CONFESSION OF JUDGMENT UNDER A WARRANT OF ATTORNEY

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Portia. Of a strange nature is the suit you follow,
Yet in such rule that the Venetian law
Can not impugn you as you do proceed.—
You stand within his danger, do you not?
Antonio. Ay, so he says.
Portia. Do you confess the bond?
Antonio. I do.

—Merchant of Venice, Act. IV, Scene 1

The merchants of Venice and the bankers of Florence were dominant factors in the spread of commerce during the early days of the Renaissance, and the name of the Medici of Florence is synonymous with a now legendary system in which finance, commerce and politics were melded. The Italian bankers participated in political and financial activities throughout the Holy Roman Empire and even into Britain. They are reported to have brought the first documents of a contractual nature into Britain about the twelfth century.\(^1\) The English at that time were having a problem with the concept of transferring incorporeal property such as debt, because there was no way of transferring seisin; but they did accept the proposition that a document evidencing a debt could be transferred. The idea of representation was still new in the thirteenth century, but was gaining acceptance because the king could no longer handle all matters personally. The Italians were developing a law of negotiable paper with a binding promise in favor of the holder by putting together these elements:

The cautious Lombard means to have an instrument that will be available in every court, English or foreign.\ldots Often the debtor is bound to pay the money either to the creditor or to any attorney or mandatory of his who shall produce the bond.\(^2\)

The custom spread and Englishmen found themselves promising "to pay the Florentine or Sienese capitalist."\(^3\)

By this time [13th century] it has spread so far that the debtor who in express written words promises to pay money either to the creditor

\(^1\) F. Pollock & F. Maitland, The History of English Law 222 (2d. ed. 1898).
\(^2\) Id. at 223.
\(^3\) Id. at 225.
or to the mandatory [nuntius] or attorney of the creditor is bound by
his promise; he has himself given the creditor power to appoint
a representative for the exaction of the debt.4

The outlines of the procedure for confession of judgment under a
warrant of attorney were becoming clearly visible. The practice continued
into eighteenth century England and Blackstone described the procedure
as follows:

It is very unusual, in order to strengthen a creditor's security, for the
debtor to execute a warrant of attorney to some attorney named by
the creditor, empowering him to confess judgment by either of the
ways just mentioned (by nihil dicit, cognovit actionem, or non sum
informatus) in an action of debt to be brought by the creditor
against the debtor for the specific sum due.5

The appointment of another to stand in the place of a party to a suit
was a new concept to the common law, for that tradition expected parties
to a suit to appear personally. However, this new concept was confirmed in
later statutes which provided that "attorneys may be made to prosecute or
defend any action in the absence of parties to the suit."6 The attorney is
to act "with perfect good faith and with a single view to his client's
interest."7 Nevertheless, a defendant, to save costs, could confess as
correct matters of law and of fact which were in contention, or give other
instructions to the attorney under which judgment would follow for
the plaintiff.

Where the defendant suffers judgment to go against him by default,
or nihil dicit;...by confession or cognovit actionem, where he
acknowledges the plaintiff's demand to be just: or by non sum
informatus when the defendant's attorney declares he has no
instruction to say anything in answer to the plaintiff...which is a
species of judgment by default.8

Not only was this procedure of benefit to the creditor, but the
ingenuity of the debtors led to confessions of judgment which were for
amounts less than due. Thus, safeguards for both debtor and creditor
were instituted so that both parties would know the exact terms of the
confession. Statutory provisions were enacted in the reign of Queen
Victoria under which a "Judge's order given by a trader defendant,
whereby the plaintiff is authorized to sign judgments... must be filed
with the clerk of the docquets in the Queen's Bench within twenty-one

4 Id. at 224.
5 3 W. Blackstone, Commentaries, § 397.
6 Id. at § 26.
7 Id. (W. D. Lewis ed. 1900) 1044 n. 16.
8 Id. at § 397.
days . . ." and an attorney of one of the superior courts was to be present on behalf of the maker and to witness the warrant of attorney.9

This practice was adopted in the Colonies and came forward with other elements of the Common Law heritage when they began existence as States. But acceptance was not without criticism. In 1824 a judgment on a bond and warrant of attorney was entered against a supplier of hides and barks for the face value of the bond. The defendants came to court to seek relief, claiming demands against the plaintiff. They had no prior notice because: "The first information he received of the aforesaid bond being entered up, was when the under-sheriff served the execution issued in said suit upon him and the other defendants yesterday afternoon."10 Chief Justice Kirkpatrick of the New Jersey Supreme Court expressed his opinion of such judgments in this way:

Indeed, I think that these judgments entered upon bonds and warrants of attorney should, under proper application, be very readily and widely opened, for the method in which they are entered is the loosest way of binding a man's property that was ever devised in any civilized country.11

One hundred and one years later, a Common Pleas judge in Trumbull County, Ohio, commented, "[A] warrant of attorney authorizing confession of judgment [is] looked upon with disfavor."12

Confession of judgment under a warrant of attorney is also known as a cognovit judgment, and the notes which contain an authorization for such judgments are known as cognovit notes. The use of the word cognovit is derived from the phrase cognovit actionem, but the modern cognovit judgment is distinguishable from the older cognovit actionem, found in Common Law.

Cognovit actionem leads to a judgment after an action is brought while a modern-day judgment by confession may be entered without any action having been brought. Judgment by confession is considered essentially a voluntary act, by which the confessor submits to the jurisdiction of the court by consent.13

It has been described more fully as:

[N]ot an ordinary note. It is indeed an extraordinary note which authorized an attorney to confess judgment against the person or persons signing it. It is written authority of a debtor and a direction

9 Id. (W. D. Lewis ed. 1900) 1355 n. 46.
10 Alderman v. Diament, 7 N.J.L. 197, 198 (1824).
11 Id. at 198.
by him for the entry of a judgment against him if the obligation set forth in the note is not paid when due. Such a judgment may be taken by any person or any company holding the note, and it cuts off every defense which the maker of the note may otherwise have. It likewise cuts off all rights of appeal from any judgment taken under it.¹⁴

This ancient device is still available in Ohio, and is used by lending agencies engaged in consumer credit transactions.¹⁵ This development may well have seemed a normal extension of established practices into a minor part of credit transactions in years past; but today consumer credit plays a major role in the debt structure of the national economy and deserves recognition of its qualitative difference from other forms of debt. (As will be elaborated later in this paper, consumer debt in the United States has grown 2400% since 1945 and is now half again as great as commercial and financial debt combined. It is nearly as large as the combined debt of local and state governments.) Therefore, the use of confession of judgment under a warrant of attorney as practiced in commercial trading and other business dealings should not be applied in consumer credit transactions. The most direct means for effecting this is by statutory exclusion of consumer credit transactions from the provisions of the confession of judgment under a warrant of attorney procedure.

Strict construction has been applied to such warrants of attorney and the judgments are to be vacated when the confessor shows credible evidence of a valid defense.¹⁶ Among the reasons for which such judgments have been vacated include:

1. the actual warrant of attorney was not produced;¹⁷
2. the amount due was not specifically stated or ascertainable;¹⁸
3. the place of payment was not specified, and the designation of any attorney of any court was too vague;¹⁹

(4) the statute of limitations operates even though the confession releases all rights of appeal; 20
(5) the life of the warrant is limited to one use; 21
(6) the wording on a warrant made out in another state did not conform to Ohio wording; 22
(7) fraud; 23
(8) forgery. 24

The procedure for opening up confessed judgments in Ohio has been considered not to be an undue burden on the debtor and to present only a minimal obstacle, 25 and the availability of the cognovit provision itself has been considered useful. 26

Professor Hunter of Ohio State University surveyed five hundred cognovit judgments entered in Franklin County, Ohio, during the period 1937-39. These judgments represented 14.3% of the 3510 civil cases entered in the period covered. In only 26 of the 500 cases was any attempt made to set aside the judgment, and of those 26, only two went to the defendant on trial. Professor Hunter concluded that the cognovit judgment is a useful device because so few (0.4%) of them were turned into verdicts for the defendant. 27

Even though there may not have been widespread abuse of cognovit judgments, the danger of abuse is always present and the probability of misuse or abuse occurring increases as the number of such notes increases. For example, a job has been lost because of judgments which

26 Hunter, The Warrant of Attorney to Confess Judgment, 8 Ohio St. L.J. 1 (1941-42).
27 Id. A possible inference which could be drawn from these data is that cognovit judgments are 99.6% right—or even purer than Ivory Soap. Another interpretation of the same data is that only 5.2% of those against whom the holder of a cognovit note takes action are knowledgeable enough, rich enough or motivated enough to seek redress. A further consideration in interpreting the data is that the economic and financial conditions of the early and mid-thirties were so different from those of the sixties and seventies as to be virtually incomprehensible to those who were not part of them. Although this paper does not agree with Professor Hunter’s conclusion at least as far as current conditions are concerned, he does deserve recognition for having made some concrete attempt to measure the impact of the procedure, and is not questioned.
were entered erroneously, resulting in garnishments. In another case, two judgments were entered on the same note. Furthermore, the number of cases cited previously, in which the defenses were eventually judged valid, show that the entry of a cognovit judgment is not always faultless and in the support of justice.

The position of the debtor is clearly stated in the Ohio statute authorizing cognovit notes.

[A] court judgment may be taken against you without your prior knowledge and the powers of the court can be used to collect from you or your employer regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause.

With an entry of judgment under this statute, the creditor no longer has the burden of proving his claim; rather the burden is on the consumer-debtor to prove his defense, and he is usually ill-equipped to bear that burden with its additional court costs, attorney's fees, and associated personal expenses.

The vulnerability of the debtor in this situation offends our traditional sense of justice and fair play, and raises the question of whether the minimum requirements of due process for notice and an opportunity to be heard are not denied.

The constitutionality of cognovit notes was questioned by Professor Hopson of Kansas University about a decade ago. He traced the developments in personal jurisdiction from the decision in International Shoe Co. v. Washington and noted that the trend was to protect the right of the plaintiff to sue in his own state. Hopson raised the question of corresponding protection for the defendant's liability in a suit away from home, as in the case of a cognovit judgment. The conclusion was that under the notice and opportunity to be heard requirements for due process, cognovit judgments probably were unconstitutional, but some court tests were needed.

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28 Harp v. Administrator, B.U.C., 12 Ohio Misc. 34, 230 N.E.2d 376 (C.P. Hamilton County 1967). The employer had a rule under which an employee whose wages were garnished twice in one year was subject to discharge. This action was an appeal from a ruling of the Bureau of Unemployment Compensation denying unemployment compensation. The appeal was upheld.

29 Public Finance Corp. v. Barnes, 84 Ohio L. Abs. 458, 165 N.E.2d 696, 80 A.L.R.2d 1376 (Ct. App. Cuyahoga County 1960). Judgment had been rendered on a note in Cleveland, and later the holder of the note had judgment entered in Lakewood. The Municipal Court of Lakewood dismissed the debtor's petition to vacate, but the Court of Appeals for Cuyahoga County reversed.

30 Supra nn. 17-24.

31 Ohio REV. CODE § 2323.13 (D) (Supp. 1971).


33 326 U.S. 310 (1945).
Since Hopson wrote his article, the Supreme Court of the United States heard the case of *Sniadach v. Family Finance Corp. of Bay View* and held that garnishment before a judgment has been obtained, without notice and a prior hearing, violates the fundamental principles of due process. The analogy to judgment by confession under a warrant of attorney is close. In both cases property is taken from its holder at the instigation of a stranger, usually the creditor's lawyer, until the debtor can convince the court to hear his defense. While formally the word *judgment* is used in the confession procedure, practically, the effects are the same.

At the same time the Supreme Court was hearing *Sniadach*, the Court of Appeals of New York heard a case involving a cognovit judgment entered in Pennsylvania. *Atlas Credit Corp. v. Ezrine* came up for a hearing on appeal from a judgment of the Appellate Division, which reversed the lower court ruling denying a motion for summary judgment. New York residents had signed a cognovit note in Pennsylvania. The holder of the note obtained a judgment on the note in a Pennsylvania Court, New York to seek judgment under the full faith and credit clause to make up the deficiency. The New York court concluded that the judgment rendered in Pennsylvania would not be honored by New York because:

1. the Pennsylvania procedure, requiring only entry by a prothonotary was not a judicial proceeding within the meaning of the full faith and credit clause; and
2. a warrant of attorney which permits entry of judgment anywhere in the world without notice violates due process and the court rendering the judgment does not have jurisdiction.

A spate of generally favorable commentaries followed the publication of this decision, supporting the proposition that due process elements are not present in cognovit notes. What criticism there was was directed more to the process by which the conclusion was reached than to the conclusion itself.

The United States Supreme Court has recently heard two cases on point, one from Pennsylvania and one from Ohio. The Supreme Court came to the conclusion that cognovit provisions are not unconstitutional

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per se, but under some circumstances might be. Thus, the circumstances under which the debtor commits himself to the power of the creditor are decisive.

The Pennsylvania case was Swarb v. Lennox. This was a class action attacking the Pennsylvania confession of judgment procedure. The procedure is:

Judgment by confession may be entered by the prothonotary... without the agency of an attorney and without the filing of a complaint, declaration or confession for the amount which may appear to be up from the face of the instrument.

A three-judge District Court heard the case. The District Court noted that the system leading to confessed judgment and execution complies with due process requirements only if "there has been an understanding and voluntary consent of the debtor in signing the document."

Because the rights of notice and opportunity to be heard could be waived if the waiver was understandingly and voluntarily made, the court examined the question of whether or not the plaintiffs understood what they were signing and, if so, whether they had signed voluntarily. The testimony of the plaintiffs, whose educational level was generally low, made it quite clear to the court that they had been uninformed as to the presence of the cognovit provisions, and would have had difficulty understanding it if they had been aware of it. A study of debtors in Pennsylvania against whom judgments had been entered was relied on to help define the class. This study showed that only 4% of those debtors had incomes over $10,000 per year, and therefore the District Court distinguished the class as natural persons living in Pennsylvania with annual incomes under $10,000 who had signed consumer financing or lease contracts containing cognovit provisions. Those signing home mortgages were excluded because of special procedures included in the act of signing the mortgage papers which were designed to make the signers aware of the contents of the documents. One of the three judges dissented to the limitation on income, and would expand the class to those making over $10,000 annually. The practice was found unconstitutional as applied to the designated class, and appeal was taken claiming error in thus limiting relief. The Supreme Court affirmed the limitation stating that: "[U]nder appropriate circumstances a cognovit debtor may be held

39 314 F. Supp. at 1095.
40 See 314 F. Supp. at 1097.
41 314 F. Supp. at 1102.
effectively and legally to have waived the rights he would possess if the
document he signed had contained no cognovit provision." \(^{42}\)

The "appropriate circumstances" referred to were present in the
Ohio case, which concerned corporate rather than consumer financing. In
\(D.\ H.\ Overmyer\ \text{Co. v. Frick \text{Co.}}\) \(^{43}\) the parties bargained at arm's length
before a cognovit clause was included in a reformed contract.

\(D.\ H.\ Overmyer\ \text{Company was part of a warehousing enterprise}
which operated in 30 states under several corporate identities. Frick
Company installed refrigeration equipment in a warehouse for Overmyer
in Toledo, Ohio, under a contract. Overmyer fell behind in payments
and, after some negotiations, a new agreement was reached. But once
more Overmyer needed an extension of time, and a new agreement was
reached on terms for a new note which would contain a confession of
judgment clause. Overmyer obtained some benefits, such as extension of
payments over 21 months instead of 12, and interest at 6% instead
of 6\(\frac{1}{2}\)%. Frick obtained the cognovit clause and second mortgages on
property in Florida and Kentucky. Yet, again, Overmyer interrupted
payments on its obligations and, almost 15 months after the work done
by Frick had been accepted, Overmyer instituted an action for breach of
contract in the United States District Court for the Southern District
of New York. Shortly thereafter Frick obtained judgment against
Overmyer in Ohio. Overmyer sought to stay execution and obtain a new
trial in Ohio, but was denied by the Common Pleas Court, affirmed by
the Court of Appeals of Lucas County, and eventually the Supreme Court
of Ohio. The appeals to both Ohio courts were based on violation of
due process under both the Ohio and Federal constitutions, but neither
court found any substantial constitutional issue. \(^{44}\)

The appeal to the United States Supreme Court was based on
(1) lack of personal jurisdiction in the Ohio courts because there was
no personal service, no voluntary appearance and the attorney did not
truly represent Overmyer, and, (2) lack of due process because there
was no notice or opportunity to be heard.

Both arguments were rejected by the Supreme Court because "[t]he
due process rights to notice and hearing prior to a civil judgment are
subject to waiver." \(^{45}\) The requirements for the waiver to be effective
are that it be made knowingly, intelligently and voluntarily. In \(Overmyer,
Overmyer was represented by counsel, negotiations covered an extended

\(^{42}\) 405 U.S. at 200.
\(^{43}\) 405 U.S. 174 (1972).
\(^{44}\) Id. The Court of Appeals of Lucas County made only a journal entry, and the Ohio
Supreme Court dismissed \(sua sponte\).
\(^{45}\) Id. at 185.
time and the cognovit provision was agreed to in exchange for benefits received. In this situation the United States Supreme Court found no violation of constitutional due process.

We therefore hold that Overmyer, in its execution and delivery to Frick of the second installment note containing the cognovit provision, voluntarily, intelligently and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences.46

The distinction between the facts of Overmyer and those of Swarb are quite striking. It is easy to agree with the Supreme Court that Overmyer had the benefit of "due process." There may well be other situations in which the availability of cognovit clauses may be of benefit to either or both parties and entered into "knowingly, intelligently and voluntarily." For example, in Jones v. John Hancock Mutual Life Ins. Co.47 a cognovit note was used for the payment of an insurance premium which provided coverage during the early stages of processing and no outright cash payment was required. Such situations, however, are not those encountered in consumer transactions involving credit in retail sales, or so-called small loans. In virtually all such situations the debtor-to-be does not truly bargain with the creditor-to-be. Contracts are almost invariably pre-printed with only a few blanks to be filled in with the date, the names and the amounts. Obiter dictum in the Supreme Court's opinion strongly suggests that their holding in Overmyer would not apply to such consumer credit transactions.

Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.48

Thus, the position of the United States Supreme Court seems to be that while cognovit provisions are not unconstitutional per se, for a certain class of Pennsylvania residents they are, and for other persons may be. Both the District Court and the Supreme Court declined the opportunity to define what would be constitutional. The District Court used these words: "It is not our function to dictate to a state exactly what constitutes understanding waiver of notice in each particular case and what proof of such notice would comply with the above mentioned decisions."49

46 Id. at 187.
48 405 U.S. at 188.
49 314 F. Supp. at 1100.
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The Supreme Court, in confirming this position, stated: "Problems of this kind are peculiarly appropriate grist for the legislative mill."\(^{50}\)

The Court of Appeals of Cuyahoga County in Ohio, in accord with the Supreme Court's approach, has looked to legislation for direction. In *Union Savings Assn. v. Home Owners Aid*\(^{51}\) the defendants were seeking a construction of the wording: "An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court...."\(^{52}\) which would require the physical act of confessing in court. The Court of Appeals for Cuyahoga County held that the physical presence of the confessing attorney was not required, and that the plaintiff's attorney could serve as agent for the confessing attorney. The Court said: "The very existence of Section 2323.13 shows the Legislature's acceptance of the institution of the cognovit note and, we must assume, the legislative intention that it have a viable existence."\(^{53}\) and:

To read the statute as requiring the physical presence of an attorney to confess the judgment, who literally and actually represented the defendant, would necessarily destroy the cognovit concept.... The usefulness of the statute could not survive a mandatory adversary procedure that was more than formal.\(^{54}\)

Thus legislative action appears to be the route to follow to effect a revision in cognovit procedures.

The Ohio statute authorizing confession of judgment under a warrant of attorney is unusual among the states. It contains four paragraphs, directed toward:

(1) production of the warrant and limitation of venue to the county where the maker resides;
(2) statement of the residence of the maker;
(3) provision for notification to the defendant of entry of the judgment; and
(4) warning in a conspicuous place and type that rights to notice and court trial are lost and any claims against the creditor will not be available in defense.\(^{55}\)

It had been proposed some years ago that cognovit notes were useful tools for the modern businessman and were an aid to congested courts.

\(^{50}\) 405 U.S. at 202.
\(^{52}\) *Ohio Rev. Code* § 2323.13(A) (Supp. 1971).
\(^{53}\) 18 Ohio App.2d at 64, 246 N.E.2d at 909.
\(^{54}\) Id. at 65, 264 N.E.2d at 909. *See supra* at 3, and nn. 5-8. The Common Law did require the confessing attorney to literally and actually represent the defendant.
\(^{55}\) *Ohio Rev. Code* § 2323.13 (Supp. 1971). *See Appendix A for complete statute.*
Therefore, they should be controlled rather than abolished, and giving the debtor an opportunity to know and understand what he has signed would be consistent with the business ethic expressed in the Uniform Commercial Code. This business ethic is expressed as "obligations of good faith, diligence, reasonableness and care," and since it would be a breach of good faith to enforce the cognovit provision without notice, making the debtor aware of what he is signing, and giving notice before the judgment becomes absolute (10 days' delay was suggested) should answer all objections, according to this proposal.

These considerations may well be on point in dealings between merchants but they miss the mark in dealings between individual consumers and business organizations. Even "a lawyer or bank president buying fishing tackle for his own use is not a merchant." The presence of the warning in big type, just above the signature may well eliminate the element of surprise which is part of the unconscionability consideration by which courts may render contracts void. It does seem to provide the requirement of knowledge for waiver of constitutional rights, but it does not necessarily make agreement to the provisions of the contract voluntary. The victims of the pirates who walked the plank may well have done so knowingly and understandingly (and this may well have constituted a large part of the pleasure the pirates derived from the exercise) but only in the very limited sense of choosing between two evils could it be called voluntary. In the same way, there is no real alternative for the consumer, with or without knowledge of his fate. He either agrees to the cognovit clause, or he goes without. Such a warning does not satisfy the requirements of "knowingly, intelligently and voluntarily" agreeing. It satisfies only the requirement of "knowingly."

The use of a confession of judgment under a warrant of attorney developed as a result of business relations between merchants. Merchants are expected to be knowledgeable and skilled in commercial relations. They have traditionally been known to drive a hard bargain and to conduct their business in keeping with the traditions of commerce. Consumers, on the other hand, do not generally have the knowledge.

57 UNIFORM COMMERCIAL CODE § 1-102(3).
58 Id. § 2-104, Comment 2. The UCC seems to recognize the differences between consumer transactions and other commercial transactions because in Sec. 2-102 it distinguishes "sales to consumers," and Sec. 9-102 recognizes consumer transactions as distinct from other commercial transactions.
59 Id. § 2-303.
60 See supra at n. 1-4, and especially nn. 2a3, together with reference to the trader defendant in n.9, showing the overriding, if not exclusive, association with trade and commerce.
means or motivation to conduct their business in the same way. In earlier times it may well have been a common practice for housewives to bargain at the market with sellers of produce, for horse traders to strike a sharp bargain and for the peddler to vary his price to match his expectation of the willingness of the customer to pay. But these transactions were essentially between individuals whereas today consumer transactions are overwhelmingly between units of large commercial organizations and individuals. Bargaining over the price and terms of sale between buyers and sellers in today's retail establishments is unheard of, except for automobile purchases. Indeed, the clerks who consummate the sales are without authority to change the listed price. The American buying public has accepted the principle of single pricing in retail trade, and generally conduct their business as if they had no alternative to accepting the terms of the retail establishment except total rejection. Partly to make acceptance of the conditions more amenable, and partly to expand the volume of their business, retail trade extended more and more liberal terms to their credit customers. Money-lending activities paralleled the growth of retail trade, so that over the past twenty-five years the growth in consumer debt has far outstripped the growth in any other form of debt. For example, while the Federal debt has increased 20% since 1945, commercial and financial debt has increased 400%, corporate debt 800%, state and local government debt 1000%, and consumer debt increased 2400%.

The fraction of total net public and private debt represented by consumer debt has increased from 1.25% in 1945 to 7% in 1970, and now is nearly as large as the entire combined debt of all local and state governments. No longer is consumer debt but one-third as large as commercial and financial debt as it was in 1945; it is now more than one and a half times as great as the combined commercial and financial debt. As pointed out earlier it is no longer an insignificant part of the total debt structure, but is now the single largest item in individual and noncorporate debt except for mortgages. It deserves recognition as qualitatively different from other types of debt, and any change in statutory treatment should recognize this difference.

There are a wide variety of ways in which the states handle confessions of judgment under a warrant of attorney. In general, the approaches are: (1) to limit the use of confession of judgment and warrant of attorney to timely use, as at trial, or to require recording of the warrant as for property, and, (2) to specifically prohibit such clauses in installment contracts and small loans.

61 The Fair Trade pricing of a generation ago expressed almost a national policy in support of single pricing in retail trade; and there was substantial support of the principle.

62 Economic Report of the President, 26, Table B-62 (1972). Total consumer debt in 1970 is listed as $126.8 billion and state and local government debt as $143.3 billion.

63 Id.
Hopson described the position of 49 states on the confession of judgment under a warrant of attorney. The movement in the decade since has been toward still more stringent restrictions on the use of the cognovit clause. A summary comparison of the positions of the states in 1962 as given by Hopson, and in 1971, is shown in the tabulation below.

During the intervening decade, the Uniform Consumer Credit Code was introduced and adopted by five states. Ohio revised its statutes twice, in 1967 and 1970, before arriving at its present form. A bill is currently under consideration by the Ohio Legislature which would make cognovit notes invalid. The bill is identified as Sub. H.B. 350. It has

64 See Hopson, supra, n. 32.
65 Kansas; a prohibition was repealed in 1969.
70 Idaho, Indiana, Oklahoma, Utah and Wyoming.
passed the House and the Senate Judiciary Committee at the time of this writing, and is in the Rules Committee of the Senate awaiting assignment for a floor vote.\textsuperscript{72} This bill provides for changes in the statutes covering secured transactions and retail installment sales.\textsuperscript{73} It does provide protection to a retail installment debtor with respect to his rights against a holder in due course, replevin of collateral and opportunity to cure default, and would make a cognovit provision in an instrument issued in connection with a retail installment contract invalid, if it results from a consumer transaction. This bill is the culmination of substantial effort on the part of a Joint Committee of the General Assembly and presents their recommendations resulting from a study of consumer protection.\textsuperscript{74}

A major obstacle to its passage is reported to be the objection of the Ohio Bankers Association to the changes in the "holder in due course" doctrine and the invalidation of cognovit notes. This objection is based largely on the fable that retail trade will suffer because a sharp decline in commercial lending will follow. It seems downright ridiculous to argue seriously that trade and commerce will decline if provisions such as are in effect in New York, Michigan and Texas are enacted. The securities markets in New York, the petroleum industry in Texas and the automobile industry in Michigan are major economic factors not only within their own states, but in the nation as well. Retail activity at Macy's and Gimbel's in New York, and along Livernois Avenue in Detroit is high by any standard. Whatever statutory position is taken in relation to consumer loans secured by cognovit notes really has no major impact on the development of industrial and commercial bases of economic strength. As for the financial institutions which do cater to retail credit and small loan business, many of them already operate with some enthusiasm in states without cognovit provisions. BankAmericard, Master-Charge, the petroleum companies and air travel companies handle consumer credit transactions throughout the country. If cognovit provisions were really important to their operations, it would seem that they would be reluctant to extend credit where such provisions were not available. Yet, Hopson surveyed a large number of lending institutions which were active in states where cognovit notes were not available to them as well as in Ohio, and found that most of them, by their own admission, did operate satisfactorily in states without cognovit provisions.\textsuperscript{75} The reason such clauses were included in contracts written in Ohio were: (1) custom, and (2)

\textsuperscript{72} Letter from Frank H. Mayfield, Jr., to Howard H. Hoekje, July 19, 1972. See Appendix B.

\textsuperscript{73} The Bill under consideration by the Senate contains some amendments not present in the original House Bill. It is section 1317.15, not in the original House Bill, which would invalidate cognovit notes arising from a consumer transaction.

\textsuperscript{74} Akron Beacon-Journal, June 25, 1972 at A20, col. 1.

\textsuperscript{75} Hopson, supra, n. 32.
competitive requirements. As long as the law allows the use of cognovit notes, any business which could use them probably would; and if one party uses them, it would be considered almost stupid in the business community if others did not.

The absence of cognovit notes would place no serious impediment in the way of lending activities. In practice, however, if cognovit notes were invalid, and all lenders operated under the same rules, the major change in modus operandi would probably be a restriction in availability of credit to marginal risks. This is probably desirable on balance, because many applicants for consumer credit depend on the judgment of the creditor for an assessment of their ability to carry the loan.

Two alternatives to prohibition of cognovit notes which should be considered, at least briefly, are:

(1) restrictions on the use of warrants of attorney; and
(2) consideration for inclusion of cognovit clauses in contracts.

Twenty-seven states limit the use of confession of judgment in some way, as for example, to situations in which action has been instituted, or where the defendant verifies the amount due by oath.\(^7\) This use is in line with the historical use of cognovit actionem. A modification requires a timely affidavit by the debtor describing the debt. For example, Missouri authorizes confession of judgment without action\(^7\) but requires the defendant to make a statement in writing, verified by oath, stating the sum due and the facts to support the position that the sum is justly due.\(^7\) The plaintiff can also confess judgment under a warrant of attorney if the warrant is acknowledged as required for deeds of land, and there is an affidavit by the plaintiff stating the debt is "bona fide for a fair and valuable consideration."\(^7\)

These restrictions are appealing on their face, because they seem to require the voluntary participation in confession necessary to meet the test of constitutionality. These procedures would require the normal actions of

\(^7\) Mo. R. Civ. P. 74.24.
\(^8\) Id. Rule 74.25.
\(^9\) Id. Rule 74.27.
debt or replevin to be instituted, or at least a more serious treatment of the warrant to be used. In practice, however, the added costs of the procedure would surely be added to the cost of the loan, and the ingenuity and superior knowledge the creditor could bring to bear would leave the debtor still the victim of unequal power.

The exchange of consideration for a confession of judgment clause has some appeal. It would probably satisfy the requirement of voluntarily waiving rights; but the amount of consideration which would be acceptable would probably have to be set by statute lest the creditor so dominate the trading that unequal bargaining power destroys the constitutionality. For example, a 33% reduction in interest rate in exchange for a cognovit clause might be attractive to the debtor. It is likely, however, that the creditor would rather take his chances with the full interest rate, which would support the thesis that the cognovit clause has no real impact on whether or not consumer loans would be made.

A satisfactory approach seems to be that taken by New York. In the first place commercial or business use of any plan of deferred payments payable in two or more installments is distinguished from consumer use.80 Furthermore, the attorney appearing under the power of attorney is charged with appearing, representing and acting for the principal.81 Finally, the inclusion of cognovit clauses in retail installment and small loan contracts is prohibited.82 This treatment is desirable because:

1. a power, or warrant of attorney is used as it was originally intended to be used and the legal process retains its traditional adversary quality;
2. consumer transactions are distinguished from business and commercial transactions; and
3. cognovit clauses are prohibited in consumer transactions, but not commercial transactions, without ambiguity.

The legislation proposed for Ohio reads:

A warrant of attorney to confess judgment contained in any instrument issued in connection with a retail contract arising from a consumer transaction, executed on or after the effective date of this section, is invalid and the courts are without jurisdiction to render a judgment based upon such a warrant.83

“Consumer transaction” is defined to include sale or lease of goods or intangibles, but does not include money.84 It appears to be effective

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82 N.Y. Bank. Law 570, 353 (McKinney 1971).
84 Id. § 1309.47(P).
for the transactions covered, but a comparable section should be enacted to cover so-called small loans. It would be desirable for Ohio to adopt the Uniform Consumer Credit Code as it has adopted the Uniform Commercial Code; but recognizing the long history of use of cognovit notes in Ohio, the enactment of the proposed legislation would not be inconsequential. The proposed legislation should be enacted because:

(1) unrestricted confessions of judgment under a warrant of attorney give too much power to the holder;

(2) agreement to such provisions must be made knowingly, intelligently and voluntarily;

(3) retail installment and small loan contracts are almost invariably contracts of adhesion and agreement is only nominally voluntary;

(4) reliance on restrictions on the use of warrants of attorney generally would not differ significantly from existing practice;

(5) the exchange of consideration for inclusion of cognovit clauses would probably be constitutional, but the interpretation of adequate consideration leaves substantial ambiguity;

(6) the nature of consumer transactions is qualitatively different from commercial and business loans, and they should be treated differently;

(7) elimination of cognovit clauses is expected to have only minimal effects on trade and commerce; and

(8) confession of judgment under a warrant of attorney has been prohibited in a great majority of states, and the trend is toward stricter restrictions in line with a general policy to distribute the risks of retail trade more evenly between individual consumers and business organizations as has been done with product liability.

Howard Hoekje
CONFESSION OF JUDGMENT

APPENDIX A

Ohio's Statute Governing Warrant of Attorney to Confess

Ohio Revised Code, Section 2323.13 (Supp. 1971)

(A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession. Notwithstanding any agreement to the contrary, if the maker or any of several makers resides within the territorial jurisdiction of a municipal court established under section 1901.01 of the Revised Code, or signed the warrant of attorney authorizing confession of judgment in such territory, judgment on such warrant of attorney shall be confessed in the municipal court having jurisdiction in such territory, provided the court has jurisdiction over the subject matter; otherwise, judgment may be confessed in any court in the county where the maker or any of several makers resides or signed the warrant of attorney. The original or a copy of the warrant shall be filed with the clerk.

(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified letter mailed to him at the address set forth in the petition.

(D) A warrant of attorney to confess judgment contained in any promissory note, bond, security agreement, lease, contract, or other evidence of indebtedness executed on or after January 1, 1971, is invalid and the courts are without authority to render a judgment based upon such a warrant unless there appears on the instrument evidencing the indebtedness, directly above or below the signature of each maker, or other person authorizing the confession, in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document:

"Warning—By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you or your employer regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause."

History: 128 v. 137 (Eff. 9/14/59); 132 v. H614 (Eff. 12/1/67); 133 v. S85 (Eff. 9/16/70).
July 19, 1972

Mr. Howard H. Hoekje
883 Ghent Ridge Drive
Akron, Ohio 44313

Dear Mr. Hoekje:

Pursuant to your inquiry of July 15 on the cognovit note legislation, be advised that the bill can be identified as H.B. 350, which has passed the House, passed the Senate Judiciary Committee, and is presently in the Rules Committee of the Senate awaiting its assignment for a floor vote.

The Legislature is now in recess, and we will return for approximately two to three weeks following the November election, and I would anticipate the bill coming up for a floor vote at that time, when we would expect to secure final passage.

If you would like a copy of the bill, I would suggest you write the Clerk's Office, Ohio Senate, State House, Columbus, Ohio 43215 and ask them to forward a copy to you.

Best wishes.

Yours very truly,

[signed]
FRANK H. MAYFIELD, JR.

FHM:pjm