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An Attack on Confession of Judgment Clauses in Residential Leases through Section 2-302 of the UCC

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I. INTRODUCTION

Confession of judgment, or cognovit, clauses have been in existence for quite some time,[1] but are utilized in only a few jurisdictions. Illinois has a statute specifically authorizing such clauses[2] and is one of three states[3] which produces the vast majority of cognovit judgments in the United States.

These confession of judgment clauses are predominantly used in rental agreements in Illinois and cover virtually every apartment rented in Chicago. The "dime-store lease",[4] a pre-printed form prepared by the Chicago Real Estate Board, contains a broad confession of judgment clause.[5] This provision allows the landlord, through his attorney and without notice, to represent the tenant in court, to admit the guilt of the tenant for any alleged failure to pay rent, and to accept the judge's penalty without argument or right of appeal. The great majority of apartment dwellers in the Chicago area are required to sign the standard "dime-store lease" as a take-it-or-leave-it condition of occupancy, thereby subjecting themselves to judgment by confession, without notice or opportunity to defend themselves.[6] Landlords and rental agencies will generally not negotiate leases, nor will they allow a tenant to strike any clauses from the leases.

1. For a discussion of historical references, *see* First Nat'l Bank v. White, 220 Mo. 717, 120 S.W. 36 (1909). Confessions of judgment have long been recognized at common law. Lock v. Leslie, 248 Ill. App. 438 (1928).

2. ILL. REV. STAT. ch. 110, § 50 (1971).

3. Pennsylvania and Ohio are the other two states which lead in the number of cases involving confessions of judgment. Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111, 115 (1961).

4. This standard lease on Form 12R for heated, unfurnished apartments can be purchased at most stationery and variety stores for twenty-five cents.

5. Paragraph 17 reads as follows:

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

6. Confession of judgment clauses in leases have been held valid by Illinois courts for the amount of rent due and interest. Fields v. Brown, 188 Ill. 111, 58 N.E. 977 (1901); Scott v. Mantoya, 164 Ill. 473, 45 N.E. 977 (1897); Fortune v. Bartolomei, 164 Ill. 51, 45 N.E. 274 (1896); Cutler v. Leader Cleaners, Inc., 12 Ill. App. 2d 439, 139 N.E.2d 832 (1957); Homewood v. Stein, 211 Ill. App. 359 (1918); Bowman v. Powell, 127 Ill. App. 114 (1907); Agnew v. Sexton, 86 Ill. App. 274 (1900).

Confession of judgment clauses have been upheld by the Illinois courts under various constitutional attacks.[7] Although the Uniform Commercial Code[8] is not directly applicable to residential leases, this article will attempt to utilize the principles and expanding case law of the Code to formulate an alternative argument attacking confession of judgment clauses in the standard residential lease.

II. THE CONSTITUTIONALITY OF CONFESSION OF JUDGMENT CLAUSES

A. Federal

The United States Supreme Court recently held that a cognovit clause is not per se violative of fourteenth amendment due process. In *D. H. Overmyer Co. v. Frick Co.*,[9] the appellant corporation, Overmyer, had defaulted on payments for equipment being installed by Frick. Overmyer then made a partial payment and issued an installment note for the balance due. Frick suggested that this note contain a confession of judgment clause, but the note as executed contained no such provision. Frick completed the work, and Overmyer became unable to make further payments on the installment note. A second note was then negotiated by both parties. This second note contained a confession of judgment provision, whereby Overmyer would consent to a judgment obtained by Frick without notice or hearing in the event of default. The cognovit provision was the product of negotiation between the parties, and Overmyer was fully aware of its inclusion in the second note. In consideration for this new note and for second mortages on Overmyer's property, Frick reduced monthly payments and interest rates, extended the time for payment, and released mechanic's liens. Later, Overmyer ceased to make payments on the second note, claiming breach of the original contract. Frick's attorney confessed judgment on behalf of Overmyer, who was given no notice of the action. Overmyer then brought suit against Frick, alleging that the entry of judgment pursuant to the cognovit clause was a violation of the fourteenth amendment. Overmyer asserted that since due process requires reasonable notice and an opportunity to be heard, it was unconstitutional to waive in advance the right to defend in an action on the note. The Supreme Court found that the confession of judgment provision did not violate due process, since Overmyer voluntarily, knowingly, and intelligently waived its rights to notice and hearing by approving the cognovit provision with full awareness of the legal consequences.[10]

7. *See* Part IIB *infra*.

8. UNIFORM COMMERCIAL CODE (1972 version) [hereinafter cited as UCC or CODE]. *See generally* Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965).

9. 405 U.S. 174 (1972). *See* Young, *Cognovit Notes Not Invalid on Their Face*, 58 A.B.A.J. 512 (1972).

10. 405 U.S. at 187.

Although the Court found that Overmyer's waiver was voluntary, knowing, and intelligent, it left open to question whether this standard for waiver should be the test in every commercial case.[11] However, other courts which have considered the issue of waiver in such cases have required a showing similar to that used in *Overmyer*.[12]

The Court was careful to point out that its holding meant that confessions of judgment are not per se violative of the fourteenth amendment.[13] The decision was limited to the facts of the particular case, with reliance on such factors as the equality of bargaining power between the two parties and the valuable consideration given for the inclusion of the cognovit provision. Overmyer was a corporation with widespread commerical activities and had entered into thousands of contracts with contractors such as Frick Company. As the Court stated, the "agreement, from the start, was not a contract of adhesion. There was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a cognovit,"[14] and the latter was fully aware of the inclusion of the provision in the second note. The Court also indicated that in certain situations, judgments by confession would be violative of due process. "Our holding . . . is not controlling precedent for other facts of other cases. For example, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other consequences may ensue."[15]

Thus, the door is left open in determining the constitutionality of confession of judgment provisions in situations where there is great inequality in bargaining power between the two parties. The typical residential lease containing a confession of judgment clause would seem to fall squarely within such a situation. The tenant is confronted with a take-it-or-leave-it adhesion contract in a market in which all lessors require the same cognovit waivers, and the tenant has no choice but to assent to the provision if he wishes to rent an apartment. It seems likely that the lessee's waiver would not be found to be voluntarily, knowingly, and intelligently made, and the confession of judgment provision could be held to violate due process.[16]

11. *See* 41 U. CIN. L. REV. 741 (1972).

12. Osmond v. Spence, 327 F. Supp. 1349, 1359 (D. Del. 1971) (knowingly and intelligently signed); Swarb v. Lennox, 314 F. Supp. 1091, 1095 (E.D. Pa. 1970) (understanding and voluntary consent); Frantz Tractor Co. v. Wyoming Valley Nursery, 348 Pa. 213, 216, 120 A.2d 303, 305 (1956) (conscious of the fact); Cutler Corp. v. Latshaw, 374 Pa. 1, 4-5, 97 A.2d 234, 236 (1953) (voluntarily accepted and consciously assumed). *See* Note, *Cognovit Notes: Pretrial Waiver of Constitutional Rights in Civil Cases,* 51 N.C.L. REV. 554 (1973) [hereinafter cited as Note, *Cognovit Notes*].

13. 405 U.S. at 187.

14. *Id.* at 186.

15. *Id.* at 188. The situation which the Court exempts from its holding is the typical contract of adhesion.

16. In a companion case to *Overmyer*, Swarb v. Lennox, 405 U.S. 191 (1972), while holding that confession of judgment provisions are not per se unconstitutional, the Court affirmed a lower court ruling that there was no intentional waiver of known

Lower federal courts have recognized the fact that a tenant does not voluntarily consent to the provisions of a lease. In two cases involving distraint procedures imposed in adhesion leases, it was concluded that assent to such provisions in a crowded housing market could not be considered voluntary.[17] The cases held that the waiver of tenants' rights was invalid and that the distraint provisions of the Pennsylvania Landlord and Tenant Act were violative of due process. This is one indication of judicial recognition of the tenant's plight in that he has virtually no bargaining power or freedom of contract whatsoever.[18]

B. Illinois

Confession of judgment clauses have consistently been upheld by Illinois courts.[19] However, especially in cases involving residential leases, there are few decisions dealing with the constitutional aspects of cognovit provisions.

In one fairly recent case, *First National Bank in DeKalb v. Keisman*,[20] involving an attack on the constitutionality of confessions of judgment, the Illinois Supreme Court held that there was no deprivation of due process or right to trial because there was nothing in the record to indicate that the signers did not knowingly and intelligently waive their rights. It is important to note, however, that the court stressed the particular facts of the case before it. The case involved two knowledgeable businessmen and an attorney negotiating an ordinary business loan. The court found no indication that the men were naive, that they were imposed upon by the lender, or that they had not agreed to the confession of judgment provision as security

rights by Pennsylvania residents earning less than $10,000 annually in executing contracts containing confession of judgment clauses. The district court held that no judgment by confession could be entered against a member of that class unless it is shown that the debtor "intentionally, understandingly, and voluntarily" waived his rights. *Id.* at 199. This class of debtors can be compared to tenants, since in neither group's situation is there voluntary consent to the cognovit provisions, nor is there any ability to bargain.

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

18. "We take 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. There is no freedom of contract—there is merely a freedom to adhere to the terms of the contract written by the landlord." Santiago v. McElroy, 319 F. Supp. 284, 294 (E.D. Pa. 1970). *See* Note, *Cognovit Notes, supra* note 12; Comment, *Judgments: The Cognovit Clause and Due Process*, 25 U. FLA. L. REV. 376 (1973).

19. Ives v. May, 5 Ill. App. 3d 193, 282 N.E.2d 193 (1972); Grundy County Nat'l Bank v. Westfall, 125 Ill. App. 2d 254, 260 N.E.2d 745 (1970); First Nat'l Bank of Kirkwood v. Galbraith, 271 Ill. App. 240 (1933). *See also* cases cited note 6, *supra*, involving confession of judgment clauses in leases.

20. First Nat'l Bank in DeKalb v. Keisman, 47 Ill. 2d 364, 265 N.E.2d 662 (1970).

for the loan.[21] This fact situation is clearly distinguishable from that of the ordinary tenant, who has no chance to negotiate the terms of a lease and who generally is unaware of the confession of judgment clause and its legal consequences.

In spite of these suggested constitutional arguments posed in behalf of tenants, the fact remains that Illinois courts, as well as the United States Supreme Court, have thus far refused to hold confession of judgment clauses unconstitutional. Since this approach in attempting to invalidate these clauses has not yet proven successful, resort could be had to an alternative argument based upon the provisions of the Uniform Commercial Code.

III. Application of the Uniform Commercial Code to Leases

Article 2 of the Code can be applied to transactions other than those involving sales. Section 2-102 defines the scope of commercial transactions covered by the Article: "[T]his Article applies to transactions in goods . . . . " The term "transactions in goods" is not defined in the Code, and it has been said that the reason for this was "to allow the Code to continually develop and encompass new types of commercial transactions used by business."[22] Further support for this can be found in the Code itself. The Code is to be "liberally construed and applied to promote its underlying purposes and policies,"[23] which are: "to simplify, clarify and modernize the law governing commercial transactions"[24] and "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties."[25] The drafters also stated that the Code "is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforseen and new circumstances and practices."[26]

It seems clear that a lease would fall within the spirit of the drafters' intentions, especially since a "transaction" contemplates a much wider scope of activity than a "sale".[27] The concept of title no longer occupies the

21. *Id.* at 366-67, 265 N.E.2d at 663. The courts have refused to uphold confessions of judgment for rent accrued after the expiration of the lease term. Weber v. Powers, 213 Ill. 370, 72 N.E. 1070 (1905); Sibenaller v. Smock, 283 Ill. App. 452 (1936); McFadden v. Lewis, 273 Ill. App. 343 (1934). *See also* Little v. Dyer, 138 Ill. 272, 27 N.E. 905 (1891).

22. Note, *Commercial Transactions: Coverage of Leases Under the UCC*, 24 OKLA. L. REV. 475 (1971) [hereinafter cited as Note, *Commercial Transactions*].

23. UCC § 1-102(1).

24. UCC § 1-102(2)(a).

25. UCC § 1-102(2)(b).

26. UCC § 1-102, Comment 1. *See also* UCC § 2-313, Comment 2.

27. F. HART & W. WILLIER, FORMS AND PROCEDURES UNDER THE UNIFORM COMMERCIAL CODE (1966). The authors point out that since section 2-102 applies to transactions in goods and omits any reference to sales transactions, the Code "should, therefore, apply to a lease of goods—a transaction in goods—by the simple construction of statutory language." *See also* Hertz Commercial Leasing Corp. v. Transportation

important position it once held in the commercial world.[28] The commercial leasing business has widely expanded over the years, and as a result, public policy demands that consumers who lease be given protection equal to that of those who purchase.[29] Responsibility for the protection of lessees must be imposed upon lessors, since they place the object of the transaction on the market and induce reliance, and since they are better able to bear any resulting loss. In recent years, courts have begun to expand the applicability of the Code to commercial leases.[30]

Judicial recognition of the applicability of the Code in the area of leases has been extended to cases involving breach of implied warranties in leases of chattel or equipment.[31] In residential lease cases, courts have recognized common law warranties of habitability and fitness for intended purpose, similar to the implied warranties in the Code.[32] These warranties are based in sales and contract law, and many commentators have urged that the warranty provisions of Article 2 be directly applied to residential leases.[33]

Credit Clearing House, 59 Misc. 2d 226, 248 N.Y.S.2d 392 (1969), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S.2d 585; UCC § 2-313, Comment 2.

28. *See, e.g.*, UCC § 9-101, Comment: "Rights, obligations and remedies under the Article do not depend on the location of title." As stated by the court in Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 447, 212 A.2d 769, 776 (1965):

> A sale transfers ownership and possession of the article in exchange for the price; a bailment for hire transfers possession in exchange for the rental and contemplates eventual return of the article to the owner. By means of a bailment parties can often reach the same business ends that can be achieved by selling and buying. The goods come to the user for the time being and he benefits by their use and enjoyment without the burdens of becoming and remaining the owner. The owner-lessor benefits by receiving the rent for the temporary use.

See also Comment, *Implied Warranties of Quality: Protection in Chattel Leases*, 1969 U. ILL. L.F. 115 (1969).

29. Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46 (1968); W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (1969), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S.2d 585; Dennis v. Southworth, 467 P.2d 330 (Wash. 1970). *See* Note, *Commercial Transactions, supra* note 22.

30. *See generally* 48 A.L.R.3d 668.

31. Cases cited note 56, *infra*; KLPR TV, Inc. v. Visual Electronics Corp., 327 F. Supp. 315 (W.D. Ark. 1971), *aff'd*, 465 F.2d 1382 (8th Cir. 1972); Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46 (1968); Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (1969), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S.2d 585; Fairfield Lease Corp. v. Commodore Cosmetique, Inc., 7 UCC Rep. 164 (Civ. Ct. N.Y. 1969); Vacuum Concrete Corp. v. Berlanti Constr. Co., 205 Pa. Super. 548, 214 A.2d 729 (1965). *See* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 656 (1957); Note, *The Extension of Warranty Protection to Lease Transactions*, 10 B.C. IND. & COM. L. REV. 127 (1970) [hereinafter cited as Note, *Warranty Protection*].

32. UCC §§ 2-314, 2-315.

33. *See* Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORD. L. REV. 447 (1971); Note, *Warranty Protection, supra* note 31; Note, *Contract Principles and Leases of Realty*, 10 BOST. U.L. REV. (1970); Comment, *Tenant Remedies—The Implied Warranty of Fitness and Habitability*, 16 VILL.

In support of this position, reliance has been placed mainly on the official comment to section 2-313:

> Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as a part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents.[34]

Thus far, however, the courts have been reluctant to hold that the implied warranties in residential leases are imposed under the Uniform Commercial Code; rather, they have held that the warranties are based in common law.[35] It is submitted, however, that these courts are actually extending the Code provisions to residential leases by recognizing that leases and sales are analagous and that lessees require protection as consumers. Although these courts are holding that the warranties are based in common law, they are using reasoning analogous to that used under the Code and are finding implied warranties of the same scope as the Code's warranty provisions.

For example, in *Lemle v. Breeden*,[36] the Supreme Court of Hawaii reasoned that since a residential lease can be considered a sale,[37] and since sales law protects the buyer through implied warranties, an implied warranty should also apply to residential leases:

> The application of an implied warranty of habitability in leases gives recognition to the changes in leasing transactions today. It affirms the fact that a lease is in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship. From that contractual relationship an implied warranty of habitability and fitness for purpose intended is a just and necessary implication. It is a doctrine which has its counterparts

L. REV. 710, 726-27 (1971) [hereinafter cited as Comment, *Tenant Remedies*]; Note, *The Implied Warranty of Habitability in Landlord-Tenant Relations: A Proposal for Statutory Development*, 12 WM. & MARY L. REV. 580 (1971).

34. UCC § 2-313, Comment 2.

35. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973); King v. Moorehead, 495 S.W.2d 65 (Mo. 1973); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Mannie Joseph, Inc. v. Stewart, 71 Misc. 2d 160, 335 N.Y.S.2d 709 (Civ. Ct. N.Y. 1972); Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. N.Y. 1971); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

36. 51 Hawaii 426, 462 P.2d 470 (1969).

37. *See* Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279, 1281 (1960). It has been said that the modern lease is essentially a contract for the purchase of space and services. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 535 (1966).

> in the law of sales and torts and one which when candidly countenanced is impelled by the nature of the transaction and contemporary housing realities. Legal fictions and artificial exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house . . . there is an implied warranty of habitability and fitness for the use intended.[38]

Similarly, in *Javins v. First National Realty Corp.*,[39] the Federal Court of Appeals for the District of Colombia held that a continuing warranty of habitability, measured by housing code standards, is implied by operation of law in residential leases of dwellings and that contract remedies are available for any breach of the warranty.

> In extensive dicta . . . the *Javins* court argued that a lease contract could be analogized to a sale of goods, and that a tenant, much like the purchaser of a product, should be assured that the goods and services which the landlord provides are of adequate quality.[40]

Thus, these two decisions, which are landmark cases in the area of implied warranties in residential leases, indicate the growing judicial opinion that the principles of consumer protection, as evidenced in the Uniform Commercial Code, should be extended to tenants.

Therefore, even though the courts have not yet directly held that the implied warranties in residential leases are imposed under the provisions of the Code, but rather have only applied the Code's warranty provisions by analogy, the results are the same. The important thing is that it is the policy behind the Code's warranty sections which allows the development of a warranty theory in residential lease cases.[41] The public policy considerations which are the basis of the warranty provisions in the Code are similar to the public policy considerations involved in the extension of implied warranties to the landlord-tenant situation: one party has induced the other's reliance on his superior knowledge and skill; the party inducing reliance is in a better position to know and to control the quality of the product or dwelling; responsibility for defects should be placed on the party who places the product or dwelling on the market, thus representing its fitness and suitability; and that party is in a better position to bear the loss resulting from a defect.[42] Thus, it is submitted that regardless of the terminology used by the courts, the warranty provisions of the Uniform Commercial Code are being applied to residential leases in practice and effect.

Since the tenant is placed in a take-it-or-leave-it situation in the housing

38. 51 Hawaii at 433, 462 P.2d at 474.
39. 428 F.2d 1071 (D.C. Cir. 1970).
40. Comment, *Tenant Remedies, supra* note 33, at 720; 428 F.2d at 1079.
41. *See* Note, *Contract Principles and Leases of Realty*, 10 BOST. U.L. REV. 24 (1970); Comment, *Tenant Remedies, supra* note 33.
42. *See generally* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

market, the application of the warranty sections of the Code attempts to assure that the dwelling will be habitable. Clearly, the application of the Code to residential leases is an attempt to protect the tenant from abuse by the landlord, who is in a superior bargaining position. Similarly, this underlying objective of tenant protection can also be applied to prohibit the use of confession of judgment clauses by utilizing the unconscionability provision of the Code.

IV. Application of Section 2-302 to Leases

In the area of disclaimer of warranties, courts have expressly held that the Code provisions apply directly to commercial leases. In *Sawyer v. Pioneer Leasing Corp.*,[43] the Supreme Court of Arkansas held that section 2-316 of the Code, requiring that any exclusion of implied warranties in contracts be conspicuous, was applicable to a lease of an ice machine.[44] The same Code provision was relied upon by a New York court to invalidate a contractual disclaimer of warranties in an equipment lease in *Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House.*[45] Thus, it is clear that the warranty and disclaimer provisions of the Code are directly applicable to commercial leases.

A confession of judgment clause in a residential lease may be viewed in the same manner as a disclaimer of warranty clause in a commercial lease. When a seller disclaims a warranty in a commercial lease, the buyer, in effect, agrees to assume all liability for defects in the product and thereby forfeits any cause of action which would otherwise grow out of such defects. Similarly, when a lessor inserts a confession of judgment clause in a residential lease, the lessee gives up all rights to challenge the lessor's cause of action for an alleged violation of the terms of the lease. The buyer and the lessee in each situation are waiving any defenses they might have and are agreeing to allow the seller or lessor to avoid answering any defenses which would be available if the confession of judgment or disclaimer clause did not exist.

It has been held that the Code's unconscionability provision, section 2-302, can be used to measure the legal effect to be afforded a disclaimer

43. 244 Ark. 943, 428 S.W.2d 46 (1968). The court based its application of the Code in this case on the fact that this was a lease which was analogous to a sale; however, the court did not specify the circumstances under which a lease would be deemed analogous to a sale.

44. *See* Note, *Uniform Commercial Code—Disclaimer Clause of Implied Warranties Extended to Leases Analogous to Sale*, 23 S.W.L.J. 196 (1969); Comment, *Application of Article 2 of the Uniform Commercial Code to Leases*, 1969 WASH. U.L.Q. 90 (1969).

45. 59 Misc. 2d 226, 298 N.Y.S.2d 392 (1969), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S.2d 585. Baker v. Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971), also applied section 2-316 to invalidate an inconspicuous disclaimer clause in the lease of a golf cart.

clause in a commercial transaction.[46] The unconscionability provision has been used extensively in the contract of adhesion situation.[47] Since the unconscionability section of the Code applies to disclaimers, it must apply to the Code disclaimer whether it is embodied in a lease or in a contract of sale. Further, since the purpose of this section is protection of the consumer, and since the effect of both a disclaimer and a confession of judgment clause is to allow the seller to escape defenses which could be asserted against him by a consumer, the unconscionability provision should be equally applicable to both a commercial and a residential lease.

Section 2-302 of the Uniform Commercial Code[48] provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Although the term "unconscionable" is not defined in the Code, the official comments to the section state the basic test:

> [W]hether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . . . The principle is one of the prevention of oppression and unfair surprise.[49]

This two-part test of prevention of oppression and unfair surprise is satisfied even if only one of the elements is present in a case. This test was discussed at length in the landmark case of *Williams v. Walker-Thomas Furniture Co.*:[50] "Unconscionability has generally been recognized to include 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."[51] Referring to oppression, the court went on to say: "In many cases the mean-

46. Hawkland, *Limitation of Warranty Under the Uniform Commercial Code*, 11 HOWARD L.J. 28, 34-37 (1965); Moye, *Exclusion and Modification of Warranty Under the UCC—How to Succeed in Business Without Being Liable for Not Really Trying*, 46 DENVER L.J. 579, 614-17 (1969).

47. *Id.*

48. ILL. REV. STAT. ch. 26, § 2-302 (1971).

49. UCC § 2-302, Comment 1. *See* Note, *Unconscionability—The Code, the Court and the Consumer*, 9 B.C. IND. & COM. L. REV. 367 (1967-68) [hereinafter cited as Note, *Unconscionability*].

50. 121 U.S. App. D.C. 315, 350 F.2d 445 (1965).

51. *Id.* at 449.

ingfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration."[52] The court then discussed unfair surprise: "Did each party to the contract . . . have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?"[53]

Section 2-302 should be extended to all lease transactions since the policy underlying the doctrine of unconscionability is common to all contracts.[54] Many commentators have advocated the application of section 2-302 to situations arising outside the scope of Article 2,[55] and the courts have recently begun to recognize this extension of the Code to cases involving leases.[56] The majority of these cases have involved exculpatory clauses, protecting one party to the contract from liability for his acts of negligence causing injury to the other party. The courts have refused to give effect to these exculpatory clauses in most cases, holding them to be unconscionable.

In *Weaver v. American Oil Co.*,[57] the Indiana Supreme Court held that a provision in a service station lease which exculpated and indemnified the lessor was unconscionable due to the lessee's lack of knowledge of his potential liability and to the inequality of bargaining power between the parties. In this case, the exculpatory provision was used to attempt to relieve

52. *Id.*

53. *Id.*

54. *See* 5A A. CORBIN, CONTRACTS § 1164 (1964):

> Where this section [2-302] is made applicable to contracts for the sale of goods, no court should fail to make it applicable to all other contracts; for the policy that it adopts is applicable to all alike. In all cases alike, it puts upon the court the responsibility of determining the degree of unconscionability and the requirement of "justice".

55. *See, e.g.*, Bolgar, *The Contract of Adhesion: A Comparison of Theory and Practice*, 20 AMER. J. COMP. L. 53, 70 (1972); Cramer, *Extension of the Uniform Commercial Code's Unconscionable Contract Provision to Exculpatory Lease Clauses*, 5 AMER. BUS. L.J. 297, 291-92 (1967); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 808-12 (1969); Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT'L & COMP. L.Q. 172, 187-88; Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880, 891-92 (1965); Comment, *The Uniform Commercial Code's Solution For Unconscionable Contracts*, 48 ORE. L. REV. 209, 212-13 (1969); Comment, *The Doctrine of Unconscionability*, 19 U. ME. L. REV. 81, 86-91 (1967); Note, *Exculpatory Clauses in Standard Form Leases: A Need for Direct Judicial Action*, 28 U. PITT L. REV. 85, 95-96 (1966); Note, *Unconscionable Sales Contracts and the Uniform Commercial Code, Section 2-302*, 45 VA. L. REV. 583, 590-91 (1959); Note, *Commercial Decency and the Code—The Doctrine of Unconscionability Vindicated*, 9 WM. & MARY L. REV. 1143, 1160-61 (1961).

56. Fairfield Lease Corp. v. Pratt, 6 Conn. Cir. Ct. 537, 9 UCC Rep. 202 (1971) (lease of vending machines); United States Leasing Corp. v. Franklin Plaza Apartments, Inc., 8 UCC Rep. 1026 (Civ. Ct. N.Y. 1971) (lease of equipment); Fairfield Lease Corp. v. George Umbrella Co., 8 UCC Rep. 184 (Sup. Ct. N.Y. 1970) (lease of vending machines); Electronics Corp. of America v. Lear Jet Corp., 55 Misc. 2d 1066, 286 N.Y.S.2d 711 (Sup. Ct. N.Y. 1967) (lease of aircraft); Fairfield Lease Corp. v. Colonial Aluminum Sales, Inc., 3 UCC Rep. 858 (Sup. Ct. N.Y. 1966) (lease of real estate); Baker v. Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971).

57. 276 N.E.2d 144 (Ind. 1971). *See also* 6 IND. L. REV. 108 (1972).

the oil company of liability when its employee sprayed gasoline on the lessee and his employee, causing them to be burned when the gas ignited. The lease had been prepared by attorneys for the oil company, and the agents of that company never attempted to explain the conditions of the lease, nor did they advise the lessee to consult a lawyer before signing. The signing of the lease was merely ceremonious, and the procedure was the same each year. The agent would put the lease in front of the lessee and tell him to sign, which he did. There was nothing in the record to indicate that the lessee ever read the lease, that the agent asked him to read it, or that the agent called his attention to the exculpatory clause. While the court specifically based its holding on the ground that the clause contravened public policy, it premised its reasoning on section 2-302 of the Code. The court stated:

> [T]he party seeking to enforce such a contract 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.*[58] (Emphasis in original.)

It is submitted that this same reasoning can be applied to confession of judgment clauses in residential leases. The following statement by one commentator concerning the unconscionability of exculpatory clauses in leases can be directly analogized to cognovit clauses:

> [I]n those cases where the exculpatory clause is raised as a defense to an action brought under a lease, the Court should use Sec. 2-302 of the Uniform Commercial Code as a guide and consider the validity of the exculpatory clause by making a factual determination as to whether the contract was one of adhesion or actually "bargained out" and freely agreed to, whether the tenant had a meaningful choice by reason of bargaining power or available alternatives of entering or refusing the lease, and whether the exculpatory provision is so extreme and one-sided as to be unconscionable according to the mores and business practices of the time and place.[59]

Confession of judgment clauses have been held by at least one court to be unconscionable under section 2-302, based on its tests of oppression and unfair surprise. In *Architectural Cabinets, Inc. v. Gaster*,[60] the defendant, who was a general contractor and partner in ownership of an apartment complex, placed several orders with the plaintiff, a manufacturer of kitchen equipment. Each of the plaintiff's order forms which the defendant signed

58. 276 N.E.2d at 148. In Baker v. Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971), section 2-316(2) was applied by analogy, and the court held unconscionable an inconspicuous disclaimer clause under which the lessor of a golf cart sought to avoid liability for injuries sustained by a lessee when the brakes failed and the cart overturned.

59. Cramer, *supra* note 55, at 292.

60. 291 A.2d at 298 (Del. 1971).

contained a confession of judgment clause. Upon defendant's default in payment, the plaintiff entered judgments by confession. The defendant then moved for an order vacating the confessed judgments, alleging that the confession of judgment clauses were unconscionable within the meaning of section 2-302 of the Code. The court agreed that the validity of a confession of judgment clause could be measured by the tests of section 2-302 by stating:

> Because a warrant of attorney authorizing judgment operates in such a one-sided way, the maner in which it appears in a contract may constitute unfair surprise or make it unconscionably oppressive within the meaning of § 2-302.[61]

Since the confession of judgment clause was neither separated from the other provisions of the agreement nor inserted in such a way as to draw special attention to it, the court held that the clause caused unfair surprise in the manner in which it appeared and that it was unconscionable.[62]

The *Architectural Cabinets* court also alluded to the requirement that a confession of judgment clause be "voluntarily accepted and consciously assumed."[63] This standard coincides with that enunciated by the Supreme Court in *Overmyer*. There must be a clear manifestation of consent by the party signing the form, or agreement to the confession of judgment clause itself.[64] This stringent requirement is necessary due to the public policy considerations which weigh against confession of judgment clauses. These considerations were summarized by one court as follows:

> A warrant of attorney authorizing judgment is perhaps the most powerful and drastic document known to civil law. The signer deprives himself of every defense and every delay of execution, he waives exemption of personal property from levy and sale under the exemption laws, he places his cause in the hands of a hostile defender. 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. For that reason the law jealously insists on proof that this helplessness and impoverishment was voluntarily accepted and consciously assumed.[65]

Courts should subject confession of judgment clauses to an active review under the Code's test for unconscionability and recognize that the necessary consent or agreement could only occur with a commercial lease.

The residential lease situation would seem to compel a finding of unconscionability under section 2-302 since oppression and unfair surprise are so prevalent in this area. "Unfair surprise occurs as a result of the nondrafting party having been unaware at the time the contract was entered

61. *Id.* at 300.
62. *Id.* at 301.
63. *Id.*
64. Egyptian Sands Real Estate, Inc. v. Polony, 222 Pa. Super. 315, 294 A.2d 799 (1972).
65. Cutler Corp. v. Latshaw, 374 Pa. 1, 4-5, 97 A.2d 234, 236 (1953).

into that certain harsh and burdensome conditions exist in the contract."[66] Surely the great majority of lessees do not realize what liability and waiver they are subjecting themselves to when they sign a form lease containing a confession of judgment provision, nor are many of them even aware that such a provision is in the lease. Clearly, a lessee in such a situation is not "consciously assuming" the ramifications of the confession of judgment clause. Further, the confession of judgment clause operates to cause the same unfair surprise as in *Architectural Cabinets* due to the manner in which it appears. Tenants have no choice but to sign the standard form if they wish to rent an apartment, and few take the trouble to read all the fine print on the form. It would make no difference whether they read the lease, since any objection they might raise would be ignored by the landlord. Even if tenants are aware of the existence of the cognovit clause, very few would understand what it means and would not comprehend its potential legal consequences.[67] The principle of oppression arises in the residential situation as a result of the tenant's lack of any real bargaining power, rendering him unable to alter the terms of the lease. The tenant either takes the lease as is or leaves it, and the odds are overwhelming that he will be confronted with that same exact lease if he attempts to rent any other apartment in the Chicago area.[68] Also, the concept of oppression encompasses the imposition of unreasonably harsh contractual provisions. Clearly, a provision which subjects a tenant to a judgment by confession with no notice or opportunity to be heard could be considered oppressive in every sense of the word.

This note does not mean to suggest that once a court finds the confession of judgment clause in a residential lease unconscionable it should declare the entire lease to be unconscionable. It is submitted that this suggested use of section 2-302 should be applied only to the confession of judg-

66. Note, *Unconscionability, supra* note 49, at 368. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 121 U.S. App. D.C. 315, 350 F.2d 445 (1965).

67. In Egyptian Sands Real Estate, Inc. v. Polony, 222 Pa. Super. 315, 294 A.2d 799 (1972), the court gave special attention to the lessees' understanding of the confession of judgment clause in holding that there was not a sufficient level of consent. The lessees had only been in the United States for twelve years prior to signing the lease and had no formal training in English, and the lessor had convinced them to use his attorney instead of outside counsel. The lessees admitted that they had not read the small paragraphs of the lease, but stated that they would not have understood them even if they had read them. The average lessee is really in no better position. Typically, a lessee will only be concerned with the items typed into the form lease, such as the term, amount of rent, and special features.

68. In the leading pre-Code case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), the court used the Code concept of unconscionability to void a standard disclaimer used in the automobile industry. The court noted that no buyer could purchase an automobile produced by the Automobile Manufacturers Association, which covered virtually all passenger cars produced, without accepting the standard disclaimer. The court was influenced by the imposition on the entire buying public of this disclaimer, but finally held the disclaimer unconscionable due to the surprise results it created. Either basis of the holding would apply with equal force to the confession of judgment clauses used in virtually every apartment lease in Chicago.

ment clause itself. The court may then declare the confession of judgment clause unconscionable and, under section 2-302(1), leave the remainder of the lease undisturbed and in effect. This would leave the lessor with a right to pursue his remedies for the alleged breach of the lease, although he could no longer confess judgment by warrant of attorney.

One further limitation upon the application of section 2-302 to confession of judgment clauses in leases is that not every confession of judgment clause will be unconscionable. If a landlord negotiates with a tenant, and through this bargaining process the confession of judgment clause is included in the lease, then it may no longer be unconscionable. It is submitted, however, that the lessee must still specifically consent to the inclusion of the cognovit clause and have actual knowledge of its purpose and effect, which could not occur with a residential lease due to the tenant's inadequate bargaining position and lack of legal expertise.

V. CONCLUSIONS AND PROPOSALS

While most states have either abolished or severely limited the use of confession of judgment clauses,[69] Illinois is one of a few states which still utilizes them extensively. Since constitutional attacks on such clauses have thus far failed in this state, an alternative argument based on the Uniform Commercial Code is an approach that may be successful in invalidating cognovit clauses in residential leases. The Code's warranty provisions have been extended to residential leases, which illustrates that the courts recognize the great need for tenant protection. A strong argument can be made in favor of extending the unconscionability doctrine of the Code to protect tenants from the legal consequences of confession of judgment clauses, considering factors such as: the unalterable form lease, its widespread use, the lack of the tenant's bargaining power, the take-it-or-leave-it condition of renting, the tenant's lack of understanding as to what the cognovit clause means, and the potential inherent abuse of such a clause.[70]

A bill[71] currently under study in the Illinois House of Representatives proposes comprehensive legislation to improve the legal standing of tenants and to correct the legal imbalance between landlords and tenants, exemplified by the "dime-store lease".[72] The proposed Residential Landlord and

69. *E.g.*, ALA. CODE, tit. 20, § 16 and tit. 62, § 248 (1958); ARIZ. REV. STAT. ANN. §§ 6-629, 44-143 (Supp. 1972); FLA. STAT. ANN. § 55.05 (1971); MASS. GEN. LAWS ch. 231, § 13A (1959). For a complete listing of the applicable statutes, *see* Note, *A Clash in Ohio?: Cognovit Notes and the Business Ethic of the UCC*, 35 U. CIN. L. REV. 470, 490-91 (1966).

70. "The fact that courts will freely and almost automatically open up a confession of judgment hardly shows that the system works fairly. Rather, it indicates that the trial court judges feel that the system is inherently subject to abuse." Hopson, *supra* note 3, at 123 n.71.

71. H.B. 1345, 78th Gen. Assem. (1973-74).

72. Chicago Tribune, October 7, 1973, § 1, at 50, col. 1.

Tenant Act would, among other things, prohibit confession of judgment clauses, requirements that tenants pay landlords' legal fees, waiver of tenants' rights under the Act, and exculpatory provisions protecting the landlord from liability.[73] This indicates that the legislature is attempting to undertake what the courts have failed to do, namely, to provide protection for tenants. However, it is doubtful that the bill can be passed within the next two years, so it is imperative that some judicial relief be provided by prohibiting confession of judgment clauses in residential leases. Thus, the tenant's burden could be eased through the application of section 2-302 of the Uniform Commercial Code to residential leases.

PATRICIA J. WHITTEN

73. Section 1.403. Prohibited Provisions in Rental Agreements. (a) No agreement may provide that the tenant:

(1) agrees to waive or to 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 attorneys 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.

(b) A provision prohibited by subsection (a) included in a rental agreement is unenforceable. If a landlord deliberately uses a rental agreement containing provisions known by him to be prohibited, the tenant may recover actual damages sustained by him and not more than 3 months periodic rent and reasonable attorneys fees.