Cognovit Revisited: Due Process and Confession of Judgment

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COGNOVIT REVISITED: DUE PROCESS
AND CONFESSION OF JUDGMENT

The fiscal mind has conjured innumerable ways to ensure payment when faced with debtor default. Perhaps the only limitation on the imagination of creditors is the conscience of society reflected in its laws and constitutions. Law must provide a countervailing power, on the debtor's side, to balance the economic and political power of creditors. Due process attempts this balance by securing to the debtor the exercise of basic rights before he can be deprived of his property. Nonetheless, for due process to be more than just a concept, specific procedures must be established to give it content.

Today, one of the harshest legal tactics available to the creditor is the cognovit note. Because of its harshness, there is widespread disagreement whether the cognovit note conforms to the requirements of due process. Recent decisions, including the Supreme Court cases of Swarb v. Lennox and D. H. Overmyer Co. v. Frick Co., have stimulated the controversy. This note will evaluate these cases and will consider whether they provide a countervailing force to the power and interest of creditors by ensuring to the debtors the rights of due process.

Cognovit Today—Background to Controversy

Today, two types of confessed judgments are recognized: the cognovit actionem and the cognovit note. The first is the debtor's written confession of liability, usually prepared after service of process. The written acknowledgment is then admissible in a judicial proceeding, where judgment is entered. Since notice of the action and the opportunity to litigate are the fundamentals of procedural due

2. A typical cognovit note might read: "AND FURTHER, I . . . do hereby . . . authorize and empower any Justice of the Peace in the State of Delaware, or elsewhere, with or without process, to enter judgment, or any Clerk, Prothonotary or Attorney of any Court of Record in the State of Delaware, or elsewhere, with or without process, to appear for me . . . and to confess judgment for the above amount against me . . . ." Osmond v. Spence, 327 F. Supp. 1349, 1353 (D. Del. 1971).
such a procedure raises no significant due process problems. This method of confessing judgment without action avoids needless litigation.

The harshness of confessed judgments arises under the second form, the cognovit note, which is the subject of recent litigation. This type of note, incorporated in a contract or other document, attempts in advance of any legal controversy to authorize (1) the assumption of in personam jurisdiction over the debtor in case of default and (2) the entering of judgment without notice and hearing for the amount confessed. The cognovit note usually consists of three provisions: a consent to jurisdiction, a waiver of notice and hearing, and a warrant of attorney authorizing judgment. Upon the slightest default, the creditor, without notifying the debtor that legal action has been initiated, can have any attorney confess judgment for the debtor in the amount due.8

Because notice is not required, the states are divided on the social worth and validity of the cognovit note and the restrictions on its use. At one extreme are those states which have declared the use of cognovit notes unlawful. New Mexico, for example, makes their use a misdemeanor.9 Nonetheless, the states that invalidate confession of judgment on warrant of attorney before an action is brought generally al-

8. The Pennsylvania Supreme Court described the cognovit note procedure as follows: "A warrant of attorney authorizing judgment is perhaps the most powerful and drastic document known to civil law. The signer deprives himself of every defense and every delay of execution, he waives exemption of personal property from levy and sale under the exemption laws, he places his cause in the hands of a hostile defender. . . . For that reason the law jealously insists on proof that this helplessness and impoverishment was voluntarily accepted and consciously assumed." Cutler Corp. v. Latshaw, 374 Pa. 1, 4-5, 97 A.2d 234, 236 (1953).

The cognovit procedure in Pennsylvania is representative. As explained in the rules of court, a confession of judgment for money may be entered by the clerk of the court without the agency of an attorney or the filing of a complaint. The amount in controversy is that which appears to be due from the face of the instrument. PA. R. CIV. P. 2951(a) (Supp., 1972). The attorney for the plaintiff may sign the confession of liability as the attorney for the defendant unless a statute or the instrument provides otherwise. PA. R. CIV. P. 2955(b) (Supp., 1972). The defendant's sole remedy is a petition to strike or reopen the judgment. However, the petition is required to state prima facie grounds for relief, PA. R. CIV. P. 2959(b) (Supp., 1972); and, the defendant waives all defenses and objections not stated in the petition. PA. R. CIV. P. 2959(c) (Supp., 1972). Throughout this process, the judgment lien remains in force.

low confession after suit is initiated, and most enforce the valid cognovit judgments of other states. At the other extreme are states that allow confession of judgment by cognovit note upon warrant of attorney. Such states, however, usually require that the cognovit note be self-sustaining, able to stand apart from any related contract, and signed independently of other contractual provisions.

Two uniform codes further illustrate the dispute over cognovit notes. The Uniform Commercial Code allows cognovit notes in negotiable instruments when it is a “written agreement executed as a part of the same transaction . . . ” On the other hand, the Uniform Consumer Credit Code specifically voids authorizations to confess judgment in the interest of consumer protection. As of 1971, however, only six states had adopted the Uniform Consumer Credit Code.

California lies somewhere in the middle in the dispute over cognovit notes. Although not voiding such notes and their use, California has established procedural safeguards which have abolished warrant of attorney. Before a court with jurisdiction can enter a judgment for money due or to become due, the defendant must make a timely sworn statement, either before or after suit is initiated, consenting to

10. As stated in Ritchey v. Gerard, 48 N.M. 452, 457, 152 P.2d 394, 398 (1944), the purpose of the misdemeanor statute was “to make void the provisions giving power of attorney with authority to confess judgment on such instruments for a sum of money to be ascertained in a manner other than by action of the court upon a hearing after proper service of process.”


The general approach, however, is that in the absence of fraud, lack of jurisdiction or statutory prohibition, the courts will enforce a foreign judgment entered on a cognovit note. Carlton v. Miller, 114 Cal. App. 272, 299 P. 738 (1931); Anderson v. Reconstruction Finance Corp., 281 Ky. 531, 136 S.W.2d 741 (1940).


16. 1 CCH CONSUMER CREDIT GUIDE ¶ 4770 (1972). The states are: Colorado, Idaho, Indiana, Oklahoma, Utah and Wyoming.
judgment. This verified statement must concisely state the facts resulting in the debt, showing that the confessed sum is justly due. The statement can be signed only by the party personally or by another under a valid power of attorney.

**Constitutional Validity: Preliminary Questions**

The concern over the constitutional validity of cognovit notes involves requirements of due process guaranteed by the Fourteenth Amendment. Despite the wide variation in approaches to cognovit judgments, there is consensus as to the constitutional minimums required for a valid judgment. As emphasized in *Sniadach v. Family Finance Co.*

A judgment depriving a person of property is generally valid only if the defendant is given notice of the action and the opportunity to be heard. Nevertheless, the Supreme Court has recognized that these constitutional rights can be waived, although there is a presumption against such waiver. To overcome this presumption, it must be shown that the waiver was given voluntarily, knowingly and with understanding of what is involved.

The cognovit procedure poses a challenge to many of the above constitutional requirements. A threshold question is whether signature on a cognovit note is alone prima facie evidence that one has knowingly, intelligently and voluntarily waived his rights to notice of

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18. As stated in Barnes v. Hilton, 118 Cal. App. 2d 108, 110, 257 P.2d 98, 99-100 (1953): "The pertinent code sections require a statement by the defendant, verified by his oath, and do not permit a statement by an attorney purporting to act under an unverified or unauthenticated power of attorney contained in a promissory note. If appellant's argument were upheld, then the provisions of the code sections here involved could readily be subverted by the simple device of including in any promissory note a warrant of attorney, whereby any attorney could make the statement in writing, verify it, and confess judgment."
19. 395 U.S. 337 (1969). *Sniadach* held that a wage earner cannot be deprived of the use of her wages by garnishment without adequate notice and an opportunity to be heard: "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing... this prejudgment garnishment procedure violates the fundamental principles of due process." Id. at 342. The lack of extended argument by the Court has raised questions as to the further application of *Sniadach*. It was the basis of Fuentes v. Shevin, 407 U.S. 67 (1972), which invalidated Florida and Pennsylvania prejudgment replevin statutes. See, Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942 (1970). For a discussion of *Sniadach* and its extension in California see, Note, *The Demise of Summary Prejudgment Remedy* *es in California*, 23 HASTINGS L.J. 489 (1972).
action against him and the opportunity to defend his cause. There is an additional problem of ensuring due process after entry of a valid cognovit judgment, through an accessible appellate procedure to reopen or strike the judgment.

Are Cognovits Constitutional?

The Supreme Court of the United States in *D. H. Overmyer Co. v. Frick Co.* considered the preliminary question of whether cognovit notes were per se violative of the Fourteenth Amendment. Overmyer, a corporation, defaulted in its payments for equipment manufactured and installed by Frick. After again defaulting under a post-contract payment agreement, both corporations, with counsel present, replaced the first note with a second note containing a cognovit clause conforming to Ohio law. Overmyer, claiming a breach of contract on the part of Frick, stopped payment on the new note. Frick, under the cognovit provision, caused judgment to be entered on the note without prior notice to Overmyer. Overmyer's motion to vacate the judgment was denied after a post-judgment hearing. This denial was affirmed on appeal. Overmyer then appealed to the Supreme Court.

Overmyer's attack on the cognovit judgment was threefold. First, Overmyer contended that the judgment was invalid because there was no personal service, no voluntary appearance by it in Ohio, and no genuine appearance by an attorney on its behalf. The argument was that voluntary appearance should be determined at the court proceeding and not when the cognovit was signed, and that the resulting appearance by an attorney did not confer jurisdiction on the court. Second, Overmyer alleged that it was "unconstitutional to waive in advance the right to present a defense in an action on the note" because of the impossibility of knowing the grounds for suit or defenses available when signing the cognovit. Finally, although it was conceded that the Ohio court could reopen the judgment upon proper showing, Overmyer claimed that this procedure was discretionary and that judgment was not ordinarily disturbed on appeal.

Justice Blackmun delivered the Court's unanimous opinion. Citing a much quoted passage from *National Equipment Rental, Ltd. v. Szukhent,* the Court held that the constitutional rights of notice and

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23. Id.
25. 405 U.S. at 184.
26. Id.
27. In *National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311 (1964), the
hearing prior to civil judgment were subject to waiver. Therefore, a cognovit note in a contract was held not per se violative of the Fourteenth Amendment. The standard to be met was that waiver must "be voluntary, knowing, and intelligently made," a standard that was "fully satisfied" in this case.

The factual context of the case forced the conclusion that the constitutional minimums for effective waiver had been met. Overmyer, a corporation, clearly understood and accepted the cognovit note as part of a negotiated contract. Nevertheless, the Court expressly distinguished other fact patterns, such as adhesion contracts, situations in-
volving great disparity in bargaining power between the parties and instances where the debtor received nothing in return for the cognovit provision. Such cases might lead to other legal consequences.\footnote{22} In the case before it, the Court found no contract of adhesion.\footnote{23}

The Court disposed of Overmyer's first and second arguments in this manner and then briefly disposed of the third. The post-judgment procedure was held not discretionary because Overmyer did have an opportunity of a post-judgment hearing under Ohio law.\footnote{24} Justice Douglas, in his concurring opinion, more fully considered Overmyer's claim that the right to challenge a confessed judgment was limited and required a higher degree of persuasion than is ordinarily imposed on defendants.\footnote{25} The Ohio Supreme Court had imposed certain safeguards on the exercise of the judge's discretion in opening confessed judgments.\footnote{26} Justice Douglas considered this a complete answer to the contention that unbridled discretion governed the disposition of petitions to vacate a cognovit judgment.

Thus, the Court in Overmyer judged that cognovit notes are constitutional where the underlying waiver of due process rights had been "voluntary, knowing and intelligently made."\footnote{27} It can then be argued that, even though a cognovit note may be constitutional on its face, no waiver of due process rights can withstand attack if the specific fact pattern involved precludes a voluntary, knowing and intelligent waiver. These three requirements for effective waiver are arguably in the conjunctive. Thus a knowing waiver of constitutional rights may not be voluntary. Also, although a maker may knowingly sign a waiver of rights, it does not necessarily follow that the individual understands the full import of his signature.

\footnote{22}{Id. at 188.}
\footnote{23}{Id. at 186. The Court reviewed the financial and contractual dealings between Overmyer and Frick and found no contract of adhesion, but rather bargaining between equals represented by counsel. Even though Overmyer could not predict when Frick would proceed under the cognovit note if Overmyer defaulted, the Court found that this alone did not mitigate against effective waiver.}
\footnote{24}{Id. at 188.}
\footnote{25}{Id. at 189-190. Justice Douglas drew a distinction between the Ohio cognovit procedure and the Pennsylvania system considered in Swarb v. Lennox, 405 U.S. 191 (1972). By juxtaposing the two procedures, Justice Douglas questioned the validity of the Pennsylvania post judgment procedure where, in order to vacate a judgment, the debtor must prove his defense by a preponderance of the evidence rather than merely pose a jury question as in Ohio. Not only must waiver be effectively rendered, but the cognovit appeal procedure itself raises constitutional issues if so severe as to result in the deprivation of property without due process.}
\footnote{26}{Livingston v. Rebman, 169 Ohio St. 109, 158 N.E.2d 366 (1959). The Ohio court held that if there was credible evidence supporting the defense upon which reasonable men might differ, the court is under a duty to suspend judgment and permit the issue raised to be litigated.}
\footnote{27}{403 U.S. at 185.}
Overmyer distinguished fact patterns that might lead to the determination that waiver was ineffective as either not knowing, not voluntary or not intelligent. Fuentes v. Shevin furthered this analysis. Although primarily concerned with the constitutionality of state replevin procedures and the due process requirement of hearing prior to repossession, Fuentes considered the question of what constitutes effective waiver of due process rights. The defendant creditors attempted to rely on Overmyer to support a clause in a sales contract which allegedly gave them the right to repossess on buyer's default. Although it might be argued that Overmyer and Fuentes are distinguishable in that physical repossession is a more serious deprivation of property than the entry of a judgment lien based on a cognovit note, both involve the taking of property, bringing into force the due process rights of notice and hearing. Therefore, Fuentes can be used to clarify Overmyer as to those fact patterns where waiver of due process rights will be seriously questioned.

The Fuentes Court began by questioning the defendants' use of Overmyer drawing a distinction between the fact patterns of the two cases. In Overmyer both parties were aware of the significance of the cognovit note. However, as to the applicability of Overmyer to the consumer sales contract before it, the Court stated that:

The facts of the present case are a far cry from those of Overmyer. There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.

Although the factual context would bear directly on the question of effective waiver, the Court found no need to consider what legal consequences might be reached if waiver was predicated on an adhesion
contract or great disparity in bargaining power. The contract at issue merely stated that the seller "may take back" the goods involved. This did not satisfy the Court's requirement that "a waiver of constitutional rights in any context must, at the very least, be clear." Effective waiver was impossible because the self-help provision was vague and uncertain.

By inference from the manner in which Overmyer and Fuentes distinguished fact patterns, it can be argued that these cases give content to the requirement that an effective waiver must arise from a contractual setting which will support a finding that the waiver was knowingly, intelligently and voluntarily rendered. A factual determination that the wording of a cognovit note was unclear or uncertain, or that the cognovit was buried in a lengthy and complicated contract, would probably negate waiver as not being knowing. Depending on the buyer's education and business experience, technical language could affect the requirement that waiver be intelligently given. Relative bargaining power must also be considered. Arguably, if there is great disparity in bargaining power between the parties, the product involved is a necessity, the cognovit is a prerequisite for sale, and the consumer has no alternative; waiver can be considered involuntary even if knowingly and intelligently made. Therefore, these cases lead to the conclusion that, at least in ultimate consumer sales contracts, a heavy burden is placed on the creditor to establish effective waiver of due process rights.

The major question, however, still remains to be answered. Given a cognovit note in a contract, a court is faced with two alternatives. It may assume effective waiver and debate this assumption after judgment is entered or it may require a prior hearing. The question is which approach conforms to the requirements of due process. Overmyer involved the rather special circumstances of corporations signing cognovits with the advice and consent of counsel. In such cases, a signature on a cognovit note does reasonably represent a knowing, intelligent and voluntary waiver of rights. On the other hand, the signature of the average consumer, even in true bargaining situations, does not persuasively demonstrate that the cognovit note was read and understood. Thus, the problem confronting the court is largely one of proof: (1) whether the debtor's signature on a cognovit note is the

42. Id. at 94.
43. Id. at 95.
equivalent of voluntary, intelligent and knowing waiver, and, if not, (2) what guidelines determine when a cognovit signature will be honored, and (3) when is this determination to be made by the court.

**Determining Effective Waiver**

Several recent cases have offered solutions to the problem of determining effective waiver of due process rights prior to entering judgment against an absent defendant. In *Atlas Credit Corp. v. Erzine,* the plaintiff brought suit in New York to enforce two Pennsylvania judgments obtained under a warrant of attorney. Justice Breitel of the New York Court of Appeals found Pennsylvania's cognovit procedure unenforceable in New York on two separate grounds. First, the court held that the proceeding of entering a cognovit judgment before the clerk of a court was purely ministerial, lacking the discretion or judgment associated with judicial proceeding. Consequently, the court argued that such judgments were not the result of a judicial proceeding within the meaning of the full faith and credit clause. Comity therefore could be the only basis for enforcement of the Pennsylvania judgments, and comity was not to be extended here because unrestricted cognovits were repugnant to New York policy.

In denying the Pennsylvania procedure the status of judgment and by concluding that it was not entitled to full faith and credit, the New York court formulated an unacceptable definition of the type of judgment entitled to full faith and credit. According to *Atlas,* those judgments or judicial acts entitled to full faith and credit involve judicial discretion in resolving controversies or matters submitted to the court. It might be argued, in the extreme, that such reasoning precludes the extension of full faith and credit to any in personam adjudication, valid and binding under the laws of a sister state, unless judgment is entered after a trial in which both sides contest the case. Thus, judgments by default and judgments by consent would not be entitled to full faith and credit for there is no exercise of judicial discretion or judgment in the sense of deciding between alternatives. Such judgments can also be considered, as *Atlas* considered cognovit judgments, merely "the court's imprimatur on a purely personal act." Further, the *Atlas* court's definition of judicial proceeding as excluding cognovit judgments from full faith and credit is in contravention of substantial precedent, and contrary to the opinion of numerous legal

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48. Id. at 230, 250 N.E.2d at 481, 303 N.Y.S.2d at 391.
49. Id.
50. Id.
51. Id.
52. See the dissent in *Atlas* for New York cases holding foreign cognovit judg-
writers.\textsuperscript{53}

The second reason given by the \textit{Atlas} court for nonenforcement was that the Pennsylvania court lacked jurisdiction. Citing \textit{Mullane v. Central Hanover Bank \\& Trust Co.},\textsuperscript{54} the New York court observed that even though notice and hearing could be waived, due process requires certain minimums based on the concept of reasonableness, and that "one minimal procedural guarantee should be that a person cannot consent to the entry of judgment against him anywhere without service of process."\textsuperscript{56} This argument is noteworthy.

The \textit{Atlas} court acknowledged that \textit{Mullane} was concerned primarily with the requirement of reasonable notice and the substitute that is most likely to reach the beneficiaries of a trust in a judicial settlement of accounts.\textsuperscript{58} Nonetheless, by inference \textit{Mullane} suggests that the entire concept of due process requires certain minimums based on reasonableness. Since due process requires both notice and hearing, each element must be granted within certain minimums. Although \textit{Szukhent} stated that notice can be waived altogether,\textsuperscript{57} it does not stand for the proposition that the opportunity to be heard can be waived altogether. The holding of \textit{Szukhent} should not be construed to effectively preclude a defendant from challenging a judgment through whatever post-judgment procedures are available to him. \textit{Szukhent} spoke in terms of agreeing "in advance to submit to the jurisdiction of a given court . . ."\textsuperscript{58} Clearly the concern of the \textit{Atlas} court was the spectre of a defendant having to protect his rights thousands of miles from his home or the situs of the contract. The court concluded that:

\begin{quote}
[A] warrant of attorney which permits entry of a judgment by confession anywhere in the world without notice violates due process and deprives the rendering court of jurisdiction. Any judgment entered thereon whether against New York residents or others,
\end{quote}

\begin{footnotes}
\item[53] See note 27 \textit{supra}.
\item[54] \textit{339 U.S. 306} (1950).
\item[56] \textit{McDonald v. Mabee, 243 U.S. 90, 92} (1917). \textit{Mullane} expanded upon this case and declared that "when notice is a person's due, process which is a mere gesture is not due process." \textit{339 U.S. 306, 315} (1950). \textit{See also Schroeder v. City of New York, 371 U.S. 208} (1962); \textit{Walker v. City of Hutchinson, 352 U.S. 112} (1956); \textit{Pennoyer v. Neff, 95 U.S. 714} (1878).
\item[57] \textit{375 U.S. at 316} (emphasis added).
\end{footnotes}
although enforced by the rendering State, may not be recognized or enforced in the courts of this State.\textsuperscript{59}

Those who seek to enforce cognovit judgments might argue that since the right to counsel\textsuperscript{60} can be waived in a criminal action where personal liberty is involved, a waiver of the right to present a civil defense in an individual's immediate locality is not inherently unreasonable. Further, if notice can be waived altogether, a hearing has no meaning for a defendant. The reason for a cognovit is the entry of judgment without the presence of the defendant. Since the defendant has not been informed of a pending action, it makes no difference, apart from social policy, that he is \textit{not} present to defend in New York or San Francisco.\textsuperscript{61} There is, however, a difference. This difference is the ability of the defendant to challenge the entry of judgment or the entered judgment on the grounds of invalid waiver. The only way that a defense can be assumed to be meaningless is if the defendant has in fact validly waived the right to defend.\textsuperscript{62} Such an assumption runs counter to any elemental concept of due process which would not tolerate the forcing of a defendant to pay the expense of asserting, at the opposite end of the country, that he never waived his rights to notice and hearing. Nonetheless, the \textit{Atlas} court went beyond this conclusion. The court inferred that, even assuming effective waiver, any procedure which allows the plaintiff to pick any forum in which to sue the defendant is not in accord with fundamental principles of justice and fair play and does not comply with the modern theory of due process.\textsuperscript{63}

Thus, the validity of the \textit{Atlas} position rests on the premise that waiver is ineffective if so broad or unconscionable as to go beyond the reasonable parameters of due process. If waiver is too broad, a court lacks jurisdiction to enter judgment on a cognovit note. \textit{Atlas}, however, did not address the question of effective waiver and is, therefore, of little assistance in solving the problem of how and when a court is to determine whether an alleged waiver of due process rights is valid. Declaring waivers of a certain type a priori ineffective avoids the issue. Yet this case does provide a useful starting point for a discussion of waiver and due process rights. The case clearly illustrates the clash between cognovit notes and social policy. The following cases focus directly on the problem of determining effective waiver.

\textsuperscript{59} 25 N.Y.2d at 232, 250 N.E.2d at 482, 303 N.Y.S.2d at 393.
\textsuperscript{60} E.g., Adams v. United States \textit{ex rel.} McCann, 317 U.S. 269, 275 (1942).
\textsuperscript{61} As stated by Chief Judge Fuld in his dissent: "If the debtor has the capacity to consent to a \textit{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 specific jurisdiction." 25 N.Y.2d at 235, 250 N.E.2d at 484, 303 N.Y.S.2d at 396.
\textsuperscript{62} See text accompanying notes 25-33 and notes 83-96.
\textsuperscript{63} 25 N.Y.2d at 232, 250 N.E.2d at 482, 303 N.Y.S.2d at 393.
Swarb V. Lennox—Changing Problems

In Swarb v. Lennox, six persons filed suit in the United States District Court on behalf of a class consisting of all individual and natural Pennsylvania residents who had signed contracts containing cognovit notes that resulted in confessed judgments in Philadelphia County. The defendants were the county prothonotary and sheriff, the officials responsible, respectively, for recording and executing the judgment. The complaint alleged that the Pennsylvania rules and statutes supporting cognovit judgments were unconstitutional on their face as a denial of due process, that the waiver of notice and hearing was rarely intelligent and voluntary, and that the debtor's only recourse (an action to strike or reopen the judgment) was costly and burdensome to low income consumers.

The complaint sought a declaration that the Pennsylvania procedure was unconstitutional and a permanent injunction restraining the defendants from recording and executing the cognovit judgments. A hearing before a three judge panel was held. One item of stipulated evidence was a sociological study entitled Consumers in Trouble. The study, conducted in 1968, surveyed 245 Philadelphia confessed judgment debtors. The report found that 96 percent of those surveyed had annual incomes of less than $10,000, only 30 percent had graduated from high school, and only 14 percent knew that the contracts they were signing contained cognovit clauses. This study was instrumental in the decision of the court.

The court held that, as of November 1, 1970, the defendants were permanently enjoined and restrained from entering cognovit judgments against individual natural persons with annual incomes of less than $10,000, "unless it has been shown that the signers of such clauses have intentionally, understandingly, and voluntarily waived all the rights lost under the Pennsylvania law . . . ." The court found the stipulated evidence and witness testimony sufficient to support a finding that those earning less than $10,000 annually, as a class, did not voluntarily, intelligently and intentionally waive their constitutional rights to notice and hearing when signing a cognovit clause.

67. Id. at 1097.
68. Id. at 1103.
69. Id. at 1100. Mortgages were excluded because safeguards had been built into the cognovit procedure to ensure due process. As the court stated: "Confession of judgment clauses in bonds and warrants of attorney accompanying mortgages are normally signed at Title Company settlements and notice of execution on the mortgaged property must be given by certified mail. . . . [T]here must be affirmatively
Although the plaintiffs sued on behalf of all cognovit judgment debtors, the court found the record insufficient to support a finding that the plaintiffs adequately represented those earning more than $10,000 annually as required by Federal Rules of Civil Procedure 23(a)(4). Since the action would be binding on all members of the class and adversely affect their ability to get credit, the class was thus limited. Finally, the court held that since there was no judicial procedure for rebutting the finding of effective waiver, the Pennsylvania practice of confessing judgment violated the due process clause of the Fourteenth Amendment as to the class. Cognovit judgments would stand only where it could be established that the signers of such contracts effectively waived their rights. Nevertheless, the court exercised judicial restraint and declined to dictate the specific procedures which would allow cognovits to be enforced against persons earning less than $10,000 annually. The court did offer Pennsylvania one suggestion: the development of a "statewide rule or legislation providing for the filing of proof of intentional, understanding and voluntary consent to confessed judgments . . . to permit use of the confession of judgment clause if Pennsylvania decides to continue this system."

The class action engendered in this case has serious flaws and creates more problems than it solves. If the premise is accepted that cognovit judgments are constitutional and any violation of due process resulting from their use is a function of ineffective waiver on the debtor's part, there is no question of law or fact common to all plaintiffs to warrant a class action. The only way to define a class would be to find that all members of the class could not have effectively waived their rights. This the court did by accepting the Caplovitz study. Thus, the validity of this class action rests totally on the validity of a demographic study of 254 cognovit judgment debtors. That study found that 86 percent did not know what they were signing, but 14 percent did. Still, 96 percent earned less than $10,000, and this percentage was high enough to provide a handle for defining a class. Nonetheless, the rational nexus between income level and the ability to effectively waive constitutional rights seems tenuous at best. This is not the place to debate statistics and sampling methods, except to say that if Federal Rules of Civil Procedure 23(b)(3) can be com-

called to any home mortgagor's attention the fact that he is subjecting his home to a lien . . . in signing such bond and warrant of attorney . . . ." *Id.* at 1098.

70. *Id.* at 1099.
71. *Id.*
72. *Id.* at 1100.
73. *Id.* at 1100-01.
74. *Id.* at 1100.
75. *Id.* at 1100-01 n.24.
plied with by using demographic data, the social sciences have attained new prominence.\(^7\)

If a class action is acceptable at all, the *Swarb* court improperly identified a class of individuals earning less than $10,000 annually rather than a class of all those signing cognovits without requisite knowledge and intent. The resulting class is underinclusive because it excludes individuals earning over $10,000 annually who do not effectively waive their rights when signing cognovits. The classification is also overinclusive for including individuals earning less than $10,000 who are capable of knowing and voluntary waiver, for example, law students.

Moreover, no matter how valid the Caplovitz study, the underlying logic of *Swarb* is faulty. Waiver is an individual consent, not a function of income level or class membership.\(^7\) A more logical and effective approach, accomplishing the same social end, would have been to reverse the burden of proof, requiring in all cases that the creditor substantiate valid waiver to the court. This would answer the social need of securing due process rights to those signing cognovit notes, regardless of income level, and avoid the creation of an artificial and perhaps meaningless class distinction as far as consent is concerned. Since the question of waiver is basically individualistic, the only logical approach is that each case, and the state of mind of each plaintiff regardless of income, must be considered on its own merits.

Thus, the *Swarb* court, using annual income to define a class, secured the rights of notice and hearing for only a subset of the population signing cognovit notes without knowledge and intent. As noted above, the allowance of a class action in this case was improper. The definition of the class is also unfortunate since it creates the illusion that only persons with minimal incomes are entitled to contest the validity of a waiver provision. Although the exclusion of persons earning more than $10,000 annually from the class action does not, as a matter of law, preclude them from separately attacking the validity of cognovit provisions, there is a danger that *Swarb* may be construed

\(^7\) It is interesting to note that the 245 cognovit judgment debtors sampled by the study represent only ½ of 1% of the 50,000 confessions of judgment filed in Philadelphia County in the year the sample was taken. Note, *Swarb v. Lennox*: *The Viability of Repeated Judicial Attacks on Confessions of Judgment in Pennsylvania*, 34 U. Pr. Rev. 103 (Fall 1972). For a commentary on the use of the social sciences and *Swarb*, see Schuchman, *In Re: Social Science in the Eastern District of Pennsylvania, United States District Court, Middle District, Nusquamia (Counsel Have Asked to Remain Anonymous)*, 32 U. Pr. Rev. 463 (1971).

\(^7\) As stated in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1937): “A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding the case . . . .”
as creating a presumption that a waiver is valid when signed by a 
person of wealth. Such a conclusion is warranted by neither justice nor 
common sense. As a blast at social injustice, the case serves a pur-
pose. Nevertheless, the problem of how to ensure the rights of due 
process for all who sign cognovit notes still remains.

The Supreme Court and Swarb—Post Script

Swarb was appealed to the Supreme Court and decided on Feb-
uary 24, 1972, along with the companion case of D. H. Overmyer 
Co. v. Frick Co. Citing Overmyer as controlling, the Supreme Court 
affirmed the district court’s decision. The plaintiffs’ contention that 
cognovit judgments were unconstitutional on their face was directly 
rejected. This affirmance, however, did not mean that the district 
court’s opinions and judgments were approved as to the other issues 
decided below and not before the Court. The basic questions of what 
constitutes effective waiver of fundamental rights and the validity of 
the income classification were not at issue on appeal and not consid-
ered by the Court. Thus, the Supreme Court again refused to declare 
cognovit judgments unconstitutional per se. Nevertheless, the Court, 
as in Overmyer, added a caveat concerning contracts of adhesion as 
perhaps applicable to the Pennsylvania system.

Osmond V. Spence—An Attempted Answer?

Contrasting favorably with Swarb is the well reasoned opinion 
of Osmond v. Spence, decided in the United States District Court 
for Delaware. This case, however, has been vacated and remanded 
by the Supreme Court for reconsideration in the light of Over-
myer and Swarb. Although Osmond is no longer binding precedent, 
an analysis of the case is useful for the case provides a significant legal 
alternative to Swarb. The extent to which Overmyer and Osmond 
conflict is open to argument and crucial to resolving the question of 
whether a court must determine effective waiver prior to entry of a cog-

78. 405 U.S. 191 (1972).
80. 405 U.S. at 200-01. There was no cross appeal by the defendants. The 
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novit procedures followed in his state and joined the appellants in urging that the 
rules and statutes be held facially invalid. The intervening finance companies were 
compelled to argue only the constitutional issue raised by the appellants. Id.
(1972).
97-101 infra.
novit judgment. Before addressing the conflict, *Osmond* itself must be considered.

The fact pattern in *Osmond* is similar to *Swarb*. The plaintiffs united to enjoin the selling of their property or the paying over of the proceeds of the attachment of their wages based on confessed judgments under cognovit notes. Further, the plaintiffs sought to have declared unconstitutional the Delaware cognovit procedure. The court first considered the constitutionality of the Delaware procedure and then addressed the question of whether a class could maintain the action. The result was a cogent argument on how to ensure due process rights for cognovit debtors.

The Delaware practice of entering judgments by confession upon warrant of attorney was comparable to the Pennsylvania procedure. *Osmond*, like *Swarb*, dealt directly with the constitutionality of cognovit judgments and the circumstances under which waiver of due process rights could be presumed prior to suit. The court first considered and then rejected *Atlas* as not authoritative because of its failure to address the issue of waiver. The court then analyzed *Swarb* and reached the "same substantive result based upon a different rationale."

Upon reviewing the Delaware procedure, the *Osmond* court determined that no court operating within such a procedure could be certain that waiver based on signature alone had been effectively made. Therefore, the Delaware cognovit scheme was unconstitutional in all cases as violative of due process. The court concluded:

[T]here is no method of judicially determining whether or not a particular debtor knowingly and intelligently signed the judgment note thereby waiving his 14th amendment rights. So that, even conceding as we do, that there may be a substantial number of persons . . . bankers, lawyers, sophisticated businessmen . . . who do sign such notes with a full realization of the legal effect of their acts, it remains that the Delaware practice furnishes no judicial means for separating the case of those persons who have knowingly and intelligently waived from those who have not.

84. 327 F. Supp. at 1350.
85. See *Id.* at 1354-55 and note 8 *supra.*
86. The court began its opinion by stating that notice and hearing were indeed rights protected by the constitutional guarantee of due process. 327 F. Supp. at 1355. Such rights must be safeguarded prior to depriving one of his property. The court relied on *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and held that a sufficient property right for due process protection was involved in this case. The lien resulting from entry of a cognovit judgment, while not completely depriving the debtor of the use of his property, seriously restricted his ability to sell or use it as collateral.
87. 327 F. Supp. at 1357.
88. *Id.* at 1359.
89. *Id.*
Having judged the Delaware procedure unconstitutional, the court considered whether a class action could be maintained. Even though the question of waiver clouds all cognovit judgments, the validity of waiver rests with a determination of whether a given individual knowingly, intelligently and voluntarily waived his rights. Using this premise, the Osmond court decided that a hearing prior to judgment was required in all cases, on a case by case basis, to determine effective waiver. The court refused to declare a specific segment of the population a priori incapable of giving effective waiver and made the practical result of the Swarb decision universal. Thus where Swarb and Osmond diverge is on the question of class action. Having determined that the Delaware procedure was unconstitutional, the majority in Osmond did not accept the contention that three plaintiffs, who claimed to have ineffectively waived their rights, could adequately represent hundreds of debtors, “many of whom, after full hearing based upon notice, may be found to have waived such rights.”

Although the concurring opinion would have followed the logic of Swarb and allowed a class action based on the poverty guidelines of the Office of Economic Opportunity, the majority found no common question of law or fact sufficient to support a class action.

Although not allowing a class action, the court held for the plaintiffs as individuals. The standard of inquiry was that “Courts indulge every reasonable presumption against waiver of a constitutional right . . . and for a waiver to be effective, it must be clearly established that there was a deliberate and understanding relinquishment of the right involved.” The court found that the defendants had not demonstrated that any one of the plaintiffs signed the cognovits in question with the specific knowledge and intent required to uphold judgment.

Even though Delaware has a procedure for reopening confessed judgments upon the showing of a meritorious defense, under the Osmond rationale a cognovit judgment would presumably stand only if it resulted from a procedure with a built-in mechanism enabling the court to separate, prior to judgment, the “case of those persons who

90. Id. at 1360.
91. Id. at 1361.
92. Id.
93. Id.
94. Id.
95. Del. Super. Ct. (Civ.) R. 60. This follows the format of Federal Rule 60. However, the Delaware rule does not alter the traditional method of attacking confessed judgments. The proceeding to set aside such a judgment is equitable in nature and follows the principle that if the petitioner affirmatively shows the existence of a meritorious defense, the judgment will be set aside. Sussex Finance Co. v. Goslee, 46 Del. 242, 82 A.2d 743 (Super. Ct. 1951). The Delaware code sections concerning cognovit judgments are: Del. Code Ann. tit. 10, §§ 2306, 4717, 4732 (1953).
have knowingly and intelligently waived from those who have not.”

Further, because the court found that the defendants had not demonstrated effective waiver, the case can be read as shifting the burden of proof onto the creditor seeking a cognovit judgment. Mere signature alone will not support a cognovit judgment. Therefore, considering the absence of the debtor, the creditor would have to substantiate effective waiver with evidence extrinsic to the cognovit note sufficient for the court to evaluate waiver prior to entry of judgment.

Osmond Versus Overmyer

Having considered the holding of Osmond, the question remains whether this holding conflicts with the Supreme Court’s decision in Overmyer. There are three possible arguments as to why the Supreme Court vacated Osmond and whether Osmond can stand in the light of Overmyer. First, it might be argued that there is no conflict, for Osmond does not run counter to the decision that cognovits can be constitutionally entered. Overmyer involved the constitutionality of cognovit judgments entered upon a valid waiver. Osmond concerned the constitutional requisite for a procedure to determine effective waiver prior to entering judgment.

Yet, the Supreme Court held that Overmyer had intelligently, knowingly and voluntarily waived its due process rights and judgment could be entered on the cognovit. Although the Court did not directly consider the question of how and when a court determines effective waiver, by inference there appeared to be no need for a hearing prior to judgment in Overmyer. Therefore, it might be argued that Overmyer stands for the proposition that certain cognovit judgments, arising out of certain factual contexts, can be entered on signature alone. The only requirement would be that the debtor be given the opportunity to vacate the judgment by showing a valid defense in a post-judgment hearing. Overmyer can then, perhaps, be limited to corporations negotiating with counsel, and Osmond can stand for the general proposition that in all other cases and factual situations a pre-judgment hearing on the issue of effective waiver is required by due process.

Nonetheless, it is illogical to argue that Overmyer can be sufficiently narrowed to allow Osmond to stand. Granting that Overmyer distinguished other fact patterns while holding the specific cognovit judgment before it valid, the allusion to other possible legal consequences

96. 327 F. Supp. at 1359.
97. Id.
98. 405 U.S. at 187-88.
99. Id.
100. See text accompanying notes 27-33 and 40-45 supra.
was addressed to the outcome of an appellate review of an entered
cognovit judgment and not to any need for a prior hearing. Further,
any effort to narrow Overmyer overlooks the holding of Osmond. How
is a court to determine that the corporations were negotiating from
relatively equal strength and with the aid of counsel prior to judgment
unless such facts are presented to it? Osmond said that a court can
not so determine and Overmyer stands for the proposition that there
is no need to so determine if a post-judgment hearing is available.
Therefore, the two cases do substantially conflict. The conflict is not
as to what constitutes an effective waiver of constitutional rights. Both
agree that such waiver must be intelligent, knowing and voluntary.101
The conflict involves whether a court must determine effective waiver
prior to or after entry of judgment on a cognovit note. Osmond
stands for the proposition that, since a cognovit judgment deprives
the debtor of property, such judgments cannot be entered unless ef-
fective waiver of notice and hearing has been judicially determined.
Overmyer, on the other hand, seems to stand for the proposition that
signature alone will support a congovit judgment if the debtor subse-
dually has the opportunity to attack the validity of the cognovit judg-
ment.

Perhaps the real conflict between Overmyer and Osmond is the clash
of social policies and the ranking of social priorities. Osmond stresses
the importance of due process rights, the strong presumption against
waiver of constitutional rights and the need for a procedure to protect
the debtor. Overmyer has a great set of facts as a stage for empha-
sizing the fact that due process rights are subject to waiver, and not
for emphasizing the presumption against waiver. As stated by Justice
Blackmun, the facts in Overmyer "amply demonstrate that a cognovit
provision may well serve a proper and useful purpose in the commer-
cial world and at the same time not be vulnerable to constitutional
attack."102

The effect of the Osmond reversal is to show that judgments can
be entered perfunctorily on cognovit notes. Signature alone is suffi-
cient to warrant entry and carries a presumption of valid waiver of due
process rights. The only procedural requirement is that there be an
appellate review for reopening or vacating the judgment. It is in the
appellate procedure that a court, if so requested, must determine the
validity of the alleged waiver of the due process rights to notice and
hearing.

**Conclusion**

The cases considered clearly state that cognovit judgments are
alive and well. They have withstood attacks under the due process

102. 405 U.S. at 188.
clause of the Fourteenth Amendment. Even though a property inter-
est sufficient to warrant notice and hearing is involved, the judicial pol-
icy reflected in Sniadach and Fuentes has not been extended to cogno-
vit judgments. Due process rights can be waived and cognovit judg-
ments can be entered if waiver is evident from the contract containing
the cognovit note.

Overmyer indicates that the Fourteenth Amendment is almost cer-
tainly satisfied if there is an appellate procedure conforming to the
requirements of due process. The review procedure must not be so
arbitrary as to preclude the reopening of a cognovit judgment if valid
defenses are presented. Justice Douglas suggested the guidelines that
a judgment should be reopened if reasonable men would differ as to the
validity of the judgment. The opportunity for review is a sufficient
due process protection of property to allow entry of judgment on a cog-
ovit note.

Although the Supreme Court refused to require a prior hearing
in cognovit cases, the cases considered provide guidelines for deter-
mining effective waiver in appellate review. Perhaps it can be argued
that the use of cognovit notes in retail sales transactions is severely
constrained. Atlas considered a limit as to what, in fact, can be
waived through a cognovit note. A waiver that places the buyer
at too great a disadvantage, for example, to defend anywhere, may be
disallowed even if effectively rendered, under the premise that due
process demands reasonableness.

Apart from the scope of the waiver considered by Atlas, a combi-
nation of the Overmyer and Fuentes lines of cases preclude the use of
cognovits in certain factual situations. It is arguable from these cases
that waiver of notice and hearing should be disallowed if the contract
language is unclear, misleading or concealed in a complex document.
Complete disclosure by the seller is mandated. Lack of clarity goes
directly to the requirement that waiver be knowing and voluntary.
Even if the language is self-evident, it can be argued by inference that
the cases preclude the use of cognovit notes in transactions where there
is a great disparity in bargaining power between the parties. Even if
a consumer knowingly signs a contract containing a cognovit, if the
transaction involves a necessity and the consumer is without alterna-
tive, the waiver can be attacked as involuntary. This conclusion is con-
sistent with the statement in Adams v. Egley, “Where . . . the parties
are both commercial entities, the bargaining power is to some degree
equalized, and the purported waiver of the constitutional right to prior
notice and hearing may indeed be effective.”

103. See text accompanying notes 35-36 supra.
104. See text accompanying notes 47-63 supra.
Thus, if a creditor manages to find a state that allows cognovits, he would be wise to refrain from a heavy-handed use of cognovit notes in retail credit sales. The courts will probably employ traditional doctrines of fairness and void waivers of due process rights in certain factual contexts. Yet if the waiver clause is explicit and the contract not one of adhesion, the cognovit judgment will probably stand.

The final question, for which there is no answer, is whether Overmyer, and the decision that there is no requirement for a hearing prior to entry of a cognovit judgment, is sound social policy. On one side is the right of the creditor to protect his interest and avoid economic loss. If prior hearing were universally required, it would probably be more difficult for the buyer to obtain credit. Higher interest rates and loans secured other than by the item purchased may be required. Perhaps the end result will be that the poor in general will pay higher prices to support among themselves the creditor's greater judicial burden and economic risk.

Nonetheless, by not requiring hearing in cognovit cases, the debtor is put at an unjust disadvantage. With a judgment lien in effect, the debtor will probably give in under pressure rather than defend his rights. Courts, law, lawyers and the resulting expense have a debilitating effect on the debtor's willingness to assert his rights—especially if all that is involved is a television. Even if he has a valid defense or the alleged waiver was not given, the debtor sees a fait accompli and the burden of taking the initiative to assert his claim.

Yet the possible intimidation of the debtor must be weighed against the freedom to contact and the need to avoid unnecessary litigation. It can be argued that the duty of the courts is to provide an impartial, neutral forum. Their function is not to demand litigation in every dispute. Since waiver of due process rights can be made, the courts' function is to provide a forum for attacking the validity of waiver if, but only if, the debtor wants to challenge it.

Perhaps, in the final analysis, the balance between debtor and creditor, although always in flux, has swung as far to the side of the debtor as it is going to swing in the near future. The political complexion of the Supreme Court has changed in the past two years. The concern with individual rights will now, probably, be tempered with a concern for economic interests.\textsuperscript{106} Hopefully, at least, the status quo will be maintained.

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