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Constitutional Law- Prejudgment Self-Help Repossession of Secured Property Held Not To Violate Due Process

RECENT DECISIONS

Constitutional Law—PREJUDGMENT SELF-HELP REPOSSESSION OF SECURED PROPERTY HELD NOT TO VIOLATE DUE PROCESS—*Adams v. Southern California First National Bank*, No. 72-1484 (9th Cir., Oct. 4, 1973).

The fourteenth amendment to the United States Constitution guarantees that no state shall deprive any person of property without due process of law.[1] Whenever a state is directly involved in the prejudgment repossession of secured property, the debtor's due process rights are clearly violated.[2] But creditors have awaited judicial determinations defining state involvement. The states' Uniform Commercial Code statutes allow private repossessions of secured property without giving the defaulting debtor prior notice or the opportunity for a hearing.[3] There is disagreement over whether such explicit authorization by state statutes constitutes sufficient state involvement to be in violation of the fourteenth amendment.[4]

Statutes allowing state assistance in prejudgment repossessions have been challenged as violative of due process, based on state involvement.[5]

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1. Action taken under color of state law depriving any person of his due process rights is subject to the fourteenth amendment:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

2. *See* Fuentes v. Shevin, 407 U.S. 67, 96-97 (1972).

3. The Uniform Commercial Code as promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, at section 9-503 adopts the common law practice of self-help through prejudgment repossession. Section 9-503 provides in part:

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

Section 9-504 allows for the disposal of the secured property after default and provides in part:

> (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . . .
>
> (2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency.

4. The argument posed by a defaulting debtor who has had his property repossessed is that his state's Commercial Code at § 9-503 allowed the repossession and therefore the creditor acted under color of state law. The debtor then uses this state involvement to bring in the fourteenth amendment. *See* note 9 *infra*.

5. Various state replevin laws provided for state assistance where the creditor decided

The United States Supreme Court in *Fuentes v. Shevin* responded by declaring the Florida and Pennsylvania replevin laws[6] unconstitutional for providing state aid in prejudgment repossessions[7] and held that state action depriving any person of the right to notice or a hearing before repossession of his property is a violation of the due process clause of the fourteenth amendment. But state action was not clearly defined. Those questions dealing with the constitutionality of private actions taken without state participation remained unanswered by the Court in *Fuentes*.[8] Disputes arose before and after *Fuentes* in which debtors argued that the state action contemplated by the fourteenth amendment is not limited to those

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against self-help or where a breach of the peace seemed probable. It was contended that where the creditor elected to ask for and received state aid, the debtor was to be afforded his due process rights. If judgment was obtained before repossession of the property then the debtor was afforded his rights. But the usual situation involved the creditor applying for a writ of replevin and upon issuance the sheriff would repossess the property. In this situation the debtor's due process rights were violated because he lost his property before a hearing was conducted. When a creditor recovered the entire amount owed him by sale of the property, he had no need to go to the courts. *See* Fuentes v. Shevin, 407 U.S. 67 (1972).

6. In most states the action is replevin, but in Virginia the proper action is detinue. *See, e.g.*, VA. CODE ANN. §§ 8-586 *et seq.* (Repl. Vol. 1957), *as amended*, (Cum. Supp. 1973); Lloyd v. Federal Motor Truck Co., 168 Va. 72, 190 S.E. 257 (1937).

Virginia law prior to the adoption of the Uniform Commercial Code provided various procedures to be followed depending upon whether the property was retaken by peaceful repossession or through judicial proceedings. *See* Snead, *Retail Installment Sales: Virginia Remedies on Default*, 16 WASH. & LEE L. REV. 1 (1959).

7. In Florida, replevin actions lie whenever goods have been wrongfully detained. The person seeking relief files a bond for double the value of the property. The writ is issued provided the plaintiff agrees to prosecute the action in court without delay. Once the sheriff seizes the property, the defendant has three days to file a bond of equal value in order to have his property returned. The Pennsylvania procedure is similar except that no court action is required. The debtor either commences court action himself if he wishes to litigate the matter, or he files a counterbond for return of the property. FLA. STAT. ANN. §§ 78.01 *et seq.* (Supp. 1972-73); PA. R. CIV. P. 1037(a), 1073 *et seq.* (1967).

8. The deprivations in *Fuentes v. Shevin* were accomplished by sheriffs who repossessed the property under authority of court issued writs. Therefore, state involvement was obvious and the issue of state action never arose. This left the future of self-help actions uncertain because the Court did not consider the constitutionality of private actions taken without state participation.

Since the United States Supreme Court announced its decision in Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), all types of prejudgment remedies have been challenged. In *Sniadach* the Court found a Wisconsin statute, which allowed wage garnishment without prior notice or hearing, to be in violation of the fourteenth amendment. This decision left many questions unanswered. *See* Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 357-59 (1973). Some courts proceeded to apply the rule to all summary creditor remedies, while other courts felt that it was restricted to wage garnishment.

For a comprehensive list of cases see Fuentes v. Shevin, 407 U.S. 67, 72 n.5 (1972); Adams v. Egley, 338 F. Supp. 614, 618-19 (S.D. Cal. 1972).

cases of active state participation. They contended that the mere adoption of Uniform Commercial Code § 9-503, which allows private prejudgment self-help repossessions, is sufficient state action to violate due process. However, the majority of state and federal courts that have considered this point have disagreed with this contention.[9]

The United States Court of Appeals for the Ninth Circuit in *Adams v. First National Bank*[10] recently passed on the constitutionality of California's Commercial Code sections 9503 and 9504.[11] The court considered whether repossession of motor vehicles by self-help,[12] as authorized by sections 9503 and 9504, is an act under color of state law and therefore "state action" within the meaning of the fourteenth amendment.[13] The plaintiff in *Adams*[14] borrowed one thousand dollars from the Bank of La

9. The United States District Court for the Western District of Virginia is in agreement with these decisions. *See* Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672 (W.D. Va. 1972).

See Baker v. Keeble, 362 F. Supp. 355 (M.D. Ala. 1973); Nicholas v. Tower Grove Bank, 362 F. Supp. 374 (E.D. Mo. 1973); Shelton v. General Elec. Credit Corp., 359 F. Supp. 1079 (M.D. Ga. 1973); Shirley v. State Nat'l Bank, No. 15,319 (D. Conn., April 2, 1973); Colvin v. Avco Fin. Serv. Inc., No. 35-72 (D. Utah, Jan. 4, 1973; Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972); Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971); Weaver v. O'Meara Motor Co., 452 P.2d 87 (Alas. 1969); Giglio v. Bank of Delaware, ___ Del. Ch. ___, 307 A.2d 816 (1973); Northside Motors, Inc. v. Brinkley, 282 So. 2d 617 (Fla. 1973); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (1972); Brown v. United States Nat'l Bank, ___ Ore. ___, 509 P.2d 442 (1973); Plante v. Industrial Nat'l Bank, No. 73-714 (R.I. Super. Ct., April 4, 1973). *Contra*, James v. Pinnix, No. 72J-250(N) (S.D. Miss., Feb. 14, 1973); Michel v. Rex-Noreco, Inc., No. 6729 (D. Vt., Nov. 1, 1972); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972).

10. CCH SEC. TRANS. GUIDE ¶ 52,216 (9th Cir., Oct. 4, 1973).

11. CAL. COM. CODE ANN. § 9503 (West 1964) and VA. CODE ANN. § 8.9-503 (Added Vol. 1965) are identical to UNIFORM COMMERCIAL CODE § 9-503, note 3 *supra*. CAL. COM. CODE ANN. § 9504 (West 1964) and VA. CODE ANN. § 8.9-504 (Cum. Supp. 1973) are identical to UNIFORM COMMERCIAL CODE § 9-504, note 3 *supra*.

12. Self-help repossession is a long-standing practice which developed under the common law. Thirteenth century English law prohibited self-help because it usually resulted in force. The law slowly developed to the point where self-help was allowed if it could be accomplished without a breach of the peace. Buyer and seller agreed by contract that if the buyer defaulted, the seller would have the right to repossess the property wherever he could find it so long as there was no breach of the peace. *See* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 278-87 (1923); L. JONES, THE LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES §§ 1337-39 (6th ed. 1933); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 383 (1956); 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW, 574-78 (1968).

Virginia recognized peaceful repossession long before section 9-503 of the Uniform Commercial Code was adopted in Virginia. *See* Universal Credit Co. v. Taylor, 164 Va. 624, 630-31, 180 S.E. 277, 280 (1935).

13. It is important to remember that self-help repossession per se is not being challenged, but rather self-help repossession by private parties without prior notice or the opportunity for a hearing.

14. The court actually heard appeals from two district courts which reached different

Jolla and executed a promissory note and a security agreement in favor of the bank. The Southern California First National Bank became the successor in interest to the Bank of La Jolla, and after the plaintiff's default, repossessed and sold two of three vehicles securing the agreement.[15] Thereafter, Adams filed suit asserting that he had not been given prior notice or the opportunity for a hearing and asked for damages and declaratory relief. Finding state involvement through section 9503, the United States District Court for the Southern District of California decided that the plaintiff's due process rights had been violated and granted him summary judgment. The United States Court of Appeals for the Ninth Circuit reversed the lower court's holding.[16]

The circuit court agreed with the district court that the fourteenth amendment applies in those cases where there is a deprivation under color of state law.[17] But it stressed that the test for color of state law "is not state

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results. In the District Court for the Southern District of California, *Adams v. Egley* (Egley was a private repossessor hired by the Southern California First National Bank) was consolidated with *Posadas v. Star & Crescent Fed. Credit Union*. Upon similar facts the district court granted both plaintiffs' motions for summary judgment. In the District Court for the Northern District of California, the court reached an opposite result in *Hampton v. Bank of California* by dismissing the complaint for lack of jurisdiction over the subject matter. The United States Court of Appeals for the Ninth Circuit heard appeals from the consolidated cases in the Southern District and an appeal from the cases in the Northern District. All three cases were considered in Adams v. First Nat'l Bank, CCH SEC. TRANS. GUIDE ¶ 52,216 (9th Cir., Oct. 4, 1973).

The facts in all three cases are similar and involve prejudgment self-help repossessions of motor vehicles by private persons. In order to avoid confusion, Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), will be used as the factual basis for further discussion.

15. The terms of the security agreement were as follows:

> Should Debtor fail to make payment of any part of the principal or interest, as provided in said promissory note . . . the whole principal sum unpaid upon said promissory note with interest accrued thereon, . . . shall immediately become due and payable at the option of the Secured Party. Upon the occurrence of any such event of default Secured Party shall have all of the rights and remedies of a Secured Party under the California Uniform Commercial Code, or any other applicable law, and all rights and remedies shall, to the extent permitted by law, be cumulative. Without limiting the generality of the foregoing, upon the occurrence of any such event of default the Secured Party is entitled to take possession of the vehicle and to take such other measures as Secured Party may deem necessary for the protection of the vehicles. . . . CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,307.

16. The court reversed *Adams* and affirmed *Hampton* (see note 14 *supra*) stating that the proper ground for dismissal of *Hampton* was in fact failure to state a federal cause of action and not lack of subject matter jurisdiction. *Id.* at 67,316 (2-1 decision).

17. The trial judge found sufficient state involvement under color of state law to raise a federal question under the Civil Rights Act, 42 U.S.C. § 1983 (1970) and its jurisdictional counterpart 28 U.S.C. § 1343(3) (1970). CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,307; Adams v. Egley, 338 F. Supp. 614, 617-18 (S.D. Cal. 1972).

42 U.S.C. § 1983 states:

involvement, but rather is *significant state involvement.*"[18] The court required a showing of state participation in, or regulation of, the private actions.[19] In *Adams* the property was seized by private creditors without state help.[20] The plaintiff argued that the private action was carried out under a state statute with sufficient state control to violate the fourteenth amendment. The dissenting judge agreed,[21] but the majority did not find either active state participation or state control.[22]

The plaintiff argued state involvement based on four grounds. He contended that the state regulated private repossession through its statutes by allowing the prejudgment self-help procedure, restricting disposal of the property, providing for deficiency proceedings, licensing the repossessor, and clearing titles to repossessed vehicles.[23] The court responded that many statutes and laws regulate purely private activity, but there must be some relationship between the state and the individual or some benefit passing between them in order to find significant state involvement.[24] Sec-

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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.

The *Adams* court stated that it is not perfectly clear whether the test used in equal protection cases applies to due process cases, but the "under color of law" test has been treated as the equivalent of the state action requirement of the fourteenth amendment. CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,309. *See* United States v. Price, 383 U.S. 787, 794-95 n.7 (1966). *But cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144, 188 (1970) (Brennan, J., concurring and dissenting).

18. CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,310 (emphasis added) (footnote omitted).

19. The *Adams* court required that a particular relationship or benefit pass as the test for significant state involvement. *Id.* at 67,310. For similar tests see Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961); Giglio v. Bank of Delaware, ___ Del. Ch. ___, 307 A.2d 816, 819 (1973).

Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672, 675 (W.D. Va. 1972), requires "active and direct" state action, stating that "passive state action is not violative of due process."

20. The court cited Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972), in which the United States Supreme Court stated that private actions are not controlled by the fourteenth amendment unless there is significant state involvement. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

21. CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,316-17.

22. *Id.* at 67,309.

23. The plaintiff contended that the state had complete control over every aspect of the private repossession. That it, in effect, authorized, regulated, and encouraged the procedures used. *Id.* at 67,308-09.

24. The court felt that following the plaintiff's arguments, state involvement could be traced to all private contractual relationships or even gifts between individuals. *Id.* at 67,310. *See* Colvin v. Avco Fin. Serv., Inc., No. 35-72 (D. Utah, Jan. 4, 1973); Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972). *See also* note 19 *supra.*

ondly, the plaintiff contended that California's Commercial Code Sections 9503 and 9504 encourage prejudgment self-help by adopting this practice in the statutes.[25] The court found that mere adoption does not encourage the practice; otherwise every statute that codifies a common law practice would "cast the shadow of state action over all activity" and bring all individual wrongs under color of state law merely because a state statute adopted such practice.[26] Thirdly, the plaintiff contended that the creditor was carrying out a public function in that repossession is normally performed by the state.[27] The court responded that repossession has been traditionally a private remedy agreed upon by the parties and not a power delegated to the creditor by the state.[28] Lastly, the plaintiff argued that the particular security agreement used, referred to and incorporated Sections 9503 and 9504 and "any other applicable law" and therefore the creditors acted "with knowledge of and pursuant to" the state law.[29] The court agreed but stated that this knowledge alone was not sufficient to argue significant state involvement.[30]

The plaintiff relied primarily on *Reitman v. Mulkey*[31] in which the United States Supreme Court found a California constitutional amendment to be unconstitutional for significantly involving the state in private racial discrimination.[32] The *Adams* court found that *Reitman* was not controlling.[33] In *Adams* the bank was not an agency of the state, no state official aided in the repossession, and the repossession was not commanded by statute.[34] The action taken was purely private, based on contractual

25. CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,309.

26. The fact that § 9-503 offers a choice between private action and state action is strong argument that the state legislature did not intend to encourage the use of one procedure over the other. *Id.* at 67,310. For the specific language of § 9-503 see note 3 *supra*.

27. *Id.* at 67,309.

28. *Id.* at 67,315.

29. *Id.* at 67,310. For the specific language of the security agreement see note 15 *supra*.

30. *Id.* at 67,310. *See* notes 18 and 19 and text *supra*.

31. 387 U.S. 369 (1967).

32. The amendment prohibited limitations on an individual's right to rent or sell his real property. *Id.* at 381.

33. CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,312. The majority in *Adams* said that *Reitman* was distinguishable for at least two reasons. First, the state in *Reitman* was involved to a far greater degree because the amendment approved what had been previously prohibited. The Uniform Commercial Code sections in *Adams* merely codified existing law, they did not reverse the law. Second, self-help is based on economic motivation and not on the circumvention of constitutional rights which is the intent in racial discrimination cases. The majority felt that a case involving racial discrimination could not control the outcome of a case involving prejudgment self-help repossession of secured property. For a comprehensive list of cases in which other courts are in agreement see CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,312 n.22.

34. The court in Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972), used

agreement. The fact that the bank acted within the law of the state does not involve the state in the action. The private repossession was not coupled with significant state involvement; therefore, due process was not an issue.[35]

The decision in *Adams* provides an element of continuity in the law of prejudgment repossession of secured property by holding that private actions pursuant to and with the knowledge of state statutes allowing such actions are not under color of state law.[36] Where private individuals employ self-help based on a contractual agreement and without explicit aid from the state, there is no significant state involvement by reason of a statute allowing such action. To date, *Adams* is the only federal circuit court decision on this point, but the majority of state and lower federal court decisions are in agreement.[37] It is important in credit transactions that the creditor be able to protect his security upon the debtor's default. Prejudgment repossession is a frequently used protective measure. To strengthen the private agreement, it is suggested that the controlling credit instrument specifically state that the creditor can repossess on default of the debtor without notice or a hearing.[38] On appeal, it is doubtful that the United States Supreme Court would find this practice to be unconstitutional when based upon a statute which does not require or control the challenged repossessions.

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similar tests to determine if private actions had been extended to include significant state involvement.

35. The court recognized that there are many situations where private actions are coupled with state involvement. Each case must be examined individually to see if such involvement exists. State involvement has been found in situations where symbiotic relationships existed between the state and private party; where there was an extensive system of state regulation; where private utility companies possessed certain state authorized powers; where the private party was performing a function normally performed by the state; where some particular power was delegated by the state to the private individual; where action was taken in concert with state officials. The *Adams* court considered and distinguished a long list of cases offered by the plaintiff but could not find in *Adams* the significant state involvement required to bring in the fourteenth amendment. CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,311-16.

36. *Fuentes* was not clear on the question of state involvement in private actions. The United States Supreme Court in *Fuentes* recognized self-help at common law and seemed to indicate that private self-help repossessions hold up today. The *Adams* court interpreted this as distinguishing private actions from state actions in the self-help area and therefore takes a stand on the gap left by *Fuentes*.

37. *See* note 9 *supra*.

38. Mr. Justice White in the minority opinion of *Fuentes* emphasized the importance of private agreements to protect the creditor's interest. 407 U.S. 67, 102 (1972).