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REQUESTED BY: PHILIP THORNEYCROFT, Assistant Director
Arizona Department of Transportation,
Motor Vehicle Division

QUESTION: In view of the recent Arizona Supreme Court's decision in Thornton v. Carson and Industrial Sewing Machine Exchange Inc., No. 11962, dated April 3, 1975, are any changes in the procedure of the Motor Vehicle Division required concerning the repossession of highway vehicles as outlined in the Arizona Uniform Commercial Code effective January 1, 1968?

ANSWER: No. See body of opinion.

The Assistant Director for the Motor Vehicle Division has requested assistance in interpreting the meaning and effect of the above described Arizona Supreme Court decision. More specifically, the Assistant Director has expressed concern as to whether or not any changes in procedure regarding the issuance of new certificates of title to repossessed vehicles are required as a result of the aforementioned Court ruling.

In the Court's decision in Thornton v. Carson, supra, Chief Justice Cameron, speaking for the majority, makes the following important qualification:

"We have concerned ourselves in this opinion only with the constitutionality of the Arizona replevin statute, A.R.S. §§ 12-1301, et seq., which the trial court upheld based, no doubt, on previous statements of this court. . . ."

Of course the "previous statements" referred to are contained in the decision of the Arizona Supreme Court in Roofing Wholesale Inc. v. Palmer, 108 Ariz. 508, 502 P. 2d 1327 (1973) in which the Court declined to recognize the decision of the United States Supreme Court in Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed. 2d 556 (1972) as binding for the reason that the case had been decided

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by a four justice majority in a seven justice court. Since the majority of the members of the United States Supreme Court have now expressed themselves on the issues raised in Fuentes v. Shevin, supra, in Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) and in North Georgia Finishing Inc. v. Di-Chem, Inc., ___ U.S. ___, 95 S.Ct. 719, ___ L.Ed.2d ___, (1975), our own Arizona Supreme Court has now expressly held that Arizona's replevin statute is contrary to the requirement of procedural due process contained in the Fourteenth Amendment to the United States Constitution as interpreted by the United States Supreme Court.

It is important to note, however, that this decision relates only to Arizona's replevin statute and does not affect the right of a secured party to repossess a motor vehicle on default of a debtor pursuant to the provisions of A.R.S. § 44-3149 (Uniform Commercial Code § 9-503). Nor does this decision necessarily invalidate or otherwise call into question certain order to show cause procedures which have been instituted by lawyers representing Arizona creditors since the decisions of the United States Supreme Court in Sniadach v. Family Finance, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) and Fuentes v. Shevin, supra.

In determining whether or not a particular creditor's remedy violates the guarantee of procedural due process contained in the Fourteenth Amendment to the United States Constitution, each case must be decided upon its own facts taking into account the specific language of the particular statute involved. Self-help repossessions by secured parties pursuant to the provisions of Section 9-503 of the Uniform Commercial Code occur within a statutory framework entirely different from that provided by Arizona's antiquated replevin statute. And it is the unanimous holding of all of the United States Circuit Courts of Appeal in which the question has been litigated that self-help repossession pursuant to the Uniform Commercial Code does not constitute state action. Gibbs v. Titelman, ___ F.2d ___ (3rd Cir., 1974); James v. Pinnix, 495 F.2d 206 (5th Cir., 1974); Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir., 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir., 1974); Shirley v. State National Bank, 493 F.2d 739 (2nd Cir., 1974); Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir., 1973) and Cook v. Lilly, 208 S.E.2d 784 (W.Va., 1974).

Therefore, it is the opinion of this office, in the absence of any Arizona or Federal court appellate decision invalidating self-help repossession under the Arizona Uniform Commercial Code that no immediate changes in the procedure utilized by the Motor Vehicle Division in processing applications for the issuance of Arizona certificates of title to vehicles repossessed pursuant to the Arizona Uniform Commercial Code are required or warranted.

Very truly yours,

Bruce E. Babbitt

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The Attorney General