

In the recent case of *Moose Lodge No. 107 v. Irvis*,[19] the Supreme Court apparently indicated an outer limit to the definition of state action. Plaintiff, Irvis, was the black guest of a white member of a private club. The club had discriminatory membership policies, and the club's bylaws prohibited the serving of blacks. After being refused service of food and alcoholic beverage because of his race, Irvis filed suit seeking injunctive relief requiring the state liquor control board to revoke the club's liquor license until it discontinued its discriminatory practices. The Court refused, holding that the mere issuance of a liquor license to a club which practiced racial discrimination was not sufficient state involvement in the discriminatory acts to be violative of the fourteenth amendment.

> [I]t cannot be said [that granting the license] in any way foster[s] or encourage[s] racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.[20]

However, the Court did find that the provision in the State Liquor Con-

11. Wilmington Parking Auth. v. Burton, 39 Del. Chanc. Rep. 10, 157 A.2d 894 (1960).
12. *Id.* at 22, 157 A.2d at 902.
13. Burton v. Wilmington Parking Auth., 365 U.S. 716, 722 (1961) (emphasis added).
14. *Id.* at 725 (emphasis added).
15. 387 U.S. 369 (1967).
16. CAL. CONST. art. I, § 26. The new section, in effect, negated all of California's fair housing laws by making them unconstitutional.
17. Reitman v. Mulkey, 387 U.S. 369, 373 (1967).
18. *Id.* at 381.
19. 407 U.S. 163 (1972).
20. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972).

trol Board regulations which required each private club licensee to "adhere to all the provisions of its constitution and bylaws,"[21] as applied to the facts of the instant case, was unconstitutional state action compelling discrimination.

Against this background, the Supreme Court of Florida held

> that self-help repossession by a creditor does not constitute state action. Florida Statutes, section 679.503 [UCC section 9-503] is no more than a codification ... of a common law right and a contract right recognized long before the promulgation thereof and creates no new rights.[22]

The court quoted with approval the following statement by Professor Soia Mentschikoff on behalf of the Permanent Editorial Board for the Uniform Commercial Code:

> Section 9-503 simply recognizes this common knowledge of buyers on time that repossession follows default and makes unnecessary its statement in the contract. It cannot be that codifying a generally understood practice of ancient and honorable lineage and surrounding it with safeguards renders the practice unconstitutional.[23]

The court went on to state that the trial court erred in extending *Fuentes*[24] to these facts, relying on the statement in *Fuentes* that its holding "is a narrow one."[25] Several other recent cases dealing with the constitutional validity of section 9-503 have distinguished *Fuentes* in the same manner.[26] While not asserting that the Supreme Court in *Fuentes* intended to declare self-help repossession unconstitiutional, it is important to note that while that case does contain the phrase, "[o]ur holding is a narrow one," the phrase appears in the middle of a paragraph concerning the adequacy of hearing proceedings.[27] From a reading of *Fuentes,* it appears that what the Court meant was that something less than a full-scale trial might suffice to satisfy the due process requirement. As there was no in-depth discussion of the definition of state action in the opinion, it would seem unlikely that the "narrow holding" phrase referred to anything but the adequacy of hearing procedures.

Although reversed on appeal in a decision similar to *Northside,* the

21. REGULATIONS OF THE PENNSYLVANIA LIQUOR CONTROL BOARD § 113.09 (June 1970).

22. 282 So. 2d at 622, and cases cited therein.

23. 282 So. 2d at 623.

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

25. *Id.* at 96.

26. Brown v. United States Nat'l Bank, — Ore. —, 509 P.2d 442 (1973); Greene v. First Nat'l Bank, 348 F. Supp. 672 (W.D. Va. 1972); Plante v. Industrial Nat'l Bank, 12 UCC REP. SERV. 739 (R.I. Super. Ct. 1973).

27. Fuentes v. Shevin, 407 U.S. 67, 96 (1972). Justice White, in his dissent, feared the downfall of section 9-503 because of the majority's decision, yet the majority chose not to address itself to this problem. The "narrow holding" interpretation given *Fuentes* by many courts seems anomalous in light of the dissent's interpretation. *See* Note, 26 U. MIAMI L. REV. 823 (1972).

Southern District Court of California, in *Adams v. Egley*, has, to date, presented the most cogent argument against the constitutionality of section 9-503.[28] The *Adams* court, relying on the holding in *Reitman v. Mulkey*,[29] declared self-help repossession under section 9-503[30] to be unconstitutional state action.

> [I]t cannot be seriously questioned that the presence of Sections [9-503 and 9-504] had a significant impact on the contents of [the] contract's provisions. The specific reference to the Uniform Commercial Code in the . . . contract and to "immediate possession . . . according to law" . . . are ample indication that in drawing up the agreements . . . creditors were "persuaded or induced to include" repossession by the fact that such repossession was permitted by statute. These Commercial Code sections set forth a state policy, and the security agreements upon which the instant actions rest . . . are merely an embodiment of that policy. It is therefore apparent that the acts of repossession were made "under color of state law . . . ."[31]

The opinions reported thus far have more or less followed either the reasoning of *Northside Motors*[32] or the alternative represented by *Adams*,[33] with the exception of an unreasoned state trial opinion[34] which simply assumed that *Fuentes* had declared section 9-503 unconstitutional. The split on the "state action" issue will apparently be resolved only when the United States Supreme Court decides the issue.

If it is determined that repossession under section 9-503 is action under color of state law, then the courts will have to face another issue not dealt with by the Supreme Court of Florida in the instant case: Whether the debtor, by signing the conditional sales agreement, has

28. 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd.* Adams v. Southern Cal. First Nat'l Bank, 13 UCC REP. SERV. 161 (9th Cir. 1973) [the district court decision will be hereinafter referred to as *Adams*]. The Court of Appeals had granted leave for Soia Mentschikoff to file an amicus curiae brief representing the Permanent Editorial Board of the Uniform Commercial Code. Her brief, styled as an article, may be found at 14 WM. & MARY L. REV. 767 (1973).

29. 387 U.S. 369 (1967). See text accompanying notes 15-18 *supra.*

30. CAL. COMM. CODE ANN. § 9-503 (Deering 1963).

31. Adams v. Egley, 338 F. Supp. 614, 617-18 (S.D. Cal. 1972) (citation omitted), *rev'd.*, Adams v. Southern Cal. Nat'l Bank, 13 UCC REP. SERV. 161 (9th Cir. 1973).

32. 282 So. 2d 617. *Accord*, Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank, 13 UCC REP. SERV. 738 (8th Cir. 1973); Adams v. Southern Cal. Nat'l Bank, 13 UCC REP. SERV. 161 (9th Cir. 1973). Colvin v. Avco Fin. Serv., 12 UCC REP. SERV. 25 (D. Utah 1973); Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972); Greene v. First Nat'l Bank, 348 F. Supp. 672 (W.D. Va. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (1972); Brown v. United States Nat'l Bank, — Ore. —, 509 P.2d 442 (1973); Plante v. Industrial Nat'l Bank, 12 UCC REP. SERV. 739 (R.I. Super. Ct. 1973).

33. 338 F. Supp. 614 (S.D. Cal. 1972). *Accord*, Michel v. Rex-Norelco, Inc., 12 UCC REP. SERV. 543 (D. Vt. 1972).

34. Chrysler Credit Corp. v. Dinitz, 11 UCC REP. SERV. 627 (N.Y. Civil Ct., Kings Cty. 1972).

waived his constitutional right to due process. The United States Supreme Court has recently dealt with the waiver problem in two cases which were argued and decided on the same day, *Swarb v. Lennox*[35] and *D. H. Overmyer Co. v. Frick Co.*[36] Both cases involved the constitutional validity of cognovit notes as authorized by the states from which the cases arose.

In *D. H. Overmyer v. Frick Co.*,[37] plaintiff, a large corporation, challenged the constitutional validity of a judgment entered upon a cognovit note, asserting that " 'it is unconstitutional to waive in advance the right to present a defense in an action on the note.' "[38] The Court upheld the validity of the cognovit note and judgment entered thereon.

> Even if, for present purposes, we assume that the standard for waiver [of fourteenth amendment rights] in a corporate property right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it must be voluntary, knowing, and intelligently made, or "an intentional relinquishment or abandonment of a known right or privilege," and even if, as the Court has said in the civil area, "we do not presume acquiescence in the loss of fundamental rights," that standard was full satisfied here.
>
> Overmyer is a corporation.... This is not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion. There was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a cognovit.[39]

The Court, however, inserted a caveat to the holding, in what it termed its concluding comments:

> Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.[40]

The Court had occasion to make reference to that caveat in *Swarb v. Lennox*.[41] In that case, plaintiffs instituted a class action alleging that the Pennsylvania confession of judgment system was on its face unconstitutional. The three-judge district court held that for the class of signers of cognovit notes with annual incomes of less than $10,000, there

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35. 405 U.S. 191 (1972).
36. 405 U.S. 174 (1972).
37. *Id.*
38. *Id.* at 184. The quote is from the transcript of the oral arguments.
39. *Id.* at 185-86 (citations omitted). Plaintiffs had signed the note after defaulting on a large contract, replaced the contract obligation with a note, and subsequently defaulted on the note. In return for the cognovit provision, plaintiff received both more time to pay and a lower interest rate.
40. *Id.* at 188.
41. 405 U.S. 191 (1972).

was no intelligent waiver of the constitutional right to a hearing.[42] The plaintiffs appealed, contending that the district court's holding should be extended to all signers, regardless of annual income. The Supreme Court refused to extend the holding. Although the Court had no jurisdiction with respect to the validity of the decision as to signers with incomes of less than $10,000[43] it intimated that this might be a proper situation for application of the aforementioned caveat to *D. H. Overmyer Co. v. Frick Co.*[44]

The Court had opportunity to face the waiver issue more squarely in *Fuentes*,[45] where defendant claimed that plaintiff, Margarita Fuentes, waived her right to due process by signing a standard form conditional sales agreement. The Supreme Court again made reference to its caveat in *D. H. Overmyer Co. v. Frick Co.*[46] and commented that, on the surface, this would appear to be a situation which the caveat would hold. However, the Court based its rejection of defendant's contention on the grounds that the alleged waiver merely stated that the seller had the right to repossess upon default.

> [A] waiver of constitutional rights in any context must, at the very *least*, be clear. . . .
>
> The conditional sales contracts here simply provided that upon a default the seller "may take back," "may retake," or "may repossess" merchandise. The contracts included nothing about the waiver of a prior hearing.[47]

Thus far, no court which has found state action in self-held repossession, thus subjecting the act of repossession to the due process requirements of the fourteenth amendment, has found an effective waiver of due process rights.[48] It would appear that, at this time, for an effective waiver to exist, the agreement must not be contained in a contract of adhesion, and the agreement must inform the buyer of his rights at the same time he signs them away. Thus, if state action were found in self-help repossession, as authorized in the Uniform Commercial Code, it would appear unlikely that the Court would find an effective waiver of due process rights in the mere signing of standard conditional sales agreements.

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42. Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970).

43. No party challenged the propriety of the lower court's ruling as to persons with annual incomes of less than $10,000. Therefore the Court was without jurisdiction as to that part of the opinion.

44. Swarb v. Lennox, 405 U.S. 191, 201 (1972), *citing* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188 (1972).

45. 407 U.S. 67 (1972).

46. Fuentes v. Shevin, 407 U.S. 67, 95 (1972), *citing* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188 (1972).

47. Fuentes v. Shevin, 407 U.S. 67, 95-96 (1972) (emphasis in original).

48. Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972); Michel v. Rex-Norelco, Inc., 12 UCC REP. SERV. 542 (D. Vt. 1972).