Confessions of Judgement in Illinois: The Need for Change Persists

Cindy F. Wile
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INTRODUCTION

The Illinois procedure by which judgments may be confessed dates back to early common law. Underlying the confession process is the debtor's advance consent to in personam jurisdiction, and, more importantly, his relinquishment of due process rights to notice and a hearing before an adverse judgment may be entered. In addition, the Illinois confession of judgment statute sanctions the common law device known as a warrant of attorney, which is a written authorization by the debtor empowering any attorney to appear in court and confess judgment on the debtor's behalf. By virtue of this authority, the creditor can, and usually does, appoint the attorney who will make the confession.

Unlike most other states, Illinois places virtually no limitations on the use of the above provisions. Nor are the concessions which the creditor may demand from the debtor restricted to these three major components. Confession notes typically demand the waiver

2. French v. Willer, 126 Ill. 611, 617, 18 N.E. 811, 814 (1888). See generally Comment, Confession of Judgment Under a Warrant of Attorney, 6 AKRON L. REV. 63 (1973) for a synopsis of the common law history of confessions of judgment. The confession procedure was originally engendered as a means by which a debtor could exchange a written confession for the privilege of extending his debt. If the debtor subsequently failed to meet his obligations, the creditor could have the judgment confessed and executed without delay. Comment, Confession of Judgment in California, 8 PAC. L.J. 99, 99-100 (1977) citing W. TIDD, 1 TIDD'S PRACTICE 559 (4th Amer. Ed. 1856).
6. Regulation usually occurs in the area of small loans and consumer sales, as exemplified by the statutes of California, Connecticut, Michigan, New York and New Jersey. See Comment, Confession of Judgment Under a Warrant of Attorney, 6 AKRON L. REV. 63, 76 (1973) for a survey of the position taken by each state in respect to limitations placed on the use of warrants of attorney.
7. See text accompanying note 13 infra.
8. The term "confession note", as used in this Note, refers to any instrument which incorporates a confession of judgment clause. As this Note deals with Illinois law, such clauses will be presumed to contain a warrant of attorney as well as advance consent to jurisdiction and a waiver of due process rights. Deviations from this definition, where necessary to examine confession procedures in other jurisdictions, will be noted.

Much confusion has been caused by the intertwining of the terms "cognovit," "confession of judgment (confession)" and "warrant of attorney". The ambiguity dates back to early common law. At that time, if the debtor executed his confession after having received a summons but prior to entering his plea the procedure was known as a cognovit actionem. If
of other rights, including the right to a jury trial, the right of appeal and the release of all errors in the confession proceedings. Although Illinois does provide a method for attacking confessed judgments subsequent to their entry, the ease with which debtors are permitted to waive their rights should not continue to be sanctioned. This

the debtor's confession was executed subsequent to his plea it was a cognovit actionem relicta verificatione, and contained a promise on the part of the debtor to withdraw his plea. 41 U. CN. L. Rev. 741, 743 (1972). The alternative method of providing for confessed judgments at common law was the warrant of attorney, used in the absence of service of process. Id. See notes 3 through 5 supra and accompanying text. The warrant was usually a separate instrument executed at the same time as the confession note. Note, Cognovit Notes in Indiana, 21 NOTRE DAME LAW. 187, 187 (1946).

The term cognovit, however, as the term is used today is really an outgrowth of the warrant of attorney and not of the cognovit actionems. Courts and commentators alike interchange the terms "cognovit," "confession of judgment (or confession)" and "warrant of attorney". As used in this Note, the terms "confession" and "confession of judgment" are employed to cover warrants of attorney, advance consent to jurisdiction and waiver of due process rights. "Confessed judgment" refers only to judgments entered pursuant to a confession clause where there has been no service of process.

9. The following confession clause is indicative of the concessions made by a debtor in signing a confession note:

Tenant . . . irrevocably authorizes any attorney of any court of record in any state of the United States from time to time to appear for tenant . . . in such court, to waive process service and trial by jury, to confess judgment in favor of owner for any rent and interest due hereunder . . . and for owner's costs and reasonable attorney's fees, to waive and release all errors in such proceedings and all right of appeal and to consent to an immediate execution upon the judgment.

This clause appears in pre-printed lease forms in widespread use in the Chicago area. See Comment, An Attack on Confession of Judgment Clauses in Residential Leases Through Section 2-302 of the UCC, 50 Chi-Kent L. Rev. 482 (1973).

Confession provisions are found in all types of instruments of indebtedness such as loan forms, leases of real and personal property, installment sales contracts, bailment leases and bonds. Comment, Confessions of Judgment, U. Pa. L. Rev. 524, 524 n.4, 528 n.27 (1954). For the sake of convenience, this Note uses the terms "debtor-creditor" rather than "owner-tenant," "buyer-seller" etc. to describe the parties involved in confessions of judgment.


11. The pernicious effect of the Illinois procedure is not limited to Illinois residents. Under the U.S. Constitution, states which have attempted to protect their own citizens by restricting or prohibiting the execution of confession notes within their borders must nevertheless enforce a valid Illinois confession judgment if sued upon in that foreign jurisdiction. U.S. Const. art. IV, § 1, cl. 1.

The distaste of other jurisdictions for enforcing Illinois confessed judgments is often noted in their decisions. See, e.g., Bell v. Staren & Co., 259 Ark. 506, 534 S.W.2d 238 (1976). Frequently courts look for minor technicalities on which to base a refusal to accord such judgments full faith and credit. See Nardi v. Poinsatte, 46 F.2d 347 (N.D. Ind. 1931), in which the court refused to enforce an Illinois judgment partly because the attorney Freedman, who confessed judgment on behalf of the defendants, was not authorized to act under the terms of the confession. Although Freedman was the attorney in fact, the court noted that the authorization in the confession ran only to an attorney of a court of record and nothing in the proceedings indicated that Freedman qualified as such. Id. at 348.

In First Nat'l Bank of Kansas City v. White, 220 Mo. 717, 120 S.W. 36 (1909) the Missouri Supreme Court refused to enforce an Illinois confessed judgment because it violated the public policy of the state. But see State v. Shain, 347 Mo. 928, 149 S.W.2d 812 (1941) where
Note examines the state of present confession law and the inequities which that law countenances. It concludes with proposals to redress the unfairness inherent in the confession process.

**THE ILLINOIS STATUTE AT WORK: AN OVERVIEW**

The Illinois confession of judgment statute permits a debtor to confess judgment on his own behalf or through an authorized attorney, without process. The only restriction placed on this practice is a jurisdictional one. The confession must be made in the county where the obligation was executed, where any debtor resides, or where either real or personal property of the debtor is located. Failure to comply with this requirement renders the confessed judgment void despite a provision to the contrary included in the confession note.

When a confession clause is contained in an instrument evidencing indebtedness, the debtor becomes bound by the clause prior to default. Entry of a confessed judgment may or may not be predi-

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1. Compare Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 219, 250 N.E.2d 474, 303 N.Y.S.2d 382 (1969) in which the New York court refused to enforce a confessed judgment rendered in Pennsylvania. The court declared that the Pennsylvania confession procedure was not, strictly speaking, a judicial proceeding and therefore held that the judgment need not be accorded full faith and credit. In addition, the court held that as the confession clause contained a warrant of attorney and authorized judgment to be confessed anywhere in the world without notice, due process was violated and the rendering court was thus deprived of jurisdiction. As at least one court has noted, although Ezrine may have reached a desirable conclusion, the opinion was more emotional than well reasoned. Osmond v. Spence, 327 F. Supp. 1349, 1358 (D. Del. 1971), vacated, 405 U.S. 971 (1972).

Prior to 1972, the only two United States Supreme Court decisions which dealt with confessions of judgment involved the issue of full faith and credit. Nat'l Exchange Bank v. Wiley, 195 U.S. 257 (1904); Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U.S. 287 (1890).


Any person for a debt bona fide due may confess judgment by himself or attorney duly authorized, without process. The application to confess judgment shall be made in the county in which the note or obligation was executed or in the county in which one or more of the defendants reside or in any county in which is located any property, real or personal, owned by any one or more of the defendants. A judgment entered by any court in any county other than those herein specified has no force or validity, anything in the power to confess to the contrary notwithstanding.

13. Id. However, this restriction is not always narrowly construed. See, e.g., Style Builders, Inc. v. Fuernstahl, 21 Ill. App. 3d 898, 315 N.E.2d 923 (1974), where judgment confessed in Cook County, Illinois, against a Du Page County resident was upheld. The Cook County court had jurisdiction since the defendant's place of employment was located within that county and the wages he received constituted a property right sufficient to accord jurisdiction under the statute.


icated upon the debtor's nonperformance. If so predicated, judgment may be entered immediately upon default. If the confession is not so conditioned, judgment may be entered as soon as the debt instrument is signed, replacing the need for collateral in some transactions. Upon default, execution on the judgment may ensue without delay.

Illinois courts have consistently emphasized that the power to confess a judgment must be clearly given and strictly construed. Accordingly, confessed judgments have been voided where the warrant of attorney authorized a specific person to confess judgment and instead judgment was confessed by a third party. They have also been voided where the debtor did not sign the instrument containing the confession clause, where the amount due could not be determined from the face of the confession note, and where joint obligees were not joined as necessary parties to the action.

Despite the courts' avowed restrictive view of confession clauses, the debtor is in an unenviable position when the creditor applies to have a confessed judgment entered. Having authorized any attorney to confess judgment on his behalf, the debtor leaves the selection of the attorney to the discretion of the creditor. Since the debtor has already relinquished his right to contest entry of the judgment, the

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21. These cases typically involve leases. See, e.g., Weber v. Powers, 213 Ill. 370, 72 N.E. 1070 (1904), holding that judgment could not be confessed against a hold-over tenant where the lease containing the confession clause had expired; March v. Cacioppo, 37 Ill. App. 2d 235, 185 N.E.2d 397 (1962) where the defendant had confessed judgment on the basis of an unsigned lease; and Wolf v. Gaines, 33 Ill. App. 2d 428, 179 N.E.2d 466 (1961) where the court refused to uphold a judgment confessed against Gaines who had signed a writing agreeing to carry out the terms of a lease which contained a confession clause, but had not signed the lease itself.
24. Long v. Coffman, 230 Ill. App. 527, 532 (1923). Often, the attorney confessing judgment is a member of the same firm as the creditor's counsel. Gecht v. Suson, 3 Ill. App. 3d 183, 188, 278 N.E.2d 193, 196 (1971), citing Blanck v. Medly, 63 Ill. App. 211 (1896). Gecht noted that the attorney's fees are computed according to a formula set forth in a circuit court rule, thus preventing the entry of an arbitrary fee. Id.
chosen attorney has no duty to represent the interests of the debtor. Concomitant with forfeiture of the debtor's right to representation by counsel of his choice is the release of all errors which may occur incident to the entry of a confessed judgment. However, the waiver of error provision indigenous to confession clauses is somewhat limited, in that it is void when applied to defects of a material nature.

A judgment entered by confession may be attacked in conformity with the method provided by Illinois Supreme Court Rule 276. In making a motion to open the judgment, it is incumbent upon the debtor to submit affidavits and a proposed answer which will convince the court that the debtor has a prima facie defense on the merits. If the debtor succeeds in meeting this burden, the motion

25. The use of warrants of attorney may be a questionable practice under the ethical considerations of the American Bar Association's Code of Professional Responsibility. See generally ABA CANONS OF PROFESSIONAL ETHICS NO. 7 which deals with the duty of an attorney to represent his client zealously.


28. ILL. REV. STAT. ch. 110A, § 276 (1977). This supreme court rule provides:

A motion to open a judgment by confession shall be supported by affidavit . . . and shall be accompanied by a verified answer which defendant proposes to file. If the motion and affidavit disclose a prima facie defense on the merits to the whole or a part of the plaintiff's demand, the court shall set the motion for hearing. The plaintiff may file counteraffidavits. If, at the hearing upon the motion, it appears that the defendant has a defense on the merits to the whole or a part of the plaintiff's demand and that he has been diligent in presenting his motion to open the judgment, the court shall sustain the motion either as to the whole of the judgment or as to any part thereof as to which a good defense has been shown, and the case shall thereafter proceed to trial upon the complaint, answer, and any further pleadings which are required or permitted. If an order is entered opening the judgment, defendant may assert any counterclaim, and plaintiff may amend his complaint so as to assert any other claims, including claims which have accrued subsequent to the entry of the original judgment. The issues of the case shall be tried by the court without a jury unless the defendant or the plaintiff demands a jury and pays the proper fee . . . to the clerk at the time of the entry of the order opening the judgment. The original judgment stands as security, and all further proceedings thereon are stayed until the further order of the court, but if the defense is to a part only of the original judgment, the judgment stands as to the balance and execution may issue thereon. If a defendant files a motion supported by affidavit which does not disclose a defense to the merits but discloses a counterclaim against the plaintiff, and defendant has been diligent in presenting his motion, the trial court may permit the filing of the counterclaim and to the extent justice requires may stay proceedings on the judgment by confession until the counterclaim is disposed of.

29. The affidavits will be deemed insufficient to support a motion to open a judgment if they are "general, conclusory and incomplete." Inland Real Estate Corp. v. Slymon, 56 Ill. App. 3d 581, 583, 371 N.E.2d 1187, 1188 (1977).
is set for hearing and the creditor may submit counteraffidavits in support of his position.30

The hearing contemplated by the Supreme Court Rule is confined to the motion and its supporting affidavits. No inquiry can be made into the facts of the case and the debtor's allegations regarding a meritorious defense must be accepted as true.31 If at the hearing the court finds that a meritorious defense has been manifested32 and that the debtor has shown due diligence in presenting his motion,33 the court must grant the motion to open the judgment and proceed to trial.34 The confessed judgment is not vacated or set aside but merely opened in order to allow each party to argue the merits of his case.35 Unless and until the debtor is able to prevail on the merits at a trial, the original judgment remains in force and stands as

30. See note 28 supra.

In scrutinizing the motion and affidavits, the court must ascertain whether the facts alleged would be admissible into evidence were the case to proceed to a trial on the merits. 20 Ill. App. 3d at 240, 313 N.E.2d at 659. Admissibility problems may present real stumbling blocks for a defendant. See Estate of Segur v. Jacoby, 5 Ill. App. 3d 459, 283 N.E.2d 76 (1972) where the defendant was incompetent to testify under the Illinois Dead Man's Act and therefore was unable to present sufficient evidence to support his affidavit; Burkett v. Finger Lake Development Corp., 32 Ill. App. 3d 396, 336 N.E.2d 628 (1975) where the court noted that mere denial of the authenticity of a signature on a confession note would not suffice to raise a meritorious defense due to the presumption of genuineness established by § 3-307 of the Uniform Commercial Code. Id. at 402, 336 N.E.2d at 633.

32. "A defense on the merits in this type of case has long been held to be one which depends on the inherent justice of the defendant's contention as shown by substantial facts." Turner v. Smiley, 8 Ill. App. 3d 388, 390, 291 N.E.2d 27, 29 (1972). See, e.g., Kuh v. Williams, 13 Ill. App. 3d 588, 301 N.E.2d 151 (1973) (lack of consideration and fraud); Marcus v. Wilson, 16 Ill. App. 3d 724, 306 N.E.2d 554 (1973) (fraud); First Commercial Bank v. Point of View, Inc., 9 Ill. App. 3d 515, 292 N.E.2d 482 (1973) (expiration of lease containing the confession). But cf. Sears Bank & Trust Co. v. Scott, 29 Ill. App. 3d 1001, 331 N.E.2d 607 (1975) where the court held that a challenge as to the sum owed would not be sufficient to support the motion to open since the sum was within the amount of the obligation set forth in the instrument.

33. Bua, Motion Practice in the Circuit Court of Cook County—A Cursory Outline, 54 Chi. BAR RECORD 231 (1973). See Kuh v. Williams, 13 Ill. App. 3d 588, 592, 301 N.E.2d 151, 153 (1973) where the court stated that the presence of a meritorious defense outweighs the presence or absence of due diligence.

Motions to open confessed judgments should be construed in a liberal, equitable manner. Bayles v. Bennett, 22 Ill. App. 3d 144, 146, 316 N.E.2d 792, 793 (1974). As one commentator has noted, the ease with which confessed judgments may be opened does not really indicate that the procedure involved is a fair one. To the contrary, "it indicates that trial court judges feel that the system is inherently subject to abuse." Hopson, Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit, 29 U. Chi. L. Rev. 111, 123 n.71 (1961).

However, execution on the judgment is stayed pending the outcome of the litigation.36

CONFESSIONS AND DUE PROCESS

Due process, as guaranteed by the fourteenth amendment to the Constitution,37 is an elusive, almost chimerical concept. It embodies the right of every person to receive notice of proceedings instituted against him and to have an opportunity to be heard on his own behalf. Only then may he be deprived of life, liberty or property by adjudication.38 However, a defendant may waive these due process rights.39 Since the waiver of due process is the essence of a confession clause,40 due process rights are inextricably linked with judgments by confession in Illinois.41

Due process challenges to confession clauses have recurred on a regular basis.42 However, both the United States Supreme Court and the Illinois Supreme Court have consistently refused to declare such provisions unconstitutional per se.43 These courts have reasoned that confessions of judgment cannot be declared facially invalid because due process rights of notice and hearing may be effectively waived in civil cases.44

Rather than providing definitive guidelines by which to determine the constitutionality of confession clauses, the recent United States Supreme Court decision of D. H. Overmyer Company v. Frick Company45 raised more questions than it answered.46

37. See note 28 supra.
38. U.S. Const. amend. XIV.
41. See text accompanying note 3 supra.
42. The Illinois confession statute specifically sanctions a waiver of due process rights. See note 12 supra.
holding the constitutionality of the confessed judgment in *Overmyer*, the court stressed that its holding would not be controlling if applied in a factually different context.\(^8\) Overmyer Co., a large corporation, entered into a contract with the respondent, Frick Co., for the manufacture and installation of a refrigeration system. Subsequently Overmyer fell behind in the payments due under the contract. After considerable negotiation, the parties agreed to a new payment plan and Overmyer executed an installment note. No confession clause was contained in this note. Thereafter, Overmyer requested additional time to make the installment payments. Following further negotiation, Overmyer signed a new note which, among other provisions, included a confession of judgment clause.\(^4\) One year later Overmyer ceased making payments under the note, and a month after that Frick caused judgment to be confessed against Overmyer in an Ohio court.\(^5\)

Overmyer argued that it is "unconstitutional to waive in advance the right to present a defense. . . ."\(^6\) In rejecting this contention,

48. 405 U.S. at 188.

The facts involved in this case were somewhat unusual. While the confession clause in *Overmyer* was bargained for between parties of substantially equal bargaining power, the more typical use of confessions arises between parties with disparate bargaining power in adhesion situations. This is especially true in the area of retail installment sales contracts which favor merchant sellers over unwaried low-income buyers who must rely upon installment buying in making most of their major purchases. Comment, *Abolition of the Confession of Judgment Note in Retail Installment Sales Contracts in Pennsylvania*, 73 DICK. L. REV. 115, 116 (1968-69). Generally, merchants possess knowledge of commerce sufficient to protect their rights when entering into contractual relations. Consumers, on the other hand, lack not only the knowledge but also the bargaining power and motivation needed to deal with merchants on an equal level. Comment, *Confession of Judgment Under a Warrant of Attorney*, 6 AKRON L. REV. 63, 74 (1973). The disparity of power inherent in most consumer debtor-creditor situations was effectively explained in Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967):

That difference [in bargaining power] exists because generally there is a substantial inequality of economic resources. . . . Their greater economic resources permit [the seller and his financer] to obtain the advice of experts; moreover, they have more time to reflect about the specific terms of exchange prior to the negotiations with the consumer; they know from experience how to strengthen their own position . . . and [they are] better able to absorb the impact of a single imprudent or unfair exchange.

*Id.* at 110, 232 A.2d at 410.

49. The parties also agreed to reduce the amount of the monthly installments, to extend the final payment date by one year, to reduce the interest rate on the note from 6 1/2% to 6%, to release three mechanics liens filed against Overmyer's property and to execute a second mortgage on Overmyer's property. 405 U.S. at 180.

50. *Id.* at 180-81. At the time it ceased its payments, Overmyer instituted a suit against Frick in New York, asserting that Frick had breached the original contract. The New York court granted an *ex parte* stay of all proceedings which Frick might institute against Overmyer, but the stay was vacated when Overmyer was unable to show that its cause had merit. *Id.* at 181.

51. *Id.* at 184.
the Court analogized the waiver of due process rights incorporated in a confession clause to the waiver of fifth and sixth amendment rights in criminal proceedings. The Court found that even if the strict criminal standard of a voluntary, knowing and intelligent waiver was applied, Overmyer had effectively waived its right to due process. The decision emphasized that Overmyer had been aware of the presence of the confession clause and had been informed by counsel of the clause's legal consequences. Furthermore, it stressed that the clause resulted from arms-length negotiations between parties of equal bargaining power.

The Overmyer Court severely limited the precedential value of its decision by indicating that different factual circumstances would require a contrary holding:

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

Since the Court listed circumstances in the conjunctive rather than the disjunctive, it is unclear whether the presence of one factor alone, such as lack of consideration, will suffice to support a claim that a waiver is invalid. Also, by failing to declare the list exclusive, the Court has opened the door to the possibility that other factors might warrant a holding different from Overmyer. Just how varied the facts may be for a court to be able to distinguish the outcome in Overmyer remains an enigma. Finally, a related issue not addressed by Overmyer continues unresolved. In Overmyer the Court found that the facts clearly evidenced a valid waiver of due process

52. Id. at 185.
54. 405 U.S. at 186.
55. Id. at 188.
56. See Fierce v. Heyison, 565 F.2d 854 (3d Cir. 1977), where the court found facts sufficiently different from those of Overmyer and vacated a summary judgment which had relied on the outcome in the Overmyer case. The case involved a confession note signed following an automobile accident in order to satisfy a subrogation claim. The court found that Overmyer was distinguishable because: 1) there was unequal bargaining power between the debtor, who was unable to pay a $228.00 judgment and the creditor insurance company, a "financial giant"; 2) counsel was not present when the debtor signed the confession note; and 3) the sole consideration which the debtor received for signing the note was the promise of the insurance company not to have the debtor's driver's license suspended as it could have done under a Pennsylvania statute. However, this statute had been declared unconstitutional, rendering the consideration nugatory.
rights. However, the Court did not decide whether a hearing to determine the validity of a waiver must precede the entry of a confessed judgment.

DETERMINING THE VALIDITY OF A WAIVER

Since rights guaranteed by the Constitution are fundamental to the American legal process, there is a well settled presumption against their waiver. However, it has been established that such a waiver may be valid under certain circumstances. Although Overmyer declined to hold that the criminal standard of a knowing, intelligent and voluntary waiver should be applied to confession proceedings, lower federal and state courts have adopted this test without comment. This result is consistent with the dictates of the fourteenth amendment which do not differentiate between criminal and civil matters in affording due process protection. As the rights relinquished in signing a confession note are by no means trivial, due process safeguards would require at the very least that the creditor clarify for the debtor the legal consequences of executing the note.

One of the major controversies surrounding confessions of judgment is whether mere execution of a confession note will suffice to show an effective waiver of rights. Overmyer suggested that the factual context surrounding the signing of the confession note is determinative of its validity. Illinois courts have inferred from Overmyer that there is no presumption against the validity of waivers embodied in confession clauses.

57. 405 U.S. 186-88.
60. See text accompanying note 40 supra.
63. See note 9 supra.
Other jurisdictions have taken a different view of Overmyer and declared that the existence of a valid waiver cannot be conditioned solely on the execution of a confession note. Since the circumstances giving rise to the confession note usually cannot be discerned from the face of the instrument, these courts have held that judgments predicated only upon these notes are defective. Such factors as the debtor’s legal sophistication, state of mind and relative bargaining power vis à vis the creditor which may not be apparent from the face of the instrument are relevant in determining the validity of a waiver. Illinois, which lacks definitive guidelines for determining the constitutional validity of confessed judgments, should follow the lead of these other jurisdictions and establish criteria which would afford greater protection to debtors.

**The Requirement of Notice and a Hearing After Judgment Has Been Entered by Confession**

Illinois has taken the stance, based on Overmyer, that the signing of a confession note will support a confessed judgment if the debtor subsequently has an opportunity to challenge its validity. Other jurisdictions have disagreed that hearings afforded after entry of a judgment, even if held prior to execution, satisfy due process. These courts have reasoned that such hearings do not conform to the requirement that the opportunity to be heard “be granted at a meaningful time and in a meaningful manner,” when deprivation may yet be prevented.

In Illinois, the confession of judgment statute does not require that a debtor be notified of a judgment confessed against him.


70. ___ Cal. 3d at ____, 577 P.2d at 193, 145 Cal. Rptr. at 373.


72. ___ Cal. 3d at ____, 577 P.2d at 193, 145 Cal. Rptr. at 373.


76. 407 U.S. at 81.

77. Other states with confession statutes similar to that of Illinois do have the notice requirement. OHIO REV. CODE ANN. § 2323.13 (Page Cum. Supp. 1978); 42 PA. CONS. STAT. § 236 (Purdon Supp. 1978).
Supreme Court Rule 276, which provides for the opening of a confessed judgment, does not remedy this situation, for a debtor cannot contest a judgment of which he is unaware. Although technically the mere entry of a judgment will not result in a deprivation of property, if a creditor obtains a judgment lien, the debtor's right to use, sell and collateralize his property is seriously impaired. Even if the debtor is later permitted to open the judgment and prevails on the merits, he may already have been harmed by entry of the confessed judgment.

In a related context, the federal court decision in *Scott v. Danaher* upheld a constitutional attack on the Illinois garnishment statute when used to satisfy a confessed judgment. The basis for the decision was the failure of the statute to require notice and an opportunity to be heard prior to execution on the judgment. The plaintiffs in the action signed an installment sales contract and judgment note containing a confession clause in order to purchase a vacuum cleaner. When the plaintiffs ceased paying on the note, judgment was confessed by defendant Puritan Thrift Plan, Inc., which had subsequently obtained possession of the paper. Based on the confessed judgment, Puritan Thrift requested that the court clerk issue a non-wage garnishment summons against the plaintiffs' bank. The plaintiffs remained unaware of the judgment and garnishment proceedings until notified by their bank that funds on deposit had been frozen.

The court held that the rights to due process had been violated because the garnishment statute failed to provide for a method of determining whether the debtors had "knowingly and voluntarily" waived their rights to notice and a hearing prior to the issuance of the garnishment summons. The Illinois legislature has not responded to this decision. The Circuit Court of Cook County, how-

80. See Tunheim v. Bowman, 366 F. Supp. 1392, 1393 (D. Nev. 1973) where the court upheld the validity of Nevada confessed judgments in light of Overmyer. The court noted that the only difference between the Ohio procedure involved in Overmyer and that of Nevada was that Ohio required prompt notice of the entry of judgment to the debtor. This difference was characterized as "insubstantial ... because by that time the harm has been done."
82. Apparently the seller of the vacuum cleaner had discounted the paper to Puritan Thrift.
83. Garnishment of wages is the one area where Illinois law prohibits confession of judgment without service of process. ILL. REV. STAT. ch. 62, § 82 (1977).
84. 343 F. Supp. at 1274.
85. Id.
ever, has acknowledged the Scott holding by promulgating General Order 6.4(b), providing that the court clerk must refuse to issue a garnishment summons based on a confessed judgment unless the judgment has been confirmed by service of process. Thus, where non-wage garnishment is involved, the right to notice and a hearing prior to execution of a confessed judgment is supported only by judicial fiat and not by legislative mandate. Since the right to notice and a hearing is required where a confessed judgment is followed by garnishment, logic would dictate that the same rights be granted before any type of execution on a confessed judgment. Both the Illinois courts and legislature should act to conform their decisions and statutes to Scott.

THE BURDEN OF PROOF

Since most jurisdictions accept a signed confession note as prima facie evidence of the creditor's claim, the debtor must shoulder the burden of proof in contesting a confessed judgment. The Illinois
procedure for opening a confessed judgment exemplifies the problems which face a debtor carrying the burden of proof. Under Illinois Supreme Court Rule 276, the onus is on the debtor to convince the court that he has a meritorious defense if he is to succeed in opening the confessed judgment. The debtor must also overcome the presumption which favors the regularity of a judgment. This task becomes more difficult when his claim is predicated upon invalidity of the waiver of due process rights, since he must prove a negative proposition rather than an affirmative one.

Proving the existence of a valid claim is by no means the only obstacle which the debtor must overcome to prevail. The debtor must first be able to pay the expenses involved in opening a confessed judgment, such as court costs and attorney's fees. Having recently defaulted on the obligation leading to the confessed judgment, it is unlikely that the debtor will be financially able to take advantage of the procedures provided by Illinois law for attacking the judgment.

Isbell v. County of Sonoma: The Implications for Illinois

The recent California Supreme Court decision in Isbell v. County of Sonoma may have important implications for confessions of judgment in Illinois. In Isbell, the court struck down the California confession of judgment statute, holding that it violated due process understanding to meet the burden, an allegation which the creditor must rebut to prevail. Id. at 1207. See Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970) aff'd on other grounds, 405 U.S. 191 (1972), where the court objected to the Pennsylvania procedure which placed the burden of proof on the debtor seeking post-judgment relief similar to that provided for under Illinois law. The court noted that:

[Th]e burden of proof is placed upon the debtor who is considered the proponent of a claim and who must convince the court of the need for equitable relief. . . . The placing of this burden upon the debtor is in direct contrast to the burdens in a normal or pre-judgment creditor-debtor action. In those cases instituted by a creditor . . . the creditor is considered the proponent of a claim and the burdens are his.

Id. at 1094-95. The Virgin Islands court rejected this contention. 358 F. Supp. at 1207.


90. Economy Truck Sales & Service, Inc. v. Granger, 61 Ill. App. 2d 111, 209 N.E.2d 1 (1965). However, this case seems to ignore the presumption that exists against a valid waiver of rights. See text accompanying note 59 supra.


92. See 314 F. Supp. at 1094. The federal court construed the Pennsylvania procedure used to open a confessed judgment. The procedure is similar to that found in Illinois; Comment, Abolition of the Confession of Judgment Note in Retail Installment Sales Contracts in Pennsylvania, 73 Dick. L. Rev. 115, 120 (1968-69); Comment, A Clash in Ohio?: Cognovit Notes and the Business Ethic of the UCC, 35 U. Cin. L. Rev. 470, 481-82 (1966).


94. Id. at ___, 577 P.2d at 194, 145 Cal. Rptr. at 374.
by providing for neither prejudgment judicial determination of the validity of a waiver nor adequate post-judgment relief. Although the California confession procedure differs from that in Illinois, the issue of waiver is the same in both jurisdictions.

The plaintiffs in Isbell were California welfare recipients. Plaintiff Isbell was jailed after pleading guilty to welfare fraud. As the court had not ordered restitution, a county representative visited the plaintiff in jail and convinced her to sign a confession of judgment for the overpayment. Entry of judgment ensued and when the plaintiff later purchased a home the judgment became a lien on her property. The other two plaintiffs were accused of fraudulently obtaining an excessive amount of welfare funds, but no charges were brought against them. Nevertheless, at the behest of a county representative, they also executed a confession of judgment. Judgment was rendered and the county subsequently attempted to enforce it.

The court held that mere presentation of a signed confession note is insufficient to demonstrate a valid waiver of due process rights. In so holding, the court rejected the contention that the execution of a confession note alone establishes that a waiver has been knowingly and intelligently made. The court took what was tantamount to judicial notice of the fact that "confessions of judgment are most frequently employed against those who are unaware of the significance of that procedure." The court concluded that since the use of confessed judgments was so prone to "overreaching, deception and abuse" a signed confession agreement could not possi-

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95. Id. at __, __, 577 P.2d at 190, 194, 145 Cal. Rptr. at 370, 374.
96. The most important difference is that California prohibits the use of a warrant of attorney. The defendant must confess his own judgment in writing. The confession is generally filed with a court clerk who enters the judgment. See __ Cal. 3d at __, 577 P.2d at 191, 145 Cal. Rptr. at 371.
97. Id. at __, 577 P.2d at 190, 145 Cal. Rptr. at 370.
98. Id.
99. In so deciding, the court observed:

[Even if the terms of the confession are not dictated by the creditor, the drastic nature of the device . . . even the right to be notified of the existence of the proceeding — strongly suggests a substantial disparity in bargaining position and implies overreaching on the part of the creditor.

Id. at __, 577 P.2d at 193, 145 Cal. Rptr. at 373.
100. Id.
101. Id. To support this contention, the majority relied on Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), aff'd, 405 U.S. 191 (1972), which in turn had relied on a single study conducted in Philadelphia. The only other source noted by the court was a general survey of the use of cognovits by finance companies in 1961. The dissenting opinion criticized the court for dealing in generalities. ___ Cal. 3d at __, 577 P.2d at 198, 145 Cal. Rptr. at 378 (Richardson, J., dissenting).
bly be accepted as *prima facie* evidence of a knowing and intelligent waiver.  

After determining that the California pre-judgment confession procedure was constitutionally unacceptable, the court examined whether post-judgment relief could cure the defects inherent in the confession process. It determined that a hearing on the validity of a waiver is ineffectual if held after judgment has been entered. As the court noted:

> Once judgment has entered, the damage is done; the debtor is now subject to an obligation imposed in violation of his due process rights, and the creditor can immediately employ legal process to enforce that obligation.

The *Isbell* decision specifically rejected the reasoning espoused in the Illinois case of *Scott v. Danaher*, where the court found no violation of due process as long as the debtor was given notice and a hearing prior to execution on the judgment.

The *Isbell* court then disposed of the contention that *D. H. Overmyer Co. v. Frick Co.* was binding precedent. The court observed that the Ohio statute involved in *Overmyer* provided the debtor with several procedural and substantive safeguards which the California statutes lacked. Notable among these was the requirement that notice be given to the debtor of the entry of a judgment confessed against him. In addition, the court found that *Overmyer* did not address the constitutionality of the Ohio confession procedures but instead relied on the peculiar facts of the case in upholding the validity of the waiver. Therefore, *Overmyer* was not determinative as to whether a pre-judgment hearing to ascertain the validity of a waiver is necessary for a confessed judgment to comport with due process.

*Isbell* not only elucidates the infirmities in present Illinois confession law, but also exemplifies a method by which the Illinois confession procedures could be attacked without running afoul of

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102. *Id.* at __, 577 P.2d at 192-93, 145 Cal. Rptr. at 372-73.
103. *Id.* at __, 577 P.2d at 194, 145 Cal. Rptr. at 374.
104. *Id.*
105. *Id.*
106. *Id.* at __ n.6, 577 P.2d at 194 n.6, 145 Cal. Rptr. at 374 n.6. See text accompanying notes 81 through 87 supra.
107. __ Cal. 3d at __, 577 P.2d at 195, 145 Cal. Rptr. at 375.
108. *Id.*
109. Like California, Illinois law makes no provision for notice to the debtor when a confessed judgment is entered.
110. __ Cal. 3d at __, 577 P.2d at 195, 145 Cal. Rptr. at 375.
111. *Id.*
Overmyer. Illinois should reassess the constitutionality of its own confession of judgment law in light of the Isbell decision.

The Need for Change: The Legislative Imperative

It has been said that "longevity can, by no means, be equated with constitutionality." Neither should it be equated with good law. Although confessed judgments have survived for centuries and weathered continual attacks, the burgeoning law of debtors' rights indicates a new concern for guaranteeing due process to the consumer. In the area of confessed judgments, even the United States Supreme Court has expressed its discomfiture with the state of present law. Court decisions, however, have been an ineffective means of challenging the current confession of judgment procedure. Two reasons for this result may be hypothesized. The first is that few confessed judgments are appealed due to the expense involved. Class action suits have proven unsuccessful in surmounting this handicap since they have caused the courts to shift their focus from the confession procedure to the appropriateness of having the plaintiff-debtor(s) represent the class. As the tendency of the courts has been to refuse to maintain confession suits as class actions, only named plaintiffs benefit from such decisions. Where courts elect to restrict class membership, debtors are faced with the difficulty of proving that they belong to the delineated class.

The second and more important explanation for the failure of the courts to redress the inequities inherent in the confession procedure is their avowed reluctance to become enmeshed in an area which is rightly within the province of the legislature. Restrictions on the use of confessed judgments in virtually all jurisdictions are prescribed

116. See, e.g., Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), aff'd, 405 U.S. 191 (1972); Irmco Hotels Corp. v. Solomon, 27 Ill. App. 3d 225, 326 N.E.2d 542 (1975). In Irmco, the court noted that the defendant did not charge that his own waiver of due process was invalid but instead only contended that the waiver given by "typical consumers" could not possibly be effective. Id. at 229, 326 N.E.2d at 545.
by laws which the various state legislatures have enacted. A recent Illinois decision acknowledged that the courts are waiting for the Illinois legislature to do likewise. *Ives v. May* involved an attack on the right of a creditor to confess judgment prior to default as authorized by the confession clause in question. In upholding the validity of the pre-default clause, the court announced that the debtors' arguments "would be more properly directed to the Illinois legislature rather than to this court."

Moreover, the United States Supreme Court has stated that "[p]roblems of this kind [regarding confessions of judgment] are peculiarly appropriate grist for the legislative mill." Clearly, it is up to the legislature to either abolish or curtail the use of confessed judgments in Illinois.

**PROPOSED AREAS OF CHANGE**

As total abolition of confessed judgments in Illinois appears unlikely, a new statute should be promulgated to abrogate the common law and delimit the procedural bounds as well as the circumstances in which creditors could utilize confessed judgments.

In order to protect the class of people usually victimized by confession clauses, the statute should prohibit the use of these clauses in such areas as consumer sales, small loans and home solicitation contracts. Furthermore, to insure procedural due process to all persons who might become subject to confession clauses, warrants of attorney should be abolished and creditors precluded from obtaining confessed judgments against debtors prior to default on their underlying obligations.

The proposed statute should also require that notice be sent to the debtor immediately upon entry of the confessed judgment. Execu-
tion on such a judgment should be stayed pending compliance with this provision. The notice should be accompanied by a copy of the complaint and the confession, in order to inform the debtor of the nature of the judgment. After receiving notice, the debtor should be assured adequate time to attack the judgment prior to execution. 127

Even if the proposed statute incorporates all of the protective measures previously mentioned, a hearing to determine the validity of the waivers embodied in the confession clause should be made a mandatory prerequisite to the entry of a confessed judgment. The hearing will not place an impossible burden on the creditor. In the majority of cases where the debtor has no defense, he is unlikely to hire an attorney and contest the matter. 128 If the validity of the waiver is contested, the hearing on that issue need not incorporate all the features of a trial. 129

At the waiver hearing, the creditor should bear the burden of proving that the debtor's relinquishment of his due process rights was knowing, intelligent, and voluntary. A requirement that confession of judgment clauses be written in a manner comprehensible to a layman, conveying to him the seriousness of the legal consequences involved, would not only enlighten the debtor but would also aid the creditor in carrying his burden of proof. 130 In mandating that the creditor prove the existence of a valid waiver, the statute will compel the creditor to call the confession clause to the debtor's attention in order to later assert that the waiver had been knowingly made. The requirement that the confession clause be phrased in lucid language will also aid the creditor in that it will lend support to the claim that the waiver had been intelligently executed. Therefore, the only major obstacle confronting the creditor will be the burden of proving that execution had been voluntary and not the result of unequal bargaining power or overreaching on his part. 131

127. See, e.g., Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), aff'd, 405 U.S. 191 (1972), where the District Court found the 20 day notice provision prior to execution of a confessed judgment insufficient, as a debtor who lacked the financial means to pay his debt would not have enough time to hire an attorney to open the judgment.


130. See, e.g., Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972), where the court examined the difficulties which a layman would have in recognizing the true dimensions of the confession provision in question.

131. See, e.g., OHIO REV. CODE ANN. § 2323.13(D) (Page Cum. Supp. 1978), which requires the following warning in confession notes:
CONCLUSION

The confession of judgment procedure in Illinois should either be abolished or amended so that Illinois citizens will receive the due process protection to which they are entitled under the Constitution. The ease with which the present system permits an unwary debtor to waive these rights is unjustified and serves no vital state interest. Creditors would not be harmed by the abolition of confessed judgments as they can rely on other established methods of protecting their rights.133

Although confession provisions have not been declared unconstitutional per se, their validity in contexts other than Overmyer remains suspect. If confessions of judgment are to continue to be sanctioned, justice demands that a pre-judgment waiver hearing be held in which the creditor has the burden of proving that the confession note was knowingly, intelligently and voluntarily executed. Furthermore, notice should be given after the entry of the confessed judgment and an adequate opportunity should be allowed the debtor to contest it. Finally, confession clauses should be banned from transactions in which unsuspecting consumers are most likely to be harmed. It is up to the Illinois legislature to bring the Illinois confession of judgment procedure in line with twentieth century concepts of due process.

CINDY F. WILE

133. Promissory notes, for example, may be substituted for the use of confession notes. Comment, Confessions of Judgment, 102 U. Pa. L. Rev. 524, 524 (1954). If a debtor chooses not to defend in a suit where he has been served with process, a default judgment may be entered against him. The default judgment is advantageous to the creditor as it becomes final in 30 days. Ill. Rev. Stat. ch. 110, § 50(5) (1977). No appreciable loss of time or money results when a creditor obtains a default judgment as opposed to a confessed judgment. Horwitz, Confession of Judgment Clauses as Violating Federal Truth-In-Lending Where Creditors Have Waived Their Right to Have Liens Placed on Obligors' Residences, 66 Ill. B.J. 688, 694 (1978). Horwitz notes that if creditors were to cease relying upon confession clauses, they would avoid possible conflicts with the federal Consumer Credit Protection Act (commonly known as Federal Truth-in-Lending). Id. at 688-93.
The Loyola University of Chicago Law Journal respectfully dedicates this issue to the late Justice James A. Dooley