

# STATE ACTION IN SELF-HELP AUTOMOBILE REPOSSESSION

## INTRODUCTION

Americans enjoy many benefits of modern society that they would not be able to afford without readily available installment buying plans. A necessary concomitant to a credit purchase of any size is the taking of some security by the creditor. In the case of automobile financing the automobile purchased becomes security for the loan and thus subject to repossession.

This comment considers the constitutional problems inherent in self-help automobile repossession as codified in the California Commercial Code.<sup>1</sup> Two recent federal court decisions provide the primary basis for this discussion, *Adams v. Southern California First National Bank*<sup>2</sup> and its companion case, *Hampton v. Bank of California*.<sup>3</sup>

## AUTOMOBILE REPOSSESSION

A brief consideration of the precise nature of this creditor remedy and its common law origins provides background for this comment. Repossession of an automobile for default on the payment schedule has been a common practice in the United States

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1. CAL. COMM. CODE § 9503 (West 1963) reads:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9504.

CAL. COMM. CODE § 9504 (West 1963) reads in 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. . . .

2. *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484 (9th Cir. Oct. 4, 1973). The official citation to *Adams* and *Hampton* became available after this comment went to press. The citation after modification of the opinion upon denial of en banc consideration of rehearing is 492 F.2d 324 (9th Cir. 1973).

3. *Hampton v. Bank of California*, Civil No. 72-1888 (9th Cir. Oct. 4, 1973). *Hampton* was consolidated with *Adams* on appeal, so hereinafter citations will be solely to *Adams* unless otherwise indicated.

for many years. The general remedy of self-help repossession<sup>4</sup> has been recognized as part of the common law.<sup>5</sup> The Uniform Commercial Code specifically allows this remedy, as did the Uniform Conditional Sales Act.<sup>6</sup> Some states such as California did not enact the Uniform Conditional Sales Act. In these states the validity of self-help repossession depended, until the enactment of the Uniform Commercial Code, on case law and contracts between the parties to the secured transaction.<sup>7</sup> The general rule was that the buyer's default enabled the seller to repossess under the terms of the contract or, in the alternative, to do so under an implied right to self-help repossession.<sup>8</sup>

The enactment of the Uniform Commercial Code in California codified the creditor's common law right to self-help repossession. Article 9 of the Code deals with secured transactions. Section 9501 states that when a debtor is in default under a security agreement, the secured party has the rights and remedies provided in Article 9 and, subject to some limitations, any additional rights and remedies in the security agreement.<sup>9</sup> Specifically, section 9503 provides that unless otherwise agreed a secured party's right to possession of the collateral accrues on default, and possession may be taken without judicial process if this can be accomplished without breach of the peace.<sup>10</sup> Section 9504 gives the secured party the right to dispose of the collateral at a commercially reasonable public or private sale.<sup>11</sup>

Despite the codification of the right to self-help repossession upon buyer's default, automobile sellers and lending institutions generally include a specific provision in their security agreements whereby the buyer agrees that the secured party may either accel-

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4. Self-help repossession is a simple remedy whereby the creditor decides to retake the property involved and dispatches someone to accomplish that task. The assistance of the judicial process is not required for the actual physical taking.

5. 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.1, at 1212 (1965).

6. UNIFORM CONDITIONAL SALES ACT § 16.

7. *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484, at 6 (9th Cir. Oct. 4, 1973).

8. *See, e.g., Johnson v. Kaeser*, 196 Cal. 686, 694-95 (1925) (contract between plaintiff and defendant contained a clause allowing the seller to repossess upon buyer's default); *Miller v. Steen*, 34 Cal. 138, 144 (1867) (defendant-seller was within his rights under the terms of the contract to retake certain machinery from plaintiff when plaintiff fell behind in his payments).

9. CAL. COMM. CODE § 9501 (West 1963) reads in part: (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this Part and except as limited by subsection (3) those provided in the security agreement. . . .

10. CAL. COMM. CODE § 9503 (West 1963).

11. CAL. COMM. CODE § 9504 (West 1963).

erate payments upon default or pursue his remedies under the Uniform Commercial Code or both.<sup>12</sup>

Repossession procedures follow a fairly standard practice. If the debtor does not freely return the automobile to the bank or loan company involved, a reposessor<sup>13</sup> locates the automobile or automobiles in question and has them towed away. Because no notice need be given prior to the taking of his property, the completely legal element of surprise helps the reposessor avoid any potentially dangerous arguments with the debtor.

A comparison of the way in which courts have dealt with other creditors' remedies is helpful in order to analyze auto repossession cases. Such a comparison must begin with a discussion of the landmark case of *Sniadach v. Family Finance Corporation*.<sup>14</sup>

#### SNIADACH AND ITS PROGENY

The prejudgment rights of debtors and creditors have been

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12. Creditors continue to maintain their contractual remedy as well as their statutory remedy, as evidenced by the language in the security agreement in *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484, at 3-4 (9th Cir. Oct. 4, 1973):

Should Debtor fail to make payment of any part of the principal or interest, as provided in said promissory note . . . the whole principal sum unpaid upon said promissory note with interest accrued thereon, . . . shall immediately become due and payable at the option of the Secured Party. Upon the occurrence of any such event of default Secured Party shall have all of the rights and remedies of a Secured Party under the California Uniform Commercial Code, or any other applicable law, and all rights and remedies shall, to the extent permitted by law, be cumulative. Without limiting the generality of the foregoing, upon the occurrence of any such event of default the Secured Party is entitled to take possession of the vehicle and to take such other measures as Secured Party may deem necessary for the protection of the vehicles. . . .

13. CAL. BUS. & PROF. CODE § 7520 (West 1964) sets forth the basic licensing requirement for repossessions. CAL. BUS. & PROF. CODE § 7521 (West Supp. 1973) reads in part:

(e) A reposessor within the meaning of this chapter is a person who, for any consideration whatsoever, engages in business or accepts employment to locate or recover personal property, including but not limited to personal property registered under the provisions of the Vehicle Code, which has been sold under a conditional sales agreement or which is subject to a chattel mortgage. A licensee under this chapter shall not engage in business or accept employment to collect claims owed or due or asserted to be owed or due to another unless the licensee has complied with the provisions of this chapter, except that a reposessor licensed under this chapter may make a written demand for payment in lieu of repossession if the demand is made pursuant to an assignment for repossession and if under the terms of the assignment the fee or remuneration due to the reposessor is not based on a percentage of the amount collected.

CAL. BUS. & PROF. CODE § 7526.4 (West 1963) reads:

An applicant for a license as a reposessor, or his manager, shall have had at least one year of experience in recovering personal property sold under a conditional sales agreement or under the terms of a chattel mortgage or the equivalent thereof as determined by this chapter.

14. 395 U.S. 337 (1969).

the subject of extensive litigation in recent years. In 1969, the United States Supreme Court ruled in *Sniadach v. Family Finance Corporation*<sup>15</sup> that Wisconsin's prejudgment garnishment procedure violated fundamental principles of due process because the wage earner had no notice or opportunity to be heard prior to the garnishment of her wages.<sup>16</sup> Many cases have been litigated since *Sniadach* in an attempt to determine the exact parameters of the decision.<sup>17</sup> Some courts narrowly read *Sniadach* as holding that notice and a prior hearing are only required prior to the deprivation of such "necessary" items as wages and welfare benefits.<sup>18</sup> However, the United States Supreme Court in a plurality opinion in *Fuentes v. Shevin*<sup>19</sup> stated that the fourteenth amendment procedural due process safeguards of notice and prior hearing attach whenever any significant property interest is at stake.<sup>20</sup> The court held that the only exceptions would be certain narrowly defined "extraordinary situations" that justify postponing notice and opportunity for a hearing.<sup>21</sup> The Florida and Pennsylvania prejudgment replevin statutes were declared unconstitutional because they allowed summary seizure of the debtors' possessions when only the private gain of individuals was at stake—a non-extraordinary situation.<sup>22</sup>

In *Blair v. Pitchess*,<sup>23</sup> the California Supreme Court held that California's claim and delivery procedures permitting prejudgment replevin prior to notice or hearing did not meet the procedural due process requirements laid down in *Sniadach*.<sup>24</sup> The California high court had previously ruled in *McCallop v. Car-*

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15. *Id.*

16. *Id.* at 342.

17. *Sniadach* and the other cases discussed in this section involved the constitutionality of creditors' remedies which directly involve a state agent in the taking of the property. Therefore, the requisite state action for a federal cause of action under the fourteenth amendment was clearly present. See text accompanying notes 32-35, *infra*.

Even though the state action question was not in dispute in these cases, they are discussed because the various creditor remedies involved were condemned for their failure to provide notice and opportunity for a hearing, the same attacks made by the plaintiff-creditors Adams and Hampton.

18. See, e.g., *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971) (Georgia's statutory garnishment scheme held invalid only as applied to wages); *Black Watch Farms v. Dick*, 323 F. Supp. 100 (D. Conn. 1971) (court held as a matter of law that *Sniadach* not intended to cover real estate attachment procedures); *Young v. Ridley*, 309 F. Supp. 1308 (D.D.C. 1970) (*Sniadach* inapplicable to foreclosure of real estate).

19. 407 U.S. 67 (1972).

20. *Id.* at 86.

21. *Id.* at 90.

22. *Id.* at 92.

23. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

24. *Id.* at 277, 486 P.2d at 1256, 96 Cal. Rptr. at 56.

berry<sup>25</sup> and *Cline v. Credit Bureau of Santa Clara Valley*<sup>26</sup> that California's wage garnishment procedures were likewise unconstitutional in light of the *Sniadach* principles.

In *Randone v. Appellate Department of Superior Court*,<sup>27</sup> the state supreme court was asked to consider the constitutionality of California's prejudgment attachment procedures. The Randones' checking account was attached by a collection agency without any prior notice or hearing as to the validity of its claim. The supreme court reversed the refusal of the lower court to dissolve the attachment, holding that the attachment statute was unconstitutional on its face for failing to provide the necessary procedural due process safeguards of notice and hearing.<sup>28</sup> The statute, as written, sanctioned attachment as a proper remedy in any contract situation and permitted attachment of *any* and *all* property of the debtor other than his wages.<sup>29</sup> In *Randone*, the California Supreme Court also stated the broad proposition later adopted by the United States Supreme Court in *Fuentes v. Shevin*<sup>30</sup> that the constitutional principles of notice and hearing underlying *Sniadach* are applicable to any situation where an individual is deprived of a significant property interest.<sup>31</sup>

In all of these cases, some property interest of the debtor was taken without any notice prior to the taking and without a preliminary hearing to determine the validity of the claim before the taking actually occurred. The failure to provide these two protections was viewed, absent extraordinary circumstances, as a violation of procedural due process.

By twists of legal history, remedies such as attachments and replevin have developed involving state officials in their actual physical enforcement.<sup>32</sup> Other remedies such as self-help repossession have developed to allow physical enforcement by the

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25. 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970). The supreme court upheld the trial court's determination that prejudgment garnishment of plaintiff's wages was an unconstitutional taking of property in violation of procedural due process.

26. 1 Cal. 3d 908, 464 P.2d 125, 83 Cal. Rptr. 669 (1970). The plaintiff sought declaratory and injunctive relief against a threat to garnish his wages to satisfy a debt. The supreme court, citing *McCallop*, reversed the dismissal of the complaint by the trial court.

27. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972).

28. *Id.* at 563, 488 P.2d at 32, 96 Cal. Rptr. at 728.

29. *Id.* at 561, 488 P.2d at 30, 96 Cal. Rptr. at 726.

30. 407 U.S. 68, 86 (1972).

31. *Randone v. Appellate Dep't of Super. Ct.*, 5 Cal. 3d 536, 547-52, 488 P.2d 13, 20-23, 96 Cal. Rptr. 709, 716-19 (1971).

32. Writs of attachment or replevin must be obtained prior to the taking of the goods involved. CAL. CIV. PRO. CODE § 509 *et seq.*, § 537 (West Supp. 1974).

creditor himself.<sup>33</sup> Although all of these remedies suffer from the same failure to provide notice and opportunity for a hearing, the courts appear disposed to using the state action issue as a means of avoiding the constitutional problems implicit in self-help repossession. Analysis of *Adams v. Southern California First National Bank*<sup>34</sup> and *Hampton v. Bank of California*,<sup>35</sup> recent auto repossession cases, will show how discussion of these procedural due process problems was avoided.

#### RECENT AUTO REPOSSESSION CASES

*Adams v. Southern California First National Bank*<sup>36</sup> and *Hampton v. Bank of California*<sup>37</sup> were companion cases on appeal to the Court of Appeals for the Ninth Circuit. George Adams borrowed \$1000 to pay medical bills. In order to repay the loan he executed a promissory note for over \$1100 and a security agreement giving the Bank of La Jolla (predecessor in interest to Southern California First National Bank) a security interest in three automobiles. The security agreement contained a clause giving the bank the right to accelerate payments upon default and to make complete use of all remedies under the California Commercial Code, including self-help repossession. Adams had paid nearly \$900 of the \$1100 before he defaulted. The Southern California First National Bank employed Richard Egly, a licensed reposessor, to take two of the three vehicles from Adams' possession. The two cars were sold and the resulting proceeds left a deficit of less than one dollar which was cancelled.

The District Court for the Southern District of California granted Adams' motion for partial summary judgment, declaring that enactment in California of sections 9503 and 9504 of the California Commercial Code amounted to sufficient state action to raise a federal question under the Civil Rights Act of 1871.<sup>38</sup> Based upon that conclusion, the district court decided that the repossession of Adams' vehicles under authority of sections 9503

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33. The creditor makes the decision to repossess and accomplishes the task without any necessary writs. See text accompanying note 13 *supra*.

The California Supreme Court in the recent case of *Adams v. Dep't of Motor Vehicles*, 11 Cal. 3d 146, — P.2d —, — Cal. Rptr. — (1974), held that the state's involvement in the imposition and enforcement of garageman's liens constitutes state action despite the fact that the lien is enforced by the creditor alone without the aid of state personnel. *Id.* at 153, — P.2d at —, — Cal. Rptr. at —.

34. Civil No. 72-1484 (9th Cir. Oct. 4, 1973).

35. Civil No. 72-1888 (9th Cir. Oct. 4, 1973).

36. Civil No. 72-1484 (9th Cir. Oct. 4, 1973).

37. Civil No. 72-1888 (9th Cir. Oct. 4, 1973).

38. 42 U.S.C. § 1983 (1970).

and 9504 was an invasion of the plaintiff's constitutional rights.<sup>39</sup>

The plaintiff in *Hampton v. Bank of California*<sup>40</sup> purchased a 1967 Buick which was financed by a sales contract assigned to the bank. After nearly two years of making payments on the thirty month payment schedule, Hampton was allegedly late in making one payment and the bank repossessed the car. The district court dismissed Hampton's complaint for lack of subject matter jurisdiction.<sup>41</sup>

These divergent cases from the northern and southern districts were consolidated on appeal. The issue on appeal was whether prejudgment self-help repossession, as provided for by security agreements between debtors and creditors and as authorized by sections 9503 and 9504 of the California Commercial Code, involves sufficient state action to establish a federal cause of action. Adams and Hampton claimed federal jurisdiction pursuant to United States Code, title 42, section 1983 and title 28, section 1343(3), alleging that California's summary repossession practices constitute action taken "under color of state law" within the meaning of the fourteenth amendment.<sup>42</sup>

Both parties alleged that California authorizes, regulates, and participates in self-help repossession by means of a pervasive statutory scheme which sets forth the basic right to summary repossession,<sup>43</sup> the procedures to be followed during and after repossession,<sup>44</sup> licensing requirements for persons in the business of repossession,<sup>45</sup> and various other procedures. Adams and Hampton maintained that these statutes sanction self-help repossession and thereby significantly involve the state of California itself in the repossession process.

The court of appeals rejected these arguments unequivocally.<sup>46</sup> The court held that the State of California is not so signif-

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39. *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484, at 2 (9th Cir. Oct. 4, 1973).

40. Civil No. 72-1888 (9th Cir. Oct. 4, 1973).

41. *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484, at 3 (9th Cir. Oct. 4, 1973).

42. 42 U.S.C. § 1983 (1970); 28 U.S.C. § 1343(3) (1970).

43. CAL. COMM. CODE § 9503 (West 1963).

44. CAL. CIV. CODE § 2983.2 (West 1954). This statute provides the creditor the right to sell the repossessed vehicle and details specific requirements for notifying all persons liable under the conditional sales agreement involved. The statute is important not for its particular requirements, but because its existence goes favorably to the question of state involvement in auto repossession. See also CAL. VEH. CODE §§ 5600-02 (West 1971). These statutes detail the procedure for clearing title to the repossessed vehicle.

45. CAL. BUS. & PROF. CODE § 7520 (West 1964); CAL. BUS. & PROF. CODE § 7521 (West Supp. 1973).

46. *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484, at 7 (9th Cir. Oct. 4, 1973).

icantly involved in self-help repossession by creditors to permit the court to find this action to be taken under color of state law.<sup>47</sup>

### ANALYZING ADAMS AND HAMPTON

#### *Applicability of Reitman v. Mulkey*

The plaintiffs, Adams and Hampton, contended that the United States Supreme Court in *Reitman v. Mulkey*<sup>48</sup> established a sufficient basis for finding the necessary color of state law in an auto repossession situation.<sup>49</sup> However, the *Adams-Hampton* court took a position diametrically opposed to that of the plaintiff-debtors and held that *Reitman* was inapplicable to the facts of the cases before them.<sup>50</sup>

The *Adams-Hampton* majority is undoubtedly correct in stating that state involvement in private discrimination must be significant before a federal cause of action arises.<sup>51</sup> Judge Byrne, in his dissenting opinion in *Adams and Hampton*, noted that the "color of state law" issue is very conceptual and susceptible of different interpretations.<sup>52</sup> The possibility of such differing interpretations is exemplified by the court's discussion of the applicability of *Reitman* to the facts of *Adams and Hampton*.

The debtors contended that the enactment of sections 9503 and 9504 of the California Commercial Code, the regulation of motor vehicles sales contracts by the Rees-Levering Act,<sup>53</sup> the re-

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47. *Id.*

48. 387 U.S. 369 (1967).

49. Civil No. 72-1484 at 12.

50. *Id.* at 12-13.

51. *Id.* at 8.

52. *Id.* at 23-24.

53. CAL. CIV. CODE §§ 2981-84.4 (West Supp. 1974). In *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484 (9th Cir. Oct. 4, 1973), *rehearing denied*, Civil No. 72-1484, at 4-5 (9th Cir. Oct. 4, 1973) (Hufstедler, J., dissenting from denial of en banc consideration of rehearing), Judge Hufstедler presents a very convincing argument that the heavy regulation of the automobile-secured credit industry by the Rees-Levering Act coupled with codified self-help repossession as an ingredient of that industry compels the conclusion of state action in *Adams and Hampton*. She enumerates all the statutes relating to self-help repossession and the licensing of repossessioners and then concludes with the following statement:

California is not a neutral bystander in a contest between these private debtors and creditors. The economy of the state has become heavily dependent on the automobile industry in all its parts, an essential feature of which is consumer credit secured by interests in automobiles. California's statutory authorization to creditors to seize automobiles without prior notice or hearing reduces the creditor's costs of repossession, for the evident purpose of stimulating the flow of consumer credit for the benefit of the state's economy, at the expense of those whose automobiles are summarily seized. Thus, the automobile-secured credit industry in California has become a state instrumentality through which California seeks to generate public benefits. Of greater



quirement that all reposseors be licensed,<sup>54</sup> and the clearing of title to repossessed vehicles for creditors<sup>55</sup> together amount to significant state authorization and encouragement<sup>56</sup> of self-help remedies. Adams and Hampton relied principally on the case of *Reitman v. Mulkey*<sup>57</sup> to demonstrate that the presence of such a statutory scheme amounts to significant state action for constitutional purposes.

The court of appeals, however, based its rejection of this argument on *Reitman*, contending that the rationale of that case could not be extended to a case involving debtors' and creditors' rights.<sup>58</sup> The two features said to distinguish *Reitman* from *Adams* and *Hampton* are: 1) the effect of the conduct challenged in each case on pre-existing law; and 2) the fact that *Reitman* involved racial discrimination.

These two factors, however, do not necessarily make the state action definition of *Reitman* inapplicable to *Adams-Hampton*. The first claimed distinction, that the State was "much more significantly involved" in *Reitman* because the challenged conduct was an attempt to reverse pre-existing law,<sup>59</sup> is an assertion of dubious importance. The only fact justifying such an assertion is that the passage of Proposition 14 reversed pre-existing law,<sup>60</sup> while the enactment of the California Commercial Code codified pre-existing law.<sup>61</sup> The *Adams-Hampton* court failed to ex-

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moment in this state action context, however, is that California's regulatory scheme, by delegating to private persons power to resort to self-help, saves the state the expense that it would otherwise incur in using its own governmental personnel to seize the property and in providing notice and hearing before the state's judicial and quasi-judicial officers. The state cannot avoid the impact of the Fourteenth Amendment by thriftily abdicating these functions to private persons. It cannot do so by expressly delegating a part of them to creditors or their nominees.

54. CAL. BUS. & PROF. CODE § 7520 (West 1964); CAL. BUS. & PROF. CODE § 7521 (West Supp. 1974).

55. CAL. CIV. CODE § 2983.2 (West 1954); CAL. VEH. CODE §§ 5600-02 (West 1971).

56. CAL. VEH. CODE § 28 (West 1971) requiring that the police be notified of self-help repossessions is another statute the plaintiffs could have cited in this context.

57. 387 U.S. 369 (1967). The California Supreme Court held that article 1, section 26 would have created a constitutional right to discriminate on racial grounds in the sale and leasing of real property. The United States Supreme Court affirmed, holding that the challenged amendment significantly encouraged private discrimination and through its enactment involved the state in this discrimination. *Id.* at 381.

58. *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484, at 12-13 (9th Cir. Oct. 4, 1973).

59. *Id.*

60. The California legislature had previously enacted several statutes regulating racial discrimination which were, in effect, a nullity after the passage of Proposition 14.

61. *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484, at 13 (9th Cir. Oct. 4, 1973). The passage of Proposition 14 changed pre-existing

plain why conduct which reverses pre-existing law involves more significant state action than conduct which codifies pre-existing law.

The *Adams-Hampton* court overlooked a statement relevant to this supposed distinction in *Palmer v. Columbia Gas of Ohio, Inc.*,<sup>62</sup> a case cited by the court in another context to support its rejection of the plaintiffs' case.<sup>63</sup> The *Palmer* court stated that the United States Supreme Court in *Reitman* held that state action is present in the enforcement of any statute or amendment which authorizes or encourages violations of constitutional rights *regardless* of whether the act codifies the common law, creates new law or otherwise alters the common law.<sup>64</sup>

In *Reitman*, the passage of Proposition 14 would have added a new amendment to the state constitution; the repeal of such an amendment must be accomplished by another statewide referendum. A statute such as section 9503 of the Commercial Code can be repealed merely by a vote of the legislature. The state conduct in *Reitman* might be denominated more "serious" but the seriousness of the act does not go to its significance in terms of the quantum of state action necessary to amount to conduct taken "under color of state law."

The second factor which the *Adams-Hampton* court indicated made the *Reitman* concept of state action inapplicable to the repossession issue is the fact that *Reitman* involved racial discrimination.<sup>65</sup> In *Reitman*, the United States Supreme Court agreed with the finding of the California Supreme Court that the challenged referendum was passed by the voters with the intent to perpetuate racial discrimination in violation of the fourteenth amendment.<sup>66</sup> The court of appeals implied that the rationale in *Reitman* requires evidence that the State intended to authorize conduct violating the fourteenth amendment by enacting the relevant sections of the California Commercial Code.<sup>67</sup> Such a subjective intent would be extremely difficult to prove, but even if it were provable, the establishment of a specific intent is not necessary to show a viola-

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law while the enactment of sections 9503 and 9504 of the California Commercial Code made no changes in pre-existing law.

62. 479 F.2d 153 (6th Cir. 1973).

63. See text accompanying notes 79 to 88 *infra*.

64. In *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 163 (6th Cir. 1973), the court cited *Reitman v. Mulkey*, 387 U.S. 369, 376 (1967) as supporting this interpretation of the *Reitman* holding. The cited section of *Reitman* reasonably lends itself to this interpretation.

65. *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484, at 13 (9th Cir. Oct. 4, 1973).

66. *Reitman v. Mulkey*, 387 U.S. 369, 376 (1967).

67. Civil No. 72-1484, at 13 (9th Cir. Oct. 4, 1973).

tion of fourteenth amendment due process rights.<sup>68</sup>

The court of appeals relied heavily on the United States Supreme Court interpretation of what the California Supreme Court did *not* hold in *Reitman*. The *Adams-Hampton* court quoted the United States Supreme Court's statement in *Reitman* that the California Supreme Court did not hold that a state may never codify an existing policy of neutrality with respect to private discriminations.<sup>69</sup> The *Adams-Hampton* court implied that the enactment of sections 9503 and 9504 was merely the codification of such an existing policy of neutrality.<sup>70</sup>

The weakness in drawing implications from such dictum is demonstrated by a closer examination of whether the Commercial Code provisions perpetuated an existing policy of neutrality. Prior to its enactment, creditors were forced to rely on their contractual rights to self-help repossession or on case law granting them such a right. The enactment by the State of statutes codifying these policies did not keep it neutral in dealings between debtors and creditors because creditors then had an additional means provided by the State of enforcing their contracts. The court of appeals claimed that the State could not be held responsible for the standardized contracts which usually provide for self-help repossession in the event of default.<sup>71</sup> However, the State can be held responsible for providing statutes which make the enforcement of such contracts all the easier.

### "Requiring" Action versus "Encouraging" Action

The court rejected the debtors' charge that all the statutes involved create an extensive system of state regulation amounting to state action.<sup>72</sup> The court cited *Moose Lodge No. 107 v. Irvis*<sup>73</sup> as authority for this rejection on the grounds that in *Adams and Hampton*, as in *Moose Lodge*, the regulations have no significance on the issue for decision.<sup>74</sup> The court implied that the issue in *Adams-Hampton* is whether there is a pervasive state scheme to *require* the use of self-help repossession.<sup>75</sup> If the is-

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68. See *Nebbia v. New York*, 291 U.S. 502 (1933).

69. Civil No. 72-1484, at 14 (9th Cir. Oct. 4, 1973).

70. *Id.*

71. *Id.* at 15.

72. *Id.* at 15-16.

73. 407 U.S. 163 (1972). In *Moose Lodge*, the Supreme Court held that Pennsylvania's regulatory scheme enforced by the state liquor board did not sufficiently implicate the state in the Lodge's discriminatory guest policies to make these practices "state action" within the purview of the Equal Protection clause.

74. *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484, at 16 (9th Cir. Oct. 4, 1973).

75. *Id.*

sue is phrased in those terms the answer is, of course, that the regulations do not *require* creditors to use the remedy of self-help repossession. However, the question is whether state law must require a certain action before that action can be said to be carried out "under color of state law." The state constitutional amendment under attack in *Reitman* did not require that citizens discriminate on the basis of race in renting or selling their homes; on the contrary, the amendment left that decision entirely up to the landlord or homeowner. It was enough "color of state law" for such a landlord to be encouraged to discriminate on the basis of race because of the existence of the amendment.<sup>76</sup>

The *Adams-Hampton* court implied that the California statutes regulating auto repossession must require the use of that remedy before sufficient state action can be found to reach the constitutionality of the procedure.<sup>77</sup> The court stated that self-help repossession is one of several alternatives open to the creditor.<sup>78</sup> It is misleading to assume that other creditor remedies leave the creditor with no alternatives; in all cases the decision to invoke any creditors' remedy is made by the creditor. The distinction is that the assistance of the judicial process is required to complete *most* remedies, whereas *repossession* is carried out by private individuals. The property involved is retaken because the debtor is behind in his payments to a particular creditor. Therefore, the failure to maintain payments is the original reason for the retaking of property in all cases, and the decision to retake the property is always made by the creditor. The only difference is the means of enforcement. The state may require a particular method of enforcement in certain cases but, in all cases, the creditor has the same initial latitude in deciding whether the property should be taken.

### *Applicability of Utility Service Termination Cases*

The *Adams-Hampton* court decided that only non-racial cases discussing the "color of state law" issue were relevant to the auto repossession problem.<sup>79</sup> On that basis, the court found cases involving utility service termination procedures to be relevant in disposing of the issue at bar.<sup>80</sup> However, the court failed to ex-

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76. *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967). The two factors which the court of appeals said distinguished *Reitman* from *Adams-Hampton* do not really involve the question of "encouraging" conduct versus "requiring" conduct. See text accompanying notes 48-71 *supra*.

77. Civil No. 72-1484, at 16 (9th Cir. Oct. 4, 1973).

78. *Id.*

79. *Id.* at 17.

80. *Id.*

plain why utility service termination cases are any more relevant than any other type of case. The finding of state action in these utility service cases is said to be warranted by significant affirmative state support contributing to the effectiveness of the defendant companies' conduct.<sup>81</sup> Such significant affirmative support occurs in utility service termination cases because the state controls nearly every aspect of the operation of public utilities.<sup>82</sup> However, the choice of this line of cases as a test for the quantum of state involvement necessary to constitute state action is questionable. The very nature of public utility operations is such that the state has been deeply involved in the operation of these facilities.<sup>83</sup> The majority in *Adams-Hampton* cautioned that if all conduct which conforms to state law is state action for the purposes of the fourteenth amendment, then the state action concept is emasculated.<sup>84</sup> The state action concept can be likewise emasculated by requiring any conduct said to be "under color of state law" to involve the state to the extent that it is involved in public utility operations.

The *Adams-Hampton* court became internally inconsistent in its rationale when it stated that utility service termination cases are relevant to the state action discussion in *Adams-Hampton* because of their non-racial nature, and then proceeded to rely specifically on *Palmer v. Columbia Gas of Ohio, Inc.*<sup>85</sup> The inconsistency arises because the *Palmer* court supported its finding of state action in that case<sup>86</sup> with an extensive discussion of *Reitman v. Mulkey*,<sup>87</sup> a case which the *Adams-Hampton* court labeled inapplicable to non-racial cases.<sup>88</sup>

#### *Applicability of Hall v. Garson and Fuentes v. Shevin*

The plaintiffs, Adams and Hampton, argued that the act of repossession, although private in form, is a function that would otherwise be performed by the state.<sup>89</sup> Their principal reliance was on the Fifth Circuit case of *Hall v. Garson*,<sup>90</sup> in which the court held that a landlord who enforced his statutory landlord's

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81. See, e.g., *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973); *Bronson v. Consolidated Edison*, 350 F. Supp. 443 (S.D.N.Y. 1972).

82. See, e.g., *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973).

83. *Id.* at 163-64.

84. Civil No. 72-1484, at 9-10 (9th Cir. Oct. 4, 1973). See also *Jojola v. Wells Fargo Bank*, Civil No. C-71 900 SAW (N.D. Cal. May 8, 1973).

85. 479 F.2d 153 (6th Cir. 1973).

86. *Id.* at 163.

87. 387 U.S. 369 (1967).

88. See text accompanying note 65 *supra*.

89. Civil No. 72-1484, at 17 (9th Cir. Oct. 4, 1973).

90. 430 F.2d 430 (5th Cir. 1970).

lien by entering the dwelling of his tenant and seizing her television set was performing an act which had all the characteristics of state action.<sup>91</sup> The Ninth Circuit attempted to distinguish *Hall* on the grounds that the tenant actually owned the television and that enforcement of such a statute had historically been the function of the State of Texas.<sup>92</sup> The court made no attempt to support this latter "distinguishing" factor and in addition asserted without any support that an argument "can" be made that repossession is traditionally a private function and, hence, no state delegation of power is involved.<sup>93</sup>

The claim that *Hall v. Garson* is inapplicable because the tenant owned the television set loses much of its validity upon closer examination of the United States Supreme Court decision in *Fuentes v. Shevin*.<sup>94</sup> In *Fuentes*, the plaintiff purchased goods under a conditional sales contract.<sup>95</sup> The Supreme Court was not concerned that the debtors had not entirely paid for the property involved; rather, the Court found it unconstitutional that the debtors were deprived of their *use* interest in the property without fulfillment of required procedural due process.<sup>96</sup> The attempt of the *Adams-Hampton* court to distinguish *Hall* from the facts at bar, on the grounds of ownership versus non-ownership, appears inapposite in light of the *Fuentes* extension of due process rights to the protection of any significant property interest regardless of who holds legal title.

### *Deficiency Judgments and State Action*

The debtors Adams and Hampton alleged that the deficiency judgment action allowed by California Commercial Code section 9504 following the sale of a repossessed vehicle results in judicial enforcement of procedures in which due process has been denied,<sup>97</sup> thus coming under the protection of *Shelley v. Kramer*.<sup>98</sup>

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91. *Id.* at 439.

92. *Id.* The *Hall* court stated that the execution of a lien, whether a traditional security interest or a writ of attachment or judgment lien has traditionally been the function of the sheriff in Texas. Apparently the *Adams-Hampton* court relied on this statement to distinguish *Hall* from *Adams-Hampton*.

93. *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484, at 19 (9th Cir. Oct. 4, 1973).

94. 407 U.S. 68 (1972).

95. Mrs. Fuentes had purchased a stove and a stereo under a conditional sales contract calling for monthly payments over a period of time. *Id.* at 70.

96. *Id.* at 86.

97. Civil No. 72-1484, at 20 (9th Cir. Oct. 4, 1973).

98. 334 U.S. 1 (1948). The *Shelley* court held that private agreements to exclude persons of a designated race from the use or occupancy of real estate for residential purposes does not violate the fourteenth amendment, but that it is violative of the equal protection clause of the fourteenth amendment for the courts to enforce these restrictive covenants.

and *Barrows v. Jackson*.<sup>99</sup>

However, the court of appeals found two major differences between the enforcement of a deficiency judgment and the enforcement of racially restrictive covenants. The court stated that the deficiency claim is based on the underlying debt and, thus, arguably not related to the alleged unconstitutional seizure.<sup>100</sup> However, if the deficiency judgment becomes necessary because the repossessed auto has been sold to an associate of the reposessor at a price below fair market value, then the need for the deficiency judgment is arguably related to the self-help seizure of the car. This relation exists because establishment of the validity of the claim under judicial auspices, with proper protection of the procedural due process rights of the debtor, would protect the debtor's interest to a greater extent.

The *Adams-Hampton* court also rejected the attempt to come under the protection of *Shelly* and *Barrows* with the tenuous statement that restrictive covenant cases "may be" and "apparently" have been limited to situations where judicial enforcement had the effect of forcing an unwilling party to discriminate.<sup>101</sup> Although it may be apparent to the *Adams-Hampton* court that *Shelley* and *Barrows* have been limited to such situations, the court failed to cite any authority in support of that statement.

### *Summary of the Court's Opinion in Adams and Hampton*

In finding for the creditors in these companion cases, the court of appeals decided that the concept of state action should not be expanded to invoke federal protection over security agreements between debtors and creditors.<sup>102</sup> The single most important factor in the failure to find state action in *Adams and Hampton* was the court of appeals' finding that *Reitman v. Mulkey* does not apply to cases which do not involve racial discrimination. That finding is obviously open to disagreement, as evidenced by the court's boot-strap analysis of why *Reitman* does not apply to debtor-creditor cases<sup>103</sup> and by the large number of courts which have applied *Reitman* to non-racial cases.<sup>104</sup> The

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99. 346 U.S. 249 (1953). The *Barrows* court held that the enforcement of a covenant forbidding use and occupancy of real estate by non-Caucasians, by an action at law in a state court to recover damages from a co-covenantor for a breach of the covenant, is barred by the fourteenth amendment.

100. Civil No. 72-1484, at 20 (9th Cir. Oct. 4, 1973).

101. *Id.*

102. *Id.* at 22.

103. See text accompanying notes 48-71 *supra*.

104. See, e.g., *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973); *Barber v. Rader*, 350 F. Supp. 183 (N.D. Cal. 1972); *Holt v. Brown*, 336 F. Supp. 2 (W.D. Ky. 1971); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970).

court of appeals' rejection of *Reitman* is also open to question when this same court utilizes *Moose Lodge No. 107 v. Irvis*,<sup>105</sup> primarily a racial discrimination case, to support its rejection of the plaintiff-debtor's arguments.

Utilization of the state action issue to avoid the merits of a constitutional challenge is an example of so-called judicial restraint. The *Adams-Hampton* court avoided consideration of the alleged procedural due process deficiencies of current self-help repossession procedures by deciding that the plaintiff had not shown the requisite state action constitutionally necessary before such considerations can be invoked. An earlier section of this comment discussed the due process problems involved in the creditors' remedies invalidated in *Sniadach v. Family Finance Corporation*<sup>106</sup> and its progeny. This comment will conclude with a brief discussion of the similar due process problems in auto repossession and the propriety of using the state action issue to avoid passing on the constitutionality of these procedures.

### CONCLUSION

The practice of self-help repossession deserves a more adequate judicial exploration than that given it in *Adams-Hampton*. A state statutory scheme which codifies a remedy and regulates its enforcement in various ways should not be dismissed as insignificant solely because the remedy existed in some form prior to the adoption of the statutes.<sup>107</sup> The debtor-creditor relationship has never been based on equal bargaining power, but the United States Supreme Court's decision in *Sniadach* was the beginning of a move to more fully protect the rights of debtors—usually persons in an inferior bargaining position. It remains to be seen whether the question of significant state involvement in the enforcement of creditor remedies such as self-help repossession will impede further clarification of debtors rights.' An appropriate response to using the state action issue to avoid further development of debtors' rights is the comment of Chief Judge Chambers, who during oral argument in *Adams* before the district court leaned over the bench and asked counsel, "Isn't there a message in *Fuentes*?"<sup>108</sup>

The "message" in *Fuentes* is that debtors can not be deprived of any significant property interest without notice and the

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105. 407 U.S. 163 (1972).

106. 395 U.S. 337 (1969). See text accompanying notes 15-35 *supra*.

107. See text accompanying notes 59-64 *supra*.

108. Dauer & Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply*, 47 S. CAL. L. REV. 116, 150 n.148 (1973).



opportunity for a prior hearing to determine the validity of the creditor's claim.<sup>109</sup> The Supreme Court in *Fuentes* found the failure to provide these protections a violation of the due process clause of the fourteenth amendment.<sup>110</sup> Chief Judge Chambers seems to be referring to the apparent incongruity of refusing to consider whether another creditor remedy such as self-help repossession also violates the fourteenth amendment. The Constitution mandates certain protections for debtors in their relationships with creditors.<sup>111</sup> The obvious question, apparently answered in the affirmative by the *Adams-Hampton* court, is whether the state action issue can be used to avoid protecting debtors from violation of their procedural due process rights.

If the debtor-purchaser of an automobile falls *one* payment behind schedule, the lending institution or other creditor can send a reposessor to take the car. The debtor need not be told that the car is to be taken, nor does he have an opportunity to protest the validity of the taking at a hearing prior to the actual repossession. If the debtor does not meet the creditor's payment demands, the car will be sold. If the proceeds of the sale are not sufficient, the debtor is liable for a deficiency judgment.<sup>112</sup>

These auto repossession practices appear to suffer from the same constitutional infirmities—lack of notice and opportunity for hearing—which have been condemned in a long line of cases previously discussed.<sup>113</sup> The fact that automobiles are involved raises another question which is beyond the scope of this comment—does automobile repossession involve deprivation of a necessity of life.<sup>114</sup> Some people would argue that an automobile is not a necessity of life,<sup>115</sup> but the courts and the California legisla-

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109. *Fuentes v. Shevin*, 407 U.S. 68, 86 (1972).

110. *Id.* In the recent case of *Mitchell v. W.T. Grant Co.*, 42 U.S.L.W. 4671 (U.S. May 13, 1974), the United States Supreme Court upheld the Louisiana sequestration statute similar to the replevin statutes invalidated in *Fuentes*. The statute in *Mitchell* was distinguished on two grounds: one, it provides an opportunity for an immediate hearing to determine whether the writ of sequestration should be maintained or dissolved, and, two, the writ is initially issued by a judge rather than by a clerk as in *Fuentes*. The Court felt that these two factors provide the due process protection which was missing in the procedures invalidated in *Fuentes*.

111. See text accompanying notes 15-35 *supra*.

112. CAL. COMM. CODE § 9504 (West 1963).

113. See text accompanying notes 15-35 *supra*.

114. A number of cases, notably *Randone v. Appellate Dep't of the Super. Ct.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), have discussed the deprivation of necessities of life. The court stated in *Randone* that the hardship imposed by the attachment of a debtor's "necessities of life" is so severe that a creditor's private interest is probably never sufficient to permit the imposition of such deprivation before notice and hearing on the validity of the creditor's claim. *Id.* at 558, 488 P.2d at 27, 96 Cal. Rptr. at 723.

115. See *Ratzlaff v. Portillo*, 14 Cal. App. 3d 1013, 92 Cal. Rptr. 722 (1971).

ture have in the past treated an automobile as important enough to merit greater protection from a taking than that given to other consumer goods.<sup>116</sup> The emphasis in California on building free-ways instead of developing mass transit and the presence of the so-called urban sprawl are further reasons why the automobile is more easily called a necessity in California than in other states.

The *Adams-Hampton* court expressed the concern that if all conduct conforming to state law is state action for purposes of the fourteenth amendment, then the state action concept is in danger of emasculation.<sup>117</sup> The court implied that finding sufficient state action in the facts of *Adams* and *Hampton* would make it possible for state action to be found in any conduct which conforms to state law, thus flooding federal courts with a multitude of new actions.<sup>118</sup>

The fear that the state action concept would be emasculated must be countered with the possibility that failure to find state action in this case will emasculate the procedural due process rights of debtors. The procedures used in self-help auto repossession appear unconstitutional in light of the lack of notice and opportunity for prior hearing. Debtors definitely have the right to notice and prior hearing, but it is conceivable that these rights may be curtailed if the courts use the state action issue to avoid deciding whether these rights have been violated in any particular case.

Courts are constantly "drawing lines" and the court of appeals in *Adams* and *Hampton* found a line it refused to cross in protecting the rights of debtors. Finding state action in the repossession of an automobile would not make it necessary to find state action in *any* conduct which conforms to state law. Auto repossession can be distinguished from other types of conduct which are subject to little or no state regulation and thus much less easily said to be carried out under color of state law.<sup>119</sup> Use

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116. *Randone v. Appellate Dep't of the Super. Ct.*, 5 Cal. 3d 536, 561, 488 P.2d 13, 30, 96 Cal. Rptr. 709, 726 (1971). The court cited several cases discussing the deprivation of necessities and then stated:

Whereas several of the foregoing cases primarily involved the deprivation of only one kind of necessity, such as "household furnishings," the broad attachment statute before the court today combines the vices of nearly all of the invalidated procedures, since it permits the attachment of *any* and *all* property of a debtor other than wages. Thus, under section 537, subdivision 1, checking and savings accounts, home furnishings, tools of the debtor's trade, automobiles, accounts receivable, and even the debtor's residence . . . are initially subject to attachment without notice and hearing. (Footnotes omitted).

But see CAL. CIV. PRO. CODE § 690.2 (West Supp. 1974) which allows a debtor to exempt from execution one automobile with a total value of not over \$1,000 if his equity over and above all liens and encumbrances does not exceed \$500.

117. Civil No. 72-1484, at 9-10 (9th Cir. Oct. 4, 1973).

118. *Id.*

119. See text accompanying notes 43-45 *supra*.

of the courts' analytical powers may be employed to effectively narrow the state action concept without denying the due process rights of debtors in automobile transactions.<sup>120</sup>

The courts should redraw the line in an auto repossession situation because of the closeness of the state action issue, the heavy regulation by the state of activities associated with use and possession of automobiles,<sup>121</sup> and the strong public policy in favor of improving debtors' positions in relation to creditors. This redrawing should be accomplished by holding that state involvement in self-help auto repossession is at least sufficient to find a federal cause of action. Such a step would then require the court to reach a decision on the merits of the constitutional challenges to self-help auto repossession. Until such a redrawing is accomplished, the evolution of debtors' rights which began with *Sniadach* may have ground to a halt.

Neil M. Schwartz

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120. See *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484 (9th Cir. Oct. 4, 1973), *rehearing denied*, Civil No. 72-1484, at 6 (9th Cir. March 12, 1974) (Hufstедler, J., dissenting from denial of en banc consideration of rehearing). Judge Hufstедler stated:

Underlying the reluctance of this court to reach the state action destination to which the Supreme Court has directed us is fear that the same path will carry the Fourteenth Amendment into boundless territory. I do not share that fear. . . . Even in those restricted instances in which private activity is drawn into the public orbit, few private acts are of the kind that could be found substantively violative of the Fourteenth Amendment. When the alleged violation of the Fourteenth Amendment lies in the procedural due process realm, flexible accommodations of the competing interests involved can be fashioned.

121. See note 53 *supra*, and text accompanying notes 53-56 *supra*. In addition to the heavy regulation of automobile credit and self-help repossession, the State heavily regulates use and possession of automobiles by means of the Vehicle Code. See CAL. VEH. CODE § 4000 (West 1971). The argument can be made that enterprises operating within heavily regulated areas of activity are performing functions substantially affecting the public. Where an activity such as automobile repossession not only falls within a regulated area (general regulation of automobiles), but is also the subject of a specific statute which expressly authorizes that activity, then private conduct pursuant to that statute is state action. CAL. COMM. CODE § 9503 (West 1963). Judge Hufstедler makes this argument drawing on the principles of *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952) and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). *Adams v. Southern California First Nat'l Bank*, Civil No. 72-1484 (9th Cir. Oct. 4, 1973), *rehearing denied*, Civil No. 72-1484, at 3-4 (9th Cir. March 12, 1974) (Hufstедler, J., dissenting from denial of en banc consideration of rehearing).