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Should A Cognovit Judgment Validly Entered In One State Be Recognized By A Sister State?

*Atlas Credit Corp. v. Ezrine*¹

*Atlas Credit Corp. v. Ezrine* involves an attempt by the New York Court of Appeals to avoid a Pennsylvania judgment obtained under a cognovit or warrant of attorney. The plaintiff, Atlas Credit Corporation, brought suit in New York to enforce two such judgments obtained in Pennsylvania pursuant to an agreement which the defendants, Ivan and Sarah Ezrine, had executed in Pennsylvania to guarantee the mortgage indebtedness of a Pennsylvania corporation. In the agreement was a cognovit clause² authorizing any attorney of any court of record at any time to appear and confess judgment on the defendants' behalf. The mortgage allegedly being in default, two judgments against defendants totalling $1,318,337.20 were confessed without personal service upon or notice to either defendant.³ Shortly after the second judgment was entered, the plaintiff initiated summary proceedings in Pennsylvania to foreclose certain security held for the debt guaranteed by the defendants. Personal property of one of the guarantors (other than the defendants) and certain real estate and machinery of the mortgagor in default were levied upon and sold to the plaintiff. None of the levies and sales were preceded by notice to either of the defendants. Since these sales were insufficient to satisfy the amount of the judgment, interest, and costs, the plaintiff, nearly two years after the second sale and in order to recover the balance due on the judgments, petitioned a Pennsylvania court to fix the fair market value of the property which had been sold.⁴ Service of process

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2. A typical cognovit clause is the following taken from Egley v. T.B. Bennett & Co., 196 Ind. 50, 145 N.E. 830 (1924):

   *I hereby irrevocably make any attorney at law my attorney for me and in my name to appear in any court of record, in term time or vacation, at any time hereafter to waive service of process and confess a judgment on this note in favor of the payee, his assigns or the legal holder, for such sum as shall then appear to be due, including an attorney fee (as stated) . . . to release all errors . . . and to consent to immediate execution on such judgment.*

   The wording of most cognovit clauses is similar to that of the above illustration in that the power or warrant of attorney is specifically made irrevocable. Even if the power or warrant of attorney is not specifically made irrevocable, in most cases it is nevertheless irrevocable because it is coupled with an interest in the creditor. *See* Barrick v. Horner, 78 Md. 253, 27 A. 1111 (1893) (a power of sale is irrevocable when coupled with an interest); Fyes, *Reappraisal of the Cognovit of Judgment Law*, 48 Ill. B.J. 764 (1960). *See also* 47 AM. JUR. 2d Judgments § 1117 (1969).

3. Since the cognovit acts as a waiver of process and notice, the only notice ordinarily available would be that transmitted by the attorney appointed. As the attorney is generally not required, either by statute or agreement, to give such notice, the debtor in effect receives no notice until action is taken on the judgment. In most cases, the attorney is appointed by the creditor and has no contact with the debtor and is, therefore, unlikely to know of or interpose any defenses which the debtor may have against entry of the judgment. Ethical considerations suggest that the attorney, by virtue of his position as the debtor's representative, has a duty to see that the debtor is promptly notified.⁴

4. See PA. STAT. ANN. tit. 12, §§ 2621.1, 2621.7 (1967). Whenever any real property is sold to the plaintiff in execution proceedings and the plaintiff claims that there is a balance due upon the amount of the judgment, he must petition the court
for this proceeding was effected by publication in a local Pennsylvania
ewspaper and by certified mail to the defendants’ residence in New
York City. At the hearing on the plaintiff’s petition, at which one
defendant appeared by attorney, the value of the property was deter-
dined to be $350,000, which amount was credited toward satisfaction
of the cognovit judgments previously entered against both defendants.
Subsequently, one of the defendants personally appeared in the Penn-
sylvania court and moved for a redetermination of fair market value;
this motion was denied. The plaintiff then brought the instant suit
in New York to recover from the defendants the balance due on
the cognovit judgments.

The New York court’s opinion raised two principal questions:
(1) whether a cognovit judgment entered without notice was a
“judicial proceeding” within the meaning of the full faith and credit
clause and (2) whether such an unlimited warrant of attorney as
existed in Ezrine so offended notions of due process as to deprive
the rendering court of jurisdiction to issue a judgment cognizable
under the full faith and credit clause. In each instance the court
concluded that the full faith and credit clause did not require that
New York honor the Pennsylvania judgment: a judgment that does
not provide a defendant with notice or opportunity to defend is not a
“judicial proceeding” under article four of the Constitution, and a
warrant of attorney which permits entry of a judgment by confession
anywhere in the world without notice does not meet either the standards
of reasonableness or the fundamental principles of justice and fair
play\(^5\) required by the due process clause of the fourteenth amendment
in order for a court to have personal jurisdiction over a defendant.
In reaching its conclusions, the court overruled its prior decision in
Teel v. Yost,\(^6\) which had held that a cognovit judgment entered in a
valid proceeding in Pennsylvania was entitled to full faith and credit
in New York.\(^7\)

Chief Judge Fuld rendered a dissent which indicated that, in
his opinion, cognovit judgments presented no constitutional problems
of the type raised by the majority. He emphasized the debtor’s consent
to any court’s jurisdiction. The judgment being a fully valid one in
Pennsylvania, comity might prevent its recognition in New York only
if it violated New York’s public policy. Judge Fuld felt that New York’s
own confession of judgment procedure was not so different from that
of Pennsylvania as to render Pennsylvania’s judgment repugnant to
New York’s policy. Judge Fuld concluded by suggesting that the
defendants were in no way prejudiced by the judgment since it was
entered in Pennsylvania where the warrants of attorney were executed,

\(^6\) 128 N.Y. 387, 28 N.E. 353 (1891).
\(^7\) But see Baldwin Bldg. & Loan Ass’n v. Klein, 136 Misc. 752, 240 N.Y.S. 804
(Sup. Ct. N.Y. County 1930), criticized in 44 HARY. L. REV. 1277 (1931) (Pennsyl-
vania cognovit judgment held invalid as against a New York resident).
where the security (in the form of real property) was located, and where the defendants would most likely have expected the judgments to have been entered.

I. Cognovit Procedures

While judgments by confession entered under a warrant of attorney existed at common law, they are now largely governed by statute. According to a 1961 survey, only seven states had statutes specifically allowing the use of cognovits. Fifteen others had declared such clauses void; twenty-three had placed various procedural limitations on confessions of judgment generally; and four states had no pertinent statutes, the common law presumably remaining in effect in these states. While procedural differences do exist between the common law and the statutory schemes of those states restricting judgments by confession, little protection from fraud, overreaching or economic duress is, in reality, available to the ordinary debtor. An examination of the various procedures indicates that in almost all of the "restrictive" states a judgment "for money due or to become due or to secure a contingent liability on behalf of the defendant, or for both" may be entered by confession upon the mere filing of a statement (ordinarily the original cognovit will suffice) signed and verified by the defendant. Such a statement need only contain an authorization for the entry of judgment for a specified sum and a statement of the facts out of which the debt arose. After these minimal requirements are met, the affidavit may then be filed with the clerk of the court, who will enter the judgment in the judgment roll. After the judgment is entered, it is final and enforceable like any other valid judgment. Execution may take place immediately unless restricted by the agreement itself. New York is one of those states which provides several technical restrictions on cognovit procedure. Maryland and Pennsylvania represent opposite extremes: Pennsylvania's statute authorizes the entry of any cognovit judgment while Maryland's statute provides stricter notice and execution requirements than those ordinarily required by other states' procedures.

10. For example, some statutes require that the judgment note be produced. E.g., Neb. Rev. Stat. §§ 25-1309 to -1312 (1964). Some require that the address of the obligor be stated in the affidavit. E.g., N.Y. Civ. Prac. Law § 3218(a)(1) (McKinney 1963); N.C.R. Civ. P. 68.1(b).
12. See, e.g., Minn. Stat. Ann. §§ 548.22-23 (1947), which specifically provides that the judgment, once entered, is final, and that execution may issue immediately; Neb. Rev. Stat. § 25-1311 (1964), which provides that the enforcement of cognovit judgments is the same as that of any other judgment. Some state statutes provide that execution may only take place to the extent of amounts presently due, leaving a lien on future installments which is enforceable after they become due. See, e.g., N.C.R. Civ. P. 68.1; N.D.R. Civ. P. 68(c); Ore. Rev. Stat. §§ 26.019-.030 (1959).
New York has attempted to provide some protection for the debtor by requiring that he state in the affidavit authorizing confession of judgment the county of his residence or the county in which the judgment is authorized. The purpose behind the requirement is that the proper county for entry of the judgment will be ascertainable on the face of the affidavit and that the defendant will know where to look for any action by his creditor. While several other states have also required that the address of the obligor be shown on the document, such a requirement offers little protection unless accompanied by a provision that notice be transmitted to the defendant before the judgment becomes final and enforceable. Without such a notice requirement, the plaintiff may execute upon the judgment and deprive the defendant of his property before he has had an opportunity to defend against the claim. While a defendant might petition the court to open or vacate the judgment, if in the interim the plaintiff has executed upon it, such an opportunity would come too late.

In comparison to other cognovit procedures, Maryland's appears to provide the greatest protection to a defendant consistent with retention of the summary nature of the proceeding. Under the Maryland procedure a judgment by confession may be entered by the clerk of the court upon the filing by the plaintiff of a declaration. This declaration must be accompanied by the written instrument authorizing confession of judgment and by an affidavit of the plaintiff stating the amount due and the address of the defendant. The feature that distinguishes Maryland's procedure from that of other states is that a personal summons must be issued to the defendant immediately upon entry of the judgment. This is to give the defendant notice and a thirty-day period in which to show why the judgment should not become final. If no cause is shown after receipt of the summons, the judgment is deemed to be final to the same extent as is a judgment after trial. Until the thirty-day period has expired, the plaintiff has merely a lien against the defendant's property since the rule specifies that a sale on execution upon a judgment by confession may not be made until after such judgment shall have become final. By this provision the defendant is afforded an opportunity to defend before he is deprived of the possession or use of his property.

14. Fifth Report, Advisory Comm. on Prac. & Proc., N.Y. Legis. Doc., 1961, No. 15, p. 503. Such a provision provides at least for the giving of constructive notice in that the obligor, by searching the judgment rolls, should be able to ascertain whether a judgment has been confessed against him.
15. See, e.g., N.C.R. Civ. P. 68.1(b).
18. Md. R.P. 645(b). This rule's requirement that a summons be served upon the defendant and its allowance of a period of thirty days within which the defendant may move to strike such judgment are the result of recognition of the hardships which were sometimes inflicted upon defendants because of a lack of notice and the consequent lack of an opportunity to interpose defenses before a judgment by confession was enrolled. Newark Trust Co. v. Trimble, 215 Md. 502, 138 A.2d 919 (1958).
In contrast to Maryland's regulation is the statute of Pennsylvania, which provides:

It shall be the duty of the prothonotary of any court of record, within this Commonwealth, on the application of any person being the original holder (or assignee of such holder) of a note . . . in which judgment is confessed, or containing a warrant for an attorney at law, or other person to confess judgment, to enter judgment against the person or persons, who executed the same. . . .

Even the mere formalities provided by other state statutes are not present. The original document need not be produced, an affidavit stating the facts out of which the debt arose is not required, and the judgment may be executed at any time after it is entered without any form of notice to the debtor.

It is the contention of this note that Pennsylvania's procedure, or any other procedure which purports to authorize the levy of an execution before the debtor is notified of the proceeding, is violative of the due process clause. While it may be argued that any judgment entered without notice to the defendant is a violation of due process, this note takes the contrary view. It is not the entry of judgment without notice that raises the due process objection, but rather an execution pursuant thereto since it is such an execution which constitutes "deprivation" in the constitutional sense; prior thereto the debtor retains both the possession and the use of his property.

II. Full Faith and Credit

Article four of the Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The New York court in Ezrine initially decided that cognovit judgments are not entitled to full faith and credit recognition since they are not "judicial proceedings" in the ordinary sense of the term. This conclusion was reached because of a combination of factors: (1) the cognovit judgments in Ezrine were entered by the clerk of the court simply as a matter of routine, (2) there was no hearing on the merits, (3) the court exercised no discretion and made no determination, and (4) no notice was provided to the defendants. While these factors may eliminate cognovit judgments from the technical purview of the term "judicial proceedings,”

23. Sumner, Full Faith and Credit for Judicial Proceedings, 2 U.C.L.A.L. REV. 441 (1955) lists three prerequisites: jurisdiction, a decision on the merits, and a final decision. Under the Restatement of Conflicts § 75 (1934), a judicial proceeding, to be entitled to full faith and credit, must provide some form of notice to the parties affected:

A state cannot exercise through its courts judicial jurisdiction over a person, although he is subject to the jurisdiction of the state, unless a method of notifica-
the Ezrine judgments still appear to fall within the scope of article four. Even if not "judicial proceedings," they plainly represented "records" of the rendering state, entered in compliance with one of its "public acts," and were entitled to full faith and credit on that basis. *Ohio v. Kleitch Bros., Inc.*\(^{24}\) involved a similar situation; there a Michigan court was asked to give full faith and credit to an Ohio tax statute, Ohio assessments, and Ohio judgments entered thereunder. The court faced directly the problem of a summary judgment entered without prior notice, hearing, or judicial determination and concluded, "Even if we do not conceive of the Ohio 'judgments' as 'judicial proceedings,' they plainly represent 'records' of that State entered in compliance with one of its 'public acts' and should be given full faith and credit."\(^{25}\)

When a state is dealing with judgments of sister states, full faith and credit may be withheld if the result of such recognition would be so contrary to the policy of the forum state as to justify refusal.\(^{26}\) In the instant case, as Judge Fuld points out in his dissent, New York permits judgments by confession without notice to the debtor; the minimal procedural requirements of the New York statute provide little, if any, more protection to the debtor than the law of Pennsylvania.\(^{27}\) The procedural differences relied upon by the majority\(^{28}\) do not supply a sufficiently overriding interest to ignore the unifying principle of the full faith and credit mandate.

Since cognovit judgments are literally included within the scope of the full faith and credit clause, the real issue is whether they fit constitutionally into its spirit. Since full faith and credit need only be given to *valid* judgments, *i.e.*, those which are rendered in accordance with due process, if Pennsylvania’s cognovit procedures did violence to the concept of due process, the New York court was correct in denying full faith and credit despite the fact that New York’s *own* procedures were substantially the same as those of Pennsylvania. This issue the

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\(^{25}\) 98 N.W.2d at 643.


\(^{27}\) 25 N.Y.2d at 234-35, 250 N.E.2d at 484, 303 N.Y.S.2d at 395.

\(^{28}\) Id. at 230-31, 250 N.E.2d at 481, 303 N.Y.S.2d at 392.
New York court in *Ezrine* resolved by denying recognition to the Pennsylvania judgments.

The United States Supreme Court has recognized that cognovit judgments, if valid where rendered, are to receive full faith and credit in every other state and may not, therefore, be refused or denied effect. For a cognovit judgment to be valid, and thus to be entitled to full faith and credit, two events must have occurred. First, the requirements of the state confession of judgment statute must have been met by the plaintiff. Second, the court granting the cognovit judgment must have had jurisdiction over both the subject matter and the parties. One element essential to the creation of jurisdiction is for the plaintiff to have complied fully with the terms of the warrant of attorney by which the defendant authorized the judgment since it is only through such compliance that the court obtains jurisdiction over the person of the defendant.

At first glance these requirements for validity appear to have been met in *Ezrine*. The Pennsylvania judgments were obtained pursuant to Pennsylvania's confession of judgment statute, thus satisfying the first requirement. The plaintiff's compliance with the terms of the warrant of attorney was exact, thus presumably creating jurisdiction over the defendant under the established principle governing cognovit judgments.

III. LACK OF JURISDICTION

The *Ezrine* majority purports to circumvent these established principles by a finding that, despite the plaintiff's exact compliance with the terms of the warrant, the Pennsylvania court nevertheless lacked that jurisdiction which it must have had for its decree to be entitled to full faith and credit.

Ordinarily, acquiring jurisdiction over a defendant entails some form of notice to the defendant. At one time jurisdiction was attainable only through service of process on the defendant while he was within the territorial confines of the state. This requirement has since been modified; today a court can obtain jurisdiction either by personal service out of state, service by mail, or constructive service by publi-

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29. The two United States Supreme Court cases dealing with cognovits have not discussed the constitutionality of a warrant of attorney which waives notice in addition to waiving personal service of process. In National Exchange Bank v. Wiley, 195 U.S. 257 (1904), the Court held that the particular warrant of attorney involved there authorized confession of judgment only in favor of the "holder" of the note. Since the plaintiff was not the "holder" but an assignee, the rendering state had no jurisdiction to enter the judgment. The judgment was "in legal effect, a personal judgment without service of process upon the defendants, and without their appearance in person or by an authorized attorney. The proceedings were wanting in due process of law." *Id.* at 270.

In Grover & Baker Sewing-Mach. Co. v. Radcliffe, 137 U.S. 287 (1899), the cognovit authorized "any attorney of any court of record . . . to confess judgment . . .." *Id.* at 290. Since judgment was confessed by a prothonotary rather than by an attorney, the Court held that the defendant had not submitted to the judgment court's jurisdiction, reasoning that he had a right to insist upon the literal terms of the authority conferred.

30. See note 20 *supra* and accompanying text.

cation, depending upon the circumstances. Jurisdiction is also attainable by personal appearance without service of process. While broadening the basis of jurisdiction, the Supreme Court has emphasized that due process is not satisfied unless notice is transmitted to all parties concerned. Not only must the defendant receive notice, but it must be the best notice possible under the circumstances of the case.

In ordinary cognovit cases, personal service is not made upon the defendant nor is notice transmitted before judgment is rendered. Such judgments are nevertheless considered valid since in the cognovit instrument the debtor specifically consents to the creation of the court's jurisdiction. Under the traditional view, when this consent is coupled with the customary warrant of attorney authorizing the attorney to appear and confess judgment on his behalf, the debtor not only invests the court with jurisdiction over his person but makes it unnecessary to provide him with notice that the suit has been brought.

Thus, in order for the New York court to deny the existence of that jurisdiction in the Pennsylvania court which was essential to the validity of the Pennsylvania judgment, which validity was essential to the imposition of full faith and credit, the court was forced to find that the debtor's consent was somehow invalid as a creator of jurisdiction. To so find, the majority held that a debtor may only consent to a particular court's jurisdiction since otherwise the power of attorney would be too broad and its use as a basis for imposing jurisdiction would be a violation of due process. As support for its position, the

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32. See International Shoe Co. v. Washington, 326 U.S. 310 (1945) (jurisdiction could be based on service by mail plus service on one of the defendant's agents, as long as such jurisdiction was not contrary to notions of "fair play and substantial justice"). See also Auerbach, The "Long Arm" Comes to Maryland, 26 Md. L. Rev. 13 (1966); Note, Requirements of Notice in In Rem Proceedings, 70 Harv. L. Rev. 1257 (1957), recognizing that historically service of process accomplished a two-fold purpose of subjecting defendants to the jurisdiction of the court and of providing notice of the impending cause of action. For a discussion of the conflicts involved in expanding the basis of a court's jurisdiction while relaxing the notice requirements, see Note, Due Process of Law and Notice by Publication, 32 Ind. L. Rev. 469 (1957).

33. National Exchange Bank v. Wiley, 195 U.S. 257 (1904). "[I]t is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law." Id. at 269. In the cognovit situation the defendant makes a personal appearance through the appointed attorney.

34. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (in order to conform to due process, notice must be reasonably calculated under the circumstances to apprise interested parties of the action and to afford them an opportunity to present their objections).

35. Walker v. City of Hutchinson, 352 U.S. 112 (1956). The Court held that notification by newspaper publication alone did not measure up to the quality of notice required by the due process clause since there seemed to be no compelling or even persuasive reasons why notice could not have been sent directly to the defendants; their names and addresses were readily available. Such reasoning is equally applicable to the cognovit situation.

36. See Restatement of Conflict of Laws §§ 75, 81 (1934); Restatement (Second) of Conflict of Laws § 25, comment g, § 32, comments h, i (1967); Restatement of Judgments § 6, comment e, § 18 (1942).

37. 25 N.Y.2d at 231, 250 N.E.2d at 482, 303 N.Y.S.2d at 392-93. In Ezrine the type of power of attorney which the court held to be invalid was one given to "any attorney in any court of record." Two other types may be created: (1) one giving to any attorney the power to confess judgment in a particular court and (2) one
court relied upon National Equipment Rental, Ltd. v. Szuhent, wherein the following statement is found: "it is settled... that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." Of vital importance to the Ezrine court was the concept of particularity expressed in the words "given court," while the dissent chose to place emphasis upon the phrase dealing with waiver.

Assuming that the prior consent of the debtor to a particular court’s jurisdiction would not conflict with due process notions, it is difficult to see how such a debtor stands in a better position than if he had consented without specifying a particular jurisdiction. In neither case is there any assurance that notice, even constructive notice, will reach the debtor before execution on the judgment takes place. The issue is actually whether the giving of prior consent to any jurisdiction can constitute a valid waiver of notice and cloak the rendering court with jurisdiction. As Judge Fuld points out:

Unless one is prepared to say that all cognovit judgments are invalid because they may be granted without notice to the debtor and thus deprive him of his day in court, it matters little where the judgment is entered. If the debtor has the capacity to consent to a cognovit judgment and, in effect, waives whatever protection notice of the proceedings might yield, then, it is difficult to perceive why as a matter of due process — as distinguished from wise policy — he may do so in only one specified jurisdiction.

39. Id. at 315-16. The court referred to the following for support: Restatement (Second) of Conflict of Laws § 32, comment g (1967) ("designated State"); Restatement of Judgments § 18, comment e. (1942) ("designated State"). See Henry & Co. v. Johnson, 176 Ga. 541, 173 S.E. 659 (1934), to the same effect: "A party may waive process... But unless [it] has reference to some particular action intended to be instituted in some particular court, it is void for uncertainty, if not against public policy as tending to use the court as a means of oppression and denying to the defendant any fair opportunity to be heard."

French law requires that, in order to contractually oust the French court of its natural forum, the French citizen must execute a formal waiver referring not only to the exclusive jurisdiction of a foreign court but also expressly renouncing certain privileges granted by the French Civil Code. Cie. Luxembourgeoise d’Assur. Le Foyer v. Dulac, Cass. Civ., Nov. 13, 1957, 1958 Rev. Crit, Cr. Int. Fr. 738. Otherwise a foreign judgment will not be given effect by the French courts. Battifol, Traite Elementaire de Croit Internationale Prive 814 (4th ed. 1967). Such a waiver will not be recognized unless the French court is satisfied that the party was aware that he was agreeing to the foreign court’s jurisdiction and that such an agreement was not part of an adhesion contract. Cie. Gen. Trans. v. Pettier fr., Cass. Req. Mar. 2, 1909, 1384. See note 61 infra and accompanying text.
41. 25 N.Y.2d at 235, 250 N.E.2d at 484, 303 N.Y.S.2d at 396.
IV. Waiver

Courts traditionally have avoided the necessity of deciding whether cognovit judgments violated due process requirements of notice by finding that the debtor's consent, as embodied in the instrument, was sufficient to overcome any constitutional infirmities which might otherwise have been present. The debtor's authorization of any attorney to appear for him and confess judgment has been considered to be a waiver of process, by which the defendant yields his right to notice of the time and place of hearing and his opportunity to be heard. Whether this consent actually constitutes a waiver is a question not heretofore adequately dealt with.

Although constitutional rights can be waived, courts indulge every reasonable presumption against their waiver. The Supreme Court's definition of "waiver" was stated in Johnson v. Zerbst: "A waiver is ordinarily an intentional relinquishment of a known right or privilege." Subsequent Supreme Court decisions dealing with the waiver of fundamental constitutional rights make it clear that, for such a waiver to occur, not only must there be a choice which is made with clear understanding of its consequences, but there must be an "absence of subverting factors so that the choice is clearly free and responsible." If the choice is made as the result of duress or misleading statements, no matter what the procurer's intention, it does not constitute a waiver. Cases involving the right to a jury trial, the right to counsel, the privilege against self-incrimination, and protections against illegal searches and seizures have added precision to the concept of waiver of fundamental constitutional rights. For example, the mere fact that a defendant has been silent, even after having been apprised of his rights, will not constitute a waiver of such rights; neither will acquiescence due to lack of knowledge of his rights or lack of understanding of the consequences of waiver. In each case involving a waiver of fundamental rights, the court will examine the particular facts and circumstances surrounding the waiver in addition to the background, experience and conduct of the waiver.

42. Cf. Green Mountain College v. Levine, 120 Vt. 288, 139 A.2d 827 (1958). "Personal service may be waived by consent, or agreement, or by designating an agent to receive service of process. . . . And if such waiver occurs there is no violation of due process."

43. See note 29 supra.
44. 304 U.S. 458 (1938).
45. Id. at 464.
47. Id. at 729.
51. See, e.g., Amos v. United States, 255 U.S. 313 (1920) (where there is coercion, no valid waiver exists).
54. See note 44 supra.
The waiver's education and mental capacity are two elements often considered.55

While most of the rules of waiver have evolved through decisions in criminal law, they should be no less applicable to civil situations involving constitutional rights. This position was taken by Mr. Justice Black in his dissent in National Equipment Rental, Ltd. v. Szukhent.56

In National Equipment the Supreme Court, by a 5-4 decision, decided that service had been made upon "an agent authorized by appointment," in compliance with Federal Rules of Civil Procedure 4(d), when made in accordance with a provision in a lease agreement whereby an agent unknown to the defendant was appointed to receive service for the defendant in any cause of action arising under the lease. Since the defendant had, in fact, received notice of the suit, the majority found no need to deal with a due process question; the Court indicated, however, that, had notice not been received, a different result would have followed.67 In his dissent Mr. Justice Black argued that the mere inclusion in the lease of a clause stating that the defendant, a Michigan farmer, thereby designated an unknown New Yorker to be his agent was "too weak an imitation of a genuine agreement to be treated as a waiver of so important a constitutional safeguard as is the right to be sued at home." Black sought support for this proposition from criminal law authority:68

Waivers of constitutional rights to be effective, this Court has said, must be deliberately and understandingly made and can be established only by clear, unequivocal, and unambiguous language. It strains credulity to suggest that these Michigan farmers ever read this contractual provision about Mrs. Weinberg [the New York agent] and about "accepting service of any process within the State of New York." And it exhausts credulity to think that they or any other laymen reading these legalistic words would have known or even suspected that they amounted to an agreement of the Szukhents to let the company sue them in New York should any controversy arise. This Court should not permit valuable constitutional rights to be destroyed by any such sharp contractual practices.69

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57. Id. at 315:

We need not and do not in this case reach the situation where no personal notice has been given to the defendant. Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases where there was no actual notice, such as Schroeder v. City of New York, 371 U.S. 208; Walker v. Hutchinson City, 352 U.S. 112 and Mulvane v. Central Hanover Tr. Co., 339 U.S. 306.
58. 375 U.S. at 332. See note 40 supra for the French attitude toward waiver.
59. 375 U.S. at 332 n.20.
60. Id. at 332.
These same arguments should be considered in deciding whether to recognize the validity of cognovit agreements since, like the lease involved in *National Equipment*, they are private contracts. Since the judicial system sanctions their use by judgment entries based upon the authority granted in the agreement, the court should assure itself that the debtor has been fully apprised of his rights and of the effect which a waiver of those rights would have.\(^{61}\)

In examining the facts and circumstances of particular cognovits, a distinction should be made between the consumer and commercial contexts. The consumer-debtor generally is not in a position of strength when dealing with the creditor; nor does he ordinarily possess sufficient knowledge and understanding of the law to be able to appreciate the consequences of a waiver of his rights to notice and to an opportunity to defend. In the commercial situation a waiver of notice may justifiably be considered effective since ordinarily neither party occupies a superior bargaining position\(^{62}\) and since a real purpose is served by allowing the use of a cognovit coupled with a waiver of notice; the parties are generally able to bargain on an equal footing and have a more sophisticated knowledge of the contractual practices involved and of their results. Had the New York court in *Ezrine* considered the question of waiver in this context, it might have found the waiver to have been effective.

An argument typically advanced in support of the constitutionality of cognovit judgments without notice is that the defendant may always petition the court to reopen or vacate the judgment.\(^{63}\) Several

\(^{61}\) See Developments in the Law, *State Court Jurisdiction*, 73 *Harv. L. Rev.* 909, 944-45 (1960), where it is suggested that all consents given prior to suit should be examined in light of “the relative bargaining positions of the parties” and that jurisdiction should be disclaimed by the court in cases where the particular device is coercive in nature. See also Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 *Harv. L. Rev.* 1121, 1138-39 (1966), suggesting the danger of coercion in cases where consent is obtained before an action is instituted and that the courts should examine all prior consents to determine whether the agreement was a fair one.

\(^{62}\) It has been commented that the statutory rights of commercial debtors are more readily waived than those given ordinary debtors. 6 *Corbin on Contracts* 983 (1950). Underlying the decision in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), are similar considerations of both the type of property taken (there, wages) and the type of debtor (there, a wage-earner) involved. See, however, the concurring opinion of Justice Harlan, suggesting that due process may be satisfied only by providing the type of notice and opportunity to defend which will allow a determination of the validity of the underlying claim before the debtor is deprived of any property or its use. *Id.* at 343.

\(^{63}\) Necessarily, one making the motion [to strike out a confessed judgment] assumes the burden of supporting the facts alleged in it, and as to all matters not going to the merits of the controversy, such as surprise or deceit in the entry of the judgment itself, he must prove such facts by a fair preponderance of the evidence. But as to defenses going to the merits of the claim upon which the judgment rests, a different rule prevails. In such cases, if the evidence adduced in support of the motion is sufficient to persuade the fair and reasoned judgment of an ordinary man that there are substantial and sufficient grounds for an actual controversy as to the merits of the case, the defendant should be deemed to have met the burden of showing that he has a meritorious defense. *Remsburg v. Baker*, 212 Md. 465, 469, 129 A.2d 687, 688 (1957), quoting *Keiner v. Commerce Trust Co.*, 154 Md. 366, 141 A. 121 (1927). See *Cropper v. Graves*, 216 Md. 229, 139 A.2d 721 (1958); *Note, Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. Pa. L. Rev. 395, 418-19 (1966), pointing out the unfairness of a system which does not provide the consumer with an
Supreme Court decisions suggest that such an argument does not satisfy due process objections. Once a debtor has been deprived of his property by execution or otherwise, the original lack of due process is not cured by the possibility of a second proceeding. In order to be effective, the opportunity to be heard must be granted at a meaningful time and in a meaningful manner. In *Armstrong v. Manzo*, the Supreme Court noted that the right to be heard was of little value unless the defendant had prior notice and could appear at the proper time to contest the action. That case involved a proceeding to set aside an adoption decree that had previously been entered against petitioner without giving him notice. The Court held that the decree had not been issued in accordance with due process and that this constitutional infirmity could not be cured by affording a subsequent hearing to the defendant on his motion to set aside the decree. In *Griffin v. Griffin*, a court order was entered declaring that petitioner owed to respondent both alimony in arrears and accrued interest. A judgment was subsequently entered without notice to the defendant, purporting to allow immediate execution in the amount of the arrears plus the interest. The Court noted that “[e]ven though petitioner could, if he knew of the judgment before execution is actually levied, move to set the judgment aside, that could not save the judgment from its due process infirmity, since it and the New York practice purport to authorize the levy of execution before petitioner is notified of the proceeding or the judgment.”

V. COGNOVITS AND MORTGAGES AS SECURITY DEVICES

Judgments by confession present a rather unique problem with respect to notice and due process requirements; since the judgment itself merely creates a lien on any property which the debtor may possess, it does not constitute a deprivation of property and so is not subject to the fourteenth amendment’s requirement of due process. In this sense the cognovit judgment is comparable to an ordinary mortgage since both are security devices. In each case the debtor retains control over and use of his property, in contrast to the situation under attachment or garnishment procedures which allow a creditor immediate possession of the debtor’s property. In each of the latter cases, the debtor immediately suffers the loss of the use of his property opportunity to present defenses before an execution on the judgment and also that few persons would be willing to pay the high fee “to unravel something which should have been straightened out in the first instance when the complaint was originally made.”

64. 380 U.S. 545 (1965).
65. 327 U.S. 220 (1946).
66. Id. at 232.
67. See Snidach v. Family Finance Corp., 395 U.S. 337 (1969); Comment, *The Constitutional Validity of Attachment in Light of Snidach v. Family Finance Corp.*, 17 U.C.L.A. L. Rev. 837 (1970). See Md. R.P. G41e, under which the debtor’s property may be seized before maturity of the plaintiff's claim. The attachment binds not only the property of the defendant in the hands of a garnishee at the time it is laid, but also such property as may come into the hands of the garnishee at any time before trial and judgment. Messall v. Suburban Trust Co., 244 Md. 502, 224 A.2d 419 (1966).
if the creditor chooses to exercise his right. Thus, to hold that an entry of judgment deprives the debtor of his property without due process of law would require not only a finding that the waiver or the power of attorney was invalid, but also a finding that the imposition of a mere lien constitutes a deprivation. The New York court in Ezrine, by failing to distinguish between the imposition of a cognovit judgment lien and its execution, went further than necessary when it included the mere entry of cognovit judgments in the category of deprivations.

Since due process is violated only upon execution without notice, a judgment by confession entered in accordance with a statute such as Maryland's is no more objectionable than any ordinary default judgment. The New York court in the instant case found that there would be no due process objection with respect to a default judgment since notice must be given to the debtor before its entry. Under the Maryland rule for confession of judgment, notice is provided in time for the debtor to present defenses to the action before his property is in any way interfered with; the procedure is, therefore, constitutionally sound. The cognovit procedures of other states, which, based on the concept of waiver, allow execution without prior notice, may be defective.

As cognovit judgments are security devices, their availability to potential creditors can enable consumers or commercial debtors to obtain credit more easily. When compared with other practices employed by creditors to obtain a security interest, cognovits actually place the debtor in a more favorable position. In the mortgage situation, for example, interests and incidental expenses such as those for title searches and insurance are high, the time factor needed to secure loan approval is great, and such loans, being best suited for long term transactions, are often unavailable to the everyday consumer. Even if we assume that the debtor has the time to expend in seeking such a loan and does in fact receive it, the creditor will almost always be able to obtain a default judgment if the schedule of payments is not met by the debtor. Since this is the exact result afforded by a cognovit judgment (assuming that, as in Maryland, the judgment is not enforceable until notice is given), a cognovit can be as effective a

68. Prior to the entry of a default judgment, process must have been served so that the debtor is made aware of the pending action; and the plaintiff must have filed a good cause of action. Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 219, 250 N.E.2d 474, 303 N.Y.S.2d 382 (1969). But see Katz, The Law and the Low Income Consumer, 3 Colum. J. of Legal & Social Problems (1967), pointing out that default judgments are also subject to abuse despite service of process.


70. Md. R.P. 643.


72. A cognovit judgment procedure may be no more susceptible to abuse than the procedure upheld over due process and equal protection arguments in Wheeler v. Adams Co., Civil No. 70-1087-k (D. Md., Jan. 25, 1971). That case involved the procedure under Md. R.P. BQ, by which a conditional vendor may replevy the goods on his ex parte showing of a prima facie case and the filing of an habendum bond.
security device as a mortgage while involving less time, effort, and expense on the part of the debtor.

VI. CRITICISMS

Perhaps the most valid objection to the use of cognovit clauses arises in the case of the ordinary consumer, who is unlikely to have knowledge of their effect. An unconscionable situation exists when the prospective debtor is presented with an application form which contains, among a multitude of other technical terms, a cognovit clause. He is generally unaware that he is signing anything except a credit application. He is completely in the hands of his creditor, who has the advantages of superior knowledge and bargaining power.

Current cognovit statutes provide little protection when creditors seek judgments on unjustified claims. A statement of facts out of which the debt arose will not prevent such abuse since no answer or defense on the debtor's part is required before entry of or execution on the judgment takes place. While the judgment may be opened and vacated on grounds of fraud, if the property has been disposed of by an execution sale without prior notice to the debtor, the debtor is left with no effective remedy. Although the debtor might maintain a civil suit for damages against the creditor, he may not be in a posi-

73. Commentators on the use of the cognovit have repeatedly stated that the consumer neither expects nor understands such clauses in consumer contracts. See, e.g., Comment, Abolition of the Confession of Judgment Note in Retail Installment Sales Contracts in Pennsylvania, 73 Dick. L. Rev. 115, 116, 118 (1968): "[I]nvariably the low-income consumer is completely uninformed concerning the nature and consequences of his signing such an instrument at the time of the sale. . . . While it has been repeatedly held that the defendant's signature upon the judgment note constitutes consent to waiver of notice, such 'consent' is fictitious since the low income consumer understands neither the character nor possible ramifications of the note." See also Swarb v. Lennox, 314 F. Supp. 1091, 1097 (E.D. Pa. 1970), discussing the results of a survey of debtors in default in Philadelphia and three other major cities. Most debtors had annual incomes of less than $6000, had limited educational backgrounds and, of 236 debtors who were aware that they had signed a contract, only 14% knew that the contract contained a confession of judgment clause.


75. See National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 333 (1963) (dissenting opinion), which clearly underlined the unconscionable aspect of a lease agreement by which the defendant had appointed an agent to accept process. The three dissenting justices noted that such clauses were often so buried within the text of the contract that they were never really read by the defendant. They expressed the opinion that, since the corporate plaintiff prepared the printed form contract, the individual purchaser should not be bound by the appointment despite his signature on the contract unless the plaintiff can prove that the debtor was aware that he was signing a power of attorney.

76. Cf. Wuchter v. Pizziutti, 276 U.S. 13 (1928), where the Court found that a New Jersey statute which provided for service of process on nonresident motorists violated the due process clause of the fourteenth amendment by failing to contain provisions assuring that the defendant would receive notice. If such notice were not required to be sent to the nonresident, then the possibility existed that unfounded claims would be prosecuted against absent defendants. The Court reasoned that a "provision of law for service that leaves open such a clear opportunity for the commission of fraud. . . . or injustice is not a reasonable provision, and . . . would certainly be depriving a defendant of his property without due process of law." Id. at 19.

77. See note 63 supra.
tion to do so.\textsuperscript{78} Cognovit procedures allowing execution before the giving of notice may also endanger the credit of the consumer without giving him the opportunity to defend against the action. In a society where credit sales form the bulk of our business transactions, this possibility poses a serious threat to the small consumer who may be unable to secure the necessities of daily living without signing credit agreements containing cognovit clauses.

The pressure which may be exerted by creditors after they obtain cognovit judgments is another area of concern. The creditor may attempt to use the judgment lien which he has obtained to force the debtor into a higher or accelerated schedule of payments or an increased interest rate as a price of retaining his property.\textsuperscript{79}

In \textit{Sniadach v. Family Finance Corp.}\textsuperscript{80} the Supreme Court recognized these very problems when it held that a Wisconsin statute providing for garnishment of wages violated the due process clause of the fourteenth amendment in that notice and opportunity to defend were not given before the \textit{in rem} seizure of wages.\textsuperscript{81} The \textit{Sniadach} decision arguably could be confined to wage garnishment since "wages are a specialized type of property presenting distinct problems. . . ."\textsuperscript{82} But wage garnishment is analogous to the creation of a judgment lien on property, as both can be used by the creditor as weapons with which to compel the debtor to accept the creditor's accounting of the debt; a real concern behind the Court's holding was the debtor's position in today's society:\textsuperscript{83}

"The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract of 'payment schedule' which incorporates these additional charges."\textsuperscript{84}

\vspace{1em}


\textsuperscript{80} 395 U.S. 337 (1969). \textit{See also} Ware v. Phillips, 468 P.2d 444 (Wash. 1970), where the Supreme Court of Washington, en banc, held that the entry of a default judgment under Washington's garnishment statute against garnishees, without notice to them that a claim had been asserted and that if they failed to answer a judgment would be entered in the amount of the claim, was a denial of due process.

\textsuperscript{81} A three-judge panel of the District Court for the District of Columbia has upheld pre-judgment wage garnishment where the wage-earner is a nonresident of the forum state and where the wage garnishment statute allows it to be quashed if the wage-earner files affidavits contradicting the plaintiff's prima facie case. Under the statute the wage-earner could request a jury trial of issues raised by such traverse. \textit{Tucker v. Burton}, 319 F. Supp. 567 (D.D.C. 1970). There is a dissent by Judge Wright. \textit{Id.} at 572.

\textsuperscript{82} 395 U.S. at 340.

\textsuperscript{83} \textit{Id.} at 340, 342 n.9. \textit{See also} Dandridge v. Williams, 397 U.S. 471 (1970).

The reasoning of the *Sniadach* Court is equally applicable to cognovit situations involving the small consumer (as opposed to the corporate or commercial debtor). The same type of economic hardship may exist; the same type of pressure may be exerted.\(^8\) The solution in the one case may be equally that of the other: the defendant must be given his day in court before he is deprived of his property.

The Supreme Court noted in *Sniadach* that under certain circumstances property may be attached without notice,\(^6\) but did not consider wage garnishment as ordinarily falling within such circumstances; the creditor's interest in debt collection was thus subordinated to the debtor's interest in having a hearing before seizure of his wages. An examination of the cases cited by the Court indicates that only a strong state interest\(^8\) or a concern for public welfare\(^8\) would justify an attachment without a prior hearing. The need of a creditor to execute upon a cognovit judgment before notice is extended to the consumer-debtor does not seem sufficiently compelling to meet these criteria.\(^9\)

State legislation has evidenced concern over the unconscionability of the use of cognovit judgments in the consumer sector by forbidding their use in small loan transactions and in retail installment sales.\(^6\)

With the exception of Ohio, Illinois and Pennsylvania, all states have at least some restriction in one or both of these areas. Uniform statutes such as the Uniform Commercial Code and the Uniform Consumer Credit Code have also followed a pattern of restriction. Under the U.C.C., adopted in every state but Louisiana, the negotiability of an instrument is not affected by a term "authorizing a confession of judgment on the instrument if it is not paid when due."\(^9\)

The implication of this language is that a note is not negotiable if it contains a term authorizing a confession of judgment prior to default, and this is in fact the position taken by the comment to section 3-112.\(^9\)

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85. Cf. Katz, *The Law and the Low Income Consumer*, 3 COLUM. J. OF LEGAL AND SOCIAL PROBLEMS (1967), suggesting that our legal order is often ineffective in protecting the poor, who can ill afford to spend several working days in court.

86. 395 U.S. at 339.


89. Cf. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), implying that there must be compelling or at least persuasive reasons in order to dispense with giving the best notice possible.


ing the validity of a term of the latter type as between the original parties, renders instruments containing such terms much less useful to a lender who is accustomed to discounting such instruments. The U.C.C.C., presently in effect in only four states,\footnote{Indiana, Oklahoma, Utah and Wyoming. CCH Consumer Credit Guide \S \S 4770.} has gone even further by making any authorization for a confession of judgment automatically void.\footnote{Uniform Consumer Credit Code \S\S 2.415, 3.407. In addition to the general prohibition, the UCCC prevents a buyer, lessee or debtor from waiving or otherwise agreeing to forego his rights or benefits under the act, by making such a waiver ineffective.}

VII. Conclusions

In the absence of an effective waiver, it is apparent that in order to satisfy current jurisdictional and procedural standards of due process, some type of notice must be provided to debtors before a levy of execution is permitted pursuant to a cognovit judgment. A procedure such as Maryland's for judgment by confession satisfies those standards of due process developed by the United States Supreme Court. In the commercial context, because of the sophistication of the parties, the nature of the business venture, and the size of the capital outlay, the debtor should be allowed to waive whatever protection that notice provides. In the consumer situation, because of the obvious danger of unconscionable creditor action, any waiver executed by the debtor should be carefully examined by the court, which should place the burden of proving its validity on the creditor.