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CPLR Art. 62: Ex Parte Attachment in an Action Based on Conversion Held Unconstitutional

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In *Gamell v. Mount Sinai Hospital*,[153] the Appellate Division, Second Department, unanimously reversed an order for a new trial based on the alleged partiality of two jurors in a medical malpractice action where the infant plaintiff had suffered permanent brain damage as a result of an excessive administration of demerol to her mother prior to delivery. The jury found for the defendant doctor and against the defendant hospital on the negligence question. The appellate division reversed as to the hospital and ordered a new trial.[154] Three months later the plaintiffs moved for a new trial as to the doctor, alleging that on *voir dire* examination one juror failed to disclose that her nephew and niece were in the medical profession, and that another concealed the fact that he had a retarded granddaughter. The trial court granted the plaintiffs' motion.

The appellate division justified its reversal of the order on several grounds. With respect to the juror with relatives in the medical profession, the court found the evidence insufficient to show nondisclosure on *voir dire*.[155] The other juror's bias, if any, was regarded as favorable to the plaintiffs.[156] The court, emphasizing the strong public policy against a jury's post-trial impeachment of its own verdict,[157] concluded that the plaintiffs' delay of over two years, after learning of the possible juror prejudice and until an unfavorable disposition on appeal, precluded them from asserting the claim.[158]

ARTICLE 62 — ATTACHMENT

CPLR art. 62: Ex parte *atttachment in an action based on conversion held unconstitutional.*

Recent consumer litigation has exposed provisional remedies as the procedural area most vulnerable to constitutional challenge on due process grounds.[159] Traditionally among the most potent weapons of the creditor, provisional remedies have become increasingly subject to

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153 40 App. Div. 2d 1010, 339 N.Y.S.2d 31 (2d Dep't 1972) (mem.).

154 34 App. Div. 2d 981, 312 N.Y.S.2d 629 (2d Dep't 1970) (mem.).

155 40 App. Div. 2d at 1011, 339 N.Y.S.2d at 32-33.

156 *Id.*, 339 N.Y.S.2d at 33.

157 *Id.* at 1012, 339 N.Y.S.2d at 33-34, *citing* McDonald v. Pless, 238 U.S. 264 (1915). The court indicated that the post-trial indictment of the jury was orchestrated by a juror and the infant's parents.

158 40 App. Div. 2d at 1011, 339 N.Y.S.2d at 33, *citing* Empire Crafts Corp. v. Grace China Co., 40 Misc. 2d 957, 244 N.Y.S.2d 572 (Sup. Ct. Richmond County 1963), *aff'd mem.*, 20 App. Div. 2d 851, 249 N.Y.S.2d 664 (2d Dep't 1964).

159 The provisional remedies are: attachment, arrest, preliminary injunction, receivership, and notice of pendency. CPLR 6001. Seizure of a chattel in a replevin action is technically not a provisional remedy, but is usually treated as one. *See* CPLR 203(b)(3), 6001.

the careful scrutiny of courts more readily disposed to strike a new constitutional balance in the creditor-debtor relationship. As a result, the constitutionality of many of New York's provisional remedies has been cast in serious doubt.

In *Sniadach v. Family Finance Corp.*,[160] the United States Supreme Court commenced the process of reevaluation by declaring the *ex parte* garnishment of 50% of a debtor's wages violative of the due process clause. While acknowledging that *ex parte* procedures could conceivably meet due process requirements in "extraordinary" situations, the Court held that, absent such circumstances, the defendant must be afforded notice and an opportunity to be heard prior to the attachment of his salary.[161]

While some courts of other jurisdictions liberally construed the Court's holding as applicable to other provisional remedies,[162] the initial New York reaction to *Sniadach* was mixed. A three-judge federal court for New York's Northern District, in *Laprease v. Raymours Furniture Co.*,[163] struck down as unconstitutional the New York replevin statute, article 71 of the CPLR, primarily on the ground that seizure of the defendant's chattel upon a mere requisition constituted an unreasonable search and seizure in violation of the fourth amendment. On the due process issue, the court acknowledged that *Sniadach* required that notice and an opportunity to be heard be given to the defendant, but indicated that creditors might also satisfy due process by presenting to a judicial officer the circumstances allegedly justifying *ex parte* action.[164] The Legislature responded by amending CPLR 7102 to require an order of seizure "to conform to the due process of law requirements of the fourteenth amendment to the constitution of the United States,"[165] but did not mandate notice prior to seizure of a defendant's goods.

The New York Court of Appeals refused to apply the principles

160 395 U.S. 337 (1969), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 580 (1972).

161 *Id.* at 339.

162 *See, e.g.*, Randone v. Appellate Dep't of Super. Ct., 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972). *Randone* struck down the California *ex parte* attachment procedure under CAL. CODE CIV. PROC. § 537(1) (West Supp. 1971) on the basis of *Sniadach*.

163 315 F. Supp. 716 (N.D.N.Y. 1970), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 585 (1972).

164 *Id.* at 724.

165 L. 1971, ch. 1051, § 1, eff. July 2, 1971. Governor Rockefeller expressed dissatisfaction with the measure in his accompanying memorandum primarily due to the absence of clear standards for applying due process requirements. *See* 2 MCKINNEY'S SESSION LAWS OF NEW YORK 2641 (1971). *See generally* Gardner, Fuentes v. Shevin: *The New York Creditor and Replevin*, 22 BUFFALO L. REV. 17, 27-28 (1972).

of *Sniadach* liberally to all *ex parte* seizures of property under ordinary circumstances, preferring instead to interpret its holding narrowly. In *300 West 154th Street Realty Co. v. Department of Buildings*,[166] the Court, perhaps influenced by the facts, read *Sniadach* as requiring a prior judicial hearing only when "special irreversible economic hardships" are involved.[167]

In 1972, however, the Supreme Court, in *Fuentes v. Shevin*,[168] clarified *Sniadach*, holding that procedural due process requires notice and a hearing before the defendant "is deprived of any significant property interest. . . ."[169] At a pre-seizure hearing the creditor must demonstrate the "probable validity" of his claim.[170] The Court reiterated that " 'extraordinary situations' that justify postponing notice and opportunity for a hearing"[171] may exist, but characterized such situations as "truly unusual." The availability of *ex parte* remedies was restricted to situations where such action was necessary to secure an important governmental or general public interest, such as the acquisition of jurisdiction,[172] or to special situations demanding prompt action, such as cases where a creditor "could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."[173]

166 26 N.Y.2d 538, 260 N.E.2d 534, 311 N.Y.S.2d 899 (1970).

167 *Id.* at 544, 260 N.E.2d at 537, 311 N.Y.S.2d at 903. The appellant therein was a landlord who challenged the constitutionality of N.Y.C. ADMIN. CODE §§ 564-15.0 to 564-31.0 (1970). He alleged that *Sniadach* forbade the payment of rent by his tenants to the Department of Buildings without a hearing as to his liability for a blocked toilet.

168 407 U.S. 67 (1972). For a discussion of the background of *Fuentes*, see Abbott & Peters, Fuentes v. Shevin: *A Narrative of Federal Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955 (1972).

169 407 U.S. at 82, *quoting* Boddie v. Connecticut, 401 U.S. 371, 379 (1971); *see* Note, Boddie *and Beyond: Rights of the Indigent in Civil Actions*, 18 CATH. LAW. 67 (1972).

170 407 U.S. at 97, *quoting* Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring).

171 407 U.S. at 90. The Court in the past has upheld *ex parte* seizure in limited cases; *see* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (summary seizure of misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (bank failure); Phillips v. Commissioner, 283 U.S. 589 (1931) (tax revenue); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) (bank failure); Ownbey v. Morgan, 256 U.S. 94 (1921) (attachment necessary to secure jurisdiction); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of contaminated food). *But see* McKay v. McInnes, 279 U.S. 820 (1929), *aff'g per curiam* 127 Me. 110, 141 A. 699 (1928), in which summary attachment was upheld. The Court in *Fuentes* limited application of *McKay* to factual situations similar to *Coffin* and *Ownbey*. 407 U.S. at 91 n.23.

172 *See* Ownbey v. Morgan, 256 U.S. 94 (1921).

173 407 U.S. at 93. The Court enumerated the principles which have been used to justify *ex parte* seizure of property:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Id. at 91.

In order to satisfy due process, any statute permitting *ex parte* seizure must be "narrowly drawn."

The New York attachment statute, article 62 of the CPLR, provides the provisional remedy by which the plaintiff seizes the defendant's property within the state prior to judgment. Attachment serves two distinct but interrelated purposes: the attached property (1) provides a basis for quasi-in-rem jurisdiction,[174] or (2) secures the collection of a future judgment. Under CPLR 6201, an order of attachment may, in the court's discretion,[175] be issued in any action, other than a matrimonial action,[176] in which the plaintiff seeks a money judgment and shows adequate jurisdictional or security grounds.[177]

CPLR 6201 must be read with the other sections of article 62 to determine the applicable procedures for securing an attachment order. CPLR 6212 requires the plaintiff to show that a cause of action exists, and CPLR 6202 allows the court in its discretion to grant the motion without notice to the defendant.

The statutory procedure for obtaining an *ex parte* order of attachment in an action based on conversion was recently declared unconstitutional by the Supreme Court, Albany County, in *Richman v. Rich-*

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174 *See generally* Comment, *Foreign Attachment After* Sniadach *and* Fuentes, 73 COLUM. L. REV. 342 (1973).

175 *See* THIRD REP. 144; 7B MCKINNEY'S CPLR 6212, supp. commentary at 27 (1967); H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 186 (3d ed. 1970); 7A WK&M ¶ 6201.03 and the cases cited therein.

176 Matrimonial actions were excluded for policy reasons; *see* THIRD REP. 143.

177 *See* CPLR 6201:

§ 6201. Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a foreign corporation or not a resident or domiciliary of the state; or
2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or
3. the defendant, with intent to defraud his creditors or to avoid the service of summons, has departed or is about to depart from the state, or keeps himself concealed therein; or
4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or
5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or
6. the action is based upon the wrongful receipt, conversion, or the aiding or abetting thereof, of any property held or owned by any governmental agency, including a municipal or public corporation, or officer thereof; or
7. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53; or
8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

man.[178] Attachment had been secured under CPLR 6201(8) by the plaintiff who alleged the conversion by his wife of substantial sums of money and negotiable instruments. The court found that since notice and an opportunity to be heard had not been afforded the defendant, the seizure of her property fell directly within the constitutional ban of *Sniadach* and *Fuentes*. The court was unable to find any "foreseeable important governmental or public interest or 'unusual' situations which would warrant a denial of a prehearing" as to the attachment.[179] Since this basic condition was not satisfied, the court apparently found it unnecessary to decide whether the statute was narrowly drawn.

There are significant differences between article 62 and the procedures struck down in *Fuentes*. Even in *ex parte* proceedings, article 62 requires the plaintiff to show a cause of action and the applicable grounds for attachment before a judicial officer.[180] The court, in its discretion, may or may not issue the order. The statutes in question in *Fuentes*, however, required no such judicial interposition, but authorized the summary seizure of the defendant's property merely on the filing with a clerk or prothonotary of an affidavit of value[181] or a complaint reciting in a conclusory fashion that the plaintiff was entitled to the property.[182]

In practice, however, the differences are more apparent than real. Adjudications that the cause of action was insufficient to support the attachment are usually made after the fact of the seizure. Orders of attachment ordinarily issue upon little more than a facial showing of the plaintiff's case.[183]

In any event, the *Fuentes* Court's insistence on notice and a

178 72 Misc. 2d 803, 339 N.Y.S.2d 589 (Sup. Ct. Albany County 1972).

179 *Id.* at 806, 339 N.Y.S.2d at 592. A similar motion to vacate an attachment order based on conversion was denied in an unreported case, Francis I. duPont & Co. v. Springer, 168 N.Y.L.J. 88, Nov. 8, 1972, at 2, col. 2 (Sup. Ct. N.Y. County).

180 For a discussion of the evidentiary requirements to support an attachment order, see, *e.g.*, Zenith Bathing Pavilion, Inc. v. Fair Oaks S.S. Corp., 240 N.Y. 307, 148 N.E. 532 (1925).

181 407 U.S. at 78.

182 *Id.* at 73-78.

183 *See* Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 469-70, 209 N.E.2d 68, 83, 261 N.Y.S.2d 8, 29, *cert. denied*, 382 U.S. 905 (1965) (Van Voorhis, J., concurring) (citations omitted):

> [I]n cases where jurisdiction is obtained by attachment, the affidavits to procure which must show "that there is a cause of action," the power "to grant an attachment does not depend upon predetermination of the merits of the action or plaintiff's prospects of success therein." Although evidentiary facts must be shown, it has been said by this court that "The jurisdiction to grant an attachment does not, we think, involve a preliminary determination by the officer to whom application for the writ is made whether in law the case presented by the complaint will entitle the plaintiff to the relief he asks." "It is enough that as to a major portion of their claim we cannot say as a matter of law on this record that the plaintiffs must ultimately be defeated."

hearing prior to a deprivation of property necessitates a complete re-examination of the constitutional validity of the *ex parte* order of attachment authorized by article 62. While the integrated nature of CPLR 6201 must be kept in mind, it will be useful for purposes of evaluation to examine separately the two basic functions of the statute.

The jurisdictional grounds for attachment, CPLR 6201(1) and (2), come within the "extraordinary situations" exception to the requirements of prior notice and a hearing, as the Court in *Fuentes* specifically characterized "attachment necessary to secure jurisdiction in state court" as "clearly a most basic and important public interest."[184] A fair reading of *Fuentes* indicates that the term "necessary" must be construed literally, *i.e.*, absolutely necessary, rather than merely useful or convenient. If in personam jurisdiction cannot be acquired over a foreign corporation or a defendant who is neither a resident nor a domiciliary, CPLR 6201(1) would then be literally necessary to the maintenance of the plaintiff's cause of action. If CPLR 302 is available, the plaintiff should not be permitted to proceed concurrently under CPLR 6201(1) for *ex parte* attachment.

It is unlikely that *ex parte* attachment under CPLR 6201(2), as presently written, could survive a constitutional test of necessity under *Fuentes*. CPLR 301 and 313 provide adequate bases for securing in personam jurisdiction over an unavailable state domiciliary. A defendant who is merely a resident presents a different problem. If in personam jurisdiction cannot be acquired in the case of an unavailable state resident who is not a domiciliary, attachment under CPLR 6201 (2) is necessary to provide a basis for jurisdiction. In this case, *ex parte* attachment should be permissible as an exception to *Fuentes*.

CPLR 6201(7) permits attachment in actions to enforce a sister state judgment under article 54 or a foreign state judgment under article 53. If the judgment of a sister state is entitled to full faith and credit,[185] it may be registered under article 54 and will be enforced as if it were a New York judgment. The statute does not, however, provide a basis for jurisdiction over the defendant.[186] It would seem,

184 407 U.S. at 91 n.23. *See* Ownbey v. Morgan, 256 U.S. 94 (1921).

185 Whether a sister state judgment is entitled to full faith and credit is a federal constitutional issue. For the appropriate standards used by the Supreme Court in determining this question, see Johnson v. Muelberger, 340 U.S. 581, 589 (1931).

186 It is arguable that the full faith and credit clause dispenses with the need for obtaining new jurisdiction in New York once jurisdiction has been obtained over the defendant by a sister state. This is a radical departure from the traditional concept of jurisdiction; *cf.* McLaughlin, *Civil Practice*, 22 SYRACUSE L. REV. 55, 57 (1971). Article 54, without more, may therefore be unconstitutional.

therefore, that CPLR 6201(7) is necessary to provide a basis for jurisdiction to enforce the sister state judgment in New York. Similarly, conversion of a foreign state judgment into a New York judgment under the provisions of article 53 requires a jurisdictional basis.[187] *Ex parte* attachment under CPLR 6201(7) retains its constitutional validity to serve these limited ends.

The security provisions originally proposed by the Advisory Committee on Practice and Procedure, now CPLR 6201(3) and (4), were included to afford plaintiffs assurance that a judgment would be collectible from a defendant in situations deemed likely to involve a substantial basis for creditor insecurity.[188] The Advisory Committee refused to include the substance of CPA 903(4)-(6), the predecessors of CPLR 6201(5), (6), and (8), in the new attachment statute on the basis that an allegation of fraud should not be a ground for attachment.[189] However, the final revision of CPLR 6201 included the substance of CPLR 6201(5), (6), and (8), with the explanation that the "new paragraphs are required in a case where attachment of the very funds which have been wrongfully received is the only effective remedy. . . ."[190]

To meet the consitutional requirements of *Fuentes*, the availability of *ex parte* procedures must be confined to extraordinary situations as authorized by a narrowly drawn statute. Clearly, any statute which serves a security purpose does not perforce fulfill the conditions set down by *Fuentes*. The Court offered only an extremely limited example, *i.e.*, "cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."[191]

CPLR 6201(3) and (4) share a basic security interest: subsection (3) deals with the defendant's making himself unavailable, while subsection (4) deals with the defendant's making his property unavailable. However, *Fuentes* recognizes no such distinction, but permits *ex parte* proceedings only when the existence or availability of property is threatened. Thus, while the situations contemplated by subsection (3) must necessarily fall within the scope of those requiring prior notice and a hearing, *ex parte* attachment pursuant to CPLR 6201(4) retains its validity as a narrowly drawn exception to the *Fuentes* rule.

CPLR 6201(5) allows attachment in an action on a contract in

187 This was the primary reason for enacting subdivision (7); *see* 7B McKinney's CPLR 6201, supp. commentary at 14 (1970).

188 *See generally* Third Rep. 147-48; Sixth Rep. 576.

189 Third Rep. 147.

190 Fifth Rep. 150.

191 407 U.S. at 93.

which the plaintiff alleges fraud. CPLR 6201(8) allows attachment in cases based on the torts of conversion, fraud, or deceit. Both of these subsections were originally excluded by the Advisory Committee as overly broad,[192] and neither involves an immediate danger to property. In *Richman*, the court struck down the *ex parte* attachment procedure based on subdivision (8) with respect to conversion, and there is little reason to assume that the other grounds allowed by these subsections are of any greater constitutional validity.

CPLR 6201(6) also involves no immediate danger to the property in question, but authorizes attachment in all cases in which peculation is alleged. While the Advisory Committee did not include this subsection in the original proposed statute,[193] the Supreme Court has allowed summary seizure of property when necessary to secure the public revenue.[194] Consequently, CPLR 6201(6) remains available as a valid ground for *ex parte* attachment.

Fuentes, then, poses a fundamental challenge to *ex parte* attachment procedures in New York. No longer will a plaintiff be permitted to deprive a defendant of his property merely upon a perfunctory showing of the elements of a cause of action.[195] Due process under

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192 *See* THIRD REP. 147.

193 *Id.* 148.

194 Phillips v. Commissioner, 283 U.S. 589 (1931). *See* Fuentes v. Shevin, 407 U.S. 67, 91 (1972).

195 Other *ex parte* seizures of property or temporary deprivations of rights to the use of property may be examined briefly for compliance with the due process requirements of *Fuentes*. For example, replevin under article 71 clearly must be reformed to provide for notice and a hearing in conformity with its requirements. A valid exception for situations in which goods are endangered can be provided in a manner similar to CPLR 6201(4).

The Court's strong concern for the preservation of the defendant's due process rights with respect to his property can readily be extrapolated into eventual disapproval of *ex parte* arrest under CPLR 6101(1). Arrest at law is available in an action to recover damages for the conversion of personal property, or for fraud or deceit. *Compare* CPLR 6101(1) *with* CPLR 6201(8). The inclusion of subdivision (8) in the attachment statute was justified by the existence of CPLR 6101(1); *see* FIFTH REP. 150. If attachment under these grounds is unconstitutional, the more drastic remedy of *ex parte* arrest under the same grounds is clearly unconstitutional. CPLR 6101(1) should therefore be repealed. *See, e.g.*, 7B MCKINNEY'S CPLR 6101, supp. commentary at 9 (1964); 7 WK&M ¶ 6101.02.

CPLR 6313 provides that a temporary restraining order may, in the court's discretion, be granted without notice to the defendant if the plaintiff, on a motion for a preliminary injunction, can show that immediate and irreparable injury, loss, or damages would otherwise result. When the action sought to be restrained endangers the defendant's property interests, it would appear that the issuance of a temporary restraining order falls precisely within the ambit of "extraordinary situations" requiring prompt action recognized by *Fuentes*.

Some difficulty is presented by CPLR 6401 as to notice requirements. The statute does not indicate whether notice must be given prior to the appointment of a temporary receiver. *See* 7B MCKINNEY'S CPLR 6401, commentary at 223 (1963). In any event, the statute does not mandate a hearing prior thereto. CPLR 6401 does, however, require a showing of danger that the property will be removed from the state, lost, materially injured, or de-

Fuentes requires that the defendant receive notice and a meaningful opportunity to be heard prior to any attachment of his property. Absent extraordinary circumstances, the court will be afforded an opportunity to balance the respective rights of the plaintiff and the defendant with the aid of information supplied by both parties to the action.

The need for a complete legislative reevaluation of provisional remedies can readily be seen as a priority of the first magnitude. *Fuentes v. Shevin* requires nothing less. Respect for the constitutional rights of the defendant and the availability of effective remedies for the plaintiff are not concepts which are mutually exclusive. Within the framework of *Fuentes v. Shevin* ample opportunity exists to strike a balance equitable to both.

INSURANCE LAW

Ins. Law § 167(1)(b): Court incorporates separate proceeding against insurance carrier into underlying negligence action.

Section 167(1)(b) of the Insurance Law[196] allows an injured party to bring a direct action against an insurer where a judgment against its insured within the policy terms and limits remains unpaid thirty days after notice of entry is served on the insured or his attorney and the insurer.

In *Brown v. Reid*,[197] after denying the defendants' motion to vacate a default judgment entered against the owner and the operator of a vehicle which struck the plaintiffs' vehicle from behind, the Supreme Court, Nassau County, held that participation of insurance carriers in the defense of the primary litigation obviated the need for a separate section 167 proceeding.[198] Reasoning that the essential ingredients of

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stroyed, and thus comes squarely within the *Fuentes* exception of a special situation demanding prompt action.

The filing of a notice of pendency under CPLR 6501 is constructive notice of the pendency of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property. No application need be made to a court as a condition precedent to the filing of the notice of pendency. While the notice of pendency technically does not restrain the conveyance of real property, it serves as a severe deterrent to a prospective buyer, and thus constitutes a significant limitation of the defendant's right to free alienation of his property. *Fuentes* requires notice of a hearing before the defendant is "deprived of *any* significant property interest . . . ." 407 U.S. at 82 (emphasis added). While constructive notice is given by the filing of a notice of pendency, no opportunity to challenge the action at a hearing exists prior thereto. Absent extraordinary circumstances, a broad reading of *Fuentes* would seem to require that the defendant be given an opportunity to be heard prior to the filing of a notice of pendency.

196 N.Y. INS. LAW § 167(1)(b) (McKinney 1966).

197 72 Misc. 2d 237, 339 N.Y.S.2d 204 (Sup. Ct. Nassau County 1972).

198 Two insurers, the defendant-owner's carrier and the Motor Vehicle Accident Indemnification Corporation (MVAIC), representing his uninsured driver, were involved in the litigation from the beginning. The former disclaimed liability on the basis of the