

STUDENT COMMENTS

EXPANDING LIMITATIONS ON PREJUDGMENT ATTACHMENT: REVERBERATIONS OF *SNIADACH V. FAMILY FINANCE CORP.*

State statutes permitting prejudgment attachment or seizure of an allegedly defaulting debtor's property have traditionally afforded creditors a convenient means of securing their claims pending an actual adjudication on the merits. However, in the wake of the Supreme Court's decision in *Sniadach v. Family Finance Corp.*,¹ there have been a number of challenges to the constitutionality of such statutes. In *Sniadach*, the Court declared the Wisconsin wage garnishment statute unconstitutional because it authorized garnishment of a debtor's wages without affording him either adequate notice or a prior opportunity to be heard.² In striking down the statute, the Court declared:

Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process.³ (Citations omitted.)

In the course of its opinion the Court also placed considerable emphasis upon the fact that "wages [are] a specialized type of property presenting distinct problems in our economic system,"⁴ and that the summary deprivation of such property often imposes "tremendous hardships" on wage earners with families to support.⁵ While the Court observed that summary procedures might be reconciled with procedural due process in "extraordinary situations," it noted that "in the present case no situation requiring special protection to a state or creditor interest is presented by the facts, nor is the Wisconsin statute narrowly drawn to meet any such unusual condition."⁶

In addition to prejudgment garnishment provisions such as that involved in *Sniadach*, there are, in most states, a variety of other types of prejudgment attachment provisions which allow creditors to attach

¹ 395 U.S. 337 (1969).

² *Id.* at 342. See generally Comment, Prejudgment Wage Garnishment: Notice and Hearing Requirements Under *Sniadach v. Family Finance Corp.*, 11 B.C. Ind. & Com. L. Rev. 462 (1970) [hereinafter cited as Comment].

³ 395 U.S. at 342.

⁴ *Id.* at 340.

⁵ *Id.*

⁶ *Id.* at 339. For a discussion of the implications of this language in the Court's opinion see Comment, *supra* note 2, at 474-75.

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or replevy chattels, such as furniture and automobiles,⁷ or to seize property in satisfaction of rental arrearages⁸ or lodging charges,⁹ or to levy attachment on property when initiating a lawsuit.¹⁰ Generally, these statutes authorize the creditor to secure a writ of replevin or attachment after filing an appropriate affidavit¹¹ and posting the required bond.¹² The writ thus obtained directs a peace officer to seize or otherwise impound the specified asset.¹³ Once the writ is executed, the debtor is deprived of the use of his property until there has been a judgment on the merits.¹⁴ This comment will examine several recent decisions which, in interpreting such statutes, have extended the *Sniadach* rationale beyond the context of wage garnishment and have declared state statutes permitting prejudgment attachment of certain other forms of property to be unconstitutional. The bases for federal jurisdiction in cases challenging the constitutionality of state prejudgment attachment statutes will be discussed and the suggestion will be made that *all* state prejudgment attachment statutes which fail to afford the debtor adequate notice and a prior hearing contravene the requirements of procedural due process and should be abolished.

⁷ See, e.g., Fla. Stat. Ann. tit. 6, §§ 78.01 to .21 (1964), as amended, (Supp. 1970); N.Y. CPLR §§ 7101 to 7112 (McKinney 1963), as amended, (Supp. 1970); Gen. Stat. N.C. §§ 1-472 to -484 (1969); Tenn. Code Ann. §§ 23-2301 to -2328 (1955); Wis. Stat. Ann. §§ 265.01 to .13 (1957). In this connection, § 9-503 of the Uniform Commercial Code, now enacted in 49 states, authorizes a secured party, upon default by a debtor, to seize chattels in which he has a security interest without resort to judicial process so long as a breach of the peace is avoided. See discussion in note 119 infra.

⁸ See discussion of the Texas "landlord's lien" law infra at p. 706.

⁹ See discussion of the California "innkeeper's lien" law infra at pp. 705-06.

¹⁰ See, e.g., Mass. Gen. Laws Ann. ch. 246, §§ 1-83 (1959), as amended, (Supp. 1970). Under these provisions prejudgment attachment of property may be accomplished by a device known as "trustee process."

¹¹ Generally the affidavit must specify:

1. The identification of the chattel in question;
2. The facts alleged as entitling the plaintiff to possession of the chattel;
3. That the chattel is wrongfully detained by the named defendant;
4. The estimated value of the chattel; and
5. Whether or not an action for recovery of the chattel has been commenced.

See, e.g., N.Y. CPLR § 7102(c) (McKinney 1963); Gen. Stat. N.C. § 1.473 (1969); Tenn. Code Ann. § 23-2304 (1955). Point 5 listed above, which requires the plaintiff to state whether or not an action for recovery of the chattel has been commenced is based upon the long-standing rule that replevin is an ancillary remedy and must be supported by an ongoing action. See *Jarman v. Ward*, 67 N.C. 32, 33 (1872).

¹² The amount of the bond is generally at least twice the value of the chattel as stated in the plaintiff's affidavit. See, e.g., N.Y. CPLR § 7102(e) (McKinney 1963). A defendant debtor in order to retain the chattel would then have to post a bond of similar amount. See, e.g., N.Y. CPLR § 7103(a) (McKinney 1963) and the additional statutes cited in note 7 supra.

¹³ See the representative statutes cited in note 7 supra.

¹⁴ In some states if the debtor possesses sufficient resources to post a bond he may secure release of the property pending adjudication of the creditor's claim. See, e.g., N.Y. CPLR § 7103(a) (McKinney 1963); Gen. Stat. N.C. § 1-478 (1969); Wis. Stat. Ann. § 265.06 (1957). It is highly unlikely, however, that low-income debtors, against whom these summary procedures are generally invoked, would possess the financial re-

I. APPLICATION OF THE SNIADACH RATIONALE TO
REPLEVIN STATUTES

The issues present in *Sniadach*, both constitutional—in terms of procedural due process—and social—in terms of balancing the legitimate interests of the debtor with those of the business community—arise in a variety of contexts beyond that of wage garnishment. Typical of such contexts, and closely analogous to garnishment, are situations in which a creditor, invoking the provisions of a state replevin statute, has a peace officer seize possession of specified property from an allegedly defaulting debtor, prior to any formal adjudication of the creditor's claim.

A recent case involving an attack on the constitutionality of a typical state replevin statute is *Laprease v. Raymours Furniture Co.*,¹⁵ in which a three-judge federal panel was convened pursuant to 28 U.S.C., Section 2281¹⁶ to hear the plaintiff's complaint that she was in immediate danger of being deprived of her property by the defendants, acting under color of the allegedly unconstitutional provisions of Article 71 of the New York Civil Practice Law and Rules, the New York replevin provisions.¹⁷ Defendant Raymours Furniture Co. (Raymours) had initiated an action to regain possession of a number of items of furniture, including a bed, box-spring and mattress, from plaintiff Laprease. Laprease filed suit in federal district court seeking to enjoin Raymours and the city marshals from seizing these items and enforcing the New York replevin provisions. Laprease contended that the provisions were unconstitutional in that they authorized a search and seizure without a warrant in violation of the Fourth and Fourteenth Amendments; that they violated the due process clause of the Fourteenth Amendment by permitting the seizure of property prior to notice and hearing; and that they violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against those financially unable to post the required bond in order to retain possession of the chattels pending adjudication of the case.¹⁸ In granting judgment for Laprease and enjoining the defendants from implementing any of the provisions of Article 71, the three-judge federal panel accepted Laprease's theory that a prejudgment seizure of chattels in a replevin action without duly-issued judicial process violated both the search and seizure provisions of the Fourth Amendment as applied to the states through the Fourteenth Amendment, and the procedural due process requirements of the Fourteenth

sources necessary to post the required bond. Consequently, the poor must await an adjudication on the merits before there can be any realistic possibility of regaining possession of the property.

¹⁵ 315 F. Supp. 716 (N.D.N.Y. 1970).

¹⁶ 28 U.S.C. § 2281 is excerpted on p. 720 *infra*.

¹⁷ N.Y. CPLR §§ 7101 to 7112 (McKinney 1963), as amended, (Supp. 1970).

¹⁸ 315 F. Supp. at 720.

Amendment.¹⁹ The court qualified its holding by stating: "We do not hold or intend to intimate that nothing less than a full adversary evidentiary hearing prior to seizure, will comport with the requirements of procedural due process."²⁰ However, the court declared that the provisions of Article 71 which allowed a sheriff to use force to enter a building or enclosure in order to seize the chattel²¹ were "unconstitutional on their face, void and unenforceable."²² Its reasoning was that a search without a warrant is "presumptively unreasonable," and that the Fourth Amendment is "a basic protection available to all, in matters both civil and criminal."²³ The *Laprease* court analogized the status of furniture in question to the wages in the *Sniadach* case and concluded that to be deprived of the use and enjoyment of such property for a theoretical minimum of four days (assuming the alleged debtor could post a bond) would constitute a burden comparable to deprivation of wages for a like period of time.²⁴ The court emphasized that "procedural due process requires that notice and an opportunity to be heard be provided the alleged debtor *before* his property is seized pursuant to Article 71, or at least that the creditor present to a judicial officer the circumstances justifying summary action."²⁵ (Emphasis in original.) The *Laprease* court stressed that in the usual case dealing with a party filing an affidavit, the party "has established no entitlement, except such as he has unilaterally declared unto himself."²⁶

An earlier challenge to the same New York provisions, brought in the state courts on similar grounds by one of the successful plaintiffs in *Laprease*, had been summarily rebuffed by the New York Supreme Court in *Lawson v. Mantell*.²⁷ The court in that case distinguished *Sniadach* on both factual and statutory grounds and concluded:

Finally, it must be noted that a careful reading of the *Sniadach* decision indicates that the same is inapplicable to the instant controversy upon its own wordage. Justice Douglas in his majority opinion noted: "A procedural rule that may satisfy due process for attachments in general . . . does not necessarily satisfy procedural due process in every case We deal here with wages—a specialized type of

¹⁹ Id. at 725. The court refused to comment on the equal protection claim. It preferred to base its finding of unconstitutionality on the previously cited grounds.

²⁰ Id.

²¹ See N.Y. CPLR § 7110 (McKinney 1963).

²² 315 F. Supp. at 725.

²³ Id. at 722.

²⁴ Id.

²⁵ Id. at 724.

²⁶ Id. at 723.

²⁷ 62 Misc.2d 307, 306 N.Y.S.2d 317 (Sup. Ct. 1969).

property presenting distinct problems in our economic system."²⁸

In extending the *Sniadach* rationale to the replevin context, however, the *Laprease* case implicitly rejects the narrow reading accorded *Sniadach* by the New York Supreme Court in *Lawson*. Concomitantly, however, the *Laprease* decision raises intriguing questions concerning whether, and to what extent, the due process requirements of adequate notice and prior hearing may be applicable to the gamut of prejudgment attachment provisions. For example, the due process issues present in *Laprease* are also present when the creditor himself seizes property of the debtor, under color of such "self-help" provisions as Section 9-503 of the Uniform Commercial Code, which authorizes nonjudicial repossession by a secured party;²⁹ or "landlord's lien" statutes which allow a landlord to seize a tenant's property without judicial process in order to secure payment of alleged rental arrearages;³⁰ and "innkeeper's lien" statutes which afford a similar privilege to hotel owners who wish to secure claims for lodging costs against guests.³¹

II. DUE PROCESS CONSIDERATIONS IN PREJUDGMENT ATTACHMENT SITUATIONS

Difficulties arise both in determining the initial applicability of the *Sniadach* decision to state prejudgment attachment statutes dealing with property other than wages, and in ascertaining the extent to which the due process requirements of notice and hearing should be applied to such statutes. One source of difficulty is the question of whether qualitative distinctions should be made between the types of property subjected to seizure. The *Laprease* decision focused upon the prejudgment attachment of personal property, in contrast to *Sniadach*, which was concerned with garnishment of wages. *Laprease* thus represents a significant development in view of the language in *Sniadach* characterizing the wages involved as "a specialized type of property presenting distinct problems in our economic system."³² This language could be viewed as raising the question of whether the *Sniadach* holding was limited to garnishment, or enunciated a broader rule requiring adherence to due process requirements in cases involving prejudgment seizure of other types of property. Secondly, even assuming that *Sniadach* is susceptible to broader interpretation, the

²⁸ 62 Misc.2d at 309, 306 N.Y.S.2d at 320.

²⁹ See generally Comment, Non-Judicial Repossession—Reprisal in Need of Reform, 11 B.C. Ind. & Com. L. Rev. 435 (1970). The only restrictions on this process appear to be that the debtor be in default and that the secured party avoid a "breach of the peace" (U.C.C. § 9-503).

³⁰ See, e.g., Tex. Civ. Stat. Ann. art. 5238a (Supp. 1969). See generally discussion *infra* at p. 706.

³¹ See, e.g., Cal. Civ. Code § 1861 (West Supp. 1969). See generally discussion *infra* at pp. 705-06.

³² 395 U.S. at 340.

question arises whether a debtor may validly "contract away" his constitutional rights to notice and a prior hearing through a clause in a retail installment sales contract or some similar document. These issues have both been considered in post-*Sniadach* cases.

A. *The Question of Whether Sniadach is Restricted to Garnishment Situations*

Consonant with the rationale upon which the court in *Laprease* proceeded, some federal courts have found little difficulty in applying the principles set forth in *Sniadach* to situations involving the prejudgment seizure of property other than wages, thus interpreting *Sniadach* as mandating a broad application of the due process requirements of "notice" and "hearing." In *Klim v. Jones*,³³ for example, an action was brought in Federal District Court for the Northern District of California seeking damages, injunctive relief, and a declaratory judgment that California Civil Code Section 1861, popularly known as the "innkeeper's lien" law, was unconstitutional in that it permitted the taking of property without due process of law.

In essence, the statute granted an innkeeper a lien upon the "baggage or other personal property" of a guest to secure payment of "proper charges due" for room and board. The statute specifically authorized peaceable entry of the guest's room between the hours of sunrise and sunset in order to seize such property and expressly declared the use of a passkey to be peaceable. Once he had gained possession of the guest's property, the innkeeper could retain possession until the charges were paid or, after a period of 60 days had elapsed, he could sell the property at a public auction and apply the proceeds in satisfaction of the claim. In accordance with this statute, the defendant padlocked the plaintiff's hotel room thereby effectively attaching all of the plaintiff's personal belongings which were in the room. The court noted that the common law principle of allowing the innkeeper a lien on the property of his guest developed in conjunction with the innkeeper's absolute liability for insuring the safety of his guest from highwaymen and outlaws. In view of the paucity of modern-day highwaymen, the court concluded that "to whatever extent a summary procedure was necessary to make the innkeeper's lien equal in scope to his potential liability, that liability has been so reduced as to no longer call for such a draconian approach as dictated by section 1861."³⁴ Accordingly, the court determined that the statute, "as presently drawn, is violative of the constitutional guarantee of due process of law as outlined in the *Sniadach* case."³⁵ As in the *Laprease* case, the *Klim* court noted that being deprived of one's belongings constituted a burden comparable to that recognized by the *Sniadach* court in situations involving deprivation of wages. In

³³ 315 F. Supp. 109 (N.D. Cal. 1970).

³⁴ *Id.* at 121.

³⁵ *Id.*

fact, the *Klim* court emphasized that there was even more hardship involved under the "innkeeper's lien" statute because "all of the boarder's possessions may be denied him if such possessions are all kept in his lodgings."³⁶ The *Klim* court also could find no "overriding state or creditor interest," as expressed in *Sniadach*,³⁷ which would justify retention of section 1861.³⁸ Consequently, the court chose to regard *Sniadach* as "standing inescapably on constitutional principles," and declared section 1861 "constitutionally infirm under *Sniadach* for its failure to provide for any sort of hearing prior to the imposition of the innkeeper's lien thereunder."³⁹

Similarly, the Court of Appeals for the Fifth Circuit, in *Hall v. Garson*,⁴⁰ recently considered an appeal from a district court's dismissal of the plaintiff's class action challenging the constitutionality of a Texas statute popularly known as the "landlord's lien" law.⁴¹ The statute allowed a landlord to secure a claim against a tenant for alleged rental arrearages by the preemptive seizure of property found on the rented premises. In reversing and remanding for further proceedings in the district court, the court of appeals carefully noted that while it would not pass upon the merits of the claim, the constitutionality of the landlord's lien statute would depend upon "whether there exists an extraordinary circumstance that would justify the summary seizure" authorized by the statute.⁴² The court recognized that the landlord's lien procedure exhibited the same characteristics as were found objectionable by the Supreme Court in *Sniadach*, namely, that property could be seized by the landlord without notice of a prior hearing. Moreover, the court observed that the statute seemed "only to protect the landlord's interest, and not any broader public interest."⁴³ It intimated that, in the absence of some showing that a compelling public interest was being served, the statute would fail for lack of compliance with fundamental due process requirements. However, whether or not such unusual conditions could be shown, the sweeping language of the Texas statute grants a landlord virtually unfettered license to impound a tenant's property without notice of a prior hearing, no matter how trivial or tenuous the claim. Accordingly, it is submitted that the statute, as presently drawn, should be held unconstitutional since it is not "narrowly drawn to meet . . . [such] unusual condition[s]" as expressed by the Supreme Court in *Sniadach*.⁴⁴

³⁶ *Id.* at 123.

³⁷ See *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969). The relevant language of the opinion is also excerpted on p. 700 *supra*.

³⁸ 315 F. Supp. at 124.

³⁹ *Id.* at 122.

⁴⁰ 430 F.2d 430 (5th Cir. 1970).

⁴¹ Tex. Civ. Stat. Ann. art. 5238a (Supp. 1969).

⁴² 430 F.2d at 441.

⁴³ *Id.*

⁴⁴ See the quotation excerpted on p. 700 *supra*.

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A number of state court decisions have also viewed the constitutional impact of *Sniadach* as extending to areas beyond wage garnishment situations. In *Larson v. Fetherston*,⁴⁵ the plaintiff, acting under the Wisconsin prejudgment garnishment statute, attached two bank accounts of a debtor travel agency. The Supreme Court of Wisconsin stated that *Sniadach* is not restricted merely to wages, and that "no valid distinction can be made between garnishment of wages and that of other property."⁴⁶ The court quoted the broad language in *Sniadach* to the effect that "... the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. . . ."⁴⁷ The court further stated that "a due process violation should not depend upon the type of property being subjected to the procedure."⁴⁸

By way of contrast, some state courts, such as the New York Supreme Court in *Lawson v. Mantell*,⁴⁹ discussed earlier, have indicated a reluctance to extend *Sniadach* beyond the context of wage garnishment. Such a case is *Termplan, Inc. v. Superior Court of Maricopa County*,⁵⁰ in which the Supreme Court of Arizona considered a challenge to that state's prejudgment garnishment law. The lower court had entered an order requiring that the clerk of court should not issue writs of garnishment or attachment of other forms of property unless it was first shown that there had been a hearing on the merits of the claim against the alleged debtor. The Supreme Court of Arizona affirmed the portion of the lower court's order dealing specifically with *wages*. However, the court modified the order as it applied to property other than wages, stating:

We emphasize, however, that our holding is limited to the prejudgment garnishment of *wages* (as was the opinion of *Sniadach*). In this regard, Termplan maintains that the Court below went beyond the scope of the *Sniadach* opinion when it ruled that the procedure therein must be followed in attachments and garnishment of property other than wages. We agree⁵¹ (Emphasis in original.)

Notwithstanding this tendency on the part of some state courts to accord *Sniadach* a narrow interpretation, restricting its requirements solely to garnishment of wages, the decisions in *Laprease*, *Hall* and *Klim*, discussed earlier, suggest that the judicial trend in the federal courts is towards a broad application of the *Sniadach* principles to prejudgment attachment statutes affecting all types of property. If, in

⁴⁵ 44 Wis.2d 712, 172 N.W.2d 20 (1969).

⁴⁶ Id. at 718, 172 N.W.2d at 23.

⁴⁷ Id. at 717, 172 N.W.2d at 23.

⁴⁸ Id. at 718, 172 N.W.2d at 23.

⁴⁹ 62 Misc.2d 307, 306 N.Y.S.2d 317 (Sup. Ct. 1969). See discussion on pp. 703-04 supra.

⁵⁰ 105 Ariz. 270, 463 P.2d 68 (1969).

⁵¹ Id. at —, 463 P.2d at 70.

light of these federal decisions, it is desired to retain prejudgment attachment statutes, the problem remains of providing realistic administrative procedures which will satisfy due process requirements.

B. *The Problem of Devising Administrative Procedures to Satisfy the Requirements of Sniadach*

Given the judicial trend towards a broad interpretation of *Sniadach*, the incorporation of the constitutional requirements of notice and a prior hearing into the existing framework of typical state prejudgment attachment procedures will foreseeably pose enormous administrative problems for the courts. In attempting to devise efficient procedures designed to alleviate these problems, reference might profitably be made to other administrative contexts in which deference to due process plays a significant role. One such context might be the administrative process involved in determining eligibility for public assistance. The recent Supreme Court decision in *Goldberg v. Kelly*⁵² focused upon the question of whether termination of public assistance to a recipient without providing a prior opportunity for an evidentiary hearing violated procedural due process.⁵³ The Court in *Goldberg* reiterated the precept that "the fundamental requisite of due process of law is the opportunity to be heard," and that "[t]he hearing must be 'at a meaningful time and in a meaningful manner.'"⁵⁴ To translate these legal principles into workable administrative procedures, however, is a major problem. Justice Harlan, concurring in *Sniadach*, pointed out that the concept of "deprivation of property" includes deprivation of the *use* of such property during the period preceding an adjudication on the merits, and that "due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use."⁵⁵ (Emphasis in original.) As the Court in *Goldberg* noted with respect to public assistance payments, the "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate."⁵⁶ (Emphasis in original.) Similarly, the fact that a hearing on the merits may ultimately result in a decision in favor of the debtor is of little consolation if, in the meantime, he has had to live without his furniture or other property.

None of the decisions dealing with the due process issue, however, attempt to delineate a concrete application of the concepts of "notice"

⁵² 397 U.S. 254 (1970).

⁵³ *Id.* at 255.

⁵⁴ *Id.* at 267.

⁵⁵ 395 U.S. at 343 (concurring opinion).

⁵⁶ 397 U.S. at 264.

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and "hearing." The *Goldberg* Court, which was dealing with a uniquely governmental activity, reasoned that "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."⁵⁷ Moreover, the Court stressed the importance of not imposing upon the states any procedural requirements beyond those demanded by "rudimentary due process."⁵⁸ Judicial review of state prejudgment attachment statutes and findings of constitutional deficiencies based upon lack of adequate notice and hearing provisions illustrate the pragmatic problem of ascertaining what specific due process standards should be employed, for example, in evaluating a replevin statute. What would be a reasonable period of notice to the alleged debtor and to what extent should his hearing before the court be of an adversarial or evidentiary nature? If one concludes that a hearing should include even a cursory examination of the merits, then the prejudgment proceeding might well become a mini-adjudication of the claim. The cumulative effect of conducting detailed proceedings in every case in which prejudgment attachment is sought to be invoked would be the imposition of enormous burdens, both administrative and financial, upon state judicial systems.⁵⁹

In view of this alarming prospect it is perhaps not inappropriate to raise the very basic question of whether the state should, in the absence of some compelling *public* interest, be involved in the prejudgment seizure of property at all. One simple solution to the due process problem would be the abolition of all statutes which allow prejudgment seizure or attachment of property. Without such statutes, creditors would have to opt either to seek a private settlement of their claims without benefit of the enormous economic leverage afforded by such statutes, or to proceed through the courts to seek a judgment on the merits. This solution assumes that the debtor's constitutional right to be free from unreasonable searches and seizures and his right not to be deprived of his property without due process of law, are absolute rights which cannot unwittingly be lost by signing some kind of standard form contract. This assumption, however, is not always valid.

⁵⁷ Id. at 263.

⁵⁸ Id. at 267.

⁵⁹ In addition to the sheer magnitude of the administrative burden involved, other and related problems might also arise. As Justice Black observed in his dissenting opinion in *Goldberg*, the concept of a "meaningful" hearing for most low-income persons necessarily adumbrates an additional requirement that counsel be appointed to assist them at such a hearing:

[T]oday's decision requires only the opportunity to have the benefit of counsel at the administrative hearing, but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these people are too poor to hire their own advocates.

397 U.S. at 278-79.

C. *Contractual Waiver of Constitutional Protections*

The question of whether a debtor may validly waive his constitutional rights by contract, thereby rendering himself vulnerable to summary attachment procedures, irrespective of their constitutionality if authorized by statute, is central to any consideration of the due process problems in attachment cases. This question was considered in the recent case of *Fuentes v. Faircloth*,⁶⁰ in which plaintiff Fuentes had purchased a stove and a stereo from co-defendant Firestone Tire and Rubber Co. (Firestone) under conditional sales contracts. Deeming Fuentes to be in default on her payments, Firestone sought to repossess these items under the Florida replevin provisions.⁶¹ Subsequently, Fuentes filed suit in federal district court seeking injunctive relief and a declaratory judgment that certain sections of the Florida replevin provisions were unconstitutional because "they authorize a taking of property without prior opportunity to be heard in contravention of the Due Process Clause of the Fourteenth Amendment and they authorize a search and seizure without the necessity of a search warrant in violation of the Fourth Amendment."⁶² The court felt that neither *Sniadach* nor *Goldberg* applied since both dealt with "special types of property" not found in the situation before the court. The main thrust of the court's opinion, however, centered upon its finding that none of the prior cases dealing with the due process problem addressed themselves to the enforcement of a contractual agreement specifically granting the creditor the right to recover the property in question without a prior hearing if the debtor was deemed to be in default. The *Fuentes* court thus accorded great weight to the contractual arrangement between the parties, and implicitly affirmed that constitutional protections may validly be waived by contract. The security agreement in question provided that in the event of "default of any payments," the seller might elect to repossess the collateral. The plaintiff in *Fuentes* admitted delinquency in payments but claimed that she had a meritorious defense. However, the court felt that the admission of delinquency was conclusive on the question of the seller's right to repossess. The statute authorized an officer executing a writ of replevin to ". . . publicly demand delivery [of the property], and if the same be not delivered by the defendant or some other person, he [the officer] shall cause such house, building or enclosure to be broken open. . . ."⁶³ Since there was no showing that a forcible entry had been employed, the *Fuentes* court refused to rule this provision *prima facie* unconstitutional and void as the *Laprease* court had done.⁶⁴ Instead, the court interpreted the replevin statute as falling within the situations outlined in *Sniadach* in which

⁶⁰ 317 F. Supp. 954 (S.D. Fla. 1970), prob. juris. noted, 91 S. Ct. 893 (1971).

⁶¹ Fla. Stat. Ann. § 78.01 to .21 (1964), as amended, (Supp. 1970).

⁶² 317 F. Supp. at 956.

⁶³ Fla. Stat. Ann. § 78.10 (1964).

⁶⁴ See discussion on pp. 702-03 *supra*.

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prejudgment seizure of goods without a prior hearing is permissible,⁶⁵ particularly in situations involving a specific contractual provision authorizing the seizure in order to protect a security interest.⁶⁶ It stated that "the essence of the contract in issue here is that one party may enter the premises of the other (whether by himself or through an officer who is executing a writ of replevin) in order to repossess property in which he has an interest."⁶⁷ The court argued that the Fourth Amendment does not prohibit parties to a conditional sales contract from contracting for peaceable repossession.

This approach, however, seemingly disregards what should be the central issue—the right of a person not to be summarily deprived of his property without due process of law. Certainly parties may contract and include the right to repossession as one of the remedies for default, but it does not necessarily follow that this consent may not be withdrawn by the debtor at any time, subject to liability for contract damages. The legitimacy of the state's involvement in the enforcement of such provisions is dubious at best. In situations involving "self-help" remedies, public policy should militate, in the first instance, against encouraging enforcement devices which contain the inherent risk of exciting violent reactions or other breaches of the peace.⁶⁸ Moreover, a satisfactory resolution of private contract disputes which are not settled informally is best achieved through an orderly adjudication of the underlying issues, and any involvement by the state prior to such an adjudication should be in strict conformity with the dictates of due process. The assertion that a debtor may freely waive his constitutional right to due process, by signing a typical installment sales contract, ignores the practical realities surrounding such transactions. Rarely is the debtor aware of the existence of the provision in the contract, nor is it likely that he would have a full appreciation of its legal significance if he were aware of it. Finally, even assuming that he were aware of it and objected to it he would most likely be told either to sign the contract in its present form or to take his business elsewhere.

⁶⁵ The *Sniadach* Court cited a number of "extraordinary situations . . . requiring special protection to a state or creditor interest." These included: a situation in which a conservator took possession of a failing bank, *Fahey v. Mallonee*, 332 U.S. 245 (1947); summary seizure of foods determined by the Federal Security Administrator to be dangerous to the public health, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); attachment of property of a non-resident debtor where the possibility of obtaining in personam jurisdiction was minimal, *Ownbey v. Morgan*, 256 U.S. 94 (1921); and a situation in which the State Superintendent of Banks levied execution upon a failing bank's shareholders in order to protect the interests of depositors, *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928). See Comment, Prejudgment Wage Garnishment: Notice and Hearing Requirements Under *Sniadach v. Family Finance Corp.*, 11 B.C. Ind. & Com. L. Rev. 462, 474-75 (1970).

⁶⁶ 317 F. Supp. at 958.

⁶⁷ *Id.*

⁶⁸ See generally Comment, Non-Judicial Repossession—Reprisal in Need of Reform, 11 B.C. Ind. & Com. L. Rev. 435, 440-49 (1970).

The *Fuentes* decision relied upon *Brunswick Corp. v. I&P, Inc.*,⁶⁹ as authority for permitting the contractual modification of constitutional rights. In that case, the Court of Appeals for the Tenth Circuit concluded that the vendor's acts of repossession and subsequent sale of the property to satisfy its claim were authorized by the sales contract and the applicable provisions of the Uniform Commercial Code, and that the vendees who admitted that they were in default on the conditional sale "... cannot now be heard to object to the default procedures they agreed to simply because Brunswick did utilize the legal process of replevin under bond."⁷⁰ Accordingly, the *Brunswick* court concluded that *Sniadach* was inapplicable to the situation at bar:

Furthermore, we find no merit in appellants' additional contention that under the recent Supreme Court case of *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969) they have been the victims of a taking of property without the procedural due process required by the Fourteenth Amendment. *Sniadach* expressly was a unique case involving, "a specialized type of property presenting distinct problems in our economic system." That case involved wage garnishment without notice or hearing prior to judgment on a promissory note. It is not in the least comparable to the case here on appeal involving enforcement of a security interest. Appellants have contractually agreed that upon default, their creditor Brunswick "* * * may take immediate possession of said property [collateral] and for this purpose the Seller may enter the premises where said property may be and remove the same without notice or without legal process; thereupon all the rights and interests of the Buyer to and in said property shall terminate."⁷¹

The restrictive view of *Sniadach* reflected in the *Brunswick* decision and adopted in *Fuentes* has not enjoyed uniform acceptance in the courts. The *Laprease* court, for example, distinguished *Brunswick* on the grounds that in *Laprease* there was no admission of default, while implicit in the *Brunswick* holding was a finding of waiver of constitutional rights and consent to the seizure by reason of the admission of default by the defendants.⁷² The *Laprease* court,

⁶⁹ 424 F.2d 100 (10th Cir. 1970).

⁷⁰ *Id.* at 105.

⁷¹ *Id.*

⁷² It is questionable whether the mere existence of the various "default" clauses relied on in *Fuentes* and *Brunswick* should be allowed to justify the wholesale surrender of constitutional rights. The concept of "default" is somewhat elusive, and a number of authorities have pointed out that the circumstances which constitute a default are a matter for contractual agreement between the parties. See, e.g., *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 818, 168 S.E.2d 827, 830 (1969); *Hogan, The Secured Party and Default Proceedings Under the U.C.C.*, 47 Minn. L. Rev. 205, 209 (1962);

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however, questioned whether "the fine print in the usual consumer's conditional sales contract gives rise to a competent and intelligent waiver of a constitutional right."⁷³ The dissenting opinion in *Fuentes* urged that one signing a contract does not waive his constitutional rights and that "[w]hen the state authorizes the forcible entry of a person's house prior to the establishment of the probable validity of a creditor's claim, it contravenes the Due Process Clause of the Fourteenth Amendment."⁷⁴ The constitutionality of prejudgment attachment statutes facilitating the unilateral settlement of claims must be measured in terms of the due process requirements that have always limited and restrained governmental authority. To imply that contractual waivers legitimize otherwise unconstitutional procedures is to misconceive the central issue involved—the constitutional limitations on state activity which directly affect individual rights.

In contrast to *Fuentes*, which readily accepts the concept of contractual waiver of constitutional rights, is a recent Pennsylvania decision which imposes a strong burden of proof upon a party seeking to enforce such a waiver. In *Swarb v. Lennox*,⁷⁵ a class action was brought in federal district court challenging the Pennsylvania procedures permitting the recording and execution of judgments by confession.⁷⁶ A three-judge federal panel found that in order for the statute to comply with due process standards, there must be a showing that there had been an intelligent and voluntary consent by the debtor signing a contract containing such a clause;⁷⁷ otherwise, the effect of the Pennsylvania procedure would be a denial of "notice" and "hearing" prior to judgment.⁷⁸ The court declared the Pennsylvania prac-

Squillante, Commercial Code Review, 74 Com. L.J. 17 (1969). In any event, it is submitted that, contrary to the view expressed in *Fuentes* and *Brunswick*, default provisions do not, a fortiori, preclude the assertion of one's constitutional rights.

⁷³ 315 F. Supp. at 724.

⁷⁴ 317 F. Supp. at 959.

⁷⁵ 314 F. Supp. 1091 (E.D. Pa. 1970).

⁷⁶ Pa. Stat. Ann. tit. 17, § 1482 III (1962); Pa. Stat. Ann. tit. 12, § 738 (Supp. 1970); Pa. Stat. Ann. tit. 12, § 739 (Supp. 1970); Pa. Rules of Civil Procedure 2950-2976. "Judgment by confession" has been defined as:

Judgment where a defendant gives the plaintiff a cognovit or written confession of the action by virtue of which the plaintiff enters judgment. The act of a debtor in permitting judgment to be entered against him by his creditor, for a stipulated sum, by a written statement to that effect or by warrant of attorney, without the institution of legal proceedings of any kind

Black's Law Dictionary 978 (4th rev. ed. 1968). It is common practice on the part of creditors in some states to include as a matter of course in their "standard form" consumer contracts, clauses authorizing the creditor or his attorney to "confess judgment" against the debtor if the debtor is deemed to be in default.

⁷⁷ 314 F. Supp. at 1095.

⁷⁸ Id. at 1095. The court described the mechanics of the Pennsylvania procedures being challenged as follows:

The Pennsylvania procedure challenged in this suit permits a debtor to sign an agreement containing a clause authorizing the Prothonotary, court clerk, or any attorney to appear in any court, at any time, to confess judgment against the debtor for any unpaid portion of the debt along with various fees and charges.

tice of entering judgments by confession to be unconstitutional and enjoined the named defendants from entering any judgments by confession against members of the designated class. The court, however, expressly limited the scope of its holding to consumer transactions involving natural Pennsylvania citizens whose income is less than \$10,000 a year.⁷⁹ The decision reiterated the principle that "there is no presumption that a person acquiesces in the waiver of his constitutional rights."⁸⁰ The court, citing the *Sniadach* case, found that absent "an understanding and voluntary consent" by the debtor to submit to judgment by confession, the Pennsylvania procedure violated the due process requirements of notice and an opportunity to be heard prior to the entry of judgment.⁸¹ Consequently, it ruled that the burden is on the creditor to prove that the debtor understood the legal significance of signing a contract containing a confession clause.⁸² The court refrained from stating precisely what procedural devices should be utilized by those wishing to employ confession of judgment clauses. It was suggested, however, that due process requirements might be met through the use of affidavits showing that the party had intentionally and intelligently signed the contract.⁸³ It is submitted that even the use of affidavits would be readily susceptible to abuse by those parties who draft the standard-form consumer contracts containing such confession clauses.⁸⁴ However, as suggested earlier, it is foreseeable that even a full appreciation for the import of such clauses would be of little assistance to persons in an unequal bargaining position who are told either to "sign or forget" the purchase. In

The burdens of establishing a defense imposed upon a defaulting debtor who has signed a contract containing a confession of judgment clause and against whom judgment has been entered are greater than those faced by the typical debtor. The judgment entered as a result of a confession clause has the same force and effect as any other judgment, i.e., it acts as a lien upon the debtor's presently owned property and on after acquired property if the judgment is revived in the case of real property or is executed upon in the case of personal property.

Id. at 1094.

⁷⁹ Id. at 1102.

⁸⁰ Id. at 1100.

⁸¹ Id. at 1095.

⁸² Id. at 1103.

⁸³ Id. at 1100 n.24.

⁸⁴ The *Swarb* court accorded full recognition to the realities underlying the typical consumer transaction. In this connection the court noted:

Over 30 years ago Professor Llewellyn wrote ("Book Reviews, the Standardization of Commercial Contracts in English and Continental Law. By O. Prausnitz," 52 Harv. L. Rev. 700 (1939)):

"... contract ceases to be matter of dicker, bargain by bargain, and item by item and becomes . . . a matter of mass production of bargain, with the background (apart from price, quantity and the like) filled in not by the general law but by standard clauses and terms prepared often by one of the parties only"

Id. at 1099 n.19. See also the quotations excerpted by the court in nn.20-22 of the opinion.

essence, the assertion that numerous methods are available in order to demonstrate the intelligent waiver of such rights ignores the obvious fact that no party except one without equal bargaining power would ever sign a note which subjects him to such drastic penalties. In the final analysis, it is relatively easy for creditors to fabricate the appearance of intelligent waiver through judicious application of their bargaining superiority in transactions involving low-income consumers.

The rejection of the due process argument in *Fuentes* appears to conflict with the underlying rationale of the *Laprease* decision. Moreover, the *Fuentes* discussion of contractual obligation seems to bypass the point made in *Swarb*—that a formidable burden of proof must be sustained in showing that an individual, particularly a person of limited education and means, has intelligently waived his constitutional rights. The replevin provisions sustained in *Fuentes* facilitated the summary seizure of chattels by a creditor who conceivably could not have sustained the standard of proof of intelligent waiver required by *Swarb*. As a result, the *Fuentes* decision conditions the enforceability of a replevin procedure, which the *Laprease* court would very likely hold to be unconstitutional, upon the comparative bargaining power of contracting parties. Additional litigation may well be required to resolve the apparently conflicting views of due process evidenced in the *Fuentes* and *Laprease* decisions, and to delineate precisely the extent to which private contracts may modify the basic guarantees of procedural due process.

III. THE JURISDICTIONAL BASES FOR ATTACKING PREJUDGMENT ATTACHMENTS IN FEDERAL COURT

Laprease and a number of other cases challenging state statutes permitting prejudgment attachment have been brought in the federal courts.⁸⁵ The plaintiffs in these cases have invoked a number of statutes as bases for federal jurisdiction. The particular constitutional claim, the relief sought, and the degree of involvement on the part of the state are important factors in determining whether federal jurisdiction may be obtained.

A. 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 as Bases for Federal Jurisdiction

The contentions most frequently advanced by plaintiffs challenging prejudgment attachment provisions are predicated upon the individual's constitutional right to be free from unreasonable search and seizure and his right not to be deprived of property without due process of law. Title 42 of the U.S. Code, Section 1983, creates a civil cause of action for the deprivation of constitutional rights. This statute provides:

⁸⁵ The claims could, of course, have been brought in state court as well, but apparently the federal courts are favored as a forum where the primary issues raised involve constitutional issues.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

It has recently been stated that two elements are necessary for recovery under section 1983; the plaintiff must prove that the defendant deprived him of a right secured by the Constitution and laws of the United States, and that the defendant deprived him of this constitutional right "under color of law."⁸⁰ Title 28 of the U.S. Code, Section 1343, is the jurisdictional statute under which the federal district courts are given original jurisdiction to hear suits predicated upon Title 42 of the U.S. Code, Section 1983. This provision states, in pertinent part:

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

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

The officers executing the writs of replevin in the *Laprease* and *Fuentes* cases were clearly representatives of the state acting pursuant to the statute and consequently within the necessary concept of "state action" and "under color of state law" required by both the Fourteenth Amendment and the statute just quoted. However, a more difficult situation is presented in cases involving private individuals who are acting on their own initiative, but in a manner prescribed and authorized by a state statute. The *Hall* and *Klim* cases, for example, concerned private acts of landlords and innkeepers who had unilaterally seized property of the respective plaintiffs. The applicability of section 1983 to such acts by private individuals requires an analysis of the precise meaning of the phrase "under color of any state law" as used in the statute. The *Klim* court, after noting that action by state officials is generally "under color of" state law, focused upon the problems arising when section 1983 is sought to be applied to conduct falling within the "gray area" between solely state and

⁸⁰ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970), rev'g 409 F.2d 121 (2d Cir. 1968).

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solely private action. The court observed that private conduct may also be covered under the section if a sufficient involvement with the state is shown.⁸⁷ On this point, the court quoted from *United States v. Price*,⁸⁸ in which the following statement appears:

Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.⁸⁹

In *Reitman v. Mulkey*,⁹⁰ the Supreme Court declared that the broad meaning of "state involvement" can even encompass situations in which the only involvement on the part of the state is the enactment of the statute in question by the legislature.⁹¹ The Court in that case went on to say that state involvement violative of the Fourteenth Amendment could exist where the state's function was only to encourage, rather than to command, the alleged unconstitutional action through the enactment of the statute.⁹²

It is apparent that the conduct of the parties acting pursuant to state law in the *Hall* and *Klim* cases can readily be construed as constituting "state involvement," since it was only by virtue of the statutes in question that the individuals had the power to seize the debtor's property. In the words of the *Klim* court, this was "not just action against a backdrop of an amorphous state policy, but [was] instead action encouraged, indeed only made possible, by explicit state authorization."⁹³ Similarly, the *Hall* court said of the conduct of the landlord who entered the tenant's apartment to seize a television, that the act "possesses many, if not all, of the characteristics of an act of the State." Further, that court recognized that the statute in question "vests in the landlord and his agents authority that is normally exercised by the state and historically has been a state function."⁹⁴ Arguably, any state statute permitting a party to enforce summary procedures prior to a hearing on the merits is, in effect, delegating a function of the state and should be open to challenge under the Fourteenth and Fifth Amendments. Indeed, as Mr. Justice Brennan observed in *Adickes v. S.H. Kress & Co.*,⁹⁵ such statutes do, in fact, manifest a state policy and "when private action conforms

⁸⁷ 315 F. Supp. at 114.

⁸⁸ 383 U.S. 787 (1966).

⁸⁹ *Id.* at 794.

⁹⁰ 387 U.S. 369 (1967).

⁹¹ *Id.* at 375.

⁹² *Id.*

⁹³ 315 F. Supp. at 114.

⁹⁴ 430 F.2d at 439.

⁹⁵ 398 U.S. 144 (1970) (separate opinion concurring in part and dissenting in part).

with state policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action."⁹⁶

The argument has been made that the jurisdictional statute, 28 U.S. Code, Section 1343(3) is limited to "personal rights" and could not be read as applying to "property rights" which are involved in replevin and "self-help" lien statutes. The *Hall* decision counters this argument by pointing out that the rights in question are not the rights to the television, they are "the right of the individual to be secure in his home and free from the invasion of that home without any prior procedure to protect his interest."⁹⁷ Moreover, as the *Klim* court pointed out, most courts have either rejected the "personal rights vs. property rights" distinction outright, or avoided its effect by "characterizing the 'property' claim in question in terms of such non-property concepts as denial of due process or equal protection of the laws."⁹⁸

B. 28 U.S.C. § 1331—Federal Question Jurisdiction

A party attempting to challenge the constitutionality of a state prejudgment attachment statute is faced with a more difficult problem in establishing federal jurisdiction under 28 U.S. Code, Section 1331 than under the previously discussed Section 1343(3). The latter section is narrower in scope in that it is addressed solely to unconstitutional *state action*, in contrast to section 1331 which is addressed to *all claims*, including those against the federal government, "[arising] under the Constitution, laws or treaties of the United States."⁹⁹ The federal issue raised in the cases involving prejudgment attachment statutes is an alleged taking of property without due process of law. A major obstacle in obtaining federal jurisdiction under section 1331 is the necessity of meeting the \$10,000 jurisdictional requirement. Thus, while *Laprease* and *Fuentes* clearly present a constitutional claim and involve the requisite element of "state action," based upon action by state officers, neither case appears to have involved an amount in controversy in excess of \$10,000, as required under section 1331. The *Klim* case presents an exception, since there the plaintiff sought \$12,000 in damages for deprivation of personal property, interference with employment opportunities, battery, and infliction of mental and emotional distress.¹⁰⁰ The court in that case, however, was also faced with the problem of ascertaining whether the hotel manager's conduct under the statute was equivalent to "state action," because the federal

⁹⁶ Id. at 203.

⁹⁷ 430 F.2d at 438.

⁹⁸ 315 F. Supp. at 115.

⁹⁹ 28 U.S.C. 1331(a) provides:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

¹⁰⁰ 315 F. Supp. at 112.

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rights asserted by the plaintiff derived from the Fourteenth Amendment, and some "state action" must be demonstrated in order to sustain a claim under that amendment.¹⁰¹ The *Klim* court reasoned that the same indicia of state action sufficient to invoke jurisdiction under section 1983,¹⁰² would also suffice for the purposes of section 1331. This approach comports with Mr. Justice Brennan's broad characterization of "state action" in *Adickes v. S.H. Kress & Co.*,¹⁰³ and suggests that in future cases dealing with attachment procedures, federal claims will be clearly presented for the purposes of section 1331 when the complaint contains allegations that the plaintiff has been deprived of his property without due process by individuals acting pursuant to the state prejudgment statute and that he has sustained damages in excess of \$10,000.

C. The Abstention Doctrine

It was argued before the *Klim* court that even if the court has proper subject matter jurisdiction, "it should nevertheless stay its hand and defer to the state courts of California for a determination as to the constitutionality of California Civil Code, Section 1861."¹⁰⁴ This argument is predicated upon the judicial doctrine of exhaustion of state remedies and the federal doctrine of abstention. The former doctrine has been consistently rejected as a prerequisite to the maintenance of actions in the federal courts under the statutes discussed above.¹⁰⁵ The abstention doctrine, on the other hand, is based more upon the concept of comity than upon the requirements for jurisdiction. The rationale of this doctrine is that state courts should be permitted to adjudicate matters within their sphere of competence thereby avoiding unnecessary federal-state friction. The abstention doctrine has been regarded with increasing disfavor by the federal courts and is now employed only in exceptional situations.¹⁰⁶ In the *Hall* case, the Court of Appeals for the Fifth Circuit stated that the district court's dismissal of the challenge to the "landlord's lien" law on the grounds that the tenants were required to exhaust their state remedies, was erroneous in light of one hundred years of litigation under section 1983.¹⁰⁷ The court reiterated the Supreme Court's position that the abstention doctrine is applicable only in those circumstances where

¹⁰¹ *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

¹⁰² See discussion on pp. 715-16 *supra*.

¹⁰³ 398 U.S. 144, 203 (1970) (separate opinion concurring in part and dissenting in part). See quotation on pp. 717-18 *supra*.

¹⁰⁴ 315 F. Supp. at 117.

¹⁰⁵ See, e.g., *Damico v. California*, 398 U.S. 416, 417 (1967); *McNeese v. Board of Education*, 373 U.S. 668, 671 (1963); *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

¹⁰⁶ See, e.g., *Zwickler v. Koota*, 389 U.S. 241, 248 (1967); *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959). A special circumstance in which abstention may still be applied would be a case involving a recently enacted statute which had not yet been interpreted by the state courts. See *Albertson v. Millard*, 345 U.S. 242, 244 (1953).

¹⁰⁷ 430 F.2d at 435.

federal constitutional claims are grounded on the uncertainty created by the "strands of local law woven into the case."¹⁰⁸ In examining the landlord's lien statute, the *Hall* court emphasized that where "there can be no doubt as to what state law provides, there is no place for abstention."¹⁰⁹ It seems apparent that there can be no question as to the meaning and effect of most, if not all, of the procedures authorized by state prejudgment attachment statutes. The uniform methods sanctioned by the replevin statutes in *Laprease* and *Fuentes* defy any interpretation which would avoid the constitutional issues raised; consequently, the abstention doctrine should not preclude the federal courts from exercising jurisdiction in similar cases arising in the future. The *Klim* decision recognized that abstention is improper where there is before the court no controlling question of state law, and it found no obstacle to its passing upon the constitutionality of the "innkeeper's lien" statute, which was neither new nor ambiguous in its terms or applicability.¹¹⁰ The long history of typical state prejudgment attachment statutes and years of litigation defining their limits and functions would also seem to argue against application of the abstention doctrine in cases challenging the validity of such statutes in federal courts.

D. *Adjudication by a Three-Judge Federal Panel*

The *Laprease*, *Swarb*, and *Fuentes* courts were all decided by three-judge district courts convened pursuant to 28 U.S. Code, Section 2281 which provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State Statute by restraining the action of any officer of such state in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under state statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.¹¹¹

The parties in an action before a three-judge panel have the right of direct appeal to the United States Supreme Court without the necessity of intermediate review or the difficulty of obtaining the more discretionary writ of certiorari.¹¹² As indicated by the court in the *Hall* case, a three-judge federal panel has jurisdiction only if the statute

¹⁰⁸ Id. at 437.

¹⁰⁹ Id.

¹¹⁰ 315 F. Supp. at 118.

¹¹¹ 28 U.S.C. § 2284 (1964) sets forth the procedures for convening a three-judge federal panel and prescribes the composition of the panel. See generally Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964).

¹¹² 28 U.S.C. § 1253 (1964).

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sought to be invalidated has statewide application and the injunctive relief sought will run against a state officer.¹¹³ Actions involving the constitutionality of state statutes obviously meet the first requirement, but problems often arise in attempting to define the meaning of the term "state officer" for purposes of section 2281. A sheriff authorized to execute writs of replevin is clearly within the meaning of the statutory phrase,¹¹⁴ but private citizens undertaking unilateral action pursuant to state "self-help" statutes are held not to be included.¹¹⁵ Both the *Klim* and *Hall* courts rejected the plaintiffs' requests that three-judge federal panels be convened, because the innkeeper and landlord were both private parties, and in neither case did the plaintiff seek to join a state or a local officer as a party defendant.¹¹⁶ The *Hall* decision noted that although the landlord may be performing a *state function*, for purposes of the "state action" requirement, "this does not mean that he becomes a state officer for purposes of section 2281—'an enactment technical in the strict sense of the word and to be applied as such.'"¹¹⁷ It seems clear, however, that plaintiffs seeking to prevent *private* parties from seizing property pursuant to a state "self-help" statute, without notice or a prior hearing, will have little success in obtaining a three-judge court to hear their claims. In such cases the plaintiff should seek a declaratory judgment from a single-judge district court. For, as the court in *Hall* observed in declining the plaintiff's request for a three-judge panel: "[W]e do not deprive the plaintiffs of an opportunity for an effective remedy. The one-Judge Court can certainly give this [claim] the expeditious treatment that is required."¹¹⁸

CONCLUSION

The current trend of judicial decisions extending the *Sniadach* rationale beyond the context of wage garnishment and applying it to state statutes permitting prejudgment attachment of other forms of property portends further such extensions in the future.¹¹⁹ Inevitably,

¹¹³ 430 F.2d at 442.

¹¹⁴ The *Klim* court observed:

[N]umerous cases have relaxed this requirement [that the relief sought run against a state officer] by authorizing the convening of a statutory three-judge Court when an injunction is sought to restrain a local officer from performing a function embodying a policy of statewide concern or where the issue involved has statewide application

315 F. Supp. at 113 (Emphasis in original.). Accord, *Spielman Motor Sales Co. v. Dodge*, 395 U.S. 89, 93 (1935). *Valtierra v. Housing Authority of City of San Jose*, 313 F. Supp. 1, 2-3 (N.D. Cal. 1970).

¹¹⁵ *Hall v. Garson*, 430 F.2d 430, 443 (5th Cir. 1970).

¹¹⁶ *Id.* at 442-43; *Klim v. Jones*, 315 F. Supp. 109, 113 (N.D. Cal. 1970).

¹¹⁷ 430 F.2d at 442.

¹¹⁸ *Id.* at 443.

¹¹⁹ The decisions discussed in this comment may acquire increased significance in light of several actions which have recently been filed seeking to have declared unconstitutional, on the authority of *Sniadach*, Section 9-503, the "self-help" repossession provision, of the Uniform Commercial Code. E.g., *Michaelson v. Walter Laev, Inc.*, Civil

most, if not all, provisions permitting seizure of property without notice and a prior opportunity to be heard will succumb to constitutional challenges. Conceivably the legislatures of the various states could re-draft all extant prejudgment attachment provisions so as to provide for some "meaningful" notice and prior hearing, consonant with "the rudiments of due process." However, requiring adherence to procedural due process in every situation in which prejudgment attachment of property is sought would impose an oppressive burden upon state judicial systems. Given this prospect, the need for a thorough reappraisal of the value of prejudgment attachment statutes seems evident. It is submitted that such a reappraisal will disclose that their questionable utility could not possibly justify the astronomical costs of their retention. Accordingly, all prejudgment attachment provisions should be abolished, with the exception of those protecting an overriding state or creditor interest and which are narrowly drawn so as to be applicable only when that interest is threatened. The policy of allowing private individuals to seek unilateral settlement of their claims with the full sanction and authority of the state harbors vast potential for disruption, inequity and abuse. Subject to the exceptions noted above, the preferable procedure would be to compel all creditors to seek satisfaction of their claims through the conventional adjudicatory processes.

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No. 70-c-249 (E.D. Wis., filed May 6, 1970). Since this provision clearly makes no provision either for notice to the debtor or for a prior hearing on the creditor's claim, the resolution of these cases will foreseeably focus upon the question of whether Section 9-503 of the Code responds to some "situation requiring special protection to a state creditor interest," as expressed by the *Sniadach* Court, and whether, assuming that this is found to be the case, the provision is "narrowly drawn to meet any such unusual condition."

The validity of section 9-503 in terms of the first criterion is dubious, and reconciliation with the second seems impossible. The provision is so broadly drawn as to allow repossession whenever the secured party deems the debtor to be in "default." Since what constitutes a default is a matter of contractual agreement between the parties, the term can encompass virtually any deviation from the contract terms, whether or not a vital or significant interest is threatened. In any event, a final determination of the validity of section 9-503 awaits decision by the courts.