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Fuentes v. Shevin: Procedural Due Process v. Prejudgment Remedies

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J. Martin Burke

"None of this seems worth the candle to me."¹ With those rather brusque words of dissent, Mr. Justice White summarily dismissed the majority opinion in *Fuentes v. Shevin*.² Perhaps, as he suggests *Fuentes* represents nothing more than "ideological tinkering with state law."³ However, even Justice White must concede that *Fuentes* is a decision of consequence. Indeed, its potential impact covers a spectrum ranging from a constitutional challenge of state prejudgment remedies to an attack on long established credit and business practices.

On its face, *Fuentes* merely ruled that the replevin statutes of two states violated due process. Seen, however, from the perspective of three years of litigation over prejudgment remedies, *Fuentes* represents a decisive, far-reaching Court decision. This note will analyze *Fuentes* not only as a single important opinion, but also as the latest, and perhaps culminating step in a process begun three years earlier. *Fuentes'* effect on Montana law will receive special consideration.

FUENTES—THE HISTORICAL CONTEXT

No discussion of *Fuentes* is meaningful without an analysis of *Sniadach v. Family Finance Corp.*⁴ For *Fuentes* is a case with a past. That past begins with *Sniadach*. Arising from the \$31.59 in garnisheed wages withheld from Christine Sniadach, the case marks the beginning of a full scale attack on prejudgment remedies.

The Court in *Sniadach* examined the claim that Wisconsin's wage garnishment statutes⁵ violated procedural due process. This charge rested exclusively on the contention that procedural due process requires an opportunity to be heard prior to the deprivation of property. Wisconsin's garnishment statutes provided creditors with quick summary procedures.⁶ No prior hearing was accorded the debtor. Mr. Justice Douglas delivered the majority opinion—an opinion whose confusing and ambiguous language would result in three years of court

¹*Fuentes v. Shevin*, 92 S.Ct. 1983, 2005 (1972).

²*Id.* [hereinafter referred to as *Fuentes*]. Chief Justice Burger and Justice Blackmun joined in the dissent.

³*Id.* at 2005.

⁴*Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) [hereinafter referred to as *Sniadach*].

⁵WISC. STAT. ANN. §§ 267.07(1) and 267.04(1), (1957).

⁶A formal action must be commenced against the debtor. The plaintiff must complain that the defendant is indebted to him and is delinquent in payment. A writ of garnishment is then issued. The defendant's wages are frozen from the time that the writ is issued to the culmination of the main suit.

controversies.⁷ The major thrust of the Douglas opinion was confined to a discussion of the specialized nature of wages and the injustices made possible by prejudgment wage garnishment.⁸ As the Court noted, to deprive a person of wages may be synonymous with "driving a wage earning family to the wall."⁹ In light of the hardships that might ensue from the loss of wages, the Court ruled that due process requires that a party be given an opportunity to be heard before being deprived of his wages.¹⁰

At the outset, Justice Douglas indicated that wage garnishment procedures like those of Wisconsin might satisfy due process requirements. To do so, however, the statutes had to be narrowly drawn to meet extraordinary situations "requiring special protection to a state or creditor interest."¹¹ Justice Douglas also briefly discussed the right to be heard. Ultimately, however, the due process problems presented in *Sniadach* were disposed of much too summarily. A more adequate articulation of due process in the context of prejudgment remedies would have dispelled many of the questions raised in the wake of *Sniadach*. Was *Sniadach's* rationale limited merely to wages? Were all necessities of life to be protected as were wages by the fifth and fourteenth amendment requirements? If so, what standards should a court use to evaluate what constitutes a necessity? What kind of property interests must be at stake before one can invoke the protection of the due process clause? These questions remained unanswered.

Following the announcement of *Sniadach* came a rash of cases challenging legally sanctioned extrajudicial remedies from attachments to liens. As might be expected, the vagueness of *Sniadach* provided ammunition for both sides in the ensuing legal battles. Asked to declare "unconstitutional" procedures which in some cases had roots in early common law,¹² many judges hesitated and refused to extend *Sniadach* beyond the matter of wage garnishment. In their opinion *Sniadach* had

⁷Justice Douglas for example referred to an old Maine case, *McKay v. McInnes*, 279 U.S. 820 (1928). This per curiam decision of the Court affirmed a Maine decision which had upheld the constitutionality of that state's attachment procedures. These procedures permitted the taking of property without notice or prior hearing. Justice Douglas' reference to the case, although attacked by Mr. Justice Harlan in his concurring opinion in *Sniadach*, nevertheless was construed by many judges and writers as proof that *Sniadach* had merely carved out wage garnishment procedures as an exception in the area of lawful prejudgment remedies. The Court in *Fuentes* remedies the problem created by this reference to *McKay v. McInnes* by stating in footnote 23 of its *Fuentes* opinion (92 S.Ct. 1999) that "... as far as essential due process doctrine goes, *McKay v. McInnes* cannot stand for anymore than was established by *Coffin Bros. and Co. v. Bennett*, 277 U.S. 29 (1928) and *Ownbey v. Morgan*, 256 U.S. 94 (1921). These latter cases both involved extraordinary circumstances as noted in footnote 11 of this note and were cited in the per curiam decision as the authority for the Court's action in *McKay v. McInnes*.

⁸*Sniadach*, *supra* note 4 at 340-341.

⁹*Id.* at 342.

¹⁰*Id.*

¹²The Court pointed out a number of exceptions to the rule that summary procedures such as provided by the Wisconsin wage garnishment statute violated procedural due process: *Fahey v. Mallonee*, 322 U.S. 245 (1947), action to protect against the economic

merely carved out an exception in the realm of lawful prejudgment seizures. The unusual nature of wages was the basis for the *Sniadach* decision. That prejudgment remedies other than wage garnishment violated due process because they failed to provide a prior hearing was, according to these judges, an unwarranted extension of *Sniadach*.¹³

An equally great number of judges adhered to the opposite view. Their construction of *Sniadach* led them to strike down general attachment laws,¹⁴ claim and delivery statutes,¹⁵ innkeeper's liens,¹⁶ and sections 9-503 and 9-504 of the U.C.C.¹⁷ In the view of these judges, *Sniadach* had decreed that prejudgment remedies constituted a taking even though goods were seized only temporarily. Thus, those remedies were subject to due process requirements.

Into this tangle of conflicting constructions, the United States Supreme Court handed down further decisions in which the Court relied on *Sniadach* for support. If anything *Goldberg v. Kelly*,¹⁸ *Bell v. Burson*,¹⁹ *Wisconsin v. Constantineau*,²⁰ and *Bobbie v. Connecticut*,²¹ should have served to indicate the intended broad scope of *Sniadach*. Each case examined due process considerations. Taken as a whole, these decisions certainly indicated the Court's assumption of a very firm position with regard to the application of the procedural due process requisites of notice and hearing. Any permanent or temporary deprivation of a significant property interest was apparently to be treated within the purview of the fifth and fourteenth amendments. In cases involving such de-

disaster of a bank failure; *Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594 (1950), action to protect the public from misbranded drugs; *Owney v. Morgan*, 256 U.S. 94 (1921), foreign attachment to secure state jurisdiction; and *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928), prejudgment attachment in case involving a bank failure.

¹⁴Remedies such as replevin, innkeeper's liens, etc. were developed at common law.

¹⁵*Accord*, *Brunswick Corp. v. J. and P. Inc.*, 424 F.2d 100 (10th Cir. 1970) (replevin action against conditional vendee); *Termplan Inc. v. Superior Court*, 105 Arizona 270, 463 P.2d 68 (1969) (Arizona wage garnishment statute held unconstitutional); *American Olean Tile Company Inc. v. Zimmerman*, 317 F.Supp. (D. Hawaii 1970) (laws authorizing garnishment of corporation checking accounts etc. do not violate due process); *Black Watch Farms Inc. v. Dick*, 323 F.Supp. 100 (D. Conn. 1971) (prejudgment attachment of real property without a hearing is not affected by *Sniadach*).

¹⁶*Randone v. Appellate Dept.*, 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971).

¹⁷*Blair v. Pitchess*, 5 Cal. 258, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971); *Lapreas v. Raymours Furniture Company*, 315 F.Supp. 716 (N.D. N.Y. 1970).

¹⁸*Klim v. Jones*, 315 F.Supp. 109 (N.D. Calif. 1970); *Collins v. Viceroy Hotel Corp.*, 338 F.Supp. 390 (N.D. Ill. 1972); *Santiago v. McElroy*, 319 F.Supp. 284 (E.D. Penn. 1970).

¹⁹*Adams v. Egley*, 338 F.Supp. 614 (S.D. Calif. 1972).

²⁰*Goldberg v. Kelly*, 397 U.S. 254 (1970) [hereinafter referred to as *Goldberg*] (welfare payments cannot be suspended until defendant is given an opportunity to be heard).

²¹*Bell v. Burson*, 402 U.S. 535 (1971) [hereinafter referred to as *Bell*] (deprivation of driver's license under Georgia Motor Vehicle law is a violation of procedural due process).

²²*Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Wisconsin law authorizing the posting of notices with regard to certain people's rights to purchase alcoholic beverages was violative of due process).

²³*Bobbie v. Connecticut*, 401 U.S. 371 (1971) [hereinafter referred to as *Bobbie*] (indigent's attack on divorce proceedings expense).

privation, due process requires notice and a prior opportunity to be heard.²² Thus, although not expressly stating it, the Court in *Goldberg, Bell, Constantineau*, and *Boddie* more clearly enunciated the true scope of *Sniadach*. Unfortunately, however, these cases did not deal with creditor-debtor problems and related summary remedies. This perhaps explains why, despite these decisions, lower courts continued to apply *Sniadach* narrowly.²³

FUENTES

In this context, *Fuentes* came before the Court. The outcome was not surprising. Although Justice Harlan who concurred in *Sniadach* and who wrote the majority opinion in *Boddie* was no longer on the bench, five members of the *Sniadach* majority were.²⁴ The die was thus cast.

FUENTES—THE CASE

The *Fuentes* decision combined Pennsylvania and Florida cases.²⁵ Both dealt with prejudgment replevin statutes. Procedural due process was again the gravamen of the disputes. The Florida requirements for a writ of replevin were three:²⁶ (1) the plaintiff had to complete forms stating that the defendant was wrongfully detaining certain goods; (2) a bond in double the value of the property to be seized was required; and (3) formal action had to be commenced against the defendant. Upon compliance with these procedures, a writ of replevin was issued by the clerk of the court. The writ authorized the sheriff to seize the goods in controversy.²⁷ If within three days, the defendant had not sought the return of the goods by posting a counterbond, the sheriff was authorized to deliver the goods to the plaintiff.²⁸ Thus, on the basis of an unproven assertion, a party was deprived of goods. The law afforded the defendant no notice or opportunity to be heard prior to the taking. Pennsylvania's replevin statutes were substantially the same.²⁹

The facts in both cases are rather commonplace. Mrs. Fuentes had purchased a stove and a stereo from Firestone on a conditional sales plan. A dispute arose between Mr. Fuentes and Firestone over the servicing of the stove. Mrs. Fuentes refused to make further installment payments. Firestone then sought and succeeded in obtaining a writ of replevin. The stove and stereo were seized.

The *Epps* case joined the complaints of four appellants, three of whom had suffered deprivation of property under circumstances similar

²²*Id.* at 379.

²³*Epps v. Cortese*, 326 F.Supp. 127 (E.D. Penn. 1971) [hereinafter referred to as *Epps*].

²⁴*Justices Stewart, Douglas, Brennan, Marshall and White*. Interestingly, Justice White wrote the dissent in *Fuentes*. Only seven justices, however, ruled on the case.

²⁵*Epps*, *supra* note 23. *Fuentes v. Faircloth*, 317 F.Supp. 954 (S.D. Fla. 1970).

²⁶FLA. STAT. ANN. §§ 78.01, 78.07 (1941) [hereinafter cited F.S.A. 1941].

²⁷F.S.A. 1941, §§ 78.08, 78.10.

²⁸F.S.A. 1941, § 78.13.

²⁹PA. STAT. ANN., Civ. and Eq. Rem. and Pro., § 1821 (1963);

PA. STAT. ANN., Rules of Civ. Pro., §§ 1071-1077 (1963).

to Mrs. Fuentes. In their cases, a bed, a table, and other household goods had been replevied. The fourth appellant complained that her husband had obtained a writ of replevin whereby furniture, toys, and clothes belonging to her son had been taken following a dispute over the custody of the child. As in the case of Mrs. Fuentes, none of the defendants in the *Epps* case had been afforded a prior hearing.

The defendants in both cases challenged the constitutional validity of their states' replevin statutes. Failure to provide due process was the basis for their attack. Three judge federal courts in Pennsylvania and Florida upheld the statutes involved.

In both cases, the federal courts relied on a very restricted definition of *Sniadach*. The *Epps* court contended that *Sniadach* and *Goldberg* had carved out an exception based on necessity. Only the deprivation of necessities required a hearing prior to the taking.³⁰ The *Fuentes* court relying on *Brunswick Corporation v. J and P Inc.*,³¹ held that *Sniadach* was expressly a unique case involving a "specialized type of property interest."³² *Sniadach's* rationale was not to be extended.

FUENTES—THE OPINION

After hearing the case in November 1971, the Court handed down its opinion June 12, 1972. Both the Florida and Pennsylvania statutes were declared constitutionally defective. The failure to provide notice and an opportunity to be heard prior to the taking of property was fatal to the statutes involved.

Mr. Justice Stewart delivered the majority opinion. In a clear and thorough discussion, the Court dealt with the nature of due process. It reasserted that fundamental to due process is the right to be heard. The purpose of such a hearing is to protect individual property rights from the "arbitrary encroachment" of government.³³ As the Court noted, a hearing in such cases serves to minimize the unjustified taking of property.³⁴ It provides an individual the opportunity to speak in his defense. It balances what would otherwise be a one-sided process favoring the creditor.³⁵ If the purpose of a hearing is to avoid unfair deprivations of property, it follows that hearings must of necessity take place before the property is ever taken. That a later hearing is provided and that damages may be awarded in the case of wrongful taking cannot undo the fact that the party has been deprived of his property.³⁶ Furthermore, the basic right to a hearing is not negated by the fact that the taking is only temporary.³⁷

³⁰*Epps*, *supra* note 23 at 133-134.

³¹*Brunswick Corp. v. J. and P. Inc.*, 424 F.2d 100 (10th Cir. 1970).

³²*Fuentes v. Faircloth*, *supra* note 25 at 957.

³³*Fuentes*, *supra* note 1 at 1994.

³⁴*Id.*

³⁵*Id.*

³⁶*Id.* at 1995.

³⁷*Id.* at 1997.

Rebutting lower court arguments in *Epps, Fuentes v. Faircloth*, and many earlier decisions, the Court emphasized that *Sniadach* and *Goldberg* had not carved out exceptions.³⁸ Rather, procedural due process requires a prior hearing not only before the taking of wages or welfare benefits but of any interest encompassed by the fourteenth amendment. According to the Court, any "significant property interest"³⁹ falls within this latter category. Thus, in the case before it, the Court ruled that the appellants' possessory interests in the bed, table, stove, and stereo were sufficient to invoke the protection of the fourteenth amendment.

Fuentes therefore established that, in general, statutes authorizing the seizure of property without affording a prior hearing are unconstitutional. The Court, however, as it had done in *Sniadach*,⁴⁰ noted that in certain extraordinary circumstances statutes need not provide for a hearing prior to the taking of property. The Court limited these extraordinary situations to those involving three elements.⁴¹ First, the statute must serve some important governmental or public interest. Second, the statute must be limited to "special situations demanding prompt action." Third, the statute must require that an official participate in the issuance of the writ and review the basis for the writ. In giving these guidelines, *Fuentes* clearly established a standard for statutes authorizing prejudgment remedies.

Fuentes thus represents a resolution of the controversies arising from *Sniadach*. No doubt remains as to the Court's position on procedural due process and its application to summary procedures. *Sniadach* has been explained. Those decisions which construed *Sniadach* broadly appear to have a new vitality.

FUENTES—A MONTANA APPLICATION

With the announcement of *Fuentes*, entire areas of statutory law became subject to constitutional challenges. Confining the discussion of *Fuentes* to Montana law, it appears that numerous sections of the *Revised Codes of Montana* (1947) are vulnerable to constitutional attack.

R.C.M. 1947, §§ 87A-9-503 and 87A-9-504, two sections of the Uniform Commercial Code adopted by this state, are arguably unconstitutional. R.C.M. 1947, § 87A-9-503 authorizes a secured party, at the time of a default to take possession of the collateral without judicial process. R.C.M. 1947, § 87A-9-504 authorizes the secured party to sell, lease or otherwise dispose of such property repossessed under the previous section. As mentioned earlier, a federal district court in California in *Adams v. Egley*,⁴² dealt with these same corresponding sections of the

³⁸*Id.* at 1998.

³⁹*Id.* at 1997.

⁴⁰*Sniadach*, *supra* note 4 at 342.

⁴¹*Fuentes*, *supra* note 1 at 2000.

⁴²*Adams v. Egley*, *supra* note 17.

California Uniform Commercial Code.⁴³ That court ruled that in view of *Sniadach*, both sections were unconstitutional as they failed to provide an opportunity for a prior hearing. Given *Fuentes*, that conclusion appears irrefutable. The two sections of the Montana law like the California sections are not narrowly drawn. They serve no special governmental or creditor interests. They are not limited to situations requiring prompt action. In general, they fail to meet the *Fuentes'* standards. Thus, as these sections of the U.C.C. result in the taking of property without a hearing, they almost unquestionably violate procedural due process. If they are to remain viable, it is incumbent upon the legislature to provide for hearings prior to such authorized seizures.

Montana's claim and delivery statutes found in R.C.M. 1947, §§ 93-4101 to 93-4119 are in like manner fatally defective on due process grounds. These statutes provide that a private party may unilaterally invoke state power by claiming that the defendant is wrongfully detaining property to which the plaintiff is entitled.⁴⁴ Upon the execution by two sureties of an undertaking in double the value of the property taken, the plaintiff may require the sheriff to seize certain property from the defendant.⁴⁵ If the defendant does not require the return of the property within five days, the sheriff must deliver it to the plaintiff.⁴⁶ No notice or prior opportunity to be heard is accorded the defendant. Undoubtedly, the claim and delivery statutes are too broadly drawn to pass constitutional muster. They too, therefore, demand legislative revision.

Just as California struck down its attachment laws following *Sniadach*,⁴⁷ the Montana state courts in light of *Fuentes* would apparently have to strike down Montana's attachment laws⁴⁸ were a proper case presented. As with the claim and delivery statutes, a summary procedure for attachment is provided in Montana. To attach the property of another in Montana, a person need only:⁴⁹ (1) sign an affidavit stating that the defendant is indebted to him; (2) have two sufficient sureties execute an undertaking in double the value of the property to be attached; and (3) file a civil complaint against the defendant. A writ of attachment is then issued and the property listed may be seized. The defendant is thus deprived of property without prior notice or a prior hearing. The attachment statutes are not narrowly drawn. Therefore, they do not meet the *Fuentes* standards and are thus susceptible to constitutional challenge.

Another area of Montana law which may now be assailed on

⁴³WEST CAL. COMM. CODE, §§ 9503-9504 (West 1964).

⁴⁴R.C.M. 1947, §§ 93-4102 - 93-4103.

⁴⁵R.C.M. 1947, § 93-4104.

⁴⁶R.C.M. 1947, § 93-4110.

⁴⁷Randone v. Appellate Dept., *supra* note 14.

⁴⁸R.C.M. 1947, § 93-4301 et. seq.

⁴⁹R.C.M. 1947, §§ 93-4301 - 93-4304.

fourteenth amendment grounds is that of liens. A lien represents a type of encumbrance upon property.⁵⁰ It may be created by operation of law or by contract.⁵¹ In the wake of *Fuentes*, those liens created by operation of law raise serious constitutional questions. Although not necessarily resulting in a physical taking as in the case of attachment or claim and delivery, nevertheless a person's free use and enjoyment of property and the power to dispose of property at will are unquestionably affected by liens. The constitutional questions regarding liens have already been raised in some states. As was noted earlier, in *Klim v. Jones*⁵² the California innkeeper's lien statute⁵³ was held unconstitutional on the grounds that it failed to provide for prior notice and an opportunity for a prior hearing. Montana has a similar hotel keeper's lien⁵⁴ providing for the detention and sale of the property of guests who have failed to pay rent. As in the case of the California statute, the Montana statute is not narrowly drawn and does not provide a prior hearing.

Likewise agisters' liens and liens for service established by R.C.M. 1947, § 45-1106 are questionable. R.C.M. 1947, § 45-1108 provides that if payment for work done is not made within thirty days, the party entitled to the lien may deliver to the sheriff a statement containing information as to the amount of claim against the property. The sheriff is then authorized to sell the property and pay the complainant from the proceeds. No notice or opportunity for a prior hearing is afforded the alleged debtor in such a case. Again, a due process question may arise. In conclusion, suffice it to say that just as these liens demand careful re-evaluation in light of *Fuentes*, so may all liens authorized by Montana law.

Fuentes v. Shevin thus portends serious consequences for Montana law particularly with regard to prejudgment remedies. Legislative action will be required to save many of the summary procedures presently available. Given the formidable task of implementing a new state constitution, the next legislature will probably not be able to deal with the demands which *Fuentes* has imposed upon state law. Serious consequences may await creditors as a result.

FUENTES—AN OVERVIEW

The significance of *Fuentes* is indeed many-faceted. For consumer protection advocates, *Fuentes* is a victory of major proportions. The required hearings may well provide a forum for consumer complaints on a scale never before possible. For the creditor, *Fuentes* of necessity means an end to a certain leverage that under the older procedures

⁵⁰R.C.M. 1947, § 45-101.

⁵¹R.C.M. 1947, § 45-107.

⁵²*Klim v. Jones*, *supra* note 16.

⁵³WEST CAL. COMM. CODE, § 1861 (West 1954).

⁵⁴R.C.M. 1947, §§ 34-103 - 34-111.

the creditor had on the delinquent debtor.⁵⁵ Furthermore, hearing requirements may demand more time from the legal departments of business concerns with consequent higher costs of providing credit. Thus, while the debtor can take comfort in the further protection provided him and his belongings, he may nevertheless find credit more restricted and more costly. For state legislators, *Fuentes* means the re-drafting of considerable parts of state law and the development of a hearing process which will suit debtors, creditors, courts and Constitution alike. Finally, judges will look upon *Fuentes* in terms of greater demands on already busy schedules.

Reflecting again on the words of Mr. Justice White,⁵⁶ perhaps the added burden placed by *Fuentes* on the states is ultimately of little worth. If of no other value, however, *Fuentes* does exemplify the Court's concern with regard to individual rights. This judicial sensitivity has prompted a re-evaluation of accepted legal procedures which often compromise individual rights for procedural ease. As *Fuentes* demonstrates, the Court is less likely to acquiesce in the deprivation of constitutionally guaranteed rights. Thus, from the perspective of individual rights alone, *Fuentes* is an important decision and a correct one.

⁵⁵Sniadach, *supra* note 4 at 341.

⁵⁶*Fuentes*, *supra* note 1.