Florida State University Law Review

Volume 4 | Issue 1 Article 6

Winter 2-1976

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)

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of professional ethics as well as his own promise given under oath to reimburse his client" as an aggravating factor.[65] It then cited the case of *The Florida Bar v. Winn*,[66] in which the court had suspended an attorney for 6 months "[o]n facts scarcely more aggravating than those presented here."[67] Although Moriber had practiced in Florida since 1953 with "no prior disciplinary punishments,"[68] it is clear that the court considered Moriber's unrepentant attitude a severely aggravating factor which weighed in its decision to suspend him from the practice of law for 45 days, his reinstatement conditioned upon restitution of the excessive portion of the fee.

In *Moriber*, the Supreme Court of Florida, although censuring an attorney for clearly excessive fees, indicated an unwillingness to relinquish the old standards of judging fees to be excessive, and will probably continue to punish only those who charge fees which "shock the conscience" of the court.

CAROL ANN TURNER

Constitutional Law—DUE PROCESS—GEORGIA PREJUDGMENT GARNISHMENT PROCEDURES INVALID.—*North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

On August 20, 1973, plaintiff Di-Chem, Inc. filed suit in the superior court of Whitfield County, Georgia, alleging that defendant North Georgia Finishing, Inc. owed it $51,279.17 for goods sold and delivered. Simultaneously, Di-Chem filed affidavit and bond for process of garnishment,[1] asserting that it had "reason to apprehend the loss of said sum

65. 314 So. 2d at 149. The fact that Moriber knew at the time the contract was executed that Pietz was the sole beneficiary of approximately $20,000 in trust funds was specifically noted by the court. *Id.* at 146.

66. 208 So. 2d 809 (Fla. 1968).

67. The facts which the court considered "scarcely more aggravating" are set out in note 52 *supra*.

68. 314 So. 2d at 148.

1. The procedural prerequisites to obtaining a writ of garnishment in Georgia are governed by GA. CODE ANN. § 46 (1974); the statute provides exemptions for wages. GA. CODE ANN. § 46-101 (1974). It requires that the plaintiff sign an affidavit before some officer authorized to issue an attachment or the clerk of any record court, stating the amount claimed due, the apprehension of loss of all or part of the amount claimed due, and postage of a double bond. GA. CODE ANN. § 46-102 (1974). The affidavit may be

or some part thereof unless process of Garnishment issues."[2] The court clerk immediately issued a summons garnisheeing North Georgia's corporate bank account at the First National Bank of Dalton. Three days later North Georgia gave bond to dissolve the garnishment and moved to dismiss the summons as being issued pursuant to a statute that violated the due process clause of the state and federal constitutions. The trial court overruled the motion, and on appeal the Supreme Court of Georgia sustained the statute.[3] The United States Supreme Court granted certiorari[4] and reversed,[5] holding that the Georgia statute violated the due process clause of the fourteenth amendment by failing to provide for pregarnishment notice and hearing, or "other safeguard against mistaken repossession."[6]

The Supreme Court's present[7] interest in the due process ramifications of creditor's prejudgment remedies began in 1969 with *Sniadach v. Family Finance Corp.*[8] There a Wisconsin garnishment statute was held violative of the procedural due process requirements of the fourteenth amendment when applied to wage earners because the statute permitted wage garnishment without prior notice and hearing. The Court stated: "A procedural rule that may satisfy due process for attachments in general . . . does not necessarily satisfy procedural due process in every case. . . . We deal here with wages—a specialized type of property presenting distinct problems in our economic system."[9] The

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sworn to by an "agent or attorney at law of the plaintiff . . . to the best of his knowledge and belief." GA. CODE ANN. § 46-103 (1974). The code *requires* the official to issue the summons to the *garnishee* only upon the fulfilling of the conditions of the code. It further requires the garnishee to give an inventory of the defendant's property which it holds. An attachment is then made upon such property. GA. CODE ANN. § 46-105 (1974). Finally, dissolution of the garnishment may be accompanied by the defendant's giving bond in the amount due with good security to the clerk or other officer who issued the summons. GA. CODE ANN. § 46-401 (1974).

2. Affidavit of Di-Chem signed by R.L. Foster, its president, and Dual Broadrick, clerk of the superior court of Whitfield County, dated August 20, 1971, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 604 n.2. (1975).

3. The appeal from the trial court had originally been transferred to the court of appeals, which affirmed the trial court, 194 S.E.2d 508 (Ga. Ct. App. 1972). The Georgia Supreme Court decided that its original transfer had been in error, 198 S.E.2d 284 (Ga. 1973), and removed jurisdiction of the case from the appellate court. The Georgia Supreme Court then affirmed the trial court's decision, 201 S.E.2d 321 (Ga. 1973).

4. North Georgia Finishing, Inc. v. Di-Chem, Inc., 417 U.S. 907 (1974).

5. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

6. *Id.* at 606.

7. Earlier cases involving the necessity for notice and hearing prior to a deprivation of property, as opposed to personal rights and liberties, held that due process requirements were met if notice and hearing were given before the final deprivation of the property. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 611 & n.10 (1974).

8. 395 U.S. 337 (1969).

9. *Id.* at 340.

Court, however, seemed to imply a limited exception to its holding, noting that summary procedures "may well meet the requirements of due process in extraordinary situations."[10] The Wisconsin statute failed since it was not "narrowly drawn to meet any such unusual condition."[11]

Three years later, in *Fuentes v. Shevin*,[12] the Court extended the *Sniadach* rationale to consumer goods,[13] holding Florida and Pennsylvania replevin statutes unconstitutional. The *Fuentes* Court asserted that *Sniadach* principles were not limited to cases dealing with wages, but "were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect."[14] The *Fuentes* court clarified the limitation hinted at in *Sniadach* by discussing some of the "extraordinary situations" in which a preseizure hearing is not required. Basically they are situations in which immediate government action is needed to protect a public interest.[15] Examples given by the Court included cases involving a national war effort,[16] bank failure,[17] misbranded drugs,[18] and spoiled food.[19] The Court also suggested, however, that carefully supervised summary seizures might be permissible if a showing was made of imminent danger that a debtor will "destroy or conceal disputed goods."[20] The latter example suggested the Court's concern with the interests of private creditors.

Nevertheless, *Fuentes* led several commentators to conclude that a private creditor's needs could never justify prejudgment garnishment absent notice and hearing.[21] Such conclusions were proven premature in *Mitchell v. W.T. Grant Co.*[22] There the Court, speaking through Mr. Justice White, upheld a Louisiana sequestration provision that permitted the holder of a vendor's lien on property to seize that property

10. *Id.* at 339.

11. *Id.*

12. 407 U.S. 67 (1972).

13. *Id.* at 88.

14. 395 U.S. at 339.

15. 407 U.S. at 90–92.

16. United States v. Pfitsch, 256 U.S. 547 (1921); Stoehr v. Wallace, 255 U.S. 239 (1921; Central Trust Co. v. Garvan, 254 U.S. 554 (1921).

17. Fahey v. Mallonee, 332 U.S. 245 (1947).

18. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

19. North Am. Storage Co. v. Chicago, 211 U.S. 306 (1908). *See also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (forfeiture of vessel carrying contraband drugs).

20. 407 U.S. at 93.

21. *See, e.g., The Supreme Court, 1973 Term,* 88 HARV. L. REV. 41, 77–78 n.42 (1974). *But see* Note, *Sniadach, Fuentes, and Mitchell: A Confusing Trilogy and Utah Prejudgment Remedies,* 1974 UTAH L. REV. 536, 541.

22. 416 U.S. 600 (1974).

without prior notice to the debtor. To obtain a sequestration writ, a Louisiana claimant had to allege an affirmative probability of destruction or concealment of the property in question; conclusory allegations would not suffice.[23] The creditor also had to verify his fear of loss and file a bond sufficient to make the debtor whole.[24] Finally, the debtor was entitled to a prompt hearing to seek dissolution of the writ.[25] Alternatively, the debtor could regain possession of the property by filing his own bond.[26]

In analyzing the constitutionality of these procedures, the *Mitchell* majority rejected the contention that *Sniadach* and *Fuentes* stood for the proposition that notice and opportunity to be heard must precede *any* deprivation of a property interest. According to the *Mitchell* majority, those cases "merely stand for the proposition that a hearing must be had before one is *finally* deprived of his property . . . ."[27] The Court suggested that the *Sniadach* result turned on the sensitivity of the property at issue, the risk that the *Sniadach* garnishment procedures would be abused by creditors, the fact that providing notice and hearing prior to garnishment posed no special risk to creditors, and the fact that the *Sniadach* Court had not considered how quickly the debtor could challenge wage garnishment.[28] The Court further stated that *Sniadach,* unlike *Mitchell,* had not involved property in which the creditor had an interest prior to a suit on the debt. Though that situation had been presented in *Fuentes,* the *Mitchell* Court stated that the *Fuentes* result turned on the fact that goods could be replevied without either notice and hearing or judicial supervision of summary procedures.[29] The Court found that the Louisiana sequestration question involved a "factual and legal background sufficiently different"[30] from *Fuentes* to pass constitutional muster and that the Louisiana law "minimize[d] the risk of error of a wrongful interim possession by the creditor."[31] The Court found the law to be a constitutionally acceptable accommodation of debtor and creditor interests.[32] In reaching these conclusions, the Court considered such factors as whether a judge or court clerk issued the writ,[33] the showing required

23. *Id.* at 605.
24. *Id.* at 605–06.
25. *Id.*
26. *Id.* at 607.
27. 416 U.S. at 611 (emphasis added).
28. *Id.* at 614.
29. *Id.* at 615.
30. *Id.*
31. *Id.* at 618. *See id.* at 616–17, n.12.
32. *Id.* at 607. *See id.* at 618.
33. *Id.* at 616.

by the applicant of possible damage to the goods,[34] whether there would eventually be an opportunity for the debtor to reply,[35] and when this opportunity would occur.[36]

Four members of the *Mitchell* Court read *Fuentes* as requiring that notice and hearing be provided prior to *any* seizure of property, and concluded that *Mitchell* had overruled *Fuentes*.[37] A fifth Justice stated simply that *Fuentes* required reversal of the Louisiana Supreme Court's judgment.[38] In this milieu the Court was faced with *Di-Chem*. Speaking for the Court, Mr. Justice White found the case controlled by *Fuentes* and *Mitchell*.[39] Though he relied on *Fuentes*, Justice White read that case as narrowly as he had in *Mitchell*. He interpreted *Fuentes* as requiring notice and opportunity for a hearing "or other safeguard against mistaken repossession" before a prejudgment seizure.[40] Because the Georgia statute permitted prejudgment seizures initiated by a "writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer,"[41] Justice White held it unconstitutional under *Fuentes*. He further found that the statute did not fall within the *Mitchell* rule. Justice White noted that the Georgia statute at issue in *Di-Chem* permitted issuance of the writ by a court clerk on the conclusory affidavit of the creditor or his attorney. In contrast, the Louisiana writ in *Mitchell* was issuable only by a judge who had examined affidavits that set out the specific facts necessitating sequestration.[42] Additionally, the Georgia statute, unlike the Louisiana statute, failed to provide an opportunity for an early hearing at which the creditor would bear the burden of showing probable cause for the garnishment.[43] Justice White also rejected arguments that *Fuentes* and *Mitchell* should be

34. *Id.* at 616. *Cf. id.* at 608 (where buyer holds property after payments stop, his use of the property produces deterioration that impairs seller's security).

35. *Id.* at 618.

36. *Id.*

37. *Id.* at 623 (Powell, J., concurring); *Id.* at 630–31 (Stewart, J., dissenting, joined by Douglas, J., and Marshall, J.).

38. *Id.* at 636 (Brennan, J.).

39. 419 U.S. at 605–08.

40. *Id.* at 606. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 615 (1974): "Because carried out without notice or opportunity for hearing and without judicial participation, [the *Fuentes*] seizure was held violative of the Due Process Clause." Justice White's reading of *Fuentes* was obviously selective. In *Di-Chem,* he quoted language from *Fuentes* which implied that even a short-term deprivation of property is subject to the Due Process Clause. 419 U.S. at 606, *quoting* 407 U.S. at 86. But he chose to ignore the sentence that followed the quoted language—a sentence indicating that any such deprivation must be preceded by notice and hearing.

41. 419 U.S. at 606.

42. *Id.* at 607. This procedure was in force only within Orleans Parish (the area in which the *Mitchell* suit arose). The Court declined to rule on the validity of statutorily authorized clerk-issued writs outside of Orleans Parish. 416 U.S. at 606 n.5.

confined to seizures of consumer goods and not extended to corporate assets. Citing *Fuentes,* and making tangential reference to *Sniadach,*[44] he asserted that the Court would not draw distinctions among different types of property in applying the due process clause.[45]

Though the concurrences and dissents in *Di-Chem* bickered over the "resuscitation" of *Fuentes,*[46] it seems clear that the *Fuentes* assumption that notice and opportunity to be heard must precede any property deprivation has not been revitalized. After *Di-Chem, Fuentes* apparently stands only for the proposition that prejudgment seizure procedures must provide adequate safeguards against wrongful, though temporary, deprivations. *Di-Chem* further indicates that the *Mitchell* safeguards would be adequate even though a creditor had no prior property interest—such as a vendor's lien—in the property to be seized. Thus the central question raised by *Di-Chem* is what procedures, other than prior notice and hearing, constitute adequate safeguards against mistaken deprivations.

Justice White apparently regards judicial supervision of summary seizure procedures as a central factor in determining the adequacy of safeguards.[47] But the *Mitchell* and *Di-Chem* emphasis on judicial issuance of sequestration and garnishment writs is unlikely to prove dispositive. Six Justices have now asserted that the fact that a writ is issued by a judge rather than a clerk is of no constitutional significance.[48] Justice White's ability to force the divergent *Mitchell* and *Di-Chem* majorities to accept his stress on the clerk-judge distinction indicates that the Supreme Court's treatment of creditors' prejudgment remedies can be best explained by examining the voting pattern of the Court. The various opinions of the Justices in *Sniadach, Fuentes, Mitchell,* and *Di-Chem* demonstrate little more than the depth of their disagreement. Except for *Sniadach,* which seems the only "untouchable" among the cases, the decisional history resolves itself into a shifting of two voting blocks around Justice White.

One block, led by Justice Stewart,[49] first coalesced in *Fuentes.* Until

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43. 419 U.S. at 607.

44. *Id.* at 608.

45. *Id.*

46. *Compare* 419 U.S. at 608 (Stewart, J., concurring) *with* 419 U.S. at 609 (Powell, J., concurring in the judgment) *and* 419 U.S. at 614–20 (Blackman, J., dissenting).

47. *See* note 40 and accompanying text *supra.*

48. North Georgia Finishing, Inc., v. Di-Chem, Inc., 419 U.S. 601, 611 n.3 (1975) (Powell, J., concurring in the judgment); *id.* at 619 (Blackmun, J., dissenting, joined by Rehnquist, J.); Mitchell v. W.T. Grant Co., 416 U.S. 600, 632–33 (1974) (Stewart, J., joined by Douglas & Marshall, JJ.).

49. Justices Stewart, Marshall, Brennan and Douglas voted together consistently in *Fuentes, Mitchell,* and *Di-Chem,* comprising the majority in *Fuentes* (a 4–3 decision),

Di-Chem, it adhered to the proposition that whenever the state seizes a debtor's property at a creditor's behest, the debtor must be given notice and opportunity to be heard before *any* deprivation occurs. The other block, consisting of the Nixon appointees, has generally[50] maintained that the due process clause is satisfied if notice and hearing are provided at some time before the deprivation becomes final.[51] Justice White, by contrast, has applied a balancing test that led him to vote with the Stewart block in *Di-Chem,* and the Nixon appointees in *Mitchell.* Though there are no indications that other Justices have accepted that test, it offers both a means of rationalizing *Sniadach, Fuentes, Di-Chem,* and *Mitchell,* and a tool for providing some predictability in this area.

Justice White first enunciated a balancing approach to prejudgment taking in *Fuentes.* There, in dissent,[52] he compared the buyer's interest in continuing use of the property with the seller's interest in preserving his property:

> [A probable cause hearing's] stated purpose is "to prevent unfair and mistaken deprivations of property." But in these typical situations, the buyer-debtor has either defaulted or he has not. If there

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the dissenting minority in *Mitchell,* and joining with Justice White to create the majority in *Di-Chem.* For examples of each Justice's position, see the opinions of Justice Stewart in *Fuentes,* 407 U.S. at 67, and *Mitchell,* 416 U.S. at 629; Justice Brennan in Calero-Toledo v. Pearson Yacht Co., 416 U.S. 664 (1974); Justice Marshall in Arnett v. Kennedy, 416 U.S. 134, 206 (1974). Justice Douglas, while not articulating an opinion in full, concurred with each of the preceding opinions.

50. Justice Powell has been somewhat more reluctant to follow Justices Blackmun, Rehnquist and Chief Justice Burger; *see, e.g.,* his concurring opinion in *Di-Chem.* 419 U.S. at 609–14. While he is concerned that special provisions for a review by a neutral (not a judicial) officer and for a prompt post seizure hearing be made at which at least a probable cause showing be required of the claimant, *id.* at 609, he appears to agree with his brethren in dissent that, given the above, the Georgia statute would have been sufficient in the commercial setting of *Di-Chem.* 419 U.S. at 612 n.5.

51. The gravamen of Justice Blackmun's dissent in *Di-Chem,* joined by Justice Rehnquist, and in relevant part by Chief Justice Burger, *id.* at 619–20, is that the protections required by the due process clause are flexible. Absent a showing of compelling public policy, notice and hearing at some time prior to final deprivation satisfies the due process clause. In the commercial world described in *Di-Chem* no more than minimum due process requirements need be followed absent a showing of unconscionability on the part of the claiming party. As examples of areas in which due process requirements were "tailored" to the surrounding commercial milieu, he cited D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), and Swarb v. Lennox, 405 U.S. 191 (1972), in which the Court, speaking through Justice Blackmun, upheld confession of judgment clauses given the arm's length nature of the transaction. For a further explanation of this idea of "tailoring" due process requirements to the nature of the property involved, see Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing,* 88 HARV. L. REV. 1510 (1975).

52. 407 U.S. at 97.

> is a default, it would seem not only "fair," but essential, that the creditor be allowed to repossess; and I cannot say that the likelihood of a mistaken claim of default is sufficiently real or recurring to justify a broad constitutional requirement that a creditor do more than the typical state law requires and permits him to do. . . . [I]t would not seem in the creditor's interest for a default occasioning repossession to occur; as a practical matter it would much better serve his interests if the transaction goes forward and is completed as planned. . . . Nor does it seem to me that creditors would lightly undertake the expense of instituting replevin actions and putting up bonds.[53]

Thus Justice White was unwilling to discount the creditor's rights in property where the right to possession was disputed. He also suggested that in a replevin action the debtor at least be required to make his payments to the court pending resolution of the suit.[54]

The full articulation of his balancing test is found in *Arnett v. Kennedy*.[55] Justice White's separate opinion[56] in that case enunciated a balancing test far more comprehensive than the somewhat cursory treatment of the debtor-creditor issues in *Fuentes*. In *Arnett,* which involved due process protections against wrongful discharge of federal employees, Justice White addressed the issue of whether a hearing must be held "*before* any 'taking' of the . . . property interest . . . occurs, even if a full hearing is available before that taking becomes final."[57] He acknowledged the constitutional requirement of notice and hearing when a property right is taken from an individual.[58] He then outlined a number of factors to be considered in determining when that hearing should occur. Stating that the Court had usually held that a hearing at some time before permanent deprivation would suffice,[59] Justice White recognized that the Court had also held that such a hearing must, on occasion, be held before any deprivation occurs.[60] In determining whether or not a predeprivation hearing was necessary, Justice White asserted that the Court had looked to the effect of prior notice and

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53. *Id.* at 100–01.
54. *Id.* at 102.
55. 416 U.S. 134 (1974).
56. *Id.* at 171 (White, J., concurring in part, dissenting in part).
57. *Id.* at 186.
58. *Id.* at 178.
59. *Id.* at 187, *citing* Ownbey v. Morgan, 256 U.S. 94 (1921); Coffin Bros. v. Bennett, 277 U.S. 29 (1928); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). These cases were also among those cited for the traditional rule in *Mitchell*. *See* note 7 *supra*.
60. 416 U.S. at 187.

hearing on the competing interests of the parties.[61] He stated that predeprivation hearings could generally be dispensed with where the "interest of the party opposing the hearing might be defeated outright if such hearing were to be held,"[62] (as where the party in possession may alienate or destroy the property[63]), the party opposing the hearing "stands ready to make whole the party who has been deprived of his property, if the initial taking proves to be wrongful."[64] He stressed, however, that in such situations summary procedures were permissible only if authorized by a public official or judge. Such official authorization, Justice White indicated, is crucial because it minimizes the possibility of mistaken deprivation.[65]

Justice White then examined cases in which a predeprivation hearing had been required. In general, those cases involved situations in which wrongful, though temporary, deprivation might produce severe injury even though normally acceptable procedures were followed. He concluded that four factors are to be weighed in determining whether a predeprivation hearing is necessary: the risk of wrongful deprivation; the impact on the property holder of having to give up his property pending a hearing (a matter evaluated by examining the type of property at issue and the length of time between the summary seizure and the postseizure hearing); the need for the creditor-claimant to avoid alerting the property holder to the pending lawsuit; and the risk of leaving the property in the hands of the current possessor during the period between the notice and hearing.[66]

Justice White apparently applied these criteria in *Mitchell* in upholding the Louisiana sequestration statute. After determining that the risk of destruction or dissipation of the vendor's lien was real,[67] he reasoned that the procedural protections were sufficient to protect the vendee from wrongful deprivation.[68] Since this was not a case involving a "necessity of life," as was *Sniadach,* the loss to the vendee was insufficient for the court to go beyond the "normal" requirement of a hearing at some time prior to final deprivation.[69]

In *Di-Chem* Justice White was faced with a statute which lacked the procedural protections—most notably judicial supervision of the

61. *Id.* at 188.
62. *Id.*
63. *Id.*
64. *Id.* at 190.
65. *Id.* at 188–89.
66. *Id.* at 190.
67. 416 U.S. at 608–09.
68. *Id.* at 608–10.
69. *Id.* at 611, 618–19.

summary procedures—mandated by his test in *Arnett* and *Mitchell.* There was thus no need to balance the creditor's interest in preserving his property from possible dissipation against any overriding need of the debtor to protect his corporate bank account. Nonetheless, some language in *Di-Chem* indicates the underlying rationale of Justice White's balancing test. He stated that "[a]lthough the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to a hearing of some sort."[70] Since Justice White believes that the "normal" requirements of the due process clause are met by a hearing at some time prior to final deprivation, it follows that, given sufficient procedural safeguards and absent an overriding need of the debtor (as in *Sniadach,* where wages were at issue), a predeprivation hearing is not constitutionally required.

In Justice White's view, it thus appears that to meet constitutional requirements in the usual summary case, a meaningful hearing must be provided prior to the final taking,[71] summary seizure procedures must incorporate safeguards—*e.g.,* judicial supervision—against wrongful deprivation,[72] and the creditor must stand ready to make the debtor whole should his suit be fruitless.[73] Under Justice White's theory it would be incumbent upon those asserting a need for predeprivation hearings to show extraordinary circumstances to justify a departure from the preceding requirements. In this sense it would appear that if Justice White's views are accepted by a majority of the Court, a broad reading of *Fuentes* is "dead."

Whether or not Justice White's balancing test will be accepted is an open question. Though a considerable majority of the Court has, in *Mitchell* and *Di-Chem,* aligned itself with the result of his rationale, no member of the Court has voiced agreement with the rationale itself.

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70. 419 U.S. at 606.

71. *See* text accompanying notes 58, 59 *supra.*

72. *See* text accompanying notes 6, 65 *supra.* It was the lack of procedural safeguards (supervision by a judicial officer, fair notice to the debtor, and issuance of the writ upon unsworn motion by the creditor) that led Judge Krentzman to find the Florida prejudgment garnishment statute, FLA. STAT. § 77.031 (1975), deficient under *Di-Chem.* Bunton v. First National Bank, 394 F. Supp. 793 (M.D. Fla. 1975). *Bunton* misreads *Di-Chem* in that the district court considered unimportant Florida's provision for a prompt post garnishment hearing. 394 F. Supp. at 795. Since this is one of the three prongs of Justice White's "normal" due process criteria (the others being judicial supervision and a readiness to make the debtor whole) it would appear that had the Florida statute provided for judicial supervision, it would have passed constitutional muster under *Di-Chem.* The *Bunton* court's emphasis on no notice to the debtor prior to issuance of the writ is a misreading of *Di-Chem* and *Mitchell;* these cases allow such an action given a bond, judicial supervision and a prompt post seizure hearing.

73. *See* text accompanying note 64 *supra.*

Justice White's theory does, however, offer a rational approach to prejudgment creditors' remedies and a means to arrive at a loose reconciliation of *Sniadach, Fuentes, Mitchell,* and *Di-Chem.* Adoption of that theory would thus make it far easier to evaluate the constitutionality of various creditors' remedies. A majority of the Court might balk at equating "adequate safeguards" with judicial supervision of summary procedures, but the remaining elements of Justice White's test—as yet unarticulated in a prejudgment remedies case—may ultimately become law. It is at least clear that so long as Justice White holds a key vote in prejudgment seizure cases, legislators and lawyers who ignore the rationale propounded in *Arnett* risk adverse decisions in the United States Supreme Court.

JOHN JEFFERSON RIMES III

Constitutional Law—VAGRANCY—FLORIDA'S LOITERING STATUTE UPHELD AS CONSTITUTIONAL WHEN CONSTRUED TO PROHIBIT LOITERING WHICH THREATENS PUBLIC SAFETY OR A BREACH OF THE PEACE.—*State v. Ecker,* 311 So. 2d 104 (Fla. 1975).

In February 1975, four consolidated cases from Dade County[1] tested for the first time the constitutionality of Florida's loitering statute.[2] The various defendants were arrested for loitering or prowl-

1. State v. Ecker, 311 So. 2d 104, 106 (Fla. 1975).
2. FLA. STAT. § 856.021 (1975), provides:

(1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

(2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstances makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial