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LANDLORD-TENANT LAW:
CHALLENGING THE CONFESSION OF JUDGMENT CLAUSE IN ILLINOIS RESIDENTIAL LEASES

William L. Niro*

The Illinois Judiciary and General Assembly have given little attention to the disadvantages and hardships created for Illinois tenants by the confession of judgment clause in form residential leases. This Article presents certain challenges to confession of judgment clauses on constitutional and contract law principles, and the author calls for judicial action to align Illinois law with that of the majority of states by abolishing or restricting the use of such clauses.

The confession of judgment clause, as it appears in a number of modern legal instruments, had its origin in the common law of the several states. Although the exact date of its first use is unknown, Blackstone acknowledged it as being:

Very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess judgment by either ... [nihil dicit, cognovit actionem or non sum informatus] in an action of debt to be brought by the creditor against the debtor for the specific sum due.1

This Article examines the historical basis and rationale for the confession of judgment clause. After a discussion of constitutional and contract-based challenges to confession of judgment clauses, it will be demonstrated that judicial reform in this area is an imperative for Illinois law.

HISTORICAL BASIS AND RATIONALE

At common law, judgment by confession could be obtained in two ways: (1) by judgment after service of process, called the cognovit actionem; 2 or

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2. In this type of confessed judgment, the defendant can “confess” the validity of the plaintiff’s suit instead of entering a plea. As an alternative, a plea may be entered, but then withdrawn and judgment “confessed.” The latter procedure is known as cognovit actionem relictur verifcatione. Note, Confessions of Judgment in Illinois: The Need for Change Persists, 10 LOY.
(2) by warrant of attorney whereby the right to service of process is waived and judgment is entered without notice. The first does not exist under present Illinois procedural practice. The modern terms "confession of judgment clause" and "cognovit clause" are commonly used to describe terms in an agreement which permit judgment to be entered by warrant of attorney. The clause may appear in a variety of instruments including personal loans, promissory notes, bills, retail installment and conditional sales contracts, and form leases for real property. The language of a confession of judgment clause may vary with state law, user preference, and the type of transaction. The typical confession of judgment clause appearing in an Illinois residential dwelling lease reads:

Lessee hereby irrevocably constitutes any attorney of any court or record of this state to enter Lessee's appearance in such court, waive process and service thereof, and confess judgment from time to time, for any rent which may be due to Lessor or his assignees by the terms of this lease, with costs and reasonable attorney's fees and to waive all errors and right of appeal from said judgment and to file a consent in writing that a proper writ of execution may be issued immediately.

While the actual wording may vary among leases, the basic coverage is the same.

This particular confession of judgment clause is indeed extraordinary in that the lessee authorizes any attorney, usually one designated by the lessor, to represent him in court, to confess that the lessee owes the money claimed, and to enter judgment against him. Further, he stipulates that the court has personal jurisdiction over him and that he waives all right to notice of the court proceedings. He also waives his right to appeal the judgment and consents to immediate issuance of a writ of execution to enforce the judgment. One court has said that the warrant of attorney, authorizing entry of judgment without notice:

3. This procedure allows the judgment to be entered on defendant's behalf by any attorney. Because the clause contains a provision for the defendant's waiver of notice, the judgment often is entered without the defendant's knowledge or an opportunity to defend. This procedure is known as judgment debitum sine brevi. Judgments, supra note 2, at 743-44.

4. While a person in his answer may confess or admit the cause pleaded in the complaint, and judgment may be entered thereon, this procedure is not a confession of judgment in current application or in the strict sense of the words. See Pyes, supra note 1, at 765. See also Third Nat'l Bank v. Divine Grocery Co., 97 Tenn. 603, 37 S.W. 390 (1896).

5. The terms cognovit and confession of judgment will be used interchangeably throughout this discussion.

6. Cole Legal Form Apartment Lease, No. L-17 (April 1975). The cognovit is succinctly defined as "the written authority of the debtor and his direction... to enter judgment against him as stated therein." Blott v. Blott, 227 Iowa 1108, 1111-12, 290 N.W. 74, 76 (1940). See also Guydon v. Taylor, 115 Ind. App. 685, 686, 60 N.E.2d 750, 751 (1945).

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 places his cause in the hands of a hostile defender. The signing of a warrant of attorney is equivalent to a warrior of old entering a combat by discarding his shield and breaking his sword.8

The reasons underlying common law recognition of the cognovit clause were to protect creditors, to broaden remedies against delinquent debtors, and to increase the availability and completion of credit sales.9 The procedure obviously provided an inexpensive means of entering and satisfying judgments. Yet, dissatisfaction with common law practices and a desire to preserve the debtor’s day in court led many states to invalidate confession of judgment agreements on public policy grounds.10 Too often those individuals least able to understand the legal ramifications of the clause, particularly the poor and uneducated, were the victims of its enforcement. The areas of consumer sales, small loans, and home solicitation contracts were particularly prone to abuse.11 In addition, the debtor had to pay for attorney’s fees and court costs, while assuming the burden of proving that due process rights were not waived.12

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8. Cutler Corp. v. Latshaw, 374 Pa. 1, 4-5, 97 A.2d 234, 236 (1953). It has also been said that “such agreements are iniquitous to the uttermost and should be promptly condemned by the courts.” First Nat’l Bank v. White, 220 Mo. 717, 728, 120 S.W. 36, 42 (1909).

9. See, e.g., Hadden v. Rumsen Prod. Inc., 196 F.2d 92 (2d Cir. 1952). The purpose of the cognovit is “to permit the note holder to obtain judgment without a trial of possible defenses which the signers of the note might assert.” Id. at 96.


11. Confessions, supra note 2, at 58. See notes 94-96 and accompanying text infra.

Legal commentators have been critical of cognovits. One such writer has specifically called for "legislative reappraisal" of confession of judgment clauses in credit sales in Illinois. Attempts to pass legislation restricting the use of cognovits or confession of judgment clauses have not been successful in the Illinois General Assembly. Until recently, Illinois continued to recognize the clause in virtually all types of transactions, including the signing of residential property leases. In October, 1979, House Bill 2678 was enacted into law, amending section 50(3) of the Illinois Civil Practice Act. The amendment provides that:

Except as otherwise provided in this subsection (3), any person may confess judgment by himself or attorney duly authorized, without process.

No power to confess judgment shall be required or given after the effective date of this amendatory Act of 1979 in any instrument used in a consumer transaction: any power to confess given is in violation hereof is null and void and any judgment entered by a court based on such a power shall be unenforceable. "Consumer transaction" as used in this Section means a sale, lease, assignment, loan or other disposition of an item of goods, a consumer service, or an intangible to an individual for purposes that are primarily personal, family or household.

The amendatory language defining "consumer transactions" can arguably be construed to apply to only leases of "items of goods." Because of this limiting language, Illinois tenants will have to await judicial interpretation of the provision.


14. Pyes, supra note 1, at 764.


As a result of Illinois' adherence to the common law position, the tenant is placed in the position of attempting to open the judgment under existing Illinois practice procedures. Notice of judgment against the tenant/debtor may reach the tenant by way of a summons to confirm judgment by confession or, as in many cases, when his bank or employer notifies the tenant/debtor that a garnishment summons has been served upon him, thereby freezing the tenant/debtor's funds or salary. Appalled by such practices, the California Supreme Court has stated that "experience has shown that the confession of judgment procedure lends itself to overreaching, deception, and abuse." The New York Court of Appeals likewise has condemned confessed judgments as "the loosest way of binding a man's property that ever was devised in a civilized country."

In the modern setting, most urban property rentals are made through form leases, the vast majority of which contain a confession of judgment clause. With the currently rapid conversion of apartments to condominiums and the resulting premium on rental units, tenants are in no position to negotiate removal of confession of judgment clauses from form leases. Thus, armed with a form lease authorizing confession of judgment and a specific procedural rule permitting entry of judgment "without process," the landlord can put tenants at a great disadvantage in asserting their rights when a dispute over their tenancy arises. The actual surrender of constitutionally guaranteed due process rights accomplished by a tenant who signs a form lease containing a cognovit provision raises sufficient grounds for challenging the constitutional validity of such a clause. It may also be challenged under contract law grounds as being adhesive or unconscionable.

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18. See note 7 supra. Four separate documents must be filed by a person seeking to open a judgment by confession: (1) notice of motion; (2) the written motion asserting diligence in filing and a meritorious defense; (3) an affidavit pursuant to Supreme Court Rule 191; and (4) a verified answer the movant proposes to file.


20. ILL. REV. STAT. ch. 110, §§ 13, 73 (1977). See also id. at ch. 110a, § 277.


23. Kirby, Contract Law and the Form Lease: Can Contract Law Provide the Answer?, 71 Nw. U.L. Rev. 204 (1976) [hereinafter cited as Kirby]. The Chicago Real Estate Board estimates that 98% of all written leases in Chicago are executed on standardized forms.


26. Enforcing a money judgment obtained in Illinois by confession of judgment in a sister state raises another set of issues beyond the scope of this article. For an in-depth study of the
STATE ACTION AND THE FOURTEENTH AMENDMENT

In claiming that a cognovit procedure is an unconstitutional denial of due process, a tenant must establish that: (1) action by the state is involved; (2) the state action deprives the complainant of a property right; and (3) the deprivation was effected without such process as is due under the circumstances, or that the alleged waiver of process was invalid.\(^2\)

The United States Supreme Court has stated that action inhibited by the due process clause of the fourteenth amendment is "only such action as may fairly be said to be that of the States."\(^2\) The clause provides no protection against wrongful conduct of individuals in their private capacities. However, "that the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of the Court."\(^2\) The inclusion of a cognovit clause in a lease is "determined, in the first instance, by the terms of [the] agreements among private individuals."\(^3\) Thus, the mere existence of a cognovit provision cannot be considered state action for fourteenth amendment purposes. However, the cognovit provision is enforced in the state courts. Because the Supreme Court has determined that judicial action is to be regarded as action of the state for the purposes of the fourteenth amendment, the requisite "state action" is present whenever the action for entry of judgment by confession is filed in the appropriate circuit court.\(^3\)

Once state action is established, the defendant (tenant) must prove that the interest sought to be protected is one of property within the scope of the fourteenth amendment.\(^3\) Illinois courts recognize that a money judgment

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30. Id. at 13.


32. The institute of property is in a great state of flux with the emergence of government as a major source of wealth. Through subsidies, franchises, occupational licenses, jobs, and public
is a significant property interest.\textsuperscript{33} In addition, the United States Supreme Court and the United States District Court for the Northern District of Illinois have ruled that a fourteenth amendment property interest exists even when a person lacks full title to the property, or when the deprivation may only be temporary, subject to a determination in a post-deprivation hearing.\textsuperscript{34} Thus, the procedure utilized to enter a money judgment by confession, even where post-deprivation hearings are possible, is subject to procedural due process guarantees. Clearly, no serious issue regarding state action or a legally sufficient property interest would arise in a landlord-tenant confession of judgment case. The right to some measure of procedural due process seems guaranteed. The most significant legal questions relating to the cognovit clause are raised in the context of whether procedural due process guarantees have been afforded.

\textit{Due Process and Waiver}

Once the tenant has established the existence of the requisite state action and a property interest sufficient of protection, he must establish that he has not been accorded the procedural safeguards due him. The tenant must assert that the appropriate form of notice and hearing required under the circumstances, given the nature of the competing interests involved, has been denied. However, in a cognovit situation, the requisite due process protection allegedly has been waived. Thus, the crucial question arises: does the mere signing of a form lease containing a confession clause effectively waive the tenant's constitutional rights?

Due process rights have been held to be subject to waiver in both a criminal and civil context, but only if the waiver has been made "voluntarily, housing the government is creating new forms of wealth and hence establishing a new form of property in the expectation of continued flow of government largesse. Deprivations of this new property and the attendant constitutional problems associated with such deprivations are reshaping the law and the result is a broader application of due process rights by the courts. See Reich, The New Property, 73 \textit{Yale L.J.} 733 (1964). See also Arnett v. Kennedy, 416 U.S. 134 (1974); Paige v. Harris, 584 F.2d 178 (7th Cir. 1978); Escalera v. New York City Hous. Auth., 425 F.2d 853 (2d Cir. 1970), cert. denied, 400 U.S. 853 (1970); Van Alstyne, Cracks in "The New Property: Adjudicative Due Process in the Administrative State, 62 \textit{Cornell L. Rev.} 445 (1977).


intelligently and knowingly . . . and with full awareness of the legal consequences. 35 D.H. Overmyer Co. v. Frick Co. 36 was the first opportunity the Supreme Court had to rule on the constitutionality of confession of judgment clauses. In that case, Overmyer Company, a debtor corporation, executed an installment note to Frick Company for past-due sums and for new equipment yet to be installed at Overmyer’s facility in Ohio. Overmyer had difficulty making payments and, therefore, executed a new note, for consideration, extending payments over a longer period of time. The new note contained a confession of judgment clause. The cognovit was a typical warrant of attorney waiving notice and authorizing Frick Company to confess judgment should the debtor default on the note. Most importantly, Overmyer Company was represented by legal counsel in all the negotiations and in the signing of the notes. Ultimately, Overmyer ceased payment, whereupon Frick Company confessed judgment. Overmyer’s motion to vacate the judgment on due process grounds was denied. The denial was upheld by both the Court of Appeals and Supreme Court of Ohio. 37

On appeal to the United States Supreme Court, Overmyer asserted as grounds for relief that: (1) it had been denied due process because it was not given notice of the action or an opportunity to be heard; and (2) the purported waiver of notice and right to present a defense was invalid. 38 The Court rejected both assertions on the basis that precedent had established that “[t]he due process rights to notice and hearing prior to a civil judgment are subject to waiver,” 39 and further, “that parties to a contract may agree in advance . . . to waive notice altogether.” 40 Thus, based on the facts of the case, the Court ruled that Overmyer Company had waived its right to prejudgment notice and hearing “voluntarily, intelligently and knowingly . . . and . . . with full awareness of the legal consequences.” 41 The Court stated, however, that the critical facts presented in Overmyer, especially


38. Id. at 184. Specifically, Overmyer asserted that it is “unconstitutional to waive in advance the right to present a defense in an action on the note.” Id.

39. Id. at 185.


41. Id. at 187.
that the parties were corporations represented by legal counsel, could give rise to a different result in other circumstances, if not present. Specifically, the Court noted that “[o]ur 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.”

In a concluding comment, the Court stated:

Our holding necessarily means that a cognovit clause is not, per se, violative of Fourteenth Amendment due process . . . . The facts of this case . . . are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world.

*Overmyer* was applied to uphold Pennsylvania’s cognovit rule in *Swarb v. Lennox*, decided the same day. *Swarb* was a class action challenge to the constitutionality of judgments by confession against Pennsylvania consumer debtors who had signed conditional sales contracts containing a cognovit clause. The Court cited its decision in *Overmyer* to support the conclusion that the Pennsylvania rules and statutes relating to cognovit provisions were not unconstitutional on their face. The Court emphasized that “under appropriate circumstances, a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision.” However, the Court did not disturb that portion of the district court ruling that held the Pennsylvania procedure unconstitutional only as it applied to Pennsylvania residents earning less than $10,000 per year. That limitation was based on a consumer study of default debtors in four Pennsylvania cities. The district court cited this study and other testimony to support its findings that there was no intentional waiver of a known right by the members of the class earning less than $10,000 per year and that the debtors did not fully understand the rights which they were relinquishing by signing the cognovit notes. Because the notes were signed and judgments confessed “based on the concept of waiver of notice without adequate understanding by the debtor,” the entry of those judgments was a violation of the due process clause of the fourteenth amendment.

42. Id. at 188.
43. Id. at 186-87. This rule was reiterated in *Swarb v. Lennox*, 405 U.S. 191, 200 (1972), which was decided on the same day as *Overmyer*.
44. 405 U.S. 191 (1972).
45. Id. at 198.
46. The study indicated that 96% of the judgment debtors had incomes less than $10,000 annually (56% less than $6,000); only 30% had graduated from high school; and only 14% knew that the contracts they had signed contained cognovit clauses. Id. at 198, relying on D. CAPLOVITZ, CONSUMERS IN TROUBLE (1968).
Within the month, the Supreme Court considered the constitutionality of a Delaware statute authorizing confession of judgment.\(^4\) In *Osmond v. Spence*,\(^5\) a federal district court recognized the prevailing rule that constitutional rights to notice and hearing are subject to waiver, but held that because of the strong presumption against waiver of constitutional rights, there must be clear evidence of waiver before the court will hold the waiver effective.\(^5\) The court concluded:

> [T]he very facts of this case demonstrate the soundness of such a rule, for a mere glance at the waiver clause contained in a typical judgment note raises serious doubt whether the average debtor could have any meaningful understanding of the legal implications of the effect of his signature thereto.\(^5\)

The District Court of Delaware held the statute to be fatally defective in that “by failing to provide for notice and hearing preceding the entry of judgment, there [was] no method of judicially determining whether or not a particular debtor knowingly and intelligently signed the judgment note thereby waiving his 14th amendment rights.”\(^5\) The determination of whether there has been an intelligent waiver of the right must depend, in each case, upon the particular facts and circumstances surrounding the surrender. Significant areas of inquiry include the background, experience, education, intelligence, and conduct of persons waiving their rights. While the Supreme Court vacated and remanded the case for further consideration in light of *Swarb* and *Overmyer*,\(^5\) the Delaware decision rests on fundamentally sound constitutional principles applicable in current consumer or landlord-tenant disputes involving the confession of judgment clause.

On remand, the Delaware court adhered to its original ruling that the signed cognovit alone is not adequate proof of waiver and that the waiver determination must be made by the court prior to entry of judgment.\(^5\) The court stated:

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\begin{align*}
49. & \text{Osmond v. Spence, 405 U.S. 971 (1972).} \\
50. & \text{327 F. Supp. 1349 (D. Del. 1971).} \\
51. & \text{The Supreme Court has held that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882). Furthermore, the Court requires that "for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' " Brookhart v. Janus, 384 U.S. 1, 4 (1966), quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See also Miranda v. Arizona, 384 U.S. 436 (1966); Glasser v. United States, 315 U.S. 60 (1942); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937).} \\
52. & \text{Osmond v. Spence, 327 F. Supp. 1349, 1359 (D. Del. 1971).} \\
53. & \text{Id. The court stated further that "the mere signature of the debtor on a judgment note, without more, [is insufficient to overcome] the strong presumption against the waiver of one's constitutional rights." Id.} \\
54. & \text{Osmond v. Spence, 405 U.S. 191 (1972).} \\
\end{align*}
\]
Unless a hearing is conducted on the waiver question before the judgment is entered, an alleged debtor will be deprived of his due process rights on every occasion when an effective waiver had not occurred upon initial execution of the note. The only procedure guaranteeing that such a deprivation will not take place is to require hearings on the waiver issue before permitting judgments to be entered.\textsuperscript{56}

In formulating a challenge to the confession of judgment clause in Illinois residential dwelling leases, a facial attack on the underlying statute would be precluded by \textit{Overmyer, Swarb,} and \textit{Osmond}. However, each decision specifically recognized that under certain circumstances the waiver of due process rights can be challenged. The solution lies in a prejudgment determination of effective waiver which would require creditors to prove, prior to entry of judgment, that the debtor knowingly, intelligently, and voluntarily waived his rights to notice and hearing. The concept is rationally based on sound constitutional principles and a need for fairness and reasonableness in modern landlord-tenant, debtor-creditor relations.

The position advocated here is further supported by a series of Supreme Court cases in which various summary creditor remedies were held to be unconstitutional. These decisions stress the importance of prejudgment notice and hearing prior to deprivations of certain property interests. \textit{Sniadach v. Family Finance Corp.}\textsuperscript{57} invalidated a Wisconsin prejudgment wage garnishment statute. \textit{Goldberg v. Kelly}\textsuperscript{58} struck down a New York state agency regulation permitting termination of welfare benefits without a hearing. \textit{Fuentes v. Shevin}\textsuperscript{59} held unconstitutional Florida and Pennsylvania statutes allowing a prejudgment writ of replevin to issue without notice. The Supreme Court declared the rights deprived to be so important that even statutory provisions for hearings subsequent to the deprivation were insufficient to cure the unconstitutionality of the prehearing procedures. As the Court held in \textit{Fuentes}, the right to notice and hearing must be granted at a "meaningful time," that is, at a time "when the deprivation can still be prevented."\textsuperscript{60}

\textbf{CHALLENGES BASED ON CONTRACT LAW}

As an alternative to constitutional attacks, a challenge to the cognovit/confession of judgment clause in a residential dwelling lease can derive from

\textsuperscript{56} Id. at 127.
\textsuperscript{57} 395 U.S. 337 (1969).
\textsuperscript{58} 397 U.S. 254 (1970).
\textsuperscript{59} 407 U.S. 67 (1972).
\textsuperscript{60} Id. at 80-81. See Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972); Osmond v. Spence, 327 F. Supp. 1349, 1355 (D. Del. 1971); Isbell v. County of Sonoma, 21 Cal. 3d 61, 145 Cal. Rptr. 368, 577 P.2d 188 (1978) (California confession of judgment statute held unconstitutional because it failed to provide for prejudgment judicial determination of the validity of a waiver and adequate postjudgment relief). See also text accompanying notes 43-46 supra and 101-113 infra. But see Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (postjudgment procedural safeguards adequate to protect due process rights where deprivation is only temporary).
At common law, a lease is regarded primarily as a conveyance governed by the law of real property, and insofar as the lease transfers an estate to the lessee, it is primarily a conveyance. However, a lease presents aspects of a contract as well. The dual character (conveyance and contract) of a lease thus creates two sets of correlative rights and duties—one set growing out of the landlord-tenant relationship, which is based on privity of estate, and the other emerging from the express agreements in the lease, which is based on privity of contract. As the leading authority on contract law has noted, "those features of the lease which are strictly contractual in their nature should be construed according to the rules for the interpretation of contracts generally."

Further, a number of state courts have expressly recognized the residential lease as a contract. The Illinois Supreme Court, in its landmark decision of *Jack Spring, Inc. v. Little*, adopted the reasoning of *Javins v. First National Realty Co.* and concluded that leases for apartments are to be

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65. 50 Ill. 2d 351, 366, 280 N.E.2d 208, 223 (1972). The landlords in *Spring* sought to recover possession of the tenant's apartment for non-payment of rent. The Illinois Supreme Court, relying on *Javins*, for the first time held that an implied warranty of habitability existed in a contract between a landlord and a tenant covering an apartment in a multiple unit dwelling. The implied warrant of habitability could be fulfilled if the landlord substantially complied with the Chicago Building Code. *Id.* at 366, 280 N.E.2d at 214. The court, quoting *Javins*, stated: "In our judgment, the old no repair rule [for landlords] cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability." *Id.* at 363, 280 N.E.2d at 215, quoting *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1076-77 (D.C. Cir. 1970). The defendants could raise the breach of the implied warranty as an affirmative defense to an action for possession. *Id.* at 366, 280 N.E.2d at 217.
66. 428 F.2d 1071, 1075 (D.C. Cir. 1970), cert. denied, 400 U.S. 925 (1970). In this case, a landlord brought an action seeking possession of the tenant's premises for non-payment of rent. The court held that the provisions of a lease must be construed according to contract law rather than property law because the modern urban tenant no longer is conveyed an interest in land, but rather "a well known package of goods and services." *Id.* at 1074. Thus, the court read an implied warranty of habitability into an apartment lease on the grounds that: 1) the historical basis for absolving a landlord of a duty to repair—the singular importance of the land and not the dwelling—no longer is present; 2) landlord-tenant law should be made consistent with consumer protection law; and 3) the dynamics of the modern housing market require protection of the tenant. *Id.* at 1077-80. Also, the court found that the local housing code should be read into any lease. *Id.* at 1081. For all these reasons, the *Javins* court held the breach of the implied warranty to be a defense to an action for rent. See also *Boston Housing Auth. v.*
treated as contracts. While *Javins* and *Spring* dealt with implied warranties of habitability rather than confessions of judgment, the conclusion that a lease is to be treated as a contract allows the validity of cognovit provisions to be analyzed according to principles of contract law. In *Irmco Hotels Corp. v. Solomon*,67 for example, an Illinois appellate court characterized a cognovit provision in a lease as a "contractual provision."68

**The Cognovit Clause as an Adhesive Contract Term**

An adhesive contract term describes a term or condition usually contained in a form contract drafted unilaterally by a dominant party in which the weaker party adheres to the terms as presented. His adherence is unwilling, and usually unknowing.69 The dominant party presents conditions which must be accepted on a "take-it-or-leave-it" basis, with no opportunity for bargaining, and under such conditions that the second party, or "adherer," cannot obtain the desired product or service without acquiescing in the form agreement. The "leave it" alternative normally is not a viable option.70

The *Javins* court expressly found that the use of standardized form leases means that landlords place tenants in such "take-it-or-leave-it" situations.71 Also, the court recognized the well-documented inequality of bargaining power between a landlord and tenant, and noted that the "increasingly severe shortage of adequate housing further increases the landlord's bargaining power."72 So common is this situation that one court took judicial notice of the fact "that form leases are put before tenants on an 'accept this or get nothing' basis, and that tenants—who need housing—are compelled to sign."73 The modern decisions are replete with expressions of judicial condemnation of inequalities in bargaining power and the take-it-or-leave-it situations presented in modern consumer credit and landlord-tenant transactions.74 Judge J. Skelly Wright has stated that "[a]s judges, 'we cannot shut

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67. 27 Ill. App. 3d 225, 326 N.E.2d 542 (1st Dist. 1975).
68. 111. App. 3d 225, 326 N.E.2d 544.
our eyes to matters of public notoriety and general cognizance. When we
take our seats on the bench we are not struck with blindness, and forbidden
to know as judges what we see as men.”

Since it is readily accepted that the typical Illinois form lease is a contract,
judicial interpretation and construction should follow normal contract princi-
ples. However, adhesion contracts present a difficult situation for the courts
because judicial rules of contract construction are premised on mutuality of
agreement and the doctrine of freedom of contract. Also, contract in-
terpretation usually proceeds on the basis that “one is held to know and be
bound by the contract he makes” and is premised on the concept of freedom
of contract or arms length bargaining between the parties. Freedom of con-
tract, mutual agreement, and equal bargaining power are notably absent in
adhesion contracts. Thus, legal scholars have called for judicial reform in the
interpretation and enforcement of standard form adhesion contracts:

The remedy for the problems of the standard form is simple. Nonbar-
gained forms must be recognized as different from bargained contracts and
hence not subject to traditional contract principles. Separating the bar-
gained from the nonbargained presents no difficulty. Bargained trans-
actions look bargained. They show give and take on both sides and are
tailored to the particulars of an individual situation. Their nonbargained
counterparts are evidenced by mass produced forms reflecting the in-
terests of the party who produced them.

Without announcing general principles applicable in every situation, some
courts have granted relief from onerous, adhesive contract terms after con-
sidering and balancing a variety of factors: viz (1) the context of the transac-
tion as a whole; (2) location of the clause on the form; (3) whether the mean-
ing of the clause was obscured by language used; (4) policy against waivers of
constitutional rights; (5) one-sidedness of the terms; (6) fairness; and (7) sur-
prise. The fact that one or more of these factors are present in the lease
situation is sufficient basis to justify a court determination invalidating the
cognovit as an adhesive contract term.

75. Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016
77. Kirby, supra note 23, at 216. See Berger, supra note 13. See also Kessler, Contracts of
Adhesion: Some Thoughts About Freedom of Contract, 43 COLUM. L. REV. 629 (1943); Slawson,
Standard Form Contracts and Democratic Control of Lawmaking Power, 84 HARV. L. REV.
529 (1971).
78. See notes 8, 34, & 52, supra. Karl Llewellyn suggests the last factor should be deter-
minative in deciding which clauses were freely bargained:

[F]ree contract presupposes free bargain, and . . . free bargain presupposes free
bargaining; and . . . where bargaining is absent in fact, the conditions and clauses to
be read into a bargain are not those which happen to be printed on the unread
paper, but are those which a sane man might reasonably expect to find on that
paper.
Invalidating Cognovit Clauses for Unconscionability

The contract law concept of unconscionability provides an additional source for challenging the cognovit clause in the residential lease. Unconscionable contract terms are those which are grossly one-sided or whose consequences are harsh. While no precise definition of unconscionability exists, application of the concept is recognized by the Uniform Commercial Code for the purpose of preventing "oppressive and unfair surprise." 79 The basic characteristics of adhesion contracts, particularly "one-sidedness," are also the prime considerations in measuring unconscionability. Further, the notion that an unconscionable bargain should not be given full enforcement has been expressed in prior case law. 80 In the landmark case of *Henningsen v. Bloomfield Motors, Inc.*, 81 the New Jersey court invalidated, as unconscionable, a term in a standardized form contract between two parties with grossly unequal bargaining positions. A "take-it-or-leave-it" situation was present since all contracts for similar products contained the same clause. 82

Five years after *Henningsen*, the Court of Appeals for the District of Columbia applied a similar analysis in *Williams v. Walker-Thomas Furniture Co.* 83 The court stated that "when a party of little bargaining power, and


Caveat lessee is no more the current law than caveat emptor. . . . The party seeking to enforce such a contract [unconscionable] has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting. . . . (Emphasis provided by the court.)

In Seabrook v. Commuter Housing Co., 72 Misc. 2d 6, 10, 338 N.Y.S.2d 67, 71 (1972), the court stated: "The doctrine of unconscionability is used by the courts to protect those who are unable to protect themselves and to prevent injustice, both in consumer and non-consumer areas." See also Ill. Rev. Stat. ch. 26, § 2-302 (1977); Attack, supra note 13; Note, Sales—Unconscionable Contract or Clause—Uniform Commercial Code, 15 DePaul L. Rev. 499 (1966).


82. Id. at 390, 161 A.2d at 85-88.

83. 350 F.2d 445 (D.C. Cir. 1965).
hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent . . . was ever given to all the terms." 84 Judge J. Skelly Wright concluded that it is "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" which gives rise to a finding of unconscionability. 85 In any particular case, the determination of reasonableness or fairness, and finding the presence of a meaningful choice, requires an examination of the circumstances existing when the contract was made. "The test is not simple, nor can it be mechanically applied." 86

In many cases the meaningfulness of the choice is negated by the gross inequality of bargaining power. 87 Therefore, a court, prior to entering a judgment by confession, should make at least minimum inquiry into such matters and closely examine these factors when affirmatively raised by a defendant. Otherwise, requiring a judgment debtor to open the judgment prior to receiving a hearing is a waste of judicial time, requires duplication of effort, and further burdens the already overcrowded court system.

In Personal Finance Co. v. Meredith, 88 Illinois' Fifth Appellate District indicated that Illinois authority "[d]oes not displace the common law principle that an unconscionable contract or clause is unenforceable." 89 After careful analysis of the agreement, the court held that the waiver of defense clause in a retail installment sales contract was valid under the facts because defendants had failed to prove surprise, lack of understanding, unequal bargaining power, or lack of meaningful choice. 90 The principles of unconscionability established in Williams, Henningsen, and a host of other cases therefore should be wholly applicable to judicial analysis of contract terms in Illinois.

84. Id. at 449.
85. Id.
86. Id. at 450.
87. Id. at 449 n.7. One of those factors to be examined, and often a crucial one, is the inequality of bargaining power. See D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188 (1972); Piercy v. Heyison, 565 F.2d 854 (3d Cir. 1977) (court distinguished Overmyer in part because there was unequal bargaining power between the debtor and the creditor, a "financial giant"). See also Strauch v. Charles Apt. Co., 111 Ill. App. 3d 57, 62, 273 N.E.2d 19, 23 (2d Dist. 1971).
89. Id. at 702, 350 N.E.2d at 788. The plaintiff brought suit to recover payments owed under two installment sales contracts obtained by assignment from the seller. Although these contracts technically were security agreements rather than negotiable instruments, the court nevertheless held they were similar enough to require notice to the buyer of the waiver of defense clauses. Id. at 698, 350 N.E.2d at 786. The court found the notice to be present in these contracts and noted that defendants should have read the provisions. Id. The case was remanded because the trial court had erred in excluding testimony relevant to whether the plaintiff had actual knowledge or notice of the seller's past failure to fulfill contractual obligations. If it had such notice, the plaintiff would not be protected by the waiver of defense clause. Id. at 700-01, 350 N.E.2d at 788.
90. Id. at 704, 350 N.E.2d at 790. The court noted that the waiver of defense clause in question was analogous to a confession of judgment clause and that "the use of these provisions can be abused." Id.
While Williams, Henningsen, and Personal Finance dealt with contracts for the sale of goods rather than a residential dwelling lease, the Personal Finance court focused its attention on the relationship and relative bargaining positions of the parties at the time the parties entered into the agreement. The significance of a prejudgment hearing to determine the presence of a waiver of constitutional rights or of contracts with adhesive or unconscionable terms is evident when one considers the concepts of judicial economy and fundamental fairness associated with affording debtors or tenants minimum due process.

Postjudgment procedures available to open or vacate judgments by confession likewise are inadequate to protect a person's property interest. Virtually none of our freedoms would be secure if any person could be deprived of his possessions without an opportunity to defend "at a meaningful time and in a meaningful manner."91 A postjudgment determination of the validity of a debtor's waiver, or the adhesiveness or the unconscionability of the contract, is not a determination "at a meaningful time." The damage is done once the judgment is entered. The creditor can immediately employ legal process to enforce the obligation.92 However, if Illinois courts would undertake a meaningful analysis of the cognovit provision in a full prejudgment hearing, they would help to assure that a tenant faced with the possible loss of shelter will receive a fair hearing on the circumstances of his particular case.

ILLINOIS PERSPECTIVE

Illinois, Ohio, and Pennsylvania are the only remaining states that provide specific authorization for the entry of judgment by confession without notice.93 At the opposite end of the spectrum, Indiana, New Mexico, and Rhode Island have declared the use of a cognovit to be a misdemeanor,94 while in California the legislature has enacted numerous statutes limiting the use of the confession of judgment clause.95 In fact, a majority of jurisdictions void the clause as against public policy, regulate its use, or limit its use in specific areas such as retail installment contracts or personal loans.96 By

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91. See note 80 supra.
95. CAL. FIN. CODE § 18440 (West Supp. 1979); CAL. CIV. CODE § 1132(b) (West Supp. 1979).
96. See, e.g., COLO. REV. STAT. § 5-2-415, -3-407 (1973); CONN. GEN. STAT. ANN. §§ 42-88, 36-26 (West Supp. 1973); FLA. STAT. ANN. § 55.05 (West 1969); GA. CODE ANN. §§ 110-601 to -603 (Supp. 1978); HAW. REV. STAT. § 521-34 (1972); KAN. STAT. ANN. § 16a-3-306 (1974); KY. REV. STAT. § 372.140 (1978); MICH. LAWS ANN. § 493.12 (Supp. 1977); MINN. STAT. ANN. § 168.71 (West Supp. 1979); N.Y. CIV. PRAC. LAW § 3201 (McKinney Supp. 1978); OR. REV. STAT. § 91.745(b) (1977); TEX. REV. CIV. STAT. art. 2224 (Vernon Supp. 1978); WIS. STAT. ANN. § 422.405 (West Supp. 1978).
contrast, Illinois courts have held the confession of judgment clause in leases valid in judgments entered for rent due and interest.\textsuperscript{97}

Since 1970, faced with continuing challenges to the confession of judgment clause, a number of Illinois decisions generally have upheld the earlier precedent. In \textit{First National Bank v. Keisman},\textsuperscript{98} defendant debtors had signed two judgment notes, but later challenged the entry of a judgment by confession and issuance of execution by the bank. They claimed that the procedure used to enter the judgment constituted a violation of their constitutional due process rights to notice and hearing \textit{prior} to entry of judgment. Appellants asserted:

\begin{quote}
[The mere signing of a document containing a warrant of attorney with power to confess judgment does not constitute a knowing waiver of one's rights, because consumers . . . are generally unaware of the existence of such a clause . . . , or that the instrument is presented to them on a take-it-or-leave-it basis, leaving them no chance for equal bargaining: . . . the waiver should be held ineffective as a matter of public policy because the poor and oppressed consumers, borrowers, and lessees should be protected from depriving themselves of such vital rights.]
\end{quote}

The court observed that precedent to support defendants' precise contention was lacking and it affirmed the concept that due process rights could be knowingly and intelligently waived. Specifically, the court reasoned that since this case concerned two "apparently knowledgeable businessmen and a lawyer," the parties' due process rights had been "knowingly and intelligently" waived.\textsuperscript{100} On appeal, the Illinois Supreme Court refused to break new ground. It would recognize only that "[i]n a particular case there may be reasons for setting aside a judgment entered by confession."\textsuperscript{101}

The only judicial condemnation in Illinois regarding the confession of judgment practice is found in \textit{Scott v. Danaher}.\textsuperscript{102} In \textit{Danaher}, a three-judge federal district court was presented with the question of whether the Illinois Garnishment Act,\textsuperscript{103} in conjunction with judgments obtained by confession under the Illinois rules,\textsuperscript{104} violated the due process and equal prote-
tion clauses of the fourteenth amendment. The plaintiff had executed an installment sales contract and judgment note for the purchase of a vacuum cleaner. The contract and note contained a standard "cognovit clause" authorizing the holder of the note to confess judgment without notice upon default of the note. The holder of the note confessed judgment against plaintiff without notice and directed the clerk of the court (Danaher) to issue a non-wage garnishment summons against the plaintiff's bank. The first notice of judicial action the plaintiffs received was from their bank—informing them that their account funds had been "frozen" pending disposition by court order.

After a detailed analysis of precedent, the district court reaffirmed the rudimentary constitutional principles that: (1) a person must be provided with notice of a judicial proceeding instituted against him and an opportunity to be heard prior to a deprivation of his property; (2) there exists a strong presumption against a waiver of constitutional rights; and (3) for a waiver to be effective it must be "clearly established" that there was an "intentional relinquishment or abandonment of a known right or privilege." The court further emphasized that such rights must be preserved prior to the deprivation of the property: "The fact that the judgment may be reopened and the property returned to the plaintiffs does not mitigate against the fact that the plaintiffs here are precluded from the use of their property for some length of time."

The garnishment statute, by failing to provide for any means of determining the effectiveness of the debtor's purported waiver of his right to notice and hearing prior to the issuance of a garnishment summons was, therefore, held to be constitutionally defective. The court's extensive analysis and discussion recognized that a layman of normal intelligence may have difficulty in comprehending the meaning of the terms employed in such a contract and the legal ramifications flowing from the execution of it.


No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.


109. Id. at 1277.


111. Id. at 1275.

112. Id. at 1278. But see Zimek v. Illinois Nat'l Cas. Co., 370 Ill. 572, 19 N.E.2d 620 (1939) (when creditor gives principal debtor proper notice of suit, due process requirements are fulfilled and garnishment statute is constitutional); Endicott Johnson Corp. v. Encyclopeda Press, Inc., 266 U.S. 285 (1924) (New York garnishment statute held to be constitutional).

By recognizing that the effectiveness of the purported waiver will generally turn on the debtor’s intelligence, state of mind, education, and bargaining power at the time of execution, the Danaher court provided some measure of protection to consumers without significantly impairing a creditor-landlord’s ability to obtain judgment. The opinion reflects an enlightened judicial awareness of the realities of modern landlord-tenant, debtor-creditor relations. Unfortunately, the posture of the federal court has not been assumed in Illinois state courts’ considerations of similar confession of judgment cases.

In Babb v. Johnson, a case involving a commercial lease, and Ives v. May, which involved a judgment note, the second district avoided ruling on appellants’ constitutional challenges to judgments obtained by confession by stating that the issue had not been raised or decided in the trial court. In Ives, the court added the terse remark that defendant’s argument—that the clause allowing confession without notice is an unconscionable provision—“would be more properly directed to the Illinois legislature rather than to this court.”

In Star Finance Corporation v. McGee, a retail installment contract case, and in Irmco Hotels Corp. v. Solomon, a lease case, the first appellate district rejected constitutional attacks on the confession of judgment provision in section 50(3) of the Illinois Civil Practice Act. In both cases, decided the same day, the court concluded that the United States Supreme Court’s decisions in Overmyer and Swarb, as well as the Illinois Supreme Court’s decision in Keisman, established that the confession of judgment statute under attack was not per se unconstitutional. In each case, the court felt that the Illinois statutory provisions for opening or vacating judgments by confession afforded adequate opportunity for considering a debtor’s claims and adequately protected a judgment debtor’s property interest.

In Irmco Hotels, the court further rejected the appellant’s claim that the mere signing of the document did not amount to a prima facie waiver of the


116. Defendant Johnson, the assignee of the lease in question, presented a second issue of whether a judgment entered upon a confession of judgment is void as against persons who did not execute the lease. The court refused to decide the issue for failure to raise same at the trial court. However, Illinois law is well settled that a judgment may not be confessed against one who did not sign the warrant of attorney. Wolf v. Gaines, 33 Ill. App. 2d 428, 179 N.E.2d 466 (1st Dist. 1961); Liberty Nat’l Bank v. Vance, 3 Ill. App. 2d 1, 120 N.E.2d 349 (1st Dist. 1954); Doss v. Evans, 270 Ill. App. 55 (3d Dist. 1933). See also 5 A.L.R.3d 426 (1966).


118. 27 Ill. App. 3d 421, 326 N.E.2d 518 (1st Dist. 1975).

119. 27 Ill. App. 3d 225, 326 N.E.2d 542 (1st Dist. 1975).
right to notice and hearing before judgment.\textsuperscript{120} Incredibly, the court found that "the defendant’s argument for a presumption against waiver — so that a confession of judgment pursuant to contractual authorization cannot stand — is beyond the scope of existing precedent."\textsuperscript{121} In effect, the court established the rule that waivers of constitutional rights are presumed valid and that it is the defendant’s duty to plead and prove that his waiver was involuntary and unknowing.\textsuperscript{122} This precedent cannot be rationalized within the framework of existing constitutional law.

To further compound matters for judgment debtors and signators of instruments containing confession of judgment clauses, the Star Finance court stated that there was "no authority for a requirement that a judicial inquiry be made to determine the voluntariness of waiver before judgment."\textsuperscript{123} These decisions cannot be squared with existing constitutional precedent or with the overwhelming disfavor of cognovits in a majority of states. They are weakened further by a rational, realistic observation of the widespread, indiscriminate, and abusive practices associated with cognovit/confession of judgment provisions.

Finally, the fifth appellate district followed D.H. Overmyer Co. v. Frick and stated that cognovit clauses are not \textit{per se} unconstitutional, but rather they require judicial scrutiny only when the cognovit note is "the product of a contract of adhesion, or [when] a great inequality of bargaining power exist[s] between the parties, or [when] the debtor receive[s] nothing for the cognovit provision."\textsuperscript{124} Because none of these factors was present, and defendant was a corporation, the court found the waiver to be valid.

However, as discussed earlier, the case of Personal Finance Co. v. Meredith\textsuperscript{125} establishes solid ground for challenging a confession of judgment clause as an unconscionable contract term. Scrutinizing a retail installment contract containing a cognovit clause, the appellate court for the fifth district asserted that:

> Courts will not permit printed, non-negotiated terms in a seller’s contract to waive the buyer’s rights and eviscerate the negotiated terms of the transaction, unless the buyer is aware of the terms. Viewed in this light, unconscionability is merely the standard to determine the actual bargain of the parties, of their “agreement.” Furthermore, the language of a contract

\textsuperscript{120} Id. at 229, 326 N.E.2d at 545.

\textsuperscript{121} Id. It is difficult to understand how the court missed the United States Supreme Court’s strong presumptions against waivers in Overmyer, Osmond, and Swarb. See note 51 supra.

\textsuperscript{122} The court went on to conclude that appellant had not demonstrated that his waiver was not effectively executed. Therefore, the trial court’s denial of his motion to vacate was affirmed. Irmo Hotels Corp. v. Solomon, 27 Ill. App. 3d 225, 229, 326 N.E.2d 542, 545 (1st Dist. 1975).

\textsuperscript{123} Star Finance Corp. v. McGee, 27 Ill. App. 3d 421, 425, 326 N.E.2d 518, 522 (1st Dist. 1975). The court remanded for further consideration the question of whether the contract was one of adhesion since the record was inconclusive on this point. \textit{Id.} at 426, 326 N.E.2d at 522.


\textsuperscript{125} 39 Ill. App. 3d 695, 350 N.E.2d 781 (5th Dist. 1976).
is not controlling as to the parties' "agreement." Other circumstances . . .
are also relevant to the inquiry of the parties' bargain in fact. We believe
the relevance of these considerations expresses a legislative policy in favor
of courts' determining the actual agreement between the parties and
against enforcing printed contract terms in a mechanical fashion.126

The court analogized the waiver of defense clause in this case to a dis-
claimer of liability clause127 and a confession of judgment clause in order to
indicate their usefulness as well as their potential for abuse. The close
scrutiny of waivers of fundamental rights and cautious concern for contrac-
tual fairness displayed by the Personal Finance court provide guidelines for a
reasonable and enlightened approach to be employed by district courts prior
to entering judgments by confession.

Construed most narrowly, Illinois precedent provides little aid to persons
seeking to challenge confession of judgment provisions in form residential
leases. The lack of judicial concern for the oppressive results and abusive
practices associated with the cognovit clause is evident in the Illinois deci-
sions. Only Danaher and Personal Finance offer clear guidelines for judicial
analysis of waivers of fundamental rights under constitutional or contract
concepts. Illinois' singular position is weakened by the long line of Supreme
Court decisions rejecting the validity of waivers of fundamental rights, favor-
ing prejudgment hearings, and favoring close judicial scrutiny of potentially
abusive contract clauses. Illinois legislative enactments disfavor waivers of
rights and exclusionary provisions in many consumer transactions.128

Hence, it is necessary that Illinois lawyers and judges inform themselves of
the authorities and policy considerations that support challenges to the con-
fession of judgment clauses.

The Future Course of Illinois Law

The time has arrived for the judiciary and legislature to end the use of the
confession of judgment clause in form residential leases. The fact that a ten-
ant, by merely signing a form lease, can waive the most fundamental consti-
tutional rights of notice and opportunity to be heard, should be soundly
condemned by the court. Judicial and legislative resistance to invalidating
the confession of judgment clause in Illinois residential leases cannot ration-
ally be supported.

In his lectures at Yale Law School in 1923, Mr. Justice Cardozo discussed
the creative activity of the courts as both normal and appropriate:

A rule which in its origin was the creation of the courts themselves, and
was supposed in the making to express the mores of the day, may be

126. Id. at 702, 350 N.E.2d at 789 (citations omitted). See also Hume v. United States, 132
U.S. 406 (1889); Lear v. Chouteau, 23 Ill. 37 (1859).
127. ILL. REV. STAT. ch. 80, § 91 (1977), declares exculpatory clauses exempting lessors from
negligence liability in residential leases void as against public policy. See also O'Callaghan v.
abrogated by courts when the mores have so changed that perpetuation of
the rule would do violence to the social conscience . . . This is not usur-
pation. It is not even innovation. It is the reservation for ourselves of the
same power of creation that built up the common law through its exercise
by the judges of the past.129

Illinois' judicial reluctance to invalidate the confession of judgment/cognovit
clause in modern landlord-tenant contracts appears to be based upon pro-
tecting landlord interests and upon a pointed deference to legislative resolu-
tion of the problem.130 Neither rationale has a solid foundation. Further,
Illinois statutes provide landlords with an armada of alternate remedies: ac-
tion for forcible entry and detainer;131 suit for recovery of rent and other
damages;132 lease termination;133 suit for ejectment and claim for rent;134
and even distress for rent, permitting the landlord to seize personal property
of the tenant.135 The availability of these remedies is adequate to protect
the landlord's legitimate interests. These alternatives are both speedy and
effective. The additional convenience for landlords in obtaining a judgment
without notice is unwarranted in light of the fundamental importance in our
society of a person's right to notice and hearing prior to the deprivation of a
property interest.136 An exhaustive search of the literature does not reveal
a single discussion on the plight of the landlords in the states which ban or
limit the use of confessions of judgment. Because the cognovit is a creature
of common law, Illinois judges need only follow the guidance of Mr. Justice
Cardozo, other legal scholars,137 and the Supreme Court to eliminate the
gross inequities represented by the continued recognition of judgments en-
tered by confession, especially in consumer and landlord-tenant contracts.138

130. The only limitation on the creditor in the Illinois statute governing confessions of judg-
ment is a procedural one concerning where the judgment can be entered. One commentator
noted: "Despite the [Illinois] courts' avowed restrictive view of confession clauses, the debtor is
in an unenviable position when the creditor applies to have a confessed judgment entered." Confessions, supra note 2, at 144.
Also, the Supreme Court and the Illinois courts have opted for a legislative resolution of the problems. In Swarb v. Lennox, 405 U.S. 191, 202 (1972), the Supreme Court stated that "problems of this kind are peculiarly appropriate grist for the legislative mill." The second appellate district in Illinois noted that the concerns of debtors "would be more properly directed to the Illinois legislature rather than to this court." Ives v. May, 5 Ill. App. 3d 193, 196, 282 N.E.2d 193, 195 (2d Dist. 1972). See Confessions, supra note 2, at 157-58.
131. ILL. REV. STAT. ch. 57, § 1 et seq. (1977).
132. ILL. REV. STAT. ch. 80, § 1 (1977).
133. Id. §§ 5-9.
134. Id. § 8.
135. Id. §§ 16-35.
137. See note 13 supra.
138. See generally Berman, The Duty of Repair and Restoration of Leased Premises in Il-
The Illinois judiciary has shown a progressive attitude in its recognition of an implied warranty of habitability in residential leases. Even prior to Spring, the first appellate district held a lease invalid and unenforceable because it was in violation of statutory law passed for the protection of the public. The Spring decision established breach of the implied warranty of habitability as a valid defense to actions for rent and possession. As such, it was based on the sound public policy of promoting decent living conditions for apartment dwellers. Also, the implied warranty has been held to apply to the purchase of new homes in Illinois. In fact, Illinois courts have gone so far as to recognize the Spring doctrine as the basis for a complaint against the landlord rather than merely an affirmative defense. Distinguishing between the policies favoring the implied warranty of habitability in residential leases, on the one hand, and commercial leases, on the other, Illinois courts have refused to apply the doctrine in a commercial lease context. The ability of commercial interests to possess a measure of equal bargaining power, to possess some measure of freedom of contract and to acquire legal counsel for representation in their contractual dealings account for the courts’ disparate treatment. In Overmyer and Keisman, the courts recognized this distinction in the context of confession of judgment clauses and the effectiveness of waivers of constitutional rights. These decisions, however, strongly support the presumption against waivers and urge procedures which provide for a determination of waiver prior to the entry of a judgment in the noncommercial lease context. Close scrutiny of this drastic contract term is well within the courts’ powers and certainly voidable with a minimum of progressive judicial attention.

139. See Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 206 (1972); Comment, The Landlord-Tenant Relationship Breaks into the Twentieth Century: The Implied Warranty of Habitability, 30 Baylor L. Rev. 513 (1978).

140. Longenecker v. Hardin, 130 Ill. App. 2d 468, 264 N.E.2d 878 (1st Dist. 1970). In Longenecker, the landlord confessed judgment against a tenant after he had been evicted for nonpayment of rent. The tenant sought to open the judgment by asserting the defense that the leased premises violated provisions of the Housing Code. Citing provisions of the Chicago Municipal Code that prohibit the leasing of premises which do not comply with the Housing Code or are not safe, clean, sanitary, and fit for human occupancy, the appellate court held that the tenant had asserted a valid defense. Id. at 474-77, 264 N.E.2d at 881-83.


Numerous states have legislatively banned or severely limited use of the confession of judgment clause in a variety of consumer contracts and residential leases. Also, thirty-eight states and the District of Columbia have adopted, by case law or statute, the implied warranty of habitability in residential leases. The states with legislative enactments pattern their new laws after the Uniform Residential Landlord and Tenant Act, which was drafted and approved by the National Conference of Commissioners on Uniform State Laws in 1972. Conspicuous in the Uniform Act is the following:

Prohibited Provisions in Rental Agreements
(a) A rental agreement may not provide that the tenant:
   (1) agrees to waive or forgo rights or remedies under this act;
   (2) authorizes any person to confess judgment on a claim arising out of the rental agreement;
   (3) agrees to pay the landlord's attorney's fees; or
   (4) agrees to the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability or the costs connected therewith.

Inclusion of such terms in a rental agreement would make the lease term unenforceable under the Act.

In contrast, the Illinois General Assembly has continually frustrated attempts to pass a Uniform Residential Landlord Tenant Act. In 1974, the Chicago Real Estate Board adopted its Form 15 Residential Lease, which was written by the Chicago Council of Lawyers. The new form replaced the 1967 and 1973 versions (Forms 12 and 12R). The goals the new lease seeks to promote are:

(1) To accurately inform both parties of their rights and responsibilities;
(2) To formulate new solutions where old solutions were unsatisfactory, cumbersome or nonexistent;
(3) To undermine as little as possible existing and needed rights and remedies;

146. See Uniform Residential Landlord and Tenant Act of 1972, UNIFORM LAWS ANN. (West 1978) [hereinafter cited as URLTA].
147. URLTA, supra note 146, at § 1.403. The Commissioners' Comment recognizes that rental agreements are often executed on forms provided by landlords and some contain adhesion clauses: "This reflects the view of the great majority of states in prohibiting authorization to confess judgment." Id. The comment cites as further support § 2.415 of the Uniform Consumer Credit Code which prohibits confession of judgment in consumer credit or consumer lease claims.
(4) To produce a document which will not in itself be detrimental to the
ability of private enterprise to supply rental housing. 149

Reflecting upon the rapid deterioration of the landlord-tenant relationship,
the nation’s rental housing inventory, and the dynamically interacting social
and economic forces at work, the Real Estate Board conspicuously deleted
the cognovit provision from its Form 15 lease. However, the new lease has
met with little acceptance among Chicago Area landlords. 150 Hence, resort
to legislative and judicial action is imperative to bring about needed change.

CONCLUSION

The widespread use of the form lease is an indication of its usefulness in
serving the landlords’ legitimate interests. A form lease containing a confes-
sion of judgment clause, however, places tenants at a gross disadvantage
when a dispute arises concerning their tenancy. Only the sophisticated ten-
ant, or one who can afford an attorney, is able to forestall execution of judg-
ment and hopefully receive a hearing on the merits. Continued recognition
of this “drastic document” cannot be justified when the competing interests
of landlord and tenant are balanced in the context of modern urban society.
Merely signing a lease does not demonstrate that a tenant desires to volun-
tarily waive his rights to notice and hearing, nor that he knowingly and
intelligently waives his rights with full awareness of the consequences. As a
remedy, providing for means to open or vacate judgments obtained by confes-
sion does not provide an adequate means to protect valuable tenant rights
nor does it allow for judicial scrutiny of oppressive contract terms at a mean-
ingful time. Requiring a prejudgment hearing on the effectiveness of the
tenant’s waiver would protect his constitutional rights without seriously
damaging or impairing the landlord’s interest. Because confession of judg-
ment clauses are of common law origin, the inequities created by their use
can be resolved appropriately by judicial action. Karl Llewellyn’s insight on
the law provides guidance and wisdom:

It is society and not the courts which gives rise to, which shapes in the
first instance the emerging institution; which kicks the courts into action
. . . . In any event, if the needs press and recur, sooner or later recogni-
tion of them will work into the law. Either they will induce the courts to
break through and depart from earlier molds, or the bar will find some
way to put new wine into old bottles and to induce in the bottles that
elasticity and change of shape which, in the long run, marks all social
institutions. 151

149. Lyman, The New Chicago Real Estate Board Lease: Dispelling the Myths, 57 CHI. B.
REC. 36, 36 (1975). See also Winter, The New Chicago Real Estate Board Lease: Notable New
Features, 57 CHI. B. REC. 44 (1975).
150. Feyder, “Tenants Rights’ Lease Form: No Big Hit with Landlords, Chicago Tribune,
The courts are equipped with adequate judicial precedent at both the federal and state level, ample demonstration of legislative intent in a majority of states, and significant scholarly criticism of the confession of judgment clause to invalidate such clauses as unconstitutional, unconscionable, or the product of an adhesion contract and therefore violative of public policy. These changes are long overdue. A tenant/consumer no longer should be placed at an immediate disadvantage through the possible involuntary waiver of fundamental constitutional guarantees the moment he contracts for the vital necessities of modern life. Illinois law must be aligned with that of the majority of her sister states, and use of the confession of judgment clause must be entirely abolished in this state.