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## CONSUMER ARBITRATION AS AN ALTERNATIVE TO JUDICIAL PRESEIZURE REPLEVIN PROCEEDINGS

ALAN N. RESNICK\*

In 1972, when the Supreme Court held two state statutes allowing prejudgment replevin of chattels without prior notice or an opportunity to be heard violative of the fourteenth amendment of the United States Constitution,<sup>1</sup> consumer advocates applauded the expansion of due process principles. Fear that increased costs and delay resulting from disruption of creditors' remedies might impair the operation of the consumer credit market, however, led the Court to call for legislative innovations designed to minimize these effects.<sup>2</sup>

Two years later, the expansion of due process protections for consumer debtors subsided when, in *Mitchell v. W.T. Grant Co.*,<sup>3</sup> the Court upheld a Louisiana sequestration procedure allowing prejudg-

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

2. Justice Stewart's majority opinion in *Fuentes* allowed flexibility in conducting preseizure hearings and encouraged legislatures to develop procedures to minimize costs and delay, hoping to prevent adverse economic reaction in the credit market which might result from the Court's holding:

The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication. Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test.

*Id.* at 96-97 (footnote omitted).

In a footnote to this call for legislative action, Justice Stewart stated: "Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has little probability of succeeding on the merits of the dispute." *Id.* at 97 n.33.

Several commentators agreed with the suggestion that state legislatures shape new replevin procedures. See, e.g., Krahmer, Clifford & Lasley, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 TEXAS TECH. L. REV. 23, 42 (1972) ("However, for the practicing attorney of today who needs to get a writ of replevin to protect his client, all of these variations must await legislative action."); Patton, *Creditors' Remedies: A Constitutional Analysis*, 28 BUS. LAW. 753, 766 (1973) ("The Supreme Court in *Fuentes* made it abundantly clear that prejudgment seizures will be upheld so long as conducted pursuant to a properly drawn statutory scheme. The problem is out of the hands of the judiciary. The enactment of statutes which will conform to the requirements of due process should not present an insurmountable task.").

3. 94 S. Ct. 1895 (1974).

ment seizure of chattels on a creditor's *ex parte* application.<sup>4</sup> By approving a prejudgment seizure remedy which required neither notice nor prior adversary hearing, as long as other procedural safeguards were employed, the Court made the desirability of prior notice and hearing as much a question of legislative discretion as one of constitutional mandate;<sup>5</sup> now state lawmakers may decide

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4. *Id.* at 1906. Justice White, speaking for the Court, did not overrule *Fuentes*, but distinguished it, pointing out that the statutes considered in *Fuentes* did not provide for "judicial order, approval or participation," did not require the creditor to "make a convincing showing before the seizure," and did not provide for an immediate hearing on the merits of the conflicting debtor-creditor claims. *Id.* at 1904. Nevertheless, it is difficult to disagree with Justice Powell's remark that, to the extent that it required an adversary hearing prior to seizure, ". . . it [is] fair to say that the *Fuentes* opinion is overruled." *Id.* at 1908 (concurring opinion).

5. See notes 39-42 *infra* & accompanying text.

The extent to which legislatures now have discretion to choose a form of replevin which does not incorporate prior notice and hearing is not yet clear. In *Garcia v. Krausse*, 380 F. Supp. 1254, 1259 (S.D. Tex. 1974), a Texas sequestration statute was declared unconstitutional because it "fail[ed] to comply with prior notice and hearing requirements of *Fuentes*, and [did] not measure up to the standards approved by the Supreme Court in *Mitchell*." Unlike the Louisiana statute, the Texas procedure did not provide for allegation of specific facts in a creditor's petition, did not require judicial scrutiny of the petition, and did not provide for an immediate hearing on the merits of the creditor's claim. It would thus appear that a procedure which did not comply strictly with the protective requirements set out in *Mitchell* might have to meet the *Fuentes* test of adequate opportunity for notice and hearing prior to deprivation of property except in extraordinary circumstances. Absent the stringently restricted scope of the Louisiana statute, *Fuentes* prior notice and hearing may remain mandatory. Compare *Guzman v. Western State Bank*, 381 F. Supp. 1262 (D.N.D. 1974) (upholding North Dakota prejudgment seizure statute that provided the same protections as the *Mitchell* statute), to *Sugar v. Curtis Publishing Co.*, 383 F. Supp. 643 (S.D.N.Y. 1974) (invalidating New York prejudgment attachment statute that provided all of the *Mitchell* protections except for the right of an immediate postseizure hearing). See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975).

Other limitations may be imposed by state courts in interpreting their own constitutions. For example, in *Randone v. Appellate Dep't of the Superior Court*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), the California Supreme Court struck down an attachment procedure under section 537(1) of the California Code of Civil Procedure. The section was considered unconstitutional under both article 1, section 13 of the California Constitution and the fifth and fourteenth amendments to the United States Constitution. Language in *Randone* suggests that, in order to comply with due process, a taking of essentials must be based on "an impartial confirmation of the actual, as opposed to probable, validity of the creditor's claim after a hearing on that issue." 5 Cal. 3d at \_\_\_\_, 488 P.2d at 30, 96 Cal. Rptr. at 726. Such a limitation would restrict the usefulness of implementing procedures which determine only probable right to recovery since many goods, such as stoves, refrigerators, cars, and television sets, which are frequently the subject of petitions for replevin or attachment, may well be classified as necessities.

Another problem may arise in connection with state constitutional requirements when legislatures consider the feasibility of providing for an arbitration procedure in which representation by counsel is to be discouraged or barred. In California, for example, due process

whether these particular procedural safeguards are beneficial to both consumer and creditor interests. While resolution of this problem may hinge upon subjective notions of fairness and justice, responsible legislative decisions also will require careful analysis of the economic effects of providing prior notice and hearing to allegedly defaulting consumer debtors.

Mandatory arbitration to test the creditor's claims prior to repossession can provide one procedure that will ensure fairness to the consumer while minimizing burdens on creditors and the consumer credit market. Providing an economical opportunity to be heard by means of mandatory consumer credit arbitration can resolve the present constitutional uncertainty by guaranteeing procedural due process rights in prejudgment replevin proceedings.

### PREJUDGMENT REMEDIES AND BALANCING INTERESTS

#### *Current Remedies and Their Constitutional Limitations*

##### *Prejudgment Seizure of Chattels*

The body of commercial law which developed over past centuries in England and the United States rewards those creditors who most quickly acquire some interest in their debtor's identifiable property.<sup>6</sup> Risks inherent in relying solely upon being the first to gain an interest in the debtor's property by means of a money judgment obtained after default have led creditors to utilize the secured transaction to "reserve" the right to a specific chattel if the debtor fails to meet his financial obligations.<sup>7</sup>

If a debtor defaults on his obligation to a secured creditor, the creditor may take possession of the property designated as collateral

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has been interpreted to require a hearing with an opportunity to be represented by counsel before a person may be deprived of property. *Brooks v. Small Claims Court*, 8 Cal. 3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973); *Mendoza v. Small Claims Court*, 49 Cal. 2d 668, 321 P.2d 9 (1958); *Prudential Ins. Co. v. Small Claims Court*, 76 Cal. App. 2d 379, 173 P.2d 38 (Dist. Ct. 1946). A legislature operating under such a state mandate would be unable to eliminate counsel, and the expense accompanying representation, from any proposed arbitration procedure which included even interim adjudication of the right to possession. See note 91 *infra* & accompanying text.

6. "The Anglo-Saxon system of debt collection has frequently been described as one of 'grab law' where the race is to the swift. He who grabs last may find himself with an empty fist." Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521 (1973).

7. See UNIFORM COMMERCIAL CODE art. 9. For a discussion of the modern use of security interests, see Goodwin, *Repossession and Sale After Default: An Old Remedy Under Fire*, 10 AM. BUS. L.J. 221 (1973).

with a minimum of formality; if the collateral can be taken without a "breach of the peace," the creditor may take possession without employing judicial process.<sup>8</sup> Since most consumer goods cannot be taken without a breach of the peace, however, the use of self-help is rare,<sup>9</sup> the secured creditor often resorting instead to state replevin procedures.<sup>10</sup> Prejudgment replevin has been utilized because it is relatively inexpensive and speedy. Prior to 1972, at least 47 states and the District of Columbia had prejudgment replevin statutes, most of which permitted the replevin of personalty prior to notice and before the debtor had an opportunity to dispute the creditor's claims in any type of judicial hearing.<sup>11</sup>

In recent decades the use of consumer credit in the United States has expanded dramatically, the level increasing from 21.5 billion dollars in 1950 to more than 137.2 billion dollars in 1971.<sup>12</sup> Most

8. UNIFORM COMMERCIAL CODE § 9-503. In contrast to the Supreme Court's recent pronouncements on prejudgment replevin, resolution of the closely related self-help issue has not been attempted. Several lower courts have held, however, that self-help repossession, which does not involve state action, is not subject to federal due process restraints. *Bichel Optical Labs., Inc. v. Marquette Nat'l Bank*, 487 F.2d 906 (8th Cir. 1973); *Adams v. Southern California First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973); *Johnson v. Associates Fin., Inc.*, 365 F. Supp. 1380 (S.D. Ill. 1973); *Kirksey v. Theilig*, 351 F. Supp. 727 (D. Colo. 1972); *Greene v. First Nat'l Exch. Bank*, 348 F. Supp. 672 (W.D. Va. 1972); *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972). See generally Goodwin, *supra* note 7; Krahmer, Clifford & Lasley, *supra* note 2, at 47-50; Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767 (1973); White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503; Comment, *Constitutional Law: State Action: U.C.C. Self-Help Repossession Provisions (§§ 9-503, 9-504) Violate Due Process Requirements*, 57 MINN. L. REV. 621 (1973); Comment, *Self-Help Repossessions Under UCC Section 9-503—"State Action"?*, 44 U. COLO. L. REV. 389 (1973).

9. See White, *supra* note 8. Professor White points out the rarity of self-help repossession in consumer situations, except in cases involving automobiles:

In the first place, it appears that when one speaks of self-help repossession he is talking mostly of automobiles and that virtually all repossession of automobiles is done by self-help. That is, creditors who choose to repossess washing machines, refrigerators, and other household goods must usually resort to judicial repossession in any event because the crossing of the threshold uninvited will constitute a breach of the peace and is therefore not permitted by section 9-503 of the Uniform Commercial Code.

*Id.* at 513 (footnotes omitted).

10. UNIFORM COMMERCIAL CODE § 9-503. The writ of replevin originated at least seven centuries ago as a device to protect feudal tenants from manor lords who took their tenants' possessions illegally to satisfy alleged rent claims. For a discussion of the history of common law replevin, see Countryman, *supra* note 6, at 545-46.

11. Krahmer, Clifford & Lasley, *supra* note 2, at 39. For a detailed list of these states with further categorization and analysis of their replevin statutes, see *id.* at 39-41.

12. NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES

purchases of major durables by low- and middle-income consumers are made on credit, using either conditional sales contracts or consumer loans; seventy-five percent of all low-income consumers use credit for the purchase of at least one major durable product.<sup>13</sup> Sharp acceleration in the use of consumer credit has increased dependence on the secured transaction as a protective device for consumer lenders and retail sellers. Reliance on security interests, in turn, has enabled lenders and retailers to extend credit to consumers who, but for their ability to convey a security interest, would be unacceptable credit risks.<sup>14</sup>

Recent consumer protection legislation has not altered materially self-help or judicial procedures for repossessing collateral. The Uniform Consumer Credit Code, now effective in seven states,<sup>15</sup> subjects consumer debtors to the Uniform Commercial Code repossession procedures with only slight modifications.<sup>16</sup> Curiously, the Consumer Credit Protection Act, enacted by Congress in 1968, is silent on secured transactions and methods of repossession,<sup>17</sup> despite its restrictions on wage garnishment.<sup>18</sup> An early draft of the National Consumer Act prohibited self-help or nonjudicial repossession in consumer situations, but the drafters subsequently retreated from this absolute prohibition.<sup>19</sup> Preservation of secured transaction and

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5 (1972) [hereinafter cited as NATIONAL COMMISSION]. For a discussion of the history of consumer credit in the United States, see *id.* at 5-21. See also R. NUGENT, *CONSUMER CREDIT AND ECONOMIC STABILITY* (1939).

13. D. CAPLOVITZ, *THE POOR PAY MORE* 95, 100 (1967).

14. "By establishing a reliable system of security, the legal system enables sellers and lenders to extend credit in cases where business risks may dictate otherwise. While never a substitute for sound evaluation practices, the fact of security tends to expand rather than limit the extension of credit." Speidel, *Enforcing Security Interests in Consumer Goods: Some Notes on the Vicious Cycle*, 7 U. RICH. L. REV. 187, 192 (1972).

15. The Uniform Consumer Credit Code was drafted by the National Conference of Commissioners on Uniform State Laws. The final draft, approved by the Commission and the American Bar Association in 1968, has been enacted in the following states: Colorado, Idaho, Indiana, Kansas, Oklahoma, Utah, and Wyoming. 1 CCH CONSUMER CREDIT GUIDE ¶ 4770 (1974). See generally Braucher, *Consumer Credit Reform: Rates, Profits and Competition*, 43 TEMP. L.Q. 313 (1970).

16. UNIFORM CONSUMER CREDIT CODE §§ 2.407, 5.103. These slight modifications, which primarily limit cross-collateral security interests of sellers and provide minimum monetary balances needed for repossession, are discussed in Curran & Fand, *An Analysis of the Uniform Consumer Credit Code*, 49 NEB. L. REV. 727, 740 (1970).

17. 15 U.S.C. §§ 1601-81t, 18 U.S.C. §§ 891-96 (1970).

18. 15 U.S.C. §§ 1671-77 (1970).

19. NATIONAL CONSUMER ACT § 5.204 (First Final Draft, 1970) prohibited self-help or nonjudicial repossession and required the filing of a complaint and a preseizure hearing. Section

repossession procedures in consumer protection legislation indicates that these commercial devices serve a vital function in the consumer credit market for both consumer and creditor.

### *Prejudgment Remedies and Due Process*

The first major threat to prejudgment summary remedies came in 1969 when, in *Sniadach v. Family Finance Corp.*,<sup>20</sup> the Supreme Court declared that prejudgment wage garnishment contravened the due process clause of the fourteenth amendment if it permitted withholding wages prior to notice and an opportunity for the defendant to be heard.<sup>21</sup> For the first time, the Court restricted a prejudgment summary remedy by applying due process principles to debtor-creditor relationships.

The scope of *Sniadach* was limited in two significant ways, however. First, Justice Douglas, speaking for the Court, acknowledged that "[s]uch summary procedure may well meet the requirements of due process in extraordinary situations,"<sup>22</sup> hinting that situations requiring "special protection to a state or creditor interest" would be sufficiently "extraordinary."<sup>23</sup> Second, he emphasized the distinctive nature of wages as opposed to other forms of personal property, pointing out that the deprivation of wages can "drive a wage-earning family to the wall."<sup>24</sup>

Although it appeared that the *Sniadach* principles might be limited strictly to situations involving prejudgment deprivation of wages, the holding generated much speculation concerning the validity of other summary creditor remedies.<sup>25</sup> This potential for limit-

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5.112 of a subsequent draft, however, proposed in December 1970, expressly allowed repossession without judicial process if it could be done without breach of the peace or entrance into a dwelling. Speidel, *supra* note 14, at 198 & n.35.

20. 395 U.S. 337 (1969). See generally Brown, *A Meaningful Opportunity to Be Heard*, 46 ST. JOHN'S L. REV. 25 (1971); Countryman, *supra* note 6; Kennedy, *Due Process Limitations on Creditors' Remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 AM. U.L. REV. 158 (1970); Note, *Summary Creditor Remedies: Going . . . Going . . . Gone?*, 10 SAN DIEGO L. REV. 292 (1973) [hereinafter cited as *Summary Creditor Remedies*].

21. 395 U.S. at 342.

22. *Id.* at 339.

23. *Id.* The Court also implied that garnishment to obtain quasi-in-rem jurisdiction would not be impaired by *Sniadach* principles. *Id.*

24. *Id.* at 341-42.

25. The case was described as a "silent revolution" by one commentator, Brown, *supra* note 20, at 26, and as the "constitutional explosion of 1969" by two others, Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973).

ing other summary remedies was indicated further in 1972 when the Supreme Court, in *Fuentes v. Shevin*,<sup>26</sup> reviewed the constitutionality of Florida<sup>27</sup> and Pennsylvania<sup>28</sup> statutes which permitted summary seizure of chattels without prior notice and an opportunity to be heard.<sup>29</sup> Both statutes were held unconstitutional on their face as violative of the fourteenth amendment by applying *Sniadach* due process principles to replevin procedures.<sup>30</sup>

For two years *Fuentes* made questionable the validity of most state replevin statutes by its declarations that even a temporary deprivation of property must be preceded by notice and an opportunity for a fair hearing<sup>31</sup> and that the fourteenth amendment protects "any significant property interest,"<sup>32</sup> including a mere possessory interest. The Court reiterated that the requirements of due process may be excused only in "extraordinary situations."<sup>33</sup>

By upholding a Louisiana sequestration statute in *Mitchell v. W.T. Grant Co.*,<sup>34</sup> however, the Supreme Court retreated from its

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26. 407 U.S. 67 (1972).

27. FLA. STAT. ANN. §§ 78.01-.13 (Supp. 1972-73).

28. PA. STAT. ANN. tit. 12, § 1821 (1967).

29. The Florida appellant and three of the Pennsylvania appellants had purchased household goods under conditional sales contracts; in each case the sellers thereafter obtained writs of replevin, claiming that installment payments were delinquent. The fourth Pennsylvania appellant had been in a dispute with her former husband, a local deputy sheriff, over custody of their son; a writ had been issued, upon application of the father, to seize the boy's furniture, toys, and clothing. 407 U.S. at 70-72.

The Florida statute made replevin available to recover goods "wrongfully detained by any other person," upon filing a complaint, which alleged wrongful detention in a conclusory fashion, along with a bond for double the chattel's value. The Pennsylvania procedure was similar, but required the applicant merely to submit his request with an affidavit stating the value of the property to be replevied. In both states the writ could be issued by a clerk without prior hearing or judicial scrutiny of the application. Upon issuance of the writ, in both states the sheriff was directed to seize the goods and hold them for three days before delivering them to the applicant, during which time the defendant could recover the goods by posting his own bond. In Florida, the plaintiff was required to institute a suit for repossession which would determine the merits of his claim; in Pennsylvania, the defendant had to initiate suit himself if he disputed the merits of the claim. *Id.* at 73-78.

30. *Id.* at 96.

31. *Id.* at 84-85.

32. *Id.* at 86, quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

33. *Id.* at 90. See notes 22-23 *supra* & accompanying text.

34. 94 S. Ct. 1895 (1974). The Louisiana sequestration statute upheld in *Mitchell* was quite similar to the Florida and Pennsylvania replevin statutes struck down in *Fuentes*. See note 29 *supra*. The saving differences in the Louisiana statute, for the *Mitchell* Court, were (1) limited grounds for issuance of the writ, (2) a requirement of specific, factual allegations in the application, (3) consideration of the application by a judge rather than a clerk, and (4)



sweeping statements in *Fuentes*. Justice White, speaking for the majority, was ". . . convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that [in *Mitchell*]," to allow the Louisiana statute to be upheld without overruling *Fuentes*;<sup>35</sup> *Fuentes* did "not require the invalidation of the Louisiana sequestration statute, either on its face or as applied . . . ."<sup>36</sup>

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opportunity for an immediate hearing on the merits after issuance and execution of the writ. *Id.* at 1899-1905.

The *Mitchell* Court pointed out that "[i]n Florida and Pennsylvania property was only to be replevied . . . if it had been 'wrongfully detained.' This broad 'fault' standard is inherently subject to factual determination and adversarial input. . . . In Louisiana, on the other hand, the facts relevant to obtaining a writ of sequestration are narrowly confined. As we have indicated, documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default." *Id.* at 1905.

Articles 3571 and 3501 of the Louisiana Code of Civil Procedure provided the foundation for issuance of the writ of sequestration. The former stated the grounds for sequestration, and the latter provided that the writ was available only when specific facts supporting the grounds asserted were presented in a verified petition or affidavit. *Id.* at 1899. In contrast to the Florida and Pennsylvania procedures, "[t]he writ . . . will not issue on the conclusory allegation of ownership or possessory rights." *Id.*

In both Florida and Pennsylvania the writ was issued by a clerk who reviewed the application to see that it was in proper form but did not evaluate the merits of the claim made therein. In Louisiana, on the other hand, "the clear showing required must be made to a judge, and the writ will issue only upon his authorization." *Id.*

Finally, in the *Fuentes* statutes a hearing on the merits was not immediately available to the defendant-buyer, who "would 'eventually' have an opportunity for a hearing" in Florida, but who would not be assured even of this in Pennsylvania unless he himself instituted an action. *Id.* at 1904. In contrast, "Louisiana law expressly provide[d] for an immediate hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued.'" *Id.* at 1905.

The distinctions relied upon in *Mitchell* may not be as clear as they appeared to the Court, especially as guidelines for drafting constitutional possessory action statutes. Justice Stewart, in dissent, viewed the *Mitchell* facts as "constitutionally indistinguishable" from *Fuentes*, suggesting that the Court had ". . . simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent." *Id.* at 1913.

While this uncertainty eventually may be eliminated by the Court, the current status of the law should not lead to forbearance in the legislative search for an accommodation of the conflicting interests in the credit market. Indeed, the irresolute concept of consumer due process was noted by the *Mitchell* Court in a discussion of recent proposals for consumer credit reform: "We indicate no view whatsoever on the desirability of one or more of the proposed reforms. The uncertainty evident in the current debate suggests caution in the adoption of an inflexible constitutional rule." *Id.* at 1906 n.13. By citing the incertitude with which potential solutions are being sought, Justice White seemed to beckon novel approaches to the problem, as did Justice Stewart for the *Fuentes* majority. See note 2 *supra* & accompanying text.

35. 94 S. Ct. at 1904. See note 34 *supra*.

36. 94 S. Ct. at 1904.

The extent to which *Mitchell* limits the application of *Fuentes* has yet to be determined. In *Fuentes* the Court declared: "[T]he constitutional guarantee of procedural due process requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible personal property, however brief the dispossession and however slight his monetary interest . . . ."<sup>37</sup> As Justice Powell observed, the Court in *Mitchell* withdrew "significantly from the full reach of that principle . . . ."<sup>38</sup> Exceptions no longer are limited to "extraordinary situations,"<sup>39</sup> for *Mitchell* suggests: "[I]t comports with due process to permit initial seizure on sworn *ex parte* documents, followed by the early opportunity to put the creditor to his proof,"<sup>40</sup> as long as the possessory writ is issued on "ordinarily uncomplicated matters that lend themselves to documentary proof . . . ."<sup>41</sup>

Because *Mitchell* indicates that prejudgment replevin will not be invalidated solely because it may not provide notice or an opportunity to be heard prior to deprivation of possession, legislatures are free to retain summary repossession procedures which operate without prior notice or hearing so long as each such procedure ". . .

37. *Id.* at 1908 (concurring opinion of Justice Powell describing the *Fuentes* decision).

38. *Id.* But see *North Georgia Finishing Co. v. Di-Chem, Inc.*, 95 S. Ct. 715 (1975).

39. See note 33 *supra* & accompanying text.

40. 94 S. Ct. at 1901.

41. *Id.* The Court expressed concern for the creditor's risk involved in delaying seizure to allow time for notice and hearing. *Id.* at 1900-01. A major factor in weighing this risk in *Mitchell* was that ". . . under Louisiana law, the seller's vendor's lien expires if the buyer transfers possession." *Id.* at 1901.

This unique characteristic of Louisiana property law places a great burden on a seller of movable goods:

The Louisiana vendor's privilege is distinctly parallel to the purchase money security interest in consumer goods . . . . [However,] [t]he Louisiana vendor's reliance on this privilege will be more restricted than a purchase money financier's dependence on the [unrecorded] lien under the UCC since the existence of the privilege depends on possession of the object remaining in the purchaser. The privilege has been held lost where the purchaser sells the object to a third party who knows of the privilege, unless the third party assumes payment of the original debt. Even if the purchaser gratuitously transfers the goods to a third party, the privilege will be lost.

Comment, *Security Rights in Movables Under the Uniform Commercial Code and Louisiana Law—A Transactional Comparison*, 40 Tul. L. Rev. 747, 776 (1966).

Although an alternative recorded lien is available under the Louisiana Chattel Mortgage Act, LA. REV. STAT. ANN. §§ 9:5351-64 (Supp. 1974), the unrecorded privilege was the type of lien at issue in *Mitchell*. See LA. CIV. CODE ANN. arts. 3217, 3227 (West 1952). For a discussion of the vendor's lien in Louisiana and a comparison with the Uniform Commercial Code, see Comment, *supra*.

protects the debtor's interest in every conceivable way, except allowing him to have the property to start with . . . ."<sup>42</sup> Nevertheless, the debtor's interest can be protected most fully only by allowing him a voice in the proceeding that may deprive him of possession of his property. *Fuentes* and *Mitchell* illustrate the difficulty of balancing the interests of creditor and debtor in seeking a fair resolution of disputes over possession of property in which each has an interest. Acknowledging the extensive effects in the consumer credit market of any modification of creditor remedies not only accentuates this quandary, it also indicates that arbitration may provide maximum protection to the interests of both creditors and debtors.

### *Economic Factors in Prejudgment Remedies*

A delicate balance between consumer protection devices and effective creditor remedies characterizes the consumer credit market.<sup>43</sup> In its final report, the National Commission on Consumer Finance<sup>44</sup> confirmed the existence of this balance:

Early in the Commission's research program it became apparent that creditors' remedies and collection practices had a direct, personal impact on consumers and on the price and amount of credit available. Illegal and unconscionable collection practices

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42. 94 S. Ct. at 1905. *Mitchell* suggests that the criteria for a constitutionally valid summary repossession procedure will include: (1) mandatory minimal time between deprivation of possession and an opportunity for the defendant to be heard, (2) sworn pleadings on statutorily limited, explicit, and easily documented grounds prior to issuance of the repossession order or writ, and (3) procedures, such as bonding, "to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits." *Id.* at 1904-05.

43. See Patton, *supra* note 2, at 766 ("The elimination of creditors' prejudgment remedies is not an absolute corollary to the vindication of debtors' prejudgment rights. The goal should be to balance the legitimate, but competing, interests of debtors and creditors—not to over-compensate for the inequities that may have existed in the pre-*Sniadach* era."); White, *supra* note 8, at 511 ("It is time that the Court ceased due process balancing simply by assigning appropriately pejorative labels to the losers and instead engaged in a serious attempt to measure the costs and the benefits."); Comment, *Replevin: A Due Process Prescription For An Ancient Writ*, 45 TEMP. L.Q. 259, 266 (1972) ("There is a dearth of evidence reflecting the cost relationship between credit and remedy.").

44. The National Commission on Consumer Finance was established by Title IV of the Consumer Credit Protection Act of 1968. Pub. L. No. 90-321, tit. IV, §§ 401-07, 82 Stat. 164. The purpose of the Commission was to study and appraise the functioning and structure of the consumer finance industry and consumer credit transactions generally. The Commission's findings and recommendations are contained in its final report. NATIONAL COMMISSION, *supra* note 12.

are instruments of economic and social oppression. However, a dearth of legitimate collection tools results in higher costs, leading to higher rates and reduced availability at the margin.<sup>45</sup>

There is little doubt that providing preseizure notice and hearing to debtors under existing court procedures would increase the collection costs of secured creditors. Except when self-help could be employed, secured creditors would incur the expenses of employing an attorney and process server for the preseizure hearing, providing witnesses, and appearing in court.<sup>46</sup> Delay in the seizure process necessitated by giving meaningful notice may result in damage to or deterioration of collateral, and the lack of summary repossession might enable debtors to abscond with collateral upon receiving notice of the preseizure hearing.<sup>47</sup> The secured creditor's alternative to incurring the expense of preseizure notice and hearing would be to forgo completely his right of repossession, depending entirely on postjudgment remedies.<sup>48</sup> This course of action, however, probably

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45. NATIONAL COMMISSION, *supra* note 12, at 1.

46. One commentator described the costs of collection resulting from the application of due process rights to New York replevin procedures:

To comply with the due process requirements, the creditor may well find himself: (1) going to court to obtain an order to show cause directing the debtor to appear and be heard if he wishes; (2) arranging for satisfactory service within defined and sometimes rigid time limits; (3) appearing on the return date with counsel and witnesses, prepared to give testimony in case the debtor appears and objects; (4) having obtained an order on the return date, arranging for seizure by the sheriff or marshal; (5) making subsequent application for a further order authorizing the Sheriff to force entry if delivery was originally denied (perhaps through another order to show cause and followup return date, if the local court deems this a necessary requirement either of discretion or due process); and (6) adjusting to the information subsequently received that entry had been forced, the goods were not found, or, if found, were in a depreciated or valueless state. The creditor will also have incurred the cost of purchasing the undertaking required by statute, apparently at the time of the original application before it is even known whether the ultimate order of seizure will be granted.

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... The certain result is a substantial increase in cost, either through increased legal expenses, decreased recoveries or both.

Gardner, *Fuentes v. Shevin: The New York Creditor and Replevin*, 22 BUFF. L. REV. 17, 28-29 (1972). See also White, *supra* note 8, at 512.

47. Note, *Constitutional Law—State Statutes Authorizing Summary Prejudgment Replevin Orders Held Violative of Constitutional Due Process Requirements*, 41 FORDHAM L. REV. 1051, 1059-60 (1973); See *Summary Creditor Remedies*, *supra* note 20, at 309.

48. Frequent use of this alternative is unlikely. The National Commission on Consumer Finance found that creditors rely heavily on repossession and that "no contract provision

would result in fewer collection recoveries, thereby also increasing the creditor's cost of doing business.

Elimination of summary repossession<sup>49</sup> may result in at least one of four general economic effects: no appreciable effect on the consumer credit market, additional collection costs passed on to consumers in the form of higher interest rates or higher prices, an increase in the minimum downpayment required by creditors, or greater selectivity by creditors in granting credit thereby reducing the availability of consumer credit.

One empirical study, which predicted minimal burdens of prior notice and hearing requirements on the credit market, included personal interviews with representatives of five banks, ten finance companies, and six retail merchants randomly selected in Lubbock, Texas.<sup>50</sup> Because of their infrequent use of the repossession remedy, the creditor representatives presaged no effect on their credit policies. Banks indicated greater concern than either finance companies or retailers, but still foresaw minimal effect.<sup>51</sup> Several obvious limitations tainted this study, including the small number of interviews, a limited geographic area, highly subjective responses, and creditor representatives from a primarily agricultural economy.<sup>52</sup> Although

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gives the creditor more effective protection than security interest and its companion remedy, the right to repossess upon 'default.' " NATIONAL COMMISSION, *supra* note 12, at 27.

49. Despite the *Fuentes*-inspired movement to restrict summary repossession procedures, several observers have sought to discourage any changes in the consumer credit market without prior empirical evidence to substantiate the proposed modification. "Once [the existing legal framework] is upset, it is not readily put in balance. There is no justification for tampering with our present structure of law until there is adequate consideration of the possible consequences." Kripke, *Collection Spite, An End to Academic Overreaction, And the Next Curricular Step*, 33 U. PITT. L. REV. 681, 684 (1972). See also Dunham, *Empiricism, Law Reform and Consumer Protection*, 23 J. LEGAL ED. 153 (1970); King, *The Search For Consumer Justice*, 23 J. LEGAL ED. 151 (1970). Although such hesitancy was perhaps an unarticulated premise of the *Mitchell* ruling, it should not lead to reluctance to experiment with new techniques, such as arbitration, as a means of balancing conflicting interests in the credit market.

50. Krahmer, Clifford & Lasley, *supra* note 2, at 54-62.

51. An analysis of these overall results indicates that there is no need for the credit market to be unduly concerned with the possible effects of *Fuentes*. . . . Default occurs in only a small percentage of total loans made. Creditors stated that in many of these defaults repossession as a collection remedy is not feasible and in those few defaults where repossession is feasible, the vast majority of debtors will voluntarily give up the collateral. This greatly diminishes the number of defaults where involuntary repossession is an important collection remedy.

*Id.* at 62.

52. These limitations were acknowledged by the authors. *Id.* at 56.

the conclusions reached may have little, if any, application to the national consumer credit market, the Texas study indicates that one cannot ignore entirely the seemingly unlikely possibility that elimination of summary repossession would have no effect on the credit market.

Nevertheless, an increase in the cost of purchasing goods on credit seems a more logical possibility. Inasmuch as a seller of goods or services who suffers an increase in the cost of doing business usually passes the increase on to the consumer in the form of higher prices, creditors faced with increased collection costs presumably will raise the price of credit.<sup>53</sup> Although existing state usury laws might curtail increases in interest rates,<sup>54</sup> restrictions on prejudgment remedies could lead to pressure for increased rate ceilings with increased collection costs providing the justification. Even without amendment of present usury laws, retail merchants could pass on their additional costs in the form of higher prices on consumer goods.<sup>55</sup>

Rather than raise the price of consumer goods, the retail merchant may choose to guard himself from loss due to increased collection costs by requiring larger downpayments. Professor James White noted that the probability of default on a consumer loan, "even by the poorest credit risks," decreases as the size of the downpayment increases.<sup>56</sup> Demands for higher minimum downpayments necessarily will result in denial of credit to consumers unable to meet such demands since there is little, if any, difference to the marginal consumer between an increased downpayment requirement and an outright denial of credit.<sup>57</sup> Moreover, reduced credit availability may result even without increased downpayments, because increased collection costs may motivate credit grantors to be more selective in extending credit. Even without conscious selectiv-

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53. See White, *supra* note 8, at 512; Note, *Constitutional Law—Due Process—The Fuentes Case: Sniadach Made Clear*, 22 DEPAUL L. REV. 499, 509 (1972).

54. NATIONAL COMMISSION, *supra* note 12, at 91-108.

55. Senator John Sparkman, a member of the National Commission on Consumer Finance, recognized that restrictions on creditors' remedies could cause increases in the price of goods. "I have always supported recommendations and legislation designed to benefit the consumer if in doing so we could strike a delicate balance so that the consumer is, in fact, protected without . . . driving up the cost of consumer goods and items as well as credit." *Id.* at 219 (separate statement).

56. White, *supra* note 8, at 522.

57. As used herein, "marginal consumers" refers to those consumers who present the highest probability of default, but who nonetheless would be granted at least some credit prior to the modification of existing creditor remedies. Typically, the marginal consumer earns a low income and depends on credit to purchase durable household goods and other necessities.

ity, increased interest rates or sales prices effectively may reduce credit availability by indirectly excluding marginal consumers from the credit market.<sup>58</sup>

It has been suggested that a reduction in consumer credit availability may be beneficial socially because it would eliminate overextension of credit to those who are likely to default.<sup>59</sup> Professor Homer Kripke has isolated the basic error in this approach: "[I]t assumes that default represents fault on the part of the creditor in the extension of credit."<sup>60</sup> Many sociological factors determine whether a debt will be paid;<sup>61</sup> to determine the overall desirability of reduced credit

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58. See White, *supra* note 8, at 512; Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 U. FLA. L. REV. 60 (1972); Summary *Creditor Remedies*, *supra* note 20, at 306-09; Comment, *Replevin: A Due Process Prescription For An Ancient Writ*, 45 TEMP. L.Q. 259, 265 (1972).

The National Commission on Consumer Finance concluded that there is "little doubt" that the availability of credit would be "severely curtailed if the right to a security interest and to repossess were restricted." NATIONAL COMMISSION, *supra* note 12, at 30.

A study by the *Yale Law Journal* shows the effect of legislation which eliminated the holder-in-due-course doctrine. Comment, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618 (1969). Discussing the results of this study, Allison Dunham emphasized a significant decline in the number of contractors, retailers, and builders supplying home improvement services to consumers. The Yale study showed that both quality and shoddy suppliers were forced out of business because they were unable to extend credit to consumers profitably, illustrating the correlation between restrictions on creditors remedies and the availability of credit. Dunham, *Empiricism, Law Reform and Consumer Protection*, 23 J. LEGAL ED. 153, 156-57 (1970). Restrictions on prejudgment replevin seemingly would have a similar effect.

The National Commission on Consumer Finance concurred:

Restrictions on creditors' remedies make the creditors' position less favorable than if they had full use of all legal collection tools. In the face of limitations on remedies a creditor can either (1) increase rates to cover added collection [costs] and bad debt losses or (2) maintain the same rates but exercise more selectivity in granting credit. To the extent that borrowers are sensitive to rates charged for credit, the first option will find less demand for credit at the higher price. The second will result in fewer qualified borrowers. Both will result in reduced availability.

NATIONAL COMMISSION, *supra* note 12, at 114.

59. See Anderson & L'Enfant, *Fuentes v. Shevin: Procedural Due Process and Louisiana Creditor's Remedies*, 33 LA. L. REV. 62, 80 (1972); Note, *State Action and Waiver Implications of Self-Help Repossession*, 25 ME. L. REV. 27, 42 (1973). While expressing no personal opinion on its merits, Judge Robert Braucher characterized this subsidiary issue in consumer protection advances as determining "how many low-income consumers should be excluded from the credit market." Braucher, *Consumer Credit Reform: Rates, Profits and Competition*, 43 TEMP. L.Q. 313, 327 (1970).

60. Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 29 (1969).

61. NATIONAL COMMISSION, *supra* note 12, at 43 (Exhibit 3-1).

availability, these factors must be considered along with an appreciation for the importance of providing credit to marginal consumers.<sup>62</sup> Additionally, denial of credit to low-income consumers may lead to increased discontent in poverty areas or to increased theft, or it may cause marginal consumers to patronize illegal credit grantors. Illegal lenders undoubtedly will accommodate consumers excluded from the legal credit market, and certainly the collection practices of these lenders do not conform to due process requirements.<sup>63</sup>

The dangers of higher interest rates, higher prices of goods, higher downpayment requirements, and less availability of credit resulting from increased costs of collection make simple abolition of summary prejudgment remedies of questionable benefit. The appearance of *Fuentes* and *Mitchell* within the space of two years illustrates the difficulties in balancing debtor and creditor interests in consumer disputes. It is time for consumer advocates and legislators to consider seriously an alternative to present procedures which will maintain the speed and economy of summary creditor remedies while providing the fairness of notice and an opportunity to be heard to the consumer. Such an alternative can be found in arbitration.

### CONSUMER ARBITRATION

Arbitration is "[t]he submission for determination of disputed matter to private unofficial persons selected in manner provided by law or agreement."<sup>64</sup> Although usually voluntary and dependent upon a contractual provision regarding future disputes, it also may be compelled by statutes.<sup>65</sup> Unlike mediation, arbitration results in

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62. Kripke noted: "[W]e cannot adopt restrictions on remedies so punitive as to put the credit sellers in the poverty areas, and their financiers, out of business. Despite the present high social cost, they serve a social purpose. The demand for modern appliances and other amenities, and for such necessities as color television and stereo sets, is irresistible at all levels of poverty, including that of welfare clients." Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 479 (1968).

The National Commission on Consumer Finance recognized the important policy considerations involved in a denial of credit to marginal consumers, but took no affirmative position. "Unfortunately, the Commission has been able to devise no empirical method for determining who should get credit, how much credit, what kind of credit, and at what price." NATIONAL COMMISSION, *supra* note 12, at 2.

63. See Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 U. FLA. L. REV. 60, 111 (1972).

64. BLACK'S LAW DICTIONARY 134 (rev. 4th ed. 1968).

65. Note, *An Analysis of A Technique of Dispute Settlement: The Expanding Role of Arbitration*, 7 SUFFOLK U.L. REV. 618, 619 (1973) [hereinafter cited as *Dispute Settlement*].



a binding decision rendered by the unofficial tribunal, thus providing a substitute for litigation.

As one of the oldest methods of dispute settlement, arbitration ". . . no doubt pre-dates our traditional judicial system and, in some respects, is the philosophical and procedural father of civil litigation";<sup>66</sup> references to its use can be found in mythology, fable, and even Biblical verse.<sup>67</sup> It has played a major role in the field of labor-management relations since the early part of the twentieth century, especially since World War II. It has played a lesser role in commercial dispute settlement, but this use also has increased since the 1940's.

The first modern arbitration statute, enacted in New York in 1920,<sup>68</sup> subsequently was copied by most state legislatures. These statutes make arbitration agreements enforceable, confer certain powers upon arbitrators, and limit the scope of judicial review of arbitration awards.<sup>69</sup> A comparable federal statute also has been enacted, governing circumstances where the parties otherwise would have access to federal diversity jurisdiction.<sup>70</sup>

The attractiveness of arbitration as a means of resolving disputes outside the courtroom has increased in recent years. While on the Court of Appeals for the District of Columbia Circuit, Chief Justice Warren Burger advocated its expanded use: "[T]here are *better* ways of resolving private disputes, and we must in the public interest move toward taking a large volume of private conflicts out of the courts and into the channels of arbitration."<sup>71</sup>

A properly designed debtor-creditor arbitration system could allow quick, low-cost settlement of consumer credit disputes while giving the debtor an opportunity to appear and be heard. To be effective such a system must be mandatory, limited in scope, and characterized by relaxed evidentiary and procedural rules. Careful attention to minimizing costs, time, and complexity in developing

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66. Lippman, *Arbitration As An Alternative to Judicial Settlement: Some Selected Perspectives*, 24 ME. L. REV. 215, 215-16 (1972).

67. *Dispute Settlement*, *supra* note 65, at 618.

68. The New York arbitration provisions are now contained in N.Y. CIV. PRAC. LAW §§ 7501-14 (McKinney Supp. 1973).

69. Lippman, *supra* note 66, at 216.

70. 9 U.S.C. §§ 1-14 (1970).

71. Address by Warren Burger, Meeting of the American Arbitration Association, November 1968, in Lippman, *supra* note 66, at 215 n.1.

consumer arbitration can produce an appropriate forum for fair and speedy settlement of consumer disputes.

*Arbitration hearings should be limited in scope.*

In order to provide a speedy and inexpensive procedure for obtaining a writ of replevin, the arbitration statute should limit the scope of mandatory arbitration solely to the question of whether a writ should issue, focusing on whether there is a clear showing that the plaintiff-creditor is likely to prevail at a trial on the merits.<sup>72</sup> The debtor should be given an opportunity to rebut the creditor's evidence and interpose affirmative defenses, and the arbitrator should award or withhold the writ on the basis of the probable outcome at trial. If the writ is not granted, the plaintiff should have the right to proceed to seek judgment on the merits in court; if the writ is granted, the plaintiff still should be required to proceed to judgment within a specified time period, thus ensuring that the debtor will be afforded a full trial on the merits.<sup>73</sup>

By limiting the scope of mandatory arbitration to the issue of whether a writ should be granted, the creditor will be relieved of the expensive and time-consuming burden of presenting all of his witnesses and evidence. In the usual case, the creditor only will need to present an employee to testify from business records regarding the validity of the consumer credit transaction, the default, and absence of known defenses.<sup>74</sup>

Although the scope of the mandatory hearing should be limited, the parties should have the right to submit the entire dispute to arbitration voluntarily. The arbitrator must exercise the utmost discretion, however, in encouraging submission of the dispute to himself for final adjudication. He should advise the parties of this alternative at the beginning of the hearing, while emphasizing that

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72. This "clear showing" would seem consonant with due process as discussed in *Mitchell*, while providing the notice and hearing required by *Fuentes*. See *Mitchell v. W.T. Grant Co.*, 94 S. Ct. 1895, 1899, 1905 (1974).

73. Opportunity for early hearing on the merits would seem to be required by *Mitchell*, even though the procedure contemplated here is not *ex parte*. The Louisiana statute's requirement of a subsequent full hearing on the merits was one of the factors the Court cited in upholding the statute's constitutionality. Anything less than a full hearing after repossession might fall short of the *Mitchell* due process standards. See *id.* at 1901, 1904-05. See also note 5 *supra*.

74. That the proof of these issues often may be accomplished by documentary evidence was noted in *Mitchell*. 94 S. Ct. at 1901, 1905.

the right remains to adjudicate the underlying issue in a court of law and, where appropriate, before a jury.<sup>75</sup> Such warning, together with explicit statutory language limiting the power of the consumer arbitration system, is necessary to avoid consumer confusion; every effort should be made to keep the debtor from mistaking the writ of replevin for a binding judgment.

Compulsory arbitration of prejudgment replevin requests should be limited to consumer credit transactions. It is essential that credit be available for the purchase of consumer goods, especially household items, the deprivation of which may cause extreme hardship. Collection costs therefore must be minimized if credit availability is to be maintained; limiting the mandatory arbitration proceeding to the comparatively simple issues of consumer credit will avoid the expense of maintaining a system capable of resolving complex business disputes. Simultaneously, arbitration can prevent temporary deprivation that does not satisfy the due process standards established in *Fuentes* and *Mitchell*, while possibly avoiding the necessity of obtaining expensive legal services in defense of a judicial proceeding. The delicate balance in the consumer credit market thus can be preserved by disregarding policy considerations that may be present in other unrelated areas.<sup>76</sup>

*Arbitration should be mandatory for creditors seeking repossession of goods.*

A successful debtor-creditor arbitration system should be mandatory to avert the otherwise probable avoidance of its use. The need for such compulsion was illustrated in an experiment by the National Center for Dispute Settlement (NCDS), an organization established by the American Arbitration Association to extend arbitration techniques into areas of community dispute other than the traditional commercial and labor relations conflicts. An attempt by

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75. This aspect of the arbitration procedure should be watched closely by legislators and judicial administrators for the purpose of detecting abuses by arbitrators or creditors. If undue pressures are exerted on consumers to forgo their right to a plenary trial, legislative modification should be considered.

76. A supplementary benefit of arbitration is that it avoids placing additional stress on already overcrowded court calendars. The use of a procedure similar to that approved in *Mitchell* would not share this advantage, and, in fact, might aggravate the problem, since the postseizure hearing arguably must be "immediate" to satisfy due process requirements. 94 S. Ct. at 1899, 1901, 1905. This immediacy requirement would give priority status to replevin hearings, necessitating further delays for other civil and criminal matters.

NCDS to arbitrate consumer disputes was a complete failure, however, primarily because of an inability to bring conflicts suitable for arbitration into the system; store managers would not agree in advance to bring disputes to the Center, and staff and budget limitations prevented effectively advertising the service directly to consumers.<sup>77</sup>

Other attempts to implement voluntary arbitration of consumer grievances have been made in recent years, the most comprehensive being that established by the Council of Better Business Bureaus. Although more than 70 of the Council's bureaus are implementing or planning arbitration programs, the existing projects are not succeeding. The unwillingness of businessmen to participate in the projects appears to be the major factor in this failure.<sup>78</sup> Reasons for this reluctance may include mistrust of an unfamiliar procedure, misunderstanding of its benefits, and fear that an arbitrator may either sympathize unduly with consumers or disregard legal rules.<sup>79</sup> Therefore, experience has shown that, if arbitration is to protect both debtors' and creditors' rights to the fullest possible extent, it should be a mandatory initial step to prejudgment repossession.

Several jurisdictions have enacted legislation providing for compulsory arbitration of certain disputes.<sup>80</sup> Although constitutional attacks, primarily based on denial of the right to trial by jury in civil cases, have been made on these statutes,<sup>81</sup> they should not be vulnerable if the procedure concerns only prejudgment possession, since the parties still could be compelled to adjudicate the underlying cause of action in the courts. Even if power is granted to the consumer arbitration system to decide the underlying issue, constitutional attacks may be averted by providing for a trial *de novo* of the underlying issue in the court on petition by either party.<sup>82</sup>

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77. McGonagle, *Arbitration of Consumer Disputes*, 27 *ARB. J.* 65, 72-75 (1972). The problem of advertising directly to consumers was intensified by the need to screen complaints for appropriateness for arbitration and to conduct negotiations to obtain the parties' consent to arbitration. No consumer disputes were ever brought to the Center, and the experiment was abandoned. *Id.*

78. *Dispute Settlement*, *supra* note 65, at 639.

79. See NATIONAL INSTITUTE FOR CONSUMER JUSTICE, *REDRESS OF CONSUMER GRIEVANCES* 7-8 (1973).

80. Lippman, *supra* note 66, at 238.

81. See Annot., 55 A.L.R.2d 432, 440 (1957).

82. See *id.* at 441. Where compulsory arbitration is designed to substitute for a trial on the merits, courts have upheld existing compulsory arbitration statutes if the right to an appeal or a trial *de novo* is provided. See, e.g., *In re Smith*, 381 Pa. 223, 112 A.2d 625, *appeal*

*Rules of evidence and procedural requirements should be relaxed.*

A consumer arbitration statute should provide for relaxed rules of evidence to minimize the complexity, time, and expense of prejudgment replevin hearings. For example, the admissibility of hearsay evidence should be within the sole discretion of the arbitrator; narrative testimony unhampered by technical objections should be encouraged; and the best evidence rule should not be operative.<sup>83</sup> Because rules of evidence are important primarily when a lay jury is the trier of fact,<sup>84</sup> their relaxation should not reduce the arbitrator's ability to determine the probability of plaintiff's success on the merits of the case.

Procedural requirements and formalities also should be minimized. The arbitration statute should recommend brief, simple example forms for petitions for writs of replevin. Written responses to petitions should be optional, while preserving the defendant's right to respond orally at the hearing itself.

*Costs of the arbitration proceeding should be met by the unsuccessful party.*

Cost minimization is a vital prerequisite to the preservation of quick and adequate summary remedies that guarantee the debtor an opportunity to be heard. Several methods may be used to obtain this objective. Eliminating written opinions and cumbersome paperwork can reduce the cost of the proceeding considerably; relaxed service of process rules will produce similar results. Arbitration costs therefore should be substantially lower than in comparable judicial proceedings for replevin. It is certain, however, that some costs will result, and the arbitrator should be given the power to assess costs against the unsuccessful party, as long as the costs do not exceed a specified maximum amount. If the unsuccessful party ultimately prevails at the trial on the merits, the trial court should be empowered to reverse the arbitrator's assessment. The possible burden of

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dismissed, 350 U.S. 858 (1955). It is perhaps more desirable, however, to exclude trial of the underlying issues from mandatory arbitration, allowing such issues to be decided at arbitration only on a voluntary basis. See notes 72-75 *supra* & accompanying text.

83. Only the rules of evidentiary privilege should be unalterable. The policies underlying these rules, which are usually unrelated to probative value, outweigh the procedural benefits to be gained by their elimination. See C. McCORMICK, *LAW OF EVIDENCE* § 72 (1954).

84. Lippman, *supra* note 66, at 240 n.140.

arbitration costs should not discourage either party from prosecuting a meritorious case.

*Lawyers should serve as arbitrators.*

Successful arbitration of prejudgment replevin disputes will depend greatly on the selection of competent arbitrators; lawyers familiar with consumer protection legislation, contract law, and pertinent constitutional safeguards are best qualified to serve in this capacity. Arbitrators with this legal expertise also must be free from bias, however. Attorneys devoted to the furtherance of consumer protection may be too sympathetic to consumers, while attorneys who frequently represent lending institutions, finance companies, or retailers may be creditor-oriented. These attitudes might affect, or appear to affect, the impartiality of the proceeding, potentially discrediting the entire arbitration program.

Numerous selection methods have been used in consumer arbitration proceedings, the two most common being direct appointment by an administrator from a list of competent arbitrators and selection from this list by the parties themselves.<sup>85</sup> The former method is preferable in replevin proceedings, since selection by the parties undoubtedly would be advantageous to creditors, who would be more likely to know the arbitrators from past experience. Consumers, unfamiliar with an arbitrator's previous record, would be inclined to choose one at random. Random selection by an administrator would eliminate this advantage, while also avoiding the delay which otherwise would be encountered while the parties agreed upon an arbitrator.

*Service of process should be by registered or certified mail.*

Requiring personal service on consumers and a lengthy notice period prior to hearing could increase collection costs considerably in prejudgment replevin proceedings. Not only would creditors have to pay for personal service, but the delay between notice and hearing would increase the probability that debtors would either abscond with the collateral or damage and abuse it. Since the creditor should be required to commence a plenary action on the debt within a

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85. See, e.g., NATIONAL CENTER FOR DISPUTE SETTLEMENT, CONSUMER ARBITRATION RULES § 7, May 15, 1971, as amended.

specified time period after the writ of replevin is issued,<sup>86</sup> and since that action must be commenced by the service of a summons and complaint, the service of notice of the arbitration hearing is not the final notice to be given. Therefore, a more flexible method of service is justified in the preseizure hearing. Notice by certified or registered mail would provide an inexpensive, speedy, and reliable method, especially since the receipt can be submitted to the arbitrator as proof of service. Furthermore, in view of widespread abuses by professional process servers in low-income neighborhoods,<sup>87</sup> service by certified or registered mail may be even more reliable than personal service.<sup>88</sup>

Legislatures should attempt to provide for the shortest possible notice period which still will comply with constitutional requirements.<sup>89</sup> Creditors' fears that notice of any type may cause the debtor to abscond with or destroy the property may be assuaged by retaining present *ex parte* remedies for use in limited, extraordinary situations. A showing of potential danger to the chattel if left in the debtor's possession, even if only for the limited notice period under the arbitration procedure, would justify avoiding the notice requirement.<sup>90</sup>

*Advisory commissions should investigate and improve consumer arbitration systems.*

Since numerous arbitration techniques are available for adaptation to consumer dispute resolution, legislatures should provide for continual investigation and evaluation of new methods to make

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86. See note 73 *supra* & accompanying text.

87. One observer has reported that abusive forms of personal service, often referred to as "sewer service," result in thousands of default judgments. "These blatant violations of due process are a major cause of 90 percent-plus rate in default judgments in parts of New York City." B. CLARK & J. FONSECA, *HANDLING CONSUMER CREDIT CASES* 115-16 (1972). See also Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 37-38 (1969); Note, *Abuse of Process: Sewer Service*, 3 COLUM. J.L. & SOC. PROB. 17 (1967); Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 765 (1967).

88. The National Institute for Consumer Justice reported recently: "Service by certified or registered mail is likely to be at least as efficient as the personal service methods currently in use in our large cities." NATIONAL INSTITUTE FOR CONSUMER JUSTICE, *REDRESS OF CONSUMER GRIEVANCES* 19 (1973).

89. A seven-day interval between notice and hearing has been suggested as sufficient to satisfy due process requirements. Patton, *supra* note 2, at 755; Note, *Procedural Due Process—The Prior Hearing Rule and The Demise of Ex Parte Remedies*, 53 B.U.L. REV. 41, 68-69 (1973).

90. Cf. *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972).

arbitration more efficient, speedy, and inexpensive. Experimentation should be encouraged with national or regional conferences among state officials to discuss the results of individual state efforts. Economists should monitor the consumer credit market closely for effectiveness, and constitutional lawyers should act as watchdogs to ensure against the erosion of due process protections.

Study commissions should consider the desirability of discouraging or prohibiting representation by counsel in arbitration proceedings. Debate continues concerning whether representation by counsel is desirable in small claims courts, consumer arbitration proceedings, and other nonjudicial dispute-settling processes.<sup>91</sup> If deemed appropriate in the prejudgment replevin context, a means should be devised to assure all consumers will be able to obtain legal assistance. Because the matter of legal representation is sensitive and complex, it should be investigated carefully to find a solution which is in the best interest of all parties.

Appropriate times and places for holding arbitration hearings also

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91. The importance of providing counsel to consumers in these situations was emphasized by Professor Vern Countryman:

It is probably also true today that most debtors will default on any opportunity the law gives them for a prior hearing before they are deprived of their property or their liberty. But many of them would not if, when they received notice of that opportunity, they had competent legal counsel to advise them as to whether they were in default and whether they had any defenses based on the creditor's default or the creditor's violation of the strictures of a growing body of legislation designed for the protection of consumers.

Countryman, *supra* note 6, at 575. *But see* Lippman, *supra* note 66, at 239-40: "A hallmark of arbitration is its informal procedure. This characteristic, particularly attractive in consumer arbitration, makes it possible for the system to function without requiring attorneys."

The National Institute for Consumer Justice recommended that lawyers and law students be prohibited from appearing before small claims courts except to represent themselves:

There are many reasons why lawyers should be kept out of the small claims court. The typical individual plaintiff will not have a lawyer; he comes to small claims court because his claim is not large enough to warrant hiring one. If the other side appears with a lawyer, the individual litigant will be at a considerable disadvantage. The presence of a lawyer in a proceeding may affect it in a variety of obvious and subtle ways. It may cause the judge to take a less active role in the trying of the case. The judge may be more hesitant to cross-examine and slower to draw out the plaintiff. The lawyer will inevitably complicate the procedure by the use of evidentiary objections, by making motions, and perhaps in other ways. By these and other means he may effectively intimidate the individual plaintiff; he will surely put that plaintiff at a disadvantage.

NATIONAL INSTITUTE FOR CONSUMER JUSTICE, REDRESS OF CONSUMER GRIEVANCES 23 (1973). *But see id.* at 48 (separate statement of Philip Elman, a director of the Institute, expressing disagreement with the Institute's position).



should be investigated. Hearings held in the evening hours or on weekends would reduce greatly the cost to the individual consumer who may otherwise have to sacrifice a day of work to defend against a repossessing creditor. Use of the arbitrator's business office in the evenings or on weekends also would reduce administrative costs of arbitration by utilizing office space already rented for other purposes.<sup>92</sup>

The desirability of requiring and publishing written opinions by arbitrators, the proper scope of judicial review, if any,<sup>93</sup> and the application of rigid rules of law<sup>94</sup> also must be studied fully by state commissions in order to devise arbitration systems which provide maximum efficiency, speed, and justice while minimizing the costs of prejudgment replevin procedures.

### CONCLUSION

Comparison of the *Fuentes* and *Mitchell* opinions reveals the difficulty of providing an effective process for determining prejudgment possessory rights to property securing consumer credit transactions which meets fairness and constitutional due process requirements. *Fuentes*, focusing on the rights of the debtor, enunciated a sweeping requirement of notice and hearing prior to deprivation of possession; *Mitchell*, emphasizing the rights of the creditor, found no denial of the debtor's due process rights in *ex parte* repossession proceedings if accompanied by stringent procedural safeguards. A consumer arbitration system can provide an answer for legislatures seeking to balance the due process rights of debtors with the creditors' need for adequate default remedies, while minimizing the effect of the form of dispute settlement on the credit market. Through arbitration, the spirit and concerns of both *Fuentes* and *Mitchell* can be met.

Extensive social research and economic analysis is essential for intelligent legislative decisionmaking on changes in collection practices and creditors' remedies. Therefore, in addition to establishing this inexpensive and speedy procedure for prejudgment replevin hearings, legislatures should establish advisory commissions to conduct needed studies. These commissions should investigate the ef-

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92. See McGonagle, *supra* note 77, at 77.

93. See generally *Dispute Settlement*, *supra* note 65, at 632-34.

94. See generally F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 321-64 (3d ed. 1973).

fects of decisions such as *Fuentes* and *Mitchell* as well as the operation of consumer arbitration to recommend refinement of the basic arbitration concept.

The inherent ability of legislatures to experiment with novel approaches to pressing problems makes them the appropriate bodies to develop a lasting solution to the prejudgment replevin dilemma. Indeed, the vacillation of the Supreme Court compels this conclusion. Consumer arbitration provides an opportunity to mold a remedy for the present upheaval in the consumer credit market that should not be neglected.