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Uniform Commercial Code--Sections 9-503 and 9-504 Declared Unconstitutional As Violative of Due Process

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place stricter requirements on entries by officers than the bare minimum imposed by the constitutional limitations of the fourth amendment, and that they will require a strong showing of exceptional circumstances before upholding a search which does not strictly comply with the provisions of the statute.

Mandy Welch

UNIFORM COMMERCIAL CODE—SECTIONS 9-503 AND 9-504 DECLARED UNCONSTITUTIONAL AS VIOLATIVE OF DUE PROCESS. *Watson v. Branch County Bank*, 380 F. Supp. 945 (W.D. Mich. 1974).

Constitutionality attacks have been numerous on sections 9-503 and 9-504 of the Uniform Commercial Code. Those sections permit self-help repossession of automobiles without judicial supervision. In *Watson v. Branch County Bank*,[1] one of the more recent attacks, the Federal District Court for the Western District of Michigan held sections 9-503 and 9-504 to be unconstitutional. Three plaintiffs brought the class action suit to enjoin the secured creditor defendants from repossessing automobiles without judicial authority or process. The plaintiffs alleged that self-help repossession of automobiles subject to security agreements by the named defendants as authorized by sections 9-503 and 9-504[2] deprived them of their property without due process of law contrary to the fourteenth amendment of the United States Constitution and the implementing civil rights statute.[3] In each of the present three instances the repossession of the plaintiff's automobile by the creditor defendant was peaceful and had been provided for in the security agreement.

The plaintiffs' claim in *Watson* was that sections 9-503[4] and 9-

1. 380 F. Supp. 945 (W.D. Mich. 1974).

2. Enacted in Michigan as MICH. COMP. LAWS ANN. §§ 440.9503, 440.9504 (1967).

3. 42 U.S.C. § 1983 (1970).

4. UNIFORM COMMERCIAL CODE § 9-503 reads as follows:

> 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 se-

504[5] of the Uniform Commercial Code together with state laws and regulations concerning motor vehicle financing and the licensing of repossessors caused the private actions to be under color of state action and that such actions were in violation of plaintiffs' guarantee of due process.[6] The district court agreed and devoted the majority of the opinion to the due process question. After deciding that repossession was violative of due process, the court found that the repossession action was under color of state law:

> In legalizing such self-help repossession contracts, the state, through its legislature, has engaged in active and effective state action by delegating both power and process to the creditors. The creditor has the substantive power to declare and adjudge that the debtor has defaulted on his contract. The creditor levies on his own judgment when he repossesses the automobile, and then he conducts his own foreclosure sale, the results of which are routinely validated by the Secretary of State. Because of the economics of legal action and automobile financing, debtors as a practical matter have no legal remedy for abuses.[7]
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cured 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.

5. UNIFORM COMMERCIAL CODE § 9-504 reads 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.

. . .

(3) Disposition of the collateral may be by public or private proceedings and may be by way of one or more contracts. . . . Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor. . . .

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

6. 380 F. Supp. at 950.

7. *Id.* at 968.

> By making UCC 9-503 and 9-504 applicable in the context of comprehensive regulations of automobile purchase financing where corporate creditors have overwhelming power, the state has deliberately denied the plaintiffs their constitutional due.
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> In declaring a default and executing the judgment, the corporate creditors who utilize UCC 9-503 are clearly performing traditional state functions.[8]

The *Watson* decision is contrary to the majority of opinions. The United States Courts of Appeals for the Second,[9] Third,[10] Fifth,[11] Eighth,[12] and Ninth[13] Circuits have sustained the constitutionality of the sections as well as other specific state statutes related thereto.[14] To date the Tenth Circuit has not decided the precise issue of the constitutionality of the sections. Oklahoma upheld the right of self-help in the 1967 case of *Kroger v. Ogden.*[15] This right of self-help still exists in Oklahoma, restricted only by the requirement that the repossession be peacefully accomplished.

Constitutional attacks on sections 9-503 and 9-504 will continue until the United States Supreme Court resolves the issue. An opportunity for such a resolution recently faded with the Court's denial of certiorari to *Adams v. Southern California First National Bank.*[16] *Adams* represented an opportunity for the court to define the scope and thrust of the "state action" doctrine because in that case all of the basic arguments of unconstitutionality were advanced and resolved in favor of the creditor.[17] The issue will frequently arise until the Court clarifies the scope and thrust of the "state action" doctrine on a record adequate enough for the lower courts to handle the variety of factual situations urged by debtors to establish the presence of "state action".[18]

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8. *Id.* at 972.
9. Shirley v. State National Bank, 493 F.2d 739 (2nd Cir. 1974).
10. Gibbs v. Titelman, 502 F.2d 1107 (3rd Cir. 1974).
11. James v. Pinnix, 495 F.2d 206 (5th Cir. 1974).
12. Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974); *petition for cert. filed,* 42 U.S.L.W. 3703 (U.S. June 19, 1974) (No. 73-1897). Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir. 1974).
13. Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973); *cert. denied,* 43 U.S.L.W. 3277 (U.S. Nov. 12, 1974) (No. 73-1842).
14. Norris, *Supreme Court Urged to Resolve Constitutionality of Self-Help Repossession,* 28 PERSONAL FINANCE L.Q. REPORT 119 (1974).
15. 429 P.2d 781 (Okla. 1967). Prior to the U.C.C. Oklahoma had allowed the secured party to take possession without judicial process so long as it was done without breach of the peace. *See* Firebough v. Gunther, 106 Okl. 131, 233 P. 460 (1925).
16. 492 F.2d 324 (9th Cir. 1973); *cert. denied,* 43 U.S.L.W. 3277 (U.S. Nov. 12, 1974) (No. 73-1842).
17. Norris, *supra* note 14, at 121.
18. *Id.* at 119.

The Court, however, is not likely to grant certiorari until one or more of the remaining circuit courts that have not passed on the issue decide contrary to those that have held the sections constitutional.

Repossession under sections 9-503 and 9-504 is not the only remedy available to secured creditors. The creditor can use the state's prejudgment replevin provisions. Prejudgment replevin provisions, in general, were passed upon by the United States Supreme Court in *Fuentes v. Shevin*.[19] In *Fuentes* the Court held Florida and Pennsylvania replevin statutes invalid under the fourteenth amendment saying they worked a deprivation of property without due process of law by denying prior opportunity to be heard before the chattels were taken from the possessor. Procedural due process requires an opportunity for a hearing before the state authorizes its agents to seize property in the possession of a person upon the application of another.[20] The Court's decision in *Fuentes* prompted nationwide revision of prejudgment replevin statutes. Oklahoma revised sections 1571 and 1580, and added section 1571.1 to title 12 in reaction to *Fuentes*.[21] The substance of the revision was to provide two methods whereby the plaintiff could claim immediate delivery of the chattel. One method provides for notice to the debtor and a judicial hearing prior to the issuance of the order of delivery by the court. The alternate method gives the debtor five days to contest the repossession and if he fails to request a hearing the court clerk will issue the order of delivery. A prompt hearing will be set if the debtor responds to the notice and either party requests a hearing. The revision also includes penalties on the debtor if he uses the notification to dispose of or otherwise render the property unavailable to the plaintiff.[22] Recently the United States Supreme Court upheld the constitutionality of similar procedures in *Mitchell v. W.T. Grant Co.*[23] The importance of *Mitchell* is that the Court held that provisions for immediate delivery to the plaintiff do not need to include notice to the debtor so long as the order of delivery has been issued upon a verified affidavit and upon a judge's authority. The debtor must also be allowed to immediately seek dissolution of the order, which must be granted unless the creditor proves the grounds for is-

19. 407 U.S. 67 (1972).
20. *Id.*
21. OKLA. STAT. tit. 12, §§ 1571, 1571.1, 1580 (Supp. 1974).
22. OKLA. STAT. tit. 12 § 1571.1 (Supp. 1974).
23. 94 S.Ct. 1895 (1974).

suance (existence of debt, lien, and delinquency).[24] The Oklahoma statute appears adequate and would even seem to be over-protective of the debtor. To date no cases have been passed upon by the Oklahoma appellate courts.

In *Watson* the creditors did not repossess under the existing Michigan prejudgment replevin provision (which had already been revised to comport with the requirements of *Fuentes*), but rather repossessed using only the language of sections 9-503 and 9-504.[25] The deficiencies of due process asserted in *Watson* are adequately provided for in the revised Oklahoma statute. Although *Watson* may be overruled on appeal, creditors who repossess using only sections 9-503 and 9-504 (and related state statutes adopting the sections) will always invite litigation, especially in those circuits that have not yet passed on the constitutionality of the UCC sections. The Tenth Circuit is one of those circuits. Creditors using prejudgment replevin provisions such as Oklahoma's are virtually assured of avoiding costly litigation since those statutes substantially accord with the United States Supreme Court decision in *Fuentes*.

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24. 94 S.Ct. at 1897.
25. 380 F. Supp. at 975.