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Commercial Law -- Confession of Judgment -- Hearing Required on Voluntariness of Waiver Before Entry of Judgment -- Virgin Islands National Bank v. Tropical Ventures, Inc.

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seen how far the rule against restraints on alienation erodes this control.

CONCLUSION

As a result of *American Industrial,* a patentee may not by agreement impose territorial restraints on his sublicensees' sales if the sublicensee purchases the product from the manufacturing licensee. The district court correctly determined that section 261 did not permit these restraints. In the process, however, the court overly strained the meaning of section 261. Instead the court could have construed section 261 as inapplicable to licensees of an exclusive right.

The conjunction of the ancient rule against restraints on alienation and the exhaustion-by-sale doctrine gave rise to a limitation of section 261. From a policy viewpoint, the court's strict construction was favorable because the reward to the patentee was deemed too speculative to permit the anticompetitive agreements.

In applying the per se rule, the district court was very much influenced by *Schwinn.* However, a presumptive rule of invalidity would have been preferable, to accommodate the meritorious exceptions of some new of failing patentee firms while still sounding a general notice.

American Industrial still leaves many issues unresolved. As in *Schwinn,* problems arise as to the scope of the term "sale." As a result of these two cases, an agreement labelling the relationship an agency will be judged on the facts to see if a sale is involved. But a contract labelling a transaction as a sale will not be scrutinized to see whether the more lenient reasonability test for an agency should be applied. Furthermore, the court did not challenge the patentee's territorial control over the licensee's sales, nor did the court dwell on the patentee's degree of territorial control over his sublicensees under a "valid" agency relationship.

MARC R.K. BUNGEROTH

Commercial Law—Confession of Judgment—Hearing Required on Voluntariness of Waiver Before Entry of Judgment—*Virgin Islands National Bank v. Tropical Ventures, Inc.*[1]—Defendants, Tropical Ventures, Inc. and World Resorts, Ltd., obtained a loan from plaintiff, Virgin Islands National Bank. The loan was evidenced by a demand note and secured by a mortgage on properties in St. Croix.[2] As part of this transaction, defendants signed a power of

[1] 358 F. Supp. 1203 (D.V.I. 1973).
[2] Id. at 1205.

attorney authorizing a confession of judgment against them in event of default.[3] When the defendants defaulted on the loan the plaintiff filed suit in federal district court to recover the balance under the note and mortgage after realizing a portion of the debt from guarantees by third parties. The defendants were served with process, and after the time for filing an answer had passed, a local attorney confessed judgment on their behalf.[4] Plaintiffs subsequently requested formal entry of judgment by the clerk of court, who referred the question to the district judge.[5] Because the nature of confession judgments is at best only nominally adversary, the judge on his own motion considered the question whether cognovit procedures violate due process requirements,[6] and HELD: confession of judgment procedures are not per se constitutionally defective; however, the defendant must be afforded a full preliminary evidentiary hearing on the voluntariness of his waiver of notice before such judgment may be entered against him.[7] The district court based its holding on the reasonable implication from the Supreme Court's dicta in the cases of *D.H. Overmyer v. Frick Co.*[8] and *Fuentes v. Shevin,*[9] and on the Court's holding in *Swarb v. Lennox,*[10] which indicate that confession judgments signed by unsophisticated consumers in form contracts are constitutionally suspect because the voluntariness of their waiver of rights is doubtful.[11] The *Virgin Islands* holding thus reflects the growing disfavor which the use of confession judgments has found in the courts, and represents an effort, not undertaken in earlier cases, to develop a procedural safeguard to isolate those

[3] A confession judgment is a traditional device by which a debtor authorizes an entry of judgment against himself if the obligation set forth in the instrument containing the clause is not paid when due. D.H. Overmyer v. Frick Co., 405 U.S. 174, 176 (1972); Jones v. John Hancock Mut. Life Ins. Co., 289 F. Supp. 930, 935 (W.D. Mich. 1968). The phrases power of attorney, confession of judgment, cognovit note and cognovit clause are often used interchangeably to signify this process. Blott v. Blott, 227 Iowa 1108, 1111, 290 N.W. 74, 76 (1940).

[4] 358 F. Supp. at 1205. A confession judgment may be obtained from a designated authority before an action has been brought, but the procedure must be authorized by statute. At common law, and under federal statutes, a confession judgment may be obtained only after the action has been brought. See Fed. R. Civ. P. 3; D.H. Overmyer v. Frick Co., 405 U.S. 174, 175 (1972).

[5] Under most state statutes, the clerk is authorized to enter judgment. See, e.g., Pennsylvania Rules of Civil Procedure §§ 2950-76. Under Federal Rules, however, judgment may be entered by a clerk only after a decision by the judge. Fed. R. Civ. P. 58.

[6] 358 F. Supp. at 1206. Although the court's reasoning with respect to the cases under Fed. R. Civ. P. 59, authorizing the consideration of due process questions on a judge's own motion, may be correct, there exists a countervailing policy in the federal courts to decide only those constitutional issues presented, and only in their narrowest possible scope. See United States v. Rumely, 345 U.S. 41, 48 (1952). But see Coolidge v. New Hampshire, 403 U.S. 443, 454 (1971), quoting Boyd v. United States, 116 U.S. 616, 635 (1885). See also text at notes 71-74 infra.

[7] 358 F. Supp. at 1206.

[8] 405 U.S. 174, 188 (1972).

[9] 407 U.S. 67, 95 (1972).

[10] 405 U.S. 191, reh. denied, 405 U.S. 1049 (1972).

[11] See 358 F. Supp. at 1206.

instances in which due process requirements are violated by waiver provisions of a credit agreement.

This note will examine the hearing procedure envisioned by the *Virgin Islands* court in light of the Supreme Court's position on the waiver of procedural rights. It is submitted that with the exception of the placement of the burden of proof, the *Virgin Islands* procedure is acceptable and consistent with the Supreme Court's procedural due process requirements, and is likely to be adopted by courts facing similar challenges to confession judgments.

In its 1969 decision in *Sniadach v. Family Finance Co.*,[12] the Supreme Court signaled a change in the judicial attitude toward prejudgment remedies, holding that, absent notice and hearing prior to the garnishment of wages, Wisconsin's garnishment procedures violated fundamental principles of due process.[13] Prior to *Sniadach*, the Court had rejected constitutional attacks on prejudgment procedures because the taking of property was seen as conditional, temporary and part of an established legal proceeding,[14] and temporary deprivations were not considered to be deprivations protected by due process. As the *Sniadach* Court noted,[15] changes in the economic system had made wages the most prevalent form of "property," and their deprivation now resulted in much greater hardship.[16] The Court noted that changes in the definition of constitutionally protected property should reflect the significance of its deprivation, and concluded that "a procedure which would pass muster under a feudal regime" does not necessarily give protection to "all property in its modern forms."[17]

Because *Sniadach* had described wages as "a specialized type of property,"[18] some courts interpreted the new definition of constitutionally protected property as limited to wages alone.[19] Others viewed the holding as requiring notice and prior hearing before the

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[12] 395 U.S. 337 (1969).

[13] Id. at 342.

[14] McKay v. McInnes, 127 Me. 110, 116, 141 A. 699, 702 (1928). See, e.g., Coffin Bros. v. Bennett, 277 U.S. 29, 31 (1928); Owenby v. Morgan, 256 U.S. 94, 111-12 (1921). See generally McDonnell, *Sniadach,* The *Replevin* Cases and Self-Help Repossession—Due Process Tokenism?, 14 B.C. Ind. & Com. L. Rev. 437, 440 (1973); Recent Decisions, 35 Albany L. Rev. 370, 373 (1971).

[15] 395 U.S. at 340.

[16] What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then being hounded into giving up his pound of flesh and being fired besides.

Id., citing 14 Cong. Rec. 1832 (1968).

[17] 395 U.S. at 340.

[18] Id.

[19] See, e.g., Brunswick Corp. v. J&P, Inc., 424 F.2d 100, 105 (10th Cir. 1970); 300 W. 115th Realty Co. v. Department of Buildings, 26 N.Y.2d 538, 544, 260 N.E.2d 534, 537, 311 N.Y.S.2d 899 (1970).

taking of any property.[20] In *Fuentes v. Shevin,*[21] the Supreme Court embraced the broader interpretation of its *Sniadach* decision, extending due process requirements to the taking of any property regardless of its importance or necessity.[22] The Court held that the replevin statutes of Florida and Pennsylvania worked a deprivation of property without due process because the appellants had not been provided a prior hearing on the validity of the creditor's claim.[23] The Court rejected the claim that appellants had waived their due process rights by signing conditional sales contracts which provided that the property could be repossessed on default. It noted that the contractual provision adverted to by the creditor did not, on its face, amount to a waiver.[24] For that reason the Court did not comment on the "involuntariness or unintelligence" of waiver,[25] but added that had a waiver been negotiated, the recognition that the parties were far from equal in bargaining power, that the contract was a printed form, and that no bargaining over contractual terms had occurred, would call for closer judicial scrutiny of such a waiver.[26] Both statutes permitted an opportunity for a hearing *after* the disputed property had already been seized, but the Court stressed that the absence of judicial supervision "at a meaningful time" rendered such procedures constitutionally deficient:[27]

> [A]s a matter of constitutional principle, it [a bond requirement] is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.[28]

The nature and form of this prior hearing and the precise issues to be resolved were left unspecified by the Court. It did require that the hearing provide "a real test," but the potential variations of the form of the hearing were left to legislative prerogative.[29]

The burden of deprivation of property in its modern form, through garnishment, replevin, confession judgments and other prejudgment procedures, is borne primarily by low income consumers

[20] See, e.g., Larson v. Fetherston, 44 Wis. 2d 712, 718, 172 N.W.2d 20, 23 (1969).
[21] 407 U.S. 67 (1972).
[22] Id. at 89-90. See also The Supreme Court, 1971 Term, 86 Harv. L. Rev. 1, 85 (1972).
[23] 407 U.S. at 96.
[24] Id. at 95.
[25] Id.
[26] Id. at 94-96, citing D.H. Overmyer v. Frick Co., 405 U.S. 174, 188 (1972). See text at notes 31-34 infra.
[27] 407 U.S. at 80-81.
[28] Id. at 83.
[29] Id. at 96-97.

who must rely on the extension of credit and its attendant procedural strictures to make purchases.[30] However, the question of the constitutionality of confession judgments has yet to reach the Supreme Court in circumstances involving low income consumers. *D.H. Overmyer v. Frick Co.*[31] dealt with a default by a corporation on a contract for equipment manufactured by another corporation. The contract contained a cognovit clause allowing the entry of judgment without notice or hearing in exchange for release of mechanic's liens and reduction of interest rates.[32] The Court held that cognovit provisions are not per se unconstitutional and that in this case defendant, a commercial enterprise, had knowingly, intelligently and voluntarily waived its due process rights in legitimate bargaining with advice of counsel.[33] However, the Court specifically added the dictum that its holding was not controlling precedent for the facts of other cases; therefore, where the contract is one of adhesion, where there is great disparity in bargaining power, or where the debtor receives no additional consideration for the cognovit provision, "other legal consequences may ensue."[34]

Though the Court upheld the specific waiver in *Overmyer,* its decision appears consistent with the due process requirements defined in *Sniadach* and *Fuentes*. *Sniadach* and *Fuentes* embraced the proposition that defaulting parties may not constitutionally be deprived of property without a hearing on the merits of their contractual dispute, and *Fuentes* implied that waiver of such a right might be constitutionally suspect.[35] *Overmyer* makes explicit the theoretical propriety of a waiver—through confession judgments—of the right to contest the merits of a contractual dispute, and supports the *Fuentes* implication that circumstances may prove the waiver involuntary and therefore constitutionally deficient. Because the facts in *Overmyer* did not disclose such circumstances, the Court did not explain the nature of the legal procedures for testing the validity of a particular confession judgment—such as a prior hearing on the voluntariness of waiver—but merely indicated that some "legal consequences" would ensue. It is the nature of such consequences which constitutes the remaining major question in assessing the constitutional validity of confession judgments. This question was reached but not resolved in the case of *Swarb v. Lennox.*[36]

Swarb involved a class action on behalf of all Pennsylvania residents who had signed contracts authorizing confessions of

[30] Swarb v. Lennox, 405 U.S. 191, 198 (1972), citing D. Caplovitz, Consumers in Trouble (1968).

[31] 405 U.S. 174 (1972).

[32] Id. at 180. The cognovit clause was negotiated after two defaults by Overmyer on the equipment contract. Id.

[33] Id. at 186-87. The Court used the strict criminal standard for waiver tentatively, id. at 185-86, but it has yet to be challenged. See Fuentes v. Shevin, 407 U.S. 67, 94 (1972).

[34] 405 U.S. at 188.

[35] See 407 U.S. at 95.

[36] 405 U.S. 191 (1972).

judgment,[37] and challenged the constitutionality of Pennsylvania's confession of judgment procedures.[38] Relying on a study[39] which revealed that persons with incomes over $10,000 accounted for only four percent of the debtors, the three-judge federal district court held that the action could not be maintained as a class action on behalf of individuals with incomes over $10,000. But relying on testimony by the debtors that they were unaware of the meaning of the cognivit provision,[40] the district court found that as to the claimants with incomes less than $10,000 there was no intentional waiver of known rights. The procedure, therefore, violated due process of law, presumably for its failure to provide an opportunity for a hearing on the voluntariness of the waiver.[41]

The plaintiffs appealed directly to the Supreme Court, claiming that the district court had erred in confining relief to only certain members of their class and asserting that the Pennsylvania statutes should have been declared unconstitutional on their face because any waiver of due process rights is itself violative of the Constitution.[42] Because the Court in *Overmyer* had explicitly rejected this latter argument[43] the Court refused to find the statutes unconstitutional per se. In affirming the district court's decision, the Court did not reach the issue of whether the relief imposed by the district court—a prior hearing on the voluntariness of the waiver —should be extended to debtors with incomes over $10,000.[44] Nor did the Court assess the constitutional propriety of such relief for debtors making less than $10,000, stating as its reason the fact that defendants had taken no cross appeal.[45]

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[37] 314 F. Supp. 1091, 1098 (E.D. Pa. 1970), aff'd, 405 U.S. 191 (1972).

[38] The Pennsylvania procedure permitted a debtor to sign an agreement containing a clause authorizing the prothonotary, court clerk or any attorney to appear in any court, at any time, to confess judgment against the debtor for any unpaid portion of the debt along with various fees and charges. 314 F. Supp. at 1094.

[39] Id. at 1097. D. Caplovitz, Consumers in Trouble (1968) is a survey of debtors in default in Philadelphia and other cities, taken from samplings of the execution books at the sheriff's office in Philadelphia County. Of 245 debtors, the majority had semi-skilled or unskilled occupations. Fifty-six percent had incomes of less than $6,000, 18 percent of less than $3,000. Four percent had incomes between $8,000 and $10,000. Thirty percent had graduated from high school, and of 236 debtors who were aware of signing a contract, only 14 percent knew that the contract contained a confession of judgment clause. See Note, Swarb v. Lennox: The Viability of Repeated Judicial Attacks on Confession Judgments in Pennsylvania, 34 U. Pitt. L. Rev. 103 (1972); Note, Confession of Judgment in Pennsylvania, 75 Dick. L. Rev. 169 (1970).

[40] 314 F. Supp. at 1099.

[41] Id. at 1100. See The Supreme Court, 1971 Term, 86 Harv. L. Rev. 1, 93 & n.51 (1972).

[42] 405 U.S. at 200.

[43] 405 U.S. at 185. The case cited by the Court for the proposition that any right may be waived, National Equip. Rental v. Szukent, 375 U.S. 311 (1964), was a 5-4 decision with a strenuous dissent on the waiver issue by Justice Black. See also Brief for Appellant at 27, Brief of California Rural Legal Assistance as Amici Curiae at 9, Swarb v. Lennox, 405 U.S. 191 (1972).

[44] 405 U.S. at 202.

[45] Id. at 201. Justice Douglas dissented in part, arguing that since briefs were filed by

The effect of this formal affirmance is to sanction the requirement of a hearing on the voluntariness of waiver, at least for debtors with incomes less than $10,000. This requirement seems consistent with the Court's reasoning in *Fuentes* and *Overmyer,* and with the Court's gratuitous comment in *Swarb* that such factors as contracts of adhesion, disparity of bargaining power, and the absence of consideration for the cognovit clause have "possible pertinency for the participants in the Pennsylvania system."[46] For confession debtors with incomes over $10,000, however, due process is apparently satisfied by the hearing required if the defendant brings an action to open the judgment.[47] And the Court's decision also leaves unspecified the nature and form of those hearings which are required to determine the validity of the waiver.

Given the logical conjunction of *Fuentes, Overmyer* and *Swarb,* the court in *Virgin Islands* took the next step by requiring an evidentiary hearing in *all* cases, regardless of the debtor's income or position, to determine whether the waiver of the due process rights to notice and hearing on the merits of a contract claim is voluntary before a confession judgment may be entered.[48] Though *Virgin Islands,* like *Overmyer,* involved sophisticated businessmen who had knowingly agreed to cognovit procedures, the district court declined merely to enter a judgment limited to the facts at issue.[49] The court noted that to do so "would create an unwelcome precedent for more marginal cases,"[50] and on its own motion raised the question whether confession judgment procedures generally comport with due process requirements.[51]

Despite its demonstrated concern for low income cognovit debtors,[52] the district court imposed a condition upon the operation of the required hearing which could mitigate its effectiveness as a consumer protection device. While other confession judgment cases[53] requiring a hearing on the waiver issue, including one in the same circuit,[54] imposed the burden of proving the voluntariness of waiver on the creditor, the *Virgin Islands* court reasoned that a debtor's signature on a waiver document was sufficient prima facie evidence of waiver to place the burden of proof on the debtor,[55]

amici explicating the arguments against right to a hearing, and since oral argument was heard on all the issues, the Court should have reached the merits. Id. at 203.

[46] Id. at 201.

[47] 314 F. Supp. at 1094-95.

[48] 358 F. Supp. at 1206.

[49] Id. at 1207.

[50] Id.

[51] See text at note 6 supra.

[52] 358 F. Supp. at 1207.

[53] Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972); Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971), vacated in light of *Swarb,* 405 U.S. 971, reconsidered on remand, 359 F. Supp. 124 (D. Del. 1972). See also Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); LaPrease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970).

[54] Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), aff'd, 405 U.S. 191 (1972).

[55] 358 F. Supp. at 1207.

comparing the assertion of involuntary waiver to any affirmative defense presumed untrue unless demonstrated.[56] But any analogy to affirmative defenses would appear to be defeated by the longstanding judicial presumption against the waiver of constitutional rights, which accords such rights fundamental status and therefore requires proof of their voluntary surrender.[57]

From an evidentiary perspective, the burden of proof would be more properly placed on the creditor-claimant. The essence of a valid waiver is that it be knowing, intelligent and voluntary.[58] To consider the mere signature of a consumer on a form contract to constitute sufficient evidence of a voluntary waiver is to ignore apparent commercial reality.[59] As a general evidentiary proposition, the burden of proof is placed upon the proponent of a claim.[60] In most creditor-debtor situations, since it is usually the creditor who brings the action, the burdens of proof are his. Shifting of the burden of proof on evidentiary grounds is generally the result of policies requiring the parties to produce evidence to which they have easy access, or which may be presented at less cost to one party than another.[61] In cognovit proceedings, the cost of proving a claim arguably bears more heavily on a debtor than a creditor. But, in addition, the debtor would be required to prove a negative—that he did not waive his rights—which is arguably more difficult than proving an affirmative proposition. In *Swarb,* one of the attacks on the confession judgment procedure accepted by the district court was that the postjudgment hearings provided by Pennsylvania law placed an extraordinary burden of proof on the debtor,[62] and the Supreme Court on occasion has held that action which results in a shift in the burden of proof itself may constitute a violation of due

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[56] Id. See generally J. Maguire, J. Weinstein, J. Chadbourn & J. Mansfield, Cases and Materials on Evidence 1008-10 (6th ed. 1973) [hereinafter cited as J. Maguire].

[57] See, e.g., Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937) ("We do not presume acquiesence in the loss of fundamental rights."); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) ("[C]ourts indulge every reasonable presumption against waiver."). See also Goldberg v. Kelley, 397 U.S. 254 (1970); Miranda v. Arizona, 384 U.S. 436 (1966); Singer v. United States, 380 U.S. 24 (1964); Glasser v. United States, 315 U.S. 60 (1942).

[58] See, e.g., Brady v. United States, 397 U.S. 742, 748 (1970); Miranda v. Arizona, 384 U.S. 436, 444 (1966); Fay v. Noia, 372 U.S. 391, 439 (1963); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[59] White, The Abolition of Self-Help Repossession: The Poor Pay Even More, 1973 Wis. L. Rev. 503, 509.

[60] J. Maguire, supra note 56, at 1008-10.

[61] Id. at 1020-21.

[62] 314 F. Supp. at 1094. The Court noted:

> The most striking feature of this latter petition (to open judgment) is that the burden of proof is placed upon the debtor . . . who must convince the court of the need for equitable relief. The placement of this burden upon the debtor is in direct contrast to burdens in a normal prejudgment creditor-debtor action.

Id. See also D.H. Overmyer v. Frick Co., 405 U.S. 174, 190 & n.* (1972) (Douglas, J., concurring).

process.[63] It seems anomalous, given the court's propensity to protect "marginal cases" and low income consumers, to conceive a plan to vindicate due process rights which at the same time makes it very difficult to establish that such rights have been violated.[64] Another problem, perhaps more immediately significant, is the difficulty the burden of proof allocation creates for future attacks on confession judgments in other jurisdictions mounted to obtain judicial consumer protection in the form of hearings on the waiver issue.[65] The scheme cannot be cited as one which protects consumers if its weight of proof makes its protection illusory.

Apart from its placement of the burden of proof, the *Virgin Islands* requirement of a hearing on the voluntariness of waiver appears to represent the procedure most likely to be adopted in cases in which confession judgments are challenged. The *Swarb* Court adopted a limited version, available to persons with incomes of less than $10,000. A Delaware district court adopted it in full, in *Osmond v. Spence,*[66] imposing the burden of proof on the creditor. A district court in Illinois adopted it in cases in which garnishments are invoked to satisfy confession judgments also imposing the burden of proof on the creditor,[67] and the debtors in the most recent attack on confession judgments—*Tunheim v. Bowman*[68]—are seeking similar relief.

The major deficiency of a hearing procedure is its cost, in time and money. It places increasing burdens on already congested courts, and results in increased expenses to the creditor and debtor. The *Virgin Islands* court meets the former objection by observing that in practice few hearings will take place in cases involving corporate defendants, who could rarely argue plausibly that their corporate counsel waived unknowingly.[69] In marginal cases in which contracting parties are individuals and small businessmen acting on advice of counsel, the issue might be resolved on the basis of affidavits alone.[70] Cases in which a full hearing would be necessary would be limited to those involving low income consumers

[63] See Armstrong v. Manzo, 380 U.S. 545 (1965); Speiser v. Randall, 357 U.S. 513 (1958); Western & Atl. R.R. v. Henderson, 279 U.S. 639 (1929).

[64] The court suggested that the burden of proving voluntariness of waiver will not be difficult for debtors since merely by alleging a lack of understanding, they will satisfy the burden. The court also suggested that creditors protect themselves from such assertions by placing the waiver in bold face type, and in a place so conspicuous that no defendant could claim ignorance of it. 358 F. Supp. 1207 (1973). But see White, supra note 59, at 509-10 n.25, where it is suggested that since few people read what they sign, even a conspicuous notice of waiver might be inadequate.

[65] Letter from Thomas Leen, Clark County Nevada Legal Services Program, to Donald Foster, National Consumer Law Center, Sept. 20, 1973.

[66] 327 F. Supp. 1349 (D. Del. 1971), vacated in light of *Swarb,* 405 U.S. 971, reconsidered on remand, 359 F. Supp. 124 (D. Del. 1972).

[67] Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972).

[68] Civil No. LV2000 (D. Nev., filed March 13, 1973).

[69] 358 F. Supp. at 1206-07.

[70] Id.

signing form contracts for installment payments or small loans —precisely the debtors a hearing is designed to protect.

Even if the court's reasoning is correct, however, it might be argued that the limited number of hearings actually needed would significantly burden the judicial system. However, the alternatives to a hearing, which would seem less burdensome to the courts, reveal defects that outweigh their savings in cost. One less costly alternative, suggested by the *Virgin Islands* court's approach to the case, is to leave determinations of the fairness of the contractual relationship to the judge, allowing him to call sua sponte for whatever procedures are necessary to protect the parties' due process rights.[71] At present, however, most state statutes allow requests for judgment under cognovit clauses to go to the clerk of the court, and to be entered without judicial supervision.[72] Unless the Supreme Court were to forbid such procedures as violations of due process,[73] which it evidenced no predilection to do in either *Swarb* or *Overmyer,* this sua sponte alternative would be available only in federal courts and in those states whose rules of procedure are similar to the Federal Rules.[74] Furthermore, since the adversary nature of confession judgments is minimal, it might not be clear from the request for judgment whether or not a waiver was voluntarily signed, requiring a hearing to assess the facts. Of course, the judge would be empowered to call a hearing in such cases, but the number of hearings so initiated would arguably be no fewer than those initiated by debtors who under appropriate state statutes may move to vacate the judgment. Thus, the *cost* to the judicial system would be no less. Finally, it may be argued that a procedure is either required for due process or it is not. To allow judicial discretion in deciding whether or not a specific procedure is called for in a given circumstance may undermine the objective of the due process requirement—to prevent arbitrary, capricious and unfair deprivations of liberty or property.[75]

A second alternative involving fewer burdens on judicial resources than the availability of a hearing as a matter of right is to require cognovit debtors themselves to initiate attacks on cognovit clauses on constitutional or contract grounds such as unconscionability. Section 2-302 of the Uniform Commercial Code allows a court to find a contract, or any part of it, unconscionable as a matter of law after a consideration of evidence defining the commercial

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[71] See text at note 6 supra.

[72] See notes 4 and 5 supra.

[73] See, e.g., 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 court found that since the confession judgment was entered by a court clerk whose functions were ministerial, its entry was without certain minimums of judicial process and therefore not entitled to enforcement under the full faith and credit clause. See Countryman, The Bill of Rights and the Bill Collector, 15 Ariz. L. Rev. 521, 558 (1973).

[74] See note 5 supra.

[75] See Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

setting, purpose and effect of the relevant contractual provision. In enforcing the unconscionability doctrine, the courts have taken into account such factors as gross price differentials, inequality of bargaining power, and duress.[76] The problem with arguments of unconscionability and other affirmative challenges is that they may only be asserted at a hearing on the merits of an action, where the contract itself is being litigated, and low income debtors often cannot afford to bring such action. In the case of confession judgments, the number of hearings on the merits is arguably small since the debtor must usually petition the court to open judgment, succeed on that motion, and then proceed to trial on the merits. In light of the Supreme Court's refusal to find confession judgments unconstitutional per se, it is unlikely that a court would find a cognovit clause unconscionable per se,[77] and even in those cases in which the clause is found unconscionable, the holding would likely be based on a recognition that the waiver was involuntary. Yet such a conclusion involves precisely the same factual scrutiny called for in the prior hearing required in *Virgin Islands*.

The second aspect of the cost problem of a required hearing is the cost in expenses to both the creditor and the debtor. Proponents of the use of confession judgments and other prejudgment remedies argue that a hearing requirement will generally harm the low income consumers it is designed to protect, by forcing businesses to abandon as costly, or no longer useful, the practice of utilizing cognovit provisions, and to raise the price of credit as a consequence.[78] But it has been demonstrated that despite the diminishing availability of prejudgment procedures, the ease and cost of obtaining credit has not been affected, which indicates that the abandonment of cognovit provisions will not injure low income consumers.[79]

If the due process hearing requirement prescribed in *Virgin Islands* will not result in the abolition of cognovit proceedings, the administration of such procedures may nonetheless cost the consumer more than prejudgment procedures without the added due process requirement. It has been suggested that courts make a more critical evaluation of these costs before imposing a due process requirement which might hurt consumers more than help.[80] While the *Virgin Islands* court considered the cost problem in terms of time imposed on the court, it did not consider the cost to the business

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[76] See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (1965); Jones v. Star Credit Corp., 59 Misc. 2d 189, 289 N.Y.S.2d 264 (1969).

[77] See text at notes 31-35 supra.

[78] See White, supra note 59, at 511; Note, 51 N.C.L. Rev. 554 (1973).

[79] See Hoekje, Confession Judgments under Warrant of Attorney, 6 Akron L. Rev. 63 (1973); Hopson, Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit, 29 U. Chi. L. Rev. 111 (1961); Note, 48 Notre Dame Law. 733 (1973); Note, Confession of Judgment in Pennsylvania, 75 Dick. L. Rev. 169 (1970).

[80] See generally White, supra note 59, at 503.

creditor of entry fee, service fees, lawyer's fees, of arranging for witnesses for the hearing, of sheriff's services, and the costs of uncollected debts. Arguably, such costs will be passed on to the debtor in one form or another. It is not suggested that a decision requiring due process should be based entirely on its costs; indeed, the implication that due process should be denied because its costs are too great is a dangerous one. But in terms of evaluating a hearing procedure as a consumer protection device, its costs to consumers must arguably be a factor.[81]

If low income consumers are confronted with the prospect of prohibitive due process costs on the one hand, and due process deprivations on the other, it may be argued that confession judgment procedures should be abolished. The Supreme Court has explicitly repudiated that conclusion,[82] but federal and state legislatures are empowered to reach such a conclusion as a matter of policy. Both courts[83] and commentators[84] have noted the inherent constraints against reform of confession judgments under the broad due process rubric. And legislatures appear to be particularly appropriate bodies to gather the facts necessary to weigh the costs against the benefits of various cognovit procedures, an ability which apparently led the Supreme Court in *Swarb* to call such questions "grist for the legislative mill."[85] As of 1970, eighteen states[86] and the Uniform Consumer Credit Code[87] had forbidden the use of confession judgments entirely. Twenty-nine states[88] limited their use in some way, leaving only three states[89] which still generally authorized cognovit proceedings. In the states where limitations are imposed, the restrictions are generally in the area of retail installment contracts, small loans, motor vehicle sales, home repair contracts and other commercial transactions in which consumers are in the weakest bargaining position.[90] New York, for example, allows confession judgments in general, but makes it illegal to confess a

[81] The following questions might be considered in assessing the cost of confession judgments: (1) How effective are confession judgments in procuring payment of debt? (2) What percentage of all secured loans does a creditor obtain through the use of confession judgments? (3) To the extent that there are added costs for hearings, who will bear them? (4) If there is a hearing imposed, will creditors use confession judgments less? (5) Among debtors in default, how many have the defense of involuntary waiver? (6) How many defaulting debtors would appear at the hearing? These factors were suggested by Professor White in the context of his discussion of self-help repossession. See White, supra note 59, at 511.

[82] D.H. Overmyer v. Frick Co., 405 U.S. 174 (1972). See text at notes 31-35 supra.

[83] See Fuentes v. Shevin, 407 U.S. 67, 96-97 (1972); Swarb v. Lennox, 405 U.S. 191, 202 (1972).

[84] See Hoekje, supra note 79, at 73; Note, Swarb v. Lennox: The Viability of Repeated Judicial Attacks on Confession Judgments in Pennsylvania, 34 U. Pitt. L. Rev. 103, 105 (1972).

[85] 405 U.S. at 202.

[86] See Brief for Plaintiffs at 48, Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970).

[87] Uniform Consumer Credit Code § 2.415.

[88] See Brief for Plaintiffs at 48, Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970).

[89] See id.

[90] See id. at 51.

judgment before a default has taken place under installment contracts of under $1500.[91] The fact that so many states have abolished confession judgments or restricted their use in consumer transactions without causing significant increases in the cost of credit[92] indicates that the commercial advantages of their use may be minimal. But without state or federal legislative action, attacks in the courts on existing procedures can only result in piecemeal reform. Since the *Virgin Islands* decision has potential value as precedent in litigation involving confession judgments in other federal jurisdictions, its impact may exceed the geographic limitations of the island district in which it was made. But until the Supreme Court resolves the extant procedural questions[93] involving the nature and form of hearings concerning waiver, judicial reform will remain the product of disparate case-by-case advances. By its reluctance in *Swarb* to address these questions, the Court has signaled its intention that the prospects for the general reevaluation of confession judgment procedures remain in the legislative province.

JEAN S. PERWIN

Copyright Law—Exclusivity of Constitutional Grant of Copyright Power to Federal Government—Supremacy Clause and Federal Preemption—Durational Limit of Copyright—*Goldstein v. California.*[1]—Donald Goldstein and others, manufacturers and vendors of sound tapes and cartridges, engaged in the practice known as "tape piracy."[2] They made exact reproductions on master tapes of record albums purchased on the open market from retail distributors.[3] Additional copies of the master tapes were made on machines known as "tape slaves." The tapes were marketed in plastic cartridges, labelled with the title of the original album, the name of the artist, the name of the original record company, and a disclaimer of any relationship with the original artist or record company.[4]

In 1970, Tape Industries Association of America and others,

[91] N.Y. Pers. Prop. Law art. 9, § 302.13 (McKinney Supp. 1973); N.Y. CPLR §§ 3201, 3218 (McKinney 1963).

[92] See Hopson, supra note 79, at 125.

[93] The opportunity for the Court to review this question will have to come in a case other than *Virgin Islands*, since there was no appeal taken, presumably because the defendant never appeared at the hearing for lack of a defense. Letter from John L. Rogers, Clerk, to Judge Warren H. Young, United States District Court for the District of the Virgin Islands, Oct. 15, 1973.

[1] 412 U.S. 546 (1973).

[2] Id. at 549.

[3] The method of operation is fully explained in Tape Indus. Ass'n of America v. Younger, 316 F. Supp. 340, 342-43 (C.D. Cal. 1970).

[4] The label read as follows: