

August 2015

Constitutional Law and Secured Transactions: State Action v. Private Action - Uniform Commercial Code Self-Help; Repossession Provisions - Do Not Violate Due Process Requirements; Adams v. Southern California First National Bank

David M. Hunter

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Constitutional Law Commons](#), [Contracts Commons](#), and the [Secured Transactions Commons](#)

Recommended Citation

Hunter, David M. (1974) "Constitutional Law and Secured Transactions: State Action v. Private Action - Uniform Commercial Code Self-Help; Repossession Provisions - Do Not Violate Due Process Requirements; Adams v. Southern California First National Bank," *Akron Law Review*: Vol. 7 : Iss. 2 , Article 4.
Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol7/iss2/4>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

CONSTITUTIONAL LAW AND SECURED
TRANSACTIONS: STATE ACTION V. PRIVATE ACTION—
UNIFORM COMMERCIAL CODE SELF-HELP

REPOSSESSION PROVISIONS (9-503, 9-504)—DO NOT
VIOLATE DUE PROCESS REQUIREMENTS

Adams v. Southern California First National Bank
UCC SEC. TRANS. GUIDE 52,216 (9th Cir. 1973)

SEVERAL YEARS AGO, the United States Supreme Court, in *Sniadach v. Family Finance Corp.*,¹ signaled what has been eventually interpreted in subsequent decisions as the strict measurement of creditors' rights against the requirements of due process set forth in the fourteenth amendment. What has since transpired has been an onslaught of litigation in this area of such magnitude that the due process requirements of prior notice and hearing found in *Sniadach* have been extended to virtually all forms of prejudgment remedies available to the aggrieved creditor.² Despite all of this, the rationale of the Court of Appeals for the Ninth Circuit in *Adams v. Southern California First National Bank*³ evidences an emerging view⁴ that limits the vague scope of *Sniadach*, distinguishes peaceful self-help repossession from summary procedures involving state action, and concludes that repossession under the Uniform Commercial Code is constitutionally sound.

¹ *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) [hereinafter cited as *Sniadach*].

² Post-*Sniadach* decisions considering due process requirements for various summary procedures include, in part: *Replevin: Fuentes v. Shevin*, 407 U.S. 67 (1972); *Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100 (10th Cir. 1970); *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970); *Garnishment: Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Jones Press, Inc. v. Motor Travel Services, Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970); *Larson v. Fetherston*, 44 Wis.2d 712, 172 N.W.2d 20 (1969); *Confession of Judgment: Swarb v. Lennox*, 405 U.S. 191 (1972); *D. H. Overmeyer v. Frick Co.*, 405 U.S. 174 (1972); *Imposition of Landlord's Lien: Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970); *Sale of Goods Destrained for Rent: Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970); *Attachment: Randone v. Appellate Dep't of Super. Ct.*, 5 Cal.3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971), cert. denied 407 U.S. 924 (1972). *Termination of Welfare Payments: Goldberg v. Kelly*, 397 U.S. 254 (1970).

³ *Adams v. Egley*, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub. nom.*, *Adams v. Southern California First Natl. Bank*, CCH SEC. TRANS. GUIDE ¶ 52,216 (9th Cir. 1973) [hereinafter cited as *Adams*].

⁴ *Accord, Colvin v. Avco Financial Services, Inc.*, 12 UCC REP. SERV. 25 (D. Utah 1973); *Kirksey v. Theilig*, 351 F. Supp. 727 (D. Colo. 1972); *Greene v. First Natl. Exchange Bank of Virginia*, 348 F. Supp. 672 (W.D. Va. 1972); *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972); *McCormick v. First Natl. Bank of Miami*, 322 F. Supp. 604 (S.D. Fla. 1971); *Messenger v. Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (1972).

Sniadach and *Fuentes*: Solving and Posing Problems

In order to appreciate fully the rationale and significance of *Adams*, a brief examination of the recent developments in this area of law is important. In 1969, the *Sniadach* decision revealed that the Supreme Court would view at least some deprivations of property pending judgment as violating due process. In that case, the Court found a prejudgment garnishment of wages made pursuant to a Wisconsin statute unconstitutional and that no such remedy could be constitutionally invoked absent prior notice and hearing. The Court was significantly influenced by the harsh effect of garnishment and its imposition of a "tremendous hardship on wage-earners"⁵ which, as a practical matter, served to drive "a wage-earning family to the wall."⁶ Unhappily, *Sniadach* may well have created more problems than it solved. Although the decision evidenced a willingness by the Court to find certain forms of prejudgment remedies unconstitutional, due to some rather unfortunate language in the majority opinion,⁷ the intended scope of the *Sniadach* holding was left open for judicial speculation.⁸

Any uncertainties as to the breadth of *Sniadach* seemed to be dispelled by the Court's recent decision in *Fuentes v. Shevin*.⁹ Decided three years after *Sniadach*, *Fuentes* considers the constitutionality of Pennsylvania and Florida replevin statutes, there used summarily to repossess various consumer goods purchased under conditional sales contracts. Refusing to construe *Sniadach* narrowly, the majority in *Fuentes* stated that due process protection under the fourteenth amendment was not limited to specialized types of property, such as wages, referred to in *Sniadach*, but that "[a]ny significant taking of property by the State is within the purview of the Due Process Clause."¹⁰

⁵ 395 U.S. at 340.

⁶ *Id.* at 341-42.

⁷ Speaking for the majority in *Sniadach*, Mr. Justice Douglas referred to the problem in that case as follows: "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340.

⁸ Lower court decisions in later cases dealing with other forms of prejudgment remedies often viewed M. Justice Douglas' language in *Sniadach* as intentionally limiting. See, e.g., *Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100 (10th Cir. 1970); *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971); *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971); *Young v. Ridley*, 309 F. Supp. 1308 (D.D.C. 1970). Conversely, some courts interpreted *Sniadach* as a broad indictment of all summary creditor remedies. See, e.g., *Randone v. Appellate Dep't of Super. Ct.*, 5 Cal.3d 536, 96 Cal. Rptr. 709, 488 P.2d 13, cert. denied, 407 U.S. 924 (1971); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970); *Jones Press, Inc. v. Motor Travel Services, Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970); *Larson v. Fetherston*, 44 Wis.2d 712, 172 N.W.2d 20 (1969).

⁹ 407 U.S. 67 (1972) [hereinafter cited as *Fuentes*].

¹⁰ *Id.* at 86.

In dissent, three Justices¹¹ accentuated the practical "dollar and cents considerations" of the majority decision. Believing that *Fuentes* would not extend additional protection to the wronged consumer buying on credit, but would only precipitate a flood of tenuous defenses by defaulting debtors, the dissenters were unable to concur with the "ideological tinkering of state law"¹² which they felt would only make credit to low-income consumers either prohibitively expensive or simply unavailable.¹³

Although *Fuentes* did much to clarify the rationale and scope of *Sniadach*, problems in the development of this area of law still remain.¹⁴ And one of a significant and reoccurring nature is framed within *Adams*: Does peaceful self-help repossession which is authorized under the Code qualify as "state action," thus invoking the protection of due process under the fourteenth amendment?

Adams: Is Self-Help Repossession State Action?

In the instant case,¹⁵ respondent George Adams (hereinafter buyer) executed a security agreement in favor of the appellant Southern California First National Bank (hereinafter bank) to cover the purchase price of a motor vehicle. After the buyer's subsequent default and in accordance with the contractual provision allowing the bank to take possession of the vehicle under the California version of the Code or other applicable law pursuant to default, the bank repossessed the automobile through a collection agency and sold it at private sale.

¹¹ Mr. Justice White, with whom Mr. Chief Justice Burger and Mr. Justice Blackmun join, dissented in *Fuentes*, a 4-3 decision. Newly appointed Court members, Mr. Justice Powell and Mr. Justice Rehnquist, did not participate in any aspect of the *Fuentes* decision.

¹² 407 U.S. at 99-102.

¹³ *Id.* at 99-102.

¹⁴ See generally, e.g., Black, *Forward: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967); Clark & Landers, *Sniadach, Fuentes, and Beyond: The Creditor Meets the Constitution*, 59 U. VA. L. REV. 355 (1973); Horowitz, *The Misleading Search for State Action Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); McDonnell, *Sniadach, The Replevin Cases and Self-Help Repossession—Due Process Tokenism?* 14 B.C. IND. & COMM. L. REV. 437 (1973); Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional Analysis*, 14 WM. & MARY L. REV. 767 (1973) [hereinafter cited as *Mentschikoff*]; Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

¹⁵ Two cases were consolidated for trial: In *Adams v. Egley*, the executed security agreement provided for the right of the creditor to take possession of the collateral under the California Commercial Code "or other applicable law" in the event of default. In the companion case, *Posadas v. Star & Crescent Federal Credit Union*, the executed security agreement provided for repossession according to law.

The buyer, alleging federal question jurisdiction,¹⁶ then brought suit in U.S. District Court against the bank asserting that California Commercial Code sections 9503 and 9504 (Code sections 9-503 and 9-504) violate due process of law by providing for repossession and disposition of the collateral by a secured party without prior notice or hearing.¹⁷ Claiming that the relevant legislation enumerating prejudgment remedies reflects a state policy significantly encouraging self-help repossession, the buyer urged the conclusion that summary repossession in accordance with the relevant Code sections constitutes action under "color of state law" within the meaning of the fourteenth amendment.¹⁸ Consequently, it was argued, the failure to afford the buyer notice and hearing prior to repossession rendered the bank civilly liable within the scope of 42 U.S.C. section 1983.

Conversely, Southern California First National Bank challenged the district court's jurisdiction on the ground that no state action or action under color of state law could be shown. Arguing that its right to repossess and dispose of the collateral arises from the private security agreement whose default provisions are self-executing, the bank drew a distinction

¹⁶ Federal question jurisdiction is raised under 28 U.S.C. § 1331 and under the Civil Rights Act, 28 U.S.C. § 1343(3) and 42 U.S.C. 1983. Section 1331(a) confers jurisdiction on the district courts over any civil action which "...arises under the Constitution, laws or treaties of the United States." Section 1343(3) provides that the district courts have jurisdiction over any civil action "[t]o redress the deprivation, under color of any state law... of any right, privilege, or immunity secured by the CONSTITUTION OF THE UNITED STATES..." *Compare* Lynch v. Household Finance Corp., 405 U.S. 538 (1972) (discussion of rights protected under 28 U.S.C. § 1343(3) and interpretation of 42 U.S.C. § 1983 extending civil liability to one who deprives another of "[a]ny rights, privileges, or immunities secured by the Constitution...") with *McCormick v. First Natl. Bank of Miami*, 322 F. Supp. 604 (S.D. Fla. 1971) (28 U.S.C. § 1343(3) applies to personal liberty, not property rights).

¹⁷ CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,308 (9th Cir. 1973). UNIFORM COMMERCIAL CODE § 9-503 provides in pertinent 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. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable and may dispose of collateral on the debtor's premises under Section 9-504.

§ 9-504 provides in pertinent 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....

¹⁸ CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,308 (9th Cir. 1973). Section 1 of the fourteenth amendment provides: "[N]o 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,"

between (1) the significant state action evidenced in certain forms of prejudgment seizure such as garnishment, claim and delivery, and replevin, solely dependent upon statutory authorization and admittedly within the scope of the fourteenth amendment, and (2) the private act of repossession which is a common-law self-help prejudgment remedy performed without the aid of any state official and thus not bound by the requirements of due process.

The district court refused to make such a distinction. In awarding partial summary judgment to the buyer, the trial court concluded that state enactment of the California Commercial Code and its accompanying authorization of self-help repossession constituted sufficient state action to invoke the constitutional protection of due process.¹⁹ In justifying its ultimate conclusion, the lower court felt compelled to endow the *Sniadach* holding with a broad construction. Viewing *Sniadach* as a cornerstone for the renewed protection of debtors' rights, the district court interpreted that case as "a return of 'the entire domain of prejudgment remedies to the long-standing procedural due process principle which dictates that except in extraordinary circumstances, an individual may not be deprived of his life, liberty, or property without notice and hearing.'"²⁰

On appeal, the Court of Appeals for the Ninth Circuit reversed,²¹ holding that self-help repossession authorized under state legislation was not an act under the color of state law and not, therefore, state action within the meaning of the fourteenth amendment.²² In reaching its decision, the appellate court proved willing to make the distinction which the district court would not; namely, that although certain actions by private individuals may be considered state action or action under the "color of law" when *significant* state involvement exists, acts within the instant case constituting a summary seizure of personal property, taken by private creditors in accordance with the provisions of a consensual agreement, without any direct action or review by state officials lack significant state involvement and thus are private in nature.²³ Rejecting the rationale embraced by the district court, the appellate court classified the assessment of state involvement in private actions as a determination not susceptible to a single, inflexible test: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."²⁴ Having

¹⁹ 338 F. Supp. at 618.

²⁰ *Id.* quoting *Randone v. Appellate Dep't of Super. Ct.*, 5 Cal.3d 536, 547, 96 Cal. Rptr. 709, 715, 488, P.2d 13, 19 (1971), *cert. denied* 407 U.S. 924 (1972).

²¹ *Adams v. Southern California First Natl. Bank*, CCH SEC. TRANS. GUIDE ¶ 52,216 (9th Cir. 1973).

²² *Id.* at 67,309.

²³ *Id.*

²⁴ *Id.* quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

recognized the inherent difficulty not only in formulating a workable test for the evaluation of state action in private conduct but also in applying any such test on a case-by-case basis, the appellate court could not classify as controlling any "state action" guidelines set forth in earlier Supreme Court decisions.

First, the Ninth Circuit was able to distinguish *Reitman v. Mulkey*,²⁵ a decision found to be controlling at the district court level. In that case it was held that a state constitutional amendment prohibiting the state from denying the right of any person to decline to sell, lease, or rent property to any person at his discretion was sufficient state action to invoke the constitutional guarantees of the fourteenth amendment. Thus action by private entities complying with this provision was within the purview of the fourteenth amendment. Nonetheless, *Reitman* was found not on point. (1) The *Adams* court could not justify the extension of the *Reitman* rationale which recognized significant state involvement in the authorization of personal conduct previously prohibited in express terms to include private acts performed in accordance with state statutes which merely codified existing common law.²⁶ In fact, the rationale of *Adams* is consistent with the reasoning expressed by the *Reitman* dissenters:

By focusing on "encouragement" the Court . . . is forging a slippery and unfortunate criterion by which to measure the constitutionality of a statute simply permissive in purpose and effect, and inoffensive on its face.

....

A moment of thought will reveal the far-reaching possibilities . . . which I am sure the Court does not intend. Every act of private discrimination is either forbidden by state law or permitted by it. There can be little doubt that such permissiveness—whether by express constitutional or statutory provision . . . to some extent "encourages" those who wish to discriminate to do so. Under this theory "state action" in the form of laws that do nothing more than passively permit could be said to tinge all private discrimination with the taint of unconstitutional state encouragement.

. . . [S]tate action required to bring the Fourteenth Amendment into operation must be affirmative and purposeful, actively fostering discrimination. Only in such a case is ostensibly "private" action more properly labelled "official."²⁷

(2) Moreover, the *Adams* court viewed the codification of prejudgment self-help remedies as founded upon "economically reasoned grounds

²⁵ *Reitman v. Mulkey*, 387 U.S. 369 (1967) [hereinafter cited as *Reitman*].

²⁶ CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,312.

²⁷ *Reitman*, 387 U.S. at 393-395.

of very long standing"²⁸ as opposed to the *Reitman* legislation which reflected a legislative intent "to authorize . . . conduct that would violate the Fourteenth Amendment."²⁹

Secondly, the Ninth Circuit was unable to detect any form of "symbiotic relationship"³⁰ between the state and the bank from which action under color of state law could be inferred. Relying on the Supreme Court's recent decision in *Moose Lodge No. 107 v. Irvis*,³¹ the *Adams* court refused to find sufficient state involvement in the acts of the bank solely due to compliance with the California version of the Code. In the *Moose Lodge* case, the Court refined a previous broad holding in *Burton v. Wilmington Parking Authority*³² and announced that state action is not found when the state merely possesses a noninfluential connection with a private person or organization, or when the state lacks some sort of causal relationship to the private action examined, but only when the state has "sufficiently involved"³³ itself with private activities. It is obvious that the *Adams* court did not feel mere compliance by a private entity to a state statute codifying a common-law remedy met this higher standard.

Thirdly, the *Adams* court could not conclude that the exercise of the traditional prejudgment remedy of repossession represented the private execution of a function which otherwise in all likelihood would be performed by the state.³⁴ In distinguishing *Adams* from earlier

²⁸ *Adams* at 61,312; accord, *Kirksey v. Theilig*, 351 F. Supp. 727, 731-32 (D. Colo. 1972). See also, e.g., *Krahmer, Clifford, and Lasley, Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 TEXAS TECH. L. REV. 23 (1972) for an excellent discussion of the practical implications of *Fuentes* and the lower court holding in *Adams*.

²⁹ *Adams* at 67,312. For differing views as to the presence of state action in apparent private conduct, compare *Fuentes*; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Shelley v. Kraemer*, 334 U.S. 1 (1948) with *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972), cert. denied, 93 S. Ct. 928 (1973); and *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972).

³⁰ *Adams* at 67,313. Compare *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (racial discrimination by a private lessee of state-held property held to constitute sufficient state action to invoke fourteenth amendment protection) with *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (racial discrimination by private club possessing state liquor license held not to represent sufficient state involvement necessary to invoke constitutional guarantees).

³¹ 407 U.S. 163 (1972) [hereinafter cited as *Moose Lodge*].

³² 365 U.S. 715 (1961) [hereinafter cited as *Burton*]; cf. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

³³ 407 U.S. at 172-73. See also *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970) ("... a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act.") (emphasis added).

³⁴ CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,313. See *Evans v. Newton*, 382 U.S. 296 (1966); *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970); *Magro v. Lentini Brothers Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1971). But see *Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638 (7th Cir. 1972), cert. denied, 93 S. Ct. 928 (1973).

cases held subject to this test, the Ninth Circuit repeatedly cited significant state involvement as the crucial criterion and again failed to find it in the instant case.

Lastly, but nonetheless of great significance, the Ninth Circuit was able to distinguish *Fuentes* as not applicable to the contractual agreement in *Adams*: "We do not read *Fuentes* so broadly that it encompasses all private actions between individuals pursuant to their consensual undertakings."³⁵ Apparently the *Adams* court is not willing to extend the *Sniadach-Fuentes* rationale to private acts performed by creditors in accordance with contractual agreements executed without request for state help and without direct action or review by state officials. Here viewing the bank's power to repossess as arising from the security agreement and not the Code, the Ninth Circuit appears to have followed reasoning similar to that expressed in the *Fuentes*' dissenting opinion: "It would appear that creditors could withstand attack under today's opinion by making clear in the controlling credit instruments that they may retake possession without hearing, or, for that matter, without resort to judicial process at all."³⁶

The crux of *Adams* concerns the nature of "substantial" state involvement—an issue for which there appears to be no simple resolution. The reasoning of *Reitman*, where state action was found in a constitutional amendment which permitted discrimination, seems easily extended to *Adams*-type situations where, arguably, at least, the Code encourages private acts which may have been refrained from in the absence of its passage by the state. Under the *Reitman* rationale, it would be an apparently short extension (perhaps no extension at all) to embrace self-help repossession under the Code as within the purview of the fourteenth amendment.

Yet while such a rationale clearly indicates pleasing "social-consciousness" results, it also embodies conceivably dangerous legal implications within a precarious extension of due process by endorsement of the oft-scorned rigid guideline for the assessment of state involvement in ostensibly private action. Due to the apparent inability to derive an infallible test for the detection of state action, the better view endows prior "state action" decisions with only limited precedential value. While guiding principles for the detection of state action are not without merit, the determination of any such involvement must be, by necessity, a subjective and flexible procedure, for it is well settled that the creation of any precise formula for the detection of state action would be an impossible task.³⁷ Time and again, the Supreme Court has emphasized

³⁵ CCH SEC. TRANS. GUIDE ¶ 52,216 at 67,316; accord, cases cited note 4, *supra*.

³⁶ 407 U.S. at 102.

³⁷ See, e.g., *Burton*, 365 U.S. 715, 722 (1961); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947).

that the presence of state action within ostensibly private activity "can be determined only in the framework of the peculiar facts or circumstances present."³⁸ Mindful of this caveat, the Ninth Circuit apparently recognizes the potentially dangerous precedent that would arise from an affirmation of the district court's rationale in *Adams*: by the creation of an inflexible rule from the specialized facts of *Reitman*, state action could then be attributed to private actions *consistent with*, although *not necessarily encouraged or fostered by*, state law. The impropriety of an extension of the recognition of state action within private action for which there has not been shown any direct, active, or significant state encouragement or involvement is obvious: "To say . . . that all human behavior which *conforms* to statutory requirements is 'State action' or is 'under color of State law' would far exceed not only what the framers of the Civil Rights Act ever intended but common sense as well." (Emphasis added).³⁹ The *Adams* court wisely applies the "significant involvement" test recently announced by the Court in *Moose Lodge*, thereby endorsing a state action standard possessing the semantic flexibility necessary to avoid absurd future decisions which could result from a strict application of *Reitman*.

The Impact of *Adams*: Questions, Not Answers

Yet instead of answering a legal question with any degree of finality, the *Adams* decision, in actuality, only focuses upon a host of constitutional problems which appear destined to avoid conclusive determination until considered and definitively resolved by the Supreme Court. A variety of unresolved issues indicate that the determination of the status of self-help repossession is far from resolved.

First, it is not at all determined whether self-help repossession is (1) a common law remedy for which mere codification by state enactment arguably fails to represent sufficient state action, or (2) a statutory remedy reflecting a pervasive state policy encouraging private unconstitutional acts. Many who would classify self-help repossession as outside the fourteenth amendment are quick to indicate that state action can not properly be attributed to that which is essentially a common-law remedy: "It cannot be that codifying a generally understood practice of ancient and honorable lineage and surrounding it with safeguards renders the practice unconstitutional."⁴⁰ However, there is authority which asserts

³⁸ 365 U.S. at 726.

³⁹ *Oller v. Bank of America*, 342 F. Supp. 21, 23 (N.D. Cal. 1972); *see, e.g.*, cases cited note 4 *supra*; *see also* *Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638, 647 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 928 (1973) ("It is by no means clear that 'state inaction' is equivalent to 'state action' for Fourteenth Amendment purposes.").

⁴⁰ *Mentschikoff*, *supra* note 13, at 785; *see also, e.g.*, 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.1 (1965); 2 F. POLLACK & F. MATTLAND, THE HISTORY OF ENGLISH LAW 574 (2d ed. 1899).

that the procedures codified in Code sections 9-503 and 9-504 can not justifiably be classified as common law remedies.⁴¹ Indeed, it is argued that since the Code gives broad authorization of acceleration clauses,⁴² eliminates the election of remedies doctrine,⁴³ limits damages for wrongful repossession,⁴⁴ and permits repossession even in the absence of a contractual clause expressly providing such a remedy,⁴⁵ the pro-creditor provisions of the Code go beyond merely authorizing private self-help and actually get the state deeply involved in expanding the right of repossession. This reasoning reaches the inevitable conclusion that self-help repossession in conformity with Article Nine must be considered action under color of state law.⁴⁶

Secondly, classifications of self-help repossession as beyond the scope of the due process requirements of the fourteenth amendment have rested upon varying rationales. Some courts have held that peaceful repossession is a private creditor's remedy which lacks sufficient state action.⁴⁷ Others have determined that constitutional guarantees are unnecessary since consent to contractual agreements containing self-help repossession provisions evidences a waiver of these rights.⁴⁸ Naturally enough, if self-help repossession is held to be outside of the scope of the fourteenth amendment, the underlying rationale of any such future decision by the Court would be crucial. Under the former theory, prejudgment seizure of the collateral by private act would always be constitutional regardless of the incorporation of any repossession provision within the contractual agreement. However under the latter rationale, it may be reasonably inferred that absent this waiver by contract, similar consistent judicial reasoning would be forced to classify self-help repossession within the

⁴¹ There is legal authority to support the argument that the Code, as legislation with significant pro-creditor bias, can not properly qualify as a mere codification of common law principles. See, e.g., Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 U. VA. L. REV. 355 (1973); Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302 (1972).

⁴² See, e.g., UCC § 3-109(1)(c) (the presence of an acceleration clause does not affect negotiability of instrument). Compare UCC § 1-208 with UCC § 1-201(19) ("good faith" provision requires attacker to show lack of honesty in fact—a subjective burden of proof).

⁴³ UCC § 9-501.

⁴⁴ Compare UCC § 9-503 with UCC § 9-501(3) (What is a "breach of the peace"?).
⁴⁵ UCC § 9-503.

⁴⁶ See 42 U.S.C. § 1983.

⁴⁷ See, e.g., Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972); Greene v. First Natl. Exchange Bank of Virginia, 348 F. Supp. 672 (W.D. Va. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); Messenger v. Sandy Motors Inc., 121 N.J. Super. 1, 295 A.2d 402 (1972).

⁴⁸ See McCormick v. First National Bank of Miami, 322 F. Supp. 604 (S.D. Fla. 1971); see generally, D. H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972); Swarb v. Lennox 405 U.S. 191 (1972) (waiver of due process requirements must be voluntarily, knowingly, and intelligently made).

scope of the fourteenth amendment. The differing implications resulting from a Supreme Court adoption of either view are, of course, obvious.

Lastly, assuming *aguardo* that the Supreme Court concludes that peaceful repossession is beyond the scope of the fourteenth amendment, it would seem only a matter of time until related issues concerning the constitutional rights of debtors and creditors acting "under color of state law" arise. Consider the problems inherent in a creditor's action for a deficiency judgment: Are the contemporary statutory extensions of in personam jurisdiction which endow creditors with increased judicial scope sufficient state action to invoke due process requirements? What about state rule changes concerning venue? Are these legislative enactments sufficient state action by rule change to compel a result different from *Adams*?⁴⁹

CONCLUSION

Perhaps only one certainty arises from the Ninth Circuit's decision in *Adams*: The entire area of law which is touched by the issue of state action and self-help repossession is destined to be plagued by uncertainty and conflicting views until *Adams* or a similar case is heard by the Supreme Court. An enlightening decision by the Court not only could make more definite what is currently conceived as the uneasy balance of rights between debtors and creditors but also could provide sharper insight into the more pervasive legal problems of assessing "substantiality" of state involvement in acts by private entities.

The Court's recent holding in *Moose Lodge* may well evidence a retreat from a seemingly logical and broad application of the prima facie implications of *Reitman*, *Burton*, and others.⁵⁰ Yet in light of the many problems raised by the issue in *Adams* as well as the varying rationales presented for its resolution, speculation as to any future Court decision in this area of the law can hardly be made with any degree of

⁴⁹ Arguments supporting the existence of sufficient state action to invoke fourteenth amendment protection are discussed in a brief for defendant's motion to quash service in *G.M.A.C. v. Wilson*, Civil No. 507118 (Akron Mun. Ct., filed Oct. 14, 1972).

⁵⁰ Compare *Evans v. Abney*, 396 U.S. 435 (1970) (estate administration of discriminatory will provision) and *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (shopping center owners' fifth amendment rights balanced against protesters' first amendment rights) with *Moose Lodge*. Taken together, these three cases indicate that the Court may well resolve future "state action/private action" conflicts with a type of balancing test. See also Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Note 25 VAND. L. REV. 1237, 1244 (1972).

certainty.⁵¹ Nonetheless an appreciation of the trend in recent Supreme Court decisions in this as well as an understanding of the current composition of the Court⁵² increases the probability that peaceful repossession under the Code will be held constitutional.

DAVID M. HUNTER

⁵¹ Legal authority concerning *Adams*-type problems is divided. Some writers urge Court affirmation of the Ninth Circuit rationale. See generally, e.g., R. HENSON, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, § 10-18 at 264 (1973); *Mentschikoff*, supra note 13; J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 26-6 at 974 (1972). But see Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 U. VA. L. REV. 355, 377 (1973); McDonnell, *Sniadach, the Replevin Cases and Self-Help Repossession—Due Process Tokenism?* 14 B.C. IND. & COMM. L. REV. 437, 450 (1973); Note, *Constitutional Torts: Section 1983 Redress for the Deprived Debtor*, 14 WM. & MARY L. REV. 627, 648 (1973).

⁵² If and when repossession under UCC 9-503 is heard by the Supreme Court, Justices Powell and Rehnquist, who did not sit for *Fuentes*, may very well join the *Fuentes* dissenters, thus creating a Court majority sufficient to sustain self-help repossession as constitutional.