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The Supreme Court's Still Changing Attitude toward Consumer Protection and Its Impact on the Integrity of the Court

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THE SUPREME COURT'S STILL CHANGING ATTITUDE TOWARD CONSUMER PROTECTION AND ITS IMPACT ON THE INTEGRITY OF THE COURT

John T. McDermott*

In the light of Sniadach, Fuentes, W. T. Grant, and North Georgia Finishing this member of the Georgia Supreme Court still acts largely in the dark.

Justice Gunter concurring in Doran v. Home Mart Building Centers, Inc.¹

I. INTRODUCTION

In the last issue of the MONTANA LAW REVIEW, I attempted to analyze the effect of two relatively recent Supreme Court decisions, Fuentes v. Shevin² and Mitchell v. W. T. Grant Co.,³ on the existing prejudgment attachment remedies in Montana.⁴ I asserted that anyone who examined the Montana statutes after Fuentes but before Mitchell would undoubtedly have concluded that both the attachment⁵ and the claim and delivery⁶ statutes were facially unconstitutional, but that after Mitchell such a conclusion was somewhat less certain.

After the article was written, but before it was published, the United States Supreme Court rendered a third decision⁷ concerning a prejudgment attachment statute: North Georgia Finishing, Inc. v. Di-Chem, Inc.⁸ Alas, I cannot report that this decision resolves the

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5. REVISED CODES OF MONTANA (1947), [hereinafter cited as R.C.M. 1947] § 93-4301 et seq.
6. R.C.M. 1947, § 93-4101 et seq.
7. Actually this is the fourth recent decision in the area of creditor's rights. The first, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), involves prejudgment garnishment of the debtor's wages said by the court to be "a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340. Most subsequent opinions, including the Supreme Court's most recent decision in Di-Chem, have limited the applicability of Sniadach to wage garnishment cases. For this reason Sniadach is not included in this analysis.
8. 419 U.S. 601 (1975). The Supreme Court's decision was rendered on January 22, 1975, but did not come to my attention in sufficient time to refer to it in the earlier article. In
confusion and perplexity caused by the court’s inconsistent decisions in Fuentes and Mitchell.

II. THE IMPACT OF DI-CHEM

As pointed out in the prior article, it was uncertain as to whether Mitchell overruled Fuentes. Justice White, the author of Mitchell, tried valiantly to reconcile the two decisions; Justice Powell, in a concurring opinion, and Justice Stewart (the author of Fuentes), in a dissenting opinion, agreed that Fuentes had been overruled. Since the composition of the court did not change between Mitchell and DiChem, as it had between Fuentes and Mitchell, one might have assumed that the Court would use DiChem as an opportunity to establish clearly that Fuentes was overruled by Mitchell. Instead, Justice White, writing for the majority, tried to use Di-Chem to reinforce his view that Fuentes was not overruled and that Mitchell, Fuentes, and now Di-Chem can all stand together as the law to be applied in suits challenging state prejudgment creditor’s remedies.

Even a cursory glance at the cases outlined in the appendix should reveal why a majority of the members of the Court, numerous lower courts, the author, and undoubtedly a score of creditor’s attorneys concluded that Mitchell must be read as overruling Fuentes. Admittedly there are differences between the Florida and Pennsylvania statutes held unconstitutional in Fuentes and the Louisiana statute upheld in Mitchell but the differences, on analysis, became insignificant and, to some degree, nonexistent.

III. THE JOINT INTEREST DOCTRINE

Perhaps the most compelling argument presented in Mitchell for upholding the Louisiana statute is the Court’s emphasizing that
both the creditor and the debtor have a property right, or at least a joint interest, in the property subject to the seizure or attachment: the creditor has a vendor's lien based on an installment sales contract, while the debtor has a right to possession under the same agreement.

Plainly enough, this is not a case where the property sequestered by the Court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."

The existence of joint interests persuaded the majority that the Louisiana statute, by requiring the creditor to put up a bond to protect the debtor from damages or expenses resulting from an improvident attachment, and by permitting the debtor to regain possession by putting up his own bond to protect the seller or, absent the bond, to demand an immediate hearing, provided "a constitutional accommodation of the conflicting interests of the parties." The Court indicated, the continued possession by the debtor during the litigation of the controversy would impair the creditor’s rights in the property, either by diminution in value resulting from normal use, or, at the extreme, by the destruction or transfer of the property by the debtor. In the Court’s view, the statute succeeds in protecting the rights of both the creditor and the debtor. It insures the creditor will be able to protect his interests by seizing the property, while the debtor will be protected by the creditor's bond. Alternatively, the debtor can retain possession and use of the property by posting a bond which will serve to protect the creditor.

Unfortunately the joint property interests, stressed so emphatically in *Mitchell*, cannot be used to distinguish *Mitchell* from *Fuentes* because both the Florida and Pennsylvania statutes stricken in *Fuentes* involved prejudgment attachment of property in which the creditor retained significant property rights under conditional or installment sales contracts valid under applicable state law.

Apparently overlooking this distinction, some courts have treated the attachment of the creditor's interest to the property as a crucial factor in determining the constitutionality of a state statute which permits a prejudgment seizure or attachment without

12. *Id.* at 1900.
prior notice and hearing. Thus, both a federal district court and the state supreme court held the Michigan prejudgment garnishment statute unconstitutional partly because the property seized under the Michigan statute was "most unlike that before the Court in Mitchell where both debtor and creditor had current, real interests in the sequestered property." This approach seems consistent with the facts of Di-Chem, since the Georgia statute declared unconstitutional was utilized to garnish a bank account in which the creditor had no interest or property right. But Justice White was apparently unwilling to base the decision in Di-Chem on this very important difference, for in so doing, he would have had to concede what he has consistently attempted to deny: Mitchell overruled Fuentes. As a result, the Court's opinion in Di-Chem has convinced other courts that the existence of a property right in the merchandise or property being seized is not significant in determining the constitutionality of an attachment or garnishment statute.

To uphold the Louisiana statute in Mitchell, while not overruling Fuentes, Justice White had to find some other grounds for distinguishing the statutes involved. He found three. First, he noted the content of the affidavits required under the state laws of Florida, Pennsylvania and Louisiana was somewhat different. The Florida and Pennsylvania statutes did not require a detailed statement of the basis for the plaintiff creditor's claim, while the Louisiana statute did. Second, the Louisiana statute was applicable in Orleans Parish but not throughout the state. It required the judge, rather than the clerk of the court, to issue a writ of attachment. Finally, the Louisiana statute permitted the debtor to seek an immediate hearing at which he could challenge the basis for the attachment.

IV. Judicial Supervision

While the Louisiana statute seems to require more detailed and specific allegations in the petition seeking the writ of garnishment or attachment than do either the Florida or Pennsylvania statutes, and that a judge rather than a court clerk is the official empowered by statute to issue the writ, when analyzed neither factor supports the conclusion that the Louisiana statute affords due process while the Florida and Pennsylvania statutes do not. Justice White seems to overlook the most important aspect of the decision-making pro-


cess employed under all three statutes: the decision to issue the writ is made *ex parte* based only on affidavits submitted by the creditors.\(^{14}\) Whether the affidavit requirements are simple or complex and whether the decision is made by a judicial officer or a ministerial official has little significance when the decision is made by a person who only hears one side of the story. The availability of "forms" for affidavits that satisfy the Louisiana requirements persuaded Justice Stewart that:

the Louisiana affidavit requirement can be met by any plaintiff who fills in the blanks on the appropriate form documents and presents the completed forms to the court. Although the standardized form in this case calls for somewhat more information than that required by the Florida and Pennsylvania statutes challenged in *Fuentes*, such *ex parte* allegations "are hardly a substitute for a prior hearing, for they test no more than the strength of the applicants own belief in his rights."\(^{15}\)

Thus the person who issues the writ, be he judge or clerk, is simply performing a ministerial task; if the affidavit satisfies the statutory requirements, and the required bond is posted, the official apparently has no choice and must issue the writ of attachment.

Furthermore, the contents of the affidavit emphasized in *Mitchell* lose their significance in *Di-Chem*. The Georgia statute required the plaintiff to state not only the amount claimed to be due but also "that he has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue."\(^{16}\) In compliance with the requirements of this statute, the president of Di-Chem, Incorporated, signed and submitted his affidavit stating:

that North Georgia Finishing, Inc., defendant, is indebted to said plaintiff (Di-Chem, Inc.) in the sum of $51,279.17 DOLLARS . . . and that affiant has reason to apprehend the loss of said sum or some part thereof unless process of garnishment issues.\(^{17}\)

The affidavit in *Mitchell* established an unpaid and overdue balance of $574.17 and that the plaintiff believed the defendant would:

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\(^{14}\) The California Supreme Court has recently pointed out some of the inherent defects in *ex parte* proceedings:

The first is a shortage of factual and legal contentions. Not only are facts and law from the defendant lacking, but the moving party's own presentation is often abbreviated because no challenge from the defendant is anticipated at this point in the proceeding.

*United Farm Workers v. Superior Court of Santa Cruz City*, ___ Cal. 3d ___, 537 P.2d 1237, 1241, 122 Cal. Rptr. 877 (1975).

\(^{15}\) *Mitchell v. W.T. Grant Co.*, supra note 3 at 1912.

\(^{16}\) *Georgia Code Annotated*, § 46-102, cited in *North Georgia Finishing, Inc. v. Di-Chem Inc.*, supra note 8 at 602.

\(^{17}\) *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, supra note 8 at 604.
encumber, alienate or otherwise dispose of the merchandise... during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises.\(^{15}\)

Although there are slight differences between the language of the Louisiana and Georgia statutes and between the affidavits actually filed in the two cases, the differences are clearly too insignificant to serve as standards for determining the constitutionality of similar state statutes.

There is one factual difference which might be a basis for reconciling these three decisions. The three state statutes found unconstitutional in *Fuentes* and *Di-Chem* permitted a clerk or prothonotary to issue the writ while the Louisiana statute upheld in *Mitchell*, as it applies in Orleans Parish,\(^{19}\) requires the writ to be issued by a judge. It is doubtful this fact will be controlling in the future. As one court has recently pointed out, "there are suggestions in the concurring and dissenting opinions [in *Di-Chem*] that some justices do not believe that supervision of the *ex parte* proceedings by a judicial officer is required."\(^{20}\) Additionally, one three-judge district court has determined the court clerk can, for the purpose of satisfying *Mitchell*, be treated as a judicial officer.\(^{21}\) Furthermore, the Supreme Court has held a court clerk in Florida is a "judicial officer" and therefore can issue arrest warrants.\(^{22}\) Unfortunately for Justice White, it was also a court clerk in Florida who issued the writ in *Fuentes*, thus making it impossible to distinguish *Fuentes* and *Mitchell* on the basis that to be valid the writ must be issued by a "judicial officer."

V. THE IMMEDIATE POST SEIZURE HEARING

Only one basis exists for trying to distinguish *Di-Chem* from *Mitchell* and *Mitchell* from *Fuentes*. In *Mitchell* the Court emphasized that the Louisiana statute permitted an *immediate* hearing, on motion of the debtor, to determine whether there was in fact a basis for the attachment or seizure of the debtor's property. In *Di-Chem*, the Court noted there was no similar provision for a hearing, and this alone has been the basis for determining a statute's constitutionality.\(^{23}\) While it was unclear that the Florida procedure under

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19. Since the Louisiana statute permits a clerk to issue the writ throughout the rest of the state, the statute must be unconstitutional in every parish in Louisiana except Orleans Parish where, ironically, the *Mitchell* case arose.
20. Guzman v. Western State Bank, 516 F.2d 125, 131 n. 7 (8th Cir. 1975).
23. For example, the North Carolina statute was upheld primarily because it provides for an immediate post-seizure hearing. *Hutchinson v. Bank of North Carolina, supra* note 21.
attack in Fuentes permitted an immediate post-seizure hearing\textsuperscript{24} it appears that a debtor in Pennsylvania can, by motion, seek to vacate the attachment order at any time, thereby giving him the same right to an immediate hearing that the debtor has in Mitchell. But, more important than a comparison of the nature or timing of the post-seizure hearings involved in these three cases, is the fact that the majority in Fuentes in no uncertain terms emphasized that any type of post-seizure hearing would, on constitutional grounds, be totally inadequate to preserve the constitutionality of a statute\textsuperscript{25} which deprived a person of his property without prior notice and hearing. The Court stated:

The Florida replevin process guarantees an opportunity for a hearing after the seizure of goods, and the Pennsylvania process allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one. But neither the Florida nor Pennsylvania statute provides notice or an opportunity to be heard before the seizure.\textsuperscript{26}

The Court in Fuentes emphasized that, to satisfy due process, the right to notice and hearing “must be granted at a time when the deprivation can still be prevented.”\textsuperscript{27} Clearly then, the availability of an immediate post-seizure hearing cannot serve as the basis for reconciling Fuentes and Mitchell, since the Fuentes Court considered that factor irrelevant.

What then are the real differences between the Florida, Pennsylvania, Louisiana and Georgia statutes? The differences are apparently intentionally obscured:

One gains the impression, particularly from the final paragraph of its opinion, that the Court is endeavoring to say as little as possible in explaining just why the Supreme Court of Georgia is being reversed.\textsuperscript{28}

\textsuperscript{24} It seems that in Florida the debtor must await the trial of the underlying controversy to attack the attachment.

\textsuperscript{25} The requirement for a preseizure hearing may be relaxed where a strong government interest is involved such as the protection of the public from contaminated food or misbranded drugs and to “safeguard the integrity of the public purse.” Harverhill Manor, Inc. v. Commissioner of Public Welfare, 330 N.E.2d 180, 188 (Mass. 1975); Cf. Dupuy v. Superior Court, 123 Cal. Rptr. 273, 538 P.2d 729 (1975).

\textsuperscript{26} Fuentes v. Shevin, supra note 2 at 80.

\textsuperscript{27} Id. at 81.

\textsuperscript{28} North Georgia Finishing, Inc. v. Di-Chem, Inc., supra note 8 at 64 (dissenting opinion of Justice Blackmun).
VI. THE VAGUE AND HAZY GUIDELINES OF STARE DECISIS

To understand the real cause of this perplexing state of affairs one must look beyond the statutes involved to other factors. It was Mr. Justice Stewart, the author of *Fuentes*, who pointed out that the difference between *Fuentes* and *Mitchell* was the composition of the Court which decided the cases.

He also expressed grave concern over the impact that these two inconsistent decisions would have on the nation's respect for the Court.

A basic change in the law on a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this court and to the system of law which it is our abiding mission to serve.

As the Supreme Judicial Court of Massachusetts has pointed out: "Certainly constitutional interpretation must respond to social change but this duty does not explain speedy overruling of new doctrines."

As Justice Stewart chides the Court for its fickleness in *Mitchell*, Justice Blackmun criticizes the Court for its inconsistent behavior in all three cases. He attributes the vacillation to the fact that *Fuentes* was decided by the Court while it was not at full strength.

The admonition of the great Chief Justice [that the Court, except in cases of "absolute necessity", should not decide a constitutional question unless there is a majority of the whole court." *Briscoe v.*


31. *Id.* Justice Stewart does not improve the Court's image by paraphrasing Samuel Clemens in referring to the impact of *Di-Chem* on *Fuentes*:

> It is gratifying to note that my report of the demise of *Fuentes v. Shevin* ... [in his dissenting opinion in Mitchell] seems to have been greatly exaggerated.


33. *Fuentes* was argued on November 9, 1971 and decided on June 12, 1972. Mr. Justice Powell and Mr. Justice Rehnquist joined the court on January 7, 1972 after the case had been argued but before the decision was announced.
CONSUMER PROTECTION

Bank of Kentucky, 8 Pet. 118, 122 (1834)], in my view, should override any natural, and perhaps understandable, eagerness to decide. Had we bowed to that wisdom when Fuentes was before us, and waited a brief time for reargument before a full court, whatever its decision might have been, I venture to suggest that we would not be immersed in confusion, with Fuentes one way, Mitchell another, and now this case decided in a manner that leaves counsel in the commercial communities and other states uncertain as to whether their own established and long accepted statutes pass constitutional muster with the waiving tribunal off in Washington D. C. This court surely fails in its intended purpose when confusing results of this kind are forthcoming and are imposed upon those who owe and those who lend.34

Justice Blackmun's concerns about the effect and confusion created by constitutional interpretations supported by less than a majority of the full court should not be limited to situations where the court was undermanned but should be considered whenever there is no majority opinion.35 Perhaps the Court's most egregious decision occurred in National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.,36 in which the Court decided the United States District Court for the District of Maryland had jurisdiction over a suit between a citizen of Virginia and a citizen of the District of Columbia, in spite of a determination by a strong majority of the Court that the District of Columbia was not a state within the meaning of Article III of the Constitution and that a federal district court could not exercise jurisdiction over suits that were not between citizens of different states. As a result, this perplexing case stands for the proposition that, although a federal district court can exercise jurisdiction over suits between a citizen of the District of Columbia and a citizen of one of the several states, it cannot do so under either of the theories advanced to support such jurisdiction.37

35. The Arizona Supreme Court carried this concern to the extreme of refusing to declare a state prejudgment garnishment statute unconstitutional on grounds established in Fuentes v. Shevin, supra note 2, because the United States Supreme Court hearing that case was not a full court. The Arizona court noted that when "we have doubts that once the full court hears the case that the opinion will stand, we are reluctant to declare unconstitutional Arizona statutes based upon a decision by less than a clear majority." Roofing Wholesale Co., Inc. v. Palmer, 502 P.2d 1327, (1972).
36. 337 U.S. 582 (1949).
37. Three justices (Jackson, Black & Burton) were of the opinion that the District of Columbia was not a "state" as that term is used in Article III but that federal court jurisdiction over such suits could be found in Article I; two justices (Rutledge and Murphy) were of the opinion that the District of Columbia was a "state" but "strongly dissented" from the idea that constitutional courts could exercise Article I jurisdiction; the remainder of the court (Chief Justice Vinson and Justice Douglas, Frankfurter and Reed) agreed that neither Article I nor Article III could support jurisdiction over the case at bar.
Justice Blackmun may have been correct in suggesting this confusion and uncertainty could have been avoided by ordering reargument of Fuentes after Justices Powell and Rehnquist joined the court. But it is possible a Tidewater situation still could have developed and the present confusion and perplexity would not have been avoided.

The real problem seems to emerge from a careful reading of Justice White’s opinions in all three cases. It is clear from his dissenting opinion in Fuentes\(^{38}\) that he disagreed with the holding of the Court. Mitchell gave him an opportunity to repudiate the holding in Fuentes and establish as “the law” in this area his dissenting opinion in Fuentes. But he and several other members of the Court, perhaps chided by Justice Stewart’s remarks, were unwilling to ignore the doctrine of stare decisis and overrule the very recent Fuentes decision. So in Di-Chem he tried once again to show that Mitchell does not overrule Fuentes, thereby paying homage to the doctrine of stare decisis. Torn between his view as to the correct decision in this area of the law and his duty to uphold the Court as an institution by applying the doctrine of stare decisis, Justice White tried to accommodate both. It is the opinion of at least two of his colleagues that in so doing, Justice White did a disservice to the Court and to the public.

VII. CONCLUSION

The blame for this unfortunate situation lies on neither Justice White nor the four justices who formed the majority in Fuentes. The real fault lies in the Court’s failure to heed Chief Justice Marshall’s admonition and the Court’s resultant misuse of the doctrine of stare decisis. Of course Justice Stewart is correct in suggesting that recent decisions of the Court should be followed by it as well as by lower courts, but he misses the point. A decision not supported by five or more justices may decide the case before the Court but is not a “decision of the Court” and should not be given stare decisis recognition.

However, Justice Blackmun was wrong in suggesting that the Court should have postponed its decision in Fuentes to await its new members. The decisional process should have continued in its normal course, but, when the Court reached its decision and found it was not supported by five or more justices, it should have announced its decision\(^{39}\) but filed no opinion “for the Court.”

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38. Fuentes v. Shevin, supra note 2 at 97-103.
39. As it does when the Court is evenly split (“the judgment below is affirmed by an equally divided court.”), the Court should announce: “the judgment below is affirmed (or reversed) by a divided court.”
ual justices could, of course, file concurring or dissenting opinions, but they would be considered merely the personal views of individual members of the Court, not in themselves precedents.

Then, Justice White would have found no dilemma in Mitchell. If four of his colleagues had supported the views he expressed in Fuentes, those views would have become "the law" and the present confusion would never have existed. The doctrine of stare decisis, when properly employed, provides "an element of continuity in the law" and "the psychologic need to satisfy reasonable expectations." Its strained and unnecessary application in these cases does neither.

# APPENDIX A

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<td>None</td>
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