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Constitutional Law -- Cognovit Notes: Pretrial Waiver of Constitutional Rights in Civil Cases

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CONCLUSION

Although the Court of Appeals for the Second Circuit characterized the New York law as a minimal infringement on the precious freedom of association and the right to vote, the reasoning behind several federal district court cases dealing with comparable, more restrictive statutes would seem to call for a contrary interpretation of the effect of New York law. The compelling state interest test for determining whether restrictions on fundamental rights are unconstitutional requires that the state interest furthered by the legislation be a compelling one, that the statute carry the burden of justifying the restriction, that the restriction be necessary to promote the interest, and that the classification be precisely tailored so that the lines of exclusion correspond almost exactly with the exclusions necessary for achievement of the legislative goal. The Second Circuit apparently diluted the compelling state interest test, for it ignored the requirement that the classification be precisely tailored. It found the restriction necessary to achieve the state's interest in preventing raiding even though it was not clear that raiding constituted a significant problem or that much less restrictive means might not suffice to deal with whatever danger was present. In view of the development of the compelling state interest test and its recent application to durational residency requirements for voting, restrictions on the right to vote in primary elections cannot be conditioned upon the length of time since the voter switched his party registration or voted in another party's primary. The right to vote, whether in a general or primary election, ranks among the most cherished rights of our democratic system. Without strong evidence that raiding represents a serious threat to the integrity of the electoral process, no state can justify denying a citizen's fundamental constitutional right to vote in a primary election solely because he participated in the nominating procedure of another party for a recent prior election or within a specified period of time.

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Constitutional Law—Cognovit Notes: Pretrial Waiver of Constitutional Rights in Civil Cases

In *D.H. Overmyer Co. v. Frick Co.*[1] and its companion case, *Swarb*

[1] 92 S. Ct. 775 (1972).

v. Lennox,[2] the Supreme Court examined the constitutonality of cognovit clauses for the first time in nearly seventy years.[3] In *Overmyer* the Court affirmed the constitutionality of cognovit clauses in arm's length contracts between economic equals although it indicated that it might find the same clauses unconstitutonal "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."[4]

Recent criticism of cognovit clauses stemmed from concern that unsophisticated consumers who accept cognovit provisions in credit arrangements forfeit their constitutional rights to notice and a hearing prior to judgment without benefit of due process of law.[5] In *Overmyer*, the Court has indicated that the constitutionality of cognovit clauses signed by individual debtors will depend on the validity of the waiver of rights in the particular cognovit clause.[6] If the constitutional rights were validly waived when the contract was signed, then a judgment filed later without notice to the debtor is secure against charges of denied due process.

The waiver rationale, previously applied in two lower court cases,[7] should silence criticisms of cognovit procedures if the courts enforce that approach stringently by applying a strict presumption against waivers and by enforcing the criminal definition of waiver in cognovit cases.[8]

The facts of *Overmyer* passed muster as a valid waiver of rights

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[2]92 S. Ct. 767 (1972).

[3]National Exch. Bank v. Wiley, 195 U.S. 257 (1904); Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287 (1890). These are the most recent cases in which the Supreme Court examined cognovit notes.

[4]92 S. Ct. at 783. As will be developed, not every such clause necessarily need be found unconstitutional.

[5]*Id.* at 778 n.4.

[6]Several writers and one state court had suggested that cognovit waivers of the rights to notice and hearing could never be valid. *See* Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 219, 232-33, 250 N.E.2d 474, 482, 303 N.Y.S.2d 382, 393 (1969); Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111, 141-43 (1961); Note, *Cognovit Judgments: Some Constitutional Considerations*, 70 COLUM. L. REV. 1118, 1126 (1970). *But see* Boddie v. Connecticut, 401 U.S. 371 (1971); National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964). *Overmyer* is possibly distinguishable from *Ezrine* in that consent to jurisdiction was limited to the state of Ohio under the Ohio statute, whereas the Pennsylvania statute in *Ezrine* placed no limit on possible jurisdiction. 92 S. Ct. at 777 n.1. See also Justice Douglas' dissent. *Id.* at 784.

[7]Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *aff'd on other grounds*, 92 S. Ct. 767 (1972).

[8]In criminal cases a waiver of constitutional rights must be demonstrably knowing, intelligent, and voluntary. *See* Brady v. United States, 397 U.S. 742, 748 (1970); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

under the strictest of standards, so the Court declined to decide whether it would countenance standards less strict than those applied in criminal cases. Grounds for justifying lower standards for cognovit waivers were suggested when the Court noted that waiver of constitutional rights in civil cases "parallels the recognition of waiver in the criminal context where personal liberty, rather than a property right, is involved."[9]

The distinction between criminal and civil cases, however, is no basis on which to erect different standards of waiver of constitutional rights. Indeed, if an approach less rigorous than that outlined above is taken in cognovit cases, the protections for cognovit debtors will be lost just when they were recognized, and the criticisms of denied due process will be resurrected.

PRESUMPTIONS AGAINST WAIVER OF CONSTITUTIONAL RIGHTS IN COGNOVIT CASES

In the past the Supreme Court has not hesitated to apply a strict presumption against waiver of constitutional rights in the civil context.[10] *Aetna Insurance Co. v. Kennedy*,[11] in which the Court declared that it would "indulge every reasonable presumption against waiver" to protect a civil party's right to jury trial,[12] is perhaps the strongest statement of the position.

There is no justification for a retreat from that policy in favor of cognovit procedures which waive the due process rights to notice and a hearing prior to judgment. Recent cases have left no doubt that these rights are considered the bedrock of due process in civil as well as criminal proceedings.[13]

Furthermore, different standards of waiver should not rest on the distinction between personal and property rights in criminal and civil cases because the fourteenth amendment guarantees personal rights and property rights equally in terms that suggest no basis for distinction. The purpose of property rights, as much as personal rights, is to secure individual liberty and independence from dominance by the govern-

[9]92 S. Ct. at 782.

[10]Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937); Hodges v. Easton, 106 U.S. 408 (1882).

[11]301 U.S. 389 (1937).

[12]*Id.* at 393.

[13]*See* National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964); Mullane v. Central Bank & Trust Co., 339 U.S. 306 (1950); Wuchter v. Pizzutti, 276 U.S. 13 (1928).

ment.[14] In the words of Professor Reich:

> [P]roperty performs the function of maintaining independence, dignity, and pluralism in society. . . . The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life. Indeed, in the final analysis the Bill of Rights depends upon the existence of private property. Political rights presuppose that individuals and private groups have the will and the means to act independently. But so long as individuals are motivated largely by self-interest, their well-being must first be independent. Civil liberties must have a basis in property, or bills of rights will not preserve them.[15]

Thus personal rights and property rights serve the same important end. They are equally guaranteed by the Constitution because they protect equal values. Since this is so,there is no basis for a distinction between personal and property rights which would justify different presumptions against waiver in criminal and civil cases. Speaking of the "conceptual difficulties created" by such a distinction relating to federal jurisdiction, the Supreme Court said recently in *Lynch v. Household Finance Corp.*,[16] "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights."

Thus the Court should continue to indulge every reasonable presumption against waivers of constitutional rights, whether the waiver occurs in criminal or civil cases.

STANDARDS OF WAIVER IN CRIMINAL AND CIVIL CASES

Johnson v. Zerbst[17] is generally cited as defining the standard for waiver of constitutional rights in criminal cases. In that case the Court held that a waiver is "an intentional relinquishment or abandonment of a known right."[18] The precise language used in *Zerbst* was borrowed from civil law. The same words had been used for at least a century to describe the standard for express waivers in contract law,[19] and the

[14]*See* Lynch v. Household Fin. Corp., 92 S. Ct. 1113 (1972); Shelley v. Kraemer, 334 U.S. 1 (1948); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[15]Reich, *supra* note 14, at 771. Professor Reich also demonstrates how it has come to be "widely thought that property and liberty are separable." *Id.* at 772.

[16]92 S. Ct. 1113, 1122 (1972).

[17]304 U.S. 458 (1938).

[18]*Id.* at 464.

[19]Hoxie v. Home Ins. Co., 32 Conn. 21 (1864); *cf.* Clark v. West, 193 N.Y. 349, 86 N.E. 1

elements of knowledge and intent have characterized definitions of waiver generally for an even longer period.[20] In every legal context, waivers have been thought to comprise knowledge and intent as a matter of elementary definition.[21] In criminal cases since *Johnson v. Zerbst*, very stringent concepts of both knowledge and voluntariness have developed in order to protect against waiver of rights where personal liberty is at stake.[22] The same concepts, for the same reasons, would apply to cognovit waivers.

Knowledge. A criminal defendant is not held to have knowingly waived his rights unless he was aware that he had those rights and he understood the consequences of his waiver. A cognovit debtor merits no less protection, for any standard of fairness is offended if constitutionally guaranteed rights are surrendered by mistake or because the unwary consumer (or defendant) did not comprehend their importance. Whether personal or property rights be forfeited as a result of the waiver should be immaterial.

Voluntariness. Recent criminal cases culminating in *Miranda v. Arizona*[23] stress the necessity to protect individual dignity as well as freedom by refusing to countenance compelled confessions (*i.e.*, involuntary waivers of the right to silence). Criminal courts are thus alert to invalidate forced waivers on grounds of psychological as well as physical compulsion. The specific impetus for this development has been a fear of the potential for compulsion inherent in police confrontations against criminal defendants.[24]

The cognovit debtor, it might be said, confronts not an arm of government power but his creditor, a private citizen who cannot in theory assert any compulsion over a customer in a free market. Since a creditor cannot force assent to a cognovit note in the same way the police can force confessions, it might be argued that the strict standard of voluntariness in criminal cases is unwarranted in the civil context.

However, the preservation of individual freedom demands that we protect property rights as jealously as we do personal liberty.[25] The

(1908); Cowenhoven v. Ball, 118 N.Y. 231, 23 N.E. 470 (1890); 28 AM. & ENG. ENC. LAW Waiver §§ I, III (1896); M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL 506 (1st ed. 1872).

[20]Darnley v. London, C. & D. Ry., L.R. 2 H.L. 43 (1867).

[21]BLACK'S LAW DICTIONARY 1751 (4th ed. 1951).

[22]*See* Brady v. United States, 397 U.S. 742 (1970); Miranda v. Arizona, 384 U.S. 436 (1966); Fay v. Noia, 372 U.S. 391 (1963); Rogers v. United States, 340 U.S. 367 (1951).

[23]384 U.S. 436 (1966).

[24]*Id.* at 448-58.

[25]*See* text accompanying note 14 *supra*.

power of commercial interests in consumer markets where adhesion contracts are common, threatens to abridge individual freedoms just as government power may. When the courts attach property on the basis of confessed judgments, commercial power is impossible to distinguish from governmental power.[26]

Furthermore, there is great potential for compulsion in dealings between parties with disparate bargaining power. A consumer confronted with a "take-it-or-leave-it" adhesion contract in a market in which all creditors require the same cognovit waivers before extending credit has no choice but to adhere to the creditor's terms if he must buy on credit. Thus a strict standard of voluntariness, the equal of that utilized in criminal cases, should be enforced by courts considering the validity of cognovit clauses if the rights of the debtor are to be adequately protected.

APPLYING STRICT STANDARDS OF WAIVER TO COGNOVIT NOTES

If the courts indulge every reasonable presumption against waivers, under what circumstances will creditors be able to demonstrate valid cognovit waivers by the strict criminal standards? Can closing procedures be devised which will satisfy these standards and preserve the commercial utility of cognovit notes?

Knowledge. Lower federal courts have invalidated cognovit provisions on the failure by creditors to demonstrate a knowing waiver in two recent cases.[27] Both courts, however, indicated that acceptable procedures for demonstrating a knowledgeable waiver could be devised.[28] A briefing procedure similar to that required by the Truth in Lending Act[29]

[26]*See generally* Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1969); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Reich, *supra* note 14.

[27]Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970).

[28]Osmond v. Spence, 327 F. Supp. 1349, 1360 (D. Del. 1971); Swarb v.Lennox, 314 F. Supp. 1081, 1100 (E.D. Pa. 1970). *See also id.* at 1098, in which the court apparently condones closing procedures utilized in connection with execution of mortgages. Notice cannot be waived in those cases, however.

[29]Consumer Credit Protection Act §§ 121-31, 15 U.S.C. §§ 1631-1641 (1970). Essentially the act requires:

(a) Disclosure, to make the consumer aware of the consequences of his act;

(b) Acknowledgment—the consumer must sign a separate document attesting his understanding; and

(c) Period of rescission, during which the consumer may renege on his contract.

or a requirement for an examination by a notary could rebut the presumption against a knowing waiver in ordinary cases without destroying the commercial utility of cognovit procedures.[30]

Voluntariness. Proof of voluntariness by the strict standards presents a much more difficult problem that the courts have yet to face. A mere briefing procedure would be ineffective to dispel doubts about the effect of economic compulsion on a cognovit debtor.

If there is disparate bargaining power between debtor and creditor, under what conditions will adherance by the debtor to the terms of an adhesion contract be considered voluntary? In such a situation, an impecunious consumer dealing with a large creditor who offers a form contract containing a cognovit clause demonstrably adheres voluntarily if reasonable alternative choices were open to the consumer but were refused by him. Thus, if the creditor is offering substantially the same terms as a competitor who does not require assent to a cognovit provision, it would appear that the consumer has a realistic choice between sellers so that his waiver could be considered voluntary. The reasonableness of the choice would be determined in view of the particular circumstances of individual cases and the extent of the burden on the consumer to know of other creditors' terms. This sort of case-to-case factual determination might make cognovit clauses commercially unfeasible in consumer transactions.

But what of the small consumer in a market in which all creditors impose cognovit clauses in installment contracts for the purchase of a given item? At the outset the consumer's choice is whether to make his purchase at all—to take it or leave it. This choice might be sufficient to render a waiver voluntary for the purchase of luxury items but not for the purchase of necessities. It seems manifestly unrealistic to argue that a person purchasing necessities on an installment contract voluntarily assents to a cognovit provision when such provisions are required by all creditors in the market. The consumer has no reasonable option to refuse to buy necessities at all, and, if he is poor, he may have no choice other than to buy on credit. He must make his credit purchase, and he cannot do so without waiving his rights in assent to a cognovit provision. The choice to buy even luxury items should not hinge on waiving constitutional rights; the presumption against waiver should not be overcome by judicial evaluations of a consumer's prudence in his purchases. The

[30] *But see* Note, *Confessions of Judgment in Pennsylvania: Halfway to Oblivion?*, 32 U. PITT. L. REV. 236, 244-49 (1971).

distinction between luxury and essential would be nearly impossible to define for contemporary consumers.[31]

Recent federal cases dealing with distraint procedures imposed in adhesion leases have determined without hesitation that assent to such provisions in a crowded housing market cannot be considered voluntary.[32] "There is no freedom of contract—there is merely a freedom to adhere . . . ."[33] In the cognovit area, however, the *Osmond* court refused (without any discussion) to find involuntariness on such grounds.[34]

Even so, if the courts continue "to indulge every reasonable presumption against waiver," cognovit clauses utilized in situations of disparate bargaining power and adhesion contracts should routinely be presumed involuntary.

Closing Procedures. In adhesion markets, then, how might creditors defeat a presumption against voluntary waivers yet retain a commercially feasible cognovit procedure? Clearly the simple signing of a contract containing a cognovit provision would not establish a valid waiver. Separate affidavits attesting the waiver and signed by the consumer might suffice to establish that a waiver was knowing, but it is difficult to see how they could guarantee voluntariness since the nature of the choices open to the consumer would not be altered by an affidavit, and a ruling on such a fact situation would likely require a decision by a judge.[35]

A possible solution may be suggested by the Court's implied criticism in *Overmyer* of the situation in which "the debtor receives nothing for the cognovit provision."[36] The cognovit procedure is commercially useful to creditors because it eliminates the expense of notice and hearing in the case of defaulting debtors. Perhaps creditors could specifically determine the worth of confessions of judgment and could offer debtors the option of including or excluding cognovit provisions with corresponding differences in price. The choice between prices would have to be reasonable and the burden of demonstrating knowledge or understanding would remain. In such a case, the parties would have bargained for

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[31]*See* Fuentes v. Shevin, 92 S. Ct. 1983, 1998-99 (1972).

[32]Sellers v. Contino, 327 F. Supp. 230 (E.D. Pa. 1971); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970).

[33]Santiago v. McElroy, 319 F. Supp. 284, 294 (E.D. Pa. 1970).

[34]327 F. Supp. at 1358.

[35]Note, 32 U. PITT. L. REV., *supra* note 30, at 244-49.

[36]92 S. Ct. at 783.

the cognovit provision, the debtor would have a choice between reasonable alternatives, and, if he waived his rights, he would receive an identifiable value for his waiver.

CONCLUSION

Cognovit procedures are not unconstitutional *per se* because the due process rights to notice and hearing prior to judgment may be validly waived. If a strict standard of waiver is applied and if a presumption against waiver is maintained, the heavy burden on creditors to establish a valid waiver may well destroy the commercial utility of cognovit notes in small consumer transactions. If the burden is placed on the creditor to demonstrate a valid waiver in a hearing to reopen judgment, a confession of judgment would be of less use to the creditor than ordinary judgment procedures, in which he can rely on default judgments to keep his legal expenses down. The cognovit creditor would be forced to gamble that the facts of the particular case could establish the validity of the waiver in order to be certain of a valid judgment. This would be an equitable burden on the creditor. Cognovit procedures are undeniably legitimate and useful commercial devices in arm's length dealings between corporate parties. In disparate bargaining situations there is a great potential for unfairness and exploitation. If a heavy burded is placed on creditors to demonstrate the efficacy of the debtor's waiver, commercial expediency will determine that creditors only employ cognovit provisions in appropriate circumstances. A creditor simply could not afford to execute a confessed judgment not validly obtained if the debtor, armed with strict standards of waiver, can so easily reopen the judgment.

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Constitutional Law—Evidence—No Testimonial Privilege For Newsmen

From the time the issue of a newsman's first amendment right to withhold information was first raised,[1] attorneys and newsmen eagerly awaited a ruling on the question by the United States Supreme Court.

[1]Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958). All previous attempts were based on common law claims. *See, e.g.*, People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).